

(b) *Effect on child's entitlement.* Where a surviving spouse is entitled to death compensation, the amount of which is based in part on the existence of a child who has attained the age of 18 years, and elects to receive dependency and indemnity compensation, the independent award of dependency and indemnity compensation to which the child is entitled will be awarded to or for the child without separate election by or for the child. Should such a surviving spouse not elect to receive dependency and indemnity compensation, the independent dependency and indemnity compensation to which a child who has attained 18 years of age is entitled, may be awarded upon application by or for the child. The effective date of award in these situations will be in accordance with § 3.400(c)(4)(ii).

(c) *Limitation.* A claim for dependency and indemnity compensation may not be filed or withdrawn after the death of the surviving spouse, child, or parent.

(d) *Finality of election.* (1) Except as noted in paragraph (d)(2), an election to receive dependency and indemnity compensation is final and the claimant may not thereafter reelect death pension or compensation in that case. An election is final when the payee (or the payee's fiduciary) has negotiated one check for this benefit or when the payee dies after filing an election but prior to negotiation of a check.

(2) Notwithstanding the provisions of paragraph (d)(1), effective November 2, 1994, a surviving spouse who is receiving dependency and indemnity compensation may elect to receive death pension instead of such compensation.

(Authority: 38 U.S.C. 1317)

(e) *Surviving spouse becomes entitled.* A surviving spouse who becomes eligible to receive death compensation by reason of liberalizing provisions of any law may receive death compensation or elect dependency and indemnity compensation even though dependency and indemnity compensation has been paid to a child or children of the veteran.

(f) *Death pension rate.* (1) Effective October 1, 1961, where the monthly rate of dependency and indemnity compensation payable to a surviving spouse who has children is less than the monthly rate of death pension

which would be payable to such surviving spouse if the veteran's death had not been service connected, dependency and indemnity compensation shall be paid to such surviving spouse in an amount equal to the pension rate for any month (or part thereof) in which this rate is greater.

(2) Effective June 22, 1966, where the monthly rate of dependency and indemnity compensation payable to a surviving spouse who has children is less than the monthly rate of death pension which would be payable for the children if the veteran's death had not been service connected and the surviving spouse were not entitled to such pension, dependency and indemnity compensation shall be payable to the surviving spouse in an amount equal to the monthly rate of death pension which would be payable to the children for any month (or part thereof) in which this rate is greater.

(Authority: 38 U.S.C. 1312(b))

CROSS REFERENCE: Deaths prior to January 1, 1957. See § 3.400(c)(3)(i).

[35 FR 18661, Dec. 9, 1970, as amended at 39 FR 20205, June 7, 1974; 41 FR 17387, Apr. 26, 1976; 44 FR 45943, Aug. 6, 1979; 60 FR 18356, Apr. 11, 1995; 61 FR 20727, May 8, 1996; 62 FR 5529, Feb. 6, 1997]

§ 3.703 Two parents in same parental line.

(a) *General.* Death compensation or dependency and indemnity compensation is not payable for a child if dependency and indemnity compensation is paid to or for a child or to the surviving spouse on account of the child by reason of the death of another parent in the same parental line where both parents died before June 9, 1960. Where the death of one such parent occurred on or after June 9, 1960, gratuitous benefits may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line.

(b) *Election.* The child or his or her fiduciary may elect to receive benefits based on the service of either veteran. An election of pension, compensation or dependency and indemnity compensation based on the death of one parent places the right to such benefits based on the death of another parent in

§ 3.704

suspension. The suspension may be lifted at any time by making another election.

(c) *Other payees.* Where a child has elected to receive pension, compensation, dependency and indemnity compensation or dependents' educational assistance under 38 U.S.C. ch. 35 based on the death of a veteran, he (or she) will be excluded from consideration in determining the eligibility or rate payable to a surviving spouse or another child or children in the case of another deceased veteran in the same parental line. See § 3.659(b).

CROSS REFERENCES: Two-parent cases. See § 3.503(a)(7). Two parents in same parental line. See § 3.659.

[27 FR 4993, May 29, 1962, as amended at 39 FR 20205, June 7, 1974]

§ 3.704 Elections within class of dependents.

(a) *Children.* Where children are eligible to receive monthly benefits under more than one law in the same case, the election of benefits under one law by or on behalf of one child will not serve to increase the rate allowable for any other child under another law in that case. The rate payable for each child will not exceed the amount which would be paid if all children were receiving benefits under the same law. Where a child is no longer eligible to receive pension, compensation or dependency and indemnity compensation because of having elected dependents' educational assistance under 38 U.S.C. chapter 35, the child will be excluded from consideration in determining the rate payable for another child or children.

(b) *Parents.* If there are two parents eligible for dependency and indemnity compensation and only one parent files claim for this benefit, the rate of dependency and indemnity compensation for that parent will not exceed the amount which would be paid to him or her if both parents had filed claim for dependency and indemnity compensation. The rate of death compensation for the other parent will not exceed the

38 CFR Ch. I (7-1-14 Edition)

amount which would be paid if both parents were receiving this benefit.

[26 FR 1602, Feb. 24, 1961, as amended at 27 FR 4993, May 29, 1962; 34 FR 839, Jan. 18, 1969; 39 FR 20205, June 7, 1974; 54 FR 34981, Aug. 23, 1989]

§§ 3.705-3.706 [Reserved]

§ 3.707 Dependents' educational assistance.

(a) *Child.* The conditions applicable to the bar to payment of pension, compensation or dependency and indemnity compensation for a child concurrently with educational assistance allowance under 38 U.S.C. chapter 35 are set forth in § 21.3023 of this chapter.

(b) *Spouse or surviving spouse.* There is no bar to the payment of pension, compensation or dependency and indemnity compensation to a spouse concurrently with educational assistance allowance under 38 U.S.C. ch. 35.

CROSS REFERENCES: Discontinuance. See § 3.503(a)(8). Certification. See § 3.807.

[34 FR 840, Jan. 18, 1969, as amended at 41 FR 29120, July 15, 1976]

§ 3.708 Federal Employees' Compensation.

(a) *Military service—(1) Initial election.* Where a person is entitled to compensation from the Office of Workers' Compensation Programs, under the Federal Employees' Compensation Act (FECA) based upon disability or death due to service in the Armed Forces and is also entitled based upon service in the Armed Forces to pension, compensation or dependency and indemnity compensation under the laws administered by the Department of Veterans Affairs, the claimant will elect which benefit he or she will receive. Pension compensation, or dependency and indemnity compensation may not be paid in such instances by the Department of Veterans Affairs concurrently with compensation from the Office of Workers' Compensation Programs. Benefits are not payable by the Office of Workers' Compensation Programs for disability or death incurred on or after January 1, 1957, based on military service.

(2) *Right of reelection.* Persons receiving compensation from the Office of Workers' Compensation Programs