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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Machinist's Mate Second Class Marlin Wilburn, Jr., USN (Deceased)--Conflicting Claims for Death Gratuity and Unpaid Compensation

File: B-251182

Date: April 30, 1993

DIGEST

Upon the death of a Navy member, his wife was charged with second degree murder, but was not indicted. When local authorities indicated that she would not be prosecuted, the Navy paid her a death gratuity. We conclude that, given the circumstances of the member's death, this payment was in error and should be collected from the payee if possible. In accordance with the member's alternate designation, the death gratuity should be paid to his father, whether or not collection of the erroneous payment is successful. The unpaid compensation should be paid to his parents in equal shares.

DECISION

We have been asked to render a decision regarding payment of a death gratuity and unpaid compensation arising from the death of Machinist's Mate Second Class (MM2) Marlin Wilburn, Jr., USN (Deceased). For the reasons presented below, the death gratuity should be paid to Marlin Wilburn, Sr.; the arrears of pay should be paid in equal shares to Marlin Wilburn, Sr., and Glenna M. Wilburn.

The record indicates that MM2 Wilburn was shot by his wife, Rhonda J. Wilburn, on July 20, 1986, and died soon thereafter. Rhonda Wilburn told police that she picked up a shotgun with the intention of committing suicide. She said that her husband convinced her not to kill herself, and she was attempting to put the gun down when it accidentally discharged. She was charged with second degree murder, but was not indicted. The Navy paid her a death gratuity after local authorities indicated that she would not be prosecuted. Subsequently, the Department of Veterans Affairs (VA) denied her application for VA benefits, issuing a determination in 1987 which concluded that Rhonda Wilburn "intentionally and wrongfully caused the death of" MM2 Wilburn. She has claimed her husband's unpaid compensation. MM2 Wilburn's parents, Marlin Wilburn, Sr., and Glenna M. Wilburn, have also claimed the unpaid

compensation, as well as the death gratuity previously paid to Rhonda Wilburn. MM2 Wilburn had no children. Our Claims Group has requested a decision in the matter.

Section 1477 of title 10 of the United States Code provides that the highest priority recipient of a death gratuity is the surviving spouse. In the absence of children, the next highest is one or more persons designated by the member from certain specified relatives, including parents.

Section 2771 of title 10 of the United States Code lists in order of priority the persons eligible to receive a deceased member's unpaid compensation. The first four categories are the beneficiary designated by the member, surviving spouse, children, and in equal shares the member's parents. Thus, under less unusual circumstances, the surviving spouse is recognized by law as the highest priority claimant for a death gratuity and the second highest for a deceased member's unpaid compensation.

However, we have consistently held to the principle reiterated in 55 Comp. Gen. 1033 (1976) that it is against public policy to pay arrears of pay or other benefits to a person who feloniously killed the member upon whose death the amounts were payable. In that situation a member's wife shot him. She claimed self-defense and was not prosecuted. We denied her claim for a death gratuity and arrears of pay because the record did not establish a lack of felonious intent on her part.

Thus, our standard in such cases is that we must find in the record evidence that the claimant acted without felonious intent before we will allow the payment of benefits to a spouse involved in the member's death. See 55 Comp. Gen. 1033, supra. Furthermore, in cases such as this one, this Office gives weight to the VA's determination of a widow's entitlement to VA benefits.

The VA denied Rhonda Wilburn's claim because it concluded that she intentionally caused her husband's death. Only her claim that the shotgun discharged itself accidentally weighs against the evidence that she shot him. Absent any suggestion as to events or circumstances that might have led to an accidental discharge, we find no basis to disagree with the VA. Her claim for MM2 Wilburn's unpaid compensation is therefore denied.

Although the record before us does not contain an Emergency Data form on which MM2 Wilburn designated beneficiaries to receive any amounts payable upon his death, we have been informally advised by the Cleveland Center of the Defense Finance and Accounting Service that such a form exists, and that it designates MM2 Wilburn's father, Marlin Wilburn,

Sr., as alternate beneficiary to receive a death gratuity at his death, consistent with the priorities established in 10 U.S.C. § 1477. His unpaid compensation, for which there is no designation, is payable in equal shares to his parents, Marlin Wilburn, Sr., and Glenna M. Wilburn, under 10 U.S.C. § 2771. The Navy should attempt to recover the death gratuity already paid to Rhonda Wilburn, but payment should be made to Marlin Wilburn, Sr., regardless of whether the original payment is recovered. See 37 Comp. Gen. 131 (1957).

The conflicting claims for amounts payable upon the death of MM2 Wilburn should be handled accordingly.

Jr *Seymour E. Hinchman*
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General Counsel