**Department of Veterans Affairs**

**Manila Regional Office** **XC**

**Manila, Philippines XXX-Veteran**

**XXX-Surviving Spouse**

**ADMINISTRATIVE DECISION**

**ISSUE:** Entitlement to basic eligibility for VA death benefits

**EVIDENCE:**

* Board of Veterans’ Appeals (BVA) decision dated August 18, 2021.
* VA Form 21-534ez, Application for Dependency and Indemnity Compensation (DIC,)

Death Pension, and/or Accrued Benefits, received on September 12, 2013 and April 7, 2004.

* Administrative Decision dated May 25, 2021.
* VA Forms 21-3101(JF), Request for Information, dated May 19, 2004, January 18, 2014,

June 28, 2014, March 1, 2021, and October 6, 2021 showing negative responses for military service and prisoner of war (POW) status for the appellant’s spouse.

**DECISION:** The appellant’s spouse does not have recognized active military service in the Philippine recognized guerillas for entitlement to VA benefits.

**REASONS AND BASES:**

Title 38, United States Code, Section 5107. Claimant responsibility; benefit of the doubt, provides:

1. Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.
2. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

## 38 CFR §3.1(a) Definitions.

“Armed Forces” means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their Reserve components.

**38 CFR §3.1(d) Definitions.**

“Veteran” means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.

## CFR §3.40 Philippine and Insular Forces.

(a)*Regular Philippine Scouts.* Service in the Philippine Scouts (except that described in paragraph (b) of this section), the Insular Force of the Navy, Samoan Native Guard, and Samoan Native Band of the Navy is included for pension, compensation, dependency and indemnity compensation, and burial allowance. Benefits are payable in dollars at the full-dollar rate.

(b)*Other Philippine Scouts.* Service of persons enlisted under section 14, Pub. L. 190, 79th Congress (Act of October 6, 1945), is included for compensation and dependency and indemnity compensation. Except as provided in §§3.42 and 3.43, benefits based on service described in this paragraph are payable at a rate of $0.50 for each dollar authorized under the law. All enlistments and reenlistments of Philippine Scouts in the Regular Army between October 6, 1945, and June 30, 1947, inclusive, were made under the provisions of Pub. L. 190 as it constituted the sole authority for such enlistments during that period. This paragraph does not apply to officers who were commissioned in connection with the administration of Pub. L. 190.

(Authority: 38 U.S.C. 107)

(c)*Commonwealth Army of the Philippines.*

(1) Service is included, for compensation, dependency and indemnity compensation, and burial allowance, from and after the dates and hours, respectively, when they were called into service of the Armed Forces of the United States by orders issued from time to time by the General Officer, U.S. Army, pursuant to the Military Order of the President of the United States dated July 26, 1941. Service as a guerrilla under the circumstances outlined in paragraph (d) of this section is also included. Except as provided in §§3.42 and 3.43, benefits based on service described in this paragraph are payable at a rate of $0.50 for each dollar authorized under the law. (Authority: 38 U.S.C. 107)

(2) Unless the record shows examination at time of entrance into the Armed Forces of the United States, such persons are not entitled to the presumption of soundness. This also applies upon reentering the Armed Forces after a period of inactive service.

(d)*Guerrilla service.*

(1) Persons who served as guerrillas under a commissioned officer of the United States Army, Navy or Marine Corps, or under a commissioned officer of the Commonwealth Army recognized by and cooperating with the United States Forces are included. (See paragraph (c) of this section.) Service as a guerrilla by a member of the Philippine Scouts or the Armed Forces of the United States is considered as service in his or her regular status. (See paragraph (a) of this section.)

(2) The following certifications by the service departments will be accepted as establishing guerrilla service:

(i)Recognized guerrilla service;

(ii)Unrecognized guerrilla service under a recognized commissioned officer only if the person was a former member of the United States Armed Forces (including the Philippine Scouts), or the Commonwealth Army. This excludes civilians.

A certification of *Anti-Japanese Activity* will not be accepted as establishing guerrilla service.

## 38 CFR §3.41(a) Philippine service.

For a Regular Philippine Scout or a member of one of the regular components of the Philippine Commonwealth Army while serving with Armed Forces of United States, the period of active service will be from the date certified by the Armed Forces as the date of enlistment or date of report for active duty whichever is later to date of release from active duty, discharge, death, or in the case of a member of the Philippine Commonwealth Army June 30, 1946, whichever was earlier.

## 38 CFR §3.203 Service records as evidence of service and character of discharge.

(a) *Evidence submitted by a claimant.* For the purpose of establishing entitlement to pension, compensation, dependency and indemnity compensation or burial benefits the Department of Veterans Affairs may accept evidence of service submitted by a claimant (or sent directly to the Department of Veterans Affairs by the service department), such as a DD Form 214, Certificate of Release or Discharge from Active Duty, or original Certificate of Discharge, without verification from the appropriate service department if the evidence meets the following conditions:

(1) The evidence is a document issued by the service department. A copy of an original document is acceptable if the copy was issued by the service department or if the copy was issued by a public custodian of records who certifies that it is a true and exact copy of the document in the custodian's custody or, if the copy was submitted by an accredited agent, attorney or service organization representative who has successfully completed VA-prescribed training on military records, and who certifies that it is a true and exact copy of either an original document or of a copy issued by the service department or a public custodian of records; and

(2) The document contains needed information as to length, time and character of service; and

(3) In the opinion of the Department of Veterans Affairs the document is genuine and the information contained in it is accurate.

(b) *Additional requirements for pension claimants.* In addition to meeting the requirements of paragraph (a) of this section, a document submitted to establish a creditable period of wartime service for pension entitlement may be accepted without verification if the document (or other evidence of record) shows:

(1) Service of 4 months or more; or

(2) Discharge for disability incurred in line of duty; or

(3) Ninety days creditable service based on records from the service department such as hospitalization for 90 days for a line of duty disability.

(c) *Verification from the service department.* When the claimant does not submit evidence of service or the evidence submitted does not meet the requirements of paragraph (a) of this section (and paragraph (b) of this section in pension claims), the Department of Veterans Affairs shall request verification of service from the service department. However, payment of nonservice-connected burial benefits may be authorized, if otherwise in order, based upon evidence of service which VA relied upon to authorize payment of compensation or pension during the Veteran's lifetime, provided that there is no evidence which would serve to create doubt as to the correctness of that service evidence. If it appears that a length of service requirement may not be met (e.g., the 90 days wartime service requirement to receive pension under 38 U.S.C. 1521(j)), the Department of Veterans Affairs shall request a complete statement of service to determine if there are any periods of active service that are required to be excluded under §3.15.

The issue presented in this case is one of status – that is, whether the claimant is a “Veteran” as the term is defined by statute. A “Veteran” is defined as a “person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable. 38 CFR 3.1(d). For purposes of determining entitlement to VA benefits, “service” is deemed to include a variety of Philippine military service. 38 CFR 3.40. However, such service is deemed to be “active service” only when certified by the Armed Forces of the United States as follows:

For a Regular Philippine Scout or a member of one of the regular components of the Philippine Commonwealth Army while serving with the Armed Forces of the United States, the period of service will be from the date certified by the Armed Forces as the date of enlistment or date of report for active duty whichever is later to date of release from active duty, discharge, death or in the case of a member of the Philippine Commonwealth Army, June 30, 1946, whichever was earlier. 38 CFR 3.41(a).

The “Armed Forces” is defined as including only “the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their reserve components.” 38 CFR 3.1(a).

For the purpose of establishing entitlement to benefits, the Department of Veterans Affairs may accept evidence of service submitted by the claimant, such as a DD 214, Certificate of Release or Discharge from Active Duty, or original Certificate of Discharge, without verification from the appropriate service department if the evidence meets the following conditions: (1) the evidence is a document issued by the service department and (2) the documents contain needed information as to length, time and character of service, and (3) in the opinion of the Department of Veterans Affairs, the document is genuine and the information contained in it accurate. (38 CFR 3.203(a).

38 CFR provides in pertinent part: “When a claimant does not submit evidence of service or the evidence submitted does not meet the requirements of paragraph (a) of this section, the Department of Veterans Affairs shall request verification of service from the service department.” A service department finding as to the fact of service in the United States Armed Forces is, by regulation, binding upon VA for purposes of establishing entitlement to benefits. *Duro v. Derwinski*, 2 Vet. App. 530 (1992).

The appellant filed an original application for death benefits on April 7, 2004 where she alleged that her spouse served during World War II under the Philippine Commonwealth Army from July 1, 1941 to December 24, 1947. On May 19, 2004, National Personnel Records Center (NPRC) has advised that the appellant’s spouse has no service as a member of the Philippine Commonwealth Army, including the recognized guerrillas, in the service of the United States Armed Forces. On June 7, 2004, her claim for death benefits was denied because her spouse had no valid military service.

On September 10, 2004, the appellant filed a Notice of Disagreement for the denial of her claim for death benefits and an appeal process request letter was forwarded to her. Subsequently, Statement of the Case dated October 28, 2004 was sent to the appellant and we have not received any response.

On September 12, 2013, the appellant attempted to reopen her claim for death benefits. A request for

reverification of military service was forwarded to the National Personnel Records Center (NPRC) based on additional unit of assignment under which the appellant’s spouse may have served.

On January 18, 2014, NPRC certified that the evidence submitted is insufficient to warrant a change in the prior negative certification to include that there is no confirmation of prisoner of war (POW) status.

On September 12, 2014, the appellant filed another Notice of Disagreement for the denial of her claim for death benefits. An appeal process request letter and Statement of the Case was sent to the appellant.

We have received VA Form 9, Appeal to Board of Veteran’s Appeals, on July 19, 2016. The appeal was certified on April 17, 2018 and the BVA made a decision on your appeal on June 7, 2018.

VA initiated another request for reverification of military service to NPRC based additional unit of assignment and copies of military records. On March 1, 2021, the NPRC has advised that the appellant’s spouse has no valid military service as a member of the Philippine Commonwealth Army, including the recognized guerrillas, in the service of the United States Armed Forces. It also certified that the evidence submitted is insufficient to warrant a change in the prior negative certification and that the alleged status for prisoner of war (POW) did not occur.

On August 18, 2021, BVA issued another decision and requires VA to make another service reverification to NPRC. We have initiated another request to NPRC based on additional military unit assignments. We have received NPRC’s response on October 6, 2021 stating that the appellant’s spouse has no valid military service as a member of the Philippine Commonwealth Army, including the recognized guerrillas, in the service of the United States Armed Forces.

We have sent a development letter dated November 16, 2021 to advise the appellant to promptly apply for a correction of your military records with the Army Board for Correction of Military Records (ABCMR) based on the available service-related evidence that have been submitted to VA. She was given 90 days to respond and to inform VA whether she had filed her application with the ABCMR or she would like an extension of time to file her application. To date, we have not received any response from the appellant.

Based on the evidence of record, we find that this appeal must be denied on its merits.  The service department determined that the appellant’s spouse had no valid military service and there is no confirmation of prisoner of war (POW) status.  The service department record is controlling, and there is no other information supplied to warrant a positive service determination.

Given the negative finding by the service department which is binding on the VA, we conclude that the appellant’s spouse did not have active or recognized military service, and there is no confirmation of prisoner of war (POW) status. He is not considered to be a “Veteran” for VA purposes.  Consequently, the appellant’s spouse has not met the threshold requirement for eligibility to receive VA benefits.

Submitted by: /es/

Concurred by: /es/

Approved by: /es/

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