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ORDER

Entitlement to VA survivor's pension benefits is denied.

FINDINGS OF FACT

1. The appellant has control to use assets of the W.LW. and K.E.W. Asset Protection Trust for her own personal benefit and, therefore, the trust assets should be included as part of the appellant's net worth.

2. The appellant's net worth exceeds the bright line net worth limitation of $123.600.00.

CONCLUSION OF LAW

Because the appellant's net worth exceeds the net worth limitation, the criteria for eligibility for VA survivor's pension benefits are not met. 38 U.S.C. §§ 1541, 1543; 38 C.F.R. §§ 3.271, 3.272, 3.274, 3.275, 3.276.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had honorable active military service from July 1962 to July 1966. The Veteran died in September 2018. The appellant is his surviving spouse.

In February 2020, the appellant submitted a VA Form 20-0995, Decision Review Request: Supplemental Claim, and requested readjudication of her entitlement to VA survivor's pension benefits most recently addressed in a November 2019 decision. In March 2020, the agency of original jurisdiction (AOJ) issued the supplemental claim decision on appeal, which implicitly found that new and relevant evidence had been received and denied the claim based on the evidence of record at the time of that decision. In her June 2020 VA Form 10182, Decision Review Request: Board Appeal, the appellant elected the Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the AOJ's March 2020 decision. 38 C.F.R. § 20.301.

Entitlement to VA survivor's pension benefits

The appellant is seeking entitlement to VA survivor's pension benefits, which have been denied based upon the AOJ's finding that her net worth exceeded the bright line limit applicable in October 2018 when she filed an Intent to File for survivor's benefits. In denying the appellant's claim for pension benefits, the AOJ found that the assets of a trust set up in August 2018 by her and the Veteran should be included in the appellant's assets. The appellant has appealed arguing that the transfer of assets into the trust should not be counted as all of the transfers were prior to October 18, 2018, and, therefore, are excluded pursuant to 38 C.F.R. § 3.276(e)(7). Furthermore, the appellant contends that the AOJ erred by not counting the monthly in-home attendant fees of $3,300.00 as medical expenses. Thus, the appellant contends that her net worth at the time of her application did not exceed the bright line limit.

Death pension is a benefit payable in certain circumstances to a surviving spouse because of a veteran's non-service-connected death. Basic entitlement exists if (i) the veteran, as defined in 38 C.F.R. § 3.1(d)(1) and (d)(2), had qualifying service as specified in 38 C.F.R. § 3.3(a)(3)(i), (ii), (iii), or (iv); or (ii) was, at the time of death, receiving or entitled to receive compensation or retirement pay for a service-connected disability based on service during a period of war (as specified in paragraph (a)(3) of this section); and (iii) the surviving spouse meets the net worth requirements of 38 C.F.R. § 3.274 and has an annual income not in excess of the maximum annual pension rate specified in 38 C.F.R. §§ 3.23 and 3.24. 38 C.F.R. §§ 3.3(b)(4); see also 38 U.S.C. §§ 101 (8), 1521(j), 1541(a); 38 C.F.R. §§ 3.23(a)(5), (d)(5).

In the present case, the is a favorable finding in the record that the Veteran had qualifying active military service. The present inquiry is whether the appellant meets the net worth and income requirement. Unfortunately, the Board agrees with the AOJ that the appellant's net worth is excessive and precludes payment of pension benefits to her at this time.

The regulations pertaining to pensions were revised effective October 18, 2018. One of the main revisions in the pension regulations was with regards to net worth calculations and what is and is not included, as well as setting a specific bright-line limit for net worth. See 80 Fed. Reg. 3,839 (Jan. 23, 2015). As the appellant's application was filed subsequent to that date, the new regulations apply to her claim.

Specific to the net worth requirements, the new regulations provide that VA will deny or discontinue pension if a claimant's or beneficiary's net worth exceeds the net worth limit. 38 U.S.C. § 1543; 38 C.F.R. § 3.274(b). The initial net worth limit established was $123,600.00 and this is to be increased whenever there is a cost-of-living increase for benefits paid under the applicable section of the Social Security Act (42 U.S.C. 415 (i)). 38 C.F.R. § 3.274 (a).

The term "net worth" means the sum of a claimant's or beneficiary's assets and annual income. 38 C.F.R. § 3.274(b)(1). The term "assets" means the fair market value, less the amount of mortgages or other encumbrances, of all real and personal property owned by the claimant except the claimant's dwelling and personal effects. 38 C.F.R. § 3.275(a). "Fair market value" means the price at which an asset would change hands between a willing buyer and a willing seller neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. 38 C.F.R. § 3.276(a)(4). Transfers for less than fair market value includes (1) selling, conveying, gifting, or exchanging an asset for an amount less than the fair market value of the asset or (2) a voluntary asset transfer to, or purchase of, any financial instrument or investment that reduces net worth by transferring the asset to, or purchasing, the instrument or investment unless the claimant establishes that he or she has the ability to liquidate the entire balance of the asset for the claimant's own benefit. If the claimant establishes that the asset can be liquidated, the asset is included as net worth. Examples of such financial instruments are annuities and trusts. The term "annuities" is defined as a financial instrument that provides income over a defined period of time for an initial payment of principle. A "trust" is a legal instrument by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor's own benefit or for the benefit of another individual. 38 C.F.R. § 3.276(a)(5).

The question in this case turns on whether the value of a trust the appellant transferred assets into should be included in calculating her net worth. The Board notes that, as argued by the appellant, it is not dealing with an asset transfer in the present case because the assets were transferred into the trust prior to October 18, 2018. However, in determining whether the appellant's net worth should include the value of the trust assets transferred into the trust, the language in 38 C.F.R. § 3.276(a)(5) as to when to include a trust's assets in net worth is instructive and persuasive. Moreover, the Board relies upon several General Counsel opinions that are instructive on the matter.

Regarding whether the value of the trust should be included in the computation of net worth for purposes of pension eligibility, the Office of General Counsel (OGC) Opinion, VAOPGCPREC 33-97 (1997), considered a similar question of whether assets placed in an irrevocable special needs trust are includable in the claimant's net worth for purposes of determining eligibility for improved pension. This OGC Opinion noted that that the trust included terms that provide that some or all of the income and principal of the trust fund may be paid by the trustee to or for the benefit of a VA claimant's "special needs for health, safety and wellbeing." This OGC Opinion states that "only property over which a claimant, or someone with legal authority to act on the claimant's behalf, has some control to use for the claimant's benefit can reasonably be expected to be consumed for a claimant's maintenance and thus be includable in the claimant's estate." The OGC Opinion held in that case that assets transferred by a legally competent claimant, or by the fiduciary of a legally incompetent one, to an irrevocable "living trust" or an estate-planning vehicle of the same nature designed to preserve estate assets by restricting trust expenditures to the claimant's "special needs," while maximizing the use of governmental resources in the care and maintenance of the claimant, should be considered in calculating the claimant's net worth for improved-pension purposes. Furthermore, this opinion makes it clear that total control of the trust's assets are not required. Rather, a claimant only need to retain "some control" over the trust's assets for them to be considered as part of his or her net worth.

In addition, VAOPGPREC 73-91 (1991) found that when the VA claimant, in an individual capacity, has retained no right or interest in the property or the income therefrom and cannot exert control over these assets for the claimant's own benefit, the trust assets would not be counted in determining net worth for improved-pension purposes, and the trust income would not be considered income of the VA claimant. Also, VAOPGPREC 72-90 (1990) holds that property held in a discretionary trust, and income therefrom, is generally countable for purposes of computing net worth and income, when the claimant possesses such control over the property that the claimant may direct it to be used for the claimant's benefit.

The Board acknowledges that the trust document attempts to maximize the appellant's VA benefits by stating that the intent of the grantors in establishing the trust was "that the principal and income of this trust will not be available to either of us for any purpose, including eligibility for Medicaid or Veterans Benefits." However, such unilateral declarations have no legal effect with respect to VA's determination of entitlement to benefits, which is governed by Federal law. See VAOPGCPREC 33-97 (1997).

Initially, the Board does not find the reasoning of either the appellant or the AOJ to be compelling in deciding this appeal. The Board acknowledges that the trust is a living trust and contains a special needs provision (See Article Six, Supplemental Needs Trust). However, the special needs provision in this trust does not provide for the maintenance of a grantor. Rather, it provides for the supplemental needs of a beneficiary of the trust, which would be one of the appellant's children. The appellant has not retained any access to the trust's income or assets for the use of her maintenance and care. However, the Board finds that the value of the trust must be included in the computation of the appellant's net worth for purposes of determining pension eligibility as the appellant has retained some control over the assets in the trust, specifically the assets held in the Residence Sub-Trust.

The trust, entitled W.LW. and K.E.W. Asset Protection Trust, was established in August 2018 while the Veteran was still alive. Unfortunately, he passed away about six weeks later and, therefore, the appellant remains the sole grantor of the trust. The trust was set up to include two sub-trusts the Residence Sub-Trust and the Non-Grantor Sub-Trust. The Residence Sub-Trust was established to hold the appellant's primary residence and to reserve to her a life estate in such property. The trust makes it clear that the grantors retained "the exclusive right to possess, occupy, and use the property for residential purposes." Moreover, the trust provides that the grantors "may not be required to pay rent for such property but may be responsible for and required to pay all of the expenses of the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep of the property." Therefore, the appellant retained an interest in the property being held in the Residence Sub-Trust, i.e., a life estate. Moreover, the appellant remains responsible for the taxes, insurance and mortgage payments on the property, which expenses are usually paid by the owner of real property. The trust also does not appear to preclude the appellant from selling the property or her interest in the property. However, as the Appellant's dwelling is specifically excluded from VA's definition of an asset for pension purposes, the Board will not deny the claim on this basis.

In addition to these provisions, the trust also gives the grantors an unfettered right to remove and replace a trustee with someone of their own choosing. As such, the grantor retains some control over the trust because the grantor can remove a trustee who is not doing what the grantor wants and replace him or her with someone who will run the trust as the grantor wishes.

Finally, the trust states that the intent is that the Residence Sub-Trust is to be treated as a grantor trust for Federal income tax purposes. Generally, grantor trusts are those in which the grantor retains certain powers and rights over the trust assets. The Board acknowledges that the other sub-trust was intended to be a non-grantor trust and, therefore, the grantors would not have control over the assets in this portion of their trust. However, the grantors created only one trust and expressly indicated that the trust be treated as a single trust rather than two separate trusts.

Hence, the Board finds that the inclusion of the trust assets totalling $167,818.23 in the appellant's net worth is appropriate. The Board notes that, based on the documentation submitted, these trust assets clearly do not include the fair market value of the appellant's principal residence that is held in the Residence Sub-Trust, which is appropriate as VA excludes a claimant's principal residence from net worth. Moreover, the Board acknowledges that the RO did not consider the appellant's caregiver fees in determining her income. The RO explained that it did not count this expense because it had not yet evaluated the appellant's claim for aid and attendance since her net worth exceeds the bright line limit. The Board notes, however, that the appellant's net worth would still exceed the bright line limit even if all the appellant's income is eliminated due to medical expenses.

M. C. GRAHAM

Veterans Law Judge

Board of Veterans' Appeals

Attorney for the Board S.M. Kreitlow

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.