

Date: January 16, 1997

VAOPGCPREC 2-97

From: General Counsel (022)

Subj: Secondary Service Connection of a Disability Resulting from a Veteran's Alcohol or Drug Abuse--38 C.F.R. § 3.310(a)

To: Director, Compensation and Pension Service (21)

**QUESTIONS PRESENTED:**

- a. May service connection be established for a disability resulting from a veteran's own alcohol or drug abuse, based on the aggravation of such disability by a service-connected disability?
- b. Does a Board of Veterans' Appeals decision based on an erroneous interpretation of law bind the Veterans Benefits Administration?

**COMMENTS:**

1. The questions presented arose from a Board of Veterans' Appeals (Board) decision granting "[e]ntitlement to service connection for alcohol and drug abuse, based on aggravation secondary to service-connected [post-traumatic stress disorder]" under 38 C.F.R. § 3.310(a) (secondary service connection) and *Allen v. Brown*, 7 Vet. App. 439 (1995) (en banc) (recognizing that service connection may be established for a nonservice-connected disability aggravated by a service-connected disability). In its "REASONS AND BASES FOR FINDINGS AND CONCLUSIONS," the Board explained:

Direct service connection may not be granted for alcoholism because it is considered under the law to be the result of the veteran's willful misconduct. 38 C.F.R. § 3.301(a), (c)(2) (1995). For claims filed after October 31, 1990, direct service connection may not be granted for disability or death resulting from abuse of alcohol or drugs. 38 C.F.R. § 3.301(a) (1995). However, service connection may be granted for alcoholism which is shown to be proximately due to or the result of a service-connected disease or injury. 38 C.F.R. § 3.310(a) (1995).

<Page 2>

2. Section 8052 of the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990), Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, amended former 38 U.S.C. §§ 310 and 331 (now designated §§ 1110 and 1131), effective for claims filed after October 31, 1990, to prohibit the payment of compensation for any disability that is a result of a veteran's own abuse of alcohol or drugs (a "substance-abuse disability"). Section 8052 also amended 38 U.S.C. § 105(a) to provide that, with respect to claims filed after October 31, 1990, an injury or disease incurred during active service will not be deemed to have been incurred in line of duty if the injury or disease was a result of the abuse of alcohol or drugs by the person on whose account benefits are claimed. Pursuant to section 8052, in claims filed after October 31, 1990, disability resulting from a veteran's own alcohol or drug abuse cannot be service connected. VAOPGCPREC 11-96.

3. Sections 1110 and 1131 of title 38, United States Code, are the statutory authorities providing basic entitlement to compensation for veterans of wartime and peacetime service, respectively. These sections authorize compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service."

38 U.S.C. §§ 1110, 1131. The sections go on to provide that "no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs." *Id.* By their terms, sections 1110 and 1131 apply to disabilities which may be incurred in service and to those which may be aggravated by service. The direction in both sections, as amended by section 8052 of the OBRA 1990, that "no compensation shall be paid if the disability is a result of the veteran's own . . . abuse of alcohol or drugs" clearly prohibits the payment of compensation for a substance-abuse disability, whatever its origin.

4. VA has promulgated a rule, now codified at 38 C.F.R. § 3.310(a), providing that "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." This rule

<Page 3>

has its basis in sections 1110 and 1131, which it references in its authority citation. The rule provides for service connection of disability not itself incurred or aggravated in service but nevertheless resulting from a disease or injury incurred or aggravated in service.

5. There is no authority under which basic entitlement to compensation for service-connected disability can be established for purposes of chapter 11 of title 38, United States Code, apart from sections 1110 and 1131. As reflected in the authority citations for 38 C.F.R. § 3.310(a), the authority to compensate under that regulation for conditions secondarily service connected derives from those statutes. Just as with directly service-connected disabilities, secondarily service-connected disabilities are the result of service-incurred or service-aggravated injury or disease, only they are somewhat more remotely related to such disease or injury. Because the authority to compensate for secondarily service-connected disability derives from sections 1110 and 1131, determi- nations regarding secondary service connection are subject to the prohibition of those sections against payment of compensation for substance-abuse disabilities.

6. Section 3.310(a) does not reflect section 8052's prohibition on the payment of compensation for a substance-abuse disability whatever its origin. Nevertheless, section 3.310(a), an administrative regulation, may not authorize what section 8052, a statutory provision, prohibits. See *American Bankers Ass'n v. Connell*, 686 F.2d 953 (D.C. Cir.), cert. denied, 444 U.S. 920 (1979). Whether service connection for a substance-abuse disability is claimed under section 3.310(a) on the basis that a service-connected disease or injury caused the substance-abuse disability or on the basis that a service-connected disease or injury aggravated the substance-abuse disability, section 8052 prohibits the payment of compensation for the substance-abuse disability.

7. In view of the above, the Board decision that prompted your opinion request is erroneous to the extent that it purports to establish entitlement to compensation for a disability that is a result of the veteran's own alcohol or

<Page 4>

drug abuse. However, while the United States Court of Veterans Appeals has jurisdiction to review Board decisions, the Secretary may not seek review of any such decision.

38 U.S.C. § 7252(a). A Board decision is final unless the Chairman of the Board orders reconsideration of the decision, which may be done either on the appellant's motion or on the Chairman's own initiative, inter alia, upon an allegation of obvious error of law. 38 U.S.C. § 7103(a);

38 C.F.R. §§ 20.1000(a), 20.1100(a). Thus, in the absence of reconsideration, the Board decision, though erroneous, is final and binding on VA. See VAOPGCPREC 71-91 (O.G.C. Prec. 71-91) (Board's erroneous decision concerning applicability of regulation is final and binding in absence of reconsid- eration); VAOPGC 7-83 (7-29-83) (where new evidence developed since Board decision may provide basis for reconsideration of factual findings regarding service dates, decision remains binding on VA unless modified).

**HELD:**

a. Section 8052 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, prohibits, effective for claims filed after October 31, 1990, the payment of compensation for a disability that is a result of a veteran's own alcohol or drug abuse. The payment of compensation is prohibited whether the claim is based on direct service connection or, under 38 C.F.R. § 3.310(a), on secondary service connection of a disability proximately due to or a result of a service-connected condition. Further, compensation is prohibited regardless of whether compensation is claimed on the basis that a service-connected disease or injury caused the disability or on the basis that a service-connected disease or injury aggravated the disability.

b. A Board of Veterans' Appeals decision based on an erroneous interpretation of law remains final and binding on

<Page 5>

all VA components, including the Veterans Benefits Administration, in the absence of reconsideration by the Board.

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