Date: January 22, 1997

VAOPGCPREC 5-97

From: General Counsel (023)

- subj: Dental Care Eligibility Neilson v. Brown, 7 Vet. App. 22
 (1994)
 - To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Whether the term "service trauma" in 38 C.F.R. § 17.123(c), the regulation which authorizes VA to provide dental care to correct service-connected noncompensable disabilities resulting from service trauma, includes tooth extraction performed during the veteran's military service?

DISCUSSION:

BACKGROUND

1. On July 20, 1994, the Court of Veterans Appeals (Court) decided the case of <u>Neilson v. Brown</u>, 7 Vet. App. 22 (1994), vacating a decision of the Board of Veterans' Appeals (Board) denying outpatient dental treatment to Thomas Neilson.

2. Mr. Neilson served on active duty from September 1950 to September 1954 and from March 1955 to October 1957. During August and September 1952, while he was stationed in Korea, apparently in a combat zone, nearly all of his teeth were extracted.¹ In February 1992, a VA regional office granted him service connection for all but four of his extracted teeth and rated the disability as noncompensable. The Regional Office denied Mr. Neilson eligibility for outpatient dental treatment. Mr. Neilson appealed to the Board, which also denied his claim of eligibility for outpatient dental treatment. Mr. Neilson then appealed to the Court. <Page 2>

¹ We note that some of the background information was obtained from Mr. Neilson's diary because most of his service medical records are presumed to have been destroyed in the 1973 fire at the National Personnel Records Center in St. Louis.

3. The Court held that the Board failed to provide an adequate rationale for its conclusion that:

the veteran's claim that tooth extractions constitute dental trauma is not supportable under current law. Regular dental treatment, including necessary extractions, is not considered to be "trauma", as the term connotes damage caused by the application of sudden, external force, brought to bear outside a clinical setting.

The Court instructed the Board to refer the issue of whether "service trauma" includes dental treatment to our office.

4. The Court also found that the Board failed to adequately develop the facts in this case. The Court instructed the Board to assist Mr. Neilson in the development of evidence pertinent to his claim and to order a thorough dental examination that takes into account the veteran's dental history including the reasons for his tooth extractions. The Court instructed the Board to consider Mr. Neilson's claim pursuant to other VA law authorizing outpatient dental treatment for noncompensable service-connected conditions under which "service trauma" is not a factor in establishing eligibility. Finally, the Court instructed the Board to determine whether the amendments to the schedule of rating for dental and oral conditions would have any effect on Mr. Neilson's claim.

5. On September 20, 1994, in accordance with the Court's instructions the Board remanded Mr. Neilson's claim to the Regional Office to allow him to make additional arguments, submit additional evidence and undergo a thorough dental examination. The Board further directed the Regional Office to readjudicate the claim when these tasks were complete. The Regional Office denied the claim again and returned the case to the Board. The Board then requested this opinion as to the definition of service trauma. We agree with the Board's initial determination that service trauma does not include regular dental treatment including tooth extraction.

<page 3>

"SERVICE TRAUMA" FOR THE PURPOSES OF CLASS IIa DENTAL CARE ELIGIBILITY DOES NOT INCLUDE THE INTENDED RESULTS OF TREATMENT PROVIDED BY VA

6. The VA statute governing outpatient dental care authorizes the Department to furnish treatment for a noncompensable dental condition or disability which is service connected due to combat wounds or other service trauma. 38 U.S.C. § 1712(b)(1)(C). The regulations implementing this statute categorize this type of eligibility as "Class IIa" (there are six classes). <u>See</u> 38 C.F.R. § 17.123. Under Class IIa "[t]hose [veterans] having a service-connected noncompensable dental condition or disability adjudicated as resulting from combat wounds or **service trauma** may be authorized any treatment necessary for the correction of such . . . condition or disability." Id. (emphasis added).

7. We reviewed the statutory provision upon which Class IIa eligibility is based and its legislative history, the dental regulations and the VA manual chapter on outpatient dental treatment. None of these provisions shed any light on the issue of whether "service trauma" includes dental treatment. <u>See</u> Public Law 84-83; S. Rep. No 463, 84th Cong., 1st Sess. *reprinted in* 1955 U.S.C.C.A.N. 2061; H. Rep. No. 298, 84th Cong., 1st Sess; 17 C.F.R. Part 17.120; VA Manual M-1, Part I, Chapter 19 (1993).

8. We also reviewed dictionary definitions of the term "trauma." Blacks Law Dictionary defines "trauma" as [a] physical injury caused by a blow, or fall or a psychologically damaging emotional experience. *Blacks Law Dictionary* 1344 (5th ed. 1979). Similarly, Stedman's Medical Dictionary defines "trauma" as a "wound; an injury inflicted usually more or less suddenly, by some physical agent." *Stedman's Medical Dictionary* 1320 (3d unabridged lawyers ed. 1972). Hence from a legal or medical perspective trauma is an injury.

9. To find Mr. Neilson eligible for dental care under Class IIa, we would have to conclude that the intended result of dental treatment, the extraction of his teeth, constitutes an injury. Treatment is given in order to

<Page 4> remedy the effects of disease or injury. <u>See id</u>. Dental treatment is not synonymous with dental trauma. E.g. James L. Gutmann, Marylou Gutmann, Cause, Incidence, and Prevention of Trauma to Teeth, The Dental Clinics of North America Jan. 1, 1995 (Causes of tooth injuries discussed did not include dental treatment). It would be anomalous to conclude that the remedy for an injury or disease constitutes further injury.²

10. Finally, defining service trauma to include a therapeutic tooth extraction would make virtually any veteran who received dental treatment during his or her military service eligible for VA dental care. Therapeutic or restorative dental care almost always involves physical impact upon one's teeth, e.g. a filling, a bridge, an extraction etc. We do not believe that was the Congress's intent.

HELD:

For the purposes of determining whether a veteran has Class IIa eligibility for dental care under 17 C.F.R. § 17.123(c), the term "service trauma" does not include the intended effects of treatment provided during the veteran's military service.

Mary Lou Keener

²In the absence of persuasive legislative history to the contrary, we would also be hesitant to ascribe to Congress an intent to predicate VA-treatment eligibility on the provision of ameliorative care in service. As the United States Supreme Court stated in <u>Brown v.</u> <u>Gardner</u>, 115 S.Ct. 552, 556 n.3, regarding the Department's interpretation of 38 U.S.C. § 1151, "[i]t would be unreasonable, for example, to believe that Congress intended to compensate veterans for the necessary consequences of treatment to which they consented (i.e. compensating a veteran who consents to amputation of a gangrenous limb for the loss of a limb)."