Date: January 29, 1997 VAOPGCPREC 7-97

From: General Counsel (022)

Subj: Benefits Under 38 U.S.C. § 1151 For Disability Incurred As The "Result Of Hospitalization"

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Do the provisions of 38 U.S.C. § 1151 authorizing monetary benefits for disability incurred as the "result of hospitalization" apply to disabilities incurred during hospitalization but which are unrelated to a program of medical treatment?

COMMENTS:

1. This responds to your requests, dated June 12, 1995 (21), and June 22, 1995 (213D), for our opinion as to whether an injury incurred during a Department of Veterans Affairs (VA) hospitalization, but not as the result of any care or treatment provided by VA, may be considered an injury suffered "as the result of . . . hospitalization" for purposes of 38 U.S.C. § 1151. The June 12 opinion request concerns a claim by a veteran who was injured during a basketball game while he was hospitalized at a VA substance abuse treatment unit. The June 22, 1995, opinion request concerns a veteran who was injured after falling down stairs while hospitalized in a VA facility. In view of the similarity of the legal issues raised in those opinion requests, we have consolidated our response to those issues. The two additional issues raised in your June 22 opinion request will be addressed in separate opinions.

2. As we previously informed you, we refrained from responding to these opinion requests due to the pendency of legislative action which could have affected the issues presented with respect to section 1151. Congress has recently enacted amendments to section 1151. Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926 (1996). Those amendments, however, will not take effect until October 1, 1997, or such earlier date as

Congress may establish by further legislation. Accordingly, currently pending cases must be decided under the existing statute. This opinion addresses the issues raised in your opinion request concerning interpretation of the current provisions of section 1151.

3. Section 1151 of title 38, United States Code, provides entitlement to monetary benefits for disability or death due to injury or aggravation of injury suffered "as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . awarded under any of the laws administered by the Secretary, or as the result of having submitted to an examination under any such law." The statute does not define the term "hospitalization" or explain the criteria for determining whether an injury is "the result of . . . hospitalization." In *Brown v. Gardner*, 115 S.Ct. 552, 555-56 (1994), the Supreme Court stated that the phrase "as the result of" in section 1151 "is naturally read simply to impose the requirement of a causal connection between the 'injury' or 'aggravation of an injury' and 'hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation.'" The requirement that injury occur "as the result of" hospitalization thus imposes, at a minimum, a requirement of a causal connection between hospitalization and the injury. Accordingly, 38 U.S.C. § 1151 does not cover injuries which were merely incurred during or coincident with hospitalization but not as a result of hospitalization.

4. The causation requirement was discussed in a 1926 opinion of the Attorney General of the United States analyzing section 213 of the World War Veterans' Act of 1924, ch. 320, 43 Stat. 607, 623, a predecessor of current 38 U.S.C. § 1151, insofar as section 213 pertained to injuries suffered "as the result of" vocational training. 35 Op. Atty. Gen. 76, 78-79 (6-12-26). In that opinion, the Attorney General stated:

> Under the wording of the Act herein under consideration, it is clear that the mere fact that an injury has been sustained in the course of the trainee's employment is not sufficient unless it has *resulted* from the training. It is not sufficient for the trainee to assert that the accident

> which caused injury to him would not have happened had he not been in the particular place where it

> occurred, but it must be shown that the accident arose because of something he was doing in the course of his training or because it placed him in a position of peculiar danger.

35 Op. Atty. Gen. at 79 (emphasis in original).

5. The Attorney General supplemented and revised this analysis of section 213 in a 1929 opinion which also dealt with injuries claimed to have resulted from vocational training. In that opinion, the Attorney General stated that "[i]t is probably impossible to state a general rule for determining whether such a causal connection is present in any given case," but that cases decided under workers' compensation and similar laws could provide guidance in making such determinations. 36 Op. Atty. Gen. 61, 63 (5-17-29). The Attorney General noted that the causation standard in numerous workers' compensation statutes, requiring that an injury "arise out of" employment, required some degree of causal connection between employment and injury. Accordingly, he stated that "it should be assumed that when Congress inserted in section 213 the requirement that an injury must result from training, without attempting to define more closely the necessary degree of causal connection, it intended that the general word 'result' should be interpreted in the light of the cases decided under the Workmen's Compensation Acts." *Id.* at 64.

6. Having determined that the statute requires a causal connection between the injury and hospitalization, it is necessary that we determine whether the term "hospitalization," as used in 38 U.S.C. § 1151, refers only to specific activities related to hospital care -- i.e., surgery and other forms of treatment for a particular condition -- or encompasses a broader range of circumstances. Webster's Dictionary defines "hospitalization" as "[t]he act or process of being hospitalized" or "[t]he period of stay in a hospital." Webster's Third New Int'l Dictionary 1094 (1976). Accordingly, the ordinary meaning of the term "hospitalization" is not restricted to activities specifically related to care and treatment, but would appear to encompass the entire process of maintaining or lodging a patient during the period of hospitalization.

7. Chapter 17 of title 38, United States Code, which governs VA's provision of medical services, employs the term "hospital care" in several provisions, and defines "hospital care" to refer to "medical services rendered in the course of the hos-

pitalization." 38 U.S.C. § 1701(5). The fact that Congress has employed the term "hospital care" in title 38 and expressly distinguished that term from "hospitalization" suggests that Congress would have used the term "hospital care" in section 1151 if it had intended to restrict payments under that section to injuries resulting from medical services rendered during hospitalization. Indeed, the recently-enacted amendments to section 1151, which will take effect October 1, 1997, will provide that compensation and DIC are payable under that provision for disability or death "caused by *hospital care*, medical or surgical treatment, or examination." Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926 (1996) (emphasis added). In view of the distinction betwen "hospitalization' and "hospital care," both in ordinary parlance and in the context of title 38, the term "hospitalization" in current section 1151 cannot be construed simply to mean "hospital care."

8. Further, it appears that VA has consistently interpreted the term "hospitalization" in section 1151 and its predecessors to cover aspects of a veteran's maintenance in a hospital which are not directly related to medical treatment. In a February 27, 1928, opinion, the General Counsel of the United States Veterans' Bureau concluded that a veteran's injury resulted from hospitalization where the veteran was placed in a hospital bed near a door to an adjacent ward which had been propped open by a chair and, while he slept, the door was blown shut on his hand, causing permanent injury. The General Counsel stated that "[i]t is apparent from the facts in this case that this veteran, by reason of his hospitalization, was unnecessarily placed in a position of peculiar danger and allowed to remain there" and that "[i]t is also apparent that there was a causative connection between this claimant's hospitalization and the injury suffered." 50 G.C. U.S.V.B. 439, 440 (2-27-28). In a 1954 decision, the Administrator of the Veterans' Administration concluded that injury or death incurred as the result of a traffic accident while the veteran is being transferred by ambulance from one hospital to another

would be considered to have resulted from hospitalization if the veteran "occupied the status of a hospitalized patient" at the time of the accident. Admin. Dec. No. 944 (7-26-54). On the other hand, in a case where the veteran was injured in an accident while being transported by private ambulance to a VA hospital for admission, the Administrator concluded that

the injury was not a result of hospitalization. Admin. Dec. No. 802 (12-30-48).

9. In 1971, VA issued 38 C.F.R. § 3.358(c)(7), which provides that nursing home care is not considered "hospitalization" for purposes of 38 U.S.C. § 1151. The Compensation and Pension Service (C & P) transmittal sheet explaining the basis for the new provision stated:

> Administrator's Decision [No. 992 (12-14-70)] provides that in the event that additional disability arises during the claimant's period of nursing home care pursuant to 38 U.S.C. 620 [now § 1720] and not as a result of medical or surgical treatment, benefits under the paragraph may not be granted because such nursing home care may not be deemed hospitalization. For example, injury from a falling lighting fixture or from a fall on negligently maintained stairs would create no entitlement because the nursing home care under 38 U.S.C. 620 cannot be deemed "hospitalization" under section 351 [now § 1151].

C & P Transmittal Sheet 467 (4-19-71). That explanation implies that injury from a falling light fixture or a fall on negligently maintained stairs during a VA hospitalization would constitute injury incurred "as the result of" hospitalization for purposes of 38 U.S.C. § 1151. Accordingly, we believe that the term "hospitalization" may encompass all conditions and circumstances of a patient's maintenance in a VA hospital, not merely the administration of care and treatment.

10. It may be difficult in individual cases to determine whether an injury was caused by a condition or circumstance of hospitalization or was merely incurred coincident with hospitalization, but due to some other cause. As the Attorney General noted in 1929 in the context of vocational training,

"[i]t is probably impossible to state a general rule for determining whether such a causal connection is present in any given case." The determination as to whether a particular injury resulted from hospitalization is basically a question of fact to be resolved by the factfinder on consideration of the circumstances of each case. *See* Op. Sol. 390-49 (9-20-49);

44 Op. Sol. 766-A (6-23-39). In the absence of statutory or regulatory guidance in making that determination, we believe that some relevant guidance may be drawn from judicial decisions concerning the issue of causation under workers' compensation statutes and similar Federal statutes requiring findings of causation but not fault.

11. Clearly, there may be significant differences between the nature and scope of "hospitalization" for purposes of section 1151 and "employment" for purposes of workers' compensation statutes and similar statutes, such that case law concerning workers' compensation will not in all cases provide a useful guide in determining whether an injury resulted from hospitalization. However, there also may be a number of circumstances in which the issues in a hospitalization claim under section 1151 are similar to those presented in a workers' compensation claim, particularly where the claimed injury does not result from medical care or treatment, but instead results from other circumstances, such as the condition of the premises or activities unrelated to medical treatment. Like section 1151, workers' compensation statutes involve issues of the connection between an injury and a particular status or relationship, and focus on causation without regard to fault. Accordingly, we believe that general principles of causation expounded by courts in the context of workers' compensation and similar cases may be relevant in evaluating claims under 38 U.S.C. § 1151 concerning injuries claimed to have resulted from hospitalization.

12. In *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951), the Supreme Court discussed the issue of causation under the Longshoremen's and Harbor Workers' Compensation Act, which authorizes compensation for "accidental injury or death

arising out of and in the course of employment." 33 U.S.C. § 902(2). The Court stated:

> Workmen's compensation is not confined by common-law conceptions of scope of employment. The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is

> that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose.

Id. at 506-07. *See also O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965) (per curiam). Several courts have applied the *O'Leary* standard in evaluating claims for purposes of the Federal Employees Compensation Act, which authorizes compensation for "disability or death of an employee resulting from personal injury sustained while in the performance of a duty." 5 U.S.C. § 8102. *See Bruni v. United States*, 964 F.2d 76, 79 (1st Cir. 1992); *Wallace v. United States*, 669 F.2d 947, 952 (4th Cir. 1982); *Bailey v. United States*, 451 F.2d 963, 967 (5th Cir. 1971); *United States v. Udy*, 381 F.2d 455, 458 (10th Cir. 1967). A number of state courts have applied the *O'Leary* standard in determining whether injuries arose out of and in the course of employment for purposes of state workers' compensation laws. *See Maryland Casualty Co. v. Messina*, 874 P.2d 1058, 1063 (Colo. 1994); *Benoit v. Capitol Mfg. Co.*, 617 So. 2d 477, 479 (La. 1993); *Grillo v. Nat'l Bank of Washington*, 540 A.2d 743, 750 (D.C. 1988); *Franke v. Durkee*, 413 N.W.2d 667, 669 (Wis. Ct. App. 1987); *Toro v. 1700 First Ave. Corp.*, 227 N.Y.S.2d 605 (N.Y. App. Div. 1962).

13. We believe that the *O'Leary* standard may provide a general framework for determining whether injuries arose as the result of hospitalization for purposes of 38 U.S.C. § 1151. If the circumstances or conditions of hospitalization gave rise to the risks out of which the injury arose, the injury may be considered to have resulted from the hospitalization. In making that determination, it is necessary to identify, to

the extent possible, the specific cause of the incident causing the injury, and to determine whether that cause is attributable to the circumstances or conditions of the hospitalization. State and Federal case law applying workers' compensation and similar statutes may provide analogous guidance on the issue of causation with respect to specific circumstances and types of injury, although such case law is not determinative.

14. Workers' compensation cases generally classify risks in three categories: those associated with the employment, those personal to the claimant, and "neutral" risks -- i.e, risks

having no particular employment or personal characteristics. *See Waller v. Mayfield*, 524 N.E.2d 458, 462 (Ohio 1988). Injuries within the first category are covered by workers' compensation. Injuries within the second category -- resulting from risks personal to the claimant -- are not covered. This category includes injuries due to pre-existing or "idiopathic" conditions of the claimant. For example, where a claimant is injured as the result of a heart attack or epileptic seizure while at work, the injury does not arise out of the employment, unless it is determined that the conditions of employment induced the heart attack or seizure. *See Evans v. Hara's, Inc.*, 849 P.2d 934, 941 (Idaho 1993). Injuries within the third category -- so-called "neutral" risks -- present some difficulty. This category includes cases where the specific cause of the injury-causing incident cannot be determined, such as where a claimant is injured due to a fall but the cause precipitating the fall is not known. A number of workers' compensation cases report a trend among courts to presume that such "neutral" injuries arise out of employment, in view of the beneficient purposes of the workers' compensation statutes.

15. Your June 22 memorandum asks whether an injury may be considered a result of hospitalization where the claimant, during his hospitalization at a VA medical center, fell down steps on a porch at the VA facility and incurred a disability. The claimant reported that he had tripped on something. As noted above, the cause precipitating the fall may be determinative of whether the fall resulted from hospitalization. In the context of workers' compensation, idiopathic falls -- those resulting from the claimant's own condition or infirmity

-- are not considered to arise out of employment. For example, in *Elliot v. Industrial Comm'n of Illinois*, 505 N.E.2d 1062, 1066-67 (Ill. App. Ct. 1987), the court held that where the claimant's leg just "gave out," due to weakness from a prior injury, causing him to fall down a flight of stairs at work, the injury was not caused by any incident or danger of employment and thus did not "arise out of" employment. *See also Cole v. Guilford County and Hartford Accident & Indemnity Co.*, 131 S.E.2d 308, 311 (N.C. 1963). Similarly, for purposes of 38 U.S.C. § 1151, we believe that falls occuring during hospitalization due to idiopathic causes should not be considered the result of hospitalization. However, recognizing that all inpatients at VA hospitals inherently suffer from some

disability, and in view of the nature and purpose of hospitalization, as distinguished from employment, special consideration must be given to whether any circumstances or conditions of the hospitalization contributed to an otherwise idiopathic fall. For example, where the effect of an idiopathic disability is induced or heightened because of treatment administered during the hospitalization, then the hospitalization may be said to have created or contributed to the zone of special danger precipitating the fall. Similarly, where the circumstances of hospitalization require a disabled veteran to repeatedly traverse a staircase, there may be a basis for concluding that the hospitalization created the zone of danger out of which the injury arose.

16. A fall which is caused by the claimant's own inadvertence or want of care would not generally be considered to have resulted from hospitalization, even though it occurs on hospital premises. In *Southside Virginia Trading Ctr. v. Shell*, 455 S.E.2d 761 (Va. Ct. App. 1995), where the claimant fell down a flight of stairs because she was unfamiliar with the particular stairway and was not paying attention to the stairs, the court held that the fall resulted from the claimant's own inadvertence and did not arise out of her employment. As a general matter, a flight of stairs on the premises of an employer or hospital does not create any zone of special danger, because stairs are a common feature of everyday life and are not unique to the hospital or employment premises. *See id.*, 455 S.E.2d at 763; *Elliot*, 505 N.E.2d at 1067. Accordingly, injury resulting from a claimant's fall down stairs due to idiopathic causes, inadvertence, or a mere failure to

negotiate the steps generally cannot be said to result from hospitalization. In such cases, the risks precipitating the fall would not be risks created by the hospitalization.

17. Even if the cause of a fall is idiopathic in nature, the injuries sustained in the fall may be considered to result from hospitalization if the conditions or circumstances of the hospitalization contributed to heighten the effect of the fall, or created an "additional risk of injury." *See Southside Virginia Training Ctr.*, 455 S.E.2d at 764. For example, In *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. 1993), the claimant suffered an idiopathic dizzy spell and fell from the elevated platform on which he was working. The court held that, although the cause of the fall was idio-

pathic, the condition of employment requiring the claimant to work on an elevated platform, contributed to the severity of his injuries, and the injuries thus arose out of employment. Similarly, where unique conditions or circumstances of hospitalization contribute to the injuries suffered in an idiopathic fall, we believe that the injuries may be considered to have resulted from the hospitalization. We note, however, that the court in *Southside Virginia Training Ctr.*, 455 S.E.2d at 764, concluded that ordinary stairs do not present an "additional risk of injury" beyond that regularly encountered outside of a claimant's employment.

18. Where the precipitating cause of a fall may reasonably be attributed to any conditions or circumstances of the hospitalization, rather than some circumstance originating with the claimant, the resulting injuries would be the result of hospitalization. This would include cases where the fall was caused by some unique feature of the hospital premises. For example, if the fall was precipitated by the unusually steep grade of the staircase, poor lighting conditions or other unique features of the stairwell, the hospitalization would have created the "zone of special danger" out of which the injuries arose. Similarly, if the fall was precipitated when the claimant tripped over some object left on or near the stairs, or slipped on water, grease, or other foreign matter, it might reasonably be concluded that the ensuing injuries resulted from hospitalization.

19. Accordingly, in determining whether injuries suffered in a fall are the "result of hospitalization" for purposes of 38 U.S.C. § 1151, it is necessary for the factfinder to determine the cause or risks which precipitated the fall and the injuries, and then to determine whether those risks arose from the claimant or from the conditions or circumstances of hospitalization. As noted above, when the cause of a fall cannot be determined, some courts presume that the fall or the injuries resulted from some risk, although unidentified, of the employment. *See Waller v. Mayfield*, 524 N.E.2d at 462-63; *Oldham v. Industrial Comm'n of Illinois*, 487 N.E.2d 693, 695 (Ill. App. Ct. 1985). For purposes of 38 U.S.C. § 1151, when the cause of a fall during VA hospitalization cannot be determined, the benefit-of-the-doubt doctrine in 38 U.S.C. § 5107(b) may militate in favor of a conclusion that the fall was attributable to the circumstances or conditions of hospitalization, if the claim is well grounded.

20. Your June 12 opinion request involves a veteran who injured his knee playing basketball during his hospitalization at a VA facility. In the context of workers' compensation, the states have developed a number of different standards for determining whether an injury due to recreational activity may be considered to result from the claimant's employment. As a general matter, an injury from a recreational activity may be considered a result of employment if the recreational activity is a condition or incident of employment. State courts have identified a number of factors for consideration in determining whether a recreational activity is an incident of employment. Those factors include: (1) the customary nature of the activity; (2) the employer's encouragement or subsidization of the activity;(3) the extent to which employer managed or directed the recreation enterprise; (4) the presence of substantial pressure or actual compulsion on the employee to participate; (5) the fact that the employer expects or receives a benefit through the employee's participation in the activity, such as improved relations or advertising. *Kemp's Case*, 437 N.E.2d 526 (Mass. 1982); 82 Am.Jur.2d *Workers' Compensation* § 287 (1992). Except for employer compulsion, no single factor is dispositive. Rather, a determination must be made based upon the totality of the circumstances. *Kemp's Case*, 437 N.E.2d 526.

21. In determining whether a recreational activity is a condition or incident of hospitalization for purposes of 38 U.S.C. § 1151, we believe that consideration must be given to all pertinent circumstances, including the extent to which participation in the activity is required or encouraged by VA, the extent to which VA manages or controls the activity, and whether the activity furthers any goals of the treatment for which the hospitalization is provided. Where participation in the activity is required or encouraged as part of a treatment program, the activity would generally be a condition or incident of hospitalization. On the other hand, if the recreational facilities are merely provided as a service to patients for their own enjoyment, and VA does not directly supervise or control the recreational activities, then there may be a basis for concluding that they are not a condition or incident of hospitalization.

22. Veterans Health Administration (VHA) program guides recommend the use of "activity therapy," including physical ac-

tivity and games, in treatment of substance abuse. *See* Mental Health and Behavioral Sciences Service (MHBSS) Drug Dependence Treatment Program Guide, G-1, VHA Manual M-2, Part XXI; MHBSS Alcohol Dependence Treatment Program Guide, G-12, VHA Manual M-2, Part X. Those provisions suggest a general policy of fostering and encouraging physical and social activity in connection with substance abuse treatment at VA facilities. Where VA provides recreational facilities, such as basketball courts, at substance abuse treatment units, those facilities would appear to be designed to further that policy. Accordingly, a patient's participation in recreational activities such as playing basketball might reasonably be viewed as part of his or her treatment, or at least a contemplated condition or incident of hospitalization for substance abuse treatment. Under those circumstances, an injury incurred during recreational activites may be considered the result of hospitalization for purposes of 38 U.S.C. § 1151. We emphasize, however, that the question of whether the injury resulted from hospitalization in a particular case is primarily a question of fact to be resolved by the factfinder. The circumstances of a particular case might indicate that the recreational activity, or the cause of the injury, was not a condition or incident of hospitalization.

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23. Because the recently-enacted amendments to section 1151, will, effective October 1, 1997, authorize payment for disability resulting from "hospital care" rather than from "hospitalization," the analysis in this opinion concerning the meaning of the term "result of hospitalization" pertains solely to the interpretation of the current provisions of section 1151 and is not intended to govern cases decided under the recently enacted amendments to section 1151.

HELD:

Compensation under 38 U.S.C. § 1151 for injuries suffered "as the result of . . . hospitalization" is not limited to injuries resulting from the provision of hospital care and treatment, but may encompass injuries resulting from risks created by any circumstances or incidents of hospitalization. In determining whether a specific injury is a result of hospitalization, guidance may be drawn in appropriate cases from judicial decisions under workers' compensation laws and simi-

lar laws requiring a finding of causation without regard to fault. An injury caused by a fall may be considered a result of hospitalizaion where the conditions or incidents of hospitalization caused or contributed to the fall or the severity of the injury. A fall due solely to the patient's inadvertence, want of care, or preexisting disability generally does not result from hospitalization. An injury incurred due to recreational activity may be considered a result of hospitalization where VA requires or encourages participation in the activity, administers or controls the activity, or facilitates the activity in furtherance of treatment objectives. In individual cases, the question whether an injury resulted from hospitalization is essentailly an issue of fact to be determined by the factfinder upon consideration of all pertinent circumstances.

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