VAOPGCPREC 8-97

Date: February 11, 1997

From: General Counsel (022)

- subj: Applicability of 38 C.F.R. § 3.310 To Disability Proximately Due To Or The Result Of Disability Covered By 38 U.S.C. § 1151
 - To: Director, Compensation and Pension Service (213D)

QUESTION PRESENTED:

May compensation be paid, pursuant to 38 C.F.R. § 3.310, for a disability which is proximately due to or the result of a disability for which compensation is payable under 38 U.S.C. § 1151?

COMMENTS:

1. This responds to one of the three issues raised in your June 22, 1995 opinion request concerning the application of 38 U.S.C. § 1151. The remaining two issues are addressed in separate opinions. As we previously informed you, we refrained from responding to this opinion request 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, which will take effect on October 1, 1997, or such earlier date as Congress may establish by further legislation. Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926 (1996). Those amendments will not affect the analysis in this opinion.

2. Pursuant to 38 C.F.R. § 3.310, "[d]isability which is proximately due to or the result of a <u>service-connected</u> disease or injury shall be service connected." (Emphasis added.) That regulation further provides that "[w]hen service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." You have asked whether compensation may be paid pursuant to 38 C.F.R. § 3.310 for disability which is proximately due to or the result of a condition which is compensated under 38 U.S.C. § 1151 "as if" it were service connected.

3. Section 1151 of title 38, United States Code, provides that when a veteran is disabled or dies as the result of an injury

<Page 2> or aggravation of an injury suffered as the result of VA hospitalization, medical or surgical treatment, vocational rehabilitation, or examination, "disability or death compensation under this chapter [chapter 11] and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-<u>connected</u>." (Emphasis added.) Section 1151 does not authorize an award of service connection for disabilities covered by that section, but authorizes payment of compensation "as if" such disabilities were service connected.

4. Although an injury compensated under section 1151 is not a "service-connected" injury within the literal meaning of 38 C.F.R. § 3.310, section 1151 requires VA to pay compensation for disabilities under section 1151 in the same manner as if the disability were service-connected. We have previously concluded that the language and history of section 1151 reflect a congressional intent that all disability and death compensation and dependency and indemnity compensation (DIC) benefits payable for service-connected disability shall also be payable for disability within the scope of section 1151. See VAOPGCPREC 100-90 (O.G.C. Prec. 100-90); VAOPGCPREC 80-90 (O.G.C. Prec. 80-90); VAOPGCPREC 73-90 (O.G.C. Prec. 73-90); VAOPGC 12-86 (11-17-86). IN VAOPGCPREC 80-90, originally issued in 1986 as Op. G.C. 5-86, we concluded that a disability compensated under 38 U.S.C. § 351 (now § 1151) could provide the basis for an award of benefits under 38 U.S.C. § 410(b)(1) (now § 1310(b)(1)), which authorized an award of DIC to the survivor of a veteran who, at the time of his or her death, was entitled to receive compensation "for a service-connected disability" which was rated totally disabling for ten years or more immediately preceding the veteran's death. We stated that "the language and legislative history of [38 U.S.C. § 351] make clear that Congress intended that all veterans' monetary benefits payable for service-connected disability or death be payable for qualifying disability or death resulting from, among other things, medical examination or treatment in the same manner as though the disability or death had been a result of military service." VAOPGCPREC 80-90, at 3 (emphasis in original).

5. In VAOPGC 12-86, we concluded that a disability compensated under 38 U.S.C. § 351 could provide a basis for compensating disability of a paired organ or extremity under 38 U.S.C. § 360 (now § 1160), which provides that when there is a service-connected disability of one paired organ, a non-service-connected disability in the other paired organ may be compensated as if it <Page 3>

were service connected. In VAOPGCPREC 100-90, we concluded that a disability compensated under 38 U.S.C. § 351 would provide a basis for payment of a clothing allowance under 38 U.S.C. § 362 (now § 1162), which authorized payment of a clothing allowance to any veteran who "because of a service-connected disability" wears or

uses a prosthetic or orthopedic device which tends to wear out or tear clothing or uses skin medication which damages clothing. In that opinion, we clarified the statement in VAOPGCPREC 80-90 that "<u>all</u> veterans' monetary benefits payable for service-connected disability or death" are available for disabilities compensated under 38 U.S.C. § 351. We explained that the statement "was generally intended to encompass all disability and death compensation and DIC benefits," but not necessarily all other ancillary benefits available to veterans suffering from serviceconnected disabilities. VAOPGCPREC 100-90, at 2-3. We stated that "section 351 entitlement <u>may</u> also provide entitlement to certain ancillary and special service-connected benefits depending upon congressional intent." *Id.* at 3 (emphasis in original).

6. We have construed section 1151 to authorize payment of all disability compensation and DIC benefits under chapters 11 and 13 of title 38, United States Code, including compensation and DIC benefits under those chapters which may be considered "ancillary" benefits because they are payable in addition to the general compensation benefits authorized by 38 U.S.C. §§ 1110 and 1131 or the general DIC benefits under 38 U.S.C. § 1310. That construction implements the plain language of section 1151, which authorizes payment of "disability or death compensation under [chapter 11] and dependency and indemnity compensation under chapter 13" and is not limited to the benefits provided in the general compensation and DIC provisions of 38 U.S.C. §§ 1110, 1131, and 1310.

7. Benefits payable for secondary conditions or proximate results under 38 C.F.R. § 3.310 are clearly in the nature of "compensation" under chapter 11 of title 38, United States Code. The regulation cites 38 U.S.C. §§ 1110 and 1131, the provisions authorizing payment of compensation, as its statutory authority. In *Allen v. Brown*, 7 Vet. App. 439, 446 (1995) (en banc), the United States Court of Veterans Appeals (CVA) stated that 38 C.F.R. § 3.310 "derives from § 1110." Further, the CVA indicated that the regulation in 38 C.F.R. § 3.310 merely implements the requirements of 38 U.S.C. § 1110. The CVA stated that 38 U.S.C. § 1110 requires payment of compensation "[f]or disability resulting from personal injury suffered or disease contracted" in active service, and it construed the statutory term "disability" to encompass any <Page 4>

impairment which results from the service-incurred injury or disease regardless of whether such impairment may itself be classified as a separate disease entity or condition. Allen, 7 Vet. App. at 447-48. The Allen decision thus suggests that the "secondary service connection" principle of 38 C.F.R. § 3.310 implements the provisions of section 1110 governing entitlement to disability compensation.

8. Inasmuch as compensation for proximate results and secondary conditions under 38 C.F.R. § 3.310 is a compensation benefit under chapter 11 of title 38, United States Code, such compensation would, pursuant to our analysis in VAOPGCPREC 80-90 and VAOPGCPREC 100-90, be available with respect to section-1151 conditions in the same manner as it is available for service-connected conditions. Accordingly, compensation may be paid for any disability which results from a section-1151 injury or disease, including any disability in the nature of a "proximate result" or "secondary condition." We emphasize, however, that neither 38 U.S.C. § 1151 nor 38 C.F.R. § 3.310 authorize an award of service connection for the original section-1151 disease or injury or for any proximate results or secondary conditions of such disease or injury. Rather, section 1151 merely authorizes payment of compensation "as if" the section-1151 disability and any secondary conditions resulting from that disability, were service connected.

HELD:

Disability compensation may be paid, pursuant to 38 U.S.C. § 1151 and 38 C.F.R. § 3.310, for disability which is proximately due to or the result of a disability for which compensation is payable under section 1151.

Mary Lou Keener