

Date: May 13, 1997

VAOPGCPREC 19-97

From: General Counsel (022)

Subj: Secondary Service Connection Based on Nicotine Dependence

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

COMMENTS:

1. Section 3.310(a) of title 38, Code of Federal Regulations, provides, in pertinent part, that, "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." The disabling condition stemming from the service-connected disease or injury is referred to in the regulation as a "secondary condition." Where a claimant can establish that a disease or injury resulting in disability or death was a direct result of tobacco use during service, e.g., damage done to a veteran's lungs by in-service smoking gave rise to lung cancer, service connection may be established without reference to section 3.310(a). However, where the evidence indicates a likelihood that a veteran's disabling illness had its origin in tobacco use subsequent to service, and the veteran developed a nicotine dependence during service which led to continued tobacco use after service, the issue then becomes whether the illness may be considered secondary to the service-incurred nicotine dependence and resulting disability or death may be service connected on that basis pursuant to section 3.310(a).

2. VAOPGCPREC 2-93 (O.G.C. Prec. 2-93) held that determination of whether nicotine dependence may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. That opinion also noted in passing that, if nicotine dependence is considered a disease for compensation purposes, such dependence began

in service, and resulting tobacco use led to disability, the issue would become whether secondary service connection could be estab-

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lished for that disability pursuant to 38 C.F.R. § 3.310(a). The threshold question which must be answered with regard to claims for secondary service connection of tobacco-related disability or death is whether nicotine dependence may be considered a disease within the meaning of the veterans' benefit laws. See VAOPGCPREC 2-93, paras. 2-4. In a May 5, 1997, memorandum, the Under Secretary for Health, relying upon the criteria set forth in VAOPGCPREC 67-90 (O.G.C. Prec. 67-90), stated that nicotine dependence may be considered a disease for VA compensation purposes.

3. Assuming the conclusion of the Under Secretary for Health that nicotine dependence may be considered a disease for compensation purposes is adopted by adjudicators, secondary service connection may be established, under the terms of 38 C.F.R. § 3.310(a), only if a veteran's nicotine dependence, which arose in service, and resulting tobacco use may be considered the proximate cause of the disability or death which is the basis of the claim. We note initially that a determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). "Proximate cause" is defined by *Black's Law Dictionary* 1225 (6th ed. 1990) as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

An act which directly produced the injury * * *. That cause which naturally leads to and which might have been expected to produce the result. That from which the effect might be expected to follow without the concurrence of any unusual circumstances. That which immediately produces the effect as distinguished from a predisposing cause. (32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

4. A subsequent event, which is referred to as an "intervening" cause, may interrupt the causal connection between an event or circumstance and subsequent incurrence of disability or death. See, e.g., *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051-52 (5th Cir. 1983). An "intervening" cause which "'turns aside the[] course [of events],
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prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated'" may be considered a su-pervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 War-ren's N.Y. Negligence § 5.08). ¹

5. Again, assuming that adjudicators adopt the Under Secretary for Health's conclusion that nicotine dependence may be considered a disease, the two principal questions which must be answered by adjudicators in resolving a claim for benefits for tobacco-related disability or death secondary to nicotine dependence are: (1) whether the veteran acquired a dependence on nicotine during service; and (2) whether nicotine dependence which arose during service may be considered the proximate cause of disability or death occurring after service. With regard to the first question, determination of whether a veteran is dependent on nicotine is a medical issue. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) at 243,

¹ Relevant considerations in determining whether an "intervening" cause supercedes an earlier event as the proximate cause of an injury include: (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the original event; (2) the extraordinary, rather than normal, nature of the force's operation; (3) the fact that the intervening force is operating independently of any situation created by the original event or is or is not a normal result of such an event; (4) the fact that the operation of the intervening force is due to another's action or failure to act; (5) the fact that the intervening force is due to an act of another which is wrongful and subjects the actor to liability; and (6) the degree of culpability of a wrongful act of another which sets the intervening force in motion. Restatement (Second) of Torts § 442 (1965).

the criteria for diagnosing substance dependence are generally to be applied in diagnosing nicotine dependence. Under those criteria, as applied to the specific circumstances surrounding nicotine use, nicotine dependence may be described as a maladaptive pattern of nicotine use leading to clinically significant impairment or distress, as manifested by three or more of the following criteria occurring at any time in the same 12-month period: (1) tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of

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nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to con-

stitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

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the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there

is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.

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