Date: August 29, 1997

From: General Counsel (022)

To: Acting Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

When a claimant has service-connected, partial hearing loss in only one ear, should the hearing in the other ear be considered normal for purposes of rating the service-connected hearing loss?

COMMENTS:

- 1. This question arises in a case currently before the Board of Veterans' Appeals (Board) on remand from the United States Court of Veterans Appeals (CVA). The case involves a veteran who has service-connected hearing loss in one ear and nonservice-connected hearing loss in the other ear. In a singlejudge memorandum decision, the CVA questioned the position of the Department of Veterans Affairs (VA) that the nonserviceconnected hearing loss should be considered normal for purposes of assigning a disability rating. The CVA noted that 38 C.F.R. § 4.85(b) "speaks only to a computation predicated on comparing the ear having better hearing with the ear having poorer hearing, but makes no reference to a computation based on comparing hearing loss in a service-connected ear with the hearing loss in a non-service-connected ear." Blevins v. Brown, No. 95-329, 1996 WL 411376, at *1 (Vet. App. July 15, 1996).
- 2. Since the days of the Veterans Bureau, hearing loss has been evaluated to reflect the level of disability that exists given the degree of impairment in each ear. See Veterans' Bureau Schedule of Disability Ratings, pages 58-59 (1930); Veterans Administration Schedule for Rating Disabilities, pages 42-43 (1933); Veterans Administration Schedule for Rating Disabilities, page 62-63 (1945); Veterans Administration Schedule for Rating Disabilities, 1945 ed., Extension 8 (Feb. 27, 1952); Veterans Administration Schedule for Rating Disabilities, 1945 ed., Extension 8-B (March 23, 1956). In cases

involving service-connected impairment in one ear only, agency practice has been to consider the hearing to be normal in the ear that has no service-connected disability. However, the <Page 2>

rating schedule has not indicated how nonservice-connected hearing loss in one ear should be evaluated for purposes of rating service-connected disability in the other ear. Thus, the CVA's observation that the provisions for rating hearing impairment under 38 C.F.R. § 4.85(b) do not expressly distinguish between a service-connected disability in one ear and a nonservice-connected disability in the other ear is well taken. Although we understand the Veterans Benefits Administration intends to address this issue in its final rule amending the schedule for rating hearing impairment, the current regulatory and manual provisions are silent in that regard.

- 3. Nevertheless, with one exception not applicable here, the statutory scheme governing VA benefits precludes consideration of nonservice-connected hearing loss in evaluating a service-connected hearing disability for compensation purposes. The rating schedule adopted under 38 U.S.C. § 1155 must conform to other statutory provisions that determine the general circumstances in which a disability or disabilities may be compensable. Thus, an interpretation of 38 C.F.R. § 4.85(b) not in conformity with the statutory scheme is not permitted.
- Except as discussed below, the statutory framework authorizes compensation for service-connected disabilities only, see 38 U.S.C. §§ 101(13), 1110 and 1131, and does not permit combination of ratings for service-connected and nonserviceconnected disabilities for compensation purposes. spect to nonservice-connected pension to veterans, section 1523(a) of title 38, United States Code, states that "ratings for service-connected disabilities may be combined with ratings for non-service-connected disabilities." On the other hand, the provision for combination of ratings for compensation purposes, section 1157 of title 38, dictates that the Secretary "shall provide for the combination of ratings and pay compensation at the rates prescribed in subchapter II of this chapter [which contains wartime rates of disability compensation] to those veterans who served during a period of war and during any other time, who have suffered disability in line of duty in each period of service" (emphasis added). Thus, section 1523 and 1157 reflect that ratings for a service-connected condition and a nonservice-connected condition may be combined for pension but not compensation purposes. See also 38 C.F.R. § 3.323; 38 C.F.R. § 4.14 ("the use of man-

ifestations not resulting from service-connected disease or injury in establishing the service-connected evaluation . . . [is] to be avoided.").

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- 5. The enactment of Pub. L. No. 87-610, § 1, 76 Stat. 406 (1962), created an exception to that rule. That law provided statutory authority for consideration of nonservice-connected blindness in one eye when compensating service-connected blindness in the other eye. See 38 U.S.C. § 1160(a)(1) (formerly § 360(a)(1)), which is implemented by 38 C.F.R. § 3.383(a)(1). The law also authorized compensation for the loss or loss of use of one kidney as the result of serviceconnected disability and involvement of the other kidney as a result of nonservice-connected disability. See 38 U.S.C. § 1160(a)(2); 38 C.F.R. § 3.383(a)(2). Prior to the enactment of Pub. L. No. 87-610, a veteran who had incurred blindness of one eye in service and then subsequent to service suffered nonservice-connected blindness of the other eye, or who had lost the use of one kidney due to service and then subsequently developed nonservice-connected dysfunction of the other kidney, was entitled to compensation only for unilateral disa-See 108 Cong. Rec. S15,075 (daily ed. Aug. 9, 1962) (statement of Sen. Mansfield); S. Rep. 1845, 87th Cong., 2d Sess. 1 (1962), reprinted in 1962 U.S.C.C.A.N. 2191; 108 Cong. Rec. H5072 (daily ed. Apr. 2, 1962) (statement of Cong. Teague); S. Rep. 1845 at 2, reprinted in 1962 U.S.C.C.A.N. at 2192 (Letter from J.S. Gleason, Jr., Administrator of Veterans Affairs, to Harry F. Byrd, Chairman, Senate Comm. on Finance (March 31, 1962)); 108 Cong. Rec. at H5071 (Letter from J.S. Gleason, Jr., Administrator of Veterans Affairs, to Olin E. Teaque, Chairman, House Comm. on Veterans Affairs (March 28, 1962)); H.R. Rep. 1456, 87th Cong., 2d Sess. 1 (1962).
- 6. In Op. G.C. 25-60 (9-13-60), recognition of the existing statutory framework led this office to conclude that VA could not promulgate a provision substantially the same as current section 3.383(a)(1) and (a)(2) of title 38, Code of Federal Regulations. The subsequent enactment of Pub. L. No. 87-610 liberalized the law to permit compensation for bilateral blindness or renal disability even though the dysfunction of one of the paired organs was not due to service-connected disability. Pub. L. No. 89-311, § 3(a), (b), 79 Stat. 1155 (1965), expanded former 38 U.S.C. § 360 to authorize consideration of nonservice-connected total deafness in one ear when

compensating total deafness in the other ear. See 38 U.S.C. \$1160(a)(3); 38 C.F.R. \$3.383(a)(3).

7. In *Blevins*, 1996 WL 411376, at *1, the CVA recognized that 38 U.S.C. § 1160(a)(3) "might give rise to . . . an inference" that "the non-serviceconnected ear is to be considered normal for the purpose of a rating evaluation." In our view, such an

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inference is not only possible, but is inescapable. actment of Pub. L. No. 87-610 would not have been necessary if VA could rate service-connected visual impairment by evaluating both the nonservice-connected and service-connected eye disabilities. Likewise, Pub. L. No. 89-311 provided the authority needed to compensate for total deafness in both ears when deafness in only one ear is service-connected. However, this by its terms applies to "total" deafness only, and under the rule of construction that the inclusion of one qualifier should be read as the exclusion of another, section 1160(a)(3) may not be applied to less-than-total deafness. Just as VA cannot factor a nonservice-connected arm disability into compensation for service-connected disability in the other arm, unless the claimant has lost the use of both hands per 38 U.S.C. § 1160(a)(4) and 38 C.F.R. § 3.383(a)(4), VA cannot (absent total deafness in both ears) combine a rating for nonservice-connected hearing loss in one ear and a rating for service-connected hearing loss in the other ear for purposes of compensation.

- 8. In Villano v. Brown, 1997 WL 251936, at *2 (Vet. App. May 8, 1997), the CVA questioned VA's interpretation that non-service-connected visual impairment in one eye should not be considered in the evaluation of rating service-connected impairment of the other eye. The CVA commented that "the Secretary's construction . . . could well conflict with 38 C.F.R. § 4.78". Id. For purposes of determining the effect of aggravation of visual disability, section 4.78 appears to require consideration of both eyes, even if the impairment in one eye is not service-connected. That provision does not apply to hearing loss, however, and there is no similar provision applicable to auditory impairment. Moreover, in view of the statutory scheme governing the combination of ratings, we strongly question the validity of section 4.78 with respect to compensation.
- 9. Fundamentally, VA cannot provide compensation except as authorized by Congress. As noted above, the statutory scheme

generally authorizes compensation for service-connected disabilities only, see 38 U.S.C. §§ 101(13), 1110, and 1131, and does not permit combination of ratings for service-connected and nonservice-connected disabilities for compensation purposes. See 38 U.S.C. § 1157; 38 C.F.R. § 3.323. In our view, an interpretation of 38 C.F.R. § 4.85(b) that required the combination of both nonservice-connected and service-connected

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hearing loss that is less than total would constitute a violation of this statutory scheme and would be invalid. Accordingly, because VA lacks statutory authority to provide compensation on the basis of nonservice-connected hearing loss in one ear that is less than total, the hearing in the ear with no service-connected disability should be considered normal for purposes of rating the claimant's hearing impairment.

HELD:

If a claimant has service-connected hearing loss in one ear and nonservice-connected hearing loss in the other ear, the hearing in the ear having nonservice-connected loss should be considered normal for purposes of computing the service-connected disability rating, unless the claimant is totally deaf in both ears.

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