Date: December 20, 1993 O.G.C. Precedent 11-92

From: General Counsel (022)

Subj: Discharge as a Conscientious Objector; Meaning of Active Continuous Service

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

QUESTIONS PRESENTED:

a) When a claimant has been discharged under honorable conditions as a conscientious objector, does 38 C.F.R. § 3.12(c)(1) bar eligibility for benefits where the evidence does not establish that the claimant refused to perform military duty, wear the uniform, or comply with lawful military orders?

b) May a period of service be considered "active, continuous service" for purposes of 38 C.F.R. § 3.307(a)(1) where the period of service was interrupted by a thirteen-day period during which the servicemember was classified as being absent without official leave (AWOL)?

COMMENTS:

1. The questions presented arose in a reopened claim for service connection for multiple sclerosis. The claimant entered active service on July 24, 1973, and was discharged under honorable conditions as a conscientious objector on November 15, 1973. Service records indicate that the claimant was AWOL from August 9, 1973, to August 21, 1973. Thus, the claimant served sixteen days prior to a thirteen-day period of AWOL and eighty-six days following the AWOL period.

2. As provided in 38 C.F.R. § 3.12(a), a "discharge under honorable conditions is binding on [VA] as to character of discharge." However, benefits are not payable regardless of the service department's characterization of the discharge, if the servicemember was discharged or released under certain specified conditions. 38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c). Under section 5303(a), those conditions include discharge on the ground of being "a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful orders of competent military authority." *See also* 38 C.F.R. § 3.12(c)(1).

3. You state in your request for opinion that the records in this case do not indicate that the claimant refused to perform military duty, wear the uniform, or otherwise comply with military orders. The controlling statute, 38 U.S.C. § 5303 (a), specifically limits the bar to benefit conscientious objectors who refused to perform military duty or refused to wear the uniform or otherwise comply with lawful military orders. It is, of course, the general rule that the plain meaning of the statute must govern when it is clear and unambiguous. 2A N.J. Singer, *Sutherland Statutory Construction* § 46.01 (5th ed. 1992). Here, the applicable statute lists the specific circumstances under which conscientious objectors are barred from VA benefits. VA's implementing regulations, at 38 C.F.R. § 3.12(c)(1), track the statute's plain language. We cannot disregard the limiting language of the statute and regulation which restricts the bar to benefits to conscientious objectors who committed specified offenses. *See Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992)("[i]f the intent of Congress is clear, that is the end of the matter; . . . the Secretary must give effect to the unambiguously expressed intent of Congress").

4. We note that not all persons discharged as conscientious objectors have engaged in the conduct specified in section 5303(a). Detailed regulations issued by the Department of Defense define a conscientious objection as being "[a] firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief." 32 C.F.R. § 75.3. An individual who maintains such an objection could be processed for separation as a conscientious objector regardless of whether he or she refuses to perform military duty, provided the necessary criteria for separation, as specified in 32 C.F.R. § 75.5, are present.

5. Department of Defense regulations specify that service-members must be counseled "regarding the possible effects of discharge as a conscientious objector *who refuses to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority*." 32 C.F.R. § 75.6(b) and n. 1 (emphasis added); *see also*

32 C.F.R. § 75.10 (statement to be executed by objector). However, other portions of the regulations make clear the Department of Defense's understanding that not all conscientious objectors will be discharged on this basis. The regulations provide that during the period in which an application for discharge as a conscientious objector is being processed, and pending separation from service after a determination has been made, the applicant is expected to "conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned." 32 C.F.R. §§ 75.6(h), 75.7(a). Persons who comply with these requirements would not have been discharged for refusal to perform military duty or comply with lawful orders. Further, under 32 C.F.R. § 75.7(b), the military departments may, at their discretion, discharge persons determined to be conscientious objectors who have requested assignment to noncombatant duties rather than discharge. Clearly, such persons would not have been discharged for refusal to perform military duty or otherwise comply with lawful orders. Thus, in order to determine whether a separation as a conscientious objector operates to bar benefit eligibility, a factual determination must be made concerning whether the claimant, in addition to claiming conscientious-objector status, also refused to perform military duty or refused to wear the uniform, or otherwise comply with lawful military orders.

6. With regard to the second question presented, the controlling statute, 38 U.S.C. § 1112(a), provides that the presumptions of service connection established under that section for certain chronic and tropical diseases apply in the case of servicemembers who served "for ninety days or more." While the statute itself does not specify that active service must be continuous, VA's implementing regulations and instructions have long contained such a requirement, and the Court of Veterans Appeals (CVA) recently upheld this requirement as consistent with the statute. *Lorenzano v. Brown*, 4 Vet. App. 446 (1993).[1] Your opinion request correctly notes that the requirement of "active, continuous

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[1] In *Lorenzano*, the claimant was a former member of the Merchant Marine with two distinct periods of service on two separate vessels. In finding that the claimant did not meet the continuous, active service requirement, the CVA viewed the statute as a whole, noting that the statute specifically refers to a "period of service" and interpreting that reference as being to a period "having a beginning, an end, and continuity." *Id.* at 449.

service" of ninety days or more for purposes of presumptive service connection of certain chronic and tropical diseases had its origin in Instruction No. 6 to Veterans Regulation No. 1, which was promulgated on April 15, 1933, under the Act of March 20, 1933, ch. 3, 48 Stat. 8. That instruction stated that the ninety-day and six-month periods specified in Veterans Regulation No. 1 for application of the presumptions of service connection and sound condition, respectively, "will be taken to mean continuous, active service, as defined in paragraph 1" of that instruction. Paragraph 1 of the instruction, the forerunner of current 38 C.F.R. § 3.15, defined "active service" as "exclusive of unauthorized leaves of absence, . . . except leaves of absence for periods of one day, weekends, and the like." However, it did not address the issue of continuity of service.

7. In 49 Op. Sol. 259, 264 (3-20-40), approved by the Administrator (8-12-40), the VA Solicitor held that periods of unauthorized absence are not to be counted in determining length of service for pension purposes. However, the Solicitor also stated that "[i]t is conceded [an AWOL] soldier remains on the active list and that his status is not changed to the point of terminating his term of service." This language was among that quoted by the Administrator in A.D. No. 613 (12-28-44) and A.D. No. 724 (10-9-46), two other opinions on the subject of length of service. The referenced opinions recognize a distinction for benefit purposes between continuity of service and length of service with regard to time lost due to AWOL. These opinions recognize that, while periods of AWOL are generally excluded from length of service calculation, the active status of an AWOL individual is not automatically terminated.[2]

8. Department of Defense policy, whereby AWOL servicemembers are considered to remain in service with their unit until they are administratively "dropped from the rolls" and classified as deserters after thirty consecutive days of absence, tends to confirm the continuing active status of individuals during brief periods of AWOL. Army Regulation 630-10, Absence

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[2] In Op. G.C. 4-80 (6-30-80), the General Counsel determined that the continuous service requirement of 38 C.F.R. § 3.307(a)(1) was not satisfied where a servicemember returned to military control after a lengthy (1,344 day) unauthorized absence. The General Counsel found that, in light of the extended nature of the absence, there was an (cont.) interruption of continuous, active service sufficient to preclude availability of presumptive service connection.

Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings, chapters 2, 3, and glossary, sec. II (June 10, 1992); Dep't of Defense Directive 1325.2, Desertion and Unauthorized Absence, para. D.1.b., (Aug. 20, 1979). Here, it appears that the claimant (although AWOL) remained assigned to an active unit, returned voluntarily to that unit, and worked through prescribed channels to secure a discharge under honorable conditions. We do not find such an absence indicative of a break in service.

9. We also note that, under military law, the offense of AWOL is not a continuing offense but is complete the moment the individual absents himself or herself without authority. *United States v. Rodgers*, 23 C.M.A. 389, 1 M.J. 20 (1975); *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989). If *any* period of AWOL were to be considered a break in "continuous" service, then an unauthorized absence of less than one hour could be considered a break in active service. Under such a construction, a lengthy period of service could be considered noncontinuous if it were punctuated by a series of brief AWOL periods. We do not believe such a result was contemplated in establishment of the continuous, active service requirement.

10. Finally, as noted in your request for opinion, 38 C.F.R. § 3.12a(a)(1)(i), governing the minimum active-duty service requirement, provides that, for purposes of that requirement, nonduty periods excludable under 38 C.F.R. § 3.15 in determining benefit entitlement, which include unauthorized absences without pay, are deducted from total time served but are not considered a break in service. Similarly, under 38 C.F.R. § 21.7020(b)(6)(ii), governing the All Volunteer Force Educational Assistance Program, time lost while on active duty does

not interrupt the continuity of service. While these provisions do not apply to determinations of presumptive service connection, they demonstrate that VA has generally not considered a period of AWOL to constitute a break in service for purposes of determining eligibility for VA benefits.

11. A restrictive interpretation of 38 C.F.R. § 3.307(a)(1) would be inconsistent with VA's announced policy "to administer the law under a broad interpretation." 38 C.F.R. § 3.102. In our view, application of this policy as it pertains to the facts presented in this case justifies a determination that the claimant's thirteen-day period of AWOL did not constitute a break in continuous, active service for purposes of 38 C.F.R. § 3.307(a)(1).

HELD:

a) Under the provisions of 38 U.S.C. § 5303(a) and 38 C.F.R. § 3.12(c)(1), a claimant who is discharged under honorable conditions as a conscientious objector is not thereby barred from eligibility for veterans' benefits unless, in addition to being a conscientious objector, the claimant also refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities.

b) In order to be eligible for service connection on a presumptive basis for certain chronic and tropical diseases, regulations at 38 C.F.R. § 3.307(a)(1) require that a veteran have had at least ninety days continuous, active service. Not all unauthorized absences result in a break in service for purposes of this requirement. An absence of thirteen days, after which the absentee voluntarily returned to the absentee's unit, although not creditable for pay or time-in-service purposes, did not constitute a break in service for

purposes of the "active, continuous service" requirement imposed by regulations governing presumptive service connection.

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