

CITATION: VAOPGCPREC 13-89
Vet. Aff. Op. Gen. Couns. Prec. 13-89

DATE: 6-6-89

TEXT:

SUBJECT: CRITERIA FOR INDEPENDENT DOSE RECONSTRUCTION

QUESTION PRESENTED:

Has the requirement of 38 C.F.R. § 3.311b(a)(3) that a 'separate radiation dose estimate' be prepared by an independent expert been satisfied when the expert selected between two dose reconstructions prepared by other experts?

COMMENTS:

The question arose in the context of an appeal before the Board of Veterans Appeals (BVA) of a denial of a veteran's claim for service-connected disability based upon bronchogenic carcinoma allegedly resulting from exposure to ionizing radiation. The BVA requested an opinion as to the adequacy of an independent dose estimate obtained by the Chief Benefits Director concerning the veteran's exposure to ionizing radiation while in service.

The facts are these. The veteran served on active duty from October 1963 to July 1966, during which period he was exposed to ionizing radiation. He later contracted bronchogenic carcinoma, from which he died in February 1984.

In adjudicating the veteran's claim for service-connected disability based upon exposure to ionizing radiation, which was filed prior to his death, the Compensation and Pension Service obtained an estimate of the veteran's ionizing radiation dose from the Navy Nuclear Test Personnel Review office (NTPR). The veteran submitted a dose estimate prepared by an expert whom he had retained. In accordance with 38 C.F.R. § 3.311b(a)(3), the two estimates and supporting documentation were referred by the Chief Benefits Director to an independent expert. Upon receipt of the expert's response, which addressed the likelihood that the veteran's disease resulted from exposure to ionizing radiation, further clarification was requested. The expert was asked for his estimate of the amount of radiation exposure received by the veteran and was also asked which of the two estimates of record was most likely to be the closest estimate of the amount of radiation exposure that the veteran received. The independent expert replied that 'if forced to choose between the disparate dose estimates', there would be 'little choice' but to select the estimate provided by the Navy NTPR as the most likely dose. He further stated that it was 'highly likely' that this dose was received and that higher doses, such as those calculated by the

veteran's expert, were 'highly speculative and without documentation.'

Under section 7 of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2727 (1984), amended by Pub. L. No. 100-321, 102 Stat. 486 (1988), the Secretary of Veterans Affairs is required to resolve material differences between a radiation dose estimate submitted by a claimant and one transmitted by the Defense Nuclear Agency (DNA) (i.e., that NTPR estimate). In doing so, the Secretary is required to 'provide for the preparation of a radiation dose estimate by an independent expert' and to 'provide for the consideration of such independent estimate in connection with the adjudication of the claim for VA compensation'. *Id.* The legislative history of the statute does not throw further light on the meaning of this requirement. See 130 Cong. Rec. H11155-H11166 (daily ed. Oct. 3, 1984); 130 Cong. Rec. S13587-S13611 (daily ed. Oct. 4, 1984); 1984 U.S. Code Cong. & Admin. News 4449.

The implementing regulation, 38 C.F.R. § 3.311b(a)(3) provides, in relevant part:

When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose estimate for consideration in adjudication of the claim. . . .

Thus, the regulation and the statute require that a separate radiation dose estimate be prepared by the independent expert and be considered in the adjudication of the claim. This requirement would not necessarily demand that new calculations be made by the independent expert, if the expert were to adopt the reasoning and conclusions reached by another expert or group. However, we do not view the statute or regulation as allowing the expert to be presented with dose estimates to choose between as an alternative to preparing a separate radiation dose estimate which could be considered in connection with the adjudication of the claim.

The determination as to whether an adequate evidentiary record has been developed in a particular case, as is the evaluation of evidence presented, as an adjudicative matter on which we are not in a position to render an opinion. Thus, we leave it to the BVA to determine whether the regulations have been complied with in the instant case, based upon the criteria set forth above.

HELD:

The Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2727 (1984) and its implementing regulation, 38 C.F.R. § 3.311b(a)(3) require when conflicting dose estimates have been

submitted that a separate radiation dose estimate be prepared by an independent expert and be considered in the adjudication of the claim. While this requirement does not necessarily mean that new calculations must be performed, it does not appear to be sufficient to present the expert with dose estimates to choose between as an alternative to preparing a separate radiation dose estimate. Whether a dose estimate in a given case is in compliance with this requirement is, however, an evidentiary matter for determination by the appropriate adjudicatory body, in this case, the BVA.

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