Date: January 13, 1993 O.G.C. Precedent 2-93

From: General Counsel (022)

Subject: Entitlement to Benefits Based upon Tobacco Use While in Service

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

QUESTIONS PRESENTED:

a. Is nicotine dependence, per se, a disease or injury for which VA compensation benefits are payable?

b. Is disability or death resulting from identifiable residuals of injury or disease due to tobacco use while on active duty service connected?

c. Does tobacco use, per se, or based upon the level of consumption, constitute willful misconduct or abuse of a drug for purposes of line-of-duty determinations?

COMMENTS:

1. These issues arise in the context of an appeal to the Board of Veterans' Appeals (BVA) by the surviving spouse of a veteran who died of adenocarcinoma of the lung with probable brain metastasis on March 15, 1980. The veteran's surviving spouse filed a claim for dependency and indemnity compensation (DIC), alleging that the veteran's adenocarcinoma, which was diagnosed in April 1977, was due to contact with cleaning solvents, aviation fuel, other chemicals, and asbestos while on active duty from June 20, 1938, to July 27, 1945, and from May 18, 1949, to May 31, 1967. After initial denial and reopening of the claim, VA denied the claim because the evidence did not show that the veteran's death was incurred in or aggravated by military service. The claimant appealed the denial to the BVA, which sought an independent medical opinion. The independent medical expert opined that the "most significant" exposure the veteran had with regard to pulmonary carcinoma was a history of smoking one and one half packs of cigarettes per day for over forty years. The expert also stated that the risk of contracting pulmonary carcinoma due to exposure to other carcinogens may have had an additive effect to the risk posed by cigarette smoking.

2. As to the first issue, we note that, if nicotine dependence is considered a disease or injury for purposes of compensation under title 38, United States Code, then, if such dependence began in service and tobacco use resulting from that dependence led to development of a disabling condition, e.g., cancer, subsequent to service, service connection could be established for disability resulting from that condition pursuant to 38 C.F.R. § 3.310(a) (authorizing service connection of disability which is proximately due to or the result of a service-connected disease or injury). In contrast, if nicotine dependence is not a disease or injury for compensation purposes, service connection could only be established for tobacco-related disability if resulting disease commenced in service or, as discussed below, a disabling disease process can be linked to an event in service such as exposure to a harmful agent.

3. This office has previously had occasion to consider the meaning of the terms "disease" and "injury" as used in the statutes authorizing veterans' disability compensation. In O.G.C. Prec. 82-90, we cited Dorland's Illustrated Medical Dictionary 385 (26th ed. 1974) as indicating that the term "disease" has been defined as "any deviation from or interruption of the normal structure or function of any part, organ or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." In that opinion we also noted that the term has been variously defined in the case law as "a morbid condition of the body or of some organ or part; an illness; [or] a sickness." In O.G.C. Prec. 86-90, we applied a distinction based on common usage, which denotes injury as "harm resulting from some type of external trauma" and disease as "harm resulting from some type of internal infection or degenerative process." See also Op. G.C. 6-86 (3-27-86) (referring to injury as resulting from external trauma, i.e., application of external force or violence, and disease as a response to environmental factors, infective agents, inherent defects, or a combination of these factors).

4. The 1987 revision of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition, (DSM-III-R), classifies nicotine dependence as a psychoactive substance-use disorder. DSM-III-R, Code 305.10. A psychoactive substance-use disorder refers to "the maladaptive behavior associated with more or less regular use" of psychoactive substances which affect the central nervous system. DSM-III-R at 165. Such a disorder clearly would fall outside the scope of the term "injury," as defined in the cited opinions. However, the issue is less clear with respect to the term "disease." In O.G.C. Prec. 82-90, we indicated that whether a particular

condition may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles relating to the condition in question. Thus, we must defer to the Board's evaluation of whether nicotine dependence may be considered a disease for compensation purposes in light of the definitions discussed above.

5. The next question posed is whether death or disability resulting from identifiable residuals of injury or disease due to tobacco use during active duty is compensable under title 38, United States Code. In a concurring opinion in Sawyer v. Derwinski, 1 Vet. App. 130, 138 (1991), Judge Steinberg appeared to suggest that a veteran could establish service connection for lung cancer based upon a fourteen-year history of smoking in service. Judge Steinberg stated, "[u]nder such an approach, the only evidence against service connection would be the 10 years of smoking after discharge until the lung-cancer diagnosis was made." Id. In a somewhat analogous situation in Douglas v. Derwinski, 2 Vet. App. 103 (1992), the United States Court of Veterans Appeals remanded a case to the BVA for consideration of whether a veteran's basal-cell carcinoma was service connected due to exposure to the sun during his tenure as a deckhand in the Navy. The court noted evidence that the veteran served as a deckhand in the Navy, has fair skin, has no family history of skin problems, and worked indoors since returning from service.

6. Compensation is payable to a veteran for service-connected disability or to a surviving spouse, child, or parent of a veteran for the service-connected death of the veteran. 38 U.S.C. §§ 1110, 1131, and 1310. A disability or death is considered to be service connected if the disability was incurred or aggravated in the line of duty in active service or if the death resulted from a disability that was incurred or aggravated in the line of duty in active service. 38 U.S.C. § 101(16). Direct service connection may be granted for a disease diagnosed after service discharge when all the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

7. Consistent with these principles, VA has promulgated regulations governing adjudication of claims based on exposure to dioxin or ionizing radiation, agents which may result in conditions which become manifest years after exposure. 38 C.F.R. §§ 3.311a and 3.311b. In authorizing service connection for disability or death resulting from such conditions, VA recognized the need for evidence of exposure to the agents in question coincident in time with a veteran's military service and some link between that

exposure and the subsequent disability or death. See generally 50 Fed. Reg. 34,452 (1985); 50 Fed. Reg. 15,848 (1985). Thus, a disease which is diagnosed after service discharge may be considered to be service connected if an event or exposure during service subsequently results in disability or death. With regard to the claim at issue, we note that epidemiologic research has identified substantial increases in the relative risk of mortality from a variety of cancers in smokers. See David Carbone, M.D., Ph.D., Smoking and Cancer, 93 (Supp. 1A) Am. J. Med. 1A-13S (1992). We conclude, therefore, that if the evidence establishes that the veteran incurred a disease or injury from tobacco use in line of duty in the active military, naval, or air service, service connection may be established for disability or death resulting from that disease or injury, even if the disease or injury does not become manifest until after service discharge.

8. The issue of whether a veteran's disability or death is due to smoking in service is a question of fact to be resolved by the adjudicator. Section 3.303(a), which was issued in 1961 at the same time as section 3.303(d), contains a general policy statement as to service connection, which is applicable to determination of service connection for a disease which is first diagnosed after discharge from service. Section 3.303(a) states that service connection:

> must be considered on the basis of the places, types and circumstances of [the veteran's] service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

With regard to this claim, the fact-finder must determine, based upon the evidence of record, whether the veteran's smoking while in service resulted in the veteran's adenocarcinoma. Of course, the possible effect of smoking before or after military service must be taken into account in making this determination.

9. The final issue posed is whether tobacco use, per se, or based upon the level of consumption, constitutes willful misconduct or abuse of drugs for purposes of determining whether disability or death resulting there from was incurred in line of

duty. A disability may not be service connected unless it results from an injury or disease incurred or aggravated "in line of duty." 38 U.S.C. §§ 1110 and 1131. Prior to passage of the Omnibus Budget Reconciliation Act of 1990 (OBRA), Pub. L. No. 101-508, 104 Stat. 1388, 38 U.S.C. § 105(a) stated that a veteran's disease or injury incurred during active military service would be deemed to have been incurred in line of duty unless such injury or disease was a result of the veteran's own willful misconduct. Section 8052 of the OBRA, 104 Stat. at 1388-351, amended 38 U.S.C. § 105(a) and what are now 38 U.S.C. §§ 1110 and 1131 by adding the phrase "or abuse of alcohol or drugs" after the term "willful misconduct." The effect of that amendment is that injury or disease incurred or aggravated as a result of alcohol or drug abuse will not be considered incurred or aggravated in line of duty, and, therefore, service connection will not be established for resulting disability.

10. We first address whether tobacco use, per se, or based upon level of use, constitutes willful misconduct. Section 200 of the World War Veterans' Act of 1924 barred compensation for death or disability resulting from injury suffered or disease contracted in the military or naval service if caused by the veteran's "own willful misconduct." Ch. 320, § 200, 43 Stat. 607, 615 (1924). Opinions of the Veterans' Bureau under that statute construed the term "willful misconduct" as essentially referring to an act of conscious wrongdoing. A 1928 decision of the Veterans' Bureau General Counsel, 52 Op. G.C. 215, 216 (5-23-28), applied a definition of the term "willful" as referring to "an act proceeding from a will; done of a purpose;" and "impl[ying] not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it." See also 65 Op. G.C. 78 (10-9-30) (disability due to injury incurred by veteran while attempting to board freight train did not result from willful misconduct in absence of evidence indicating veteran knowingly and willfully violated provision of law relative to boarding a moving freight train).

11. In a 1931 opinion interpreting the World War Veterans' Act of 1924, the Attorney General of the United States stated that willful misconduct would seemingly involve "something in the nature of conscious wrong-doing." Manuscript Op. Att'y Gen. at 3 (1-20-31). Applying that concept, the Attorney General concluded that a veteran was not guilty of willful misconduct in drinking whiskey which caused blindness due to wood alcohol poisoning because there was no law prohibiting the drinking of intoxicating liquor and no evidence that the veteran knew the liquor might blind him, i.e., "no evil intent of any kind." Id. at 5. The

Veterans Administration Solicitor relied on the 1931 Attorney General's opinion in the case of a veteran who had been addicted to morphine and who died, according to the opinion of one physician, as a result of drug use. The Solicitor concluded that, in order to find that death was the result of willful misconduct, it was required that, in taking the drug which resulted in death, the veteran have engaged in conscious wrong-doing or acted with a wanton and reckless disregard of the probable, as distinguished from possible, consequences. 36 Op. Sol. 308-a, 308-e (1-28-38). See also Op. Sol. 584-48 (9-7-48) (death of veteran who collided with train after apparently suffering epileptic seizure while driving vehicle was due to willful misconduct if veteran completely disregarded almost certain consequences resulting from the frequency of seizures, but death would not be result of willful misconduct if driving was sporadic or of a single instance, with due regard to the frequency of the veteran's seizures); 66 Op. G.C. 270, 272 (2-26-31) (finding of willful misconduct requires "something in the nature of conscious wrongdoing, that is, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences").

12. These precedents were incorporated in VA regulations in 1948 (former 38 C.F.R. § 3.65(c)), 13 Fed. Reg. 7003 (1948), which directed that the precedents under the World War Veterans' Act of 1924 were to be applied in determining whether a veteran had engaged in willful misconduct. Then section 3.65(c) also stated, "[g]enerally, these precedents are to the effect that an act to be one of 'willful misconduct' must be 'malum in se' or 'malum prohibitum' if involving conscious wrongdoing or known prohibited action." In 1961, VA promulgated 38 C.F.R. § 3.1(n), 26 Fed. Reg. 1563 (1961), the successor to former 38 C.F.R. § 3.65(c), which also defined willful misconduct as "an act involving conscious wrongdoing or known prohibited action." Two years later, current paragraph (n)(1) was added to that section, stating that willful misconduct "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 28 Fed. Reg. 320 (1963).

13. The issue of whether smoking constitutes willful misconduct was discussed in Administrator's Decision No. 988 (8-13-64). The primary focus of that decision was the criteria for determining when death or disability is the result of a veteran's willful misconduct because of use of alcohol as a beverage. The decision distinguished the proximate and immediate effects resulting from intoxication from the remote, organic, secondary effects of the

continued use of alcohol. With regard to the former, the decision concluded that an individual acts with wanton and reckless disregard of the consequences if he willingly becomes intoxicated and, while in this condition, undertakes tasks for which his condition renders him physically and mentally unqualified. As to the latter, on the other hand, the decision stated that "[w]ith common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of a secondary condition [such as cirrhosis of the liver or gastric ulcer] does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences." The decision further stated that tobacco smoking had not been considered willful misconduct even though the harmful effects of smoking on circulation and respiration were known long before tobacco was known to be a causative agent in cancer, emphysema, and heart disease. The decision concluded that it would be unreasonable and illogical to apply one set of rules to alcohol and a different set to the closely analogous situation of tobacco.

14. In spite of Administrator's Decision No. 988, which has not been reissued as a precedent opinion under 38 C.F.R. § 14.507, we do not believe that the use of alcohol presents a situation which is necessarily analogous to the use of tobacco. In contrast to alcohol, nicotine rarely causes any clinically significant state of intoxication, and, as a result, there is no impairment in social or occupational functioning as an immediate and direct consequence of its use. DSM-III-R at 182. Further, public knowledge of the long-term consequences of use of tobacco and alcohol may have differed at particular times.

15. With regard to tobacco, we note that the Supreme Court's decision in Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2615-17 (1992), traces the development of health concerns regarding smoking. As noted in that opinion, in 1964, three years prior to this veteran's discharge from the Air Force, an advisory committee to the Surgeon General issued a report which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." HEW, U.S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964), quoted in Cipollone, 112 S. Ct. at 2616. Congress passed the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, in 1965. That act declared Congress' policy that the public be adequately informed of the health hazards of cigarette smoking, id. § 2, 79 Stat. at 282, and required the following warning label on cigarette packages: "Caution: Cigarette

Smoking May Be Hazardous to Your Health." Id. § 4, 79 Stat. at 283 (emphasis added.) Congress subsequently enacted the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (1970), which changed the warning to read "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." (Emphasis added.) In 1984, Congress amended the Federal Cigarette Labeling and Advertising Act to require the use of various, more explicit warnings on cigarette packages, including "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy." Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4(a), 98 Stat. 2200, 2201 (1984). The purpose of that act was stated to be to make Americans "more aware of any adverse health effects of smoking" and "to enable individuals to make informed decisions about smoking." Id. § 2, 98 Stat. at 2200. This history gives some indication of the extent of the general public's knowledge of the health effects of smoking at particular points in time.

16. We also note that the armed services have taken actions which could be viewed as encouraging the use of tobacco. For example, cigarettes have been included in the K-rations and C-rations provided to service members, and cigarettes are sold in military commissaries at a price which is substantially less than in civilian stores. Gregory H. Blake, M.D., Smoking and the Military, 85(7) N.Y. St. J. Med. 354, 355 (1985); see also 10 U.S.C. § 2486(b)(8) and (d) (authorizing the sale of tobacco products in commissary stores and establishing pricing policy).[1] These actions strongly suggest that mere use of tobacco by an affected service member should not be considered to involve deliberate wrongdoing.

17. This office has long stated that a determination of whether a veteran has engaged in willful misconduct is a question of fact which depends upon all the facts and circumstances shown by the evidence. See 79 Op. Sol. 380, 383 (4-21-45). Under 38 C.F.R.§ 3.1(n), in order for tobacco smoking to constitute willful misconduct in a particular case, the evidence must establish that the smoking involved deliberate or intentional wrongdoing and that either the veteran knew or intended the health consequences

of smoking or that the veteran smoked with a wanton and reckless disregard of the probable consequences. The veteran's awareness of

[1] Congress has restricted the amount of tobacco which the Air Force may sell to an enlisted member on active duty to sixteen ounces per month. 10 U.S.C. § 9623.

the potential health consequences at the time the veteran engaged in cigarette smoking in service is relevant to this inquiry.

18. Finally, we address whether the use of tobacco constitutes drug abuse for purposes of line-of-duty determinations.[2] We note initially that section 8052 of the OBRA, which added the reference to drug abuse to statutes governing service-connected disability and death, is only applicable to claims filed after October 31, 1990. Pub. L. No. 101-508, § 8052(b), 104 Stat. at 1388-351. Since in the case at issue VA received the surviving spouse's DIC claim on March 28, 1980, and the surviving spouse sought to reopen the claim on June 23, 1987, the amendments made by section 8052(a) of that statute are not applicable to the claim.

19. In any event, however, we do not believe that tobacco use constitutes drug abuse within the meaning of section 8052(a) of the OBRA. We recognize that a 1988 report of the Surgeon General determined that "nicotine, the principal pharmacologic agent that is common to all forms of tobacco, is a powerfully addicting drug." HHS, The Health Consequences of Smoking: Nicotine Addiction - A Report of the Surgeon General (1988), quoted in Cipollone v. Liggett Group, Inc., 893 F.2d 541, 563 n. 19 (3d Cir. 1990), aff'd in part & rev'd in part, 112 S. Ct. 2608 (1992). Further, the United States District Court for the District of Columbia referred to tobacco as a drug in Nat'l Org. for Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 138 (D.D.C. 1980). We, therefore, must consider whether Congress intended to include tobacco as a "drug" when it enacted section 8052 of the OBRA.

20. Section 8052 of the OBRA does not define the term "drug." Because the term is capable of several definitions, it is necessary to look to extrinsic aids to assist in interpreting

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[2] While paragraph 11.04 e.(2)(a) of VA Manual M21-1 states that drug abuse includes the use of "illegal drugs (including pre-scription drugs that are illegally or illicitly obtained), the use of prescribed or non-prescribed drugs for a purpose other than the medically intended use and the use of other agents, e.g., glue, paint, to enjoy their intoxication effects," we do not consider this manual regulatory and the provision contained therein pertaining to drug abuse is not based on authoritative guidance from this office.

this term as used in section 8052. The legislative history of section 8052 does not indicate what substances would be classi-fied as drugs under that statute. Under the rule of statutory construction of statutes in pari materia, statutes which relate to the same person or thing or class of persons or things, or which have the same purpose or object, should be construed together. 2A Norman J. Singer, Sutherland Statutory Construction §§ 51.01-51.03 (4th ed. 1984). "Statutes which are parts of the same general scheme or plan, or are aimed at the accomplishment of the same results and the suppression of the same evil, are. . . considered as in pari materia." 73 Am. Jur. 2d Statutes § 189 (1974). Further, the meaning of words in one statute which are capable of more than one meaning may be determined by referring to another related statute in which the same words are used. 82 C.J.S. Statutes § 365 (1953); 2A Singer, supra § 51.02.

21. Two years prior to enactment of section 8052 of the OBRA, Congress enacted the National Narcotics Leadership Act of 1988, Pub. L. No. 100-690, Title I, Subtitle A, § 1010(1), 102 Stat. 4181, 4188, which created the Office of National Drug Control Policy. The Office of National Drug Control Policy is charged with coordinating anti-drug programs at the Federal level and ensuring consistency in Federal anti-drug programs. The National Narcotics Leadership Act may be viewed as in pari materia with section 8052 of the OBRA because both statutes are part of a general scheme to establish and enforce a coordinated drug policy within the Federal government. Therefore, the definition of the term "drug" found in the National Narcotics Leadership Act is instructive in interpreting the term "drug" as used in section 8052 of the OBRA. The National Narcotics Leadership Act states that the term "drug" has the same meaning as the term "controlled substance" has in section 102(6) of the Controlled Substances Act (codified at 21 U.S.C. § 802(6)).[3] Section 102(6) of the

[3] Other titles of Pub. L. No. 100-690 employ other definitions of the term "drug." Section 3601(5), found in Title III, Sub-title C, dealing with drug abuse education and prevention, states that "the term 'drug' means-(A) a beverage containing alcohol, (B) a controlled substance, or (C) a controlled substance analogue." 102 Stat. at 4261. Section 4003, which is part of Title IV, Subtitle A, pertaining to international narcotics control, defines the term "drug" as "narcotic and psychotropic drugs and other controlled substances as defined in section 481(i)(3) of the Foreign Assistance Act of 1961." 102 Stat. at 4263. These definitions, while less clearly in para materia with section 8052 of the OBRA, also suggest that, in its efforts to combat drug abuse, Congress did not contemplate restriction of the use of tobacco.

Controlled Substances Act specifically exempts tobacco from the term "controlled substance." See Nat'l Org. for Reform of Marijuana Laws, 488 F. Supp. at 137-38 (upholding definition against allegation of underinclusiveness). Based upon the exclusion of tobacco from the definition of the term "drug" found in the Controlled Substances Act, upon which the National Narcotics Leadership Act relies, it is reasonable to conclude that Congress did not intend to include tobacco as a drug within the meaning of section 8052 of the OBRA.

22. Further, even if we were to assume that tobacco constitutes a drug under section 8052 of the OBRA, the use of tobacco, as such, could not, in our view, be considered drug "abuse" for purposes of determining whether injury or disease was incurred in line of duty. The different parts of a statute reflect upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. 73 Am. Jur. 2d Statutes § 191 (1974). For that reason, a statute should be construed in its entirety. Id. Title 38, United States Code, in which the laws relating to veterans' benefits are codified, contains, in addition to the sections referring to drug abuse, section 1715, which provides that VA may furnish tobacco to veterans receiving hospital or domiciliary care. We cannot ascribe to Congress an intention to include the use of tobacco within the meaning of the phrase "abuse of alcohol or drugs" in 38 U.S.C. §§ 105(a), 1110, and 1131, as amended by section 8052 of the OBRA, while 38 U.S.C. § 1715 permits VA to furnish tobacco for use by VA hospital and domiciliary patients. Since, in enacting section 8052 of the OBRA, Congress did not repeal or amend section 1715, we conclude that Congress did not intend to amend title 38 so that smoking per se would be considered "abuse" of a drug.

HELD:

a. Determination of whether nicotine dependence, per se, may be considered a disease or injury for disability compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles relating to that condition.

b. Direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service.

c. A determination of whether tobacco use constitutes willful misconduct for purposes of determining whether disability or death may be considered to have resulted from injury or disease

incurred in line of duty depends upon whether the evidence in the particular case establishes that the veteran engaged in deliberate or intentional wrongdoing and either knew or intended the consequences of tobacco use or used tobacco with a wanton and reckless disregard of its probable consequences. However, tobacco use does not constitute drug abuse within the meaning of statutes providing that injury or disease will not be considered incurred in line of duty where it results from abuse of drugs.

James A. Endicott, Jr.

ATTACHMENT

O.G.C. Prec. 2-93--Entitlement Based on Tobacco Use While in Service

Introduction

On January 13, 1993, the General Counsel issued O.G.C. Prec. 2-93, which addresses the issue of potential entitlement to VA benefits based upon tobacco use while in service.

Holdings of the General Counsel Opinion

1. Determination of whether nicotine dependence, per se, may be considered a disease or injury for disability compensation purposes is essentially an adjudicative matter to be resolved by adjudication personnel based on accepted medical principles relating to that condition.

2. Direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service.

3. Determination of whether tobacco use constitutes willful misconduct for purposes of determining whether disability or death may be considered to have resulted from injury or disease incurred in line of duty depends upon whether the evidence in the particular case establishes that the veteran engaged in deliberate or intentional wrongdoing and either knew or intended the consequences of tobacco use or used tobacco with a wanton and reckless disregard of its probable consequences.

4. Tobacco use does not constitute drug abuse within the meaning of statutes providing that injury or disease will not be considered incurred in line of duty where it results from abuse of drugs.

Misconceptions About the Opinion

1. The opinion does not hold that service connection will be established for a disease related to tobacco use if the affected veteran smoked while in service.

--In fact the opinion states:

a. The fact that an injury or disease allegedly related to tobacco use in service was not diagnosed until after service discharge would not preclude establishment of service connection.

b. However, service connection may not be established based on tobacco use unless the evidence of record demonstrates that the injury or disease for which the claim is made resulted from the veteran's tobacco use during service.

c. Determination of the issue of service connection for injury or disease due to tobacco use must take into consideration the possible effect of smoking before or after military service.

2. The opinion does not hold that a veteran can establish service connection for tobacco-related illness: (a) if the veteran was unaware of the risks of tobacco use while in service; or, (b) based upon the actions of the military services in making tobacco products available to service personnel.

--Under the opinion, the veteran's awareness of smoking hazards relates only to the issue of willful misconduct. The veteran must nonetheless establish that the injury or disease for which compensation is sought resulted from tobacco use in service.

--The discussion in the opinion concerning the availability of tobacco products at commissaries or, formerly, in military rations also pertains only to the subissue of willful misconduct. The opinion states that the inclusion of cigarettes in military rations and their sale at discounted prices in military commissaries "strongly suggest that mere use of tobacco by an affected service member should not be considered to involve deliberate wrongdoing."