Date: December 27, 1994 O.G.C. Precedent 23-94

From: General Counsel (022)

Subj: Gardner ruling

To: Under Secretary for Benefits (20)

1. You have indicated you wish to instruct VA Regional Offices to adjudicate those pending 1151 claims which can be allowed on the basis of the U.S. Supreme Court's precedential decision in Brown v. Gardner, No. 93-1128 (S. Ct., Dec. 12, 1994), and seek advice as to the proper criteria for so doing.

2. As you know, the Supreme Court affirmed lower court rulings which held that VA's regulation, at 38 C.F.R. § 3.358(c)(3), is invalid to the extent it precluded compensation under 38 U.S.C. § 1151 unless there was a showing of fault on the part of VA health-care providers or the occurrence of an "accident." However, the Court also indicated the statute should not be applied on a strictly no-fault basis when, at page 5 of the slip opinion, it stated the following (with regard to the statute's requirement that the demonstrated injury must be "the result of" VA treatment or examination):

> Assuming that the connection is limited to proximate causation so as to narrow the class of compensable cases, that narrowing occurs by eliminating remote consequences, not by requiring a demonstration of fault. [3]
> * * * * *

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[3] We do not, of course, intend to cast any doubt on the regulations insofar as they exclude coverage for incidents of a disease's or injury's natural progression, occurring after the date of treatment. See 38 C.F.R. § 3.358(b)(2)(1993). VA action

> is not the cause of the disability in these situations. Nor do we intend to exclude application of the doctrine *volenti non fit injuria*. See generally M. Bigelow, Law of Torts 39-43 (8th ed. 1907). It would be unreasonable, for example, to believe that Congress intended to compensate veterans for the necessary consequences of treatment to which they consented (i.e., compensating a veteran who consents to the amputation of a gangrenous limb for the loss of the limb).

3. The first part of the above-quoted footnote is a straight-forward endorsement of VA's current regulation to the extent that it precludes compensation for the natural progress of a condition that is unrelated to VA's treatment. The parameters of the remainder of the footnote are, how-ever, less clear and as you are aware the Secretary has requested an interpretive opinion by the Attorney General.

4. Should you decide to instruct that adjudications resume before the Attorney General's opinion is obtained and VA's regulation revised, in order to adjudicate claims which clearly could be allowed under the Supreme Court's decision (but not to deny others), we recommend that your instructions emphasize the following.

5. Clearly the Court's decision means that the absence of fault on the part of VA-care providers is not of itself fatal to an 1151 claim. Thus, for example, if a pharmaceutical supplier mislabels a drug and as a result it is improperly administered by VA, the absence of fault on VA's part is not a bar to compensation for resulting injury.

6. The Court has clearly said that compensation is not payable for incidents of a disease's or injury's natural progression, or for the intended consequences of a medical procedure to which a veteran consented. It has also suggested that compensation <u>may</u> not be payable for the unintended results of care if they are among the risks

which the veteran was advised before consenting to that care. It follows, however, that compensation is payable if an injury resulting from VA treatment causes additional disability or death and the injury is not a risk of which the veteran was informed before consenting to undergo treatment. For example:

- A veteran is informed of three of the known risks of a certain surgical procedure before consenting to it. As a result of the surgery, the veteran suffers a fourth and different type of complication which he had not been informed was a risk of the procedure. Compensation would be payable for resulting disability or death.

- A medical procedure is performed on a veteran without his or her consent. Compensation would be payable for resulting disability or death.

7. You may, if course, also continue your current practice of allowing those claims in which indicated fault on the part of VA-care providers, or the occurrence of an "accident," is shown to have resulted in increased disability or death.

8. My staff is available to work with yours in developing the guidance you will provide to adjudication personnel.

Mary Lou Keener