Department of Veterans Affairs

Memorandum

Date: MAR 15 2017

VAOPGCPREC 1-99 (Amendment)

From: Interim General Counsel (022)

Subj: Amendment to VAOPGCPREC 1-99: Interpretation of 38 U.S.C. § 1151; Disability Resulting from Assault During Examination or Treatment

To: Executive in Charge, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

May compensation be paid under 38 U.S.C. § 1151, as in effect before October 1, 1997, for disability incurred or aggravated as the result of a sexual assault by a Department of Veterans Affairs (VA) physician that occurred while a veteran was receiving an examination or medical treatment at a VA facility?

DISCUSSION:

1. VAOPGCPREC 1-99 previously addressed the question presented in terms of the version of 38 U.S.C. § 1151 applicable to claims filed before October 1, 1997. Section 1151 at that time authorized compensation if a veteran "suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . , awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct."

2. VAOPGCPREC 1-99 held the following in Held paragraph a.:

> Section 1151 of title 38, United States Code, as applicable to claims filed before October 1, 1997, does not authorize payment of compensation for disability incurred or aggravated as the result of a sexual assault by a [VA] physician which occurred while a veteran was receiving medical treatment or an examination at a VA facility. For purposes of compensation under those provisions, the disability must result from the medical treatment or examination itself and not from independent causes occurring coincident with the treatment or examination. A sexual assault generally would not constitute medical treatment or examination within the meaning of 38 U.S.C. § 1151 and would not provide a basis for compensation under those provisions. However, if the actions or procedures alleged to have constituted an assault would otherwise be within the ordinary meaning of the terms "medical treatment" or "examination," then compensation may be payable under section 1151. Accordingly, it may be necessary to make factual determinations in individual

> cases as to whether the actions or procedures alleged to have caused disability constituted part of "medical treatment" or "examination" or were independent actions merely coincidental with such treatment or examination.

3. The U.S. Court of Appeals for the Federal Circuit subsequently addressed this version of 38 U.S.C. § 1151 in *Jackson v. Nicholson*, 433 F.3d 822 (Fed. Cir. 2005). In *Jackson*, a veteran was verbally and physically assaulted by a patient while hospitalized at a VA medical center. *Id.* at 823. Addressing the statutory phrase "as the result of hospitalization," the Federal Circuit held that section 1151 covered injuries causally connected to hospitalization, regardless of VA action. *Id.* at 825 ("The word 'hospitalization' is a term of status; one is hospitalized when one is in the hospital."). Though the acts of the patient might be an "intervening cause," the court stated that an "'intervening cause' does not preclude liability where there exists a causal connection between the hospitalization and the injury." *Id.* at 826 ("The fact that an intervening cause may mean that the injury was not the result of VA action does not mean that it was not 'as the result of hospitalization.'"). The court further noted that it would not legislate an intervening cause exception into the statute, stating that "[t]he injury here would not have occurred if there had not been hospitalization; it was therefore a result of the hospitalization." *Id.*

4. Section 1151 was amended, for claims filed on or after October 1, 1997, to authorize compensation for disabilities (1) "caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility," and (2) proximately caused by "negligence . . . or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination," or "an event not reasonably foreseeable." *See* Pub. L. No. 104-204, § 422, 110 Stat. 2874, 2926-27 (1996).

5. The Federal Circuit addressed this version of section 1151 in *Viegas v. Shinseki*, 705 F.3d 1374 (Fed. Cir. 2013). In *Viegas*, following a prescribed therapy session at a VA medical center, a veteran was injured due to a faulty restroom grab bar. *Id.* at 1376. Noting that the statute covered care provided "'*either* by a [VA] employee *or* in a [VA] facility,'" the Federal Circuit held that section 1151 covered "not simply the actual care provided by VA medical personnel, but also treatment-related incidents that occur in the physical premises controlled and maintained by the VA." *Id.* at 1378. The court rejected the notion that an injury must be directly caused by the actual provision of care by VA employees; all that is required is a "causal connection" between the injury and the care or treatment provided by VA. *Id.* at 1380. Although the court noted that section 1151 does not extend to the "remote consequences" of VA medical treatment, such as an injury during recreational activities at the facility hours after

an examination, restroom grab bars such as those at issue here were "a necessary component of the health care services the VA provides because without such equipment many veterans would be unable to avail themselves of VA medical care." *Id.* at 1379, 1383. Reviewing the legislative history, the court found "nothing to indicate that Congress intended to preclude compensation for injuries stemming from the VA's failure to properly install and maintain the equipment necessary to provide health care services." *Id.* at 1381.

6. Based on the *Jackson* and *Viegas* decisions, we have reexamined the Held paragraph a. of VAOPGCPREC 1-99. That holding relied on a concept—independent and intervening causes—that has since been rejected as an exception to section 1151 and a narrow view of the term "treatment" at odds with the Federal Circuit's understanding of the statute now in effect, which uses this same term.

7. The question presented asks whether 38 U.S.C. § 1151, as in effect before October 1, 1997, authorizes compensation for disability resulting from a sexual assault by a VA physician that occurred *while* a veteran was receiving an examination or medical treatment at a VA facility. In such a circumstance, there can be no doubt that the assault is causally connected to the examination or treatment. *See Viegas*, 705 F.3d at 1380 (requiring only a "causal connection" between the injury and the care or treatment provided by VA); *cf. Jackson*, 433 F.3d at 826 ("The injury here would not have occurred if there had not been hospitalization; it was therefore a result of the hospitalization."). Under the reasoning of *Viegas*, an assault during examination may be considered a "treatment-related incident[ ]" occurring "in the physical premises controlled and maintained by the VA"; the provision of a safe examination is certainly "a necessary component of the health care services the VA provides"; and the "remote consequences" exception recognized in *Viegas* involves situations removed from VA's provision of health care to a patient, not VA employee actions during the provision of health care. *Viegas*, 705 F.3d at 1378-79, 1383.

8. The fact that the assault might not itself be "medical treatment" or "examination" within the meaning of section 1151 or that it might be considered independent or intervening is not controlling. *See Jackson*, 433 F.3d at 826 ("An 'intervening cause' does not preclude liability where there exists a causal connection between the hospitalization and the injury."). Contrary to Held paragraph a. of VAOPGCPREC 1-99, there is no need to analyze whether the assault "constituted part of 'medical treatment' or 'examination'" or was an "independent action[ ] merely coincidental with such treatment or examination"; if an assault is causally connected to a VA examination or treatment, and not a remote consequence thereof, the assault generally would provide a basis for an award of compensation under section 1151 for resulting disability.

Executive in Charge, Board of Veterans' Appeals (01)

HELD:

Section 1151, as in effect before October 1, 1997, authorizes payment for disability incurred or aggravated as the result of a sexual assault by a VA physician that occurred while a veteran was receiving an examination or medical treatment at a VA facility. Held paragraph a. of VAOPGCPREC 1-99 is not consistent with the reasoning of subsequently issued Federal Circuit decisions. Accordingly, we hereby amend VAOPGCPREC 1-99 by replacing Discussion paragraphs 3-16 and Held paragraph a. of VAOPGCPREC 1-99 with this opinion.[1]

Meghan K. Flanz

Attachment: VAOPGCPREC 1-99

[1] The remaining portions of VAOPGCPREC 1-99, which relate to Held paragraph b. – regarding whether VA may pay compensation under section 1151 for a psychiatric disability due to a disease or injury incurred or aggravated as a result of a VA examination or medical treatment – are not affected by this action.