

DATE: 07-18-90

CITATION: VAOPGCPREC 60-90
Vet. Aff. Op. Gen. Couns. Prec. 60-90

TEXT:

Subject: Entitlement to Special Monthly Compensation Pursuant to 38 U.S.C. § 314; Specially Adapted Housing Pursuant to 38 U.S.C. § 801; and Automobiles and Adaptive Equipment Pursuant to 38 U.S.C. § 1901

(This opinion, previously issued as Administrator's Decision 994, dated June 10, 1974, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTIONS PRESENTED:

- (a) Does a functional (as distinguished from organic) loss of use of lower extremities meet the statutory requirement of loss of use?
- (b) Does such functional loss of use satisfy the requisite standard of permanence?

COMMENTS:

The veteran has service connection for several disabilities including conversion reaction with loss of equilibrium (loss of use of both feet), currently evaluated at seventy percent (70%) disabling and has been found entitled to a total rating by reason of individual unemployability.

The Board of Veterans Appeals found that the veteran was not shown to have loss of use of either lower extremity due to service-connected organic disability and so did not meet the requirements for special monthly compensation under 38 U.S.C. § 314, for specially adapted housing under 38 U.S.C. § 801 or assistance in purchasing an automobile or other conveyance under 38 U.S.C. § 1901. The rationale was that functional loss of use of the veteran's lower extremities without secondary structural changes was not permanent and irreversible and that any organic pathology due to non-service-connected disability was not properly for consideration.

In support of reconsideration, it was contended that the medical evidence conclusively establishes that functional loss of use of both feet is a manifestation of the veteran's service-connected conversion reaction, that the loss of use of both feet has existed for a number of years, and that this long-time loss of use of both feet should be classified as irreversible and permanent.

The Board of Veterans Appeals requested an opinion on the following question:

"Assuming that it can be factually established that this veteran has at present the loss of use of both lower extremities albeit on a functional basis (conversion hysteria) and that the prognosis for reversal is virtually nil from a medical standpoint, may the payment of either special monthly compensation under 38 U.S.C. § 314 or specially adapted housing under 38 U.S.C. § 801 or assistance in purchasing an automobile or other conveyance under 38 U.S.C. § 1901 be authorized?"

The foregoing question is read as consisting of two parts:

- (a) Does a functional loss of use of lower extremities (as distinguished from organic) meet the statutory "loss of use" requirements for entitlement to the specified benefits?
- (b) Does such a functional "loss of use" meet the requisite standards of permanence?

Paragraph 63 of the Schedule for Rating Disabilities (38 C.F.R. § 4.63) defines the loss of use of a hand or foot, in pertinent part, as follows:

"Loss of use of a hand or a foot, for the purpose of special monthly compensation, will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow or knee with use of a suitable prosthetic appliance. The determination will be made on the basis of the actual remaining function of the hand or foot, whether the acts of grasping, manipulation, etc., in the case of the hand, or of balance and propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis."

A substantially identical definition is set forth in VAR 1350(A)(2)(a). 38 U.S.C. § 801 relating to specially adapted housing, qualifies the term "loss of use" by the phrase, "such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair ..."

It was suggested that the determination of the Board in this case, to the effect functional loss of use of extremities does not meet the requirements for the benefits in question, "is in accord with continuous agency interpretation of the current and forerunner laws, extending back to the War Risk Insurance Act." Research has failed to reveal any legal opinions specifically holding that under current laws "loss of use" must be organic as distinguished from functional.

A.D.927, dealing with eligibility of non-service-connected pensioners to an increased benefit on the predicate of being "helpless or blind or so nearly helpless or blind as to need the regular aid and attendance of another person," held in pertinent part:

"Functional blindness, as distinguished from blindness or near blindness due to organic conditions, if permanent, as determined by medical principles and evidence, would meet the requirements of the act."

There is an apt analogy between the described ruling of functional blindness and the present question regarding functional "loss of use." Moreover, we can conceive of no rational basis, short of an explicit statutory limitation, for being less liberal respecting determinations of entitlement of service- connected disability compensation than the VA has been with regard to payment of non-service-connected disability pension.

Note has also been taken of a letter of May 7, 1964, from the Assistant General Counsel (023) to the Veterans Service Office, Downieville, California. That letter dealt with an asserted functional loss of use of a creative organ. The adverse nature of the response regarding the lack of authority for payment of the special benefit under 38 U.S.C. § 314(k) for such a specific loss of use was based primarily on the fact that impotency is a disability with a related distinct difficulty of proof of permanence. That letter may not properly be construed as a broad legal opinion to the effect that any specified "loss of use" must be organic notwithstanding establishment of a requisite factor of permanence.

Proceeding now to the question of when a "loss of use" is permanent, attention is invited to paragraph 15 of the Schedule for Rating Disabilities (38 C.F.R. § 4.15) which reads in pertinent part:

" * * * permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. * * * "

Also, see VA Regulations 1340(B).

HELD:

In view of the foregoing, it is, therefore, held:

(1) When the requisite determination of "loss of use" is made with regard to a particular VA benefit, it controls respecting eligibility irrespective of whether such loss is functional or organic in origin.

(2) The submitted assumption "that the prognosis for reversal is virtually nil from a medical standpoint" meets the requirements of permanence applicable to entitlement to the benefits in question.

This opinion is hereby promulgated for observance by all officers and employees of the Veterans Administration.

VETERANS ADMINISTRATION GENERAL COUNSEL

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