

DATE: 07-18-90

CITATION: VAOPGCPREC 75-90
Vet. Aff. Op. Gen. Couns. Prec. 75-90

TEXT:

Subject: Entitlement to Service-Connected Benefits Where Disability or Death Is Compensable Under 38 U.S.C. § 360 "As If" Service-Connected

(This, opinion, previously issued as General Counsel Opinion 9-87, dated October 21, 1987, 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.)

QUESTION PRESENTED:

Whether entitlement to compensation under 38 U.S.C. § 360 will serve to provide entitlement to the following ancillary benefits:

- a. Dependency and indemnity compensation under 38 U.S.C. § 410(b);
- b. Specially adapted housing and special home adaptation grant under 38 U.S.C. § 801;
- c. Dependents educational assistance under 38 U.S.C. Chap. 35; and
- d. Special allowance under 38 U.S.C. 412.

COMMENTS:

The answer concerning the 38 U.S.C. § 410(b) benefit is yes. The answer concerning benefits under 38 U.S.C. § 801 chapter 35, and § 412 is no.

The facts are these. The veteran has been in receipt of compensation for the service-connected loss of use of the left hand since September 29, 1945. Subsequently established non-service-connected loss of use of the other paired extremity provided entitlement under 38 U.S.C. § 314(t) from June 2, 1982, until this provision of the law was repealed by Pub.L. No. 99-576, s 109(b) (1986). The veteran is now entitled to compensation at the 100-percent rate, with entitlement to special monthly compensation under 38 U.S.C. § 314(m), on account of loss of use of both hands, based on the revision of 38 U.S.C. § 360 made by section 109(a) of Pub.L. No. 99-576.

Section 360 of title 38 permits disability of a specified organ, which arose from non-service causes, to be considered, for disability compensation purposes, "as if" service-connected, that is, quasi-service-connected, if the corresponding organ is disabled due to service-connected causes. In such instances, section 360 provides that "the

Administrator shall assign and pay to the veteran the applicable rate of compensation under this chapter chap. 11 as if the combination of disabilities were the result of service-connected disability." It should be noted that the provision does not confer service-connected status for the non-service-related corresponding organ. Rather, it authorizes the VA to pay disability compensation under chapter 11 as though the disabilities in combination were service connected. This presents an issue similar to the one involved in Op. G.C. 5-86.

Section 360 derived from Pub.L. No. 87-610, § 1 (1962). Its purpose was, in cases of disability to specified paired organs, to equate disability compensation claims where one organ was disabled due to service and the paired organ was not, with claims where both paired organs were disabled due to service. S. Rep. No. 1845, 87th Cong., 2d Sess. 1 (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 2191. While Pub.L. No. 99-576, to which the request alludes, expanded the list of disabilities covered by section 360, it did not change the purpose and thrust of the provision. The history of section 360 does not indicate whether Congress intended additional benefits to flow from section 360 entitlement.

Monthly Dependency and Indemnity Compensation (DIC) payments are authorized by 38 U.S.C. § 410 (b) to the qualifying surviving spouse and child of a veteran whose service-connected disabilities were rated totally disabling for a period of at least 10 years immediately preceding death, or if less than 10 years, for at least 5 years following release from active duty. The provision derived from Pub.L. No. 95-479, s 204 (1978). The enactment was based upon the premise that the presence of total service-connected disability for an extended period may reduce life expectancy and prevent the normal accumulation of an estate sufficient to provide for the veteran's survivors. There is nothing apparent in the history of the provision to indicate whether Congress intended that a section-360-total-disability rating could supply entitlement to section 410(b) benefits. See S. Rep. No. 1054, 95th Cong., 2d Sess. 27-31, reprinted in 1978 U.S. Code Cong. & Ad. News 3485-3489.

Op. G.C. 5-86 held that the quasi-service-connected status provided under section 351 (disability compensation or DIC payable because of disability or death due to VA medical care, etc.) could supply entitlement to any benefit in the nature of compensation or DIC, including section 410(b) DIC. Based upon the principles stated in that opinion, it follows that the quasi-service-connected status supplied by section 360 should also provide entitlement to section 410(b) DIC.

In view of the foregoing, and based on the reasoning of the above-cited opinion, it is concluded that section 360 entitlement will serve as a basis for eligibility to section 410(b) DIC, if entitlement otherwise exists.

The Specially Adapted Housing (SAH) Program is authorized under 38 U.S.C. § 801, et seq., to provide grants for certain severely disabled veterans whose service-connected disabilities, permanent and total in nature, require special adaptations of a house in

order that they may live independently of continuing VA hospital care.

The SAH program derived from Pub.L. No. 80-702 (1948), an enactment that predated section 360. Section 801(a) requires, as a threshold criterion, entitlement "to compensation under chapter 11 of this title for permanent and total service-connected disability" (emphasis supplied). Clearly Congress, when it enacted the provision, was speaking of a rating based only on service-connected disability, because the combined rating of specified non-service-connected and service-connected disabilities under section 360, for disability compensation purposes, did not then exist in law. By the plain meaning of the language it must be concluded, therefore, that section 360 does not supply entitlement to SAH.

The Survivors' and Dependents' Educational Assistance (DEA) Program, established under chapter 35 of title 38, authorizes monetary educational benefits to a qualifying spouse or child, or surviving spouse or child, of a veteran whose death or permanent and total disability was due to military service. These benefits began with the "War Orphans' Educational Assistance Act of 1956," Pub.L. No. 84-634, which also predated the section 360 benefit. As with the SAH benefit, a threshold criterion for DEA eligibility is total service-connected disability or death. * * It may also be based upon missing-in-action or other status specified in 37 U.S.C. § 557 but such status is irrelevant to the present consideration. See 38 U.S.C. s 1701(a)(1). For the same reasons discussed concerning SAH, it is concluded that section 360 does not supply entitlement to DEA.

Finally, the request mentioned the special allowance payable under 38 U.S.C. § 412(a). Under this provision special monthly monetary benefits are payable to the qualifying survivor of a veteran whose death was service-connected, but who, at the time of death, was not fully and currently insured under the Social Security Act.

This provision derives from Pub.L. No. 84-881, § 405 (1956). Its purpose was to put military personnel into Social Security on the same basis as all other segments of the population. See Social Security Benefit Act: Hearings on H.R. 7089 Before the Committee on Finance, 84th Cong., 2d Sess. 176 (1956) (statement of Charles I. Schottland, Commissioner of Social Security). It, too, predates the section 360 provision and has service connection as a threshold requirement for entitlement. The benefit is not in the nature of compensation or DIC, but is a special payment, more akin to a Social Security benefit. For the same reasons discussed concerning the SAH and DEA benefits, it is concluded that section 360 entitlement will not confer section 412(a) eligibility.

HELD:

In summary, 38 U.S.C. § 360 entitlement will provide eligibility to section 410(b) DIC, if the other requirements are met. Section 360 entitlement will not supply eligibility to specially adapted housing under section 801, dependents educational assistance under chapter 35, or the special Social Security allowance under section 412(a).

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 75-90