DATE: 07-18-90

CITATION: VAOPGCPREC 77-90
Vet. Aff. Op. Gen. Couns. Prec. 77-90

TEXT:

Subject: Period of Eligibility for Insurance

(This, opinion, previously issued as General Counsel Opinion 5-87, dated July 27, 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

When does a grant of service connection for a disability on a secondary basis establish a new period of eligibility to apply for Service-Disabled Veterans (RH) Insurance (SDVI)?

COMMENTS:

The veteran was separated from active service in November 1966 and was granted service connection for diabetes mellitus with a 20% rating, from November 10, 1966, by a rating decision dated May 18, 1967. He was notified of the award on June 23, 1967. The veteran did not, within the following year, apply for insurance pursuant to 38 U.S.C. § 722(a). Subsequently, until July 1983, his disability ratings fluctuated depending on the evaluation of his service-connected diabetes mellitus. In a July 7, 1983, rating decision, service connection was established for: chronic renal failure secondary to diabetes, rated 100% disabling; hypertension secondary to diabetes, rated 10% disabling; and, peripheral neuropathy of both lower extremities, each rated 10% disabling. A 40% rating
for diabetes mellitus was assigned "without inclusion of complications." By a rating decision dated October 7, 1983, in addition to the above-described ratings, the veteran was granted service connection for "BILATERAL LIGHT PERCEPTION EYES DUE TO DIABETES" evaluated at 100% disabling. Among other special ratings, he was found entitled to compensation pursuant to 38 U.S.C. § 314(k) for loss of use of a creative organ. Also, his diabetes mellitus rating was changed to "DIABETES MELLITUS WITH IMPOTENCE." A rating decision of June 28, 1984, added a 100% service- connected disability rating for peripheral neuropathy with bilateral foot drop and loss of use of both feet, a 60% service-connected disability rating for coronary artery disease with acute heart failure and essential hypertension, and a 0% service-connected disability rating for impotence secondary to diabetes mellitus (previously rated as diabetes mellitus with impotence).

The veteran signed an application for SDVI on December 9, 1983, stating he had service-connected diabetes which resulted in service-connected renal failure and blindness. He was notified on May 21, 1984, that his application was disapproved as untimely because it was sent after the one-year period following the date his diabetes mellitus was determined to be service connected (May 18, 1967). By a decision dated April 30, 1986, the BVA reversed the rating-board decision, finding that, because the veteran was awarded service connection for loss of vision in October 1983 and for impotence in 1984, the period for application was extended to one year after the June 1984 rating-board decision. Accordingly, the veteran's December 1983 insurance application was considered timely.

The legislative history of the pertinent statute, 38 U.S.C. § 722(a), reveals that it was originally enacted, in substantially its present form, on April 25, 1951, as part of the Insurance Act of 1951, Pub.L. No. 23, § 10, 65 Stat. 33, 36 (adding a new section 620 to the National Service Life Insurance Act of 1940). The principal purpose of this provision was " t o authorize the granting of non-participating life insurance to any person who ... is found by the Administrator of Veterans' Affairs to be suffering from a disability or disabilities," on a direct or presumptive basis, for which compensation would be payable if rated 10 percent or more disabling and which renders the person uninsurable. Report of the Administrator of Veterans Affairs to the Chairman, House Committee on Veterans' Affairs, on H.R. 1 and H.R. 3, 82d Cong., January 15, 1951.

As originally introduced, the provisions of H.R. 1 limited the time in which a veteran was permitted to apply for this insurance to one year from the date of release from active service. The bill was later amended to delete any time limitation dating from release from active service, apparently because it was recognized that a service-connected disability may not manifest itself until long after discharge. See 95 Cong. Rec. 1572 (daily ed. Feb. 26, 1951) (statement of Rep. Lehman). No reference was made to secondary disabilities in any remarks.

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n 1958, the Veterans Benefits Act was enacted as Pub.L. No. 85-857. Section 722 restated the provisions of the former law and extended the time for application for mentally incompetent persons who were so situated during the one-year application period. The present-day language of section 722(a) was adopted at that time. The section provides, in pertinent part, as follows:

"(a) Any person who is released from active military, naval, or air service, under other than dishonorable conditions on or after April 25, 1951, and is found by the Administrator to be suffering from a disability or disabilities for which compensation would be payable if 10 per centum or more in degree and except for which such person would be insurable according to the standards of good health established by the Administrator, shall, upon application in writing made within one year from the date service connection of such disability is determined by the Veterans' Administration and payment of premiums as provided in this subchapter, be granted insurance by the United States against the death of such person occurring while such insurance is in

force ..." (emphasis added)

No substantial changes from prior law were made by this revision, and the legislative history does not address the meaning of the term "a disability."

The legislative history of section 722(a) in no way suggests that secondary disabilities are excluded from the term "a disability" for the purpose of commencing the period of eligibility for SDVI. Indeed, the only clarification of the term revealed by the legislative history was that it was intended to be read expansively to include presumptive disabilities (supra, paragraph 4). Accordingly, it cannot be inferred that Congress intended to exclude service connection of secondary disabilities from the definition of "a disability" for purposes of defining the application period for SDVI.

The VA issued regulations interpreting this statute stating that, in addition to other requirements, a person could qualify for insurance under section 722(a) upon submitting proof of service-connected disability (or disabilities) and written application for such insurance within one year form the date service connection of "such disability" is first determined by the VA. 38 C.F.R.§s 8.0(e) (1956); former VAR 3400. This regulation was applied by the VA so as to bar eligibility for insurance under section 722(a) if application was not made within one year of the date on which service connection was first established for some disability. After this first determination of service connection was made, any rating granting service connection for another disability was not considered to provide a new one-year application period.

This interpretation was recognized as leading to inequitable results, as was particularly evidenced in two cases in which veterans were initially awarded service connection for minor disabilities. Neither veteran applied for SDVI after receiving the original rating; each applied several years later when more serious service-connected disabilities became apparent. Both submitted applications for insurance within a year after their later ratings of service connection, and both applications were disapproved because they had not been submitted within one year of the first grant of service connection. See Digested Opinion, 1-29-62 (Veteran) to the Chief Insurance Director.

As a result of the perceived harshness of these results, the regulation was amended in July 1963 at the urging of the Office of the General Counsel. On March 21, 1963, this office sent a brief memorandum to the Acting Director of the Insurance Service, stating in part:

It was the former General Counsel's view that the statute 38 U.S.C. s 722(a) clearly permits, and equity requires, a legal construction which will extend to disabled veterans a one-year period from the date service connection of any disability is determined by the Veterans Administration, and that VA Regulation 3400(B)(1)(c) should be amended to so provide." (Emphasis in original.)

Accordingly, the regulation was amended in part to provide that, retroactive to April 25, 1951, written application for SDVI must be submitted within one year from the date service connection for "any disability" (emphasis added) is established. 38 C.F.R. § 8.0(b)(1)(iii).

We note that in one of the cases which prompted this amendment, the veteran's initial rating was for post-operative residuals of removal of a melanoma. The second rating was for malignant melanoma, a condition obviously related to and representing a progression of the disease process which gave rise to the original rating.

On July 9, 1963, shortly after issuance of the revised regulations, the Deputy Director for Underwriting, Accounts and Insurance Claims, in a memorandum to the Manager of the VA's St. Paul Insurance Center, interpreted the regulation to apply only "to cases where the veteran is given more than one rating of service-connection following his last discharge from service and the ratings are for different disabilities. It does not extend the time in cases where the second or subsequent ratings are re-ratings of the same disability or disabilities." We understand this interpretation to mean only that a new application period is not provided where a different percentage rating is applied to the same identified disability or the same disability is given a different name.

In a June 4, 1986, memorandum to the Deputy Vice Chairman of the BVA, the Insurance Center expresses the view that secondary disabilities, in reality, represent a worsening of the basic condition and do not truly establish the existence of a totally new disability. This interpretation is to some degree reflected in VA Manual M29-1, Part IV, paragraph 1.07, which states that while a veteran may apply for insurance within one year from the date any disability is determined by the VA to be service connected, the disability being rated "must be a new and independent condition" and cannot be a "manifestation of the original disability." This provision, of course, does not have the force and effect of law.

The regulations governing SDVI were amended in 1965 to define the term "service-connected disability" for purposes of applications for insurance under 38 U.S.C. §§ 722 (a) and 725. One amendment to the regulations states:

The term "service-connected disability (or disabilities) for which compensation is or would be payable, if 10 per centum or more in degree" as used in this paragraph includes all disabilities which are rated service-connected by the Veterans Administration except for dental ratings which are made for dental treatment only and ratings made under the provisions of 38 U.S.C. 602."

38 C.F.R. s 8.0(b)(4). The clear language of this regulation includes "all disabilities" rated as service-connected with the sole exceptions of dental ratings for treatment purposes and presumptive ratings of psychosis for purposes of hospital and medical care. As this regulation was promulgated specifically to define service-connected disability for the purpose of insurance applications under section 722(a), and as this regulation listed exceptions to this definition without reference to ratings of

secondary disabilities, the terms of section 8.0(b)(4) support the conclusion that the term "service-connected disability" as defined therein includes secondary disabilities.

We derive no guidance from 38 C.F.R. § 3.310(a), which pronounces compensation-adjudication policy regarding service connection for "secondary conditions." The first sentence of that subsection simply restates basic authority to compensate for disability proximately due to or a result of "service-connected disease or injury." (The choice of the quoted words is unfortunate, because technically speaking it is disabilities or deaths which are service connected for compensation purposes, not diseases or injuries. 38 U.S.C. §§ 101(16), 310. The term "disability" is not synonymous with "disease or injury," the former referring to the fact or extent of disablement that may or may not be caused by the latter). The following rather puzzling sentence completes the subsection:

When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition."

The import of this is far from clear. "Condition" is not a defined term and may refer to either the condition of the veteran's health (e.g., state of progression of disease) or to the condition or extent of disablement. However, even if the language could be interpreted with certainty, it is not evident what significance it has, i.e., for what purpose the "conditions" should be considered "part" of one another. All resulting disability would be considered service connected and ratable for compensation purposes regardless of the above-quoted language.

Language indicating that a secondary condition shall be considered a part of the original condition for compensation purposes appeared in R & PR 1103 as of May 19, 1930, which predates the insurance provisions of 38 U.S.C. § 722 (a).

This provision was expanded on January 25, 1936, as R & PR 1101 to provide that the secondary condition will be considered a part of the original condition "for all purposes." This language was incorporated in former 38 C.F.R. § 3.101. 13 Fed. Reg. 7023 (1948). Some explanation of this provision is found in Vet. Reg. 3(a), Instruction No. 1, paragraph 5, issued in 1933, which, in discussing compensation eligibility, provided that a secondary condition will be considered a part of the original condition for all purposes, "i.e., for determinations regarding rights on account of combat, etc." In 1961, following the implementation of the SDVI program, the phrase "for all purposes" was deleted from the regulation without explanation, when the regulation became 38 C.F.R. § 3.310(a). 26 Fed. Reg. 1582 (1961). The continued relevance of this sentence today is questionable, but in any event, it is in no way controlling with respect to SDVI eligibility for several reasons. This provision appears in Subpart A of Part 3, title 38 C.F.R. which relates not to insurance but to adjudication of compensation and pension claims. The history of the rule gives no indication it was intended to govern claims for insurance. As we indicated above, language suggestive of a broad application was deleted following implementation of the SDVI program. Additionally, while the insurance regulations governing SDVI specifically define "service-connected disability", they do not cross-reference this section. See 38 C.F.R. Part 8. Thus, to the extent that this

provision is still relevant, it effects compensation and pension claims, not insurance provisions.

The inclusion of a secondary disability in the term "any disability" in 38 C.F.R. § 8.0(b)(1)(iii) for the purposes of determining eligibility for SDVI is consistent with and supported by agency policy to interpret laws liberally to the benefit of the veterans and their survivors. See, e.g., Op. G.C. 14-79. Application of this policy in this instance would alleviate concerns regarding insurance eligibility which do not apply in connection with compensation eligibility. A veteran's insurance needs (and, indeed, very insurability) can change considerably as additional disabilities arise. For example, a veteran whose
circulatory system and eyesight become seriously impaired as a result of diabetes may find himself with very different life-insurance needs than he had during the incipient stages of the disease. Interpreting the term "any disability" to include secondary disabilities, as is consistent with agency policy, would give rise to a new period of eligibility for SDVI when service connection is established for a secondary disability.

HELD:

In accordance with the language of 38 U.S.C. section 722(a), its legislative history, and the pertinent regulations and their development, we conclude that a finding of service connection for a secondary disability establishes a new period for filing an application for insurance under that section. This is so even if the newly recognized disability is a result of the same disease responsible for earlier-manifested, different disabilities. In the instant case, the October 1983 rating awarded service connection for a "disability" (visual impairment) not previously service connected, and, accordingly, established a new period of eligibility for the veteran to apply for SDVI.

VETERANS ADMINISTRATION GENERAL COUNSEL