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CITATION: VAOPGCPREC 82-90
Vet. Aff. Op. Gen. Couns. Prec. 82-90

TEXT:

Subject: Congenital/Developmental Conditions under 38 C.F.R. § 3.303(c)

(This, opinion, previously issued as General Counsel Opinion 1-85, dated March 5, 1985, 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:

In view of the provisions of 38 C.F.R. § 3.303(c), under what circumstances, if any, may service-connection be granted for disorders of congenital or developmental origin?

COMMENTS:

The opinion was issued in response to a request from the Chairman, Board of Veterans Appeals, which request came against the backdrop of three disability-compensation claims which were on appeal to the Board. In two of the cases the issue presented was entitlement to service-connection for retinitis pigmentosa, and in the third the issue was entitlement to service-connection for polycystic renal disease. Both diseases are considered by medical authorities to be of familial (or hereditary) origin. In each of the three cases, the disease was first manifested and diagnosed during the individual's military service.

The regulation in question, 38 C.F.R. § 3.303(c), states in pertinent part as follows:

"... Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation."

In the Schedule for Rating Disabilities, at 38 C.F.R. § 4.9, the same principle is set forth but with some variation in language:

"Mere congenital or developmental defects, absent, displaced or supernumerary parts, refractive error of the eye, personality disorder and mental deficiency are not diseases or injuries in the meaning of applicable legislation for disability compensation purposes."

The applicable basic legislation, 38 U.S.C. § 310, 331, essentially provides for the payment of compensation to (otherwise eligible) veterans,

(f)or disability resulting from personal injury suffered or disease contracted in line of

duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval or air service ...

The question thus becomes whether 38 C.F.R. § 3.303(c) has effectively removed from the scope of 38 U.S.C. §§ 310 and 331 familial conditions (like retinitis pigmentosa and polycystic renal disease) and, for that matter, all disabilities of congenital or developmental origin.

Initially, it is well to focus on the word "defects" in the phrase "congenital or developmental defects." In a medical context, a "defect" is an imperfection, failure or absence. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 351 (26th Ed.1974). Because a human body afflicted with a disease could be said to have an imperfection by virtue thereof, one might well argue that the term "defects" includes, within its ambit, diseases; and hence, that any congenital or developmental disease is not a proper subject for service-connection under the law. But this line of argument cannot withstand close scrutiny for one cogent reason in particular. If so, broad a meaning were assigned to the word "defects," the regulation would be at odds with 38 U.S.C. §§ 310 and 331, for nowhere in the statutory law governing VA disability compensation is the term "disease" qualified by definition or stated exceptions. Thus, the term must be given its common meaning and must be deemed to encompass all diseases. See Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944); SUTHERLAND STATUTORY CONSTRUCTION § 47.28 (4th Ed.1974). It is axiomatic that in any case of conflict between a statute and an agency regulation, the provisions of the statute will prevail. SUTHERLAND STATUTORY CONSTRUCTION, supra, at § 31.02.

By reason of logic and necessity, the term "disease" in 38 U.S.C. §§ 310, 331, and the term "defects" in 38 C.F.R. § 3.303(c) must be interpreted as being mutually exclusive. Each has reference to a particular category of medical conditions. "Disease" has been broadly defined as any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 385 (26th Ed.1974). In case law, the word has been variously defined as (for example) a morbid condition of the body or of some organ or part; an illness; a sickness. 12A WORDS AND PHRASES Disease, at 388 et seq. (1954). On the other hand, the term "defects," viewed in the context of 38 C.F.R. § 3.303(c), would be definable as structural or inherent abnormalities or conditions which are more or less stationary in nature. Interestingly, one influential Federal court, in drawing a distinction between "disease" and "defect," indicated that the former referred to a condition considered capable of improving or deteriorating, whereas the latter referred to a condition not considered capable of improving or deteriorating. Durham v. United States, 214 F.2d 862, 875 (D.C.Cir.1954); see also United States v. Shorter, 343 A.2d 569, 572 (D.C.1975). While we would characterize as a generalization a statement that "defects" are incapable of any improvement or deterioration, we believe the contrast drawn by the court is essentially valid and helps to clarify the difference between these terms.

Obviously, in the adjudication of claims for service-connection for conditions of congenital or developmental origin, close attention must be paid to the question of whether the condition is a disease process or is simply a defect or abnormality. In many instances, it may be necessary for VA adjudicators to seek guidance from medical authorities regarding the proper classification of a medical condition at issue.

Most diseases are considered acquired in nature. Others are recognized to be congenital, developmental or familial in origin. When any of the latter becomes the basis for a claim for service-connection of a disability, VA adjudicators ordinarily are justified in finding that such disease, by its very nature, preexisted the claimant's military service. (In the case of some diseases, notably those first becoming manifest during service, guidance from medical authorities may be necessary regarding the actual time of inception.) Typically, in these cases, entitlement to service-connection should turn on the question of whether manifestations of the disease in service constituted "aggravation" of the condition. That question must be resolved by applying the same stringent legal standards which are applicable in cases involving acquired disabilities. 38 U.S.C. § 353; 38 C.F.R. § 3.306.

Various provisions in current VA regulations lend support to our position that service-connection may be granted for congenital, developmental, and familial diseases. For example, at 38 C.F.R. § 4.57, it is indicated that under certain circumstances service-connection by aggravation is warranted for pes cavus, which is "a typically congenital or juvenile disease." The regulation 38 C.F.R. § 3.380 stands for the proposition that diseases of allergic etiology may not be disposed of (for compensation purposes) as constitutional or developmental abnormalities, but rather that service-connection must be determined based on the entire evidentiary picture. Significantly too, in the Schedule for Rating Disabilities (38 C.F.R. Part 4) two familial diseases, sickle cell anemia and Huntington's chorea, are included for rating purposes under Diagnostic Codes 7714 and 8106, respectively.

It is clear that congenital or developmental defects may not be service-connected because they are not diseases or injuries under the law. See, e.g., Thompson v. United States, 405 F.2d 1239 (Ct.Cl.1969). We must caution, however, that many such defects can be subject to superimposed disease or injury. If, during an individual's military service, superimposed disease or injury does occur, service-connection may indeed be warranted for the resultant disability.

HELD:

Service-connection may be granted for diseases (but not defects) of congenital, developmental or familial origin. In the instant cases, service connection is warranted if the evidence as a whole establishes that the familial conditions in question were incurred or aggravated during service within the meaning of VA law and regulations.

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