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Vet. Aff. Op. Gen. Couns. Prec. 86-90

TEXT:

Subject: Entitlement to Service-Connected Disability Benefits for Heart Attack Sustained during Inactive Duty Training

(This opinion, previously issued as General Counsel Opinion 1-81, dated February 9, 1981, 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:

Does a myocardial infarction, sustained during the course of mandatory heavy exertion during inactive duty training, constitute "an injury" within the meaning of 38 U.S.C. § 101(24) so as to establish incurrence of a disability during such duty, or aggravation by injury of a preexisting disorder?

COMMENTS:

In brief, the pertinent facts are that the claimant, during a weekend National Guard drill period mandated by 32 U.S.C. § 502, completed a physical fitness test consisting of a four-mile march covered in approximately 56 minutes in March 1978, shortly thereafter experienced classic symptoms of a heart attack, and was hospitalized later the same day with an ultimate diagnosis of acute inferolateral myocardial infarction. The individual was 51 years of age at the time. Clinical data and history of record reveal no symptoms of cardiovascular disease prior to the described onset during inactive duty training. The claimant is now in post-myocardial-infarction status, and has been shown by cardiac catheterization to have two-vessel coronary artery disease. The United States National Guard Bureau has determined that the cardiovascular condition was not incurred in the line of duty, but existed prior to the training period in which it was manifested. In January 1979 the individual filed a claim for service-connected disability benefits based, in part, on cardiovascular disease.

A brief discussion of the medical problem may be helpful before we analyze the legal issue.

"Acute myocardial infarction is the condition in which a portion of the heart muscle dies because it is not getting enough blood. This occurs when a part of the coronary vessel is so narrowed, either acutely (as by a blood clot), or chronically by atheromatous formations (arteriosclerosis) in the vessel wall.

When the vessel is narrowed acutely, so little blood gets through that the muscle dies, even though it needs are not increased. If the vessel has been chronically constricted, exertion or other events which increase the need of the heart muscle for blood may result in death of only a portion of the muscle. Most myocardial infarctions, however, cannot be related to exertion or other stress."

5A Lawyers' Medical Cyclopedia Heart and Blood Vessels § 34.25(B). With further regard to the question of physical strain and its effect upon the cardiovascular system, the overwhelming majority of medical specialists appear to believe "that excessive effort and strain cannot damage a normal heart." Id. § 34.39. The instant case, in which tests after the claimant's heart attack revealed significant preexisting disease, seems typical of heart attacks in persons of his age group.

"Acute myocardial infarction may occur after exercise in individuals with severe coronary artery disease. However, this process often occurs unassociated with physical activity, and it is difficult to decide in the individual case whether the myocardial infarction was the result of physical effort or simply an expression of the co-existent heart disease."

Id. § 34.40. Clearly, establishing the medical cause of a heart attack is a difficult matter, necessarily carried out on a case-by-case basis where the law necessitates such a determination.

Under the law (38 U.S.C. § 331) disability will be considered service connected for VA benefit purposes if it is the result of "personal injury suffered or disease contracted in line of duty, or ... aggravation of a preexisting injury suffered or disease contracted in line of duty, **in the active military, naval, or air service** ..." (emphasis added). Since, by the terms of the statute, service connection is precluded unless the period of duty with reference to which disability is claimed was "active military, naval, or air service," our threshold inquiry turns upon the definition of that term, which, under the law, includes active duty, any period of active duty for training during which the individual concerned was disabled or died from a **disease or injury** incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an **injury** incurred or aggravated in line of duty.

38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a) (emphasis added).

Thefinal clause is operative in the present case, because the claimant, at the time in question, was performing inactive duty training with a National Guard unit under 32 U.S.C. § 502. See 38 U.S.C. § 101(23); 38 C.F.R. § 3.6(d)(3). Thus, the problem is one of statutory construction, specifically, to construe "injury" in the context of 38 U.S.C. § 101(24).

Subsection 101(24) arose as a new substantive provision during the consolidation into one title of all the laws administered by the Veterans Administration. Veterans' Benefits Act of 1958, Pub.L. No. 85-857, 72 Stat. 1105. An exhaustive review of the legislative

history of the Act discloses no specific guidance as to the interpretation of the provision, other than reference to earlier legislation which had conferred benefits upon reservists and national Guard personnel who sustained disability incident to service (Act of June 20, 1949, ch. 225, 63 Stat. 201, known as Public Law 108, 81st Congress). The House report accompanying the Veterans' Benefits Act noted that, "Public Law 108 and its current restatement (38 U.S.C. § 318) require that such training be for more than 30 days to qualify disability from disease for benefits and, if it is less than 30 days, limits the coverage to injury." H.R.Rep. No. 1298, 85th Congress, 2d Sess. 17, 40, reprinted in 1958 U.S.Code Cong. and Ad.News 4352, 4353-54, 4362.

Since Congress in creating a distinction between injury-caused versus disease-caused disability for the purpose of determining whether certain individuals were in active service when disabled, cited an earlier distinction with apparent approval, we have studied the legislative history of Public Law 108, 81st Congress, for an expression of congressional intent at that time. Reference to the history of a prior statute on a related subject is a well-established practice. See 2A Sutherland, Statutory Construction § 48.03 (4th ed. 1973). Basically, the purpose of the legislation in 1949 was to recognize and provide for the fact that training with the Reserve and national Guard was much more hazardous and exacting than it had been in pre-war days. Statistics were cited to demonstrate that the danger was particularly apparent in aviation, with numerous short-tour reservists having died in airplane crashes since the war; hundreds more were noted to have been "killed" and "injured" during reserve training involving no flight. The remedy sought was to cover such personnel with extensive disability benefits, similar to those available to active duty personnel, if injured during training of any type, or if disabled by injury or disease during training duty in excess of 30 days. H.R.Rep. No. 582, 81st Cong., 1st Sess. 1,3, reprinted in 1949 U.S.Code Cong.Svc. 1379, 1381.

At a hearing on the bill which became Public Law 108, the Chief of Naval Personnel testified, "It should be noted that the bill would extend coverage as to those on inactive duty training for 30 days or less only to those cases involving injury, and not to those involving illness or disease ... (O)ther provisions of existing law provide entitlement to hospitalization ... for illness or disease incurred while serving in line of duty on active or inactive training duty status." Hearing Before a Subcomm. of the Comm. on Armed Services, U.S. Senate, on S. 213, 81st Cong., 1st Sess. 3 (1949). Later that year, in testimony on a bill concerning disability retirement for military personnel, which distinguished between injury and disease for purposes of benefitting those on training for 30 days or less, the hypothetical case of a person who "collapsed" due to a heart attack while on inactive duty training was discussed. A witness from the Bureau of Naval Personnel stated rhetorically, "The question is, do you want to place such a person as that on the retired list for disability?" The answer implied the negative: "It is restricted to injury." Hearings before a Subcomm. on Armed Services. House of Representatives, on H.R. 2553, 81st Cong., 1st Sess. 2015 (1949).

The latter bill discussed above, H.R. 2553, was subsequently redesignated H.R. 5007, and was ultimately enacted as the Career Compensation Act of 1949, ch. 681, 63 Stat. 802. The U.S. Court of Claims had occasion to interpret the Act some years later,

when a Reserve officer sued the Government for disability retirement pay based upon a myocardial infarction which had occurred during a two-week tour of training duty involving hard work in hot weather. Gwin v. United States, 137 F.Supp. 737 (Ct.Cl. 1956). After recognizing the different treatment, in the law, of short-tour versus extended-duty reservists, the court dealt with plaintiff's assertion that his post-heart-attack condition was the "result of an injury to his heart caused by unusual and excessive strain, which he underwent in the performance of his duties."

"In common parlance, a heart attack is not spoken of as an injury but as a disease. If Congress, which obviously did intend to make some distinction, did not intend to make the distinction, which is made in common speech, we are at a loss to imagine where they did intend to draw the line. Plaintiff's counsel seems to urge that there is something special about the kind of heart attack which the plaintiff suffered which makes it more like a collision than a disease; that some substance breaks loose from a blood vessel and is carried to another place where it obstructs the passage of blood. Of the plaintiff's two medical witnesses before the Board for the Correction of Military Records, one testified, and the other one apparently agreed with him, that only in the rarest cases does such a thing happen; that in nearly all cases the swelling of the walls of the blood vessel is what shuts off the flow of blood.

We see little more basis for regarding a heart attack as an injury than for similarly regarding pneumonia, typhoid or yellow fever, small pox or any other ailment which a soldier might catch, or which, if he already had it, might disable him while on a short tour of duty. In each of such illnesses there are physical changes in the body such as congestions and swellings, comparable to those which cause a heart attack.

The legislative history, which is extensive, footnote omitted shows that Congress was not ready to allow disability retirement to persons who were disabled by disease while on short tours of duty, and that section 402(c) of the Act was worded as it was, for that reason. However beneficent it might be for us to construe the statute otherwise, it would be an usurpation of the functions of Congress."

137 F.Supp. at 740. The Gwin case has been reaffirmed and followed in Rae v. United States, 159 Ct.Cl. 160 (1962), and Stephens v. United States, 358 F.2d 951 (Ct.Cl.1966). In the latter, at 956, the court discussed the Army Medical Board's findings, to the effect that plaintiff's heart attack

"was a common manifestation of a slowly developing arteriosclerotic condition, typical of human males and commencing at an early age. The Board was of the opinion that the particular physical activities precipitating the infarction were not of an usual nature, could not in themselves have been responsible for causing an acute coronary occlusion and that the infarction was probably one of the ordinary instances and complications occurring in the course of a coronary disease. The Board also stated that plaintiff's diagnosed arteriosclerotic condition probably would not have been recognizable upon examination as a clinical coronary disease prior to the infarction episode, although it admitted that this conclusion was somewhat speculative in view of plaintiff's past history

of sundry diseases, illnesses, and complaints. The evidence does not show that plaintiff suffered any independent blow or injury while on this active duty tour which would have precipitated the infarction.

In summary, the defendant's determination that the myocardial infarction sustained by plaintiff on August 2, 1957, was a manifestation of a pre-existing arteriosclerotic heart disease rather than an "injury" has not been shown to be arbitrary, capricious, or unsupported by substantial evidence."

Another area of the law in which the problem of distinguishing between injury-and disease-caused disability is treated is that here, one example is the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, which affords compensation for "accidental injury or death arising out of and in the course of employment." 33 U.S.C. §§ 902(2). The Supreme Court has held that this Act, like the State workers' compensation statutes, was intended by Congress to relieve the financial burden on employees and their dependents caused by work- related disability by requiring payments by employers, and should be liberally construed to effect its purpose. Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932). Consistent with this tenor, several cases have interpreted the Act to permit recovery for preexisting cardiovascular disease aggravated at work by exposure to intense cold, Hoage v. Employers' Liability Assur. Corp., 64 F.2d 715 (D.C.Cir.1933); heavy lifting, Commercial Casualty Ins. Co. v. Hoage, 75 F.2d 677 (D.C.Cir.), cert. denied, 295 U.S. 733 (1935); and overexertion, Friend v. Britton, 220 F.2d 820 (D.C.Cir. 1955). In another case, a heart attack on the job was held compensable, despite no specific precipitating contemporaneous event, because its occurrence had been made more likely by a myocardial infarction suffered five years earlier at work when a truck transmission had fallen on the worker's chest, aggravating his preexisting coronary arteriosclerosis. J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C.Cir. 1967). It must be noted, however, that the Act contains an explicit presumption, at section 920(a) in favor of the validity of any claim. See O'Keefe v. Smith, Hinchman & Grylls Assoc., 380 U.S. 359, 362 (1965); Wheatley v. Adler, 407 F.2d 307, 312 (D.C.Cir 1968). This presumption has the effect of furthering the liberal sweep of the Act.

Also in the Federal workers' compensation scheme is the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193, originally enacted September 7, 1916, ch. 458, 39 Stat. 742, which will compensate an individual for disability "resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. § 8102(a). "Injury," under the Act, includes "a disease proximately caused by the employment." 5 U.S.C. § 8101(5). It has been held that this program should be liberally construed to effectuate its humane purposes, U.S. v. Udy, 381 F.2d 455 (10th Cir.1967), and we have been informally advised by the FECA Appeals Board that heart attacks have been administratively held to fit the definition of employment-caused disease, where proof of inducing stress or strain is established. As will be developed below, a generous approach in favor of granting benefits in heart attack cases has been a hallmark of workers' compensation law.

With regard to State workers' compensation laws, the universal requirement for compensability of a disability is that it arise through work- related injury. Since heart attacks are generally not attributable to clearly identifiable external trauma, and since the States obviously do not intend to compensate all heart attacks which happen to occur at work, lest workers' compensation become general health and life insurance for employees, the courts have struggled with the problem of determining who is and who is not covered when a heart attack strikes. In light of statistics indicating that at least half of all American males over the age of 45 have significant coronary atherosclerosis see Report of the Committee on the Effect of Strain and Trauma on the Heart and Great Vessels, 26 Circulation 612, 617 (1962) and that more than half of all American deaths are caused by cardiovascular disease (See U.S. Dept. of HEW, Health United States 1979 12), and estimates that half of all workers may die or permanently cease working because of cardiovascular and therefore becomes potential compensation claimants see H. McNiece, Heart Disease and the Law 112 (1961) , it is not surprising that there has been a significant amount of litigation dealing with this issue. A leading authority on workers' compensation has stated, "The compensability of heart attacks continues to be probably the most prolific and troublesome problem in workman's compensation law." Larson, The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution, 65 Mich.L.Rev. 441 (1967) (Hereinafter cited as "Larson"). This is so because the courts have resorted to the creation of various controversial legal tests and have applied them with such inconsistency that it is virtually impossible to derive a rule which comports with a continuous line of precedent. For purposes of the present discussion, however, it is sufficient to note that there have been a multitude of both allowances and denials of heart attack claims as alleged work-related injuries under State workers' compensation laws. The requisite that an injury must have occurred has been satisfied, in successful cases, by proof of varying degrees of exertion or stress preceding, by varying periods of time, the claimants' heart attacks. A common thread of approach in the decisions has been the courts' attempts to analyze the alleged precipitating exertion by comparing it to the "usual" versus "unusual" everyday exertion of the claimant, but even this approach has been fraught with difficulty and inconsistency. See generally Larson, supra, and cases collected at 445-48, 458-461. That commentator has proposed a two-pronged test requiring proof of both medical causation (i.e., the actual exertion involved contributed causally to the attack) and legal causation (the exertion was connected with the employment); where there is preexisting cardiovascular disease, the commentator would require a greater degree of exertion than where such predisposition is not shown. 1B A. Larson, the Law of Workmen's Compensation § 38.83 (1980 ed.). As noted above, however, no uniformly-adopted rule exists. The overall application of State workers' compensation laws to heart attack cases has been based upon liberal construction in favor of the employee. See 81 Am.Jur.2d Workmen's Compensation § 28 (1976).

The important question to be resolved in the present context is whether principles which have evolved in workers' compensation law are applicable in relation to benefits provided by title 38, United States Code. Workers' compensation arose in this country in the early part of the twentieth century, with the primary purpose of eliminating the

vagaries and expense of personal injury litigation between employers and employees over job-related disability and death, by substituting a statutory scheme of compensation based upon strict liability of the employer. The previously existing common law rights and remedies available to workers were seen as inadequate, since the classic claim of employer negligence was very often rebuffed by common-law defenses such as contributory negligence, assumption of risk, and fellow-servant negligence.

Even when employees were able to recover damages, the delays and expenses inherent in the litigation created undesirable hardships and inequities. The overriding concern has been the reduction of fractious master-servant disputes via the creation of new rights and remedies, in derogation of common-law tort principles. See generally 81 Am.Jur.2d Workmen's Compensation § 2 (1976); C.J.S. Workmen's Compensation § 5 (1958); New York Central R.R.Co v. Winfield, 244 U.S. 147, 159, 164 (1917) (dissenting opinion of Mr. Justice Brandeis). As will be seen, no such concerns lay behind the creation of veterans' benefits.

A member of a military service bears a relationship to the Government much different from that of an employee to his or her employer. First, the servicemember undergoes a change of status rather than merely entering into a contract of employment. In re Grimley, 137 U.S. 147, 152 (1890). This status as a member of the Armed Forces is "distinctively federal in character," Feres v. United States, 340 U.S. 135, 143 (1950); "the relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals." Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 680 (1977). A service-member's rights as against the Government are narrowly circumscribed by the longstanding doctrine of sovereign immunity. “We know of no American law which ever has permitted a soldier to recover [damages] against either his superior officers or the Government he is serving.” Feres, supra, at 141. Accordingly, since sovereign immunity bars any action by a servicemember against the United States based upon disbaility, it is clear that the establishment by Congress of veterans’ disability benefits was not in derogation of, or a substitution for, any preexisting common-law rights, but created rights where non had previously existed. Such benefits are gratuities bestowed by the Government under whatever conditions it chooses to impose. Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964). For practical reasons, such as the intermittent contact between inactive duty trainees and their units, the lack of time and facilities for medical screening of such personnel prior to every training period, etc., Congress can validly set aside such individuals as eligible for benefits different from those available to extended-duty members, and reject the more universal coverage which has developed in workers’ compensation law. Certainly, a person who has a full-time relationship with an employer of military service is easily distinguished from one who is “on the job” for only, say, one weekend each month.

As noted above in a related context in the Gwin case, Congress clearly intended to distinguish between injury and disease in title 38 when it conferred benefit eligibility upon short-tour training members. In the absence of authority, precedent, or

congressional expressing [sic] to the contrary, we believe a meaningful distinction must be maintained between the two, and that the principle that words in a statute are to be given their common meaning should be applied. See 2A Sutherland, Statutory Construction § 47.28 (4th Ed. 19730. "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944). When confronted with a distinction between injury and disease, we submit the average person would read the former as denoting harm resulting from some type of external trauma, and the latter as harm resulting from some type of internal infection or degenerative process. Based upon the legislative history, discussed above, our inference is that Congress contemplated that distinction in the context of ordinary usage of the terms, and we believe the law should continue to have the effect unless and until Congress expresses a contrary view.

We acknowledge the Veterans Administration's policy of making determinations of service connection "under a broad and liberal interpretation" of the law, 38 C.F.R. § 3.303(a), but the Agency also has a legal obligation to restrict benefit grants to those intended by Congress. We conclude that it was the intention of Congress, when it defined active service in 38 U.S.C. § 101(24), to exclude inactive duty training during which a member was disabled or died due to nontraumatic incurrence or aggravation of a disease process, and that manifestations of cardiovascular disease, such as heart attacks of nontraumatic origin, fall within the excluded class of disability, i.e., do not constitute injuries under the statute.

HELD:

The question presented Does a myocardial infarction, sustained during the course of mandatory heavy exertion during inactive duty training, constitute "an injury" within the meaning of 38 U.S.C. § 101(24) so as to establish incurrence of a disability during such duty, or aggravation by injury of a preexisting disorder? is answered in the negative.

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