

DATE: 09-25-90

CITATION: VAOPGCPREC 93-90
Vet. Aff. Op. Gen. Couns. Prec. 93-90

TEXT:

Entitlement to Special Monthly Compensation for Anatomical Loss of a Creative Organ

QUESTIONS PRESENTED:

A. Should special monthly compensation (SMC) under 38 U.S.C. § 314(k) be restored for anatomical loss of a creative organ where the veteran was originally determined to be eligible for this benefit but was later found ineligible because the veteran had suffered a complete loss of procreative power prior to service through surgical removal of certain other organs?

B. If payment of SMC is appropriate, should the effective date of the benefit be retroactive to the date when it was terminated or to a later date determined by the application of 38 C.F.R. § 3.114(a)?

COMMENTS:

1. Questions regarding legal aspects of entitlement to SMC as provided in 38 U.S.C. § 314(k), and the effective date of such awards, have resulted in several opinions by the VA General Counsel and Solicitor. FN1 In this instance, an analysis of the facts in light of the most recent General Counsel opinions on this topic leads us to the conclusion that SMC should be restored, effective from March 23, 1989, the date of issuance of O.G.C.Prec. 5-89.

2. In this case, the veteran entered service following several gynecological procedures resulting in a loss of procreative power. FN2 However, in 1955, the veteran was determined to be entitled to SMC for loss of a creative organ due to removal of the left ovary as a result of a service-connected carcinoma. The veteran's entitlement to SMC was terminated by rating decision as of April 1, 1963, as a result of a memorandum by the Director, Compensation and Pension Service. The rationale given for this decision was that the initial decision constituted "clear and unmistakable error" as the evidence demonstrated complete loss of procreative power prior to induction.

3. Prior to the issuance of O.G.C.Prec. 5-89, this office had not definitively interpreted whether 38 U.S.C. § 314 (k) benefits should be granted in situations where loss of use of a creative organ predated anatomical loss. FN3 In O.G.C.Prec. 5-89, the General Counsel examined this issue holding that "Congress intentionally provided two bases for special monthly compensation with regard to creative organs: either anatomical loss or loss of use. The fact that loss of use is not service-connected does not bar compensation for anatomical loss."

4. Clearly, the veteran here lost use of the creative organ prior to entering service. It is also undisputed that the anatomical loss of the organ was service-connected. As explained in O.G.C.Prec. 5-89, section 1(A) of Pub.L. No. 427, 66 Stat. 295 (1952) (now codified at 38 U.S.C. § 314 (k)) added anatomical loss of a creative organ as a basis for SMC. Section 314(k) currently provides that SMC is payable, "if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs." The statute's plain language supports award of SMC for the veteran's anatomical loss resulting from service-connected disability. In O.G.C.Prec. 5-89, the General Counsel cited 2A N. Singer, Sutherland Statutory Construction ss 46.01-.04 (4th ed. 1984), in applying a literal interpretation of section 314(k), stating "insertion of an additional basis for eligibility--anatomical loss--is unambiguous in its meaning."

5. Further, application of this interpretation in the case at issue is consistent with Congress' rationale in enacting Pub.L. No. 427, as noted in O.G.C.Prec. 5-89. As stated in that opinion, " t he purpose of the statutory award for loss or loss of use of a creative organ is to account for psychological factors, S.Rep. No. 1681, 82d Cong., 2d Sess. 2 (1952); as well as the loss of physical integrity, H.R.Rep. No. 6, 89th Cong., 1st Sess. 4 (1965)." Despite the fact that the veteran in this case had previously suffered the loss of certain other creative organs resulting in loss of use of the remaining organ, we cannot conclude that the loss of that remaining organ was without psychological impact and did not result in a loss of physical integrity. Accordingly, an award of SMC in this case would appear to be consistent with both the terms of the statute itself and its rationale, as interpreted by the General Counsel in O.G.C.Prec. 5-89.

6. A second issue is the establishment of an effective date for this veteran's SMC benefit. A precedent opinion was recently issued by the General Counsel involving a similar fact pattern. In O.G.C.Prec. 88-90, the General Counsel examined whether the effective date for SMC awarded as a result of O.G.C.Prec. 5-89 should be retroactive to the original date of entitlement for compensation or the date of the VA administrative issue holding that SMC should be awarded for anatomical loss. The General Counsel held that:

Where a VA administrative issue provides the legal interpretation establishing a veteran's entitlement to special monthly compensation authorized in 38 U.S.C. § 314(k), the effective date of benefits is determined by the application of the criteria set forth in 38 U.S.C. § 3010(g) and its implementing regulation 38 C.F.R. § 3.114(a).

The General Counsel found, further, that a precedent General Counsel opinion is an administrative issue and the effective date of a benefit award resulting therefrom is governed by section 3010(g). The above holding, along with the pertinent sections of the United States Code and the Code of Federal Regulations, establish a framework for making decisions regarding effective dates where a precedent General Counsel opinion provides a new interpretation resulting in entitlement. This situation should be

distinguished from situations where a prior decision is deemed to have been based on "clear and unmistakable error."

7. The term "clear and unmistakable error" does not appear in title 38, United States Code. However, as recognized in O.G.C.Prec. 88-90, there is regulatory authority for the proposition that where such error is found benefits may be awarded from the date on which they would have been payable had the original decision been correctly made. See 38 C.F.R. §§ 3.105(a) and 3.400(k). See also 22 Op.Sol. 722-A (1935); 32 Op.Sol. 472 (1937) (longstanding VA policy that a veteran should not be denied a benefit due to error by the government). Therefore, in this veteran's case, a finding that the 1963 decision constituted clear and unmistakable error would result in establishment of an effective date in accordance with 38 C.F.R. §§ 3.105(a) and 3.400(k).

8. In this case, O.G.C.Prec. 5-89 is dispositive of the issue of entitlement to SMC. Thus, benefits may be awarded under 38 U.S.C. § 3010(g) and 38 C.F.R. § 3.114(a) based on the date of issuance of that opinion, unless you find that the decision to terminate benefits constituted clear and unmistakable error.

HELD:

A. Pursuant to 38 U.S.C. § 314 (k), which authorizes special monthly compensation (SMC) for anatomical loss or loss of use of one or more creative organs as a result of service-connected disability, a veteran who suffers a service-connected anatomical loss of a creative organ is entitled to SMC, regardless of whether the veteran suffered prior nonservice-connected loss of use of that creative organ. This is true notwithstanding that the loss of use resulted from prior anatomical loss of other organs. Where the veteran's entitlement to SMC was terminated because the nonservice-connected loss of use predated the anatomical loss, the veteran's entitlement to SMC should be restored.

B. Determination of the effective date of SMC, where a veteran was previously denied benefits and a VA administrative issue has since provided a legal interpretation which results in the granting of the benefit, is governed by O.G.C.Prec. 88-90. That opinion requires the application of the criteria set forth in 38 U.S.C. § 3010(g) and its implementing regulation 38 C.F.R. § 3.114(a) in situations where the initial decision did not constitute clear and unmistakable error. The cited statute and regulation authorize establishment of an effective date based on the date of issuance of the precedent General Counsel opinion giving rise to entitlement.

1 See O.G.C.Prec. 88-90; O.G.C.Prec. 5-89; Digested Opinion 5-11-88 (14-9a Statutory Awards-Loss of Creative Organs); Digested Opinion 4-26-85 (14-9a Statutory Awards-Loss of Creative Organs); Op.Sol. 320-50 (1950); Op.Sol. 362-50 (1950).

2 Prior to service, the veteran underwent a hysterectomy, a right oophorectomy, and a bilateral salpingectomy. 3 This office did issue an unpublished digested opinion to the Chairman of the Board of Veterans Appeals on April 26, 1985, in which the General

Counsel held that eligibility for SMC can be based on either anatomical loss or loss of use. This opinion has not been reissued as a precedent opinion.