DATE: 12-24-90

CITATION: VAOPGCPREC 99-90
Vet. Aff. Op. Gen. Couns. Prec. 99-90

TEXT:

Subj: Benefits under 38 U.S.C. § 351 for HIV infection acquired through blood transfusion

QUESTION PRESENTED:

May the term "accident," as used in 38 C.F.R. § 3.358(c)(3) concerning medical and surgical procedures and care, include events which by their nature are only remotely foreseeable?

COMMENTS:

1. Your opinion request of December 18, 1989, involves three claims for benefits under 38 U.S.C. § 351 which are currently on appeal to the Board of Veterans Appeals. In reviewing the questions raised in your request, we wish to emphasize that we have not attempted to make any factual determinations in the cases. The responsibility for such determinations rests with the Board.

2. The first veteran received blood transfusions during VA hospitalizations in 1978 and 1979. Acquired immunodeficiency syndrome (AIDS) was diagnosed in June 1986 and the veteran died in July 1986. The second and third veterans received blood transfusions during VA hospitalizations in May and September 1984, respectively. One was diagnosed as having AIDS in July 1985 and died in February 1986. The other tested positive for human immunodeficiency virus (HIV) in September 1985. Service connection has not been established for any disability in these cases. It will be assumed, for purposes of this opinion, that all three veterans contracted HIV, which causes AIDS, as a result of blood transfusions properly administered during their VA medical and/or surgical treatment. Whether this assumption is correct with respect to any or all of these cases is, of course, a factual issue for resolution by the Board.

3. Monetary benefits are available pursuant to 38 U.S.C. § 351 for disability caused by "injuries" resulting from VA medical and surgical care. The regulatory framework developed by VA to implement this provision is contained at 38 C.F.R. § 3.358. Pertinent to this opinion is the limitation at subsection 3.358(c)(3):

Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However,

compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

(Emphasis added.) Thus, benefits under 38 U.S.C. § 351 are currently payable, pursuant to 38 C.F.R. § 3.358, for additional disability resulting from VA medical treatment which is not properly administered or in the event of an "accident." Since a 1978 General Counsel Opinion, "accident" has been considered to mean "any unforeseen, untoward result of surgery, medical treatment or hospitalization." Op.G.C. # 2-78 (10-25-78). This interpretation has removed from consideration all types of "accidents" which represent foreseeable, however remotely so, consequences of medical care and treatment. As the facts you present do not suggest that these three veterans received less than proper medical care, we will narrow our focus to consideration of the term "accident" as employed in the regulation.

4. In applying the definition of "accident" currently contained in 38 C.F.R. § 3.358(c)(3) to the claims before us, we note that the two veterans who received blood transfusions in 1984 did so at a time when it was rapidly being accepted by the medical profession that infection with HIV could occur as a result of a blood transfusion. Even the veteran who received transfusions in 1978 and 1979, well before AIDS had become recognized as a disease entity, could be held to have contracted a disability which was foreseeable" in that all invasive procedures are known to involve a risk of infection. In view of the restrictive nature of VA's regulation in this regard, evaluation of its genesis is warranted.

5. We begin by reviewing the applicable legislative history of section 351. A provision similar to the current version of 38 U.S.C. § 351 was first enacted in 1924, on recommendation of the Veterans' Bureau. See The World War Veterans' Act, Pub.L. No. 68-242, sec. 213 (1924). It provided:

That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War.

General Frank T. Hines, then Director of the Veterans' Bureau, explained, in a letter dated December 5, 1923 to the Chairman of the Select Committee on Investigation of the United States Veterans' Bureau, that the Bureau favored "and recommended" a proposal of the Disabled American Veterans that any person who suffered an injury due to his work or study in line with, or caused by his vocational training or placement training, be compensated. Of that proposal, he stated:

This is new. I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of

the workmen's ompensation act. I would extend the principle beyond this particular proposal to include also ratable disabilities incurred without fault and due to the hazards of medical and surgical treatment. It seems that the whole purpose of giving such treatment or of giving training is defeated if, in the course of the training or treatment, a disability is incurred without fault and due solely to the training and treatment for which there is no authority to compensate because of course, such disability is not directly connected with the service. I recommend this principle to your thoughtful consideration.

Reprinted in Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, conducted in February 1924 on H.R. 7320, at 122. In testimony before the Committee on World War Veterans' Legislation, General Hines explained the need for the benefit in this manner:

(I)n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness--things that must sometimes happen--the patient is further injured or disabled, there is at resent no provision for compensating him to the extent thereof.

(Emphasis added.) Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, at 113 (Feb. 26, 1924). During that same hearing, in a subsequent exchange, General Hines acknowledged upon further questioning that "greater disability" sometimes occurs despite a veteran having received "the best medical advice" and after a doctor "does the best he can and without neglect." 1924 Hearings, supra, at 114.

6. This legislative history reflects that disability stemming from non- negligent events was contemplated by those seeking enactment of the measure and the word "accident" was the term employed to describe that "branch" or class of events.

7. Section 213 was repealed by Public Law No. 73-2, 48 Stat. 11 (1933). Then, in 1934, Senator Steiwer, by offering an amendment to H.R. 6663 (which became Public Law No. 73-141) effected a reenactment of the provision. However, his description of the measure reflected a more restricted view of its coverage:

The first merely provides, in effect, that where a veteran is injured because of malpractice, he shall receive compensation just the same as though his disability were of war-service origin ... (W)here, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability, and the veteran shall be compensated in the same way.

78 Cong.Rec. 3289 (Feb. 27, 1934). Upon questioning as to how it would be determined that there had been a case of malpractice,
Senator Steiwer answered:

I do not know that the Veterans' Administration can determine that there has been a

case of malpractice, but they do determine that the veteran is suffering from disability, and in some cases they have determined that the disability was caused by or aggravated by some mistreatment upon the part of the veterans' agencies. I do not think there has ever been any trial of a doctor to determine malpractice, and I am told--and I ought to say in fairness to the Veterans' Administration--that in recent years there have been very few of these unfortunate cases ... who have suffered at the hands of Veterans' Administration physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government.

78 Cong.Rec. 3289-90. On that same date, Senator Steiwer referred to what he had previously stated as the explanation of this provision. He stated, "I shall not explain it further, except to say that the language employed in this amendment, as nearly as I can remember, is a mere reenactment of the law as it existed prior to the Economy Act." 78 Cong.Rec. 3298 (Feb. 27, 1934). Thus, the legislative history surrounding reenactment of this provision must be considered somewhat ambiguous.

8. The provision described by Senator Steiwer became section 31 of Public Law No. 73-141, 48 Stat. 526 (1934):

Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits ... benefits ... shall be awarded in the same manner as if such disability, aggravation, or death were service connected.

This is almost identical to the current language of 38 U.S.C. § 351. Congress expanded its provisions in 1940 to include veterans who sustain injuries as a result of examinations, Pub.L. No. 76-866, sec. 12, 54 Stat. 1193, 1197 (1940), and in 1943 to include veterans who suffer additional injury as a result of vocational rehabilitation, Pub.L. No. 78-16, sec. 4, 57 Stat. 43, 44 (1943). Also, an offset against amounts awarded as a result of an action under the Federal Torts Claims Act was provided in 1962. Pub.L. No. 87- 825, 76 Stat. 948 (1962).

9. The original construction placed on section 213 by the Veterans' Bureau was a broad one. An outline of the history of that original construction is provided in a memorandum of October 24, 1935 of the then Solicitor of the Veterans Administration (VA) and this opinion will not recite all the details. However, we note that the Solicitor acknowledged in his memorandum the role played by an early Comptroller General opinion in providing VA with its regulatory language, including the word "accident."

10. Specifically, Comptroller General Decision No. A-31895, 9 Comp.Gen. 515 (1930) considered the issue of whether a veteran could be granted compensation under section 213 of the World War Veterans' Act of 1924, for a disability resulting from hospitalization awarded the veteran for treatment of an existing disability, which at the time of treatment was considered to be service connected but was subsequently

determined to be non-service connected. The Comptroller General held that compensation under section 213 was payable notwithstanding the breaking of service connection. In addition to that holding, the decision contained the statement that "the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc. ..." (Emphasis added.) The statement was gratuitous and largely irrelevant obiter dictum. However, it was cited in Administrator's Decision No. 255, dated August 9, 1934, and was relied upon to support a holding that section 213 benefits were payable only when the disability arose through accident, carelessness, negligence, etc. Although, the precise question was not before the Comptroller General, this statement did reflect a contemporaneous interpretation of the congressional intent behind the unique benefits granted by the provisions of section 213, Pub.L. No. 68-242. In the same way, the Administrator's 1934 decision (No. 255) represents a contemporaneous interpretation of the "reenactment" statute, a slightly different version from that of 1924. The Administrator was of the opinion that:

It is apparent that it was the intent of Congress to reenact the law as it existed in section 213 of the World War Veterans' Act, 1924, as amended, prior to the approval of Public No. 2, Seventy-third Congress. Accordingly, the instructions and precedents governing the determination of entitlement to benefits under section 213 of the World War Veterans' Act, as amended, are applicable in determining entitlement to benefits under section 31 of Public No. 141.

Administrator's Decision No. 255 (8-9-34).

11. Perhaps the best summary of the position VA finally took in interpreting this statute is contained in the Solicitor's Memorandum of October 24, 1935:

(T)he law does not require the claimant to go so far as to show malpractice but ... there must be more than a mere showing that the disability resulted from other than the usual after results of approved medical care and treatment properly administered. There must be a showing of accident, carelessness, negligence ... (emphasis added).

However, this view had altered by July 1953, as shown in a memorandum on the subject from the then Solicitor to the Administrator. It was his position that section 31 was applicable only if injury, or death, were caused by "accidental means," an expression utilized in insurance contract cases. That is, "if, in the act or event which precedes the injury, something unforeseen, unexpected, or unusual occurs, which produces the injury, it properly can be said to have resulted from accidental means." Solicitor's Memorandum of July 20, 1953.

12. In February 1961, VA amended part 3 of title 38, Code of Federal Regulations. Then, new section 3.358 included the following provision:

Compensation is not payable for either the usual or unusual after results of approved medical care properly administered, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Veterans Administration.

26 Fed.Reg.1590-91 (Feb. 24, 1961). As noted in the General Counsel opinion of October 25, 1978, this regulatory language equated "accidents" with instances of "indicated fault" (in terms of giving rise to compensation eligibility). As accepted in that opinion, the "ordinary meaning of the word 'accident' is opposite that of 'negligence.' " Op.G.C. # 2-78. One holding in the 1978 opinion was that:

(T)here is no necessity of showing negligence or fault on the part of the Veterans Administration when an "accident" is found.... Such a conclusion broadly construes the statute with a view toward carrying out the apparent intent of Congress without doing violence to the plain language of the Act or disregarding the ordinary meaning of the words used.

Op.G.C. # 2-78 (10-24-78). We agree with that particular conclusion in the opinion. However, the definition of "accident" contained therein, "any unforeseen, untoward result" and the regulatory provision resulting therefrom, 43 Fed.Reg. 51015 (11/2/78), do not allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit. Specifically, we do not believe the statute should be read as failing to authorize compensation for injuries resulting from events which are to any degree foreseen or foreseeable. Perhaps the problem results from advances in medical technology. While still falling short of providing us with a total understanding of the workings of the human body and the diseases that prey upon it, scientists have provided us with a thorough understanding of the multiplicity of "risks" inherent to medical/surgical intervention and care. Currently, it seems that almost no medical event, including the AIDS phenomenon, is now totally "unforeseeable."

13. Having recognized that the current regulatory definition of "accident" is too restrictive in view of the legislative history of 38 U.S.C. § 351 we are tasked with providing a "definition" which will aid in the case-by- case application of those provisions. To this end, we suggest that it is appropriate to consider claims initially for indications of carelessness or other "indicated fault." If none is found, the fact-finder must review the evidence surrounding the veterans' medical and surgical care seeking to determine whether "accidents" occurred. That is, were there any events which were truly unexpected or not reasonably foreseeable and which involved additional "injury?" This reasoned approach does not represent a literal, i.e., strict-liability, interpretation of section 351. For instance, medical procedures often involve a common and, thus, clearly-recognized risk of additional injury. Such results, although representing an undesired outcome of treatment, should not be viewed by a fact-finder as an accident because their occurrence was reasonably foreseeable. Also, in cases where the only treatment that can possibly arrest a life-threatening condition involves a high risk of

additional injury or death, in our view, the circumstances involved in such cases dictate only one reasonable conclusion, that the additional injury or death should be considered to result from the disease or injury itself rather than be classified as an "accident."

14. Appropriate amendment along these lines is being recommended to the Veterans Benefits Administration and will provide rating personnel, as well as the Board, the guidance needed to avoid absurd results, while providing claimants with the compensation statutorily authorized under section 351.

HELD:

The provisions of 38 C.F.R. § 3.358(c)(3) divide events into two categories, those occurring due to improper or negligent care and those considered "accidents." This latter term was previously defined by the General Counsel as including only unforeseen, untoward results of surgery, medical treatment or hospitalization and not including expected or contemplated risks of surgery, no matter how remote. In view of the legislative history of 38 U.S.C. § 351, this definition has proven too restrictive to serve as a guideline in awarding benefits under this statute. Instead, those charged with consideration of claims for benefits under 38 U.S.C. § 351 must consider the consequences of medical and surgical care in the light of whether they are unexpected or not reasonably foreseeable. Thus, if it is determined an individual is infected with human immunodeficiency virus as a result of a blood transfusion administered by VA at a time when that type of infection as a result of blood transfusions was not reasonably foreseeable--an accident--that individual may receive benefits under 38 U.S.C. § 351

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 99-90