

DEPARTMENT OF
VETERANS AFFAIRS

Memorandum

Date: March 29, 1991

O.G.C. Precedent 50-91

From: General Counsel (022)

9-2

Subj: Protection of Service-Connection for a Non-Existent
Disability-~~TACKLE~~, JAMES A., C 27 317 171] Do NOT Copy
To: Chief Benefits Director (20)

QUESTION PRESENTED:

Can an original benefit determination wherein VA incorrectly identified the site of a disability for which service connection is now protected under the provisions of 38 U.S.C. § 359 be corrected to reflect the actual site of the disability?

COMMENTS:

1. In this case, the veteran filed his original claim for benefits on December 12, 1972. The initial rating decision of February 21, 1973, awarded service connection for several disabilities, resulting in a 10% rating. The veteran was then granted an increase to 50% by a rating decision dated May 17, 1973; this rating decision included a 0% rating for a donor site scar on the left iliac crest.^{1/} The 0% rating for the scar has remained unchanged since 1973.^{2/}

2. The statute authorizing protection of service connection, 38 U.S.C. § 359, provides in pertinent part:

Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed on or after January 1, 1962,

^{1/} The veteran's service records indicate that the donor site was the right iliac crest. An examination of the veteran by VA on April 26, 1973, also notes a 10 cm. scar on the right iliac crest.

^{2/} The fact that the veteran's scar appears on the right iliac crest was again identified in a medical examination dated December 4, 1989.

Service - Connection - Compensation

x 1-5 38 U.S.C. § 359
x VET TACKLE, JAMES A.



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except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.

In the present case there are no facts suggesting that the veteran does not have the "requisite service" or that the rating in question resulted from "fraud." The veteran's service connection for the scar on the left iliac crest has been continuously in effect for over 10 years. Therefore, the issue is whether VA has the authority to correct the veteran's service-connected rating to reflect a donor site scar on the right iliac crest.

3. In enacting 38 U.S.C. § 359, Congress sought to prohibit VA from terminating service connection for those veterans who have been service connected in excess of 10 years. The legislative history of section 359 provides support for the position that the statute was intended to establish a period of time beyond which VA may not sever service connection. Review of the legislative history of H.R. 113, 86th Cong. 1st Sess. (1959), which gave rise to section 359, reveals the provision was developed at the urging of veterans' organizations and others who perceived a need to remove uncertainty and provide peace of mind to veterans with longstanding compensation awards. Hearing on Miscellaneous Compensation Legislation Before the Subcommittee on Compensation and Pensions of the House Committee on Veterans Affairs, 86th Cong., 2d Sess. 2208, 2233 (1960) (statements of Bill Fribley, National Commander, Disabled American Veterans, and Norman Jones, Director of the National Rehabilitation Service of the Veterans of Foreign Wars) (cited by the General Counsel in Digested Opinion, 8-6-84 (9-2 Service Connection)). The legislative history of H.R. 113 also suggests that while severing protected service connection would be prohibited, VA could make modifications to a veteran's rating short of severance of service connection:

It should be pointed out that this bill merely freezes the determination of service connection, that is to say the finding by the Veterans Administration that the disability was incurred or aggravated.

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by military service. It does not freeze the percentage rating which represents the degree of the disability and governs the amount of compensation therefor.

S. Rep. No. 1394, 86th Cong., 2nd Sess. 1, reprinted in 1960 U.S. Code Cong. & Admin. News, 2338.

It is significant that in this case action by VA would merely involve correcting a decision to reflect the actual site of the disability without changing the veteran's service connected status. In our view, this is distinguishable from severing service connection. Here there is one donor site scar and hence one service-connected disability resulting from that scar. The "frozen" service connection determination would be maintained because correction of the anatomical site would not change the fact that the veteran is service connected for a donor site scar on the pelvis.

4. A restrictive reading of 38 U.S.C. § 359 could lead to the conclusion that section 359 is an absolute bar to any type of change involving a service connection determination in place for over 10 years. The General Counsel has previously held that, barring fraud or a clear indication that the veteran lacks requisite service, protected service connection cannot be severed. See Op. G.C. 8-83 (9-30-83). The General Counsel referred to the holding of Op. G.C. 8-83 in a memorandum issued to the Chairman, Board of Veterans Appeals on August 22, 1984 stating: "[w]e see no basis for distinguishing between the errors of assigning service connection for a disability based on a diagnosis found in hindsight to be incorrect and assigning service connection incorrectly for a disability based on a valid diagnosis."

5. In this case the evidence suggests both the diagnosis of a donor site scar and the grant of service connection are correct, the only complicating factor is that the location of the donor site scar is listed incorrectly as the left iliac crest. To allow this minor detail to result in VA being prohibited from correcting the veteran's record to reflect the actual site of the scar would have clearly absurd results. Specifically, the veteran could be service connected for two disabilities (the actual site and the protected site) when only one is shown by medical evidence to exist. We believe that such a result in this case is beyond the legislative purpose of section 359.

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6. Clearly, statutes should not be interpreted to "produce an absurd and unjust result . . . inconsistent with the purposes and policies of the act in question." 2A N. Singer, Sutherland Statutory Construction § 45.12 (4th ed. 1984). The Supreme Court has held that if the legislative purpose of a statute is expressed in plain and unambiguous language, it is the duty of the courts to give effect according to its terms unless that interpretation would reach absurd results or consequences obviously at variance with the policy of the statute. United States v. Rutherford, 442 U.S. 544, 551-52 (1979). While the language of section 359 clearly prohibits the severance of a protected service-connected rating, it is silent as to the correction of an existing determination. It is well settled that where ambiguity exists or where literal interpretation would work unreasonable results, resort may be had to the legislative history to ascertain congressional intent. United States v. Public Utilities Commission of California, 345 U.S. 295, 315 (1953). There is nothing in the legislative history which would suggest that Congress intended for VA to interpret section 359 in a manner which would cause VA to maintain two service-connected ratings for one disability. Likewise it appears clear the correction of this veteran's record to accurately reflect the site of the disability does not violate the congressional intent of the statute as the veteran would remain service connected for the donor site scar.

7. We note your concern that while the disability here is assigned a noncompensable evaluation, a case might arise where increased special monthly compensation would be granted for a non-existent disability. If the disability did not exist but was erroneously rated by VA (as opposed to a disability that did exist but was identified as being in the wrong area of the body) VA would be precluded from severing service connection if the requirements for protection under section 359 are met. Op. G.C. 8-83 (9-30-83). If the finding of service connection is protected and compensable disabilities exist which may entitle the veteran to special monthly compensation, it would be necessary to determine whether the evaluation percentages could be modified. If the veteran does not meet the requirements for preservation of a rating for the non-existent disability under 38 U.S.C. § 110, then it would be permissible to modify the veteran's rating for that "disability" to the minimum rating authorized for that particular condition. If the veteran meets the requirements established in section 110

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for the preservation of a disability rating then the reduction of that rating would be prohibited. In O.G.C. Prec. 16-89, the General Counsel examined whether a protected erroneous disability rating must be used as a basis for an award of special monthly compensation. The General Counsel held that the protected erroneous rating, as opposed to the accurate rating, must be used in calculating the total percentage of disability because neither the protection statute nor the statute authorizing special monthly compensation offers any exception which would permit disregarding the protected rating in favor of the actual level of disability.

HELD:

The provisions of 38 U.S.C. § 359 establish criteria for the protection of service connection decisions in force for ten or more years. Those criteria do not prohibit the redesignation of an existing service connected rating to accurately reflect the actual anatomical location of the injury or disease resulting in the veteran's disability, provided the redesignation does not result in the severance of service connection for the disability in question.



Raoul L. Carroll

Attachment: C-file