DATE**:** 08-15-91

CITATION: VAOPGCPREC 66-91
Vet. Aff. Op. Gen. Couns. Prec. 66-91

TEXT:

Evaluation of Separately Ratable Disabilities.

(This opinion, previously issued as a Digested Opinion of the General Counsel dated April 23, 1982, 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 regulatory provisions.)

QUESTIONS PRESENTED:

May the disability ratings assigned several separately ratable conditions of common etiology, none of which is evaluated at 100 percent, be combined so that a single rating of 100 percent can be established when the computation reaches 95 percent or more and may the remaining ratings for separately ratable conditions arising from the same etiology then be combined to achieve a 60 percent rating in order to establish entitlement to the special monthly compensation rate provided by 38 U.S.C. § 1114(s) (formerly 314(s))? FN1

COMMENTS:

1. This question arose as the result of an inquiry concerning a veteran who had been granted service connection for multiple sclerosis which is currently manifested by urinary incontinence, anal sphincter impairment; partial paralysis, left lower extremity with foot drop; partial paralysis, left upper extremity; depressive neurosis; diplopia; partial paralysis, right lower extremity; partial paralysis, right upper extremity; impotence; and slurred speech. The respective percentage evaluations assigned are 60, 60, 50, 30, 30, 30, 20, 20, 20 and 10 in accordance with the criteria contained in the Schedule for Rating Disabilities (Schedule), 38 C.F.R., Part 4, for each manifestation.

2. We need not look beyond the plain meaning of the authorizing provision in the statute. In pertinent part, 38 U.S.C. § 1114(s) requires that a veteran have:

a service-connected disability rated as total, and (1) have additional service-connected <u>disability or disabilities</u> independently ratable at 60 percentum or more, or (2) be rendered housebound thereby . (Emphasis supplied.)

The threshold requirement is "a" disability rated as total. The veteran has a single disease, multiple sclerosis, resulting in multiple disabilities, none of which is a total disability.

3. In our opinion, there is no room to permit the construction of "a ... disability rated as total," in this context, as including multiple less-than- total disabilities (though they be properly combined, per 38 C.F.R. § 4.25, to a total rating). Not only must we infer the Congress knew how to express itself differently had it intended to permit the contrary result; it did, in the immediately succeeding clause, use the very enabling terms which would have been required ("additional ... disability or disabilities"). A reading of any term in a statute must be done by reference to other terms employed in the same act. Dunlop v. Alhambra Nursery, 409 F.Supp. 309, 311 (D.Az. 1976), aff'd, 584 F.2d 319 (9th Cir.1978). Where different language is used in different parts of a statute, it is to be presumed that the language is used with a different intent. Guarantee Title & Trust Co. v. Title Guaranty and Surety Co., 224 U.S. 152 (1912); See FTC v. Sun Oil Co., 371 U.S. 505, 514-15 (1963). Accordingly, the presence of a provision in one section in a statute and its absence from another infer it is not to be implied in the section from which it is omitted. United States v. Atchison, T. & S.F. Ry. Co., 220 U.S. 37 (1911). It cannot be inferred the Congress intended that the threshold total rating could be of a disability or disabilities.

4. Literal or strict interpretations give way where there is clear and convincing evidence of contrary legislative intent. See generally, 73 Am.Jur.2d Statutes § 275 (1974 & 1981 Supp.). The legislative history of Pub.L. No. 86-663 (July 14, 1960), from whence section 1114(s) derives, does not provide such evidence. S.Rep.No.1745, 86th Cong., 2d Sess. (1960); H.R.Rep. No.723, 86th Cong., 1st Sess. (1959). Moreover, we do not find the chosen words ambiguous, and interpretive rules do not permit departure from the literal meaning where statutes are unambiguous. Helvering v. N.Y. Trust Co., 292 U.S. 455 (1934).

5. Finally, the VA's own, contemporaneous construction, which would be given weight in a court of law, is that the threshold disability must be "a single service-connected disability rated as 100 percent," as opposed to the "additional service-connected disability or disabilities independently ratable at 60 percent." 38 C.F.R. § 3.350(i) 26 Fed.Reg. 1587 (1961) .

HELD:

The threshold requirement for entitlement under 38 U.S.C. § 1114(s) is "a" disability rated as total. If a veteran does not have a single service- connected disability rated as total (100 percent), he cannot be eligible for compensation at the 38 U.S.C. § 1114(s) rate.

1 The Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, s 5(a), 105 Stat. 378, 406 (1991), redesignated each section in, among other chapters, chapter 11 of title 38, United States Code, so that the first two digits of the section number are the same as the chapter number of the chapter containing that section.