Date: August 25, 1993 O.G.C. Precedent 8-93

From: General Counsel (022)

Subject: Protection of Service Connection Under 38 U.S.C. § 1159 and 38 C.F.R. § 3.957

To: Director, Compensation and Pension Service (211)

QUESTION PRESENTED:

Do the provisions of 38 U.S.C. § 1159 and 38 C.F.R. § 3.957 protect an award of dependency and indemnity compensation (DIC) under which benefits have been paid for over ten years but which was erroneously made in light of a rating-board decision that the veteran's death was not service connected?

COMMENTS:

1. The question presented arose from the following facts. A veteran's surviving spouse claimed DIC. A VA rating board determined on August 23, 1982, that the cause of the veteran's death was not service connected. However, despite the rating-board determination, an award of DIC to the surviving spouse was authorized. In two letters dated in September 1982, VA informed the surviving spouse that the claim for DIC had been approved and that the effective date of the award was July 1, 1982 (the first day of the month in which the veteran died). VA has apparently paid DIC to the surviving spouse continuously since then, although an administrative decision was prepared in January 1993 concluding that the award was solely an administrative error by VA.

2. Although the opinion request specifically asks whether the DIC award is protected under 38 C.F.R. § 3.957, we begin our analysis with the statute on which that regulation is based. Section 1159 of title 38, United States Code, provides:

> 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 . . . 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. The mentioned

> period shall be computed from the date determined by the Secretary as the date on which the status commenced for rating purposes.

3. The primary source for discovering the legislative intent of a statute is the language of the statute itself. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . ." Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted). "[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." Id. at 490 (citation omitted).

4. In our opinion, the language of section 1159 plainly expresses the requirement that there be an actual determination of service connection for the protection afforded by that provision to apply. The first sentence of section 1159 refers to "[s]ervice connection . . . granted." The exception for fraud also speaks of "the original grant of service connection." Although the term "grant" is not defined in the statute, we believe the accompanying reference to "service connection" plainly indicates that Congress was referring to VA's determination that a particular disability or death is service connected, i.e., the rating decision establishing service connection, as opposed to an award action providing disability or death benefits or to the commencement of payment of such benefits. If Congress had intended to refer to the award of benefits or the period of payment, rather than the finding of service connection, it could easily have done so, as it did, for example, in 38 U.S.C. § 5111. Further, the second sentence in section 1159, concerning computation of the ten-year period, refers to "the date on which the status commenced for rating purposes." This language similarly indicates that rating action concerning service connection is the event which triggers application of section 1159. The statutory language thus clearly and unambiguously communicates that an actual rating determination of service connection is a prerequisite to application of the prohibition against severance.

5. Section 3.957 of title 38, Code of Federal Regulations, which implements section 1159, provides:

Service connection for any disability or death granted or continued under title 38[,] U.S.C., which has been in effect for 10 or more years will

> not be severed . . . . The 10-year period will be computed from the effective date of the [VA] finding of service connection to the effective date of the rating decision severing service connection . . . . The protection afforded in this section extends to claims for dependency and indemnity compensation or death compensation.

The regulatory language is also plain in its meaning. It includes the phrases "[s]ervice connection . . . granted or continued," "finding of service connection," and "rating decision severing service connection."[1] Clearly, VA also contemplated that, for severance to prohibited, there must have been an actual determination that disability or death was service connected, a determination which could only be overturned by rating action on the issue of service connection.

6. An actual determination of service connection is lacking in this case. In fact, the only determination made concerning service connection was the August 1982 rating-board determination that the veteran's death was not service connected. It does not appear that the surviving spouse was even informed that the veteran's death had been found to be service connected. At no time did service-connected status commence for rating purposes. Section 1159 does not provide protection under these circumstances.

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[1] The last sentence of section 3.957 provides that the protection afforded by that section "extends to claims" for DIC and death compensation. Since the term "claim," as used in part 3 of title 38, Code of Federal Regulations, refers to an application for benefits, see 38 C.F.R. § 3.160, this provision clearly does not refer literally to protection of claims themselves. The sentence was added to the regulations in 1968, 33 Fed. Reg. 15,285, 15,286 (1968), to reflect a General Counsel opinion, Undigested Opinion, 5-16-68 (1-17 VA Regulations (1957)), which held that the protection provided under the predecessor to section 1159 to service connection of a disability continues in a claim for DIC or death compensation based on death resulting from that disability. Thus, the last sentence of section 3.957 must be read as merely recognizing that the existing protection of service connection for a disability will carry over to the adjudication of claims for DIC and death compensation based on death from that disability. The provision has no application in the matter at issue.

7. In Salgado v. Brown, 4 Vet. App. 316 (1993), the United States Court of Veterans Appeals (CVA) interpreted section 110 of title 38, United States Code, which provides, in part:

> A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under laws administered by the Secretary shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud. The mentioned period shall be computed from the date determined by the Secretary as the date on which the status commenced for rating purposes.

In Salgado, the appellant's disability had been rated at the 50-percent level for over twenty years, but because he had never waived his military retirement pay, VA had never paid him compensation. Relying on the plain meaning of section 110, the CVA held that section protected the rating for compensation purposes regardless of whether a monetary award had actually been paid to the appellant. 4 Vet. App. at 320. The CVA's decision turned on the meaning of the phrase "for compensation purposes," id. at 318-19, which does not appear in section 1159. However, implicit in the CVA's holding is the conclusion that section 110 protects the status of a disability evaluation, not the payment of monetary benefits based on that status. In contrast to Salgado, where a rating was in effect but no benefits were paid, in the instant case, benefits were paid but there was no rating to support the payment. Nonetheless, our reading of 38 U.S.C. § 1159 is consistent with the Salgado decision in that it applies the somewhat analogous protection of service connection to the status of service connection, not to the payment of benefits based on that status.

8. Neither 38 U.S.C. § 1159 nor 38 U.S.C. § 110 provides an exception for error on the part of VA, and the General Counsel has held that an erroneous disability rating in effect for the requisite period is protected under section 110. See, e.g., O.G.C. Prec. 16-89; O.G.C. Conc. 12-89 ("after 20 years, protection attaches to an erroneous rating" (emphasis added)). However, in no case have we extended the protection afforded by these provisions to the erroneous payment of benefits when the requisite rating was not made. When VA's error consists of payment of

monetary benefits absent the requisite finding of service connection,

there is no rating to which the protection afforded by section 1159 may apply.

9. We note that, by virtue of 38 U.S.C. § 5112(b)(10), the erroneous DIC payments do not in this case give rise to a debt against the recipient, as correctly determined by the VA Regional Office in February 1993.

HELD:

The provisions of 38 U.S.C. § 1159 and 38 C.F.R. § 3.957 do not protect an award of dependency and indemnity compensation under which benefits have been paid for over ten years but which was erroneously made in light of a rating-board decision that the veteran's death was not service connected.

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