Date: December 13, 1994 O.G.C. Precedent 21-94

From: General Counsel (022)

Subj: Aid & Attendance Allowance for Improved Pension Purposes --XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Must the need for aid and attendance be permanent in order to qualify for a higher rate of improved pension?

DISCUSSION:

1. Section 1521(d) of title 38, United States Code, provides an increased rate of nonservice-connected disability pension for veterans who meet basic pension eligibility requirements and are "in need of regular aid and attendance." See also 38 U.S.C. § 1541(d) (pension for surviving spouses). Pursuant to 38 U.S.C. § 1502(b), a person will be considered to be in need of regular aid and attendance if he or she is "(1) a patient in a nursing home or (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person." In 38 C.F.R. §§ 3.351 and 3.352, the Department of Veterans Affairs has prescribed guidelines governing the determination of the need for aid and attendance for purposes of section 1521(d) and several other statutory provisions. As with the referenced statutes, the regulations do not expressly require that the need for regular aid and attendance be a permanent need. However, the title of 38 C.F.R. § 3.352 does refer to "[c]riteria for permanent need for aid and attendance and 'permanently bedridden.'"

2. In determining the meaning of a statutory provision, the starting point is the language of the provision, viewed in its statutory context. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). If the language is clear, then the statute must be applied in a manner consistent with that

clear meaning. Id. If the statute is ambiguous, the interpretation of the statute by the agency charged with its administration may be entitled to weight, particularly if the agency interpretation has been consistent and longstanding. See Securities and Exchange Comm'n v. Sloan, 436 U.S. 103, 117-18 (1978). Greater deference will generally be accorded an agency interpretation issued contemporaneously with the statute being construed. See Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978).

3. Read literally, 38 U.S.C. §§ 1502(b), 1521(d), and 1541(d) establish entitlement to increased improved pension for any veteran or surviving spouse who is otherwise entitled to such pension and who is in need of "regular aid and attendance." Nothing in those provisions requires that the need be permanent. Accordingly, because the statutory language does not establish a condition of "permanent" need as a prerequisite to increased pension, such a condition may not be construed unless a straightforward application of the language as written would violate or affect the clear purpose of the statute. See Dameron v. Brodhead, 345 U.S. 322, 326 (1953); see also Skinner v. Brown, 27 F.3d 1571, 1573 (Fed. Cir. 1994) (VA may not impose additional restrictions on benefit entitlement which are not contained in the statute mandating payment of benefits). The manifest purpose of the statutory aid-and-attendance provision is to provide for the expense of obtaining regular aid and attendance for a person who, as a result of disability, is in need of such services. See VA Admin. Dec. No. 201 (10-31-33); see also O.G.C. Prec. 23-92 (allowance for higher level of care). Recognizing that the expense of obtaining regular aid and attendance will exist regardless of whether the need is temporary or permanent, applying 38 U.S.C. §§ 1521(d) and 1541(d) according to their plain meaning to permit payment of the increased amount whenever a beneficiary is in need of regular aid and attendance, without regard to whether the need is permanent, would be consistent with the statutory purpose. In contrast, imposing additional limitations upon the statutory grant would hinder accomplishment of the statutory purpose.

4. Congress has expressly used the terms "permanent" and "permanently" in several provisions of title 38 of the United

States Code in order to establish a permanence requirement. See, e.g., 38 U.S.C. § 101(4)(A)(ii) ("permanently incapable of self-support"); § 1114(l) ("permanently bedridden"); § 1114(s) ("permanently housebound"); § 1160(a)(5) ("permanent service-connected disability"); § 1521(a) ("permanently and totally disabled"). Indeed, the respective statutory provisions immediately following the "aid and attendance" provisions of sections 1502(b), 1521(d), and 1541(d) establish an intermediate pension rate for persons who do not meet the "aid and attendance" requirement but who are "permanently housebound." 38 U.S.C. §§ 1502(c), 1521(e), 1541(e). Where Congress includes particular language in one section of a statute but omits it in another, the omission may be considered to have been purposeful. See Russello v. United States, 464 U.S. 16, 24 (1983). Accordingly, the repeated use of the terms "permanent" and "permanently" throughout title 38, and particularly in the same statutory sections containing the "aid and attendance" provisions at issue here, strongly suggests that the omission of a permanence requirement with respect to the need for aid and attendance was purposeful.

5. We have found nothing in the legislative history of the aid-and-attendance provisions which would contravene the plain meaning of the current statutory provisions. Provisions regarding the need for aid and attendance have been a part of the veterans' benefit laws since the Civil-War era. We have examined these prior provisions to determine whether, through consistent usage, a requirement of a permanent need might be inherent in the term "in need of regular aid and attendance." We have found no such usage implying a requirement of permanence.

6. The Act of June 6, 1866, ch. 106, § 1, 14 Stat. 56, providing "pensions" to certain veterans suffering from service-connected disabilities, authorized payment of the maximum rate to veterans who, due to the service-connected disability, had become "so permanently and totally disabled as to render them utterly helpless, or so nearly so as to require the constant personal aid and attendance of another person." The inclusion of a reference to permanence in the same statutory phrase referencing the need for aid and attendance could be read to imply that the need for aid and attendance must be permanent. However, the Act of March 3, 1873, ch. 234, § 4, 17 Stat. 566, 569, employed similar criteria and further

stated that "the pension for a disability not permanent, equivalent in degree to any provided for in this section, shall, during the continuance of the disability in such degree, be at the same rate as that herein provided for a permanent disability of like degree." This latter provision was interpreted by the Department of the Interior (which then had jurisdiction over veterans' pensions) to provide that the specified rate could be paid to a veteran who was in need of regular aid and attendance due to helplessness "not permanent in character" resulting from service-connected disability, "during the continuance of the disability in such a degree." 3 Dep't of Interior Pen. Dec. 72, 74 (1889) (emphasis in original). The Act of July 14, 1892, ch. 169, 27 Stat. 149, which provided an intermediate rate of compensation for veterans who, due to service-connected disability, were "totally incapacitated for performing manual labor" and disabled to such a degree as to require personal aid and attendance of another person contained no requirement that the disability be permanent in nature.

7. The World War Veterans' Act of 1924, ch. 320, 43 Stat. 607, authorized payment of compensation for service-connected disabilities and provided that such compensable disabilities would be rated as either "total and temporary," "partial and temporary," "total and permanent," or "partial and permanent." Id. § 202(1)-(4), 43 Stat. at 618. Section 202(5) of that statute provided for payment of an additional sum "[i]f the disabled person is so helpless as to be in constant need of a nurse or attendant." 43 Stat. at 619. The language and structure of the World War Veterans' Act suggest that the additional compensation under section 202(5) based upon the need for a nurse or attendant was payable to any "disabled person" covered by the act, regardless of whether the disability giving rise to the need for aid and attendance was classified as permanent or temporary.

8. The Act of May 1, 1920, ch. 165, 41 Stat. 585, increased pensions provided by other statutes to certain veterans of the Civil War and the War with Mexico. Section 2 of that act provided an increased rate of pension to certain veterans of those wars who were or became, "by reason of age and physical

or mental disabilities, helpless or blind, or so nearly helpless or blind as to require the regular personal aid and attendance of another person." 41 Stat. at 586. Subsequent statutes provided similar allowances to various classes of veterans. See Act of May 1, 1926, ch. 209, § 3, 44 Stat. 382, 383; Act of June 2, 1930, ch. 375, §§ 2, 4, 46 Stat. 492, 493; Act of June 9, 1930, ch. 420, § 2, 46 Stat. 529. Nothing in those statutes indicated that the need for aid and attendance was required to be permanent.

9. Veterans Regulation No. 1(a), issued by President Roosevelt in 1933, provided a higher pension rate, pursuant to the Act of March 20, 1933, ch. 3, § 3, 48 Stat. 8, 9, to any person who, as the result of a service-connected disability, had become "so helpless as to be in need of regular aid and attendance." Vet. Reg. No. 1(a), part I, para. II(l), and part II, para. II(l). In 1951, Congress amended part III of Veterans Regulation No. 1(a) to provide a greater pension rate to recipients of nonservice-connected pension who become, "on account of age or physical or mental disabilities, helpless or blind or so nearly helpless or blind as to need or require the regular aid and attendance of another person." Act of Sept. 18, 1951, ch. 406, § 1(a), 65 Stat. 324.

10. Prior to legislation enacted in 1957 and 1958 which substantially reorganized and repealed many of the prior veterans' benefit statutes, the numerous provisions regarding "aid and attendance" were reflected in various sections of title 38, United States Code. See 38 U.S.C. §§ 155a, 156, 157, 174, 175, 275, 364b, 365a, 365c, 370a, 381, 381-1, 381-2, 478 (1952); see also Vet. Reg. No. 1(a) (38 U.S.C. ch. 12A (1952)). These statutes contained numerous "aid and attendance" provisions, some of which could be read as suggesting a requirement of a permanent need and others of which contained no suggestion of such a requirement. Compare, e.g., 38 U.S.C. § 155a (1952), with 38 U.S.C. § 156 (last sentence) (1952). In 1957 and 1958, Congress consolidated the various provisions concerning aid and attendance into a few, consistently-worded provisions. See Pub. L. No. 85-56, 71 Stat. 83 (1957); Pub. L. No. 85-857, 72 Stat. 1105 (1958). A provision authorizing payment of an aid-and-attendance allowance

to widows receiving death pension was added by Pub. L. No. 90-77, § 108, 81 Stat. 178, 180 (1967). The current aid-and-attendance provisions in 38 U.S.C. §§ 1521 and 1541 derived directly from Pub. L. No. 95-588, §§ 106, 109, 92 Stat. 2497, 2500, 2503 (1978). Significantly, none of these provisions referred to a "permanent" need for aid and attendance, although the referenced acts expressly required permanence with respect to certain other statutory criteria. See, e.g., Pub. L. No. 85-857, §§ 314(l) ("permanently bedridden"), 502(a) ("permanently and totally disabled"), 72 Stat. at 1121, 1134.

11. In 1978, Congress established a higher aid and attendance allowance for certain severely disabled veterans suffering from service-connected disabilities who required a "higher level of care." Pub. L. No. 95-479, § 101(c), 92 Stat. 1560, 1561 (1978) (codified, as amended, at 38 U.S.C. § 1114(r)(2)). In a report pertaining to that statute, the Senate Committee on Veterans' Affairs stated that severely disabled veterans who have been able to overcome the effects of their disabilities would not generally require the new allowance, but that,

> even in such cases, it is entirely reasonable to expect that, from time to time, such a veteran's disabilities would result in substantial inca-pacitation -- and the veteran would be forced to seek institutional care even though he or she would prefer to remain at home. In such cases, the Committee strongly suggests that the VA assist the veteran through payment of the higher aid-and-attendance allowance during that period . . . .

S. Rep. No. 95-1054, 95th Cong., 2d Sess. 22 (1978), reprinted in 1978 U.S.C.C.A.N. 3465, 3480. Although this statement pertains to an aid-and-attendance provision different than that in question here, it does suggest Congress' recognition that, in some cases, the need for aid and attendance may be temporary but the rationale for providing assistance may be equally applicable.

12. The foregoing history suggests that the term "in need of regular aid and attendance" does not contain an inherent requirement that the need be permanent. Rather, it appears that, when Congress has intended to require that the need be permanent, it has so stated in the statute. Accordingly, the statutory history tends to support the conclusion that 38 U.S.C. §§ 1521(d) and 1541(d) do not require that the need for aid and attendance be permanent.

13. Because the statutory aid and attendance provisions are unambiguous on their face, they must be applied in accordance with their plain meaning. Accordingly, if the regulations at 38 C.F.R. §§ 3.351 and 3.352 impose the additional requirement that the need for aid and attendance be permanent, those regulations would be inconsistent with the governing statutes. See Skinner, 27 F.3d at 1573. Regulations are generally construed, if possible, to avoid conflicts with statutory provisions. See Smith v. Brown, 35 F.3d 1516, 1526 (Fed. Cir. 1994); LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Management Comm'n, 866 F.2d 616, 623 (3d Cir. 1989). We have examined the pertinent regulatory context and history to determine whether the regulations purport to require a permanent need for aid and attendance. For the reasons explained below, we believe that the regulations may be construed to authorize an aid-and-attendance allowance without regard to whether the need for regular aid-and-attendance is permanent.

14. Although the texts of 38 C.F.R. §§ 3.351 and 3.352 appear to be consonant with the plain meaning of the controlling statutes, the reference to "permanent need for aid and attendance" in the caption of section 3.352 could be read to suggest that the regulations should be construed as containing a requirement of permanence. Regulations are generally interpreted according to the same rules of construction applicable to statutes. See KCMC, Inc. v. FCC, 600 F.2d 546, 549 (5th Cir. 1979); Rucker v. Wabash R.R., 418 F.2d 146, 149 (7th Cir. 1969). As with statutes, the plain meaning of the terms used in the regulation will ordinarily be controlling. See KCMC, 600 F.2d at 549. As a general rule, the heading of a statute cannot limit the plain meaning of the text of that section. Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519, 528-29 (1947). We believe that this principle

would apply to regulations as well. See KCMC, 600 F.2d at 549; Rucker, 418 F.2d at 149; cf. United States v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975) (applying Trainmen analysis to court rule). However, the heading of a statute or regulation can aid in resolving an ambiguity in the text. Brotherhood of R.R. Trainmen, 331 U.S. at 529; INS v. National Center for Immigrants' Rights, Inc., 116 L. Ed. 2d. 546, 555 (1991). In this case, because the terms of section 3.352 are plain on their face, there is no need to resort to the caption of that section to resolve any ambiguity in the text, nor would it be appropriate to rely upon that caption to conceive an ambiguity which does not exist in the regulatory text.

15. Further, we have found no consistent or persuasive agency interpretation of the aid-and-attendance provisions of current or prior statutes or regulations which would require that VA's regulations be construed as mandating a permanent need for aid and attendance. In 1924, the Director of the United States Veterans' Bureau issued Regulation No. 79 implementing the World War Veterans' Act. That regulation provided that "[i]f and while a compensable claimant is so helpless as to be in constant need of a nurse or attendant, there shall be allowed, in addition to the compensation provided by the statute, the sum of $50 per month." Veterans' Bureau Reg. No. 79, sec. 3300 (emphasis added). This use of the term "while" indicates that the agency contemplated that the additional payment could be made in the case of helplessness which was either intermittent or temporary. The pertinent provisions of this regulation were incorporated into regulation R & PR 1179 in 1930, and then into R & PR 1237 in 1936. As a result of the Act of September 18, 1951, this regulation, then codified at 38 C.F.R. § 3.237, was amended in February 1952 to provide for an aid-and-attendance allowance in nonservice-connected pension cases as well as in compensation cases. The regulation, as then amended, stated that an additional allowance would be payable "[i]f and while a veteran is so helpless on account of a service-connected compensable condition or a nonservice-connected condition as to be in need of a nurse or attendant or regular aid and attendance."

16. On May 19, 1952, the Assistant Administrator for Claims issued Claims Information Bulletin (IB) 8-74, which stated that "[t]he need for aid and attendance must be a permanent need or must continue for an indefinite period without reasonable expectation that the veteran's condition will improve to the point where he will no longer be in need of aid and attendance." In a 1953 decision, the Administrator of Veterans Affairs responded to the assertion by certain service organizations that IB 8-74 was unauthorized under the Act of September 18, 1951, in requiring a permanent need for regular aid and attendance. VA Admin. Dec. No. 927 (3-27-53). The Administrator concluded that, in light of the statutory context, the legislative history of the Act of September 18, 1951, and VA's interpretation and application of the aid and attendance provisions over the years, the need for aid and attendance had to be a permanent need.

17. In February 1961, the Veterans' Administration rescinded prior regulations and issued the regulations at 38 C.F.R. §§ 3.351 and 3.352. As noted above, those regulations do not expressly require that the need for aid and attendance be a permanent need. In May 1961, the Veterans' Administration amended the caption of section 3.352 to include a reference to "permanent" need for aid and attendance. 26 Fed. Reg. 4365 (1961). However, no corresponding change was made to the body of the regulation, and no rationale was given for the amendment to the caption.

18. Transmittal sheets pertaining to subsequent amendments to 38 U.S.C. §§ 3.351 and 3.352 contain suggestions that those regulations were viewed as requiring a permanent need for aid and attendance. In 1967, VA added 38 C.F.R. § 3.351(c)(2), which implemented section 102(b) of Pub. L. No. 90-77, 81 Stat. 178 (1967), providing that a person would be considered to be in need of regular aid and attendance if he or she was a patient in a nursing home. The transmittal sheet accompanying that change stated that "[t]he presumption presupposes permanency of need within the meaning of VA Regulation [3.352]." Trans. Sheet 407, at vi (9-13-67). In 1976, the Veterans' Administration deleted a provision codified at 38 C.F.R. § 3.352(b) which provided that a beneficiary's hospitalization at his or her own expense in a private institution would not be considered as indicating

a need for regular aid and attendance. See 38 C.F.R. § 3.352(b) (1975). The accompanying transmittal sheet stated that the provision was deleted because "the mere fact that the claimant is hospitalized, in and of itself, would not constitute a basis for finding that there was a permanent need for regular aid and attendance." Trans. Sheet 609 (7-13-76).

19. We also note that O.G.C. Prec. 60-90 apparently presumed, without explanation, that provisions in what is now 38 U.S.C. § 1114, providing special monthly compensation for loss of use of certain anatomical structures, require that the loss of use be permanent, although the statute does not expressly impose such a requirement. The opinion's reference to a requirement of "permanent" loss of use in section 1114 would be consistent with a determination that the provisions in the same statute regarding the need for aid and attendance also contain an implicit requirement of permanence.

20. The foregoing history does not establish a consistent VA interpretation that the statutory phrase "in need of regular aid and attendance" requires a permanent need. As noted above, Veterans' Bureau and Veterans' Administration regulations in force between 1924 and 1961 appeared to indicate that the "aid and attendance" allowance in both compensation and pension cases was payable although the need for regular aid and attendance was only temporary. Current regulations, at 38 C.F.R. §§ 3.351 and 3.352, do not expressly require that the need be permanent, although the heading of section 3.352 refers to a "permanent" need for aid and attendance. Agency statements in connection with the 1967 and 1976 amendments to 38 C.F.R. §§ 3.351 and 3.352 suggest that VA has interpreted those regulations to require a permanent need for aid and attendance. See Trans. Sheets 407 and 609. However, the transmittal sheets containing these statements expressly state that the comments contained therein are not regulatory. Accordingly, the comments do not alter the plain meaning of the text of the regulations, and, while they may be viewed as providing some guidance as to VA's understanding of its regulations, they do not establish a binding agency interpretation.

21. VA Admin. Dec. No. 927 stated that the need for aid and attendance had to be permanent in order to establish entitlement to the aid-and-attendance allowance. Although Admin. Dec. No. 927 may be regarded as a contemporaneous agency interpretation of the Act of September 18, 1951, establishing a generally applicable aid-and-attendance standard for pensioners, there are several reasons why we do not consider that interpretation to provide authoritative guidance in the interpretation of current statutes and regulations. First, a contemporaneous agency interpretation cannot be relied upon in construction of a statute which is unambiguous on its face. See, e.g., Glaxo Operations UK Ltd. v. Quigg, 894 F.2d 392, 398-99 (Fed. Cir. 1990). Second, the interpretation is in apparent conflict with the plain language of 38 U.S.C. § 3.237, which, as amended in February 1952, can also be regarded as a contemporaneous agency interpretation of the 1951 statute. Third, as explained below, the reasoning of Admin. Dec. No. 927 is neither clear nor persuasive. See Barnett v. Weinberger, 818 F.2d. 953, 962 (D.C. Cir. 1987) (deference to be given to administrative interpretation of a statute depends in part upon "the thoroughness and validity of its reasoning").

22. The determination in Admin. Dec. No. 927 was apparently predicated upon two factors, neither of which we find persuasive for purposes of the present inquiry. First, the Administrator apparently concluded that, because basic pension eligibility is based upon a finding of a total disability which is permanent in nature, entitlement to increased pension based upon the need for regular aid and attendance must be construed to contain an implicit requirement that the need be permanent. However, the criteria governing basic pension eligibility are distinct from the criteria governing entitlement to increased pension based on the need for aid and attendance. The express statutory requirement of permanence as to the former does not compel the conclusion that such a requirement is implicit as to the latter. Rather, as noted above, the fact that the statute expressly refers to "permanent and total disability" but not to "permanent" need for aid and attendance suggests that a permanence requirement does not apply to the need for aid and attendance.

23. Second, the Administrator stated that the Act of September 18, 1951, was modeled upon prior statutes providing aid-and-attendance benefits to certain veterans and was intended to provide a similar benefit to veterans of World War I, World War II, and the Korean Conflict. He apparently concluded that those prior laws contained a permanence requirement and that the 1951 statute should therefore be construed to contain a permanence requirement. However, as is apparent from the preceding discussion of the history of the aid-and-attendance allowance, we have found no evidence that the relevant prior laws consistently required that the need for aid and attendance be permanent. Further, a permanence requirement is not found in the aid-and-attendance provisions of the Act of June 2, 1930, the statute specifically discussed by the Administrator. Similarly, although the Administrator referred to "accepted administrative interpretations and applications over a period of more than 20 years," we have not found evidence of a consistent VA interpretation of the aid-and-attendance provisions existing prior to the 1951 statute. For the foregoing reasons, we decline to follow the interpretation of the aid-and-attendance statute stated in Admin. Dec. No. 927.

HELD:

The statutory provisions in 38 U.S.C. §§ 1502(b), 1521(d), and 1541(d), authorizing an increased improved-pension rate for persons in need of regular aid and attendance, do not require that the need be permanent as a predicate to an award of the increased rate. To the extent that the title of 38 C.F.R. § 3.352 suggests that the need must be permanent, that title is inconsistent with the governing statutes and should be revised. Increased improved pension based upon the need for regular aid and attendance may be awarded without regard to whether the need is permanent.

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