

Date: November 15, 1996

VAOPGCPREC 11-96

From: General Counsel (022)

Subj: Dependency and Indemnity Compensation--Disabilities Resulting from Alcohol or Drug Abuse--Pub. L. No. 101-508, § 8052

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

1. Does section 8052 of the Omnibus Budget Reconciliation Act of 1990 prohibit payment of dependency and indemnity compensation under 38 U.S.C. § 1310 for a veteran's death where the disability from which the veteran died resulted from the veteran's alcohol or drug abuse, but service connection of the disability was established for disability compensation purposes based on a claim filed on or before October 31, 1990?

2. Does section 8052 of the Omnibus Budget Reconciliation Act of 1990 prohibit payment of dependency and indemnity compensation under 38 U.S.C. § 1318 where the disability that was continuously rated totally disabling for an extended period immediately preceding a veteran's death resulted from the veteran's alcohol or drug abuse, but service connection of the disability was established for disability compensation purposes based on a claim filed on or before October 31, 1990?

COMMENTS:

1. Section 8052 of the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990), Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, amended former 38 U.S.C. §§ 310 and 331 (now designated §§ 1110 and 1131) to prohibit, effective for claims filed after October 31, 1990, payment of compensation for any disability that is "a result of the veteran's own . . . abuse of alcohol or drugs." Section 8052 also amended 38 U.S.C. § 105(a) to provide that, with respect to claims filed after October 31, 1990, an injury or disease incurred during active service will not be deemed to have been incurred in line of duty if the injury

or disease was a result of the person's own abuse of alcohol or drugs.

2. Dependency and indemnity compensation (DIC) is payable to certain survivors of "any veteran [who] dies after December 31, 1956, from a service-connected or compensable disability." 38 U.S.C. § 1310(a). DIC is also payable in the same manner as if the veteran's death were service connected to certain survivors of a veteran "who was in receipt of or entitled to receive . . . compensation at the time of death for a service-connected disability" continuously rated totally disabling for an extended period immediately preceding the veteran's death. 38 U.S.C. § 1318(a) and (b). Section 8052 did not amend what are now 38 U.S.C. §§ 1310 and 1318, and its text does not refer to DIC. Nevertheless, because of its impact on line-of-duty determinations under 38 U.S.C. § 105(a), its effect on claims for DIC under sections 1310 and 1318 filed after October 31, 1990, must be considered.

3. As noted, the payment of DIC under section 1310 requires a death from a *service-connected* or compensable disability, and the payment of DIC under section 1318 requires a *service-connected* disability rated totally disabling for a specified period of time. (The term "compensable disability," although not defined in statute or regulation, serves to bring within the scope of section 1310 disabilities for which compensation is paid in the same manner as if the disability were service connected. See 38 U.S.C. § 1151.) A *service-connected* disability is one incurred or aggravated *in line of duty* in the active military, naval, or air service. 38 U.S.C. § 101(16); 38 C.F.R. § 3.1(k). A *service-connected* death is one resulting from such a disability. *Id.* See also 38 C.F.R. § 3.301(a) (direct service connection may be granted only when a disability or cause of death was incurred or aggravated in line of duty and not the result of the veteran's own alcohol or drug abuse). Section 8052's amendment of 38 U.S.C. § 105(a) precludes an injury or disease resulting from a veteran's own alcohol or drug abuse from being deemed to have been incurred or aggravated in line of duty. Consequently, in claims filed after October 31, 1990, disability resulting from a veteran's own

alcohol or drug abuse cannot be service connected and therefore cannot form the basis of a DIC award under either section 1310 or 1318.

4. The question has arisen, however, whether service connection established for a disability that resulted from a veteran's own alcohol or drug abuse, in a compensation claim filed on or before October 31, 1990, may form the basis of an award in a DIC claim filed after October 31, 1990. That question arises because a DIC claim involves an issue that, in a claim under 38 U.S.C. § 1310, may have already been decided or, in a claim under 38 U.S.C. § 1318, was necessarily decided in a prior compensation claim, i.e., whether a veteran's disability was service connected.

5. Section 20.1106 of title 38, Code of Federal Regulations, headed, "Claim for death benefits by survivor--prior unfavorable decisions during veteran's lifetime[,]" provides that, "[e]xcept with respect to benefits under the provisions of 38 U.S.C. [§] 1318 . . . , issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime." Although the regulatory text seems to provide that, in a death-benefit claim, the Board will disregard any prior disposition of an issue previously decided in a claim filed by the veteran, whether favorable or unfavorable, the Board's practice, consistent with the regulation's heading, is to disregard only unfavorable prior determinations. In other words, in deciding a death-benefit claim, the Board relies on conclusions reached in a prior proceeding, but only where such reliance is to the claimant's benefit. Section 20.1106's exclusion of section-1318 DIC claims from its coverage suggests that, in such a claim, any prior disposition of an issue may be relied upon, even if it is unfavorable to the claimant.¹

¹ The history of that exclusionary phrase in the regulation explains why, in the absence of clear and unmistakable error, any prior disposition, whether favorable or unfavorable, may be relied upon in a section-1318 DIC claim. Section-1318 DIC claims were excluded from section 20.1106's coverage to assure consistency with 38 C.F.R. § 3.22(a)(2), which states the criteria for DIC eligibility under section 1318. 54 Fed. Reg. 34,334, 34,338 (1989). Section 3.22(a)(2) was amended in 1983 to reflect the amendment of what is now section 1318 by section 112 of the Veterans' Compensation, Education, and Employment Amendments

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6. Although it apparently has been VA's practice to accept favorable findings of service connection made for disability compensation purposes in adjudicating subsequent DIC claims relating to the same veteran, such practice must yield in the face of statutory authority requiring a different result. In our view, the plain language of section 8052 of the OBRA 1990 and the lack of any indication in the statutory language or in the provision's legislative history that Congress intended any exception where service connection was established in a disability compensation claim filed on or before October 31, 1990, require a departure from the referenced practice in the situation addressed by that statute. With respect to the statutory language, section 8052(b)

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of 1982, Pub. L. No. 97-306, § 112, 96 Stat. 1429, 1432. 48 Fed. Reg. 21,595 (1983). Congress enacted section 112 to establish eligibility under what is now section 1318 for the surviving spouse of a veteran who was not actually receiving compensation for total disability for the requisite period due to clear and unmistakable error in the adjudication of the veteran's disability compensation claim. S. Rep. No. 550, 97th Cong., 2d Sess. 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2877, 2898; Explanatory Statement of Compromise Agreement, 128 Cong. Rec. H7777 (daily ed. Sept. 28, 1982), *reprinted in* 1982 U.S.C.C.A.N. 3012, 3013. The General Counsel has interpreted section 112's amendment of what is now section 1318 as indicating Congress' intention that clear and unmistakable error in a prior rating must be found for a veteran to be considered to have been "entitled to receive" compensation for total disability although not actually in receipt of such compensation. VAOPGCPREC 68-90 (O.G.C. Prec. 68-90). Accordingly, the General Counsel concluded, what is now section 20.1106 could not be used as a basis for *de novo* review in a section-1318 DIC claim of the question of entitlement to compensation for total disability for the specified period. *Id.*

provides that, "[t]he amendments made . . . shall take effect with respect to *claims filed* after October 31, 1990." (Emphasis added.) The unambiguous import of that language is that, *for a claim filed* after that date, a disability which resulted from a veteran's own alcohol or drug abuse may not be considered service connected. The provision does not refer to facts found or adjudications made after that date, but specifies applicability to claims filed after that date. As noted above, section 1310(a) requires the death of a veteran from a "service-connected" disability as a prerequisite to a survivor's entitlement to DIC. Section 1318(b) requires that a veteran have been in receipt of or entitled to receive compensation for a "service-connected" disability at the time of death, in order for a survivor to qualify for DIC under that provision. Regardless of whether, for compensation purposes, service connection was legally established in a claim filed on or before October 31, 1990, for a disability resulting from a veteran's own alcohol or drug abuse, the effect of section 8052 is that such disability may not be considered service connected with respect to a DIC claim filed after that date.

7. Although section 8052's prohibition applies only to claims filed after October 31, 1990, it may not be evaded by basing an award of DIC on a disability compensation claim filed during a veteran's lifetime on or before that date. Section 5101(a) of title 38, United States Code, requires that "[a] specific claim . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." More specifically, "[a] specific claim . . . must be filed in order for death benefits to be paid to any individual under the laws administered by VA." 38 C.F.R. § 3.152(a). Thus, for VA to award DIC to a veteran's survivor, a claim for death benefits must be filed, regardless of whether a disability compensation claim had been filed during the veteran's lifetime. See *Vda de Landicho v. Brown*, 7 Vet. App. 42, 47 (1994) ("veterans' claims under chapter 11 do not survive their deaths"). A prior disability compensation claim is insufficient under sections 5101(a) and 3.152(a) to authorize an award of DIC to a veteran's survivor.

8. Furthermore, for DIC to be paid, requirements in addition to those sufficient to establish service connection of a disability must be met. For example, under section 1310(a), the veteran must have died from a service-connected or compensable disability, and the claimant must be a member of one of certain classes of survivors (i.e., surviving spouse, child, or parent). Under section 1318, the veteran must have died and, at the time of death, been receiving or entitled to receive compensation for a service-connected disability rated totally disabling for a specified period. 38 U.S.C. § 1318(b). These additional requirements for DIC entitlement serve to distinguish DIC claims from compensation claims.

9. The United States Court of Veterans Appeals has not ruled on the distinction between DIC and disability compensation claims for purposes of section 8052, but its holding in *Zevalkink v. Brown*, 6 Vet. App. 483 (1994) (appeal pending), lends support to the conclusion that such claims are distinct. In *Zevalkink*, the court held that a veteran's survivor's accrued-benefits claim, for jurisdictional purposes, is different from the veteran's disability-compensation claim from which the accrued-benefits claim was derived. *Id.* at 489. The court reasoned that, although the accrued-benefits claim was related to the veteran's disability-compensation claim, entitlement to accrued benefits arises under a statute different from that authorizing compensation and is predicated upon an accrued-benefits application filed after the veteran's death. *Id.* Similarly, although a DIC claim may be related to a disability-compensation claim based on the same disability incurred by the same veteran, entitlement to DIC arises under 38 U.S.C. § 1310 or 1318, rather than 38 U.S.C. § 1110 or 1131, and is predicated upon an application filed after the veteran's death. DIC claims and disability compensation claims are distinct from one another, and section 8052's prohibition may not be avoided by basing a DIC award on a finding of service connection made in a disability-compensation claim filed on or before October 31, 1990.

10. Since a DIC claim is separate from a disability compensation claim filed during the veteran's lifetime, a finding

of service connection in the subsequent DIC claim is necessary to establish entitlement. Further, as discussed above, a finding of service connection made in a prior compensation claim may not be applied in a subsequent DIC claim where to do so would conflict with section 8052 of the OBRA 1990. However, the impact of another statutory provision must also be considered. Section 1159 of title 38, United States Code, provides that a grant of service connection which has been in force for ten or more years may not be severed except on a showing that the original grant was based on fraud or on a clear showing from military records that the person concerned did not have the requisite service or character of discharge. VA's regulation implementing the protection statute explicitly extends the protection of service connection to subsequent death-benefit claims. Section 3.957 of title 38, Code of Federal Regulations, after restating the statutory protection provision, states that, "[t]he protection afforded in this section extends to claims for dependency and indemnity compensation or death compensation." VA added the provision concerning DIC and death compensation to the regulation in 1968. 33 Fed. Reg. 15,285, 15,286 (1968). The purpose of the provision was "to incorporate the rule that where service connection for a disability remained in effect for 10 or more years during a veteran's lifetime, the statutory protection provided by 38 U.S.C. [§] 359 [now § 1159] does not terminate upon his death but applies in rating claims for [DIC] or death compensation." VA Regulations, Compensation and Pension, Transmittal Sheet 427 (Oct. 8, 1968). That "rule" originated with a memorandum General Counsel opinion issued earlier that year, in which the General Counsel concluded that the protection provided by what is now section 1159 for service connection of disability extends to the adjudication of claims for DIC or death compensation. Undigested Opinion, 5-16-68 (1-17 VA Regulations and Procedure).

11. VA's interpretation of 38 U.S.C. § 1159, as reflected in 38 C.F.R. § 3.957, creates a conflict with section 8052 of the OBRA 1990. Where service connection for a disability resulting from a veteran's own alcohol or drug abuse, established in a compensation claim filed on or before October 31, 1990, has through the passage of time acquired the

protection from severance afforded by 38 U.S.C. § 1159, and a DIC claim is filed after October 31, 1990, 38 C.F.R. § 3.957 indicates that, pursuant to section 1159, VA should consider the disability service connected in adjudicating the DIC claim. On the other hand, section 8052 would seem to prevent VA from considering the disability service connected for purposes of the DIC claim. The conflict between section 1159's protection and section 8052's effective prohibition is direct and irreconcilable. Effect cannot be given to both provisions simultaneously with respect to that narrow class of claims.

12. Apparently conflicting statutes on the same subject are to be harmonized so as to effectuate every provision if reasonably possible. 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (5th ed. 1992). However, if statutes on the same subject irreconcilably conflict, a later, more specific statute prevails over an earlier, more general one, and the later, more specific statute is considered an exception to the earlier, more general one. 2B *id.* §§ 51.02, 51.05. Section 1159 is the earlier statute, and its protection of service connection for any disability, regardless of the disability's genesis, which has been in effect for at least ten years, is more general. The OBRA 1990 is the later-enacted statute, and section 8052's effective prohibition of service connection for disabilities or deaths resulting from a veteran's own alcohol or drug abuse for claims filed after October 31, 1990, is more specific, applying only in claims involving disability or death resulting from a specific cause. By applying accepted rules of statutory construction to the irreconcilably conflicting provisions, we conclude that section 1159's earlier, general protection must yield to section 8052's later, specific prohibition. Therefore, VA may not pay DIC in a claim filed after October 31, 1990, based on a veteran's death caused by a disability resulting from the veteran's own alcohol or drug abuse or on the basis that the veteran was receiving or entitled to receive compensation for such a disability continuously rated totally disabling for an extended period immediately preceding death, regardless of whether service connection established for the disability in a compensation claim filed on or before October 31, 1990, had acquired the

protection from severance afforded by 38 U.S.C. § 1159 and 38 C.F.R. § 3.957.

HELD:

Section 8052 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, applicable to claims filed after October 31, 1990, precludes an injury or disease that is a result of a person's own abuse of alcohol or drugs from being considered incurred in line of duty and, consequently, precludes resulting disability or death from being considered service connected. Section 8052 therefore prohibits the payment of dependency and indemnity compensation based on a veteran's death resulting from such a disability or on the basis that the veteran was in receipt of or entitled to receive compensation for such a disability continuously rated totally disabling for an extended period immediately preceding death. Even where service connection established for compensation purposes in a claim filed on or before October 31, 1990, for a disability resulting from a veteran's own alcohol or drug abuse has been in effect for ten or more years and would therefore generally be protected from severance under the provisions of 38 U.S.C. § 1159 and 38 C.F.R. § 3.957, section 8052 prohibits the payment of dependency and indemnity compensation in a claim filed after October 31, 1990, based on a veteran's death resulting from such a disability or on the basis that the veteran was in receipt of or entitled to receive compensation for such a disability continuously rated totally disabling for an extended period immediately preceding death.

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