The decision of the U.S. Court of Appeals for Veterans Claims in Hornick v. Shinseki overruled this GC opinion. In Hornick, the Court held "that the section 1159 protection from severance of awards of 'service connection' in effect for 10 or more years also extends to awards of compensation under section 1151 that have been in effect for 10 or more years," and "reject[ed] G.C. Prec. 13–96, which determined that the section 1159 protection does not apply to awards of compensation under section 1151." 24 Vet. App. 50, 56 (2010). VAOPGCPREC 13-96 should no longer be followed, and is retained for historical reference purposes only.

Date: November 25, 1996 VAOPGCPREC 13-96

From: General Counsel (022)

Subj: Severance of Entitlement to Benefits Under 38 U.S.C. § 1151

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

a. Does the protection of service connection provided by 38 U.S.C. § 1159 apply to disabilities compensated under 38 U.S.C. § 1151?

b. Is termination of entitlement to benefits under 38 U.S.C. § 1151 subject to the requirements of 38 C.F.R. § 3.105(d)?

COMMENTS:

1. The veteran suffered an injury to his left knee and ankle during a 1992 hospitalization at a VA medical center. The injury was reportedly accidental and unrelated to any circumstance of the veteran's treatment. In March 1993 and April 1994, the veteran was awarded compensation under 38 U.S.C. § 1151 for his ankle and knee disabilities, respectively. The regional office having jurisdiction over the claims now believes that the award of benefits was clearly and unmistakably erroneous and seeks guidance as to whether, and under what circumstances, it may sever entitlement to benefits under section 1151. You have requested our views as to whether entitlement under section 1151 is subject to the requirements of 38 U.S.C. § 1159, regarding protection of service connection, and/or 38 C.F.R. § 3.105(d), regarding the standards and procedures for severing service connection.

2. Section 1151 provides that when a veteran is disabled or dies as the result of an injury or aggravation of an injury suffered as the result of VA hospitalization, medical or surgical treatment, vocational rehabilitation, or examination, "disability or death compensation under this chapter [chapter 11] and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such

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disability, aggravation, or death were service-connected." (Emphasis added.) Accordingly, 38 U.S.C. § 1151 does not authorize an award of service connection for disabilities covered by that section, but authorizes payment of compensation "as if" such disabilities were service connected.

3. Section 1159 of title 38, United States Code, provides that:

> 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, 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.

Your opinion request concerns the propriety of reducing benefits initially awarded under 38 U.S.C. § 1151 in 1993 and 1994. Because those awards have not been in force for ten or more years, the protection of section 1159 would have no application in the case at issue, regardless of whether that protection may apply generally to awards under section 1151. In order to fully address the questions posed in the opinion request, however, we will consider whether the protection of section 1159 is generally applicable to awards under section 1151 which have been in force for ten or more years.

4. VA regulations in effect since at least 1928 authorize revision of prior final decisions which were based on "clear and unmistakable error." *See Smith v. Brown*, 35 F.3d 1516, 1524 (Fed. Cir. 1994). That authority is presently contained in 38 C.F.R. § 3.105(a), which states that:

> Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service,

> dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended.

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Further, 38 C.F.R. § 3.105(d) states that "service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government)." The United States Court of Veterans Appeals (CVA) has held that section 3.105(a) is a valid regulation authorizing the correction of erroneous VA decisions denying or awarding benefits. *Russell v. Principi*, 3 Vet. App. 310, 313 (1992).

5. Section 1159 of title 38, United States Code, enacted in 1960, establishes a limitation on VA's authority to correct clearly and unmistakably erroneous determinations of service connection. Pursuant to section 1159, a determination of service connection which has been in force for ten or more years generally may not be severed, even if it was clearly and unmistakably erroneous. By its terms, section 1159 protects only determinations of "service connection." Congress has defined the term "service connected" to mean "with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16); *see also* 38 C.F.R. § 3.1(k). Accordingly, the plain language of section 1159 protects only the factual determination that a veteran's disability or death resulted from a disability incurred or aggravated in service. In enacting the provisions currently codified in section 1159, Congress explained that the statute "merely freezes the determination of service connection, that is to say the finding by the [VA] that the disability was incurred in or aggravated by military service." S. Rep. No. 1394, 86th Cong., 2d Sess. 1 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2338. Section 1159 does not limit VA's authority under 38 C.F.R. § 3.105(a) to correct erroneous VA determinations with respect to any issue of fact or law other than the determination as to whether disability or death resulted from a disability incurred or aggravated in service. An award of benefits under 38 U.S.C. § 1151 does not involve a determination of service connection for a disability or death, but, rather, requires a determination as to whether disability

or death resulted from VA hospitalization, treatment, vocational rehabilitation, or examination. Accordingly, because

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an award of benefits under section 1151 does not involve a determination of service connection, the plain language of 38 U.S.C. § 1159 has no application to awards under section 1151. We have found nothing in the legislative history of section 1159 indicating a congressional intent to protect factual determinations under section 1151 that disability or death resulted from VA hospitalization, treatment, vocational rehabilitation, or examination.

6. Although section 1159 does not purport to protect determinations under 38 U.S.C. § 1151, we must further consider whether section 1151 itself provides a basis for applying the protection of service connection under 38 U.S.C. § 1159 to determinations of entitlement to benefits under section 1151. We have previously concluded that certain statutes providing ancillary benefits in cases of "service-connected" disability or death may be construed to apply also to disability or death compensated under section 1151. *See* VAOPGCPREC 100-90 (O.G.C. Prec. 100-90); VAOPGCPREC 80-90 (O.G.C. Prec. 80-90); VAOPGCPREC 73-90 (O.G.C. Prec. 73-90); VAOPGC 12-86 (11-17-86). In VAOPGCPREC 80-90, originally issued in 1986 as Op. G.C. 5-86, we concluded that a disability compensated under 38 U.S.C. § 351 (now § 1151) could provide the basis for an award of benefits under 38 U.S.C. § 410(b)(1) (now § 1310(b)(1)), which authorized an award of dependency and indemnity compensation (DIC) to the survivor of a veteran who, at the time of his or her death, was entitled to receive compensation "for a service-connected disability" which was rated totally disabling for ten years or more immediately preceding the veteran's death. We stated that "the language and legislative history of [38 U.S.C. § 351] make clear that Congress intended that <u>all</u> veterans' monetary benefits payable for service-connected disability or death be payable for qualifying disability or death resulting from, among other things, medical examination or treatment in the same manner as though the disability or death had been a result of military service." VAOPGCPREC 80-90, at 3 (emphasis in original).

7. In VAOPGCPREC 100-90, we concluded that a disability compensated under 38 U.S.C. § 351 would provide a basis for payment of a clothing allowance under 38 U.S.C. § 362 (now § 1162), which authorized payment of a clothing allowance to any veteran who

"because of a service-connected disability" wears or uses a prosthetic or orthopedic device which tends to wear out or tear

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clothing or uses skin medication which damages clothing. In that opinion, we clarified the statement in VAOPGCPREC 80-90 that "all veterans' monetary benefits payable for service-connected disability or death" are available for disabilities compensated under 38 U.S.C. § 351. We explained that the statement "was generally intended to encompass all disability and death compensation and DIC benefits," but not necessarily all other ancillary benefits available to veterans suffering from service-connected disabilities. VAOPGCPREC 100-90, at 2-3. We stated that "section 351 entitlement may also provide entitlement to certain ancillary and special service-connected benefits depending upon congressional intent." *Id.* at 3 (emphasis in original).

8. In VAOPGC 12-86, we concluded that a disability compensated under 38 U.S.C. § 351 could provide a basis for compensating disability of a paired organ or extremity under 38 U.S.C. § 360 (now § 1160), which provides that when there is a service-connected disability of one paired organ, a non-service-connected disability in the other paired organ may be compensated as if it were service connected. We further stated that a section-351 disability would not generally confer entitlement to benefits, other than compensation and DIC benefits, which are based on service connection. Specifically, we noted that a veteran receiving compensation under section 351 would not thereby be eligible for such ancillary benefits as specially-adapted housing under 38 U.S.C. § 801 (now § 2101), service-connected burial allowance under 38 U.S.C. § 901 (now § 2307), dependents' educational assistance under 38 U.S.C. § 1701 (now § 3501), and automobile allowance under 38 U.S.C. § 1902(a) (now § 3902(a)).

9. As those opinions indicate, the language and history of section 1151 reflect a congressional purpose to make all compensation and DIC benefits which are payable for service-connected disability or death under chapters 11 and 13 similarly available for disability or death within the scope of section 1151. Accordingly, we have concluded that the provisions of chapters 11 and 13 authorizing awards of compensation and DIC for service-connected disability or death would generally be applicable to disability or death within the scope of section 1151. It does not follow, however, that all provisions of chapters 11 and 13 are applicable to disabilities under section 1151. Some provisions in those chapters, such as

the presumptions of service connection in 38 U.S.C. §§ 1112 and 1116, clearly pertain solely to the factual determination of service connection and would have no apparent application to awards under section 1151, which do not involve determinations of service connection. Similarly, section 1159 does not authorize an award of compensation or DIC for service-connected disability, but, rather, merely protects determinations regarding the specific factual issue of service connection.

10. The requirement in section 1151 that compensation and DIC be "awarded in the same manner" as if the disability or death were service connected suggests an intent to require application of the provisions of title 38, United States Code, governing the "manner" in which compensation and DIC benefits may be "awarded," i.e., the provisions authorizing awards of compensation or DIC and establishing the manner and form of payment pursuant to such awards. Accordingly, consistent with our prior opinions, we construe section 1151 as providing that statutory provisions authorizing awards and payments of compensation and DIC for service-connected disability or death will generally be applicable to disability or death due to a cause within the scope of section 1151. However, nothing in section 1151 suggests that statutory provisions which pertain solely to the factual determination of service connection and do not themselves authorize awards of compensation or DIC would be applicable for purposes of section 1151. The plain language of section 1151 makes clear that a determination of entitlement under section 1151 does not involve a determination of service connection, but merely provides a basis for awarding benefits "as if" the disability or death were service connected. Accordingly, we believe that section 1151 incorporates only those provisions authorizing compensation or DIC awards for service-connected disability, but not provisions which govern the specific factual determination of service connection.

11. The conclusion that the purpose of section 1151 is to incorporate the provisions of title 38 which authorize awards and payments of compensation and DIC is consistent with the history of that statute. Section 1151 derives from similar provisions originally enacted in Section 213 of the World War Veterans' Act of 1924, ch. 320, 43 Stat. 607, 623, based upon

legislative recommendations from the Disabled American Veterans and the Veterans' Bureau. In testimony before Congress on the proposed legislation, the Director of the Veterans' Bureau stated:

> This is a new princip[le] but one necessary to the very purpose for which the benefits of these acts are accorded. If, in the course of vocational training, the trainee is injured without fault of his own as a result of one of the occupational hazards of the training, there is at present no authority to compensate him for that disability which, of course, has no direct service connection; nor is there authority to give him further vocational training based on that disability. Yet the very purpose of giving vocational training at all may thereby be defeated. Having undertaken to rehabilitate a beneficiary, the latter finds himself, as a result, in worse condition than before.
>
> So also in cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness--things that must sometimes happen--the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit, has, in fact, inflicted a loss.
>
> It is therefore proposed, with proper restrictions safeguarding against double payments of compensation, to authorize in such cases an increase of compensation commensurate with the increased disability.

Hearings before the House Committee on World War Veterans' Legislation, 68th Cong., 1st Sess. 113 (1924). The language of section 213 as enacted was substantially similar to the language of current section 1151 in providing that compensation and DIC "shall be awarded in the same manner" as if the disability or death were service connected. The apparent purpose of that provision was to provide statutory authority to award and pay benefits for disability or death resulting from hospitalization, treatment, or vocational rehabilitation,

whereas no such authority had previously existed. Our conclusion that section 1151 incorporates only those provisions

authorizing awards of compensation and DIC for service-connected disability is consistent with the statute's purpose to authorize awards of benefits for disability or death due to VA hospitalization, treatment, vocational rehabilitation, or examination. There is no indication in the language or history of section 1151 of an intent to adopt any provisions beyond those authorizing awards of compensation and DIC and prescribing the manner and amount of payments pursuant to such awards.

12. Section 1159 does not authorize awards of compensation or DIC, nor does it prescribe the manner and amount of payments of compensation or DIC. Rather, section 1159 establishes a limitation on VA's authority to correct erroneous factual determinations of service connection which have been in force for ten or more years. Because section 1159 pertains solely to the specific factual determination of service connection, and not to the manner of awarding compensation or DIC, we conclude that section 1159 is not applicable to determinations of entitlement to benefits under section 1151.

13. You have asked whether termination of entitlement to benefits under section 1151 would constitute a severance of service connection subject to the requirements of 38 C.F.R. § 3.105(d). Section 3.105(d) establishes standards and procedures governing severance of service connection on the basis of clear and unmistakable error. As explained above, a determination of entitlement to benefits under section 1151 is not based upon a finding of service connection, and provisions relating solely to the factual determination of service connection are generally not applicable to determinations of entitlement to benefits under section 1151. Accordingly, the provisions of section 3.105(d) governing severance of service connection are not applicable to termination of entitlement to benefits under section 1151.

14. Although section 3.105(d) is not applicable in terminating entitlement to benefits under section 1151, the standards and procedures governing termination of section 1151 entitlement are substantially similar to those in section 3.105(d). Pursuant to 38 C.F.R. § 3.105(a), a prior final decision of

entitlement to benefits under section 1151 may be reversed or amended only on the basis of clear and unmistakable error. Under 38 C.F.R. § 3.103(b)(2), VA would be required to provide the beneficiary with notice of the proposed termination and a period of 60 days in which to submit evidence to show that the

action should not be taken. The beneficiary would have the right to request a hearing. 38 C.F.R. § 3.103(c). The only significant difference between termination of entitlement under 38 C.F.R. § 3.105(a) and severance of service connection under section 3.105(d) pertains to the effective date of the discontinuance of benefits. Section 3.105(a) provides that when an award is discontinued pursuant to a determination of clear and unmistakable error, the provisions of 38 C.F.R. § 3.500(b)(2) will apply. Section 3.500(b)(2) provides that a reduction or discontinuance based on a finding of clear and unmistakable error will be the date of the last payment. *See* 38 U.S.C. § 5112(b)(10). Section 3.105(d) provides that when benefits are discontinued due to a severance of service connection, the discontinuance will be effective "the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires." *See* 38 U.S.C. § 5112(b)(6).

HELD:

a. The protection of service connection under 38 U.S.C. § 1159 is not applicable to disabilities compensated under 38 U.S.C. § 1151.

b. Termination of entitlement to benefits under 38 U.S.C. § 1151 is not subject to the requirements of 38 C.F.R. § 3.105(d), regarding severance of service connection, but is subject to similar requirements under 38 C.F.R. §§ 3.103 and 3.105(a).

Mary Lou Keener