

**Department of
Veterans Affairs**

Memorandum

Date: July
VAOPGCPREC 24-97

3,

1997

From: General Counsel (021)

Subj: Special Housing Adaptations for Veteran Receiving Compensation Under Section 1151;

To: Chairman, Board of Veterans Appeals (01)

QUESTION PRESENTED:

Is a veteran who is receiving compensation pursuant to 38 U.S.C. § 1151 due to blindness in both eyes which resulted from the veteran's hospitalization, medical, or surgical treatment by VA, and not incurred or aggravated in the line of duty in the active military, naval, or air service, eligible for a special housing adaptation grant under chapter 21 of title 38, United States Code?

DISCUSSION:

1. In 1985, the veteran suffered a cardiac arrest. After initial treatment at a private hospital, the veteran was transferred to a VA hospital for further treatment. Several different medications were tried without success to treat the veteran's recurrent atrial and ventricular tachycardia and fibrillation. It was then decided to use a drug, amiodarone, which was undergoing investigational studies.

2. Although the amiodarone was apparently successful in treating the veteran's cardiac condition, the veteran began experiencing vision problems. For purposes of this opinion, we need not detail the veteran's continuing treatment by VA or the progressive deterioration of vision. The veteran's C-file clearly documents that the veteran is now totally legally blind in both eyes, and the blindness is a direct result of complications from the use of the drug amiodarone administered by VA.

3. In a decision dated November 4, 1991 (docket number 91-18-738), the Board of Veterans Appeals determined that the veteran was eligible for VA disability compensation pursuant to 38 U.S.C. § 1151 due to the bilateral loss of vision proximately due to VA medical care.

4. On or about August 21, 1992, the veteran applied to the VA Regional Office in Albuquerque, New Mexico, for a special housing adaptation grant. By letter dated October 2, 1992, the Regional Office advised the veteran that he was not eligible for this benefit. The Regional Office stated that the veteran must have a permanent and total disability "incurred in or aggravated by active military service."

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5. The veteran's notice of disagreement was received by the Regional Office on October 29, 1992. The veteran alleges that 38 U.S.C. § 2101(b) "allows this benefit to any veteran entitled to 100% compensation under Chapter 11."

6. Currently, 38 U.S.C. § 1151 provides:

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. . . .

7. Section 422(a) of Public Law 104-204, enacted September 26, 1996, substitutes the following language for the first sentence of section 1151 (quoted above) effective October 1, 1997:

(a) Compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded for a qualifying additional disability or a qualifying death of a veteran in the same manner as if such additional disability or death were service-connected. For purposes of this section, a disability or death is a qualifying additional disability or qualifying death if the disability or death was not the result of the veteran's willful misconduct and--

(1) the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary, either by a Department employee or in a Department facility as defined in section 1701(3)(A) of this title, and the proximate cause of the disability or death was--

(A) carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the Department in furnishing the hospital care, medical or surgical treatment, or examination; or

(B) an event not reasonably foreseeable; or

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(2) the disability or death was proximately caused by the provision of training and rehabilitation services by the Secretary (including by a service-provider used by the Secretary for such purpose under section 3115 of this title) as part of an approved rehabilitation program under chapter 31 of this title.

The amendments to section 1151 will govern administrative and judicial determinations of eligibility for benefits made on or after the effective date of such amendments. Pub. L. 104-204 § 422(b)(2). Thus, these amendments will not affect the instant veteran's eligibility for compensation. They will, however, affect eligibility for compensation of other veterans. As we will explain below, the 1996 amendments will not affect the issue of eligibility for chapter 21 benefits.

8. Under 38 U.S.C. § 2101(b) the Secretary is authorized to

[A]ssist any veteran (other than a veteran who is eligible for assistance under subsection (a) of this section) who is entitled to compensation under chapter 11 of this title for a permanent and total service-connected disability which--

(A) is due to blindness in both eyes with 5/200 visual acuity or less, or

(B) includes the anatomical loss or loss of use of both hands, in acquiring such adaptations to such veteran's residence as are determined by the Secretary to be reasonably necessary because of such disability or in acquiring a residence already adapted with special features determined by the Secretary to be reasonably necessary for the veteran because of such disability.

9. This office has written a number of opinions addressing the interplay between statutes such as 38 U.S.C. § 1151 (formerly § 351) which provide that compensation "shall be awarded [to a veteran or surviving spouse] *in the same manner as if* such disability, aggravation, or death were service-connected" (emphasis added) and statutes such as 38 U.S.C. § 2101(b) that make entitlement for a particular benefit conditioned on the veteran being "entitled to compensation under chapter 11 of this title for a permanent and total *service-connected* disability" (emphasis added). *See:* VAOGCPREC 75-90 (O.G.C. Prec. 75-90); VAOGCPREC 80-90 (O.G.C. Prec. 80-90); VAOGCPREC 100-90 (O.G.C. Prec. 100-90); VAOGCPREC 3-96; and VAOGCPREC 13-96.

10. In an opinion originally dated October 21, 1987, which was reissued as VAOGCPREC 75-90 (O.G.C. Prec. 75-90), this office considered the effect of a veteran being determined eligible for compensation under the paired organ provisions of the former 38 U.S.C. § 360 (now codified as § 1160). Under that

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section, a veteran who has lost or lost the use of one of certain paired organs; *e.g.*, eye, ear, hand, or foot from a service-connected cause, and also lost or lost the use of the other paired organ from a non-service-connected cause not the result of the veteran's willful misconduct, is eligible for compensation "as if the combination of disabilities were . . . service-connected . . ." The opinion noted that former section 360 (now section 1160) "does not confer service-connected status for the non-service-related corresponding organ. Rather, it authorizes VA to pay disability compensation . . . as though the disabilities in combination were service connected." (Emphasis in original.)

11. The opinion reviewed the language and legislative history of what was then 38 U.S.C. § 801(a) (now codified as 38 U.S.C. § 2101(a)) and concluded that in order for a veteran to qualify for specially adapted housing the veteran must have a permanent and total service-connected disability. Even though the veteran receiving benefits under former section 360 was being paid compensation "as if" the entire disability was service connected, in reality the veteran had a service-connected disability in one organ but a non-service-connected disability in the other. Under the "plain meaning" of this statute, the veteran was not entitled to specially adapted housing.

12. That opinion also concluded, using similar reasoning, that the veteran was not eligible for Survivors' and Dependents' Educational Assistance. However, based upon our interpretation of the law governing Dependency and Indemnity Compensation (DIC) benefits discussed in Op. G.C. 5-86, now reissued as VAOGCPREC 80-90 (O.G.C. Prec. 80-90), this office concluded that entitlement for paired-organ compensation would provide eligibility for DIC benefits if the other requirements for DIC benefits were met.

13. As noted above, VAOGCPREC 80-90 (O.G.C. Prec. 80-90) considered whether the surviving spouse of a veteran granted compensation "as if" service connected based on VA medical or surgical treatment under the former section 351 (now section 1151) could qualify for DIC benefits. The opinion concluded the spouse could qualify. That opinion discusses at length principles of statutory construction regarding statutes *in pari materia*. Such statutes involve the same matter or subject or have a common purpose. They are intended to be construed together.

14. The opinion also contains the following very broad dicta: "Both the language and history of . . . [former section 351] make clear that Congress intended that all 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." (Emphasis in original.) That opinion

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did not define or discuss what is meant by the phrase “all veterans’ monetary benefits.”

15. VAOGCPREC 100-90 (O.G.C. Prec. 100-90), which is referenced in your memorandum requesting this opinion, dealt with the issue of whether a veteran eligible for compensation under the former section 351 could also qualify for a clothing allowance under the former 38 U.S.C. § 362 (now § 1162). Relying on the principles of statutory construction stated in VAOGCPREC 80-90 (O.G.C. Prec. 80-90), this office concluded that veterans receiving section 351 compensation could qualify for the clothing allowance. It was noted that previously the former section 362 had at one time provided that the clothing allowance could be paid, under certain circumstances, to anyone eligible for compensation under chapter 11 of title 38, United States Code. In 1989 the Congress amended section 362 by, *inter alia*, deleting the reference to compensation under chapter 11 and substituting compensation “because of a service-connected disability.”

16. The question of whether the dependents of a veteran receiving compensation “as if” the total disability was service connected under the paired-organ statute, 38 U.S.C. § 1160, were eligible for CHAMPVA medical benefits was addressed in VAOPGCCONCL 3-96. This office concluded they were not. In reviewing the issue, that opinion reiterated the conclusion of VAOPGCPREC 75-90 that benefits awarded under section 1160 do not establish eligibility for specially adapted housing.

17. Finally, in VAOPGCPREC 13-96 this office concluded that the protection of a determination of service connection under 38 U.S.C. § 1159 does not apply to compensation under 38 U.S.C. § 1151. That opinion concluded that section 1151 did not extend beyond authorizing monetary awards under chapters 11 and 13 as if certain disabilities or death were service connected. There was no intent to confer actual service connection to such injuries, or grant the veteran any right beyond receiving payments under those chapters.

18. In construing opinions 80-90 and 100-90, we believe it is important to recall that former section 351, and the current section 1151, provide that if the requisite injury occurs, “disability or death *compensation under this chapter and dependency and indemnity compensation under chapter 13* of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.” (Emphasis added.) The amendments to section 1151 set to take effect October 1, 1997, contain substantially identical language. The plain language of section 1151 clearly mandates that if a veteran’s injury or death falls within the ambit of section 1151, *any* chapter 11 benefit that provides some form of compensation for disability or death of a veteran, as well as DIC under chapter

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13, will be provided to the veteran as though such injury or death was service connected. Both sections 1151 and 1162 are in chapter 11 of title 38 (as were former sections 351 and 362). Therefore, since section 1162 compensates certain veterans whose service-connected disabilities unduly damage their clothing, veterans with similar disabilities resulting from VA medical treatment will receive the same clothing allowance "as if" the disability had been service connected. Likewise, the surviving spouse of a veteran who received compensation under section 1151 would qualify for DIC benefits under chapter 13 "as if" the compensation had been for a service-connected disability, provided all other qualifications for DIC are met.

19. On the other hand, special housing adaptations are provided for in chapter 21 of title 38. It is a well accepted legal maxim that *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of others. *See*: 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed.). By specifying that chapter 11 and 13 benefits are to be provided "as if" certain disabilities were service connected, section 1151 would appear to exclude treating such disabilities "as if" they were service connected for purposes of benefits provided for in any other chapters of title 38, or any other law, unless such law clearly provides otherwise.

20. Our view is reinforced by 38 U.S.C. § 1710, which specifies who is eligible for VA hospital care, medical services, and nursing home care. This section, which is located in chapter 17, specifically provides for veterans receiving compensation under section 1151. 38 U.S.C. § 1710(a)(2)(C). If the Congress had intended that veterans entitled to compensation under section 1151 were to be treated as though the disability were service connected for all VA benefits, paragraph (2)(C) of section 1710(a) would have been unnecessary.

21. In order to qualify for special housing adaptations under chapter 21, a veteran must be entitled to compensation for a qualifying "permanent and total *service-connected disability*." 38 U.S.C. § 2101(b). As the opinions we have discussed clearly hold, the instant veteran has a total and permanent disability due to blindness and is eligible for compensation under chapter 11 "as if" it were service connected, but the veteran does not have a service-connected disability. Therefore, the veteran does not meet the statutory prerequisite for special housing adaptations. As this office discussed in VAOGCPREC 75-90 (O.G.C. Prec. 75-90), nothing in the legislative history of chapter 21 suggests a congressional intent to overcome the plain meaning of the statute.

22. There are references in the documents you forwarded for our review that the veteran was seeking either specially adapted housing or special housing adaptations. It is our understanding that "specially adapted housing" normally

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refers to the benefit described in subsection (a) of 38 U.S.C. §§ 2101-2102. In order to qualify for specially adapted housing the veteran must be “entitled to compensation under chapter 11 of . . . title [38, United States Code] for [certain] permanent and total service-connected disability[ies]” involving the lower extremities. 38 U.S.C. § 2101(a). One qualifying disability “includes (A) blindness in both eyes, having only light perception, plus (B) loss or loss of use of one lower extremity” 38 U.S.C. § 2101(a)(2). “Special housing adaptations” generally refers to the benefit described in subsection (b) of §§ 2101-2102. Because we find no determination in the material you provided us that the veteran has been found eligible for compensation for the loss or loss of use of a lower extremity, it does not appear that the veteran would qualify for specially adapted housing, even if the veteran’s blindness were service connected. Both subsections (a) and (b) of section 2101 require that the qualifying disabilities be service connected. Accordingly, our conclusion that special housing adaptations may not be awarded to a veteran whose qualifying disability resulted from VA medical care rather than military service would apply equally to specially adapted housing.

23. The rationale of this opinion would equally apply to other non-chapter 11 or 13 benefits such as automobiles and adaptive equipment under chapter 39 of title 38 where eligibility is conditioned on the veteran having a service-connected condition, unless the statute or legislative history clearly and unambiguously provided otherwise.

HELD:

A veteran with a disability that resulted from VA hospitalization or medical or surgical treatment who has been determined eligible for compensation “as if” such injury were service connected pursuant to 38 U.S.C. § 1151 is not eligible for a special housing adaptation grant as a result of the disability caused by VA medical care.

Mary Lou Keener