Date: February 10, 1998 VAOPGCPREC 2-98

From: Acting General Counsel (022)

Subj: Benefits Based on Service-Connected Disability or Death--Disabilities Resulting from Alcohol or Drug Abuse--Pub. L. No. 101-508, § 8052

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

a. For claims filed after October 31, 1990, based on service connection of disability or death resulting from a veteran's own alcohol or drug abuse, does section 8052 of the Omnibus Budget Reconciliation Act of 1990 preclude entitlement to the following benefits:

(1) Dependents' educational assistance under 38 U.S.C. ch. 35?

(2) Burial benefits?

(3) Accrued benefits?

(4) Surviving spouses' loan guaranty benefits under 38 C.F.R. § 3.805?

(5) The special allowance under 38 U.S.C. § 1312?

(6) Medical care under the Department of Veterans Affairs Civilian Health and Medical Program (CHAMPVA)?

b. If, based on a claim filed on or before October 31, 1990, service connection has been established for a disability that resulted from a veteran's own alcohol or drug abuse, what effect does section 8052 of the Omnibus Budget Reconciliation Act of 1990 have on a claim for an increased rating filed after 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, made two amendments to statutes governing entitlement to Department of Veterans Affairs (VA) benefits. First, section 8052(a)(1) amended 38 U.S.C. § 105(a) to provide that 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." Second, section 8052(a)(2) and (3) amended former 38 U.S.C. §§ 310 and 331 (now designated §§ 1110 and 1131) to prohibit payment of compensation for any disability that is "a result of the veteran's own . . . abuse of alcohol or drugs." These two amendments apply "to claims filed after October 31, 1990." OBRA 1990 § 8052(b), 104 Stat. at 1388-351. (Throughout this opinion, comments refer to claims filed after October 31, 1990, unless specified otherwise.)

2. Pursuant to section 8052(a)(2) and (3), 38 U.S.C. §§ 1110 and 1131, which state that "no compensation shall be paid if the disability is a result of the veteran's own . . . abuse of alcohol or drugs," plainly and unambiguously prohibit the payment of compensation for a disability that is a result of a veteran's own alcohol or drug abuse (for convenience, in this opinion called a "substance-abuse disability"). Moreover, they prohibit compensation for a substance-abuse disability regardless of the theory on which service connection is claimed, viz., whether a claimant seeks to establish service connection on the grounds that a substance-abuse disability was incurred or aggravated in service ("direct service connection") or on the grounds that the disability is proximately due to or the result of a service-connected disease or injury (service connection under 38 C.F.R. § 3.310(a) of a secondary disability or "secondary service connection"). VAOPGCPREC 2-97. One example of the latter type of claim (service connection on a secondary basis) would involve a veteran whose service-connected psychiatric disability caused him to become a drug abuser.

3. As amended by section 8052(a)(1) and interpreted by VA through 38 C.F.R. § 3.1(m), 38 U.S.C. § 105(a) precludes a finding that an injury or disease resulting from a person's own alcohol or drug abuse was incurred or aggravated in line of duty. Since a service-connected disability is one in-curred or aggravated in line of duty, a substance-abuse disability cannot be service connected on the basis of its incurrence or aggravation in service. *See* VAOPGCPREC 11-96; 38 U.S.C. § 101(16); 38 C.F.R. § 3.1(k).

4. To determine whether section 8052 affects entitlement to the various benefits administered by this Department, eligibility for which is based on a service-connected disability or death, we begin by examining 38 U.S.C. § 105 itself and its context. Subsections (a) and (b) of section 105 establish criteria for line-of-duty determinations without specifying that those determinations pertain to eligibility for any particular type of benefits. Both of these subsections contain a general reference to "the person on whose account *benefits* are claimed" (emphasis added), again without limiting their applicability to any particular type of benefits. Subsection (c), which refers specifically to education and rehabilitation benefits, suggests that the section as a whole was viewed by Congress as having broader applicability than merely to claims for disability compensation or death benefits.

5. Section 105 is located in "Chapter 1--General" of "Part I--General Provisions" in title 38, United States Code. Furthermore, despite section 8052(a)'s heading of "Elimination of Compensation in Certain Cases," of the six subtitles in the OBRA 1990's "Title VIII--Veterans' Programs," section 8052 is in "Subtitle F--Miscellaneous," rather than the other subtitles, which relate to specific benefit programs, such as "Subtitle A--Compensation, DIC [dependency and indemnity compensation], and Pension." 104 Stat. at 1388-341. Section 105(a)'s applicability to all of title 38 and section 8052's designation as a miscellaneous provision suggest that Congress intended the line-of-duty preclusion for alcohol and drug abuse to apply to line-of-duty determinations for purposes of any title 38 benefit, not only to determinations made for compensation purposes. Either interpretation of section 105(a) (applicability to all title 38 benefits or applicability only to compensation) would be consistent with the overall purpose of the OBRA 1990, which was to reconcile the fiscal year 1991 budget, 104 Stat. at 1388, since either interpretation would reduce spending on veterans' programs.

6. Next, we turn to the legislative history of the OBRA 1990. A budget reconciliation provision considered in the House would have amended former 38 U.S.C. §§ 310, 331, and 521 (redesignated as §§ 1110, 1131, and 1521) "to preclude payments of compensation or pension for misconduct disabilities, including their secondary effects." H.R.

Rep. No. 881, 101st Cong., 2d Sess. 223 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2227. The amendment to the line-of-duty statute derived from a Senate amendment, which, when adopted in conference, was described as providing "that injuries or diseases incurred during service as a result of willful misconduct or the abuse of alcohol or drugs will not be considered incurred in the line of duty and thus would not be compensated by VA as a service-connected disability." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 997 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2702. The legislative history clearly expresses an intent to preclude compensation for disability resulting from a substance-abuse injury or disease incurred during service, but is silent as to benefits other than disability compensation, eligibility for which is based on service-connected disability or death. However, this legislative history does not, in our view, provide the clear expression of intent required to overcome the plain meaning of statutory language. *See Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 135-36 (1991) (plain language of statute is controlling absent a clear showing of contrary legislative intent).

7. In view of the foregoing, the most natural construction of section 105(a) is that it precludes a determination that an injury or disease resulting from alcohol or drug abuse was incurred in line of duty for purposes of all title 38 benefits and that it precludes direct service connection of a substance-abuse disability for purposes of such benefits.

8. As indicated above, 38 U.S.C. §§ 1110 and 1131, as amended by section 8052(a)(2) and (3) of the OBRA 1990, prohibit the payment of compensation for a substance-abuse disability independently of the line-of-duty preclusion and resultant preclusion of direct service connection stemming from section 105(a), as amended. Thus, sections 1110 and 1131 prohibit compensation for a substance-abuse disability regardless of whether service connection is claimed on a direct or secondary basis. However, section 8052 did not amend other statutes to prohibit, independently of the line-of-duty preclusion, the provision of other benefits based on a substance-abuse disability or death. This raises another issue: whether benefits other than disability compensation may be provided on the basis of a secondary

substance-abuse disability service connected under 38 C.F.R. § 3.310(a).

9. This issue gives rise to a preliminary question as to whether a secondary disability service connected under 38 C.F.R. § 3.310(a) may be considered service connected for purposes of benefits other than disability compensation. The authority citation for section 3.310 references sections 1110 and 1131, along with the general rulemaking authority of 38 U.S.C. § 501. Further, section 3.310 is located in "Subpart A--Pension, Compensation, and Dependency and Indemnity Compensation" of part 3, title 38, Code of Federal Regulations. These facts do not, however, necessarily limit the applicability of section 3.310(a) to compensation. *See* VAOPGCADV 9-97 (several regulations in 38 C.F.R. pt. 3, subpt. A, apply to CHAMPVA because they implement general statutory provisions applicable to all benefits
under title 38, United States Code). In fact, the provision's history indicates that the provision was intended to have a broader application.

10. A regulation authorizing compensation for a disability developing subsequent to military service which was proximately due to or the natural progress of a service-connected injury or disease first appeared in Veterans' Bureau regulations in 1930. Veterans' Bureau Regulations, Adjudication, para. 1103 (1930). In 1933, an instruction to Veterans Regulation No. 3(a) was issued designating as "pensionable" disability which was proximately due to or the result of a service-connected disease or injury and further providing that, "[w]hen service connection is thus established for a secondary condition, the secondary condition will be considered a part of the original condition for all purposes, i.e., for determinations regarding rights on account of combat, etc." Veterans Regulation No. 3(a), Instruction No. 1, (June 24, 1933). The example pertaining to "rights on account of combat" was dropped when the provision was incorporated in regulations. Veterans' Administration Regulations, para. 1101 (Jan. 25, 1936) (codified in substantially the same form in 38 C.F.R. § 3.101 (1949)).

11. Consideration of the secondary condition as "a part of the original condition" appears to mean that the service-

connected status of the secondary condition is equivalent to such status established on the ground of direct service connection. Further, the reference to "all purposes" suggests that the secondary condition would be considered service connected for purposes of all benefits administered by the agency. Although the words "for all purposes" were dropped when the provision was recodified in substantially its current form in 1961, the recodification project of which the 1961 amendment was a part, *see* Compensation and Pension Transmittal Sheet 209 (Feb. 24, 1961), was described as a restatement of existing regulations for simplicity. Compensation and Pension Transmittal Sheet 189 (May 29, 1959). Thus, it appears that no substantive change from the prior provision was intended to be made by the 1961 restatement. In addition, the United States Court of Veterans Appeals has indicated that it considers secondary service connection to be applicable to benefits other than those listed in the heading of 38 C.F.R. pt. 3, subpt. A. *Allen v. Brown*, 7 Vet. App. 439, 449 (1995) (because a secondarily service-connected disability becomes a part of the original service-connected condition, "there is no question that health care under chapter 17 would be available to the veteran for that [secondary] disability as part of the original service-connected condition"). Accordingly, we conclude that a secondary disability service connected under section 3.310(a) may be considered service connected for purposes of all benefits administered by VA.

12. Having concluded that service connection established under 38 C.F.R. § 3.310(a) applies for purposes of all VA benefits, we next consider whether section 105(a) as amended by section 8052(a)(1) precludes service connection under 38 C.F.R. § 3.310(a) of a *secondary* substance-abuse disability. The statutory terms of section 105(a) strongly suggest that that provision does not restrict secondary service connection of a substance-abuse disability. Section 105(a) refers to "injury or disease incurred during active . . . service" and to status of active duty or authorized leave "at the time the injury was suffered or disease contracted." Section 3.310(a) does not require that a secondary disability have been incurred or aggravated in line of duty to be service connected. That regulation requires only that the secondary disability be proximately due to or the result of a disease or injury that was incurred or aggravated in line of duty in active service.

Thus, on its face, section 105(a) appears to preclude only direct, not secondary, service connection of a substance-abuse disability.

13. The legislative history does not indicate an intent contrary to the plain meaning of the statutory terms. It does clearly show that Congress, when drafting section 8052, was aware of secondary service connection, for the committee reports on the legislation repeatedly mention the secondary effects of certain conduct. H.R. Rep. No. 881, 101st Cong., 2d Sess. 223 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2227; H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 996-97 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2701-02. Thus, the absence of any reference to secondary service connection in the provision enacted may be read as implying a decision not to preclude secondary service connection of substance-abuse disabilities for purposes of benefits other than compensation, which as addressed in VAOPGCPREC 2-97 was dealt with through the amendment of 38 U.S.C. §§ 1110 and 1131. In any event, the legislative history does not provide clear evidence of contrary legislative intent which might justify departure from the plain meaning of the terms of section 105(a), as amended. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

14. Section 105(a), as amended by the OBRA 1990, precludes a determination that an injury or disease resulting from a person's own alcohol or drug abuse was incurred in line of duty and therefore precludes direct service connection of a substance-abuse disability, for purposes of all title 38 benefits. However, in view of the foregoing, we find that section 105(a) is inapplicable to a determination of whether a disability is proximately due to or the result of a service-connected disease or injury and, therefore, does not itself preclude secondary service connection of a substance-abuse disability.[1]

---

[1] In VAOPGCPREC 11-96, we held that the amendments made by section 8052 of the OBRA 1990 prohibit the payment of DIC based on a veteran's death resulting from a substance-abuse disability or on the basis of a veteran's entitlement to receive compensation for a substance-abuse disability continuously rated totally disabling for an extended period preceding death. Those conclusions were based on sec-

Dependents' Educational Assistance

15. Section 3510 of title 38, United States Code, entitles each "eligible person" to educational assistance. The term "eligible person" includes a child or the surviving spouse of a veteran who died of a service-connected disability, a child or the surviving spouse of a veteran who died while having a service-connected disability evaluated as total and permanent in nature, and a child or the spouse of a veteran or service-member who has a permanent, total service-connected disability. 38 U.S.C. § 3501(a)(1); 38 C.F.R. §§ 3.807(a), 21.3021(a). In these instances, eligibility for dependents' educational assistance under 38 U.S.C. ch. 35 requires a service-connected disability or a death resulting from a service-connected disability. In our opinion, for purposes of establishing eligibility in these instances, a substance-abuse disability may be considered a service-connected disability only if the substance-abuse disability can be service connected under 38 C.F.R. § 3.310(a) as a disability proximately due to or the result of a service-connected disease or injury.

Burial Benefits

16. Chapter 23 of title 38, United States Code, authorizes various burial benefits. Service-connected disability or death or incurrence or aggravation of disability in line of duty is a component of eligibility for many of them, specifically: a flag to drape the casket of a deceased veteran awarded on the basis that the veteran had been discharged or released from active service for a disability incurred or aggravated in line of duty, 38 U.S.C. § 2301(a)(1)(C); 38 C.F.R. § 1.10(a)(1)(ii); an allowance

---

tion 8052's amendment to section 105(a) and the resultant preclusion of direct service connection for a substance-abuse disability. We did not, however, consider secondary service connection in VAOPGCPREC 11-96. Our conclusions that a disability service connected under 38 C.F.R. § 3.310(a) is service connected for purposes of all VA benefits and that 38 U.S.C. § 105(a) does not itself preclude secondary service connection of a substance-abuse disability apply to claims for DIC as well as to claims for the other VA benefits discussed in this opinion.

to cover the burial and funeral expenses of a veteran who at the time of death was in receipt of compensation (or who would have been in receipt of compensation but for receipt of retired pay) or of certain wartime veterans who were discharged or released from active service for a disability incurred or aggravated in line of duty, 38 U.S.C. § 2302(a); 38 C.F.R. § 3.1600(b); an allowance to cover the burial and funeral expenses and transportation of the body of a veteran who died in a certain type of facility to which he or she was properly admitted for specified kinds of care, if care was being provided on the basis that the veteran had a service-connected disability or was discharged or released from active service for a disability incurred or aggravated in line of duty, 38 U.S.C. §§ 2303(a), 1710(a); 38 C.F.R. § 3.1600(c); a plot or interment allowance for certain veterans who were in receipt of compensation at the time of death or were discharged from active service for a disability incurred or aggravated in line of duty, 38 U.S.C. § 2303(b); 38 C.F.R. § 3.1600(f); an allowance to cover the burial and funeral expenses of a veteran who died as a result of a service-connected disability or disabilities, 38 U.S.C. § 2307; 38 C.F.R. § 3.1600(a); and an allowance to cover the cost of transporting to a national cemetery the body of a veteran who died as the result of a service-connected disability or at the time of death was in receipt of disability compensation (or would have been but for the receipt of military retired pay), 38 U.S.C. § 2308; 38 C.F.R. § 3.1600(g). Under our interpretation of section 8052, a substance-abuse disability may be considered a service-connected disability for purposes of establishing eligibility for chapter 23 burial benefits only if the substance-abuse disability can be service connected under

section 3.310(a). Further, section 105(a) would serve as a bar to any burial benefit eligibility for which is based on disability incurred or aggravated in line of duty, if the disability on which the claim is based is a substance-abuse disability.

Accrued Benefits

17. Periodic monetary benefits under laws administered by VA to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in

the file at the date of death, and due and unpaid for a period not to exceed two years, are payable upon the individual's death to certain specified individuals. 38 U.S.C. § 5121(a); 38 C.F.R. § 3.1000(a). The periodic monetary benefits subject to payment under those provisions include benefits such as disability compensation and DIC, eligibility for which is generally based on a service-connected disability or death. A claim for any periodic monetary benefit filed after October 31, 1990, is itself subject to the limitations imposed by section 8052(a) of the OBRA 1990. If section 8052(a) bars entitlement to the periodic monetary benefit itself, then no benefit accrues to be claimed after death.

18. However, a situation may arise in which a claim for a periodic monetary benefit was filed on or before October 31, 1990, and the benefit was legally awarded on the basis of a service-connected substance-abuse disability, but a claim for accrued benefits was filed after October 31, 1990. Our analysis in VAOPGCPREC 11-96, of a pre-October 31, 1990, disability compensation claim and a post-October 31, 1990, DIC claim, suggests that an accrued-benefits claim must be compared to a claim for the underlying periodic monetary benefit to determine whether the accrued-benefits claim should be treated as a separate claim for purposes of section 8052.

19. We note, first, that, to establish entitlement to accrued benefits, a claim must be filed within one year after the date of death. 38 U.S.C. § 5121(c); 38 C.F.R. § 3.1000(c). Second, the statute authorizing the payment of accrued benefits, section 5121, is distinct from the statutes authorizing the various periodic monetary benefits. Third, establishing entitlement to accrued benefits requires the meeting of criteria in addition to those required for the underlying periodic monetary benefit, such as the death of the individual entitled to the underlying benefit or entitlement based on existing ratings or decisions and evidence to establish membership in a category of potential beneficiaries and order of precedence among potential beneficiaries. 38 U.S.C. § 5121(a); 38 C.F.R. § 3.1000(a). Thus, despite the connection between an accrued-benefits claim and a claim for the underlying benefit, an accrued-

benefits claim is, in our opinion, a distinct claim which must be considered a separate claim for purposes of section 8052. *See Zevalkink v. Brown*, 102 F.3d 1236, 1241 (Fed. Cir. 1996) (although an accrued-benefits claim is derivative of a veteran's claim for service connection, "[a] claim for accrued benefits under [section] 5121 . . . is a separate claim from the veteran's claim for service connection because it is based on a separate statutory entitlement for which an application must be filed in order to receive benefits").

20. We therefore conclude that an accrued-benefits claim filed after October 31, 1990, is subject to the section 8052(a) limitations regardless of the establishment of service connection for a substance-abuse disability or death resulting from a substance-abuse disability based on a claim filed before that date. Sections 1110 and 1131 of title 38, United States Code, bar payment of a claim for accrued disability compensation for a substance-abuse disability, if the accrued-benefits claim was filed after October 31, 1990. If the accrued-benefits claim is for an underlying benefit other than compensation, then a substance-abuse disability may be considered service connected for purposes of establishing eligibility to accrued benefits only if the disability can be service connected under section 3.310(a).

Surviving Spouses' Loan Guaranty

21. Among the veterans who are eligible for housing-loan benefits under 38 U.S.C. ch. 37 are veterans who were, after September 15, 1940, discharged or released from a period of active duty for a service-connected disability. 38 U.S.C. § 3702(a)(2)(B). Chapter 37 housing-loan benefits are also available to the surviving spouse of a veteran who died from a service-connected disability, if the surviving spouse is not eligible in his or her own right. 38 U.S.C. § 3701(b)(2); 38 C.F.R. § 3.805(c). A substance-abuse disability may be considered a service-connected disability for purposes of establishing eligibility for housing-loan benefits under chapter 37 only if the disability can be service connected under section 3.310(a). However, the existence of a substance-abuse disability that was incurred or aggravated in service would not bar a veteran from es-

tablishing eligibility under one of the alternative bases provided in 38 U.S.C. § 3702(a)(2), e.g., service of ninety days or more by veterans of specified wars.

Special Allowance Under 38 U.S.C. § 1312(a)

22. A special allowance is payable to the survivors of certain veterans who die while in service or as the result of a service-connected disability incurred after September 15, 1940, and who were not fully and currently insured individuals under title II of the Social Security Act. 38 U.S.C. § 1312(a); 38 C.F.R. § 3.804(e)(1). A substance-abuse disability may be considered a service-connected disability for purposes of establishing eligibility for the special allowance only if the disability can be service connected under section 3.310(a).

CHAMPVA

23. VA may provide medical care for the spouse or child of a veteran who has a total disability permanent in nature resulting from a service-connected disability; for the surviving spouse or child of a veteran who died as a result of a service-connected disability or who, at the time of death, had a total disability permanent in nature resulting from a service-connected disability; and for the surviving spouse or child of a person who died in active service in line of duty and not due to such person's misconduct, if the spouse or child is not otherwise eligible for medical care under 10 U.S.C. ch. 55. 38 U.S.C. § 1713(a); 38 C.F.R. § 17.84(a). A substance-abuse disability may be considered a service-connected disability for purposes of establishing eligibility for medical care under 38 U.S.C. § 1713(a) only if the substance-abuse disability can be service connected under section 3.310(a). Further, section 105(a) would serve as a bar to benefits under section 1713(a) based on death in active service in line of duty, if death resulted from the servicemember's abuse of alcohol or drugs.

Increased Rating

24. The request for opinion asks what effect section 8052 of the OBRA 1990 has on a claim for an increased disability

rating for a substance-abuse disability for which service connection was properly established in a claim filed on or before October 31, 1990. In contrast to DIC claims and

accrued-benefits claims discussed above, an increased-rating claim involves the same claimant, the same benefit, and the same general authorizing statutes as the original compensation claim on which the award sought to be increased was based. Generally, even the same criteria will be applied in determining the level of benefits to which the claimant is entitled. Nevertheless, the similarity between original compensation and increased-rating claims is, in our opinion, insufficient to render an increased-rating claim filed after October 31, 1990, outside the scope of the limitations imposed by section 8052(a).

25. We find no indication in either section 8052's language or legislative history that Congress intended to except an increased-rating claim from the application of section 8052. Furthermore, in establishing standards governing effective dates of awards, Congress has recognized a distinction between original claims and claims for increase. *See* 38 U.S.C. § 5110(a). VA, in its regulations, also maintains a distinction between original claims and claims for increase, even though both types of claims may be treated in the same manner under particular rules. *See* 38 C.F.R. §§ 3.114(a) (effective-date provision governing increase based on liberalizing law or VA issue applicable to both original claims and claims for increase), 3.157(a) (in case of examination or hospitalization report constituting an informal claim, claim for increase subject to additional requirements) and (b) (receipt of certain evidence can constitute an informal claim for increase after action has been taken on a formal (original) claim), 3.158(a) (either original claim or claim for increase considered abandoned if requested information is not forthcoming), 3.160(b) and (f) (defining "original claim" and "claim for increase," respectively), 3.326(a) (provision governing VA examinations with regard to wellgrounded claims applicable to both original claims and claims for increase), and 3.655(b) (if claimant fails to report for scheduled examination, original compensation claim is decided on evidence of record, but claim for increase is denied).

26. The statutory and regulatory references to original claims and claims for increase as distinct entities, and particularly Congress' recognition of claims for increase as a distinct category of claims, indicate that claims for increase must be considered distinct from prior original claims for purposes of application of the effective date provision of section 8052(b), regardless of whether service connection of a substance-abuse disability has been properly established in a claim filed on or before October 31, 1990. An increased-rating claim is a claim for increase. *See* 38 C.F.R. § 3.106(f). Accordingly, we conclude that increased-rating claims filed after October 31, 1990, are subject to section 8052's limitations regardless of when the original claim was filed giving rise to the benefit an increase in which is sought.

27. Turning to application of the amendments made by section 8052(a) to increased-rating claims, we note that, generally, an increased-rating claim concerns the evaluation of a disability for which service connection has already been established. The issue of whether a disability was incurred or aggravated in line of duty will already have been decided in connection with an earlier claim. In our view, by making the section-8052 amendments effective with respect to claims filed after October 31, 1990, Congress intended that VA not subsequently reopen matters decided in claims filed on or before that date. In contrast to the issue of increased rating, which requires evaluation of the current level of disability, a matter not decided in the original claim, the issue of whether an injury or disease was incurred or aggravated in line of duty would have been resolved in the prior claim and, if that prior claim was filed on or before October 31, 1990, would not be subject to the amendment to
38 U.S.C. § 105(a) made by section 8052 of the OBRA 1990.

28. Occasionally, an increased-rating claim does involve a service connection determination. This circumstance could arise when a higher rating is claimed on the basis of impairments that may be related to an existing service-connected disability, e.g., arthritis allegedly associated with a service-connected traumatic joint injury. Compensation may not be provided for disability distinct from the original service-connected disability unless the distinct disability is itself service connected. Such an increased-

rating claim would involve an original compensation claim for the additional disability, which would be subject to the requirements governing line of duty. If the additional disability is a substance-abuse disability, section 105(a) would preclude establishment of direct service connection for that disability. Furthermore, even if the additional disability could be service connected under section 3.310(a) as proximately due to or the result of a service-connected disease or injury, 38 U.S.C. §§ 1110 and 1131 prohibit the payment of compensation for a substance-abuse disability whether directly or secondarily service connected. VAOPGCPREC 2-97. The line-of-duty preclusion would not affect service connection of the original disability, since service connection for that disability was established in a claim filed on or before October 31, 1990.

29. The amendments to 38 U.S.C. §§ 1110 and 1131 made by section 8052(a), providing that "no compensation shall be paid" for a substance-abuse disability, also apply only with respect to claims filed after October 31, 1990. Since a claim for increase is a distinct claim from the original claim on which the underlying benefit was awarded, the amendments to sections 1110 and 1131 would apply to a claim for increase, including an increased-rating claim, filed after October 31, 1990. Because an increased-rating claim filed after that date opens the issue of the correct current degree of disability resulting from a particular disease or injury, an issue which, as noted above, would not have been resolved in any claim filed prior to the 1990 amendments, the question then arises whether the amendments to sections 1110 and 1131 bar payment of any compensation based on a rating determined in connection with such an increased-rating claim, be it higher, lower, or the same as that assigned previously.

30. It appears that the effective date provision of section 8052(b) of the OBRA 1990 was intended to leave undisturbed awards of benefits for substance-abuse disabilities made in connection with claims filed on or before October 31, 1990, so long as factually supported. However, in light of regulatory provisions at 38 C.F.R. § 3.157 which authorize consideration of a report of VA medical examination or treatment as an informal claim for increase, a veteran may reopen the issue of level of disability for a substance-abuse disability merely by seeking treatment for

that or other disabilities for which he or she is entitled to medical treatment from VA. A medical report evaluating the substance-abuse disability, alone or in connection with other disabilities, might serve to trigger reevaluation of the level of disability attributable to the substance-abuse disability, thereby subjecting the veteran to loss of all benefits for the substance-abuse disability, if the amended provisions of section 1110 or 1131 were interpreted to bar any compensation based on an evaluation made in connection with a claim filed after October 31, 1990. Such a result might discourage veterans from seeking medical care to which they are legitimately entitled and would run counter to what we believe to be Congress' intention in enacting section 8052(b) of the OBRA 1990. Accordingly, in our view, the 1990 amendments to sections 1110 and 1131 should not be so interpreted.

31. We believe another interpretation of sections 1110 and 1131 as amended would better effectuate Congress' apparent intention in enacting section 8052(b). That interpretation is that sections 1110 and 1131 prohibit any increase in compensation, based on a claim filed after October 31, 1990, but do not otherwise affect an award established on the basis of a claim filed on or before October 31, 1990, so long as factually supported. Thus, sections 1110 and 1131 would not prohibit the appropriate continuation or reduction in a compensation award warranted by the facts, in connection with a claim for increase arising after October 31, 1990. Once such a reduction is made, however, sections 1110 and 1131 would prohibit any increase in compensation above the reduced level based on a claim filed after October 31, 1990.

32. We note that section 8052 of the OBRA 1990 would also affect a claim for increase other than an increased-rating claim, such as a claim under 38 U.S.C. § 1115 for additional compensation based on acquisition of a dependent, in the same manner. If the disability in question is a substance-abuse disability, the amendments made to 38 U.S.C. §§ 1110 and 1131 by section 8052(a) would prohibit the award of any additional compensation on the basis of a claim filed after October 31, 1990. Those amendments do not, however, affect the continued payment of any compensation based on a claim filed on or before October 31, 1990, nor would they prohibit a reduction of a compensation award in accordance with

the facts. Furthermore, they would not affect any increase in compensation that would automatically become effective without the filing of a claim, such as a statutory increase in the rates of compensation paid for the various levels of disability.

HELD:

a. With respect to claims filed after October 31, 1990, 38 U.S.C. § 105(a), as amended by section 8052(a)(1) of the Omnibus Budget Reconciliation Act of 1990 and implemented by 38 C.F.R. § 3.1(m), precludes, for purposes of all VA benefits, a finding that an injury or disease that was a result of a person's own alcohol or drug abuse was incurred or aggravated in line of duty. Thus, for purposes of all VA benefits, eligibility for which requires a service-connected disability or death, section 105(a) precludes service connection of a disability resulting from alcohol or drug abuse on the basis of the disability's incurrence or aggravation in service or of a death resulting from such a disability. However, for purposes of all such VA benefits other than disability compensation, the amendments made by section 8052 do not preclude eligibility based on a disability, or death resulting from such a disability, secondarily service connected under 38 C.F.R. § 3.310(a) as proximately due to or the result of a service-connected disease or injury.

b. Claims for increase filed after October 31, 1990, are subject to the amendments made by section 8052(a) of the Omnibus Budget Reconciliation Act of 1990. If, based on a claim filed on or before October 31, 1990, service connection has been established for a disability that resulted from a veteran's own alcohol or drug abuse, 38 U.S.C. §§ 1110 and 1131, as amended by section 8052(a), prohibit the payment of any increase in compensation for that disability, based on a claim for increase filed after October 31, 1990, including, for example, a claim for an increased rating or a claim for increase based on acquisition of a dependent. Sections 1110 and 1131 do not, however, prohibit continuation or reduction, in accordance with the facts, of an award of compensation for the disability established on the basis of a claim filed on or before that date. Further, sections 1110 and 1131 do not prohibit payment of an increase in compensation, such as a cost-of-

living adjustment, that would become effective without the filing of a claim.

Robert E. Coy