Department of Veterans Affairs

Memorandum

Date: October 2, 1998 VAOPGCPREC 14-98

From: Acting General Counsel (022)

Subj: Issues Raised by Joint Remand Motion: Presumption of Aggravation for Chronic Diseases; Removal of Documents from Claims File; Validity of 38 C.F.R. § 20.903

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

QUESTIONS PRESENTED:

a(1). Does 38 U.S.C. § 1112(a) establish a presumption of aggravation for a chronic disease which existed prior to service but was first shown to a compensable degree within the presumptive period following service?

a(2). If it does, must the incremental degree of disability allegedly resulting from aggravation first shown during the presumptive period be itself compensable, or may aggravation be found by combining the degree of preservice disability with the degree of disability first presented during the presumptive period?

b. Is it lawful for an employee of the Board of Veterans' Affairs (Board) to remove, temporarily or permanently, an opinion of a Board medical advisor from a veteran's claims folder? As an alternative, could the Board cover such an opinion in the claims folder with opaque paper?

c. Is the Board required to provide directly to a represented veteran a copy of an opinion from an independent medical expert?

DISCUSSION:

1. The above-stated questions have arisen in connection with a case remanded to the Board from the United States Court of Veterans Appeals (CVA) involving a claim for service connection for multiple sclerosis. The CVA ordered the remand pursuant to a joint motion of the parties requesting remand for specified purposes. The opinion request states that the first two questions presented are also pertinent to another case

currently pending before the Board, involving a claim for service connection for hypertension.

2. The first question concerns whether 38 U.S.C. § 1112(a) establishes a presumption of aggravation for a chronic disease which existed prior to service, but which was first shown to a compensable degree within the presumptive period following service. Pursuant to 38 U.S.C. § 1110, the Department of Veterans Affairs (VA) is authorized to pay compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty" in active service. Section 1112(a), provides, in pertinent part:

> For the purposes of section 1110 of this title, and subject to the provisions of section 1113 of this title, in the case of any veteran who served for ninety days or more during a period of war--
>
> (1) a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service;
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> (2) a tropical disease . . . becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service, or at a time when standard or accepted medical treatises indicate that the incubation period thereof commenced during such service;
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> (3) active tuberculous disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;
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> (4) multiple sclerosis developing a 10 percent degree of disability or more within seven years from the date of separation from such service;
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> (5) Hansen's disease developing a 10 percent degree of disability or more within three years from the date of separation from such service;
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> shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

In a regulation implementing that statute, VA has provided that a chronic or tropical disease becoming manifest to the requisite degree within the prescribed presumptive period "will be considered to have been *incurred* in service . . . even though there is no evidence of such disease during the period of service." 38 C.F.R. § 3.307(a) (emphasis added).

Further, 38 C.F.R. § 3.307(c) states that, "[t]he consideration of service incurrence provided for chronic diseases will not be interpreted to permit any presumption as to aggravation of a preservice disease or injury after discharge." Thus, VA

has, in section 3.307(a) and (c), indicated its conclusion that 38 U.S.C. § 1112(a) does not provide a presumption of in-service aggravation for chronic diseases which existed prior to service and which first became manifest to a compensable degree within the applicable presumptive period after service. As explained below, we conclude that the regulation represents a proper interpretation of section 1112(a).

3. Section 1112(a) states that diseases meeting the statutory criteria "shall be considered to have been incurred in or aggravated by" service. Viewed in isolation, the phrase "incurred in or aggravated by" may suggest that Congress intended to create a presumption of aggravation for chronic diseases existing prior to service. However, the meaning of statutory terms cannot be determined by reading those terms in isolation. *See Smith v. Brown*, 35 F.3d 1516, 1522-23 (Fed. Cir. 1994). Rather, the meaning of any statutory terms must be discerned by reading those terms in the context of the language and purpose of the statute in which they have been placed by Congress. *See Smith*, 35 F.3d at 1523. The broader context indicates that Congress did not intend to establish, in section 1112(a), a presumption of aggravation for diseases existing prior to service.

4. As stated in paragraphs (1) through (5) of section 1112(a), the presumption created by that statute applies only where a disease specified therein "becom[es] manifest" or develop[s]" to a degree of disability of 10 percent or more within a prescribed period following service. The requirement that the disease "becom[e] manifest" or "develop[]" within the presumptive period following service necessarily implies that the disease had not previously been manifest, either during or prior to service. *See Ford v. Gober*, 10 Vet. App. 531, 535 (1997) ("on its face, it is clear that section 1112 applies only where a covered condition is first manifest within one year after . . . service"). Construing section 1112(a) to permit a presumption of aggravation for diseases shown to have existed prior to service would be inconsistent with the statutory requirement that the disease have "becom[e] manifest" or "develop[ed]" within the presumption period following service. The requirement that the disease be manifest to at least a 10-percent degree within the presumption period is stated as a limitation on the application of the presumption. Pursuant to that requirement, the presumption of service connection does not apply to any and all manifestations of a chronic disease within the presumptive period, but only to manifestations sufficient to establish a 10-percent or greater degree of dis-

ability existing within the presumptive period. *See Stadin v. Brown*, 8 Vet. App. 280, 283-84 (1995). Because the

requirement of a 10-percent degree of disability is clearly intended as a limitation on the application of the presumption, it cannot reasonably be construed as also providing, by implication, that the presumption of service connection extends to diseases which were manifest prior to service to less than a 10-percent degree of disability. Accordingly, we conclude that section 1112(a) establishes a presumption of service connection for certain diseases first becoming manifest subsequent to service, provided that such diseases are manifest to at least a 10-percent degree of disability within the presumptive period. It does not provide a presumption of aggravation for a chronic disease which was manifest prior to service, but which first arrived at a 10-percent degree of disability within the presumptive period.

5. The manifest purpose of section 1112(a) is to establish presumptions of service connection for diseases which may have had their onset in service but which, due to their insidious nature and slow progression, may not be diagnosed until a year or more following service. Section 1112(a)(2) provides that "a tropical disease . . . becoming manifest to a degree of 10 percent or more within one year from the date of separation from . . . service, *or at a time when standard or accepted treatises indicate that the incubation period thereof commenced during . . . service*" shall be considered to have been "incurred in or aggravated by such service." (Emphasis added.) Similarly, in establishing presumptions for specific diseases, Congress has expressly indicated that the presumptive periods are based on the conclusion that diseases manifested within such periods may be presumed to have had their onset during service. When Congress established a seven-year presumptive period for multiple sclerosis, in what is now 38 U.S.C. § 1112(a)(3), the Senate Committee on Finance explained that the presumptive period was "based on information obtained from the National Institute of Health that it was the opinion of its scientific staff that 7 years was not an unreasonable period to recognize as the interval between onset and diagnosis in multiple sclerosis." S. Rep. No. 1806, 87th Cong., 2d Sess. 5 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2365, 2369. When Congress established a three-year presumptive period for Hansen's disease in what is now section 1112(a)(5), the Senate Committee on Finance explained: "The minimum incubation period of Hansen's disease has not been definitely established. It is known to vary from several months to several years. In view of this, the Committee on Finance feels justified in increasing the period for presumption of service connection therefor to 3 years." S. Rep. No. 661, 86th Cong.,

1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2160, 2161. The Committee further stated that the purpose of the

legislation was to increase the period during which a veteran suffering from Hansen's disease "shall be presumed to have *incurred* the disease in active service." 1959 U.S.C.C.A.N. at 2160 (emphasis added). Similarly, when Congress first established a statutory list of "chronic" diseases which would be considered to have been incurred in service in the Act of June 24, 1948, ch. 612, 62 Stat. 581, the Senate Committee on Finance explained that the purpose of that statute was to provide "that the term 'chronic disease' as used in [former Veterans Regulation No. 1(a), Part I, para. I(c)] shall include certain specified diseases . . . which, when found within 1 year after termination of wartime service, shall be presumed *to have been incurred in such service*." S. Rep. No. 1536, 80th Cong., 2d Sess. 1 (1948), *reprinted in* 1948 U.S.C.C.S. 2114 (emphasis added).

6. The establishment of presumptive periods based on the time interval between in-service onset and post-service diagnosis of a disease strongly suggests an intent to establish a presumption of service connection only for diseases which initially become manifest after service and which may reasonably be presumed to have had their onset in service. Construing section 1112(a) to permit a presumption of aggravation for a chronic disease which existed prior to service would be inconsistent with Congress' purpose to establish presumptive periods reflecting the incubation periods of the identified diseases and to provide presumptive service connection for diseases which may be presumed to have had their onset during service. In *Ford v. Gober*, the United States Court of Veterans Appeals (CVA) stated that section 1112 applies only where a covered condition is "first manifest" within the presumptive period and that, "[w]here . . . the condition was manifest in service, section 1112 is not for application." 10 Vet. App. at 535. The CVA's construction of section 1112(a) is consistent with our conclusion that that provision does not encompass a presumption of aggravation for diseases manifested prior to service.

7. In view of the relatively clear congressional intent to establish presumptions of service connection only for chronic diseases which initially become manifest after service, the purpose of the reference to aggravation in section 1112(a) is not immediately clear. It appears, however, that the phrase "incurred in or aggravated by," by tracking the language of section 1110, is intended only to establish that diseases meeting the requirements of section 1112(a) may be compensated for under section 1110, which authorizes VA to pay compensa-

tion for disability or death due to diseases incurred in or aggravated by service. This view is bolstered by the fact

that the statute refers to consideration of a disease as having been incurred in "or" aggravated by service without specifying the circumstances under which each would apply. If Congress had meant to create separate presumptions of incurrence and aggravation, it could be expected to have specified the circumstances under which each applied. However, if the "incurred in or aggravated by" language was merely intended as a reference to section 1110, no need for such specificity would arise. We also consider it significant that the same or similar reference to consideration of a condition as having been incurred in or aggravated by service is used in statutory provisions establishing presumptive service connection for certain diseases associated with specific causative factors encountered in service, such as exposure to ionizing radiation or herbicide agents. *See* 38 U.S.C. §§ 1112(c)(1) and 1116(a)(1). Congress has given no indication that it considers exposure to these specific hazards to be a source of aggravation of disability. Accordingly, the phrase may represent a consistent and longstanding legislative usage for indicating that compensation under section 1110 may be paid for certain diseases notwithstanding the lack of evidence that the disease was actually incurred in or aggravated by service.

8. A review of the history of statutes providing presumptions of service connection for chronic diseases suggests another plausible interpretation of the statutory reference to aggravation. A presumption of service connection for certain chronic diseases was first established in the Act of August 9, 1921, ch. 57, § 18, 42 Stat. 147, 153-54, which established the United States Veterans' Bureau and made a number of amendments to the War Risk Insurance Act (WRIA). Section 18 of that statute amended section 300 of the WRIA to provide a presumption of service incurrence or aggravation of active pulmonary tuberculosis or neuropsychiatric disease developing to a degree of disability of 10 percent or more within two years after separation from service. Significantly, prior to August 9, 1921, section 300 of the WRIA authorized compensation for disability due to disease or injury incurred in service, but not for in-service aggravation of a preexisting disease or injury. Section 300 further provided a conclusive presumption that all service members "shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." Act of June 25, 1918, ch. 104, § 10, 40 Stat. 609, 611 (amending section 300 of WRIA).

9. In hearings preceding the enactment of the Act of August 9, 1921, the Assistant Director of the Bureau of War

Risk Insurance, Leon Frazer, explained that, as a result of the conclusive presumption of sound condition, the Bureau was

required to pay compensation for preexisting disabilities that were aggravated by service, even though the statute did not expressly authorize compensation for aggravated disabilities. *Hearings Before a Subcommittee of the Committee on Finance, United States Senate, on H.R. 6611*, 67th Cong., 1st Sess., part 2, 60-61 (1921). The Act of August 9, 1921, amended section 300 of the WRIA to authorize compensation for aggravation of a preexisting disease or injury. That Act retained the conclusive presumption of soundness, but made that presumption applicable only to veterans who were on active duty on or before November 11, 1918, and provided that the presumption did not extend to "defects, disorders, or infirmities, made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service."

10. The provision of the Act of August 9, 1921, establishing a presumption of service connection for tuberculosis and neuropsychiatric disease derived from an amendment proposed by Senator David I. Walsh to House bill H.R. 6611, 67th Cong., 1st Sess., which became the Act of August 9, 1921. The legislative history indicates that the presumption was intended as a presumption that diseases manifest subsequent to service would be presumed to have been incurred in service, unless the Government established that the disease had been incurred subsequent to service. In explaining the presumption, Senator Walsh stated, "there being the presumption in his favor that he was sound physically when he entered the military service[,] . . . [m]y amendment would raise a presumption at once that as he has one of the aforesaid diseases [i.e., tubercular or neuropsychiatric disease] he must have contracted it in line of service." 61 Cong. Rec. 4105-06 (1921). In agreeing to a modified version of Senator Walsh's proposal, a conference committee of members of the House and Senate stated that the provision "provides that in case of pulmonary tuberculosis or neuropsychiatric disease developing within two years *after* separation from the active military or naval service of the United States, the ex-service man shall be considered to have *acquired* his disability in service." 61 Cong. Rec. 4560 (1921) (emphasis added).

11. The quoted statements indicate that the presumption of service connection was intended to address only the question of whether a disease developing subsequent to service was contracted in service or subsequent to service. However, the statute itself stated that a veteran

having an active pulmonary tuberculosis or a neuropsychiatric disease manifest to a 10-percent degree of disability within two years after service would be considered to have incurred the disease in service "or to have suffered an aggravation of a preexisting pulmonary tuberculosis or neuropsychiatric disease in such service." Viewed in the context of the above-quoted legislative history, it appears that the reference to aggravation of a preexisting disease was intended to encompass diseases which may have existed prior to service but which, under the conclusive presumption of soundness, were required to be service connected on the same basis as diseases which were incurred in service or initially manifest within the presumptive period.

12. In discussing the presumption of service connection, Congress clearly indicated that it intended only a presumption that diseases becoming manifest after service would be considered to have been incurred in service. However, the above-referenced history suggests that Congress also contemplated that the presumption of sound condition would be applicable in making determinations regarding the presumption of service connection for tuberculosis and neuropsychiatric disease. Accordingly, it appears that the statutory reference to aggravation of a preexisting tuberculosis or neuropsychiatric disease may have been intended to clarify that, under the conclusive presumption of soundness, the presumption of service connection could not be rebutted merely by evidence that the disease existed prior to service. Viewed in this light, the Act of August 9, 1921, did not itself establish a presumption of aggravation for preexisting tuberculosis or neuropsychiatric disease, but merely indicated a recognition that the presumption of service connection would apply to preexisting diseases to the extent required by operation of the presumption of sound condition. Stated differently, the Act of August 9, 1921, established a presumption of service connection for tuberculosis or neuropsychiatric disease which was initially manifest within the presumptive period following service or for a preexisting tuberculosis or neuropsychiatric disease which, under the presumption of soundness, must be deemed to have been initially manifest during the post-service presumptive period. This construction is consistent with Congress' stated intent to establish a presumption applicable only to diseases initially manifest after service.

13. Shortly after Congress enacted the Act of August 9, 1921, the Acting Director of the Veterans' Bureau, on November 12,

1921, issued Veterans' Bureau Regulation No. 11, which established a rebuttable presumption that a "chronic constitutional

disease" becoming manifest within one year after separation from service "will be considered as incurred in such service or aggravated by service." On November 25, 1930, the General Counsel of the Veterans' Bureau issued an opinion addressing whether that regulation established a presumption of aggravation for a chronic disease which was noted at the time of a veteran's entry into service and was found to be disabling to a compensable degree within one year after separation from service. The General Counsel stated that, "it is the opinion of this Service that the term 'or aggravated by service', as used in the Bureau issues referred to in your submission, was not in its ordinary accepted sense, but was meant to be applicable only to those cases where no notation was made at the time of, or prior to, entry into the active military service." 65 Op. V.B.G.C. 294, 297 (1930). Consistent with the above analysis of the Act of August 9, 1921, the General Counsel construed the reference to aggravation in former Veterans' Bureau Regulation No. 11 as encompassing only those preexisting diseases which, under the then-conclusive presumption of soundness, were compensable on the same basis as diseases incurred in service. The General Counsel concluded that former Veterans' Bureau Regulation No. 11 did not provide a presumption of aggravation for diseases which were noted at or prior to entry into service and, therefore, were not governed by the presumption of soundness under then-existing law.

14. The World War Veterans' Act of 1924, ch. 320, § 200, 43 Stat. 607, 615-16, provided that a veteran developing neuropsychiatric disease, active tuberculous disease, paralysis agitans, encephalitis lethargica, or amoebic dysentery to a 10-percent degree prior to January 1, 1925, would be presumed to have acquired such disability in service "or to have suffered an aggravation of a preexisting [disease]" in service. That Act also continued the conclusive presumption of sound condition for persons in active service on or before November 11, 1918, except as to conditions recorded by proper Government officials at the time of, or prior to, inception of active service.

15. In 1933, the President issued Veterans Regulation No. 1, Exec. Order No. 6089 (March 31, 1933), pursuant to his authority under the Economy Act of 1933, ch. 3, 48 Stat. 8. Part I, paragraph I(a) of that regulation authorized VA to pay "pension" (the equivalent of what is now disability compensation) for disability resulting from disease or injury incurred in or aggravated by active service. Part I, paragraph I(c), provided that, for purposes of paragraph I(a), "a chronic disease

becoming manifest to a degree of 10% or more within one year from the date of separation from active service . . . shall be

considered to have been incurred in or aggravated by service." Part I, paragraph I(d), stated that, for purposes of paragraph I(a), "a preexisting injury or disease will be considered to have been aggravated by active military service as provided for therein where there is an increase in disability during active service unless there is a specific finding that the increase in disability is due to the natural progress of the disease." Further, Part I, paragraph I(b) of that regulation provided that veterans would be presumed to have been in sound condition at the time of examination, acceptance, and enrollment into service, except for disorders noted at the time of examination, acceptance, and enrollment. Notably, however, paragraph I(b) further provided that the presumption of sound condition would be rebutted "where evidence, or medical judgment is such as to warrant a finding that the injury or disease existed prior to acceptance and enrollment." Veterans Regulation No. 1 was superseded by Veterans Regulation No. 1(a), Exec. Order No. 6156 (June 6, 1933), in June 1933, but the above-referenced provisions were not changed.

16. On April 15, 1933, the Administrator of Veterans' Affairs issued Instruction No. 6 to Veterans Regulation No. 1. Paragraph 3 of that instruction stated in part that, "[t]he consideration of service incurrence or aggravation provided for chronic diseases shall not be interpreted to permit any presumption as to aggravation, but aggravation of disease or injury will be accepted only upon a showing of increase in disability from such condition during active service as required by Veterans Regulation No. 1, Part I, paragraph I(d)." A similar statement was subsequently included in Veterans' Administration regulation 1080(C) (1-25-36), and former 38 C.F.R. § 3.80(c) (1949), although the reference to "aggravation" was dropped from the subject of the sentence.

17. Paragraph I(b) of Part I of Veterans Regulation No. 1 provided, for the first time, that the presumption of sound condition could be rebutted by evidence that the disease existed prior to service. By eliminating the formerly conclusive presumption of soundness, that provision arguably rendered obsolete the provisions referring to aggravation of preexisting diseases in relation to the presumption of service connection for chronic diseases. The fact that Veterans Regulation No. 1 and subsequent laws continued to use the phrase "incurred in or aggravated by service" appears to reflect the usage which had by then become well established in the prior statutes and does not appear to reflect any intent to expand the law to establish a presumption of in-service aggravation

for preexisting diseases which are not subject to the presumption of soundness, or as to which the presumption has been rebutted. Absent any evidence of an intent to interject such a significant change into the law, we cannot conclude that Veterans Regulation No. 1 established a presumption of aggravation for preexisting chronic diseases based on manifestations within the post-service presumptive period. Veterans Regulation No. 1 merely incorporated the language of prior enactments, which, as noted above, was intended to provide a presumption of service connection only for diseases first manifest after service and any preexisting diseases which, under the presumption of soundness, would be deemed to have been initially manifest after service.

18. In 1958, Congress enacted Pub. L. No. 85-857, which codified the presumption of service connection for chronic diseases in what was then 38 U.S.C. § 312 (now § 1112(a)). In 1961, VA issued 38 C.F.R. § 3.307 to implement what is now 38 U.S.C. § 1112(a). As noted above, section 3.307(a) provides only that chronic diseases meeting the statutory criteria "will be considered to have been incurred in service." Further, section 3.307(c) states that, "[t]he consideration of service incurrence provided for chronic diseases will not be interpreted to permit any presumption as to aggravation of a preservice disease or injury after discharge." For the reasons stated above, we believe that section 3.307 represents a proper interpretation of 38 U.S.C. § 1112(a). Accordingly, we conclude that section 1112(a) does not authorize a presumption of aggravation for chronic diseases which existed prior to service but were first shown to a compensable degree within the presumptive period following service. The determination as to whether a preexisting chronic disease was aggravated by service is, as with any other preexisting disease, governed by the provisions of 38 U.S.C. § 1153. In view of the conclusion stated above, it is unnecessary to address the second question presented in the opinion request.

19. The third question presented in the opinion request concerns whether the Board may remove an opinion of a Board medical advisor from a claims folder. The opinion request refers to a case in which the Board obtained a Board medical advisor opinion (BMAO), which was placed in the claims folder. Subsequently, the Chairman of the Board issued Chairman's Memorandum No. 01-94-17, indicating that the Board would no longer request BMAOs in adjudicating claims, but that an existing BMAO would not be removed from the record if the opinion had already been transmitted to the Board section which requested

the opinion. Following issuance of that memorandum, the Board transferred the veteran's claims file, with the BMAO included,

to an independent medical expert for an opinion pursuant to 38 U.S.C. § 7109. In a joint remand motion before the CVA, the parties raised the concern that the presence of the BMAO in the claims file could have influenced the independent medical expert's opinion. The motion stated that the Board should temporarily remove the BMAO from the claims file and obtain a new independent medical opinion or, alternatively, the Board should explain why the claimant would not be prejudiced by the medical expert's consideration of the BMAO. The opinion request asks whether the Board may remove the BMAO from the claims file, either temporarily or permanently, or alternatively, whether the Board may cover the BMAO in the claims file with opaque paper.

20. Section 2071(b) of title 18, United States Code, provides for criminal penalties and loss of public office for anyone who "willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys" Government records in his or her custody. Section 2071(a) contains a general prohibition on willful and unlawful concealment, removal, mutilation, obliteration, or destruction of Government records. In our view, this statute would not prohibit the Board from temporarily removing the BMAO, or temporarily covering the BMAO with opaque paper, under the circumstances described in the opinion request. As explained below, the purpose of section 2071 is to criminalize only those actions which wrongfully deprive the Government of the proper use of its records. In our view, a temporary removal or concealment of a document which would not interfere with VA's ability to use the BMAO for any proper purpose would not violate the statute. Further, section 2071 punishes only actions which are "willful[] and unlawful[]." We believe that the temporary removal or concealment of the BMAO under the circumstances described in this case would not be unlawful and, hence, would not give rise to criminal liability under 18 U.S.C. § 2071.

21. Section 2071 was codified in title 18, United States Code, by the Act of June 25, 1948, ch. 645, § 1, 62 Stat. 683, 795. The original version of that statute was enacted in 1853. Act of February 26, 1853, ch. 81, §§ 4 and 5, 10 Stat. 170. We have found no pertinent legislative history regarding the intended scope of the statute. However, the few reported cases addressing section 2071 and its antecedents provide guidance in interpreting that provision. In *United States v. Rosner*, 352 F. Supp. 915 (S.D.N.Y. 1972), *petition denied*, 497 F.2d 919 (2d Cir. 1974) (table), the defendant was prosecuted under 18 U.S.C. § 2071 for allegedly obtaining photocop-

ies of documents in the files of a United States Attorney's office. The court noted that, "[i]f documents were removed

from the files, they were removed temporarily and only for the purpose of reproduction." 352 F. Supp. at 919. After reviewing the history and previous application of section 2071 and its predecessors, the court concluded that the purpose of that provision "is to prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal." 352 F. Supp. at 919. Accordingly, the court stated that, "Section 2071 does not embrace any and all instances of removal of Government record; it proscribes that removal which deprives the Government of the use of the records." 352 F. Supp. at 921. The court concluded that the defendant's conduct did not violate section 2071 because it did not deprive the Government of the use of the documents in question. Similarly, in *Martin v. United States*, 168 F. 198 (8th Cir. 1909), the defendant was prosecuted under section 5408 of the Revised Statutes of the United States, 18 Stat. 1047 (1878), the antecedent to 18 U.S.C. § 2071(b), for temporarily removing records from a Government office and copying those records before returning the records to the Government office. The court concluded that the defendant's actions did not violate the statute because the statute did not apply to a removal of records "which in no way interferes with the lawful use of the record or document in its proper place." 168 F. at 204.

22. Under the circumstances described in the opinion request, temporarily removing the BMAO from the claims file, or covering the BMAO with opaque paper, would not deprive VA of the proper use of the BMAO. VA would retain possession and control of that document and would be able to use that document for any proper purpose. If it is determined that it would be inappropriate or prejudicial to the claimant to permit an independent medical expert to review the BMAO, then the act of withholding or concealing that document from the independent medical expert would not deprive the Government of the proper use, if there is one, of the BMAO. Accordingly, the temporary removal of the BMAO, or the act of covering the BMAO with opaque paper, would not, in our view, violate 18 U.S.C. § 2071.

23. Section 2071 prohibits the "unlawful[]" removal or concealment of Government documents. The temporary removal or concealment of the BMAO under the circumstances described in the opinion request would not, in our view, be "unlawful." No statutory or regulatory provision prohibits the Board from either temporarily removing the BMAO from the claims file or covering the BMAO with opaque paper. Section 7104(a) of ti-

tle 38, United States Code, provides that decisions of the Board "shall be based on the entire record in the proceeding

and upon consideration of all evidence and material of record." That provision would not preclude the Board from temporarily removing or concealing the BMAO for the limited purpose of securing an opinion from an independent medical expert, since the rendering of an opinion by an independent medical expert could not be considered a decision of the Board. *See generally* 38 U.S.C. §§ 7101, 7101A, 7109 (distinguishing the Board from independent medical experts).

24. Subject to any limitations imposed by statute, agencies have discretion to formulate reasonable procedures to carry out their statutory responsibilities. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). This discretion includes the power to resolve procedural matters such as the admission or exclusion of evidence. *See Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1378 (Fed. Cir. 1988); *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 162 (3d Cir. 1986). In our view, a determination by the Board that a BMAO should be excluded from the file transmitted to an independent medical expert, due to the potential for prejudice or other procedural reasons, would be a valid exercise of the Board's discretionary authority over such procedural matters. As indicated by Chairman's Memorandum No. 01-94-17 and reflected in BVA Handbook 8440 (Sept. 18, 1996), the Chairman of the Board apparently determined that the use of BMAOs may be prejudicial to claimants in some circumstances and, accordingly, issued guidelines to limit the use of BMAOs. Consistent with that determination, it is our understanding that the proposed temporary removal or concealment of the BMAO is intended for the claimant's benefit and would assist the Board in carrying out its statutory duties regarding appeals processing. In view of that legitimate purpose, and the absence of any prohibition on the proposed action, the proposed temporary removal or concealment of the BMAO could not, we believe, be considered "unlawful[]" removal or concealment within the meaning of 18 U.S.C. § 2071.

25. The above analysis may also suggest that the Board could permanently remove the BMAO from the claims file in some circumstances. As noted above, 38 U.S.C. § 7104(a) requires that Board decisions be based on "the entire record in the proceeding." It may be argued that this provision would require that a BMAO which has been placed in the claims file be included in the record before the Board, even though the Board may be precluded from relying upon it to the prejudice of the claimant. In our view, however, section 7104(a) would not preclude VA from excluding irrelevant or prejudicial materials from a claims file and, hence, from the record before the Board.

Although the Board's decision must be based on "the entire record in the proceeding," VA has authority to make reasonable determinations regarding the inclusion or exclusion of materials from the record. *See Curtin*, 846 F.2d at 1378; *Warner-Lambert Co.*, 787 F.2d at 162; *see also* 38 U.S.C. § 501(a)(1) (VA may prescribe regulations with respect to "the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits"). A determination to exclude a BMAO from the record on the basis that it is potentially prejudicial to the claimant and that the Board is precluded from relying upon it would, in our view, be a valid exercise of the Board's authority with respect to such procedural matters. Accordingly, permanently removing a BMAO from the claims file pursuant to such a determination would not, in our view, be "unlawful[]" within the meaning of 18 U.S.C. § 2071 as violative of title 38 requirements, and would not deprive the Government of proper use of that document for title 38 purposes. We caution, however, that the permanent removal of documents from a claims file without notice to the claimant may raise concerns regarding procedural fairness, particularly in view of the possibility that such documents, including BMAO's, may be favorable to the claimant in some instances. Accordingly, if the Board considers it appropriate to permanently remove documents from claims files, we recommend that procedures be established to ensure that claimants are given adequate notice of such removal, and to ensure that documents which are favorable to the claimant or are otherwise relevant to the Board's decision are not removed from the claims file.

26. We also note that, under 5 U.S.C. § 552a(d)(2), each agency that maintains a system of records within the scope of that statute must permit an individual "to request amendment of a record pertaining to him." When such a request is received, the agency must either "make any correction of any portion [of the record] which the individual believes is not accurate, relevant, timely, or complete" or must inform the individual of the reasons for refusing to amend the record and the procedures for requesting review of that refusal. Courts have held that expungement of agency records is an appropriate remedy under 5 U.S.C. § 552a. *See Hobson v. Wilson*, 737 F.2d 1, 64 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *R.R. v. Department of Army*, 482 F. Supp. 770, 774 (D.D.C. 1980). If documents are permanently removed from a claims file on the claimant's request in accordance with 5 U.S.C. § 552a(d)(2), such action would not, in our view, constitute "unlawful[]" removal of Government records within the meaning of 18 U.S.C. § 2071.

27. Although it may be appropriate to permanently remove documents from a particular claims file under certain circumstances, there are restrictions on VA's authority to destroy such documents following their removal from a particular file. Chapter 33 of title 44, United States Code, establishes procedures for the permanent disposal of Government records. *See* 44 U.S.C. §§ 3301-3314. Those procedures apply to all documents made or received by a Federal agency in connection with the transaction of public business that are "preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 U.S.C. § 3301. The disposition of any such records requires the approval of the Archivist of the United States. *See* 44 U.S.C. §§ 3303 and 3303a; 36 C.F.R. § 1220.38. Under 44 U.S.C. § 3314, "records of the United States Government may not be alienated or destroyed except under [chapter 33 of title 44, United States Code]." Merely removing a document from a particular claims file would not constitute an alienation or destruction of the document, within the ordinary meanings of those terms, if VA preserves and retains possession of the document. However, VA would generally be precluded from destroying such a document following its removal from a claims file, except through the procedures established under 44 U.S.C. ch. 33. The United States Court of Appeals for the District of Columbia Circuit has held that the restrictions of 44 U.S.C. ch. 33 regarding destruction of Government records do not apply in cases where expungement of records is ordered pursuant to 5 U.S.C. § 552a. *Hobson v. Wilson*, 737 F.2d at 64-65. Generally, however, if VA removes a document from a particular claims file, we believe it would be necessary for VA to either retain the document apart from the claims file or to follow the procedures of 44 U.S.C. §§ 3301-3314 for the destruction of Government records, if destruction of the document is considered appropriate.

28. The fourth question in the opinion request concerns whether, when the Board obtains an opinion of an independent medical expert under 38 U.S.C. § 7109, it must provide a copy of that opinion directly to a represented claimant, rather than only to the claimant's representative. The relevant statutory provision, 38 U.S.C. § 7109(c), provides that, "[t]he Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the

claimant with a copy of such opinion when it is received by the Board." VA regulations implementing that provision state

that, when the Board requests an opinion from an independent medical expert, "the Board will notify the appellant and his or her representative, if any." 38 C.F.R. § 20.903. The regulation further states that, "[w]hen the opinion is received by the Board, a copy of the opinion will be furnished to the appellant's representative or, subject to the limitations provided in 38 U.S.C. 5701(b)(1), to the appellant if there is no representative." 38 C.F.R. § 20.903. The regulation plainly contemplates that a copy of the medical opinion will be furnished only to the claimant's representative in cases involving a represented claimant. Accordingly, the sole question for consideration is whether that regulation is consistent with 38 U.S.C. § 7109(c). In VAOPGCADV 42-93 (O.G.C. Adv. 42-93), we concluded that it is, and we find the reasoning of the opinion sound. We reiterate and expand on it here.

29. The Supreme Court has stated that "[u]nder our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92 (1990) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962), and *Smith v. Ayer*, 101 U.S. 320, 326 (1880)). Pursuant to that principle, courts have concluded that a statute requiring that a document be provided to or received by a represented individual may be satisfied when the document is provided to or received by the representative. In *Jones Stevedoring Co. v. Director, Office of Workers Compensation Programs*, 133 F.3d 683 (9th Cir. 1997), the United States Court of Appeals for the Ninth Circuit construed a statute, 33 U.S.C. § 908(c)(13)(D), which provided that the statutory period for an employee to file a notice of injury due to hearing loss under the Longshore and Harbor Workers' Compensation Act would not begin to run "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." The audiogram report in that case had been sent to the claimant's attorney, but not directly to the claimant. The court held that "an attorney's receipt of an audiogram is constructive receipt by the employee under § 908(c)(13)(D)," and that the filing period, therefore, began to run when the attorney received the audiogram report. 133 F.3d at 689. In rejecting a literal reading of the statute, the court stated that, "[s]ince clients are normally bound by the acts and omissions of their attorneys, Congress might simply have assumed that requiring receipt by the employee of the audiogram to trigger the statute of limitations encompassed receipt by the employee's attorney." *Id.*

30. In *Decker v. Anheuser-Busch*, 632 F.2d 1221 (5th Cir. 1980), *vacated*, 670 F.2d 506 (5th Cir. 1982), the United States Court of Appeals for the Fifth Circuit interpreted a statute, 42 U.S.C. § 2000e-5(f)(1), providing that, when the Equal Employment Opportunity Commission (EEOC) dismisses a discrimination complaint, it "shall so notify the person aggrieved," and that this notice begins the running of the period for filing suit. The court concluded that "notice to an attorney who is formally representing the complainant in an EEOC proceeding, constitutes notice to the complainant" for purposes of the statute. 632 F.2d at 1223. The court rejected the contention that the statute could be satisfied only by direct notice to the aggrieved individual, citing the "long standing tradition that notice to or knowledge by the attorney is notice to or knowledge by the client." 632 F.2d at 1224. The court stated that notice to the attorney would be considered notice to the client, "[u]nless and until there is a clear expression by the Congress to the contrary." *Id.* Although the court later vacated its opinion and remanded the case for additional factual development concerning the notice provided to the claimant's representative, the Supreme Court cited the opinion approvingly in *Irwin*, suggesting that the Fifth Circuit's reasoning remains valid.

31. In *Irwin*, the Supreme Court stated that, "[i]f Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly." *Irwin*, 498 U.S. at 93 (citing *Decker*, 632 F.2d at 1224). Congress has, in some statutes, expressly provided for furnishing certain types of notice to both the claimant and the claimant's representative, if any. *See* 38 U.S.C. §§ 5104(a) and 7104(e). However, it did not include such a provision in 38 U.S.C. § 7109(c), even though that statute was enacted in the same legislation which added section 7104(e). Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, §§ 103(a), 205, 102 Stat. 4105, 4106, 4111 (1988). In the absence of any clear evidence of a contrary intent by Congress, the requirement in section 7109(c) to furnish a claimant with a copy of an independent medical opinion obtained by the Board may reasonably be interpreted in accordance with the well-established rule that notice to the authorized representative of a claimant constitutes notice to the claimant. VA has expressly adopted that interpretation in 38 C.F.R. § 20.903, and, in our view, that regulation constitutes a reasonable exercise of VA's rulemaking authority under 38 U.S.C. § 501(a).

HELD:

a. Section 1112(a) of title 38, United States Code, does not establish a presumption of aggravation for a chronic disease which existed prior to service but was first shown to a compensable degree within the presumptive period following service.

b. Where the Board of Veterans' Appeals (Board) determines that it would be potentially prejudicial to a claimant for an independent medical expert to consider a Board medical advisor opinion which is in the claims file, the Board may temporarily remove that document from the claims file or temporarily cover the document with opaque paper prior to forwarding the file to the independent medical expert. Such action would not, in our view, violate 38 U.S.C. § 7104(a) (requiring Board decisions to be based on the entire record) or 18 U.S.C. § 2071 (prohibiting removal or concealment of Government records). If it is determined that the Board is precluded from relying upon a Board medical advisor opinion due to the potential for prejudice to the claimant, the Board may permanently remove the opinion from the claims folder without violating 38 U.S.C. § 7104(a). Such removal would not, in our view, be unlawful under 18 U.S.C. § 2071 as violative of title 38 requirements. If a claimant requests that a Board medical advisor opinion be permanently removed from his or her claims file, the Board may permanently remove the opinion pursuant to 5 U.S.C. § 552a(d)(2) (permitting amendment of agency records that are not accurate, relevant, timely, or complete), and such action would not, in our view, violate 18 U.S.C. § 2071.

c. The Board of Veterans' Appeals is not required to transmit a copy of an independent medical expert opinion directly to a represented claimant. Providing the opinion to the claimant's representative, in accordance with 38 C.F.R. § 20.903, satisfies the requirement in 38 U.S.C. § 7109(c) that the Board furnish the claimant with a copy of the opinion.

John H. Thompson

Attachments: Claims Folders