Department of Veterans Affairs

Memorandum

Date: November 16, 1999 VAOPGCPREC 15-1999

From: General Counsel (022)

Subj: Validity of Regulatory Provisions Precluding Service Connection of Polycythemia Vera Based on Exposure to Ionizing Radiation

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Are the provisions of 38 C.F.R. § 3.311(b)(3) and (4) valid insofar as they appear to preclude claimants from establishing that polycythemia vera was incurred as the result of exposure to ionizing radiation in service?

DISCUSSION:

1. This issue was called to our attention by a congressional committee staff member. Based on our review of the issue, we have concluded that 38 C.F.R. § 3.311(b)(3) and (b)(4) are, in part, inconsistent with 38 U.S.C. § 1113(b). Accordingly, we are issuing this opinion to inform you of that conclusion and its basis.

2. Section 5 of Pub. L. No. 98-542, 98 Stat. 2725, 2727-29 (1984), directed the Department of Veterans Affairs (VA) to prescribe regulations to govern claims for service connection of disability or death allegedly caused by exposure to ionizing radiation in service. Section 5(b)(2)(A)(i) of Pub. L. No. 98-542 required that VA's regulations include determinations, based on sound scientific and medical evidence, as to whether, and under what circumstances, service connection may be granted for specific diseases claimed to have resulted from in-service exposure to ionizing radiation. The statute required VA to state such determinations with respect to eight specified diseases, including polycythemia vera. *See* Pub. L. No. 98-542, §§ 2(5), 5(b)(2)(A)(i), and 5(b)(2)(B), 98 Stat. at 2725, 2728.

3. Pursuant to Pub. L. No. 98-542, VA issued 38 C.F.R. § 3.311b (now § 3.311) in August 1985. 50 Fed. Reg. 34452 (1985). VA determined that sound scientific and medical evidence indicated an association between ionizing radiation and several diseases, which VA listed in its regulation as "radiogenic" diseases. *See* former 38 C.F.R. § 3.311b(b)(2) (1986). VA also determined that sound scientific and medical evidence did not indicate an association between ionizing radiation and polycythemia vera and, accordingly, stated in its regulation that polycythemia vera would not be considered a "radiogenic" disease. *See* former 38 C.F.R. § 3.311b(b)(3) (1986). The regulation specified procedures for the development and adjudication of claims for service connection of those diseases which VA considered to be "radiogenic." *See* former 38 C.F.R. § 3.311b(a) and (b)(1) (1986). Paragraph (h) of section 3.311b, as issued in 1985, stated that "[n]othing in this section will be construed to prevent the establishment of service connection for any injury or disease otherwise shown by sound scientific or medical evidence to have been incurred or aggravated during active service." Former 38 C.F.R. § 3.311b(h) (1986).

4. In a January 1993 opinion in *Combee v. Principi*, 4 Vet. App. 78, 94 (1993), the United States Court of Appeals for Veterans Claims (CAVC) (formerly Court of Veterans Appeals) held that VA had reasonably interpreted 38 C.F.R. § 3.311b as precluding claimants from establishing that a disease not recognized by VA as radiogenic had been caused by exposure to ionizing radiation in service. The CAVC concluded that paragraph (h) preserved a claimant's right to demonstrate that any disease was incurred or aggravated in service on any basis other than an allegation that radiation exposure caused the disease. *Combee*, 4 Vet. App. at 95. In March 1993, VA amended 38 C.F.R. § 3.311b(h) to specify that, although section 3.311b would not prevent the establishment of service connection for any disease or injury shown to have been incurred or aggravated in service, service connection generally could not be established "on the basis of exposure to ionizing radiation" for any disease other than those identified as "radiogenic" in section 3.311b(b)(2). 58 Fed. Reg. 16358 (1993).

5. In September 1994, the United States Court of Appeals for the Federal Circuit reversed the CAVC's decision in *Combee. Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994). The Federal Circuit concluded that Pub. L. No. 98-542 was intended to ease claimants' evidentiary burden in establishing service

connection for diseases allegedly caused by radiation exposure, [1] but that the statute did not preclude or authorize VA to preclude claimants from submitting actual proof that any disease was caused by in-service radiation exposure. *Combee*, 34 F.3d at 1043-44. In November 1994, Congress enacted Pub. L. No. 103-446, section 501(b) of which amended 38 U.S.C. § 1113(b) to provide, in pertinent part, that "[n]othing in . . . section 5 of Public Law 98-542 (38 U.S.C. 1154 note) shall be construed to prevent the granting of service-connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active military, naval, or air service." Pub. L. No. 103-446, § 501(b), 108 Stat. 4645, 4663 (1994).

6. In February 1995, VA amended 38 C.F.R. § 3.311 (which was renumbered from 3.311b to 3.311 in February 1994, 59 Fed. Reg. 5106, 5107 (1994)), to implement the requirements of Pub. L. No. 103-446 and the Federal Circuit's decision in *Combee*. 60 Fed. Reg. 9627 (1995). VA removed former paragraph (h) from the regulation. Paragraphs (a) and (b)(1) of section 3.311, as amended, provide the procedures for development and adjudication of claims for service connection of "radiogenic" diseases. Paragraph (b)(2) of the amended regulation contains the list of diseases recognized by VA as "radiogenic" diseases. Immediately following paragraph (b)(2) are the following two paragraphs:

> (3) For purposes of paragraphs (a)(1) and (b)(1) of this section, "radiogenic disease" shall not include polycythemia vera.
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> (4) If a claim is based on a disease other than one of those listed in paragraphs (b)(2) or (b)(3) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent
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> scientific or medical evidence that the claimed condition is a radiogenic disease.

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[1] Although the Federal Circuit characterized Pub. L. No. 98-542 as creating a "presumption of service connection," *Combee*, 34 F.3d at 1044, its subsequent decision in *Ramey v. Gober*, 120 F.3d 1239 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1171 (1998), clarified that neither the statute nor VA's implementing regulation established a presumption of service connection.

38 C.F.R. § 3.311(b)(3) and (4).

7. As an initial matter, it is necessary to determine whether paragraphs (b)(3) and (b)(4) purport to preclude a claimant from establishing that he or she incurred polycythemia vera as the result of exposure to ionizing radiation in service. Section 3.311(b)(3) provides that polycythemia vera shall not be considered a "radiogenic" disease "[f]or purposes of" 38 C.F.R. § 3.311(a)(1) and (b)(1). The statement that polycythemia vera is not a "radiogenic" disease may be viewed as consistent with the requirements of section 5(b)(2)(A)(i) of Pub. L. No. 98-542 that VA regulations include a finding concerning service connection of polycythemia vera based on exposure to ionizing radiation. Further, the statement that polycythemia vera is not considered radiogenic "[f]or purposes of" 38 C.F.R. § 3.311(a)(1) and (b)(1) does not, in itself, preclude any claimant from establishing that polycythemia vera was caused by exposure to ionizing radiation in service. Pursuant to the authority of Pub. L. No. 98-542, section 3.311(a) and (b)(1) establish special procedures for development and adjudication of claims based on radiogenic disease. Read literally, section 3.311(b)(3) indicates only that those special procedures do not apply to claims based on polycythemia vera, but does not preclude a claimant from establishing, under generally-applicable procedures, that his or her polycythemia vera was actually caused by exposure to ionizing radiation in service.

8. Section 3.311(b)(4) provides that, if a claim is based on a disease other than polycythemia vera which VA regulations do not identify as radiogenic, the special procedures of section 3.311 will nevertheless be applied if evidence in the particular claim demonstrates that the disease is capable of induction by ionizing radiation. In providing that claims based on diseases other than polycythemia vera which are not listed as radiogenic may be developed and adjudicated under the special procedures of section 3.311, paragraph (b)(4) does not expressly foreclose the possibility that service connection based on radiation exposure may be granted for polycythemia vera under generally-applicable procedures, as distinguished from the special procedures in section 3.311. However, the categorical statement in paragraph (b)(3) that polycythemia vera shall not be considered a "radiogenic" disease, viewed together with the language of paragraph (b)(4) indicating that any disease other than polycythemia vera may be shown to be a "radiogenic" disease by evidence in a particular claim, strongly implies that service connection

may not, in any circumstance, be granted for polycythemia vera on the basis that it was caused by exposure to ionizing radiation. The only plausible interpretations of the regulation are that VA intended either to preclude service connection of polycythemia vera on the basis of exposure to ionizing radiation or that VA intended to establish a specific adjudication procedure applicable to all radiation claims except those involving polycythemia vera.

9. Section 3.311 establishes procedures for the adjudication of radiation claims based on any disease, whether or not identified as radiogenic in VA's regulations, with the express exception of polycythemia vera. Rather than identifying any procedures applicable to claims involving polycythemia vera, or indicating that such claims may be adjudicated under generally-applicable VA procedures, the regulation merely provides that polycythemia vera is not considered to be a disease that may be induced by ionizing radiation. 38 C.F.R. § 3.311(b)(2) and (3). The language and context of the regulation, therefore, suggest an intent to establish an exclusive procedure for adjudicating radiation claims not covered by 38 C.F.R. § 3.309(d) (which recognizes presumptions of service connection for certain radiation-exposed veterans) and to preclude service connection of polycythemia vera on the basis of radiation exposure, rather than an intent to establish a procedure which applies to all claims except those involving polycythemia vera.

10. In the notice of rulemaking accompanying the February 1995 revision of section 3.311, VA stated that the effect of the revision was "to provide claimants who base their claims on conditions not on [VA's] regulatory list [of radiogenic diseases] an opportunity to establish service connection by demonstrating that their conditions are radiogenic diseases." 60 Fed. Reg. at 9627. This statement is consistent with the view that the provisions of section 3.311(b)(4) are intended to state the exclusive procedures applicable to claims for service connection based on radiation exposure for diseases not identified as radiogenic in VA's regulation or covered under 38 C.F.R. § 3.309(d). Inasmuch as the 1995 revision of section 3.311 was intended to clarify the method of establishing service connection for diseases not identified in VA's regulation as radiogenic, the absence of any reference to the procedures for establishing service connection of polycythemia vera, coupled with the seemingly preclusive language of section 3.311(b)(3) and (4), suggest that VA intended to preclude service connection for that disease on

the basis of radiation exposure. In light of the language, context, and history of the regulation, we conclude that 38 C.F.R. § 3.311(b)(3) and (b)(4) are most reasonably construed as prohibiting establishment of service connection for polycythemia vera on the basis of exposure to ionizing radiation in service.

11. We now turn to the question of whether 38 C.F.R. § 3.311(b)(3) and (b)(4) are valid insofar as they purport to preclude establishment of service connection for polycythemia vera on the basis of radiation exposure. Section 5(b)(2)(A)(i) of Pub. L. No. 98-542 expressly requires that VA regulations state a finding concerning service connection of polycythemia vera based on exposure to ionizing radiation. The statement in section 3.311(b)(3) that polycythemia vera shall not be considered a "radiogenic" disease was apparently made for purposes of implementing that statutory requirement. However, 38 U.S.C. § 1113(b), as amended by section 501(b) of Pub. L. No. 103-446, states, in pertinent part, that, "[n]othing in . . . section 5 of Public Law 98-542 . . . shall be construed to prevent the granting of service-connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active military, naval, or air service." The legislative history of Pub. L. No. 103-446 indicates that Congress expressed disapproval of the view taken by the CAVC in *Combee* and that this provision was intended to "affirm[] a claimant's right to attempt to establish direct service connection for a disability associated with exposure to ionizing radiation." 140 Cong. Rec. S15,015 (daily ed. Oct. 8, 1994). Based on the statutory language and legislative history, we interpret 38 U.S.C. § 1113(b) as providing that VA's determinations under section 5 of Pub. L. No. 98-542 may not be used to preclude any claimant from establishing by evidence that his or her disability was caused by exposure to ionizing radiation in service. This result is also consistent with the Federal Circuit's decision in *Combee*, which concluded that Pub. L. No. 98-542 does not authorize VA to prevent any claimant from showing by evidence that his or her disability was caused by exposure to ionizing radiation in service.

12. Section 1113(b) and the Federal Circuit's decision in *Combee* both indicate that VA's determinations under section 5 of Pub. L. No. 98-542 must be viewed as relating to the specific purpose of that statute to ease the evidentiary and procedural requirements for veterans seeking service connec-

tion for disease which VA has found to be radiogenic. The Federal Circuit has stated that a determination that a particular disease is radiogenic "relieves the claimant of the need to show that it is possible that in-service exposure to ionizing radiation may have been a precipitating factor for the disease." *Ramey v. Gober*, 120 F.3d 1239, 1245 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1171 (1998). We note further that a determination that a disease is radiogenic entitles claimants seeking service connection for such diseases to have their claims developed and adjudicated under the guidelines established by VA pursuant to Pub. L. No. 98-542. *See* 38 C.F.R. § 3.311. Accordingly, a conclusion under Pub. L. No. 98-542 that a disease is radiogenic does not preclude service connection for all other diseases claimed to have been caused by radiation exposure, but, rather, serves only to ease the evidentiary and procedural requirements for claimants who have a disease recognized as radiogenic.

13. Conversely, pursuant to 38 U.S.C. § 1113(b), a determination under Pub. L. No. 98-542 that a particular disease is *not* radiogenic should not be construed to preclude a claimant from establishing service connection for such disease based on radiation exposure, but should establish only that such a claimant is not entitled to the evidentiary and procedural advantages accorded to veterans seeking service connection for diseases VA has identified as radiogenic. Accordingly, VA's conclusion under section 5 of Pub. L. No. 98-542 that polycythemia vera is not a radiogenic disease cannot, in light of 38 U.S.C. § 1113(b), provide a basis for precluding a claimant from establishing by evidence that a particular veteran incurred polycythemia vera as the result of exposure to ionizing radiation in service.

14. To the extent that 38 C.F.R. § 3.311(b)(3) and (b)(4) purport to preclude service connection for polycythemia vera on the basis of exposure to ionizing radiation in service, it is inconsistent with 38 U.S.C. § 1113(b). VA generally may not impose restrictions on rights granted by mandatory and unambiguous statutory provisions. *See Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed. Cir. 1994); *Davenport v. Brown*, 7 Vet. App. 476, 482 (1995). Accordingly, to the extent that 38 C.F.R. § 3.311(b)(3) and (b)(4) are inconsistent with section 1113(b), VA may not rely upon that regulation as the basis for summarily denying a claim for service connection for polycythemia vera alleged to have been caused by in-service exposure to ionizing radiation. Rather, VA must give claimants the opportunity to show by evidence that

their polycythemia vera was caused by in-service exposure to ionizing radiation.

15. We do not mean to imply that 38 C.F.R. § 3.311(b)(3) and (b)(4) are invalid in their entirety. As noted above, paragraph (b)(3) is valid insofar as it reasonably implements a requirement of section 5 of Pub. L. No. 98-542 and establishes that VA will not *presume* polycythemia vera to be a radiogenic disease. It is inconsistent with 38 U.S.C. § 1113(b) only to the extent that, viewed in connection with paragraph (b)(4), it suggests that a claimant may not attempt to show by evidence that a particular veteran incurred polycythemia vera as a result of exposure to ionizing radiation in service. Paragraph (b)(4) is consistent with 38 U.S.C. § 1113(b) except to the extent that the regulation may be read as excluding polycythemia vera from the general principle that claimants may attempt to prove that their diseases are capable of induction by exposure to ionizing radiation in service.

HELD:

Paragraphs (b)(3) and (b)(4) of 38 C.F.R. § 3.311 are inconsistent with 38 U.S.C. § 1113(b) to the extent that those regulatory provisions purport to preclude a claimant from establishing by evidence that a particular veteran incurred polycythemia vera as the result of exposure to ionizing radiation in service. The Department of Veterans Affairs (VA) may not rely upon 38 C.F.R. § 3.311(b)(3) and (4) as a basis for summarily denying any claim that polycythemia vera was incurred as a result of exposure to ionizing radiation in service. Rather, VA must give a claimant the opportunity to submit evidence to establish that a particular veteran incurred polycythemia vera as the result of exposure to ionizing radiation in service.

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