Department of Veterans Affairs

Memorandum

Date: April 3, 2000 VAOPGCPREC 2-2000

From: General Counsel (022)

Subj: Special Monthly Compensation for Loss of Creative Organ--Mastectomy--38 U.S.C. § 1114(k); 38 C.F.R. § 3.350(a)

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

May the Department of Veterans Affairs (VA) through rulemaking authorize special monthly compensation under 38 U.S.C. § 1114(k) (k-rate SMC) for a service-connected mastectomy?

COMMENTS:

1. This is in response to your inquiry regarding VA's authority to implement a recommendation of the Advisory Committee on Women Veterans to amend VA regulations to authorize k-rate SMC for a service-connected mastectomy. We conclude that VA may not by rulemaking authorize k-rate SMC for a service-connected mastectomy because such a rule would be contrary to the intent of Congress as expressed in the governing statute.

2. Section 1114(k) of title 38, United States Code, authorizes a special rate of compensation under the following circumstances:

> if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, or has suffered complete organic aphonia with constant inability to communicate by speech, or deafness of both ears, having absence of air and bone conduction.

A mastectomy is the "excision of the breast." *Dorland's Illustrated Medical Dictionary* (*Dorland's*) 992 (28th ed. 1994). Section 1114(k) nowhere refers to a breast or mastectomy. Clearly, section 1114(k) does not expressly authorize special monthly compensation for a mastectomy.

3. In neither section 1114(k), nor in the statute granting VA general rulemaking authority, 38 U.S.C. § 501(a), do we find a delegation of authority from Congress to VA to authorize k-rate SMC for any injury or condition not specified by Congress in section 1114(k). Section 1114(k) does not contain any general term, such as "or a comparable condition," which would evince an intent to permit VA to designate additional conditions for which k-rate SMC would be payable. Section 501(a) grants VA only the "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by [VA] and are consistent with those laws." It does not provide VA authority to create entitlements not authorized by another statute. In light of the absence of express authorization to issue a legislative rule, VA may not by rulemaking designate additional injuries or conditions for which it will pay k-rate SMC, beyond those specified in section 1114(k), even if it finds that the loss involved is comparable to the losses involved in the conditions for which Congress has authorized k-rate SMC.

4. The question then becomes whether a mastectomy may be considered as falling within the scope of the injuries and conditions identified in section 1114(k). The only term in that section which might be interpreted as including excision of a breast is loss of a "creative organ[]." However, we believe that Congress intended the term "creative organs" in section 1114(k) to mean procreative, or reproductive, organs and did not intend that term to include the breast.

5. Neither section 1114(k), nor any other provision of title 38, United States Code, defines the term "creative organ." We have found no court decision interpreting the term. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Although the individual words "creative" and "organ" have common, ordinary meanings,[1] the composite term "creative organ" does

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[1] The word "organ" ordinarily means "a differentiated structure . . . in an animal or plant made up of various cells and tissues and adapted for the performance of some specific function and grouped with other structures sharing a common function into systems." *Webster's Third New Int'l Dictionary* 1589 (1981). The word "creative" ordinarily means "having the power or quality of creating" or "given to creation." *Id.* at 532. The word "procreative," by comparison, refers to something related to reproduction. *Id.* at 1809.

not. The term appears to be unique. Our research disclosed no incident of its use in any Federal or state statute or court opinion except in connection with section 1114(k) and VA's implementing regulation, 38 C.F.R. § 3.350(a).

6. In our opinion, Congress intended the term to mean something other than the literal combination of the ordinary meanings of the constituent words. A literal combination of the ordinary meanings of "organ" and "creative" would result in the provision's application to any organ that creates something. Virtually every human organ can be said to be creative in the ordinary sense. Every organ can be said to create the state resulting from its proper functioning. Yet, because Congress specified not just organs, but rather "creative organs," it must have intended the provision to apply to only certain organs. To conclude otherwise would render the word "creative" superfluous. *See* 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.06 (5th ed. 1992)("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous"). Further, literal interpretation of the term "creative organ" would clearly render another term in the statute superfluous. A literal interpretation would apply the provision to the speech organs, which have the power or quality of creating speech. Yet section 1114(k) expressly authorizes k-rate SMC for "complete organic aphonia with constant inability to communicate by speech."

7. The absence of a common meaning for the term "creative organ," the necessarily restrictive nature of the term in light of its structure and context, and the similarity of that term to the more readily understood "procreative" organ suggest that Congress had the latter term in mind in

framing the statute. In our opinion, by using the term "creative organs," Congress meant procreative, or reproductive, organs. This interpretation is reflected by VA's regulation implementing that provision in section 1114(k), 38 C.F.R. § 3.350(a)(1), which provides that, "[l]oss of a creative organ will be shown by acquired absence of one or both testicles (other than undescended testicles) or ovaries or other creative organ" and describes how "[l]oss of use of one testicle will be established." 38 C.F.R. § 3.350(a)(1)(i). The regulatory terms indicate that creative organs are testicles, ovaries, and other creative organs. If general words follow specific words in a series of terms, the general words are construed to embrace only things similar in nature to the things specified by the preceding words. 2A *Sutherland Statutory Construction*, *supra*, § 47.17. Application of this canon of construction to section 3.350(a)(1)(i) indicates that the phrase "other creative organ" refers to other procreative or reproductive organs because the preceding specific words, "testicles" and "ovaries," are limited to such organs.

8. Although section 1114(k)'s legislative history sheds no light on what Congress meant by "creative organ" when it first introduced the term into the veterans' benefit statutes, the legislative history does indicate that VA's predecessor agency from the start interpreted the term to mean procreative, or reproductive, organ. In 1930, Congress amended the World War Veterans' Act, 1924, to authorize for World War I veterans a statutory award for "the loss of the use of a creative organ." Act of July 3, 1930, ch. 849, § 13, 46 Stat. 991, 998. In commenting on a report on H.R. 10381, 71st Cong., 2d Sess. (1930), a predecessor bill to the one eventually enacted, the Medical Director of the Veterans Bureau interpreted the term to mean procreative organ. *See* Memorandum from the Medical Director to the Assistant Director, Coordination Service (March 26, 1930) (commenting that the provision would authorize an award for loss of one testis or ovary as well as for loss of both testes or ovaries).

9. Just a few years later, the Veterans' Administration formalized that interpretation. *See* Veterans' Administration Service Letter (April 8, 1935) (indicating that avulsion of one or both testicles or ovaries or atrophy resulting in loss of "procreative function" establishes

loss of use). Shortly thereafter, that same interpretation entered the agency's regulations, where it has remained to the present day. VA Regulation 1131 (Jan. 25, 1936). Thus, for sixty-five years the agency consistently maintained its interpretation of "creative organ" as referring to procreative organ.

10. Congress was aware of the agency's interpretation when it passed additional legislation using the same term. In 1952, Congress extended the applicability of the creative-organ provision to veterans of wars subsequent to World War I. Act of June 30, 1952, ch. 525, § 1(A), 66 Stat. 295. In reporting on H.R. 7783, 82d Cong., 2d Sess., the bill that was eventually enacted on June 30, 1952, the Deputy Administrator of Veterans' Affairs referred to, and enclosed a copy of, a Veterans' Administration report on a previous bill that contained the same provision, H.R. 318, 82d Cong., 1st Sess. (1951). H.R. Rep. No. 1931, 82d Cong., 2d Sess. 4 (1952); S. Rep. No. 1681, 82d Cong., 2d Sess. 4 (1952). The Veterans' Administration report on H.R. 318 referred to the fact that the 1945 Schedule for Rating Disabilities provides a zero-percent evaluation for atrophy of one testis to illustrate that, from a medical viewpoint, loss of use of a creative organ does not necessarily destroy procreative power. H.R. Rep. No. 234, 82d Cong., 1st Sess. 4 (1951); Letter from Administrator of Veterans' Affairs to Chairman, Senate Finance Committee (May 18, 1951). Congress' enactment of legislation using the same term when it was aware of VA's long-standing, contemporaneous interpretation of the earlier law is persuasive evidence that VA's interpretation of the statute is correct. *See* 2B *Sutherland Statutory Construction, supra*, § 49.09 (reenactment of statute by legislature familiar with contemporaneous interpretation by administrative body charged with duty of administering statute implies adoption of administrative interpretation by legislature).

11. Having determined that the term "creative organs" in section 1114(k) means procreative organs, we next consider whether a breast is such an organ. It is not. The breast is "the anterior aspect of the chest, often applied especially to the modified cutaneous glandular structure it bears." *Dorland's* at 227 (defining "breast"). The female breast contains the elements that secrete milk for nourish

ment of the young. *Dorland's* at 983 (defining "mamma"). The function of the breast is to aid in the care of the newborn, rather than to assist in the process of reproduction, i.e., the forming, creating, or bringing into existence of a new being. *See Webster's Third New Int'l Dictionary* 1927 (1981) (defining "reproduction"); *see also Dorland's* at 1190 (definition of "organa genitalia" describing "the various internal and external organs that are concerned with reproduction" without reference to the breast).

12. In sum, VA may not by rulemaking authorize k-rate SMC for any condition not specified in section 1114(k). Further, the anatomical loss or loss of use of one or more creative organs specified by Congress means loss or loss of use of a procreative, or reproductive, organ and does not include excision of the breast. Therefore, VA may not by rulemaking authorize k-rate SMC for a service-connected mastectomy.

HELD:

Section 1114(k) of title 38, United States Code, authorizes a special rate of compensation for the disabilities specified in that provision. Neither section 1114(k) nor VA's general rulemaking authority, 38 U.S.C. § 501(a), delegates to VA authority to recognize by rulemaking additional injuries or conditions not specified in section 1114(k) for which the special rate of compensation will be paid. By authorizing that rate of compensation for "anatomical loss or loss of use of one or more creative organs," Congress intended to compensate for loss of a procreative, or reproductive, organ, which does not include the breast. Therefore, VA may not by rulemaking authorize special monthly compensation under section 1114(k) for a service-connected mastectomy.

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