

**Department of
Veterans Affairs**

Memorandum

Date: July 11, 2002

VAOPGCPREC 6-2002

From: General Counsel (022)

Subj: Protection of Service Connection—38 U.S.C. § 1159; 38 C.F.R. § 3.957
XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

A. May the Department of Veterans Affairs (VA) sever service connection of a disability erroneously and recently granted but with an effective date more than ten years earlier than the date of the decision granting service connection?

B. If such a grant of service connection is protected from severance, must VA retroactively award compensation for that disability, if otherwise in order?

COMMENTS:

1. The relevant facts are these. The veteran served on active duty from January 18, 1949, to September 5, 1953. On December 1, 1954, the veteran filed a claim for compensation or pension based on infantile paralysis, which reportedly began on July 10, 1954. A private physician certified in January 1955 that he had treated the veteran from August to November 1954 for acute anterior poliomyelitis that began in July 1954. On May 11, 1955, a Veterans Administration (now Department of Veterans Affairs (VA)) regional office denied service connection for residuals of acute anterior poliomyelitis because “it developed acutely at a date beyond the maximum incubation period for poliomyelitis following veteran’s period of Korean service.” The veteran did not appeal that decision.

2. On January 3, 2001, a VA regional office found clear and unmistakable error in the May 1955 denial of service connection, on the basis that the chronic disease manifested to the required degree within one year from the claimant’s separation from service. Current medical evidence shows that the veteran continues to have residuals of polio. The regional office established service connection for residuals of acute poliomyelitis to include paraplegia of both lower extremities effective from December 1, 1954, rated the disability zero percent disabling from that date and 100 percent disabling from August 10, 2000, and

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deferred a reevaluation of the disability from December 1, 1954, pending receipt of additional evidence. Citing the provisions of what is now 38 C.F.R. § 3.379¹ (which were in effect when VA received the veteran's original claim), you find no error in the May 1955 denial of service connection and believe the recent grant of service connection to be erroneous.

3. Section 1159 of title 38, United States Code, provides:

Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed . . . except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The mentioned period shall be computed from the date determined by the Secretary as the date on which the status commenced for rating purposes.

VA's implementing regulation, 38 C.F.R. § 3.957, essentially tracks the statutory language. With respect to computation of the ten-year period, section 3.957 provides, "[t]he 10-year period will be computed from the effective date of the [VA] finding of service connection to the effective date of the rating decision severing service connection."

4. Section 1159 limits VA's authority to correct clearly and unmistakably erroneous determinations of service connection. VAOPGCPREC 13-96. Pursuant to section 1159, a determination of service connection that has been in force for ten or more years generally may not be severed, even if it was clearly and unmistakably erroneous. *Id.* This office has previously interpreted that provision as protecting grants of service connection even if erroneously based on an inapplicable presumption. VADIGOP, 8-6-84 (9-2 Service Connection) (former section 359² protects service connection of diabetes presumed to have

¹ Section 3.379 provides:

If the first manifestations of acute anterior poliomyelitis present themselves in a veteran within 35 days of termination of active military service, it is probable that the infection occurred during service. If they first appear after this period, it is probable that the infection was incurred after service.

² Former 38 U.S.C. § 359 was recodified as 38 U.S.C. § 1159. Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 378, 406 (1991).

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been incurred or aggravated in active service even though claimant's only service was active duty for training); VAOPGC 8-83 (9-30-83) (same).

5. Section 1159 protects a grant of service connection from severance if the status of service connection "has been in force for ten or more years," unless the grant was based on fraud or military records clearly show that the person concerned did not have the requisite service or character of discharge. To determine whether a grant of service connection "has been in force for ten or more years," the statute directs that "[t]he mentioned period shall be computed from the date determined by [VA] as the date on which the status commenced for rating purposes." 38 U.S.C. § 1159. This latter provision was added to the statute in 1962, Pub. L. No. 87-825, § 6, 76 Stat. 948, 950 (1962), to make consistent the beginning of the periods for protection of service connection and for protection of certain disability evaluations,³ S. Rep. No. 87-2042 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3260, 3261; Explanatory Statement on H.R. 7600, 87th Cong., *reprinted in* 1962 U.S.C.C.A.N. 3263, 3269. One period began from the date on which the decision granting the rating was signed; the other began from the date on which service connection itself became effective. *Id.* The amendment was made "to assure that the period in question begins from the date determined by [VA] as the date on which the status commenced for rating purposes." 1962 U.S.C.C.A.N. at 3261. Consistent with the legislative intent demonstrated by this legislative history, VA's regulation specifies that the ten-year period begins from the effective date of the VA finding of service connection. 38 C.F.R. § 3.957.

6. Had VA erroneously granted service connection for the veteran's poliomyelitis in 1955, there is no doubt that section 1159 would now protect that service connection from severance, because it would have been in force for more than ten years. Because the ten-year period mentioned in section 1159 is computed from the effective date of the establishment of service connection, and not from the date of the decision establishing service connection, it matters not in this case that service connection was only recently granted, but with an effective date more than ten years earlier than the date of the decision. Further, the statutory reference to service connection having "been in force" for the requisite period cannot be read, in the context of the statute, as requiring that the rating actually have been extant for that period. The statutory reference to "the date on which the status commenced for rating purposes" clarifies that a retroactive period is counted in the computation, because service connection would be considered to have commenced for rating purposes at the beginning of the retroactive period. For example, if a veteran established service connection based on a claim filed

³ Certain disability evaluations are protected after twenty years by 38 U.S.C. § 110 and 38 C.F.R. § 3.951(b).

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within one year of service discharge, the date on which the status commenced for rating purposes would be the day after service discharge. 38 U.S.C. § 5110(b)(1). The retroactive period from the day after service discharge to the date of the decision establishing service connection would be counted in computing whether service connection has been in force for ten or more years. Therefore, VA may not sever service connection (unless the exception for fraud or lack of requisite service or character of discharge is found applicable).

7. If a veteran's disability has been service connected, and the veteran was discharged or released under conditions other than dishonorable from the period of service in which the injury or disease that resulted in disability was incurred or aggravated, VA "will pay" compensation to the veteran in accordance with applicable provisions of chapter 11 of title 38, United States Code. 38 U.S.C. §§ 1110, 1131. The statutes directing payment of compensation for service-connected disability make an exception for disability that is a result of the veteran's own willful misconduct or abuse of alcohol or drugs, but do not make any exception for disability granted service connection erroneously. The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:23 (6th ed. 2000). There is no indication in this case that the veteran's polio was a result of the veteran's willful misconduct or substance abuse. Thus, we find no legal basis on which to deny payment of compensation if otherwise in order, in accordance with applicable provisions of chapter 11, for the veteran's service-connected disability.

HELD:

A. Section 1159 of title 38, United States Code, and its implementing regulation, 38 C.F.R. § 3.957, protect a grant of service connection (unless the grant was based on fraud or military records clearly show that the person concerned did not have the requisite service or character of discharge) that has been in effect for ten years or longer, as computed from the effective date of the establishment of service connection. Those provisions protect even service connection erroneously and recently granted, but with an effective date more than ten years before the date of the decision establishing service connection. The Department of Veterans Affairs (VA) may not sever such a grant of service connection (in the absence of fraud or lack of requisite service or character of discharge).

B. Sections 1110 and 1131 of title 38, United States Code, direct the payment of compensation in accordance with the provisions of chapter 11, title 38, United States Code, to a veteran with the requisite service who is disabled by a service-connected disability, unless the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs. In the absence of the veteran's own

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willful misconduct or abuse of alcohol or drugs, VA must pay, in accordance with the provisions of chapter 11, compensation otherwise in order for a disability that was erroneously service connected, where service connection is protected from severance.

Tim S. McClain

Attachment (claim folder)