Department of Veterans Affairs

Memorandum

Date: July 16, 2003 VAOPGCPREC 3-2003

From: General Counsel (022)

Subj: Requirements for Rebutting the Presumption of Sound Condition Under 38 U.S.C. § 1111 and 38 C.F.R. § 3.304

To: Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

A. Does 38 C.F.R. § 3.304(b), which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service, conflict with 38 U.S.C. § 1111, which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service "and was not aggravated by such service"?

B. Does 38 C.F.R. § 3.306(b), which provides that the presumption of aggravation under 38 U.S.C. § 1153 does not apply when a preexisting disability did not increase in severity during service, conflict with 38 U.S.C. § 1111?

Comments:

1. Briefs filed by appellants in recent litigation before the United States Court of Appeals for Veterans Claims (CAVC) and the United States Court of Appeals for the Federal Circuit have identified an apparent conflict between 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b), the Department of Veterans Affairs (VA) regulation implementing that statute. In *Cotant v. Principi*, U.S. Vet. App. No. 00-2382 (June 6, 2003), the CAVC discussed the apparent conflict between those provisions, but declined to rule on the validity of VA's regulation. For the reasons stated below, we have concluded that VA's regulation conflicts with the statute and is therefore invalid.

2. Section 1111 provides:

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or

> disease existed before acceptance and enrollment and was not aggravated by such service.

The plain language of this statute provides that the presumption of soundness is rebutted only if clear and unmistakable evidence establishes both that (1) the condition existed prior to service and (2) the condition was not aggravated by service. VA's implementing regulation, however, omits the second prong of that standard, and states that the presumption may be rebutted solely by clear and unmistakable evidence "that an injury or disease existed prior [to service]." 38 C.F.R. § 3.304(b). VA regulations further provide that VA's duty to show by clear and unmistakable evidence that a condition was not aggravated by service arises only if evidence first establishes that the condition underwent an increase in severity during service. *See* 38 C.F.R. § 3.306(b). Under VA's regulations, therefore, if a condition was not noted at entry but is shown by clear and unmistakable evidence to have existed prior to entry, the burden then shifts to the claimant to show that the condition increased in severity during service. Only if the claimant satisfies this burden will VA incur the burden of refuting aggravation by clear and unmistakable evidence.

3. The interpretation reflected in VA's regulations conflicts with the language of section 1111. Contrary to section 3.304(b), the statute provides that the presumption of soundness is rebutted only where clear and unmistakable evidence shows that the condition existed prior to service and that it was not aggravated by service. Under the language of the statute, VA's burden of showing that the condition was not aggravated by service is conditioned only upon a predicate showing that the condition in question was not noted at entry into service. The statute imposes no additional requirement on the claimant to demonstrate that the condition increased in severity during service. Because the regulation imposes a requirement not authorized by the section 1111, it is inconsistent with the statute. *See Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed. Cir. 1994).

4. The phrase "and was not aggravated by such service" in section 1111 is stated as an element of VA's burden of proof in rebutting the presumption of soundness. The conclusion, reflected in sections 3.304(b) and 3.306(b), that the reference to aggravation in section 1111 merely heightens VA's burden in rebutting the presumption of aggravation under a different statute – 38 U.S.C. § 1153 – is not consistent with the plain language of section 1111. We note that 38 U.S.C. § 1153 establishes a rebuttable presumption of aggravation applicable only where it is shown that a preexisting disease or injury increased in severity during service. However, we find no basis for concluding that the reference to "aggravation" in section 1111 implicitly incorporates the substantive and procedural requirements governing the presumption of aggravation under section 1153 or shifts the burden of proof from VA to the claimant in a manner not otherwise provided for in section 1111. Sections 1111 and 1153 establish independent factual presumptions, each of

which specifies the predicate facts necessary to invoke the presumption and the facts that must be shown to rebut the presumption. Neither of those presumptions expressly, or by necessary implication, incorporates the elements of proof and counter-proof in the other.

5. The legislative history of section 1111 confirms that Congress intended VA to bear the burden of proving that a condition was not aggravated in service. The rebuttal standard in what is now section 1111 was enacted by the Act of July 13, 1943, ch. 233, § 9(b), 57 Stat. 554, 556 (Public Law 78-144), as an amendment to Veterans' Regulation No. 1(a), part I, para. I(b) (Exec. Ord. No. 6,156) (June 6, 1933). Prior to the amendment, paragraph I(b) stated that the presumption of soundness could 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." In 1943, a bill was introduced in the House to make the presumption of soundness irrebuttable. *See* H.R. 2703, 78th Cong., 1st Sess. (1943). That bill apparently was introduced in response to the concern that "a great many men have been turned out of the service after they had served for a long period of time, some of them probably 2 or 3 years, on the theory that they were disabled before they were ever taken into the service." 129 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Cong. Rankin). The Administrator of Veterans Affairs recommended that the bill be revised to permit rebuttal of the presumption "where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment." S. Rep. No. 403, 78th Cong., 1st Sess. 6 (1943). The Senate thereafter approved an amendment to the bill adopting the Administrator's suggested language, but adding to it the phrase "and was not aggravated by such active military or naval service." That language was approved by the House and was included in the legislation enacted as Public Law 78-144. The provisions of Veterans' Regulation No. 1(a), part I, para. I(b), as amended, were subsequently codified without material change at 38 U.S.C. § 311, later renumbered as section 1111.

6. A Senate Committee Report concerning the 1943 statute stated:

> [T]he amendment . . . is for the purpose of applying a rebuttable presumption under Public, No. 2, Seventy-third Congress, and the Veterans Regulations for war service connection of disability and death, including World War II, similar to that applied for World War I service connection of disability or death under Public, No. 141, Seventy-third Congress, March 28, 1934.
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> The language added by the committee, "and was not aggravated by such active military or naval service" is to make clear the intention to preserve the right in aggravation cases as was done in Public, No. 141.

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S. Rep. No. 403, at 2. This report makes clear that the reference to aggravation in what is now section 1111 was purposefully incorporated into the statutory presumption of soundness, although the report does not clearly indicate the effect of the added language. Public Law 73-141, referenced as the model for the Senate amendment, provided for restoration of service-connected disability awards that had been severed under prior statutes. The act provided that benefits would not be restored in some circumstances:

> The provisions of this section shall not apply . . . to persons as to whom clear and unmistakable evidence discloses that the disease, injury, or disability had inception before or after the period of active military or naval service, unless such disease, injury, or disability is shown to have been aggravated during service . . . and as to all such cases enumerated in this proviso, all reasonable doubts shall be resolved in favor of the veteran, the burden of proof being on the Government.

Act of March 27, 1943, ch. 100, § 27, 48 Stat. 508, 524. Although the 1934 statute is quite different from the presumption of sound condition, the fact that it placed the burden of proof exclusively on VA is consistent with the view that the 1943 statute was intended to place the burden of proof on VA with respect to the issue of aggravation.

7. Statements in floor debates concerning the 1943 amendment also reflect a purpose to place the burden of proof exclusively on VA to refute aggravation. In discussing the Senate amendment to H.R. 2703, the sponsor of that bill stated that the amendment "places the burden of proof on the Veterans' Administration to show by unmistakable evidence that the injury or disease existed prior to service and was not aggravated by such active military or naval service." 129 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Cong. Rankin). One House member expressed the view that it would be prohibitively difficult for VA to prove the absence of aggravation, and stated:

> I think the gentleman is right in agreeing to make this bill provide the burden of proof shall be upon the Government to show that the condition did exist previous to entry into service, rather than having the burden of proof on the veteran to show that it did not exist before he entered the service. . . .
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> But with the word aggravated in there it is going to be almost impossible ever to keep some from getting pensions that ought not to get them.

Id. at 7465 (statement of Cong. Judd). The sponsor of the bill responded that the proposed standard would not be prohibitively difficult because the meaning of the term "aggravated" was well established in VA's practice. Id. (statement of Cong.

Rankin). This exchange suggests that legislators understood the nature of the burden the statute would place on VA to prove that a condition was not aggravated by service. Accordingly, we find no evidence of a congressional purpose at odds with the literal language of section 1111.

8. Our interpretation of section 1111 is also consistent with a 1944 opinion of the Solicitor of the Veterans' Administration discussing Public Law 78-144. 72 Op. Sol. 298 (Feb. 7, 1944). The Solicitor stated that the statute "may be said to create a rebuttable presumption of soundness with a proviso that, even where rebutted by clear and unmistakable evidence, there is a presumption of aggravation which itself is rebuttable but only by clear and unmistakable evidence." 72 Op. Sol. at 300. The Solicitor further concluded that, under the presumption of sound condition, claimants were not required to make a preliminary showing of an increase in disability during service, as was required under the general presumption of aggravation then contained in paragraph I(d) of Veterans' Regulation No. 1(a), part I, corresponding to current 38 U.S.C. § 1153. The Solicitor contrasted the standards and burdens under the presumption of aggravation with the standards and burdens under the presumption of sound condition as revised by section 9(b) of Pub. L. No. 78-144:

> There are . . . differences between said sub-section (d) [of Veterans' Regulation No. 1(a), part I, para. I] and [section] 9(b) [of Pub. L. No. 78-144], namely, the former requires an increase in service, the latter does not require a showing of increase, but presumes same as to pre-existing defects or disorders. Stated another way, the former presumes aggravation if there be shown an increase beyond natural progress, whereas the latter presumes aggravation subject only to clear and unmistakable proof there was none.

72 Op. Sol. at 301.

9. For the foregoing reasons, we conclude that section 1111 requires VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition. The CAVC's decision in *Cotant* appears to suggest one possible means of construing section 3.304(b) to contain the "and was not aggravated" requirement of section 1111 even though it contains no language referencing such a requirement. The CAVC stated that VA regulations existing prior to 1961 contained such a requirement and that VA removed that requirement in 1961 in the course of what was characterized as a nonsubstantive reorganization of existing regulations. *Cotant*, slip op. at 18. The CAVC cited *Kilpatrick v. Principi*, 327 F.3d 1375, 1382 (Fed. Cir. 2003), for the principle that "it is improper to interpret a codification as making substantive changes in the law absent a clear indication in the legislative history." We construe the CAVC's discussion to raise the possibility that the omission of the relevant language from current section 3.304(b) was unintentional and that section 3.304(b) should be construed as consistent with VA's pre-1961

regulations. For the reasons explained below, we do not believe the analysis suggested by the CAVC supports a conclusion that section 3.304(b) implicitly contains the "and was not aggravated" requirement of section 1111.

10. Prior to 1961, 38 C.F.R. § 3.63 (1949) (VA Regulation 1063) addressed both the presumption of sound condition and the presumption of aggravation. With respect to the presumption of sound condition, the regulation stated that the presumption could be rebutted where "clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment and was not aggravated by such service." 38 C.F.R. § 3.63(b) (1949) (emphasis added). Paragraph (d) of the regulation, however, stated that "evidence which makes it obvious or manifest that the injury or disease existed prior to acceptance and enrollment for service will satisfy the requirements of the statute," thus suggesting that evidence of preexistence alone would rebut the presumption of sound condition. Further, paragraphs (d) and (i) of the regulation indicated that VA's burden of showing the absence of aggravation would arise only if it were first established that the condition increased in severity during service. Paragraph (d) stated, in pertinent part that "claims to which the above cited presumptions [of sound condition and aggravation] apply may be denied only on the basis of evidence which clearly and unmistakably demonstrates that the disease did not originate in service, or, if increased in service, was not aggravated thereby." 38 C.F.R. § 3.63(d) (1949) (emphasis added). Paragraph (i) stated, in pertinent part:

> injury or disease . . . noted prior to service or shown by clear and unmistakable evidence, including medical facts and principles, to have had inception prior to enlistment will be conceded to have been aggravated where such disability underwent an increase in severity during service unless such increase in severity is shown by clear and unmistakable evidence, including medical facts and principles, to have been due to the natural progress of the disease. Aggravation of a disability noted prior to service or shown by clear and unmistakable evidence, including medical facts and principles, to have had inception prior to enlistment may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of such disability prior to, during and subsequent to service. . . .

38 C.F.R. § 3.63(i) (1949) (emphasis added). Viewed together, paragraphs (d) and (i) may be read to state that the presumption of sound condition could be rebutted solely by evidence that a condition existed prior to service, and that VA's burden of showing that such condition was not aggravated by service would arise only in cases where evidence affirmatively establishes that the condition increased in severity during service. In view of the incongruity between the general statutory standard recited in paragraph (b) of the regulation and the specific principles set forth in

paragraphs (d) and (i) of the regulation, we conclude that the pre-1961 regulation was ambiguous regarding the nature of VA's burden of proof in rebutting the presumption of sound condition.

11. In 1961, VA removed former section 3.63 and issued separate regulations at 38 C.F.R. §§ 3.304 and 3.306, in essentially their present form, to govern the presumption of sound condition and the presumption of aggravation. As revised, section 3.304(b) omitted the phrase "and was not aggravated by such service" that formerly appeared in 38 C.F.R. § 3.63(b). A VA "Transmittal Sheet" summarizing the revisions indicated that sections 3.304 and 3.306 were merely "restatement[s]" of provisions formerly in section 3.63. VA Compensation and Pension Transmittal Sheet 209 (Feb. 24, 1961).

12. Even if the *Kilpatrick* analysis were relevant to the 1961 regulatory revision, we could not conclude that 38 C.F.R. § 3.304(b) implicitly contains a requirement that VA prove the absence of aggravation in order to rebut the presumption of sound condition. As stated above, the language of the pre-1961 regulation was ambiguous regarding the nature and extent of VA's burden in rebutting the presumption of sound condition. Current section 3.304(b) is consistent with the principles stated in 38 C.F.R. § 3.63(d) and (i) before 1961, which were that clear and unmistakable evidence of preexistence would suffice to rebut the presumption of sound condition and that VA's burden of showing the absence of aggravation would arise only if an in-service increase in disability were first established. The 1961 VA transmittal sheet characterizing the regulatory change as merely technical in nature, even under the *Kilpatrick* analysis, provides no basis for reading section 3.304(b) in a manner contrary to its plain language, because VA reasonably may have viewed the language adopted in section 3.304(b) as reflecting the provisions of the pre-1961 regulation.

13. In *Cotant*, the CAVC also suggested that a literal application of 38 U.S.C. § 1111 could yield potentially absurd results, by requiring disparate treatment of preexisting conditions that were noted at entry into service, as compared to those that were not. The court referenced VA regulations providing the following guidelines in evaluating disabilities aggravated by service:

> In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree of disability existing at the time of entrance into active service, whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to have existed at that time. It is necessary to deduct from the present evaluation the degree, if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule except that if the disability is total (100 percent) no deduction will be

> made. If the degree of disability at the time of entrance into service is not ascertainable in terms of the schedule, no deduction will be made.

38 C.F.R. §§ 3.322(a), 4.22. The CAVC stated that if a veteran's disability were noted at entry into service and found to have been 20 percent disabling at that time, VA would deduct 20 percent from the current disability evaluation in determining the veteran's award. *Cotant*, slip op. at 19. The CAVC contrasted this with the example of a veteran whose disability was not noted at entry into service and stated that in the latter case, VA would make no deduction from the current rating "***unless*** the rating at entry were ascertainable – something that would appear to be a relatively rare phenomenon for a not-noted-at-entry condition." *Id*. In our view, the court's examples do not reflect disparate treatment or an absurd distinction sufficient to override the plain meaning of section 1111. The cited VA regulations specify that the same rating criteria apply "whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to have existed at that time." The determinative factor in the CAVC's two examples is the presence of evidence regarding the level of pre-service disability in one case and the absence of such evidence in the other. The different outcomes in the two examples would be a product of the evidence in each case and not a consequence of section 1111. We note that it may be necessary to reassess the provisions of 38 C.F.R. §§ 3.322(a) and 4.22 in light of the analysis in this opinion. However, we conclude that the concerns referenced by the CAVC do not identify any absurd consequence flowing from 38 U.S.C. § 1111.

14. We note that the logic of section 1111 may be questioned in other respects. A presumption serves to permit the inference of a material fact, and it ordinarily ceases to operate once the contrary of the presumed fact is proven by the requisite degree of proof. *See A.C. Auckerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (a presumption "completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."). Although section 1111 provides a presumption that a veteran was in sound condition at the time of entry into service, its language compels the seemingly illogical conclusion that the presumption is not rebutted even where VA proves the contrary by showing that the veteran's disease or injury clearly and unmistakably existed prior to service. The additional rebuttal element in section 1111 – a showing that the preexisting condition was not aggravated <u>after</u> entry into service – has no obvious bearing upon the presumed fact of whether the veteran was in sound condition when he or she entered service. Accordingly, there is no obvious correlation between the fact presumed (sound condition at entry) and the facts that must be proven to rebut that presumption (including the absence of aggravation subsequent to entry).

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15. The fact that a statute produces arguably illogical results ordinarily does not, in itself, provide a basis for disregarding the literal meaning of the statute. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Denkler v. United States*, 782 F.2d 1003, 1007 (Fed. Cir. 1986). The Supreme Court has explained that, if a statute, properly construed, produces "mischievous, absurd, or otherwise objectionable" results, "the remedy lies with the law making authority." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Where the literal reading of a statute would produce an odd result, it is appropriate to search for other evidence of congressional intent. *See Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989). The literal meaning of a statute may, in some instances, be so contrary to the purpose of the statute that Congress clearly could not have intended the result. *See Griffin*, 458 U.S. at 571. Departure from the literal meaning of the statute, however, is permissible only if the history or structure of the statute persuasively shows that Congress did not intend what the statutory language literally requires. *See Crooks*, 282 U.S. at 60 ("there must be something to make plain the intent of Congress that the letter of the statute is not to prevail"); *Denkler*, 782 F.2d at 1007 ("the absurd result, as it appears to the judge, of literal construction of a statute, does not justify a reading unsupported by the text, unless it can be shown that the intent of Congress was imperfectly expressed."). As explained above, the relevant legislative history of section 1111 indicates that Congress intended VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition. Accordingly, concerns regarding the wisdom of that requirement do not permit the statute to be interpreted contrary to its plain meaning.

16. In *Cotant*, the CAVC also questioned whether 38 C.F.R. § 3.306(b) is consistent with 38 U.S.C. § 1111. *See Cotant*, slip op. at 19. Section 3.306(b) provides, in pertinent part:

> *Wartime service; peacetime service after December 31, 1946*. Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. . . . Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during, and subsequent to service.

This regulation implements 38 U.S.C. § 1153, which provides that, "[a] preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." In *Cotant*, the CAVC questioned whether the regulatory requirement of an increase in severity would conflict with the provision in section

1111 vesting VA with the burden of providing the absence of aggravation irrespective of whether an increase in severity was first shown.

17. The requirement for an increase in disability in section 3.306(b) merely reflects the provisions of 38 U.S.C. § 1153 requiring such an increase and is clearly valid for that reason. As explained above, that requirement does not apply in the context of determining whether the presumption of sound condition under 38 U.S.C. § 1111 has been rebutted. Section 1111 and section 1153 establish distinct presumptions, each containing different evidentiary requirements and burdens of proof. Section 1153 requires claimants to establish an increase in disability before VA incurs the burden of disproving aggravation in cases governed by the presumption of aggravation, while section 1111 does not impose such a requirement in cases subject to the presumption of sound condition. Section 3.306 is intended to implement the presumption of aggravation under section 1153. Section 3.306(a) reiterates the language of section 1153 and cites that statute as its authority. Accordingly, we conclude that section 3.306(b) is inapplicable to determinations under 38 U.S.C. § 1111.

18. There is no conflict between 38 C.F.R. § 3.306(b) and 38 U.S.C. § 1111 because those provisions relate to different presumptions and generally do not apply to the same claims. As stated above, section 1111 establishes its own evidentiary requirements and burdens of proof. If service connection is granted because VA was unable to rebut the presumption of sound condition under section 1111, there is no need to consider whether the veteran is independently entitled to the presumption of aggravation under the distinct provisions of 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b). We note that, if the presumption of sound condition under section 1111 were rebutted, the provisions of 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b) would, in theory, become relevant to determining whether the preexisting condition was aggravated by service. As a practical matter, however, section 1153 and 38 C.F.R. § 3.306(b) would have no impact on cases in which the presumption of sound condition had been applied and rebutted. In such cases, VA would have been required under section 1111 to find by clear and unmistakable evidence that the condition was not aggravated by service in order to conclude that there was a preexisting injury or disease. Such a finding would necessarily be sufficient to rebut the presumption of aggravation under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b). Accordingly, because the requirement in section 3.306(b) applies only to determinations under 38 U.S.C. § 1153, it does not conflict with 38 U.S.C. § 1111.

Held:

A. To rebut the presumption of sound condition under 38 U.S.C. § 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury

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was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. The provisions of 38 C.F.R. § 3.304(b) are inconsistent with 38 U.S.C. § 1111 insofar as section 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.

B. The provisions of 38 C.F.R. § 3.306(b) providing that aggravation may not be conceded unless the preexisting condition increased in severity during service, are not inconsistent with 38 U.S.C. § 1111. Section 3.306(b) properly implements 38 U.S.C. § 1153, which provides that a preexisting injury or disease will be presumed to have been aggravated in service in cases where there was an increase in disability during service. The requirement of an increase in disability in 38 C.F.R. § 3.306(b) applies only to determinations concerning the presumption of aggravation under 38 U.S.C. § 1153 and does not apply to determinations concerning the presumption of sound condition under 38 U.S.C. § 1111.

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