Department of Veterans Affairs

Memorandum

Date: March 9, 2004 VAOPGCPREC 3-2004

From: General Counsel (022)

Subj: Eligibility for Automobile Assistance in Relation to Compensation for Disability "As If" Service Connected--38 U.S.C. §§ 1151(a) and 3901(1)(A); 38 C.F.R. § 3.808

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

QUESTION PRESENTED:

Does a veteran's entitlement under 38 U.S.C. § 1151(a) to compensation for a disability "as if" service connected satisfy the requirement of 38 U.S.C. § 3901(1)(A) that, to be eligible for automobile benefits under chapter 39, a claimant must be entitled to compensation under chapter 11 for a disability that "is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service"?

COMMENTS:

1. In a November 4, 2003, decision, the Board of Veterans' Appeals (Board) granted entitlement to automobile purchase assistance and adaptive equipment under 38 U.S.C. §§ 3901 and 3902 on the basis of a disability compensated under 38 U.S.C. § 1151(a) "as if" service connected. See In re Dee W. Kilpatrick, B.V.A. No. 97-29406 (Nov. 4, 2003). That Board decision, which did not follow controlling authority, gave rise to the issue discussed in this opinion. The veteran, who has one, noncompensable service-connected disability, receives compensation under section 1151(a) for disability resulting from injuries sustained while receiving VA surgical treatment. He claimed specially adapted housing benefits under 38 U.S.C. § 2101 and automobile and adaptive equipment benefits under section 3902, both of which the Board denied in a prior decision, in reliance on VAOPGCPREC 24-97. That opinion held that a veteran with a disability compensated under section 1151 "as if" service connected is not eligible for a special housing adaptation grant as a result of that disability.

2. On February 8, 2002, the Court of Appeals for Veterans Claims (CAVC) decided that the veteran met the eligibility requirements for specially adapted housing under the "plain meaning" of section 2101(a) because, as a section 1151 beneficiary, he was entitled to the same chapter 11 compensation as a veteran with permanent and total service-connected disability. Kilpatrick v. Principi, 16 Vet. App. 1, 6 (2002). Accordingly, the CAVC invalidated 38 C.F.R. § 3.809 and VAOPGCPREC 24-97 to the

extent that VA had interpreted section 2101(a) as precluding eligibility for section 1151 beneficiaries. Id. at 8-9. With respect to chapter 39 automobile benefits, the CAVC found that the Board had erred in interpreting VAOPGCPREC 24-97 as barring a section 1151 beneficiary from eligibility for automobile benefits when the opinion did not reach a specific holding as to automobile benefits. 16 Vet. App. at 9-10.[1] The CAVC noted, in dicta, that 38 U.S.C. § 3902(b)(1) expressly incorporates the service-connected "eligible person" definition contained in section 3901(1), while section 3902(b)(2), which pertains to compensation for ankylosis and authorizes automobile benefits for "any veteran (other than a person eligible for assistance under paragraph (1) of this subsection)," does not. In its analysis of these provisions, the CAVC expressed concern that an absurd result would occur if section 3902(b)(2) could be interpreted as applying to section 1151 beneficiaries. The CAVC suggested that such an interpretation "would yield the anomalous result of entitling to benefits a veteran who, during hospital treatment, incurred injuries resulting in ankylosis, but excluding from benefits a veteran who suffered a wrongful amputation (or some other non-ankylosis section 1151 qualifying disability)." Id. at 10-11. Although the CAVC did not reach the merits of the veteran's claim for ancillary automobile benefits and merely remanded that claim to the Board for an adequate statement of its reasons and bases, the court suggested that the veteran might have a viable claim. Id. While this remand went back to the Board, VA appealed the CAVC's finding that receipt of benefits under section 1151 entitles a claimant to specially adapted housing under section 2101(a) to the Court of Appeals for the Federal Circuit (Federal Circuit).

3. The Federal Circuit affirmed the CAVC's holding that section 1151 beneficiaries are eligible for specially adapted housing under section 2101(a), but in doing so, rejected the CAVC's analysis. Kilpatrick v. Principi, 327 F.3d 1375, 1379 (Fed. Cir. 2003). The Federal Circuit noted that section 1151's predecessor statute, former 38 U.S.C. § 501a, provided eligibility for certain listed benefits, one of which was specially adapted housing benefits under former 38 U.S.C. § 701(g), section 2101's predecessor. Kilpatrick, 327 F.3d at 1380. Former section 501a authorized VA to provide "the benefits of sections 471a, 473a, 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721" to veterans injured by VA medical or surgical treatment "in the same manner as if such disability, aggravation, or death were service connected." See Pub. L. No. 73-141, § 31, 48 Stat. 509, 526 (1934) (as codified in 38 U.S.C. § 501a (1954)). In a 1957 reorganization of title 38, United States Code, Congress repealed section 501a and enacted a new 38 U.S.C. § 2351, which authorized VA to award only disability compensation and dependency and indemnity compensation to veterans injured by VA medical treatment. See Pub. L. No. 85-56, § 351, 71 Stat. 83, 102 (1957). Though severed from the new section 2351, the specially adapted housing benefit remained unchanged in new 38 U.S.C. § 2601. See Pub. L. No. 85-56, § 601, 71 Stat. at 114.

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[1] The November 4, 2003, Board decision erroneously stated that the "CAVC found that the same 1997 General Counsel opinion . . . was in error as such opinion did not address Chapter 39 statutory benefits nor did it provide any basis for a determination that eligibility thereunder was 'conditioned on a service-connected condition.'" In re Kilpatrick, at 6.

Relying upon legislative history indicating that Congress did not intend to exclude housing benefits from section 2351, the Federal Circuit concluded that veterans disabled by VA medical care were eligible for specially adapted housing under section 501a and, since that time, Congress has not expressed its intent to exclude section 1151 beneficiaries from eligibility for the benefit. Kilpatrick, 327 F.3d at 1381-82. Significantly, the Federal Circuit did not hold that disabilities compensated under section 1151 are service connected or that section 1151 beneficiaries are generally entitled to the full panoply of VA's ancillary benefits.

4. In its November 4, 2003, decision, the Board found 38 U.S.C. §§ 3901 and 3902 ambiguous as to whether section 1151 beneficiaries are eligible to receive financial assistance in the purchase of an automobile and adaptive equipment or adaptive equipment only. In re Kilpatrick, at 10. Although the Board recognized that the Federal Circuit had analyzed legislative history to determine whether section 1151 beneficiaries are eligible to receive ancillary housing benefits, id. at 7, it did not conduct a similar analysis to determine whether those beneficiaries are also eligible to receive ancillary automobile benefits. Nor did the Board request the General Counsel's opinion concerning the issue. Rather, resolving the ambiguity in the veteran's favor, the Board decided that, as a section 1151 beneficiary, the veteran is eligible for automobile benefits. Id.

5. Section 3901(1)(A) of title 38, United States Code, states that any veteran who is entitled to compensation under chapter 11 of title 38 for a listed disability is eligible for VA automobile benefits "if the disability is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service." VA implemented this eligibility provision in 38 C.F.R. § 3.808(b)(1), which reflects section 3901(1)(A)'s language in requiring that a qualifying disability result from injury or disease incurred or aggravated during active service. Section 1151(a) of title 38, United States Code, provides that "[c]ompensation under [chapter 11] and dependency and indemnity compensation under chapter 13 of [title 38] shall be awarded for a qualifying additional disability or a qualifying death of a veteran in the same manner as if such additional disability or death were service-connected." This office has issued several opinions addressing the relationship between section 1151 and its predecessors and other statutes, some of which govern ancillary benefits. See VAOPGCPREC 24-97 (section 1151 beneficiary not eligible for ancillary housing benefits) (invalidated in part by Kilpatrick, 327 F.3d at 1379); VAOPGCPREC 13-96 (protection of service connection under 38 U.S.C. § 1159 not applicable to disabilities compensated under section 1151); VAOPGCPREC 3-96 (VA not required to provide healthcare benefits to the dependents of a veteran receiving compensation for a paired-organ disability "as if" it were service-connected); VAOPGCPREC 100-90 (O.G.C. Prec. 100-90) (veteran receiving compensation under predecessor to section 1151 entitled to chapter 11 clothing allowance); VAOPGCPREC 80-90 (O.G.C. Prec. 80-90) (surviving spouse of veteran that received compensation for ten or more years under predecessor to section 1151 may qualify for DIC under former 38 U.S.C. § 410(b)(1)) ; VAOPGCPREC 75-90 (O.G.C. Prec. 75-90) (veteran receiving compensation for a paired-organ disability "as if" it were service-connected not entitled to service-connected ancillary benefits);

VAOPGC 12-86 (11-18-86) (eligibility for compensation under predecessor to section 1151 does not confer entitlement to service-connected ancillary benefits). Those opinions generally hold that entitlement to compensation under section 1151 does not confer eligibility for ancillary benefits if the statute providing the ancillary benefit requires service connection (as section 3901 does), unless the statute's legislative history is clear that Congress intended such eligibility. With one exception, our interpretation of section 1151 and use of legislative history to determine a section 1151 beneficiary's eligibility for ancillary benefits remains valid under current law.

6. In Alleman v. Principi, No. 03-7027, 2003 U.S. App. LEXIS 23733 (Fed. Cir. Nov. 21, 2003) (for publication at 349 F.3d 1368), the Federal Circuit applied its Kilpatrick analysis to a claim for Service Disabled Veterans' Insurance (SDVI) under 38 U.S.C. § 1922 made by a section 1151 beneficiary's surviving spouse. Section 1922(a) authorizes VA to provide SDVI to certain veterans who suffer from a disability or disabilities for which compensation would be payable and who apply for SDVI "within two years from the date service-connection (sic) of such disability is determined by [VA]." The surviving spouse contended that her deceased husband sustained a qualifying service-connected disability while receiving VA medical treatment. Alleman, at *4. She argued that, because 38 U.S.C. § 101(13) defines "compensation" as a monthly payment for a service-connected disability, the disability for which her deceased husband received compensation under section 1151 must have been service connected. Id. at *5. The Federal Circuit rejected this argument and held as follows:

> In order for a disability to be "service-connected," the disability must have been incurred or aggravated "in line of duty in the active military, naval, or air service." Section 1151 does not redefine "service-connected." Instead, it provides an exception that grants compensation for some non-service-connected disabilities, treating those disabilities for some purposes "as if" they were service-connected.
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> Mr. Alleman's disability clearly was not service-connected, because it arose as a result of medical treatment at a [VA] hospital rather than in line of duty.

Id. at *5-6 (citation omitted). Having conclusively determined that section 1151 beneficiaries do not receive compensation for service-connected disabilities, the court used its Kilpatrick analysis to determine whether the surviving spouse was entitled to SDVI benefits even though her deceased husband's disability was not service-connected. Id. at *6. First, the Federal Circuit noted that section 1922, unlike 38 U.S.C. § 2101, is not ambiguous in requiring service connection. Id. at *10. Second, it concluded from the legislative history of sections 1151 and 1922 that section 1151 beneficiaries had never been eligible for SDVI. Id. at *11-12. Thus, the Federal Circuit confirmed that section 1151 beneficiaries are not eligible for ancillary benefits under statutes that condition eligibility upon service connection, unless legislative history shows that Congress authorized such eligibility.

7. Turning to the ancillary benefit at issue in the Board's November 4, 2003, decision, we find that section 3901(1)(A)'s plain language is unambiguous in requiring service connection for eligibility for financial assistance in the purchase of an automobile and adaptive automobile equipment. Nevertheless, Kilpatrick instructs us to examine the legislative history to determine whether Congress originally intended section 1151 beneficiaries to be eligible for automobile benefits. In a 1946 supplemental appropriations act, Congress funded a Veterans' Administration program to provide automobiles and adaptive equipment to each World War II veteran "entitled to compensation for the loss, or loss of use, of one or both legs at or above the ankle." Pub. L. No. 79-663, 60 Stat. 910, 915 (1946). Eligibility for this benefit did not change until 1951 when Congress enacted Pub. L. No. 82-187, § 1, 65 Stat. 574, 575 (1951) (codified as former 38 U.S.C. § 252a), which limited the program to veterans entitled to compensation for certain conditions "due to disability incurred in or aggravated by active military, naval, or air service of the United States" during World War II or after June 26, 1950. The House Committee on Veterans' Affairs stated that veterans entitled to compensation "as a result of such service" would be eligible for the automobile program. H.R. Rep. No. 82-876 (1951), reprinted in 1951 U.S.C.C.A.N. 2368, 2369. Congress' 1958 reorganization of title 38 repealed section 252a and reenacted it as section 1901 without changing the service-connected disability requirement. See Pub. L. No. 85-857, § 1901, 72 Stat. 1105, 1215 (1958). The Senate Committee on Labor and Public Welfare later noted that under a 1970 amendment to former section 1901 "veterans disabled during the Vietnam era are made subject to the same service-connection standard—'disability incurred in or aggravated by active military, naval or air service'—as is applied to veterans of World War II or the Korean conflict." S. Rep. No. 91-1233 (1970), reprinted in 1970 U.S.C.C.A.N. 5999, 6000. Furthermore, it is clear from section 1151's legislative history that VA's automobile benefits were not among the benefits expressly authorized for persons with non-service-connected disabilities compensable under section 1151's predecessors. Moreover, the legislative history is clear that, since the original enactment of the predecessors to section 1151 and 3901, Congress has never altered the relationship between the two provisions. Accordingly, we find no basis in the plain language of the statutes or in the legislative history that would justify awarding ancillary automobile benefits to section 1151 beneficiaries.

8. Finally, after reviewing the legislative history of 38 U.S.C. § 3902(b)(2), we are unable to find any support for the CAVC's dicta concerning its hypothetical interpretation of that statute. In 1981, Congress amended the predecessor to section 3902(b), former 38 U.S.C. § 1902(b), by adding a new paragraph containing the language that is in current section 3902(b)(2). Pub. L. No. 97-66, § 302, 95 Stat. 1026, 1030 (1981). This new provision "[e]xtend[ed] eligibility for automobile adaptive equipment assistance to veterans with ankylosis of one or both knees, or one or both hips, if such disability is service-connected." S. Rep. No. 97-153 (1981), reprinted in 1981 U.S.C.C.A.N. 1595, 1598 (emphasis added). The Senate Committee on Veterans' Affairs explained this extension of ancillary automobile benefits as follows:

> Specifically, service-connected disabled veterans who suffer from ankylosis—the stiffening of a joint as the result of abnormal bone fusion—

> of the knees or hips at so-called favorable angles do not meet the VA's criterion for the requisite determination that the veteran has suffered the "loss of use" of a lower extremity. . . .
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> . . . This category of service-connected disabled veterans appears to be the only category of such veterans who need automobile adaptive equipment and who are not considered to have lost or lost the use of one of their limbs . . . .
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> Thus, [the provision] would extend . . . eligibility under specified circumstances for an adaptive equipment award to a veteran who is entitled to service-connected compensation for ankylosis of one or both knees, or one or both hips but who is not considered to have lost the use of a lower extremity.

Id. at 1611; see also Explanatory Statement on Compromise Agreement on S. 917, reprinted in 1981 U.S.C.C.A.N. 1651, 1653 (benefit extended to veterans suffering from service-connected ankylosis). It is clear from the legislative history of section 3902(b)(2) that Congress intended to extend ancillary automobile benefits to an additional, limited class of veterans: those who suffer from service-connected ankylosis of the knees or hips, but have not lost the use of their feet as required by section 3901(1)(A). Thus, Congress' use of the phrase "any veteran (other than a person eligible for assistance under paragraph (1) of this subsection)" in section 3902(b)(2) refers to veterans with service-connected ankylosis, not to section 1151 beneficiaries receiving compensation for ankylosis as if their disabilities were service-connected.

HELD:

Section 1151(a) of title 38, United States Code, authorizes compensation under chapter 11 of title 38 for additional disability caused by Department of Veterans Affairs (VA) hospital care, medical or surgical treatment, or examination, or proximately caused by VA's provision of training and rehabilitation services or by participation in a compensated work therapy program, "as if" the disability were service connected. A veteran's entitlement under section 1151(a) to compensation for a disability "as if" service connected does not satisfy 38 U.S.C. § 3901(1)(A)'s requirement, for eligibility for automobile benefits under chapter 39 of title 38, United States Code, of entitlement to compensation under chapter 11 for a disability that "is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service."

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