

CITATION: VAOPGCPREC 14-89  
Vet. Aff. Op. Gen. Couns. Concl. 14-89

DATE: 8-29-89

**TEXT:**

**QUESTION PRESENTED:**

Do the provisions of 38 U.S.C. § 312(c), granting presumptive service connection to radiation-exposed veterans for listed diseases, apply to individuals who were on active duty for training during onsite nuclear test participation?

**COMMENTS:**

1. The inquiry before us arose as part of an administrative review in the above-referenced case, in response to a reopened claim by the veteran's surviving spouse for Dependency and Indemnity Compensation (DIC) based on an assertion that in-service radiation exposure caused the veteran's fatal leukemia.
2. The record shows that the veteran served on active duty from June 1955 to September 1956. Also, while serving with the Tennessee Air National Guard, the veteran had a 20-day period of active duty for training which commenced on July 23, 1957. The veteran's flying activities on August 7, 1957, in connection with such duty, were determined to be consistent with participation in Shot Stokes of Operation PLUMBBOB, conducted on that date. The veteran died in August 1978 due to chronic myelocytic leukemia.
3. With the passage of Public Law No. 100-321, 102 Stat. 485, the "Radiation-Exposed Veterans Compensation Act of 1988," a new "presumption" was created under section 312 of title 38, United States Code. It provides that certain specified diseases, which become manifest in a radiation-exposed veteran to a degree of 10 percent or more within a specified presumptive period, "shall be considered to have been incurred in or aggravated during the veteran's service on active duty" (emphasis added) for purposes of VA compensation. The definition of "radiation-exposed veteran," codified at 38 U.S.C. § 312(c)(4)(A), is "a veteran who, while serving on active duty, participated in a radiation-risk activity." (Emphasis added).
4. The term "active duty" is defined for the purposes of title 38, United States Code, at section 101(21), in pertinent part, as including "full-time duty in the Armed Forces, other than active duty for training."
5. Our review of the pertinent legislative history concerning Public Law No. 100-321 discloses no discussion on this point. However, it is clear from the language

of 38 U.S.C. § 312(c) that only individuals participating in a radiation-risk activity while on active duty are eligible for presumptive service connection under its provisions. The statutory language being unambiguous, we conclude that the plain language of the statute governs its construction in this case. See 2A N.J. Singer, Sutherland Statutory Construction s 46.01 (4th ed. 1984).

**HELD:**

In order to qualify for presumptive service connection under the provisions of 38 U.S.C. § 312(c), a radiation-exposed veteran must have been serving on "active duty" at the time of participation in a radiation-risk activity. Therefore, those onsite nuclear test participants who were on active duty for training at the time of such participation are not entitled to the presumption created by that subsection.

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