CITATION: VAOPGCPREC 18-90
Vet. Aff. Op. Gen. Couns. Prec. 18-90

DATE: 06-13-90

TEXT:

SUBJECT: Line-of-Duty Determination--Unauthorized Absence

QUESTIONS PRESENTED:

A. If it should be established that the veteran was insane at the time of the veteran's unauthorized absence from service, is this a legal defense to an unfavorable line-of-duty determination under 38 C.F.R. § 3.1(m)(1) and 38 U.S.C. § 105(b)?

B. If so, (a) must the criteria governing insanity determinations under 38 C.F.R. § 3.354 be satisfied, or (b) is a service department finding that a veteran could not be charged under the Uniform Code of Military Justice, based on lack of substantial capacity, sufficient to bind VA under 38 C.F.R. § 3.1(m) unless patently inconsistent with applicable laws?

COMMENTS:

1. In brief, the record shows that the veteran served on active duty from July 1976 to December 1980. The veteran was absent without leave (AWOL) from September 11, 1977, to October 3, 1977, and May 14, 1978, to July 24, 1980. The veteran was placed on deserter status on June 21, 1978. In August 1978, while AWOL, the veteran was injured in the right shoulder by a gunshot. After the veteran was returned to military control, a board of medical officers concluded that at the time of the alleged AWOL, the veteran's "mental state was apparently such that he did lack substantial capacity to conform his conduct to the requirements of the law." He was diagnosed by the board as a paranoid personality, and no disciplinary action was taken under the Uniform Code of Military Justice (UCMJ). As recommended by the medical board, the veteran was administratively discharged from the service "under honorable conditions" based on his unsuitability for service. In January 1981, the veteran's service department determined that the veteran's AWOL from May 1978 to July 1980 was not excused as unavoidable, and he, therefore, was not entitled to any pay or allowances for that period. In April 1985, the veteran filed a claim for compensation for the gunshot wound. By a VA administrative decision in March 1986, the veteran's gunshot-wound injury was determined not to have been incurred in line-of-duty since the veteran was in a deserter status when the injury occurred. In April 1987, the veteran's service organization representative

raised the issue of insanity by alleging that the veteran was mentally unsound at the time the unauthorized absence began and during the period of absence and therefore was not at fault. By a rating decision in July 1987, the veteran was found to have been sane at the time of the gunshot injury. On appeal, the Board of Veterans Appeals remanded the case to the originating agency to obtain any clinical records pertaining to the veteran's mental state at the time the veteran went AWOL from service.

2. In order for a veteran to be entitled to disability compensation, the injury or disease from which the veteran's disability results must have been incurred in or aggravated by active military, naval, or air service "in line of duty." 38 U.S.C. §§ 101(16), 105(a), 310, 331; see also 38 C.F.R. §§ 3.1(k), 3.1(m), 3.301(a). The term "in line of duty" means "an injury or disease incurred or aggravated during a period of active military, naval, or air service unless such injury or disease was the result of the veteran's own willful misconduct." 38 C.F.R. s 3.1(m); see also 38 U.S.C. § 105(a); 38 C.F.R. § 3.301(a). The line-of-duty requirement "will not be met if it appears that at the time the injury was suffered or disease contracted the person on whose account benefits are claimed ... was avoiding duty by deserting the service or by absenting himself or herself without leave materially interfering with the performance of military duties." 38 U.S.C. § 105(b); see also 38 C.F.R.§ s 3.1(m).

3. The line-of-duty determination is governed by the language in 38 U.S.C. § 105 (a) which provides that the injury or disease shall not be determined incurred in line of duty if it was "the result of the person's own willful misconduct." VA regulations define "willful misconduct" in general as "an act involving conscious wrongdoing or known prohibited action ... deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n). When the service department has made a finding that the injury, disease, or death was incurred in line of duty, or a finding that the injury, disease, or death was not due to misconduct, the finding "will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs" and, in the case of misconduct, with the facts as well. 38 C.F.R. §§ 3.1(m) and 3.1(n).

4. In your memorandum, you first ask whether a determination of insanity bars an unfavorable line-of-duty determination under 38 U.S.C. § 105(b) and 38 C.F.R. § 3.1(m)(1). As you recognized in your memorandum, there are no provisions in 38 U.S.C. § 105(b) or 38 C.F.R. § 3.1(m)(1) which specifically provide for the application of an insanity defense to an unfavorable line-of- duty determination.

5. Unlike the provisions of 38 U.S.C. § 105(b), 38 U.S.C.§ 3103(b) specifically authorizes VA to make an insanity determination under certain circumstances. Section 3103(b) provides in pertinent part that:

if it is established to the satisfaction of the Secretary that, at the time of the commission of an offense leading to a person's court-martial, discharge, or resignation, that person was insane, such person shall not be precluded from benefits under laws administered by the Department of Veterans Affairs based upon the period of service from which such person was separated.

The provisions of 38 C.F.R. § 3.354 provide the definition of insanity to be applied in the insanity determination authorized under 38 U.S.C. § 3103(b). Section 3.354 provides in pertinent part:

An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

A review of the legislative history of 38 U.S.C. § 105(b) does not contain an explicit indication of whether Congress intended to apply an insanity defense in VA line-of-duty determinations. Nonetheless, as discussed below, we believe such an element must be considered inherent in the determination of line of duty.

6. The insanity defense in criminal law is based on the public policy that "even though a defendant satisfies all of the elements of a crime, society chooses not to hold him criminally responsible because he was suffering from a mental disease or defect." Comment, Constitutional Law-Due Process-Criminal Defendant Must Prove He Suffered from Mental Disease or Defect by Preponderance of Evidence Before He May Introduce Such Evidence to Negate the Existence of an Element of the Offense. State v Breakiron, 108 N.J. 591,532 A.2d 199 (1987), 19 Rutgers L.J. 1101, 1104 n. 19 (1988). In certain instances, lack of mental capacity may negate a required element of an offense. In the case of desertion, the accused may have been incapable of forming the intent to remain away permanently from his or her unit, organization, or place of duty. See Article 85, Uniform Code of Military Justice, 10 U.S.C. § 885. Although the offense of AWOL requires no such intent, military law nonetheless provides an insanity defense which recognizes the important public policy that a person determined to be insane should not be held legally responsible for the consequences of his or her actions. See Article 50a, Uniform Code of Military Justice, 10 U.S.C. § 850a; Manual for Courts-Martial, United States, Rule for Courts-Martial 916(k)(1) (1984); see also 18 U.S.C. § 17 (Federal criminal insanity defense). In our view, it is inconceivable that Congress could have intended that VA make determinations regarding AWOL without recognizing a

similar policy concerning persons not accountable for their actions due to insanity.

7. Furthermore, the history of 38 U.S.C. § 105 and VA's construction of that statute suggest the statute must properly be interpreted to include an exception to the AWOL provision in the case of insanity. Prior to 1944, laws governing line of duty for VA purposes, Vet. Reg. 10, para. VIII, provided that injury resulting from certain conduct not involving an element of misconduct, i.e., "something not involving misconduct but done in pursuing some private business or avocation," would be considered not in line of duty. The regulation further referred only to “misconduct," as opposed to willful misconduct. In 1943, the President vetoed an attempted reform of the line-of- duty provisions, stating that "the definition of misconduct should be correlated with that of line-of-duty" and noting that VA was developing legislation to remove certain recognized defects in the law in this area. 89 Cong. Rec. H7631 (daily ed. Sept. 14, 1943). Shortly thereafter, VA in fact submitted to Congress proposed legislation, enacted as the Act of September 27, 1944, Ch. 426, 58 Stat. 752, which substantially revised the laws governing line-of-duty determinations. This revision substituted the concept of "willful misconduct" for "misconduct" and, while retaining a pre-existing provision relating to desertion and AWOL, eliminated certain other exclusions including that relating to injury incurred in pursuit of private business, an activity not generally associated with willful misconduct. In submitting this legislation to Congress, VA indicated it was intended not only to simplify administration, but to eliminate injustices and permit payment of compensation in a number of cases where payment had theretofore been barred. Letter from the Administrator of Veterans Affairs to the Speaker of the House, October 5, 1943, incorporated in H.R. Rep. No. 1263, 78th Cong., 2d Sess. 6, 8 (1944).

8. Shortly after adoption of this legislation, VA issued an interpretation equating determination of line of duty for compensation purposes with consideration of whether willful misconduct resulted in injury. In issuing this contemporaneous construction of the statute which VA had helped draft, the VA Administrator stated, " the sole bar which the law provides is that injury shall not be deemed incurred in line of duty if it was ' * * * the result of his own willful misconduct: * * * '." A.D. No. 715 (6- 28-46). We note also that under Vet. Reg. 10, para. VIII, AWOL had been considered a form of misconduct for purposes of the line-of-duty determination. See Op. Sol. 275-51 (7-13-51) ("Where a person was absent without leave a finding of misconduct was required."). Based on the foregoing, we conclude that under the predecessor to 38 U.S.C. § 105 as amended by the Act of September 27, 1944, the desertion and AWOL exclusion was intended to be read in light of the willful misconduct provision currently codified at section 105(a). Thus, in applying the desertion and AWOL exclusion currently found at section 105(b), while the specific event giving rise to injury need not have resulted directly from willful misconduct, willful misconduct must have been an element in creation of the status, i.e., deserter or AWOL, in effect when the injury occurred. Use of the term "willful" in section 105 connotes an action taken

"voluntarily and intentionally and with the specific intent to do something the law forbids." Black's Law Dictionary 1434 (5th ed. 1979). This willful element would be lacking if, due to insanity, the veteran was unable to form the intent necessary to perform a willful act of desertion or AWOL.

9. Regarding the proper standard for evaluation of insanity, 38 C.F.R. §3.354(b) provides that, in making determinations as to whether a veteran was insane at the time of committing an offense leading to court-martial, discharge, or resignation, the rating agency will apply the definition of 38 C.F.R. § 3.354(a). However, section 3.354(b) does not limit the applicability of the section 3.354(a) insanity definition to court-martial and discharge situations. For purposes of consistency, we believe this definition may properly be applied in line-of-duty determinations as well. Accordingly, we find that VA's determination of insanity under 38 C.F.R. § 3 354(a) may be applied to line-of-duty determinations required to be made in accordance with 38 U.S.C. § 105(b). When the issue of insanity is raised by the veteran, all service medical records pertaining to the veteran's mental state at the time of the AWOL or desertion should be considered in the insanity and line-of-duty determinations. In such a situation, a determination under 38 C.F.R. § 3.354(a) that the person on whose account benefits are claimed was insane at the time he or she deserted or was AWOL will preclude a finding under 38 U.S.C. § 105(b) that the person on whose account benefits are claimed was avoiding duty by deserting the service or by absenting himself or herself without leave materially interfering with the performance of military duties. Thus, in our view, an injury or disease incurred while in deserter status or AWOL by a person claiming disability benefits, where such person is determined to have been insane at the time the person deserted or was AWOL, may, if otherwise appropriate, be deemed under 38 U.S.C. § 105 a) to have been incurred "in line of duty" and "not the result of the person's own misconduct."

10. In your memorandum, you ask whether a service department finding that a veteran could not be charged under the UCMJ, based on lack of substantial capacity, is sufficient to bind VA under 38 C.F.R. § 3.1(m), unless it is patently inconsistent with applicable laws. In the present case, there is no indication from the record that the service department ever made a finding that the claimed injury occurred in line of duty or a finding that the claimed injury was due to the willful misconduct of the veteran. Instead, the service department's medical board determined that at the time of the AWOL, the veteran "lacked the substantial capacity to conform his conduct to the requirements of the law." FN1 Additionally, the service department determined that the AWOL was not punishable under the UCMJ and was not unavoidable. FN2 These findings by the service department are not the same determinations required to be made by VA under 38 U.S.C. § 105(a) and, therefore, need not be followed by VA under the provisions of 38 C.F.R. §§ 3.1(m) or 3.1(n).

11. In view of the foregoing, we conclude that a service department finding that a veteran could not be charged under the UCMJ, based on lack of substantial

capacity, is not a sufficient determination to bind VA under 38 C.F.R. §§ 3.1(m) or 3.1(n). Independent VA determinations of line of duty and willful misconduct are necessary in any case where the finding of the service department does not conform to the standards provided under 38 U.S.C. § 105 (a). In such a case, VA must make its own determinations consistent with the laws it administers. See generally Op. G.C. 7-83 (7-29-83); 38 U.S.C. § 3103(b) (VA must determine if a person is insane at the time of committing the offense for which charged).

HELD:

A. If it should be established that the veteran was insane at the time of the unauthorized absence, you may conclude that, despite the veteran being in deserter or AWOL status at the time injury was incurred, the injury may be considered to have been incurred in line of duty under 38 C.F.R. § 3.1(m)(1) and 38 U.S.C. § 105.

B. (a) The criteria under 38 C.F.R. § 3.354(a) pertaining to insanity are appropriate for consideration in making a determination of insanity for line- of-duty purposes.

(b) A service department finding that a veteran would not be charged under the UCMJ, based on lack of substantial capacity, is not binding on VA in determining whether injury was incurred in line of duty under 38 C.F.R. § 3.1(m)(1).

1 The "lacks substantial capacity" formulation used by the service department medical board in its determination was apparently based on the Manual for Courts-Martial's lack of mental responsibility insanity defense legal standard in effect at the time. See para. 120b, Manual for Courts-Martial, United States (rev. ed. 1969); United States v. Frederick, 3 M.J. 230, 238 (C.M.A.1977).

2 This finding was apparently required under Department of Defense regulations to determine whether the period of the AWOL should be considered as time lost under 10 U.S.C. § 972 and to determine whether pay and allowances for the period should be forfeited by the service department under 37 U.S.C. § 503.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 18-90