DATE: 07-18-90

CITATION: VAOPGCPREC 67-90
Vet. Aff. Op. Gen. Couns. Prec. 67-90

TEXT:

SUBJECT: Congenital/Developmental Conditions under 38 C.F.R. § 3.303(c)

(This opinion, previously issued as General Counsel Opinion 8-88, dated September 29, 1988, is reissued as a Precedent Opinion pursuant to 38 C.F.R §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:
Whether a hereditary disease under 38 C.F.R. § 3.303(c) always rebuts the presumption of soundness found in 38 U.S.C. §§ 311and 332.

COMMENTS:
The opinion was issued in response to a request from the Chairman, Board of Veterans Appeals, and updates a previous opinion on this subject, Op. G.C. 1-85, March 5, 1985. The previous opinion involved three cases, two where the condition at issue was retinitis pigmentosa, as in the instant case, and one where the condition at issue was polycystic renal disease. Both diseases are considered to be hereditary in origin by accepted medical authority. In that opinion we drew a distinction between "congenital or developmental defects" as used in 38 C.F.R. § 3.303(c) and "diseases" as used in that regulation and 38 U.S.C. §§ 310 and 331. We stated that congenital or developmental defects are normally static conditions which are incapable of, improvement or deterioration. A disease, on the other hand, even one which is hereditary in origin, is usually capable of improvement or deterioration.

It is clear from our previous opinion that retinitis pigmentosa and most other diseases of hereditary origin can be incurred or aggravated in service, in the sense contemplated by Congress in title 38. They can be considered to be incurred in service if their symptomatology did not manifest itself until after entry on duty. The mere genetic or other familial predisposition to develop the symptoms, even if the individual is almost certain to develop the condition at some time in his or her lifetime, does not constitute having the disease. Only when symptomatology and/or pathology* *In this context we use the term "pathology" in the sense of an active disease process, not just a mere predisposition to develop a disease, which process may or may not precede symptomatology. exist can he or she be said to have developed the disease. At what point the individual starts to manifest the symptoms of, or have pathological changes associated with the disease is a factual, not a legal issue. This must be determined in each case based on all the medical evidence of record.

Even where a hereditary disease has manifested some symptoms prior to entry on duty, it may be found to have been aggravated during service if it progresses during service at a greater rate than normally expected according to accepted medical authority. Again, this is a factual, medical determination which must be based upon the evidence of record and sound medical judgement.

In the instant case, the veteran entered naval service on January 3, 1980. The report of his enlistment physical on October 10, 1979, report dated October 16, 1979, shows his visual acuity at that time to have been 20/20 for both eyes with no visual problems noted nor history of eye trouble reported. The first indication in the record of any visual impairment was on November 4, 1981, when the veteran was seen at a naval eye clinic for a floater in his left eye of one month's duration. By the time of his separation physical on December 20, 1982, the veteran's visual acuity had deteriorated to 20/40 in the right eye and 20/50 in the left. He left active duty on January 2, 1983, and was subsequently diagnosed by a private eye specialist in May 1984 as having retinitis pigmentosa. As it appears, from the facts presented, that the veteran's visual problems during service directly related to the retinitis pigmentosa and that there were no symptoms of the disease prior to entry on active duty, the presumption of soundness upon entry would be applicable and the disease found to have been incurred in service. Therefore, we believe the decision of the Board on May 13, 1986, that service connection may not be granted for retinitis pigmentosa because its "developmental" character rebuts the presumption of soundness and its manifestation in service constitutes "natural progress" of the disease was legally incorrect, particularly in light of our analysis in Op. G.C. 1-85. We do, of course, defer to the Board as to findings of fact. In this connection, the proposal of the panel convened to reconsider the veteran's appeal seems most appropriate, i.e., to seek an independent medical expert's opinion as to whether, under scientific and medical principles, there is a factual basis to hold that the veteran incurred retinitis pigmentosa during active naval service.

HELD:
A hereditary disease under 38 C.F.R. § 3.303(c) does not always rebut the presumption of soundness found in 38 U.S.C. §§ 311 and 332. Service connection may be granted for hereditary diseases which either first manifest themselves during service or which preexist service and progress at an abnormally high rate during service.

VETERANS ADMINISTRATION GENERAL COUNSEL