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CITATION: VAOPGCPREC 8-92
Vet. Aff. Op. Gen. Couns. Prec. 8-92

TEXT:

Entitlement to REPS Benefits

QUESTION PRESENTED:

Does a veteran who had service in Vietnam during the Vietnam-Era and who died of service-connected non-Hodgkins lymphoma that was first diagnosed after August 13, 1981, qualify as a member or former member of the Armed Forces under section 156(c) of Pub. L. No. 97-377, for purposes of the Restored Entitlement Program for Survivors?

COMMENTS:

1. This question arose in the case of a Vietnam-Era veteran with service in Vietnam who was diagnosed with and died of non-Hodgkin's lymphoma (NHL) in 1990. Service connection for NHL was established under 38 C.F.R. § 3.313, which provides that "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease." A survivor of the veteran now seeks benefits under the Restored Entitlement Program for Survivors (REPS), Pub. L. No. 97-377, § 156, 96 Stat. 1830, 1921 (1982). Section 156 of Pub. L. No. 97-377 authorizes payment of REPS benefits to survivors of members or former members of the Armed Forces "who died on active duty before August 13, 1981, or died from a service-connected disability incurred or aggravated before such date." 96 Stat. at 1921.
2. VA provides disability compensation and survivors' benefits for service-connected disability and death. 38 C.F.R. §§ 3.4(a) and 3.5(a)(1). The term "service-connected" is defined in 38 U.S.C. § 101(16) to mean, with respect to disability or death, that "such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service." See also 38 C.F.R. § 3.1(k). Thus, by definition, a disability, to be service connected, must have been incurred during service. It is not required that the disability have become manifest to a compensable degree during service, only that it have had its origins in service.
3. As noted above, the provisions of 38 C.F.R. § 3.313 provide for the establishment of service connection for NHL based on service in Vietnam. Although the regulation refers to service connection of disease rather than resulting disability, the regulation was clearly intended to authorize service

connection for disability resulting from that disease. The preamble to the Federal Register notice announcing issuance of 38 C.F.R. § 3.313 stated:

In this case, the Secretary has determined that proof of service in Vietnam during the Vietnam era and the subsequent development of NHL is sufficient evidence to establish that the resulting disability was incurred in the line of duty in the active military, naval, or air service, i.e., that such evidence meets the criteria for the establishment of service connection. See 38 U.S.C. 310 now 38 U.S.C. § 1110.

55 Fed. Reg. 43, 123 (1990). It follows that disability resulting from NHL service connected under section 3.313(b) must be considered to have been incurred during active service, notwithstanding that it did not become manifest to a compensable degree until years later.

4. We also note that the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, codified with minor modifications the administratively created presumptions regarding service connection based on Vietnam service or dioxin exposure. See, e.g., 137 Cong. Rec. S1282 (daily ed. Jan. 30, 1991) (remarks of Sen. Jeffords); President's Statement on Signing H.R. 556, 27 Weekly Comp. Pres. Doc. 136 (Feb. 11, 1991). The wording of 38 U.S.C. § 1116(a) (formerly 38 U.S.C. § 316(a)), as contained in Pub. L. No. 102-4, explicitly states that NHL becoming manifest to a degree of 10 percent or more in a Vietnam-Era veteran with Vietnam service "shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service." The legislative history of Pub. L. No. 102-4 clearly reflects that Congress intended that Vietnam veterans with NHL would be "presumed to have incurred that disease while on active duty." 137 Cong. Rec. S1277, S1282 (daily ed. Jan. 30, 1991) (remarks of Sen. Pressler & Sen. Jeffords); see also 137 Cong. Rec. S1266 (daily ed. Jan. 30, 1991) (letter from Secretary Derwinski to the Ranking Minority Member, Senate Committee on Veterans' Affairs); 137 Cong. Rec. H722 (daily ed. Jan. 29, 1991) (letter from Secretary Derwinski to the Chairman, House Committee on Veterans' Affairs). Legislative materials further reflect an awareness that presumptions of service connection based on service in Vietnam are similar to earlier presumptions of service connection, which were created "because it was determined that those disabilities were just as connected to military service as a wound from a bullet, bomb, or grenade." 135 Cong. Rec. S16540 (Nov. 21, 1989) (remarks of Sen. Daschle, a cosponsor of legislation which became Pub. L. No. 102-4).

5. The concept of service connection is based upon the principle that a disability had its origins in service. While in the case of certain latent diseases the manifestations of such disease may not be immediately apparent, presumptions of service connection for diseases such as NHL are premised upon the recognition that some injury occurred during service which initiated the disease process. In this case, the veteran's service-connected NHL is presumed to have

originated in service in Vietnam, which in this veteran's case occurred prior to discharge from service in 1968. Accordingly, we conclude that the veteran's service-connected disability was incurred prior to August 13, 1981, for purposes of determining the eligibility of the veteran's survivors for REPS benefits, notwithstanding that NHL did not become manifest until after that date.

HELD:

A veteran who had service in Vietnam during the Vietnam-Era and who died of service-connected non-Hodgkins lymphoma that was first diagnosed in 1990 may be considered a former member of the Armed Forces who died from a service-connected disability incurred prior to August 13, 1981, for purposes of determining the eligibility of the veteran's survivors pursuant to section 156(c) of Pub. L. No. 97-377, for benefits under the Restored Entitlement Program for Survivors.

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