Paragraph b of the HELD section of this opinion was superseded effective March 1, 2002, by section 202(a)(1) of Pub. L. 107-103. That change in law deprived the holding in paragraph b of this opinion of any precedential weight as to decisions made on or after March 1, 2002. *See* 38 C.F.R. §14.507(b). Accordingly, the holding in paragraph b of the HELD section of this opinion and the corresponding analysis in paragraphs 6-16 of the DISCUSSION section of this opinion should not be relied upon or followed as authority for decisions on or after March 1, 2002. The holding in paragraph a of the HELD section of this opinion remains valid. The full text of the opinion is being retained for historical reference.

Department of Veterans Affairs

Memorandum

Date: August 3, 1998 VAOPGCPREC 8-98

From: Acting General Counsel (022)

Subj: Compensation for Undiagnosed Illness Under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. Does 38 C.F.R. § 3.317 preclude compensation for an illness manifested by symptoms that could, in some circumstances, be attributable to a known clinical diagnosis, even if no such diagnosis has been made with respect to the individual seeking compensation?

b. May the Department of Veterans Affairs (VA) pay compensation under 38 U.S.C. § 1117 for disability manifested by symptoms that either elude diagnosis or are attributed to a poorly-defined disease such as chronic fatigue syndrome or fibromyalgia?

DISCUSSION:

1. Section 1117(a) of title 38, United States Code, authorizes VA to pay service-connected disability compensation "to any Persian Gulf veteran suffering from a chronic disability resulting from an undiagnosed illness (or combination of undiagnosed illnesses)" that became manifest during active service in the Southwest Asia theater of operations during the Persian Gulf War or became manifest to a degree of 10 percent within a presumptive period prescribed by VA. Section 1117(c) of ti-

tle 38 directs VA to prescribe regulations to carry out that authority which include, among other things, "[a] description of the illnesses for which compensation under [section 1117] may be paid." In February 1995, VA issued 38 C.F.R. § 3.317 to implement the authority of 38 U.S.C. § 1117. Section 3.317(a)(1) provides, in pertinent part:

> (a)(1) . . . VA shall pay compensation in accordance with chapter 11 of title 38, United States Code, to a Persian Gulf veteran who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms such as those listed in paragraph (b) of this section, provided that such disability:
>
> . . . .
>
> (ii) By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

Section 3.317(b) provides a non-exclusive list of thirteen signs or symptoms which may be manifestations of undiagnosed illness.

2. VA has received a letter from the Chairman of the House Committee on Veterans' Affairs expressing the view that 38 C.F.R. § 3.317 is, in two respects, an unduly restrictive interpretation of the statutory authority conferred by 38 U.S.C. § 1117. The Chairman states, first, that section 3.317(a)(1), read literally, would improperly preclude compensation for an illness manifested by symptoms that could be attributed to a known diagnosis, even if no diagnosis had been made with respect to the particular veteran seeking compensation. Second, the Chairman asserts that section 3.317(a)(1) improperly precludes compensation under 38 U.S.C. § 1117 in all cases where a diagnosis has been made for the illness in question. With regard to the second contention, the Chairman asserts that the regulations should mandate compensation for illness manifested by symptoms which either elude diagnosis or, if a diagnosis is rendered, are attributed to a poorly-defined disease such as chronic fatigue syndrome or fibromyalgia.

3. With regard to the first issue, we understand the question presented to be whether 38 C.F.R. § 3.317 precludes compensation pursuant to section 1117 when the signs or symptoms exhibited by a veteran could, under some circumstance, be attributed to a known clinical diagnosis. For example, 38 C.F.R. § 3.317(b) lists "joint pain" as one of the signs or symptoms which may be manifestations of an undiagnosed ill-

ness. VA's schedule of rating disabilities, however, recognizes that joint pain may also be a symptom of arthritis, a "known clinical diagnosis." *See* 38 C.F.R. § 4.71a, Diagnostic Code 5003. Accordingly, the question is whether section 3.317(a)(1)(ii) would preclude compensation under section 1117 for a Persian Gulf veteran exhibiting joint pain, because joint pain can be attributed to arthritis, regardless of whether the particular veteran's joint pain has actually been attributed to arthritis. We conclude that the regulation does not impose such a restriction. Rather, the language of the regulation indicates that the pertinent inquiry is whether, under the circumstances of the particular veteran's case, the signs or symptoms manifested by the veteran can be attributed to a recognized disease or injury suffered by the veteran.

4. Section 3.317(a)(1) mandates compensation to a Persian Gulf veteran "who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms . . . , provided that <u>such disability</u> . . . <u>cannot be attributed to any known clinical diagnosis</u>." (Emphasis added.) The words "such disability," as used in the regulation, refer to the disability exhibited by the veteran seeking compensation, as manifested by the veteran's signs or symptoms. The requirement that the veteran's disability "cannot be attributed to any known clinical diagnosis," on its face, requires a determination as to the nature and cause of that particular veteran's disability, based on the evidence in the particular case. If a claimant suffers disability manifested by a sign or symptom, such as joint pain, which cannot, in that veteran's case, be attributed to a known clinical diagnosis, such as arthritis, the requirement in 38 C.F.R. § 3.317(a)(1)(ii) will be met and compensation may be paid if the veteran satisfies the other statutory and regulatory criteria. It is, therefore, irrelevant whether the signs or symptoms exhibited by the veteran could be attributed to a known clinical diagnosis under a different, hypothetical set of facts which are not actually present in the veteran's case.

5. Under 38 C.F.R. § 3.317(a)(1)(ii), the determination as to whether a veteran's disability can "be attributed to any known clinical diagnosis" must be based on "history, physical examination, and laboratory tests." The phrase "history, physical examination, and laboratory tests," as used in that regulation, is most naturally read to refer to the particular veteran's history, and to physical examination and laboratory tests conducted with respect to the particular veteran. VA regulations provide that each veteran's disability must be evaluated in relation to its history and to the findings on physical examinations of the veteran. 38 C.F.R. §§ 4.1 and 4.2. VA's

schedule of disability ratings indicates that the diagnosis of certain conditions may depend upon complete medical examination of the particular veteran's disability. *See, e.g.*, 38 C.F.R. § 4.42. Accordingly, 38 C.F.R. § 3.317(a)(1)(ii) requires only that the history, physical examinations, and laboratory findings regarding a particular veteran not provide a basis for attributing such veteran's signs or symptoms to any known clinical diagnosis. The fact that particular signs or symptoms could be attributed to a known clinical diagnosis under other circumstances not presented in the particular veteran's case would not preclude compensation under that regulation.

6. The second question presented pertains to whether VA has authority to pay compensation under 38 U.S.C. § 1117 for disability manifested by symptons which either elude diagnosis or, if diagnosed, are attributed to a poorly-defined disease such as chronic fatigue syndrome or fibromyalgia. As used in the opinion request, the concept of poorly-defined diseases apparently refers to diseases which are recognized by the medical and scientific community as known and diagnosable diseases, but which are defined in terms that may arguably be characterized as vague, general, or controversial and, therefore, may not be diagnosed consistently by different physicians treating similarly-situated patients. The opinion request and the letter from a member of Congress referenced in the opinion request identify chronic fatigue syndrome and fibromyalgia as examples of poorly-defined diseases. VA has adopted provisions in its schedule for rating disabilities setting forth the identifying criteria for those two conditions. Chronic fatigue syndrome is a condition of unknown etiology which often involves multiple body systems. *See* 59 Fed. Reg. 60,901 (1994). Under VA's rating schedule, diagnosis of chronic fatigue syndrome requires the following three elements: (1) the new onset of debilitating fatigue severe enough to reduce daily activity to less than 50 percent of the usual level for at least six months; (2) the exclusion, by history, physical examination, and laboratory tests, of all other clinical conditions that may produce similar symptoms; and (3) the presence of at least six of ten other specified symptoms. 38 C.F.R. § 4.88a. "Fibromyalgia is a syndrome of chronic, widespread musculoskeletal pain associated with multiple tender or 'trigger' points, and often with multiple somatic complaints." 61 Fed. Reg. 20,438, 20,439 (1996). VA's rating schedule indicates that symptoms associated with fibromyalgia may include fatigue, sleep disturbance, stiffness, paresthesias, headache, irritable bowel symptoms, depression, anxiety, and Raynaud's-like symptoms. 38 C.F.R. § 4.71a, Diagnostic Code 5025.

7. VA has authority under 38 U.S.C. § 1110 to pay compensation for disability due to a diagnosed disease, such as chronic fatigue syndrome or fibromyalgia, regardless of whether the disease may be characterized as poorly defined. However, in the absence of an applicable presumption of service connection, veterans seeking compensation for such disability must submit evidence that their diagnosed disease was incurred in or aggravated by service. In contrast, 38 U.S.C. § 1117(a) and 38 C.F.R. § 3.317(a) establish a presumption of service connection for Persian Gulf veterans who manifest disability due to an undiagnosed illness to a 10-percent degree prior to December 31, 2001. Accordingly, the issue implicated by the second question is whether the presumption of service connection under 38 U.S.C. § 1117(a) and 38 C.F.R. § 3.317(a) may be applied to diseases which have been diagnosed, but which are attributed to a poorly-defined disease, such as chronic fatigue syndrome or fibromyalgia.

8. On its face, 38 U.S.C. § 1117(a) confers no authority to grant presumptive service connection for any diagnosed disease, regardless of whether the disease may be characterized as poorly defined. Section 1117(a) authorizes VA to pay compensation "to any Persian Gulf veteran suffering from a chronic disability resulting from an undiagnosed illness (or combination of undiagnosed illnesses)" which became manifest in service in the Southwest Asia theater or within a prescribed presumptive period. (Emphasis added.) The term "undiagnosed illness," read literally, means an illness which has not been diagnosed. It is well established that the plain meaning of a statute's language is controlling except in "'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 135-36 (1991) (citation omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

9. We have found no indication that applying 38 U.S.C. § 1117(a) in accordance with its plain meaning would contravene any clearly expressed legislative intention. The legislative history indicates that the purpose of 38 U.S.C. § 1117(a) is to authorize compensation for disability due to illnesses which cannot be diagnosed. The provisions codified in section 1117 derived from H.R. 4386, 103d Cong., 2d Sess. (1994), provisions of which were incorporated, with certain amendments, into the Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 106, 108 Stat. 4645, 4650. The legislative history of H.R. 4386 indicates that the provisions in section 1117 were enacted in response to a determination by VA that it lacked authority under 38 U.S.C. § 1110 to pay compensation for disability in cases where the underlying illness could not be diagnosed and, therefore, the disability could

not be attributed to any disease or injury. H.R. Rep. No. 669, 103d Cong., 2d Sess. 6 (1994). In explaining the purpose of this provision, the Committee on Veterans' Affairs of the House of Representatives stated:

> The primary purpose is to provide disability compensation on a presumptive basis to certain veterans of the Persian Gulf War who suffer chronic disabilities resulting from undiagnosed illnesses attributed to their service in the Persian Gulf. The Secretary of Veterans Affairs has indicated that current law does not permit the VA to grant service connection in these cases due to the absence of a diagnosis of the underlying illness. As indicated in a June 10, 1994, memorandum to the Secretary of Veterans Affairs[VAOPGCADV 26-94 (O.G.C. Advis. 26-94)], it is the opinion of the VA's General Counsel that "because the VA is authorized to compensate only for disease-caused or injury-caused disabilities, unless the VA can ascribe a disability to a disease or injury, there is no authority to compensate. The pending legislation supplies that needed additional authority."

H.R. Rep. No. 669, 103d Cong. at 6. The legislative history indicates that 38 U.S.C. § 1117 was intended to remedy the situation in which the absence of a diagnosis precluded an award of compensation under 38 U.S.C. § 1110. That purpose is consistent with the plain language of section 1117(a), which authorizes compensation only for "undiagnosed illness."

10. To the extent that the legislative history discusses service connection for diagnosed illnesses, it merely reflects a congressional understanding that VA had authority under existing law to provide compensation for such illnesses and to prescribe rules for adjudication of claims based on such illnesses. At a June 9, 1994, hearing on H.R. 4386, the bill's chief sponsor stated that, "[v]eterans whose sicknesses are diagnosed are eligible for compensation. The law provides benefits for these veterans. I think we have to provide for Persian Gulf veterans who are suffering from undiagnosed illnesses, who are unable to work." *Hearing Before the Subcommittee on Compensation, Pension and Insurance of the Committee on Veterans' Affairs, House of Representatives*, 103d Cong., 2d Sess. 9 (June 9, 1994) (statement of Cong. Montgomery). In its report on H.R. 4386, the House Committee on Veterans' Affairs discussed the similarities between chronic fatigue syndrome and the undiagnosed illnesses of Persian Gulf veterans and noted that, "[a]lthough the etiology of [chronic fatigue syndrome] currently is not known, the Secretary of Veterans

Affairs testified that [chronic fatigue syndrome] will be added to the VA rating schedule and guidance has been established for adjudication of [chronic fatigue syndrome] claims." H.R. Rep. No. 669, 103d Cong. at 20-21. These statements are consistent with the conclusion that Congress intended to authorize compensation under 38 U.S.C. § 1117 only for illnesses which could not be diagnosed and did not intend to alter VA's existing authority to pay compensation for diagnosed illnesses. In discussing chronic fatigue syndrome, the House Committee on Veterans' Affairs appears to have acknowledged that compensation for that condition would be governed by existing law and did not indicate any intent that a presumption of service connection be established for that or any other diagnosed condition. Thus, the legislative history of Pub. L. No. 103-446 does not provide the sort of clear evidence of legislative intent which would be necessary to permit VA to depart from the plain meaning of section 1117(a).

11. The Chairman's letter referenced in the opinion request refers to the statement of congressional findings in section 102(2) of Pub. L. No. 103-446, which states:

> Significant numbers of veterans of the Persian Gulf War are suffering from illnesses, or are exhibiting symptoms of illness, that cannot now be diagnosed or clearly defined. As a result, many of these conditions or illnesses are not considered to be service connected under current law for purposes of benefits administered by [VA].

Pub. L. No. 103-446, § 102(2), 108 Stat. at 4647 (emphasis added); *see also* Pub. L. No. 103-446, § 103(1), 108 Stat. at 4648 (referring to "illnesses that cannot now be diagnosed or defined"). The Chairman suggests that the phrase "or clearly defined" reflects a congressional intent to provide compensation for illnesses which have been diagnosed under a disease category which is not clearly defined, such as chronic fatigue syndrome or fibromyalgia. In our opinion, the language of section 102(2) does not clearly convey such an intent. The interpretation advanced by the Chairman is based on the view that the phrase "cannot now be diagnosed or clearly defined" refers to two classes of illnesses, i.e., those which cannot be diagnosed and those which, although they can be diagnosed, cannot be clearly defined. However, that phrase may also be interpreted as referring to a single class of illnesses, i.e., those which can neither be diagnosed nor clearly defined. If the latter meaning was intended, then section 102(2) would clearly be consistent with the language of 38 U.S.C. § 1117(a) authorizing compensation only for disability due to undiagnosed illness.

12. In its report on H.R. 4386, the House Committee on Veterans' Affairs stated that, "[t]he National Institutes of Health Technology Assessment Workshop on the Persian Gulf Experience and Health (NIH Workshop), which met April 27 through April 29, 1994, was unable to develop a working case definition for the so-called 'Persian Gulf Syndrome'." H.R. Rep. No. 669, 103d Cong. at 7. The final statement of the referenced NIH Workshop, included as an appendix to H.R. Rep. No. 669, stated that, "[i]t appears from the information presented that some Persian Gulf veterans have symptoms that are not readily explained by using established disease categories. Under these circumstances, it would be helpful to establish a single case definition to assist in evaluating and managing these veterans." H.R. Rep. No. 669, 103d Cong., 2d Sess. at 51. However, the NIH Workshop panel which prepared the statement concluded that a case definition could not be established due to the lack of data. *Id.* The NIH Workshop report indicated that the "undiagnosed illnesses" exhibited by Persian Gulf veterans could not at that time be clearly defined by any single set of descriptive criteria. *Id.* Viewed in relation to this history, the statement in section 102(2) that certain illnesses "cannot now be diagnosed or clearly defined" appears to state only that such illnesses elude both diagnosis and definition and, therefore, does not appear to refer to illnesses which have been diagnosed under arguably ill-defined disease categories. Although this legislative history does not conclusively resolve the meaning of section 102(2) of Pub. L. No. 103-446, it suggests an interpretation of that provision which is entirely consistent with the plain meaning of 38 U.S.C. § 1117(a).

13. Several provisions of Pub. L. No. 103-446 suggest that Congress intended VA would work toward developing diagnoses for the illnesses suffered by Persian Gulf War veterans and improve the process of reaching diagnoses of particular veterans' illnesses. *See* Pub. L. No. 103-446, §§ 103(2) (stating purpose to develop definitions or diagnoses of illnesses), 104(a) (development of medical evaluation protocol to ensure appropriate diagnosis), 104(a)(4)(A) (diagnostic tests at non-VA facilities), and 104(c) (directing development of definitions or diagnoses), 108 Stat. at 4649-50. At the same time, Congress authorized payment of compensation to veterans suffering from undiagnosed illness. Pub. L. No. 103-446, § 106, 108 Stat. at 4650; see also Pub. L. No. 103-446, § 103(1), 108 Stat. at 4648 (stating purpose to provide compensation to veterans whose disabilities "cannot now be diagnosed or defined"). These provisions suggest an intention to continue efforts to diagnose illnesses suffered by Persian Gulf veterans and pay compensation to such veterans by existing means,

while at the same time providing for payments, under section 1117, to veterans whose illnesses are not yet capable of diagnosis.

14. VA has authority to implement 38 U.S.C. § 1117 by adopting regulations which are necessary or appropriate to carrying out that statute, provided that such regulations are consistent with section 1117. *See* 38 U.S.C. § 501(a). Further, any such regulations must be supported by a rational basis. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because 38 U.S.C. § 1117(a) authorizes compensation only for disability due to "undiagnosed illness," nothing in that provision would authorize VA to provide presumptive service connection for diagnosed illness. *See Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity."). However, VA may have authority to adopt reasonable regulations governing the determination as to what constitutes a diagnosis for purposes of section 1117(a). If, for example, there were a rational basis for concluding that some terms employed by physicians do not constitute diagnoses for purposes of section 1117(a) (e.g., because those conditions are not generally recognized in the medical community), then VA would have authority to adopt a regulation providing that the use of such terms would not constitute a diagnosis which would preclude compensation under section 1117(a).

15. In adopting rating-schedule provisions for chronic fatigue syndrome and fibromyalgia, VA appears to have already concluded that those conditions constitute recognized diagnoses. Further, in adopting regulations to implement 38 U.S.C. § 1117, VA rejected the suggestion, submitted during the comment period, that VA adopt a regulatory definition as to what constitutes a "known clinical diagnosis." In rejecting that suggestion, VA stated:

> The concept of what constitutes a "known clinical diagnosis" is not such a matter of uncertainty within the medical community as the commenter has implied. Examining physicians routinely determine whether or not an illness is part of a disease process that follows a particular clinical course which can be generally predicted. If the physician is unable to attribute a disability to such a known clinical diagnosis, he or she would routinely include a statement to that effect on the examination report. In the event of conflicting findings, it would be incumbent upon

> VA to resolve the issue on the basis of all medical evidence of record.

60 Fed. Reg. 6660, 6662 (1995). It appears that VA has opted to rely upon case-by-case determinations, rather than rulemaking, to determine whether a veteran's disability has been attributed to a known clinical diagnosis. We are aware of no basis for questioning VA's determination that chronic fatigue syndrome and fibromyalgia are recognized diagnoses, or its decision not to adopt a regulatory definition of "known clinical diagnosis." Our conclusion that VA has authority to issue a rule defining what constitutes a diagnosis for purposes of 38 U.S.C. § 1117(a) is not intended to imply any view as to whether VA should issue such a rule.

16. Finally, although we conclude that 38 U.S.C. § 1117(a) does not authorize VA to grant presumptive service connection for diagnosed illnesses, we note that VA has authority under 38 U.S.C. §§ 501(a) and 1110 to adopt reasonable presumptions of service connection. *See Chemical Mfrs. Ass'n v. Department of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) ("It is well settled that an administrative agency may establish evidentiary presumptions."). Generally, an agency may establish a presumption only if there is "a sound and rational connection between the proved and inferred facts." *Chemical Mfrs. Ass'n*, 105 F.3d at 705 (citing, among other authorities, *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979)). Pursuant to sections 501(a) and 1110, VA would be authorized to adopt presumptions of service connection for specific diagnosed conditions manifested by Persian Gulf veterans, if it is determined that a rational basis exists for establishing such presumptions. Again, we express no view as to whether such presumptions are warranted.

HELD:

a. Compensation may be paid under 38 C.F.R. § 3.317 for disability which cannot, based on the facts of the particular veteran's case, be attributed to any known clinical diagnosis. The fact that the signs or symptoms exhibited by the veteran could conceivably be attributed to a known clinical diagnosis under other circumstances not presented in the particular veteran's case does not preclude compensation under section 3.317.

b. Section 1117(a) of title 38, United States Code, authorizes service connection on a presumptive basis only for disability arising in Persian Gulf veterans due to "undiagnosed illness" and may not be construed to authorize presumptive service connection for any diagnosed illness, regardless of whether the diagnosis may be characterized as poorly defined.

John H. Thompson