

Department of **Memorandum**

Veterans Affairs

Date: June 9, 1999

VAOPGCPREC 7-99

From: General Counsel (022)

Subj: Dependency and Indemnity Compensation--Disabilities
Resulting from Alcohol or Drug Abuse--Pub. L. No. 101-508,
§ 8052

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

A. In view of the amendments made by section 8052 of the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990), can a disability due to substance abuse caused by a service-connected disability be service connected under 38 C.F.R. § 3.310(a)?

B. Can the aggravation by a service-connected disability of a nonservice-connected disability arising out of substance abuse be service connected under 38 C.F.R. § 3.310(a)?

C. In light of the decision of the United States Court of Appeals for Veterans Claims (Veterans Court) in *Barela v. West*, 11 Vet. App. 280 (1998), and VAOPGCPREC 2-98, may dependency and indemnity compensation (DIC) be considered "disability compensation"?

D. May the Department of Veterans Affairs (VA) award DIC based either on a veteran's death caused by a disability due to substance abuse that was itself secondary to a service-connected disability or on a veteran's death while receiving or entitled to receive compensation for such a substance-abuse disability that was continuously rated totally disabling for an extended period immediately preceding death?

COMMENTS:

1. Section 8052 of the OBRA 1990, Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, made two amendments to statutes governing entitlement to VA benefits. First, section 8052(a)(1) amended 38 U.S.C. § 105(a) to provide that an injury or disease incurred during active service

will not be deemed to have been incurred in line of duty if the injury or disease was "a result of the person's own . . . abuse of alcohol or drugs." Second, section 8052(a)(2) and (3) amended former 38 U.S.C. §§ 310 and 331 (now designated §§ 1110 and 1131) to prohibit payment of compensation for any disability that is "a result of the veteran's own . . . abuse of alcohol or drugs" (for convenience, in this opinion called a "sub-stance-abuse disability"). These two amendments apply "to claims filed after October 31, 1990." OBRA 1990, § 8052(b), 104 Stat. at 1388-351. (Throughout this opinion, comments refer to claims filed after October 31, 1990, unless otherwise specified.)

2. Disability that is proximately due to or the result of a service-connected disease or injury is itself service connected. 38 C.F.R. § 3.310(a). (A disability that is proximately due to or the result of another disability is called a "secondary disability," and hence, service connection under section 3.310(a) of such a disability is called "secondary service connection.") If a service-connected disability aggravates a nonservice-connected disability, the degree of disability over and above the degree of disability existing before the aggravation is compensable. *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (en banc). Furthermore, a secondary disability service connected under section 3.310(a) may be considered service connected for purposes of all VA benefits. VAOPGCPREC 2-98 at para. 11.

3. In VAOPGCPREC 2-98, this office concluded that the amendments made by section 8052 do not preclude eligibility based on a substance-abuse disability (or death resulting from a substance-abuse disability) secondarily service connected under section 3.310(a) as proximately due to or the result of a service-connected disease or injury, except in the case of disability compensation, payment of which is precluded. The basis for that conclusion may be summarized as follows. The amendments made by section 8052 of OBRA 1990 affect eligibility for VA benefits in the following two ways:

a. They prohibit compensation for a substance-abuse disability whether a claim is based on direct service connection or secondary service connection under section 3.310(a) and whether secondary service connection is claimed on the basis of causation or aggravation of a substance-abuse disability. VAOPGCPREC 2-97. This is because section 8052 amended the statutes authorizing the payment of compensation to a veteran for service-connected

disability, former 38 U.S.C. §§ 310 and 331 (now §§ 1110 and 1131), to prohibit outright the payment of compensation for a substance-abuse disability. OBRA 1990, § 8052(a)(2) and (3), 104 Stat. at 1388-351. However, those amendments did not affect any statute governing eligibility for any other VA benefit based on service-connected disability or death.

b. The amendments made by section 8052 also preclude direct service connection of a substance-abuse disability for purposes of all VA benefits. VAOPGCPREC 2-98. This is because section 8052 amended the statute governing line-of-duty determinations, 38 U.S.C. § 105(a), which generally applies to all VA benefits eligibility for which is based on a service-connected disability or death. OBRA 1990, § 8052(a)(1), 104 Stat. at 1388-351; see also VAOPGCPREC 2-98 at para. 4-7. However, that amendment does not apply to *secondary* service connection under section 3.310(a) because line-of-duty determinations are irrelevant to a determination of whether a disability is secondary to a service-connected disability, except with respect to service connection of the primary disability. See VAOPGCPREC 2-98 at para. 14.

4. Thus, for purposes of all VA benefits, a substance-abuse disability that is secondary to a service-connected disability can be secondarily service connected under section 3.310(a). However, disability compensation, which for a substance-abuse disability is prohibited outright under 38 U.S.C. §§ 1110 and 1131, cannot be paid for a substance abuse disability which is service connected on either a direct or secondary basis.

5. A secondary substance-abuse disability can be service connected under section 3.310(a) regardless of whether the secondary service connection is based on causation or aggravation of a substance-abuse disability by a service-connected disability. In general, the aggravation of a disability by a service-connected disability can be secondarily service connected under section 3.310(a) for purposes of all VA benefits. See *Allen*, 7 Vet. App. at 448. Nothing relating to whether a substance-abuse disability was aggravated by a service-connected disability, rather than caused by such a disability, renders the amendments made by section 8052 relevant to a determination of whether the substance-abuse disability is secondary to a service-connected disability. We therefore conclude that the aggravation of a substance-abuse disability by a service-connected disability can be secondarily service connected under section 3.310(a). However, disability compensation cannot be paid for such a disability due to

the prohibition in 38 U.S.C. §§ 1110 and 1131 against payment of disability compensation for substance-abuse disability.

6. In its decision in *Barela v. West*, 11 Vet. App. at 283, the Veterans Court, citing VAOPGCPREC 2-98, recognized that 38 U.S.C. § 1110, by its terms, "prohibits only the payment of 'compensation' for disability due to alcohol and drug abuse" and that "compensation is but one of the potential title 38 benefits which could flow from a determination that a disability is service connected." The court went on to mention educational assistance and housing-loan benefits as two benefits which could be available on the basis of a finding of service connection. For the following reasons, we do not believe that the absence of a reference to DIC as being a benefit which could flow from establishment of service connection notwithstanding the amendment made to section 1110 by section 8052 of the OBRA 1990 in any way implies that DIC may be considered "compensation" for purposes of the prohibition in 38 U.S.C. §§ 1110 and 1131 on payment of compensation for substance-abuse disability.

7. The term "compensation" as used in title 38, United States Code, encompasses two distinct benefits: one paid to a veteran because of a service-connected disability and the other paid to certain survivors of a veteran because of the veteran's service-connected death occurring before January 1, 1957. 38 U.S.C. § 101(13); 38 C.F.R. § 3.4(a). Basic entitlement criteria for "disability compensation," the term used to denote compensation paid to a veteran because of a service-connected disability, are stated in 38 C.F.R. § 3.4(b)(1). Entitlement criteria for "death compensation," the term used to denote the benefit paid to certain survivors of veterans for service-connected deaths occurring before January 1, 1957, are found at 38 C.F.R. § 3.4(a) and (c). Entitlement criteria for the distinct DIC benefit, payable for service-connected deaths occurring on or after January 1, 1957, or by election, for such deaths occurring prior to that date, are found at 38 C.F.R. § 3.5. The term "disability compensation" is used in the heading of subchapters II and IV of chapter 11 of title 38, United States Code, which contain 38 U.S.C. §§ 1110 and 1131, the sections authorizing, respectively, compensation for service-connected disability incurred in wartime and peacetime. Because the section 8052(a)(2) and (3) amendments prohibiting compensation for substance-abuse disability amended only what are now sections 1110 and 1131, authorizing the payment of compensation to a veteran for service-connected disability, they affect only "disability compensation" as authorized by those two sections. They have no effect on DIC, which is a distinct benefit

payable under chapter 13 of the United States Code. See 38 U.S.C. § 101(14) and ch. 13, subch. II.

8. The distinction between disability compensation and other benefits is crucial in the context of our opinions on the OBRA 1990 amendments because, as noted above, the amendments prohibiting compensation for a substance-abuse disability affected only statutes, 38 U.S.C. §§ 1110 and 1131, authorizing disability compensation. They did not affect statutes authorizing death compensation or DIC, such as 38 U.S.C. §§ 1121, 1141, 1310, and 1318. See VAOPGCPREC 11-96 at para. 2 ("Section 8052 did not amend what are now 38 U.S.C. §§ 1310 and 1318, and its text does not refer to DIC.") Thus, in the context of General Counsel opinions interpreting the amendments made by section 8052 of the OBRA 1990, DIC must be considered a VA benefit other than disability compensation. Consequently, the amendments made by section 8052 affect eligibility for DIC only by precluding direct service connection of a substance-abuse disability. Payment of DIC benefits based on secondary service connection of a substance-abuse disability is not precluded.

9. The Veterans Court's decision in *Barela v. West* is consistent with our several conclusions about the effect of the OBRA 1990 amendments: (1) sections 1110 and 1131 prohibit the payment of disability compensation for a substance-abuse disability whether claimed on the basis of direct or secondary service connection; (2) section 105(a) precludes direct service connection of a substance-abuse disability; and (3) payment of VA benefits other than disability compensation based on secondary service connection of a substance-abuse disability is not precluded. The court in *Barela*, in which a veteran was claiming service connection for a substance-abuse disability secondary to service-connected post-traumatic stress disorder, held that the Board of Veterans' Appeals erred in concluding that 38 U.S.C. § 1110 precludes service connection for a substance-abuse disability. 11 Vet. App. at 283. This conclusion is consistent with our conclusions because, as we have noted, section 1110 precludes only the payment of compensation for substance-abuse disability, not service connection for such disability. Section 105(a), which the Court did not address in *Barela*, precludes direct service connection of such disability.

10. VA may award DIC under 38 U.S.C. § 1310 based on a veteran's death caused by a substance-abuse disability that was itself secondary to a service-connected disability. Section 105(a) as amended by section 8052 of the OBRA 1990 precludes direct service connection of a substance-abuse

disability that caused a veteran's death. VAOPGCPREC 11-96. However, the amendments made by section 8052 do not preclude service connection of a substance-abuse disability, or of death resulting from such a disability, on a secondary basis under 38 C.F.R. § 3.310(a). VAOPGCPREC 2-98. Section 8052 amended only the statutes authorizing disability compensation and governing line-of-duty determinations and did not amend section 1310, the statute authorizing the payment of DIC for service-connected death. Section 1310(a) authorizes DIC "[w]hen any veteran dies . . . from a service-connected or compensable disability." That section makes no distinction between disabilities service connected on a direct or secondary basis and contains no prohibition concerning substance-abuse disabilities. Thus, DIC may be paid on the basis of a secondarily service-connected death, regardless of whether such death resulted from a substance-abuse disability.

11. VA may award DIC under 38 U.S.C. § 1318 based on a disability due to substance abuse itself secondary to a service-connected disability. Section 1318 authorizes the payment of DIC following the death of a veteran "who was in receipt of or entitled to receive . . . compensation at the time of death for a service-connected disability" that was continuously rated totally disabling for an extended period immediately preceding death. 38 U.S.C. § 1318(a) and (b). If a veteran had never established service connection for a substance-abuse disability, then that disability could not form the basis of a section 1318 DIC award on a claim filed after October 31, 1990. The veteran would not in fact have been in receipt of or entitled to receive compensation for that disability when he or she died, and section 8052's prohibition on payment of disability compensation for a substance-abuse disability, applicable to claims filed after October 31, 1990, would preclude a survivor from establishing the veteran's hypothetical entitlement for purposes of a DIC claim. Even if a veteran had established service connection of a substance-abuse disability for compensation purposes in a claim filed on or before October 31, 1990, that disability could not form the basis of a section 1318 DIC award, in a claim filed after October 31, 1990, if the basis of service connection is the substance-abuse disability's incurrance or aggravation in service, since section 8052 precludes direct service connection of a substance-abuse disability. VAOPGCPREC 11-96.

12. However, if a veteran had established service connection of a substance-abuse disability for compensation purposes, that disability could form the basis of a

section 1318 DIC award, if the basis of service connection was that the substance-abuse disability was secondary to a service-connected disability. This is because section 8052 of the OBRA 1990 does not preclude secondary service connection of a substance-abuse disability, and section 8052 does not limit eligibility for DIC by any means other than the preclusion of direct service connection. Therefore, if a veteran had established service connection of a substance-abuse disability for compensation purposes on the basis that the substance-abuse disability was secondary to a service-connected disability, and the other requirements of section 1318 are met, VA may award DIC under section 1318 on the basis of that secondary substance-abuse disability.

HELD:

A. The amendments made by section 8052 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 8052, 104 Stat. 1388, 1388-351, which are applicable to claims filed after October 31, 1990, prohibit the payment of compensation to a veteran under 38 U.S.C. § 1110 or 1131 for service-connected disability ("disability compensation") for a disability that is a result of a veteran's own abuse of alcohol or drugs (a "substance-abuse disability"), and they preclude direct service connection of a substance-abuse disability for purposes of all VA benefits, including dependency and indemnity compensation. The amendments do not preclude service connection under 38 C.F.R. § 3.310(a) of a substance-abuse disability that is proximately due to or the result of a service-connected disease or injury. A substance-abuse disability caused by a service-connected disability can be service connected under section 3.310(a) for purposes of all VA benefits. However, disability compensation cannot be paid for such a disability.

B. The aggravation of a substance-abuse disability by a service-connected disability can be service connected under section 3.310(a) for purposes of all VA benefits. However, disability compensation cannot be paid for such aggravation.

C. Dependency and indemnity compensation is a benefit distinct from disability compensation for purposes of the amendments made by section 8052 of the Omnibus Budget Reconciliation Act of 1990 and is not affected by that Act's prohibition on payment of disability compensation for substance-abuse disability.

D. VA may award dependency and indemnity compensation to a veteran's survivors based on either the veteran's death

from a substance-abuse disability secondarily service connected under 38 C.F.R. § 3.310(a) (entitlement established under 38 U.S.C. § 1310) or based on a veteran's death while in receipt of or entitled to receive compensation for a substance-abuse disability secondarily service connected under section 3.310(a) and continuously rated

totally disabling for an extended period immediately preceding death (entitlement established under 38 U.S.C. § 1318).

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