

**Department of
Veterans Affairs**

Memorandum

Date: October 28, 2003

VAOPGCPREC 6-2003

From: General Counsel (022)

Subj: Service Connection for Cause of Disability or Death
XXXXXXXXXX XXXXXXXXXXXX

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

QUESTION PRESENTED:

Under 38 U.S.C. §§ 1103, 1110, and 1131, may service connection be established for a tobacco-related disability or death on the basis that the disability or death was secondary to a service-connected mental disability that caused the veteran to use tobacco products?

DISCUSSION:

1. The Board of Veterans' Appeals has requested opinions in two cases raising in essence the same issue involving secondary service connection. We are responding to these requests in a single opinion. The question raised by these two cases is whether, for purposes of a claim received by VA after June 9, 1998,¹ secondary service connection may be established for a tobacco-related disability or death that is a result of or aggravated by a service-connected disability unrelated to tobacco use.
2. In one case, the veteran served on active duty from May 1959 to March 1961. The veteran has been service connected for schizophrenia since discharge from service. In June 2000, the veteran filed a claim for service connection for emphysema, bronchitis, and asthma as secondary to smoking as a result of the service-connected schizophrenia. A Department of Veterans Affairs (VA) physician provided an opinion that the veteran's schizophrenia is as likely as not related to the veteran's tobacco use and subsequent development of chronic obstructive pulmonary disease and bronchitis.
3. In the other case, the veteran served on active duty from June 1943 to November 1945 and died on September 18, 1998. The veteran's death certificate

¹ Section 1103(a) of title 38, United States Code, is applicable to claims received by VA after June 9, 1998. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 9014, 112 Stat. 685, 865-66.

lists the cause of death as metastatic lung cancer. The death certificate also indicates that tobacco use contributed to the cause of death. The veteran, a former prisoner of war, had been service connected for post-traumatic stress disorder (PTSD) since December 1990. The veteran's surviving spouse filed a claim for dependency and indemnity compensation (DIC) in March 1999. A letter from one of the veteran's private treating physicians stated that the veteran's lung cancer was "almost without question related to [the veteran's] history of tobacco abuse" and that the stresses of the veteran's military service made the veteran much more vulnerable to developing a smoking habit that eventually contributed to the veteran's death. A physician involved with the veteran's treatment at a VA medical center from 1988 until the veteran's death stated in a letter that the veteran smoked since World War II, that the veteran developed nicotine addiction over time, that the veteran's psychiatric condition most likely played a significant part in the development of the nicotine addiction, and that the veteran's psychiatric condition "undoubtedly doomed [the veteran's] attempts at smoking cessation to failure, and in this manner, contributed to [the veteran's] eventual demise." Another physician involved in the veteran's treatment at a VA medical center from 1988 until 1997 noted in a letter that the veteran had been addicted to cigarettes since the veteran's military service during World War II. The physician reported that the veteran had told him that the veteran's nervous condition prevented the veteran from giving up smoking. The physician concluded that the veteran died from "cancer, the result of years of smoking, refractory to cure because of . . . severe PTSD."

4. Pursuant to 38 U.S.C. §§ 1110 and 1131, compensation is payable "[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty."² DIC is payable to the surviving spouse of "any veteran [who] dies after December 31, 1956, from a service-connected or compensable disability." 38 U.S.C. § 1310(a). Section 1310(a) states that the "standards and criteria for determining whether or not a disability is service-connected shall be those applicable under chapter 11 of this title." Chapter 11 contains the eligibility criteria for disability compensation for service-connected disability.

5. Section 1103(a) of title 38, United States Code, prohibits service connection of a death or disability "on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during the veteran's service." (Emphasis added.) VA implemented 38 U.S.C. § 1103 by promulgating 38 C.F.R. § 3.300. Section 3.300(a) and (c) provide in pertinent part:

² Section 1110 of title 38, United States Code, is virtually identical to section 1131, except that section 1110 authorizes disability compensation for disability resulting from injury suffered or disease contracted during a period of war, while section 1131 authorizes such compensation for disability resulting from injury suffered or disease contracted during peacetime service.

(a) For claims received by VA after June 9, 1998, a disability or death will not be considered service-connected on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during service. . . .

. . . .

(c) For claims for secondary service connection received by VA after June 9, 1998, a disability that is proximately due to or the result of an injury or disease previously service-connected on the basis that it is attributable to the veteran's use of tobacco products during service will not be service-connected under § 3.310(a).

(Emphasis added).³ The plain language of 38 U.S.C. § 1103(a) and 38 C.F.R. § 3.300(a) prohibits service connection for a condition that is attributable to a veteran's use of tobacco during service. In addition to barring direct service connection where tobacco use results in disability or death, this prohibition appears to apply to disability or death secondary to a service-connected disability that caused the veteran to use tobacco products during service, unless disability or death arose during service or during an applicable presumptive period. See 38 C.F.R. § 3.300(b)(1) and (2). Further, section 3.300(c) prohibits a finding of secondary service connection where the secondary condition is proximately due to a disease or injury that was service connected based on a claim filed on or before June 9, 1998, on the basis that it was attributable to use of tobacco products during service. However, the plain language of the statute and regulation do not bar a finding of secondary service connection for a disability related to the veteran's use of tobacco products after the veteran's service, where that disability is proximately due to a service-connected disability that is not service connected on the basis of being attributable to the veteran's use of tobacco products during service.

6. With regard to a claim for secondary service connection, section 3.310(a) of title 38, Code of Federal Regulations, provides that "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected." "Proximate cause" is defined by Black's Law Dictionary 213 (7th ed. 1999) as a "cause that directly produces an event and without which the event would not have occurred."⁴ See Forshey v. West, 12 Vet. App. 71, 73-74 (1998)

³ See Kane v. Principi, 17 Vet. App. 97, 102 (2003) (section 3.300 constitutes a permissible construction of 38 U.S.C. § 1103).

⁴ This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

An act which directly produced the injury * * *. That cause which naturally leads to and which might have been expected to produce

(that which in a continuous sequence produces injury and without which the result would not have occurred), aff'd on other grounds, 284 F.3d 1335 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). There may however be more than one action that has an effect in bringing about a harm. When there are potentially multiple causes of a harm, a similar rule is to be applied, i.e., an action is considered to be a proximate cause of the harm if it is a substantial factor in bringing about the harm and the harm would not have occurred but for the action. Shyface v. Secretary of Health & Human Svs., 165 F.3d 1344, 1352 (Fed. Cir. 1999); Restatement (Second) of Torts §§ 430 cmt. d. and 433 cmt. d. (1965). A determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). The questions that adjudicators must resolve with regard to a claim for service connection for a tobacco-related disability alleged to be secondary to a disability not service connected on the basis of being attributable to the veteran's use of tobacco products during service are: (1) whether the service-connected disability caused the veteran to use tobacco products after service; (2) if so, whether the use of tobacco products as a result of the service-connected disability was a substantial factor in causing a secondary disability; and (3) whether the secondary disability would not have occurred but for the use of tobacco products caused by the service-connected disability. If these questions are answered in the affirmative, the secondary disability may be service connected.

7. As noted above, DIC is payable where death results from a service-connected disability, 38 U.S.C. § 1310(a), and the standards and criteria for determining whether a disability is service connected are those applicable under chapter 11 of title 38, United States Code, for determination of eligibility for disability compensation. Those standards and criteria include the rules for secondary service connection under 38 C.F.R. § 3.310(a), which are based on the authority provided by chapter 11. See VAOPGCPREC 8-97 (38 C.F.R. § 3.310 cites 38 U.S.C. §§ 1110 and 1131 as its statutory authority and implements section 1110). Whether the cause of a veteran's death is service connected is a finding of fact. Swann v. Brown, 5 Vet. App. 229, 232 (1993). Pursuant to 38 C.F.R. § 3.312(a), a veteran's death "will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death." Thus, in a DIC claim in which the claimed cause of death is related to use of tobacco products after service secondary to a disability not service connected on the basis of being attributable to the veteran's use of tobacco products during service, adjudicators must resolve the same three questions stated above to determine whether the disability that was the principal

the result. That from which the effect might be expected to follow without the concurrence of any unusual circumstances. That which immediately produces the effect as distinguished from a predisposing cause.

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

or a contributory cause of death may be considered service connected. If these three questions are answered in the affirmative, the secondary disability may be considered service connected and may be considered as a possible basis for service connection of the veteran's death, applying the rules generally applicable in determining eligibility for DIC.

HELD:

Neither 38 U.S.C. § 1103(a), which prohibits service connection of a disability or death on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during service, nor VA's implementing regulations at 38 C.F.R. § 3.300, bar a finding of secondary service connection for a disability related to the veteran's use of tobacco products after the veteran's service, where that disability is proximately due to a service-connected disability that is not service connected on the basis of being attributable to the veteran's use of tobacco products during service. The questions that adjudicators must resolve with regard to a claim for service connection for a tobacco-related disability alleged to be secondary to a disability not service connected on the basis of being attributable to the veteran's use of tobacco products during service are: (1) whether the service-connected disability caused the veteran to use tobacco products after service; (2) if so, whether the use of tobacco products as a result of the service-connected disability was a substantial factor in causing a secondary disability; and (3) whether the secondary disability would not have occurred but for the use of tobacco products caused by the service-connected disability. If these questions are answered in the affirmative, the secondary disability may be service connected. Further, the secondary disability may be considered as a possible basis for service connection of the veteran's death, applying the rules generally applicable in determining eligibility for dependency and indemnity compensation.

Tim S. McClain

Attachments: C-files