

*Frequency of Response:* On occasion.  
*Estimated Number of Respondents:* 5,000.

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Dated: March 31, 1998.

By direction of the Secretary.

**Donald L. Neilson,**

*Director, Information Management Service.*

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## DEPARTMENT OF VETERANS AFFAIRS

### Summary of Precedent Opinions of the General Counsel

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Department's General Counsel involving veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters. The summary is published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretation regarding the legal matter at issue.

**FOR FURTHER INFORMATION CONTACT:** Jane L. Lehman, Chief, Law Library, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6558.

**SUPPLEMENTARY INFORMATION:** VA regulations at 38 CFR 2.6(e)(9) and 14.507 authorize the Department's General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public

with notice of those interpretations of the General Counsel that must be followed in future benefit matters and to assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above.

### VAOPGCPREC 35-97

#### Question Presented

Does the failure of the Department of Veterans Affairs (VA) to render a timely decision regarding entitlement to service-connected burial benefits following a veteran's death in 1977 provide a basis for awarding dependency and indemnity compensation (DIC) retroactive to the date of death?

#### Held

The failure of the Department of Veterans Affairs to render a timely decision regarding entitlement to service-connected burial benefits following a veteran's death may not provide a basis for awarding retroactive payment of dependency and indemnity compensation (DIC) in a manner inconsistent with the express requirements of 38 U.S.C. § 5110, except insofar as the Secretary may order such benefits pursuant to his equitable-relief authority under 38 U.S.C. § 503(a). Pursuant to 38 U.S.C. § 5110(a) and (d)(1), an award of DIC may be made effective from the month of death only if the claimant filed an application for DIC within one year after the date of death, or filed an informal claim for DIC within such period, followed by a timely formal application for DIC which may, under 38 C.F.R. § 3.155(a), be deemed to have been filed within one year after the date of death.

Effective Date: December 9, 1997.

### VAOPGCPREC 36-97

#### Questions Presented

a. Whether Diagnostic Code (DC) 5293, intervertebral disc syndrome (IDS), is based upon loss of range of motion, and therefore whether 38 C.F.R. §§ 4.40 and 4.45 are applicable in determining the extent of a veteran's disability due to IDS.

b. Whether 38 C.F.R. §§ 4.40 and 4.45 must be considered where a veteran receives less than the maximum schedular rating under DC 5293, but that rating corresponds to the maximum schedular rating under another diagnostic code pertaining to limitation of motion.

c. Whether 38 C.F.R. § 3.321(b) must be considered when a veteran receives

less than the maximum rating under DC 5293, irrespective of whether 38 C.F.R. §§ 4.40 and 4.45 must be applied in such a case.

#### Held

1. Diagnostic Code (DC) 5293, intervertebral disc syndrome (IDS), involves loss of range of motion because the nerve defects and resulting pain associated with injury to the sciatic nerve may cause limitation of motion of the cervical, thoracic, or lumbar vertebrae. Therefore, pursuant to *Johnson v. Brown*, Vet. App. 7 (1996), 38 C.F.R. §§ 4.40 and 4.45 must be considered when a disability is evaluated under this diagnostic code.

2. When a veteran has received less than the maximum evaluation under DC 5293 based upon symptomatology which includes limitation of motion, consideration must be given to the extent of the disability under 38 C.F.R. §§ 4.40 and 4.45, even though the rating corresponds to the maximum rating under another diagnostic code pertaining to limitation motion.

3. The BVA must address entitlement to an extraschedular rating under 38 CFR 3.321(b)(1) if there is evidence of "exceptional or unusual" circumstances indicating that the rating schedule, including 38 CFR 4.40, 4.45, and 4.71a, may be inadequate to compensate for the average impairment of earning capacity due to IDS, regardless of the fact that a veteran may have received the maximum schedular rating under a diagnostic code based upon limitation of motion.

Effective Date: December 12, 1997.

### VAOPGCPREC 37-97

#### Question Presented

Are attorney fees payable in cases in which the decision of the Board of Veterans' Appeals was on the issue of whether a claimant had submitted new and material evidence sufficient to reopen a claim?

#### Held

In a case where BVA has denied reopening of a claim for service connection based on failure to submit new and material evidence and that determination is reversed by CVA and service connection is ultimately allowed, attorney fees may be paid. In a claim where BVA has determined that new and material evidence has been submitted and has remanded the claim to the AOJ, attorney fees may not be paid because a final decision within the meaning of 38 U.S.C. 5904(c)(1) is lacking.

Effective Date: December 16, 1997.

**VAOPGCPREC 38-97***Question Presented*

Can the misapplication of, or failure to apply, a statutory or regulatory evidentiary presumption in a prior final decision constitute new and material evidence for purposes of reopening a previously denied claim pursuant to 38 U.S.C. 5108?

*Held*

The misapplication of, or failure to apply, a statutory or regulatory evidentiary presumption in a prior final decision cannot, in itself, constitute "new and material evidence" within the meaning of 38 U.S.C. 5108 for purposes of reopening a claim.

Effective Date: December 17, 1997.

**VAOPGCPREC 39-97***Question Presented*

Are reparations paid to a veteran's spouse, a victim of Nazi persecution, by the Federal Republic of Germany (FRG) countable as income for purposes of Department of Veterans Affairs (VA) pension programs and parents' dependency and indemnity compensation (DIC)?

*Held*

Reparations paid by the Federal Republic of Germany to individuals who were victims of Nazi persecution are not countable as income or net worth for purposes of determining eligibility for section 306, old law, and improved pension, and parents' dependency and indemnity compensation.

Date: December 22, 1997.

**VAOPGCPREC 40-97***Question Presented*

a. Do the amendments to 38 U.S.C. 1151 made by section 422(a) of Pub. L. No. 104-204 apply in claims filed before October 1, 1996, which are still pending on October 1, 1997?

b. Do those amendments apply in claims filed on or after October 1, 1996, but before October 1, 1997, which are still pending on the latter date?

*Held*

All claims for benefits under 38 U.S.C. 1151, which governs benefits for persons disabled by treatment or vocational rehabilitation, filed before October 1, 1997, must be adjudicated under the provisions of section 1151 as they existed prior to that date.

Effective Date: December 31, 1997.

**VAOPGCPREC 1-98***Question Presented*

Does 38 U.S.C. 7111, which Pub. L. No. 105-111 added to title 38, apply to claims pending on the date Pub. L. No. 105-111 was enacted?

*Held*

Section 7111 of title 38, United States Code, as added by Pub. L. No. 105-111, under which a claimant is entitled to a Board of Veterans Appeals decision on the merits on a request for revision of a prior Board decision on the grounds of clear and unmistakable error, applies to claims pending on the date Pub. L. No. 105-111 was enacted.

Effective Date: January 13, 1998.

**VAOPGCPREC 2-98***Questions Presented*

a. For claims filed after October 31, 1990, based on service connection of disability or death resulting from a veteran's own alcohol or drug abuse, does section 8052 of the Omnibus Budget Reconciliation Act of 1990 preclude entitlement to the following benefits:

- (1) Dependents' educational assistance under 38 U.S.C. ch. 35?
- (2) Burial benefits?
- (3) Accrued benefits?
- (4) Surviving spouses' loan guaranty benefits under 38 C.F.R. § 3.805?
- (5) The special allowance under 38 U.S.C. § 1312?
- (6) Medical care under the Department of Veterans Affairs Civilian Health and Medical Program (CHAMPVA)?

b. If, based on a claim filed on or before October 31, 1990, service connection has been established for a disability that resulted from a veteran's own alcohol or drug abuse, what effect does section 8052 of the Omnibus Budget Reconciliation Act of 1990 have on a claim for an increased rating filed after October 31, 1990?

*Held*

a. With respect to claims filed after October 31, 1990, 38 U.S.C. § 105(a), as amended by section 8052(a)(1) of the Omnibus Budget Reconciliation Act of 1990 and implemented by 38 C.F.R. 3.1(m), precludes, for purposes of all VA benefits, a finding that an injury or disease that was a result of a person's own alcohol or drug abuse was incurred or aggravated in line of duty. Thus, for purposes of all VA benefits, eligibility for which requires a service-connected disability or death, section 105(a) precludes service connection of a disability resulting from alcohol or drug abuse on the basis of the disability's

incurrence or aggravation in service or of a death resulting from such a disability. However, for purposes of all such VA benefits other than disability compensation, the amendments made by section 8052 do not preclude eligibility based on a disability, or death resulting from such a disability, secondarily service connected under 38 C.F.R. § 3.310(a) as proximately due to or the result of a service-connected disease or injury.

b. Claims for increase filed after October 31, 1990, are subject to the amendments made by section 8052(a) of the Omnibus Budget Reconciliation Act of 1990. If, based on a claim filed on or before October 31, 1990, service connection has been established for a disability that resulted from a veteran's own alcohol or drug abuse, 38 U.S.C. §§ 1110 and 1131, as amended by section 8052(a), prohibit the payment of any increase in compensation for that disability, based on a claim for increase filed after October 31, 1990, including, for example, a claim for an increased rating or a claim for increase based on acquisition of a dependent. Sections 1110 and 1131 do not, however, prohibit continuation or reduction, in accordance with the facts, of an award of compensation for the disability established on the basis of a claim filed on or before that date. Further, sections 1110 and 1131 do not prohibit payment of an increase in compensation, such as a cost-of-living adjustment; that would become effective without the filing of a claim.

Effective Date: February 10, 1998

**VAOPGCPREC 3-98***Question Presented*

Whether a person who is between 18 and 23 years of age and is pursuing a high school education in a home-school program is pursuing a course of instruction at an educational institution for purposes of 38 U.S.C. § 101(4)(A)(iii).

*Held*

A home-school program does not constitute an institution within the meaning of 38 U.S.C. § 101(4)(A)(iii) and 104(a) because the program terminates when the child completes his or her course of instruction or withdraws, does not have an ongoing enrollment, and is operated for the sole purpose of serving the needs of a particular student. Therefore, a person who is between 18 and 23 years of age and is being educated in a home-school program is not a child for purposes of 38 U.S.C. § 101(4)(A)(iii) because he or she is not pursuing a course of instruction at an

educational institution. Effective Date: March 19, 1998.

#### VAOPGCPREC 4-98

##### *Question Presented*

Does 38 U.S.C. § 2305 have any application in claims for burial benefits involving veterans who served in the organized military forces of the Commonwealth of the Philippines while such forces were in the service of the United States Armed Forces during World War II?

##### *Held*

The saving provision currently codified at 38 U.S.C. § 2305 preserved potential eligibility for burial benefits under chapter 23 of title 28, United States Code, for individuals who could have qualified for those benefits under "the laws in effect on December 31, 1957." The statute governing benefits eligibility based upon service in the Philippine Commonwealth Army in World War II that was in effect on that date did not confer potential eligibility for burial benefits for individuals with such service. Consequently, section 2305 has no application in claims for burial benefits based on service in the Philippine Commonwealth Army during World War II. Effective Date: April 1, 1998

#### VAOPGCPREC 5-98

##### *Questions Presented*

a. What is the proper disposition of funds derived from Department of Veterans Affairs (VA) benefits and held by a legal custodian, when a beneficiary dies intestate but with known heirs?

b. Does VA have a legal duty to supervise estate assets derived from VA benefits and in the hands of a legal custodian, after the death of the beneficiary?

c. Does VA have authority to distribute a deceased beneficiary's estate assets, derived from VA benefit payments, and, if so, how should the distribution be made?

##### *Held*

When a veteran or other VA beneficiary dies without a will but with known heirs, VA-derived funds held by a legal custodian should be distributed by an appropriate estate administrator in accordance with applicable state law governing intestate succession. VA is not authorized to recover such funds and distribute them to the beneficiary's heirs. Generally, VA is authorized to supervise the estate only to the extent necessary to assure that the fiduciary fulfilled his or her responsibilities to the beneficiary and to assure preservation of

assets which may be reclaimed by the Government pursuant to 38 U.S.C. § 5502(e).

Effective Date: April 2, 1998.

#### VAOPGCPREC 6-98

##### *Question Presented*

If a veteran both challenges the validity of a debt assessed by the Department of Veterans Affairs (VA) and, in the alternative seeks waiver of such debt, must VA first fully adjudicate the debt validity issue, and the veteran exhaust all appeals on that issue, before waiver may be considered?

##### *Held*

When a veteran both challenges the validity of a debt and seeks waiver of the debt, the Regional Office must first fully review the debt's validity and, if the office believes the debt to be valid, prepare a written decision fully justifying the validity of the debt. At that point, the veteran's request for waiver should be referred to the Committee on Waivers and Compromises. If waiver is denied, the veteran must be informed of his or her right to appeal both decisions to the Board of Veterans Appeals.

Effective Date: April 24, 1998

#### VAOPGCPREC 7-98

##### *Questions Presented:*

a. Where eligibility under the Restored Entitlement Program for Survivors (REPS) is based on service connection established under a Department of Veterans Affairs (VA) regulation establishing a presumption of service connection for a disease, is the effective date of the award of REPS benefits limited by the effective date of the regulation establishing the presumption?

b. If, pursuant to the *Nehmer* stipulation, an award of dependency and indemnity compensation (DIC) is made effective prior to the effective date of the VA regulation establishing presumptive service connection for the cause of death, is the effective date of an award of REPS benefits also governed by the *Nehmer* stipulation?

##### *Held*

In the case of a member or former member of the Armed Forces who died on active duty prior to August 13, 1981, or who died from a service-connected disability which was incurred or aggravated in service before such date, the Department of Veterans Affairs (VA) is authorized, under Pub. L. No. 97-377, § 156, 96 Stat. 1830, 1920 (1982), and 38 C.F.R. § 3.812, to award benefits under the Restored Entitlement Program for

Survivors (REPS) to the member or former member's surviving spouse or child for all periods in which such spouse or child meet the eligibility requirements for such benefits. If a claimant meets the statutory requirements governing eligibility for REPS benefits, the fact that service connection for a former member's death has been established pursuant to regulatory presumptions of service connection which became effective subsequent to the initial period of eligibility does not limit VA's authority to award REPS benefits retroactive for all periods of eligibility.

Effective Date: May 4, 1998.

**John H. Thompson,**

*Acting General Counsel.*

[FR Doc. 98-15116 Filed 6-5-98; 8:45 am]

BILLING CODE 8320-01-M

## DEPARTMENT OF VETERANS AFFAIRS

### The Enhanced-Use Development of the VAMC Sioux Falls, SD

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice of designation.

**SUMMARY:** The Secretary of the Department of Veterans Affairs is designating the Sioux Falls, SD, Department of Veterans Affairs Medical Center (VAMC) for an Enhanced-Use development. The Department intends to enter into a long-term lease of real property with the Children's Care Hospital and School (CCH&S). The CCH&S will construct and maintain a parking area on the site, and will, as consideration for the lease, provide specified facilities and services to the Department at no cost.

#### FOR FURTHER INFORMATION CONTACT:

Jacob Gallun, Asset and Enterprise Development Office (189), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC, 20420, (202) 565-4307.

**SUPPLEMENTARY INFORMATION:** 38 U.S.C. Sec. 8161 *et seq.*, specifically provides that the Secretary may enter into an Enhanced-Use lease, if the Secretary determines that at least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department; the least will not be inconsistent with and will not adversely affect the mission of the Department; and the lease will enhance the property. This project meets these requirements.