

DATE: 3-16-90

CITATION: VAOPGCPREC 1-90
Vet. Aff. Op. Gen. Couns. Prec. 1-90

TEXT:

Request for Opinion Regarding Presumptive Service Connection,

QUESTION PRESENTED:

Whether service connection may be established pursuant to 38 C.F.R. § 3.309(a) when a hereditary or familial disease first becomes manifest to a compensable degree within the presumptive period following discharge from service?

COMMENTS:

1. This replies to your request for our opinion as to whether service connection may be established in cases in which a hereditary or familial disease first becomes manifest to a compensable degree within the presumptive period following discharge from service. For reasons that follow, we conclude that presumptive service connection may be granted for diseases of hereditary origin.

2. In the instant case, the veteran served on active duty from September 25, 1967 through September 24, 1971 and again from January 13, 1972 to February 29, 1988. Neither the initial examination in August 1967 prior to entry into service nor an examination in April 1972 upon transfer revealed any evidence of neurological disorders. After an initial VA examination on August 24, 1988, service connection was established for chondromalacia, patellae, bilateral, based on findings in service and at the initial VA examination. The veteran was seen by a private physician on November 10, 1988 who noted the veteran had a history of progressive gait deterioration and numbness of both legs. Based upon additional neurological examinations by private physicians, the veteran submitted a reopened claim on March 20, 1989. The veteran received a VA examination by a consultant in neurology on May 9, 1989, and was diagnosed with Hereditary Sensory Motor Neuropathy, type V, also known as familial spastic paraparesis. Pursuant to a rating decision dated May 30, 1989, service connection for the veteran's neurological disorder was denied and his ratings for chondromalacia, patella, bilateral were reduced to 0%. The veteran requested a hearing before the regional office, which was held on October 4, 1989. The regional office determined that the evidence showed manifestation of neurological disease to a compensable degree within the presumptive period. This request for an advisory opinion resulted from that hearing.

3. Basic entitlement to peacetime disability compensation will be paid if 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, in the active military, naval or air service" to otherwise eligible veterans. 38 U.S.C. § 331 Section 3.303 of title 38, Code of Federal Regulations, elaborates on the evidence necessary to establish service connection. Such evidence should "establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein." 38 C.F.R. § 3.303(a). Accordingly, diseases incurred in or aggravated by service may be service connected.

4. The issue of whether hereditary diseases may be service connected was discussed in Op.G.C. 1-85 (3-5-85). That opinion focused on the language of 38 C.F.R. § 3.303(c) which states, "congenital or developmental defects ... are not diseases or injuries" for disability compensation purposes. The opinion distinguished between congenital defects and congenital diseases. A defect was described as a structural or inherent abnormality, generally incapable of improvement or deterioration whereas a disease is capable of improvement or deterioration whereas a disease is capable of improvement or deterioration. We held that service connection may be granted for diseases, but not defects, of congenital, developmental or familial origin, if the evidence incurred or aggravated within the meaning of VA law and regulations. We continue to find the reasoning of this position persuasive. Further, Op.G.C. 8-88 (11-7-88) held that service connection may be granted for hereditary diseases which either first manifest themselves during service or which preexist service and progress at an abnormally high rate during service. The presumption of soundness (38 C.F.R. § 3.303(c)) is not rebutted merely by the fact a disease is hereditary, as a genetic or other familial disposition to develop a disease does not constitute having the disease. This opinion, too, we continue to find persuasive. Accordingly, service connection may be granted for diseases of congenital, developmental or familial (hereditary) origin where such disease was first manifest during service or progressed at an abnormally high rate during service.

5. This reasoning may be extended to grant presumptive service connection to hereditary diseases which first become manifest to a compensable degree within the applicable presumptive period following discharge from service. Certain chronic diseases, listed in 38 U.S.C. § 301(3) and 38 C.F.R. § 3.309(a), are presumed to have been incurred in or aggravated by service when they become manifest to a degree of 10% or more within the applicable time following the date of separation from service. 38 U.S.C. §§ 312, 337 and 38 C.F.R. §§3.309(a), 3.307(a). Organic diseases of the nervous system are included as chronic diseases subject to the presumption of service connection. 38 U.S.C. § 301(3), 38 C.F.R. § 3.309(a). These diseases "shall be granted service connection although not otherwise established as incurred in service" if service requirements are met and if the disease becomes manifest to a compensable degree within the specified time periods after separation from service. 38 C.F.R. § 3.309(a). The statutes and implementing regulations concerning the presumption of service connection focus on the time period in which the disease first becomes manifest to a compensable degree. Although a veteran may have a genetic or familial predisposition to develop a disease, where a chronic disease, as listed in 38 U.S.C. § 301 and 38 C.F.R. § 3.309(a) becomes manifest to a compensable degree during the applicable

time periods, then that chronic disease will be presumed to have been incurred in or aggravated by service absent any evidence which rebuts this presumption.

6. The presumption of service connection may be rebutted where the facts establish that a chronic disease results from intercurrent causes or is due to the veteran's own willful misconduct. 38 U.S.C. § 313 (a). The exceptions to a presumption of service connection are further described in 38 C.F.R. § 3.307. These exceptions do not per se remove hereditary diseases from those chronic diseases which may be presumed to have been incurred in service. Section 3.307(b) excludes from the diseases subject to presumptive service connection, any disease listed in section 3.309(a) which results from intercurrent causes such as a cerebral hemorrhage or which results from drug ingestion or a complication of some other condition not related to service. 38 C.F.R. § 3.307(b). Diseases of hereditary or familial origin are not necessarily exempted under these provisions. It remains a function for VA adjudicators to determine in accordance with section 3.307(d) whether the evidence concerning the existence and inception of disease rebuts the presumption of service connection. 38 C.F.R. § 3.307(d). As noted in Op.G.C. 8-88, a "genetic or other familial predisposition to develop a disease does not constitute having the disease ... Only when symptomatology and/or pathology exist can he or she be said to have developed the disease" (footnote omitted). Accordingly, the fact that a disease is of a hereditary or familial nature does not necessarily rebut the presumption that the disease was incurred in service. Where the rebuttable presumption provisions of section 3.307 are satisfied, a hereditary or familial disease which first becomes manifest to a compensable degree within the presumptive period following discharge from service may be granted service connection pursuant to section 3.309(a).

HELD:

Service connection may be established pursuant to 38 C.F.R. § 3.309(a) when a hereditary or familial disease first becomes manifest to a compensable degree within the presumptive period following discharge from service provided the rebuttable presumption provisions of § 3.307 are satisfied.

VETERANS ADMINISTRATION GENERAL COUNSEL
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