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TEXT:

SUBJECT: Definition of Radiogenic Disease as used in 38 U.S.C. § 312 (c)(2) and 38 C.F.R. § 3.311(b)(2).

QUESTIONS PRESENTED:

1. Does 38 U.S.C. § 313 (a) preclude the establishment of presumptive service connection under 398 U.S.C. x21 312 (c)(2) for a cancer listed therein which developed as a result of metastasis of a non-radiogenic cancer, i.e., a cancer not listed in section 312(c)(2)?
2. Does 38 C.F.R. § 3.311b(g) preclude the establishment of service connection under 38 C.F.R. § 3.311b for a cancer listed therein which developed as a result of metastasis of a non-radiogenic cancer, i.e., in this situation, a cancer not listed in 38 C.F.R. § 3.311b?

COMMENTS:

1. These questions arise in the context of claims of certain radiation- exposed veterans who have developed one of the cancers listed in either 38 U.S.C. § 312(c)(2) or 38 C.F.R. § 3.311b as a result of metastasis of an unlisted cancer. They arise because although both sections authorize service connection for listed diseases, their provisions also expressly preclude establishment of service connection in situations where there is affirmative evidence to the contrary.
2. With the passage of The Radiation Exposed Veterans' Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485, a new presumption was created under 38 U.S.C. § 312(c). It provides that certain diseases, which become manifest in a radiation- exposed veteran to a degree of 10 percent or more within a specified period, "shall be considered to have been incurred in or aggravated during the veteran's service on active duty" for purposes of VA compensation. The basic principle embodied in this presumption is the possibility of a relationship between the development of any of the listed diseases and exposure to radiation at some past point in time rather than a scientific cause and effect relationship. (See remarks of Representative Montgomery, 133 Cong. Rec. 21305 (1987)).
3. The legislative history of section 312(c) reveals it to be the latest in a series of congressional expansions of presumptions extending health care and disability benefits to radiation- exposed "atomic veterans" without regard to strict application of scientific and/or medical principles normally governing determination of disease causation. Throughout the congressional debate on the Act, sharp differences were displayed about what might be called the "politicization" of cancer diagnoses. A recurrent justification for the decision to create the presumption in section 312(c)(2) was, as Senator Cranston said, "the impossibility of determining, with respect to a

given veteran, whether his disability was caused by radiation exposure rather than something else...." (134 Cong. Rec., S4,639 (daily ed. April 25, 1988)). The diseases listed in section 312(c)(2) were viewed by Congress, Representative Penny said, as "those malignancies considered most likely to be related to ionizing radiation exposure." (133 Cong. Rec. H6,675 (daily ed. July 28, 1987)). (See also H.R. Rept. No. 100-235, 100th Cong., 1st Sess. 4 (1987)). Some members of Congress wanted even more expansive coverage such as Senator Simon who complained, " i t (the final bill) does not create a comprehensive presumption of service connection for all radiogenic diseases." (133 Cong. Rec. S4,647 (daily ed. April 25, 1988, S4647)).

4. Although scientific and medical principles of causation, for the most part, were ignored by Congress in its enactment of section 312(c), the final compromise adopted reveals that they were not completely abandoned. The final compromise rejected the Senate provisions for three categories covering 21 diseases of varying susceptibility to radiation and instead accepted the House list of 13 specific cancers all of which were to be presumed service connected. As part of this agreement the House was forced to drop its inclusion of colon cancer, one of the most common forms of the disease, largely because of Senator Cranston's insistence that colon cancer was more likely to result from other intervening factors such as alcohol abuse, tobacco smoking, or poor diet rather than from radiation. (134 Cong. Rec. S4,640 (daily ed. July 28, 1988)). Thus, it is clear that Congress believed some cancers to be caused by radiation exposure and other cancers, which they decided to exclude from the service connection presumption, to be more likely the result of non-radiation causes.

5. This is even more clearly demonstrated by the fact that Congress made the presumptions regarding radiogenic diseases created in section 312(c) expressly subject to the limitations set forth in section 313 which states in part:

(a) Where there is affirmative evidence to the contrary, or evidence that an inter-current injury or disease which is a recognized cause of any of the diseases within the purview of section 312 of this title, has been suffered from the date of separation from service and the onset of any such diseases ... service connection pursuant to section 312 of this title will not be in order.

6. At no point in the congressional debate on section 312(c) was there any mention of metastatic cancers or their possible relationship to the diseases listed therein. Moreover, during the congressional consideration of the Act, the only reference which can be interpreted as applying to section 313 and the limitations it imposes on section 312(c), came when Senator Murkowski, who opposed the bill, noted without contradiction: " o f course, the VA will have the authority to challenge or rebut the presumptions in categories 1 and 2 (of the bill) if it was recognized that intervening causes could have contributed to the manifestation of the disease ..." adding that the bill "simply provides a presumption for 13 diseases, some of which are known to be very strongly connected with intervening factors." (134 Cong. Rec. S4,644 (daily ed. April 25, 1988)). There was no Senate Report on H.R. 1811 and H.R. Rept. No. 100-235, 100th Cong., 1st Sess. (1987) at page 4 simply notes the application of section 313.

7. Because the limitations of section 313 apply to the presumptions created in section 312(c), resolution of the first question raised is governed by the nature of the metastatic process. Metastasis is the transfer of a disease producing agent from one part of the body to another, usually in the blood or lymphatic systems. (Cancer,

Principles & Practice of Oncology, 3rd Ed., vol. I, 98, 1989). Thus, by definition, a cancer listed in section 312(c)(2) which developed as a result of metastasis of a non-radiogenic cancer (as identified by omission from lists of presumptively radiogenic cancers) must be viewed as being caused by the non-radiogenic cancer.

8. Metastasis is of considerable importance in the adjudication of the claims in question since the most recent findings indicate that about 60% of all cancer patients are affected by this process. Of newly diagnosed patients with solid tumors about 30% already have clinically detectable metastases. Of the remaining 70%, about half have clinically occult micro-metastases which ultimately become manifest. Many cancer patients have multiple metastases. (Id). Determining whether one of the diseases listed in 38 U.S.C. § 312(c)(2) is a primary site of disease or a secondary site resulting from metastasis of a non-radiogenic cancer is a medical question. The response to this basic question will determine the eligibility of claimants in the cases at issue here. In an individual case, service connection cannot be established if it is determined that the claimant's development of one of the diseases listed in section 312(c)(2) resulted from the metastasis of a legally defined non-radiogenic cancer.

9. The same factual situation presented in the first question also arises in some radiation exposure claims under 38 C.F.R. § 3.311b which implements The Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, Pub. L. No. 98-542, 98 Stat. 2728 and governs the adjudication of such claims. (Note: Establishment of service connection under section 3.311b may provide a separate and distinct basis of entitlement from that authorized under the presumptive provisions of 38 U.S.C. § 312) Section 3.311b lists certain diseases for which service connection is to be considered. In these cases, veterans seek to establish service connection for cancers listed in the regulation which developed as a result of metastasis of a non-radiogenic cancer.

10. In Pub. L. No. 98-542, Congress avoided designating specific diseases as being presumptively service connected and instead addressed the process by which VA was then considering compensation claims of radiation-exposed veterans. Prompted by concern with the VA radiation claims procedure, Congress adopted the rule-making approach rather than imposing legal presumptions regarding service connection based on possible radiogenic diseases about which scientific opinion was often deeply divided. (See Pub. L. No. 98-542, section 2. Also remarks of Senator Cranston, 130 Cong. Rec. 13148, (1984)). Sections 2(13) and 3 of the Act directed VA to adopt binding regulations "based on sound scientific and medical evidence". Section 2(5) included a list of diseases VA was to consider in its rule making proposals. Each of the listed diseases was selected on the basis of then available scientific opinion showing a possible connection between past radiation exposure and the named disease. In spite of being given discretion to decide if any of the named diseases should be accorded presumptive service-connected status in the new regulations (section 5b(2)(A)(i) of the Act), the VA elected not to do so in favor of the case-by-case consideration of radiation claims for diseases it listed in 38 C.F.R. § 3.311b.

11. There was very little congressional debate on the final passage of Pub. L. No. 98-542, and there was no mention of metastasis. The final form of the Act, however, demonstrated Congress' intent that a relationship exist between radiation exposure and a disease found to be service connected by including section 5(b)(2)(A)(ii) directing the regulations to specify

that in the adjudication of individual cases, service connection shall not be granted where there is sufficient affirmative evidence to the contrary or evidence to establish that an intercurrent injury or disease which is a recognized cause of the described disease has been suffered between the date of separation from service and the onset of such disease....

12. Reflecting this congressional mandate, 38 C.F.R. § 3.311b(g) reads:

Willful misconduct and intervening cause. In no case will service connection be established if the disease is due to the veterans own willful misconduct, or if there is affirmative evidence to establish that a supervening, non-service related condition or event is more likely the cause of the disease. (Emphasis added).

In our opinion, the above provisions of section 3.311b(g) implementing section 5(b)(2)(A)(ii) of Pub. L. No. 98-542 dictate a similar result in the cases described in your second question as that reached above in regard to the establishment of service connection under 38 U.S.C. § 312(c). That is, in cases where one of the cancers listed in section 3.311b develops as a result of metastasis of an unlisted cancer, there is sufficient "affirmative evidence to establish that a supervening, non-service related condition or event is more likely the cause of the disease" and service connection is precluded.

HELD:

38 U.S.C. § 313(a) precludes establishment of presumptive service connection under 38 U.S.C. § 312(c)(2) for a cancer listed therein which developed as a result of metastasis of a non-radiogenic cancer, i.e., a cancer not listed in section 312(c)(2).

38 C.F.R. § 3.311b(g) precludes establishment of service connection under 38 C.F.R. § 3.311b for a cancer listed therein which developed as a result of metastasis of a non-radiogenic cancer, i.e., in this situation, a cancer not listed in section 3.311b.

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