

DATE: 03-11-91

CITATION: VAOPGCPREC 07-91  
Vet. Aff. Op. Gen. Couns. Prec. 07-91

**TEXT:**

**SUBJECT:** Eligibility for Invalid Lift.

(This opinion, previously issued as Opinion of the General Counsel 1-61, dated January 6, 1961, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

**To: Chief Medical Director**

1. This is in reply to your memorandum of December 2, 1960 requesting an opinion as to whether the above-named veteran may be furnished an invalid lift under the provisions of 38 U.S.C. § 617.

2. You state that the veteran is receiving compensation for a service- connected disability, which is a greater benefit than the non-service-connected disability pension which it is indicated he would otherwise be entitled to receive upon application therefor. Further, you state that the veteran would otherwise be entitled to receive the monthly rate of pension based on the need of regular aid and attendance. Your submission does not show whether present eligibility for pension has in fact been adjudicated. The veteran's service- connected disability apparently does not warrant the furnishing of an invalid lift on account of such disability and his non-service-connected disability is not medically adjunct to his service-connected disability.

3. 38 U.S.C. § 617 reads as follows:

"The Administrator may furnish an invalid lift, if medically indicated, to any veteran in receipt of pension under chapter 15 of this title based on the need of regular aid and attendance." (Underscoring supplied.)

Paragraph 3d of DM & S Circular 10-127, dated July 1, 1960, Subject: Furnishing of Invalid Lifts, reads as follows:

"An applicant with a service-connected disability requiring the use of an invalid lift must have, or be in need of, regular aid and attendance. An applicant with a nonservice-connected disability must be in receipt of pension based upon the need for regular aid and attendance."

4. The answer to your question depends upon the interpretation of the phrase "in receipt of pension" appearing in 38 U.S.C. § 617 quoted above. The legislative history of this law does not reflect anything determinative of the question. It is reasonable to assume, however, that Congress was aware that there was existing authority to furnish an invalid lift to a veteran in need thereof based upon his service-connected disability. Section 617 was merely an extension of this benefit to non-service-connected cases in need of regular aid and attendance. It is equally reasonable to assume that there was no Congressional intent to establish a technical hiatus which would exclude a veteran in the circumstances presented or require a series of elections and re-elections of pension and compensation benefits to obtain a lift without suffering a resulting monetary loss in compensation. Moreover, and apart from such consideration, it would appear that the language of the statute is subject to an appropriate construction which avoids this impasse and accords with the purposes of the law.

5. Although the language "receiving" or "in receipt of" is sometimes required to be construed literally as an unqualified statutory provision requiring actual or physical receipt of the benefit, this office has interpreted such language, under certain circumstances, as not requiring actual physical receipt of the benefit under a particular statute. Administrator's Decision numbered 87, involving the interpretation of the word "receiving" in section 214 of the World War Veterans' Act, 1924, as amended, states in part:

"While the veteran was not actually receiving compensation at the time of disappearance, he was entitled thereto, and had a guardian been appointed, an award would have been made. The case is, therefore, within the purview of section 214, quoted above."

Section 214 read, in pertinent part, as follows:

"Where an incompetent veteran receiving disability compensation under the provisions of this act disappears, the director, in his discretion, may pay to the dependents of such veteran the amount of compensation provided in section 201 of the World War Veterans' Act, 1924, as amended, for dependents of veterans." (Underscoring supplied.)

6. A subsequent Administrator's Decision, numbered 316, involved an interpretation of Part VI of Veterans Regulation No. 1(a), as amended by Veterans' Regulation No. 1(g), which contained a provision similar to that in section 214 of the World War Veterans' Act, 1924, as amended. It was held that the fact that the veteran was not actually receiving compensation did not bar

payment of benefits to his dependents since the veteran was entitled to compensation at the time of his disappearance. A similar question considered in Administrator's Decision numbered 498 was whether the phrase "in receipt of pension or compensation" in Veterans' Regulation No. 9(c) must be literally construed or may be interpreted as including a case in which determination of entitlement of pension had been made prior to the veteran's death. Veterans' Regulation No. 9(c) read, in part, as follows:

"Where an honorably discharged veteran of any war or a veteran of any war in receipt of pension or compensation dies after discharge, the Administrator, in his discretion and with due regard to the circumstances in each case, shall pay, for burial and funeral expenses and transportation of the body ..."

The Decision held that burial expenses may be paid although the veteran was not actually in receipt of pension at the date of his death since, prior to his death, he was held to be entitled to receive pension. It is plain from the foregoing that a finding of a constructive receipt founded upon eligibility and entitlement is warranted or required in some circumstances to carry out the intent of the law and to avoid an injustice to a beneficiary.

7. It is, of course, true that a person entitled to receive compensation or pension under more than one law or section of a law administered by the VA may elect which benefit to receive, irrespective of whether it is the greater or lesser benefit, and such person may at any time re-elect the other benefit. (See VA Regulation 1701.) However, a veteran finding himself in the situation presented, should not be required to first elect to receive pension in order to obtain a lift only to thereafter re-elect compensation in order to obtain the larger financial benefit.

8. In view of the foregoing, it is the opinion of this office that a veteran, who is adjudicated to be presently eligible for a disability pension based upon the need for regular aid and attendance, may be furnished an invalid lift under the provision of 38 U.S.C. § 617, notwithstanding the non-receipt of such pension by reason of the receipt of a greater disability compensation benefit.

9. You may desire to modify D M & S Circular 10-127.

**HELD:**

A veteran, who is adjudicated to be presently eligible for a disability pension based upon the need for regular aid and attendance, may be furnished an invalid lift under the provisions of 38 U.S.C. § 617, notwithstanding the non-receipt of such pension by reason of the receipt of a greater disability compensation benefit.

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