

DATE: 6-2-92

CITATION: VAOPGCPREC 13-92
Vet. Aff. Op. Gen. Couns. Prec. 13-92

TEXT:

Subj: Protection of Service Connection and Redesignation of Diagnostic Code to Accurately Reflect a Veteran's Current

QUESTION PRESENTED:

Do the provisions of 38 U.S.C. §1159 (formerly § 359) prevent a service-connected rating for a low back disability due to degenerative arthritis under diagnostic code 5003 which has been in place for over 10 years from being modified to reflect a low-back disability due to traumatic arthritis of the lumbar spine under diagnostic code 5010?

COMMENTS:

1. You have requested our opinion in the case of a veteran who, in 1946, was service connected and rated as 10% disabled effective October 30, 1945, under diagnostic code 5003, for "hypertrophic arthritis; lumbar spine, with congenital anomaly, lumbro-sacral joint and partial sacralization on right side." The veteran's rating was increased in 1961 to 20% under the same diagnostic code. As a result of a VA examination, the veteran's rating was increased to 40% effective January 16, 1973, for the disabling lower-back condition, but the diagnostic code for that disability was changed from 5003 to 5010. FN1 The rating action that modified the diagnostic code and increased the rating, also denied service connection for "degenerative arthritis throughout the remainder of the veteran's body" stating that it was "obvious" that the veterans lower-back disability was a result of "localized traumatic arthritis."

2. In your request for opinion you ask: " W hether a diagnostic code which has been in effect for ten or more years can be changed to properly reflect the type of disability?" Protection of service connection is governed by 38 U.S.C. § 1159 (formerly § 359) which provides in pertinent part:

Service connection for any disability or death granted under this title which has been in force for ten or more years shall not be severed on or after January 1, 1962, except upon a showing that the original grant of service connection was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.

Here, there are no facts which suggest that the veteran does not have the "requisite service" or that the rating resulted from fraud. Further, the medical

evidence supports the conclusion that the veteran suffers from a lower- back disability that was incurred in service for which he was granted service connection and a disability rating.

3. In your request you mention O.G.C. Prec. 50-91; unlike the situation presented there, here the question is not merely whether the anatomical location of the disability was correctly identified by the initial rating. In this case, the question is whether VA may, after the passage of the statutory time period for protection of service connection, rate the disability under another diagnostic code.

4. In making a decision as to whether the diagnostic code may be modified, we realize the distinction between "disability" and "diagnosis." The General Counsel recently examined this distinction in the context of protected service connection and protected ratings. In O.G.C. Prec. 68-91 the General Counsel stated: "'Disability' and 'diagnosis' are not interchangeable terms. Thus, both 38 U.S.C. § 1159 (formerly 38 U.S.C. § 359) and 38 C.F.R. § 3.957 protect 's er vice connection for any disability or death,' not diagnoses" (emphasis added). Here, the 1973 evaluation and rating resulted in the veteran being diagnosed as having both "localized traumatic arthritis" and "degenerative arthritis throughout the remainder of the veteran's body." The modification in the diagnosis had no effect on the veteran's service-connected status for the lower-back condition, and service connection for that condition was not terminated. In fact, the veteran's disability rating for the lower back was increased from 20% to 40% under the new diagnostic code. FN2

5. In enacting 38 U.S.C. § 1159 (formerly § 359), Congress sought to prohibit VA from terminating service connection for those veterans who have been service connected in excess of 10 years. The legislative history of section 1159 provides support for the position that the statute was intended to establish a period of time beyond which VA may not sever service connection. See Hearing on Miscellaneous Compensation Legislation Before the Subcommittee on Compensation and Pensions of the House Committee on Veterans Affairs, 86th Cong., 2d Sess. 2208, 2233 (1960) (statements of Bill Fribley, National Commander, Disabled American Veterans, and Norman Jones, Director of the National Rehabilitation Service of the Veterans of Foreign Wars). The legislative history of H.R. 113, which gave rise to what is now section 1159, also suggests that while severing protected service connection would be prohibited, VA could make modifications to a veteran's rating short of severance of service connection. S. Rep. No. 1394, 86th Cong., 2nd Sess. 1, reprinted in 1960 U.S. Code Cong. & Admin. News, 2338 (cited by the General Counsel in O.G.C. Prec. 50-91).

6. In this case, VA initially determined to grant service connection for the veteran's low-back disability. The 1973 rating decision, while noting marked degenerative changes, did not alter the fact that the veteran was service

connected for the low-back disability. The modification of the diagnostic code appears to be based upon the medical evidence contained in the veteran's file which continued to support service connection for the low-back disability. Accordingly, the modification of the diagnostic code from 5003 to 5010 did not change the protected status of the disability or violate 38 U.S.C. § 1159 since service connection for the disability in question was not severed.

HELD:

The provisions of 38 U.S.C. § 1159 (formerly § 359) do not prohibit modification of an existing service-connected rating for low-back disability due to degenerative arthritis pursuant to rating code 5003 that has been in place for over 10 years, to a rating for low-back disability due to traumatic arthritis under rating code 5010.

1 The March 22, 1973, rating noted marked degenerative arthritis, lumbar spine. Rating code 5003 is termed "Arthritis degenerative (hypertrophic or osteoarthritis)." Rating code 5010 is termed "Arthritis due to trauma, established by X-ray findings: Rate as arthritis, degenerative." See 38 C.F.R. § 4.71a.

2 The March 22, 1973, rating increased the veteran's lower back rating from 20% under rating code 5003, to 40% under rating code 5010 effective January 16, 1973. The March 22, 1973, rating also increased the veteran's rating for the ankylosis of the proximal interphalangeal joint under diagnostic code 5226 from 0% to 10%. The veteran is currently rated at 40% under diagnostic code 5010 and 10% under diagnostic code 5226. An appeal of the veteran's reopened claim requesting increased compensation is currently pending before the Board of Veterans' Appeals.

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