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On appeal from the
Department of Veterans Affairs Regional Office in Denver, Colorado

THE ISSUE

Entitlement to a monetary allowance under 38 U.S.C.A. § 1805 for a Vietnam Veteran's child on account of spina bifida.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

Veteran, his spouse and appellant
ATTORNEY FOR THE BOARD

T. Mainelli, Counsel

INTRODUCTION

The Veteran served on active duty from August 1969 to July 1973 with a tour of duty in the Republic of Vietnam during the Vietnam War. The appellant is the Veteran's son seeking benefits for a child born with spina bifida.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a June 2001 rating decision by the Department

of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida. The RO in Denver, Colorado currently has jurisdiction over the claim.

FINDING OF FACT

The Veteran's son's disability is forms and manifestations of spina bifida.

CONCLUSION OF LAW

The criteria for a monetary allowance under 38 U.S.C.A. § 1805 for a Vietnam Veteran's child on account of spina bifida have been met. 38 U.S.C.A. §§ 1802, 1805, 5107 (West 2002); 38 C.F.R. § 3.814 (2008).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served a tour of duty in the Republic of Vietnam during the Vietnam War. He seeks to establish his entitlement to a monetary allowance under 38 U.S.C.A. § 1805 for a Vietnam Veteran's child on account of spina bifida. For children of a Vietnam veteran, Congress has authorized VA to pay a monthly allowance, based upon the level of disability, to or for a child who had been determined to be suffering from spina bifida. 38 U.S.C.A. § 1805(a); 38 C.F.R. § 3.814(a).

The case at hand involves a highly complex and technical determination as to whether the Veteran's son manifests a form and manifestation of spina bifida as contemplated for purposes of Chapter 18 benefits.

As a starting point, the statutory definition of spina bifida provided at 38 U.S.C.A. § 1802 provides that spina bifida conditions covered under title 18 "applies with respect to all forms and manifestations of spina bifida except spina bifida occulta." The implementing regulation, 38 C.F.R.

§ 3.814(c)(3), similarly defines the term spina bifida as "any form and manifestation of spina bifida except spina bifida occulta."

In VAOPGCPREC 5-99 (May 3, 1999), VA's General Counsel issued an opinion regarding the scope of the term "spina bifida" for purposes of title 18. An opinion was sought based upon a memorandum to the Director of the Compensation and Pension from the Chief Public Health and Environmental Hazards Officer which concluded that "encephalocoeles represented the same process as spina bifida," and that an "occipital encephalocele is the equivalent of spina bifida."

VA's General Counsel noted that the term spina bifida generally encompassed three main conditions: (1) spine bifida occulta, which was an opening in one or more of the bones of the spinal column which did not involve any damage to the spinal cord; (2) meningocele, a more serious form of spina bifida in which the membrane surrounding the spinal cord pushes out through an opening in the spinal column; and (3) myelomeningocele, the most severe form of spina bifida in which the nerve roots of the spinal cord, and often the spinal cord itself, protruded from the open spine. VA's General Counsel also indicated that neural tube defects were a category of birth defects involving incomplete development of the brain, spinal cord and/or the protective coverings of these organs. It was noted that there were three types of neural tube defects, spina bifida, anencephaly and encephalocele. Spina bifida was distinguished from the latter two types as it involved a malformation of the spine while anencephaly involved a birth defect resulting in infants born with underdeveloped brains and incomplete skulls, and encephalocele involved a birth defect resulting in a hole in the skull from which brain tissue protruded.

After a review of additional definitions and legislative history, VA's General Counsel concluded that, for purposes of title 18 benefits, the term spina bifida referred to a defective closure of the bony encasement of the spinal cord, but did not include other neural tube defects such as anencephaly and encephalocele.

Notably, the precedent opinions of VA's General Counsel are

binding on the Board. 38 U.S.C.A. § 7104(c).

In Jones v. Principi, 16 Vet. App. 219 (2002), the United States Court of Appeals for Veterans Claims (Court) addressed the issue of whether a claimant who manifested occipital encephalocele was entitled to benefits under 38 U.S.C.A. § 1805. The Court held that the plain language of 38 U.S.C.A. § 1802 did not limit the definition to spina bifida per se but included other "forms and manifestations" of spina bifida except for spina bifida occulta. The Court did not reach the issue of whether VAOPGCPREC 5-99 should be invalidated, but noted that consideration should be given to the rule that interpretative doubt of a statute should be resolved in a veteran's favor. See Brown v. Gardner, 513 U.S. 115, 117, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994).

In this case, the Veteran's son has been diagnosed with Chiari I malformation, syringomyelia, syringohydromyelia and cervical syrinx. The treatment records include loose references to "spina bifida" and "spina bifida occulta" which, as addressed below, appears to the Board as being attributable to the varying interpretations and definitions to what constitutes spina bifida in the medical community, providing evidence in support of this claim.

Notably, one definition provided by the Veteran himself defines a Chiari I malformation as a benign structural problem affecting the cerebellum, consisting of extra cerebellum crowding the outlet of the brainstem/spinal cord from the skull on its way to the spinal canal, present in children who do not have spina bifida. See Pediatric Neurosurgery articles from Columbia University received in February 2002.

On review of VAOPGCPREC 5-99 (May 3, 1999), Jones and the plain language of 38 U.S.C.A. § 1802, the Board finds that the question presented on appeal concerns whether the diagnosed Chiari I malformation, syringomyelia, syringohydromyelia and/or cervical syrinx constitutes "any form and manifestation of spina bifida except spina bifida occulta."

The Board sought, and obtained expert medical opinion on this

issue in July 2008 which accurately reviews the factual information of record. This examiner discussed two issues in its discussion section. The RO has reviewed this opinion in its November 2008 supplemental statement of the case (SSOC), but only discussed the first section of the discussion.

The Board must note that the RO's lack of discussion of the second issue addressed by the July 2008 VA examiner. This second section contains some information favorable to the claimant. In the normal course of events, actual VA examination reports are not provided to a claimant unless specifically requested. Thus, the only notice an appellant would have of the contents of an examination report would be that provided through a discussion in a document such as a rating decision, a statement of the case or a supplemental statement of the case. VA has a duty to alert a claimant to information favorable to the claim. See 38 U.S.C.A. § 5104(b) (in any case where VA denies a benefit sought, the notice shall include a statement of the reasons for the decision and a summary of the evidenced considered).

The discussion section of the July 2008 VA examination report, in full, states as follows:

Based on the radiographic evidence, there is not an evidence of a defect in the spinal column. [The Veteran's son], therefore, does not have 'spina bifida occulta' which is a defect at a single level and unassociated with neurologic abnormality. He also does not have meningomyelocele or spina bifida which in a technical sense refers to herniation or tethering of the neural tissue typically at the level of the spinal defect which in the most severe forms involves herniation of neural tissue outside of the spinal canal and into the region of the vertebra and even posteriorly through the skin such that it is evident on the back. On review of the physical exams in the clinical records, I did not note any examiner who described any abnormalities of the skin overlying the lumbar spine although such an exam is not mentioned. The only defect noted in the lumbar spine is the

Schmorl's nodule. I would have to resort to speculation as to what Dr. [C] et al is referring to as "spina bifida occulta". Only the doctor writing those reports can comment on their meaning as it is not consistent with the radiographic findings as reported.

The second issue is that of a Chiari I malformation and syringomyelia which the [Veteran's son] clearly ha[s]. This is both mentioned in all the clinical reports and is also evident in all the x-ray reports. He has the Chiari I type of malformation and he also has a syrinx in the cervical cord. The majority of the neurologic abnormalities were noted for the [Veteran's son] such as ataxia, numbness in the right arm, and headaches are etiologically related to these neurologic abnormalities. From a pathophysiologic point of view, there is a broad spectrum of neural tube defects involving the posterior region of the brain and spinal cord. The development and embr[y]ology of these abnormalities are generally felt to be related. The manifestations of neural tube defect include spina bifida and the Chiari malformations and syringomyelia, and other forms. In some clinical settings, the terms 'spina bifida' and 'neural tube defects' are used somewhat loosely and interchangeably. In a strictly technical sense, spina bifida refers to the spinal form of neural tube defect typically seen in the lumbar region, although it can occur at other levels of the spine. From a radiographic point of view, in this patient there is no documentation of tethering or the cord or spinal defect and, therefore, again from a technical point of view, the [Veteran's son] does not have confirmed evidence of spina bifida in the spinal column. He does, however, have clear evidence of a neural tube defect, as mentioned above, which includes the Chiari I malformation and the cervical syringomyelia. His abnormalities, therefore, are clearly not limited to 'spina bifida occulta'.

Spina bifida occulta is only a defect in the bone with no neurologic abnormalities. In this veteran's son's case, there are clear neurologic abnormalities to include Chiari I malformation and syringomyelia and these are manifestations of a neural tube defect, which is from a pathophysiologic and etiologic point of view associated with spina bifida. If the "all forms and man[i]festations of spina bifida" referred to in the Remand includes Chiari malformation or spinal syrinx (syringomyelia) then the son has this, it includes only Chiari malformation et. al when a spina bifida is also found, then he does not have this. The legal question, it seems, resolves on an "and" or an "or." Does this rating guideline intend all serious neural tube defects: spina bifida OR Chiari malformations? Yes the child qualifies. Does the rating guideline intend Chiari malformations ONLY IF there is a spinal manifestation of spina bifida as well? No the child does not qualify.

In this case, the evidence is quite clear that the Veteran's son does not manifest spina bifida occulta, which is specifically excluded under 38 U.S.C.A. § 1802, or spina bifida per se, which is specifically contemplated by 38 U.S.C.A. § 1802. In Jones, the Court was unable to determine from review of legislative history why the term "and manifestations" was added to the definition of spina bifida, but was not convinced the insertion had no meaning. Jones, 16 Vet. App. at 225-26. As such, the Jones Court determined that the range of spina bifida conditions is not limited to spina bifida per se, but potentially includes other forms and manifestations of spina bifida except for spina bifida occulta. Jones, 16 Vet. App. at 225-26.

According to the July 2008 VA examiner, the Veteran's son's "Chiari I malformation and syringomyelia ... are manifestations of a neural tube defect, which is from a pathophysiologic and etiologic point of view associated with spina bifida."

In adjudicating this claim, the Board has also considered the

doctrine of reasonable doubt. As the U.S. Court of Appeals for Veterans Claims (Court) has written:

> A unique standard of proof applies in decisions on claims for veterans' benefits. Unlike other claimants and litigants, pursuant to 38 U.S.C. § 3007(b) [now 38 U.S.C.A. § 5107(b)], a veteran is entitled to the "benefit of the doubt" when there is an approximate balance of positive and negative evidence.

Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990).

Citing to the Supreme Court of the United States, the Court in Gilbert noted that the standard of proof is to instruct the fact-finder in the "'degree of confidence our society thinks we should have in the correctness of a factual conclusion for a particular type of adjudication.'" This burden "'reflects not only the weight of the private and public interest affected, but also a societal judgment about how the risk of error should be distributed between the litigants.'" Id. (citations omitted).

As currently codified, the law defines the "benefit of the doubt" doctrine as:

> When, after consideration of all evidence and material of record in this case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination in the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant.

38 U.S.C.A. § 5107(b).

The Court noted that under this standard, when the evidence supports the claim or is in relative equipoise, the appellant prevails. Where the "fair preponderance of the evidence"

is against the claim, the appellant loses and the benefit of the doubt rule has no application. Gilbert, 1 Vet. App. at 56. "A properly supported and reasoned conclusion that a fair preponderance of the evidence is against the claim necessarily precludes the possibility of the evidence also being in an approximate balance." Id. at 58. The Court has further held that where there is "significant evidence in support of the appellant's claim," the Board must provide a "satisfactory explanation" as to why the evidence is not in equipoise. Williams v. Brown, 4 Vet. App. 270, 273 (1993).

In the light of the apparent expansive but ambiguous definition provided in 38 U.S.C.A. § 1802, the lack of legislative guidance and the suggestion by the Jones Court that consideration should be given to the doctrine of interpretative doubt, the Board resolves interpretative doubt in favor of the Veteran by finding that Veteran's son's Chiari I malformation and syringomyelia are forms and manifestations of spina bifida. The appeal, therefore, is granted.

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2008); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2008). In this case, the Board is granting in full the benefit sought on appeal. Accordingly, assuming, without deciding, that any error was committed with respect to either the duty to notify or the duty to assist, such error was harmless and will not be further discussed.

ORDER

The claim of entitlement to a monetary allowance under 38 U.S.C.A. § 1805 for a Vietnam Veteran's child on account of spina bifida is granted.

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JOHN J. CROWLEY
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs