1994

Military Veterans and VA Medical Treatment: Must a Veteran Prove Fault before Receiving Compensation for Medical Injuries (93-1128) Administrative Law

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Case at a Glance

Fred Gardner challenges a long-standing Veterans Affairs' interpretation of a federal statute under which a military veteran is compensated for injuries caused by VA medical treatment of conditions not related to the veteran's military service. The success or failure of Gardner's challenge is significant to veterans for it will establish whether a veteran must prove the VA's fault in connection with an injury sustained during the delivery of medical treatment or simply prove that the injury was not caused by the veteran's willful misconduct.

Military Veterans and VA Medical Treatment: Must a Veteran Prove Fault Before Receiving Compensation for Medical Injuries?

by William L. Andreen

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For many years, the Department of Veterans Affairs and its predecessors, the Veterans' Administration and the Veterans' Bureau (collectively, the "VA"), had stood as the only large federal agency whose major activities were immune from judicial review. That special status ended in 1988 when Congress passed the Veterans' Judicial Review Act giving military veterans a day in court. As a consequence of the Veteran's Judicial Review Act, a number of VA regulations are subject to judicial review for the first time.

One of those regulations is at issue in this case — a long-standing interpretation of a federal statute that provides compensation for any injury sustained by a veteran as a result of VA medical treatment for nonservice-related medical conditions. The interpretation being challenged requires a veteran injured while receiving such treatment to prove that the VA was at fault or that the injury was an accident.

ISSUE

Did the VA reasonably interpret a 1924 federal statute when it required veterans to establish, as a precondition to the award of compensation, that injuries arising out of VA medical treatment for nonservice-related conditions resulted from either fault or from an accident?

FACTS

Fred P. Gardner is a veteran of the Korean conflict. In 1986, he was admitted to a VA hospital for the evaluation and treatment of a nonservice-related back condition. VA physicians diagnosed a herniated disc and removed it. Gardner claims that he suffered permanent neurological damage from the operation that has caused pain, atrophy, and weakness in his left leg. As a result, he says that he must wear a leg brace and use a cane.

Two years after the surgery, Gardner filed a claim for disability benefits with the VA's Regional Office in Waco, Texas. His claim was denied.

Gardner appealed to the Board of Veterans' Appeals (the "Board") which affirmed the denial of benefits in an unreported opinion. The Board, following VA regulation 3.358(c)(3), 38 C.F.R. § 3.358(c)(3),

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS V. FRED P. GARDNER
DOCKET NO. 93-1128

ARGUMENT DATE:
OCTOBER 31, 1994
FROM: THE FEDERAL CIRCUIT

held that a veteran was entitled to compensation under the statute, 38 U.S.C. § 1151 (Supp. IV 1992) ("Section 1151"), only if the injury was caused by the "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA or was caused by some sort of unforeseen "accident." After reviewing the evidence, the Board concluded that Gardner had failed to prove that his injury resulted from negligent treatment or an unforeseeable accident. According to the Board, Gardner's problem was just a common occurrence associated with back surgery. Gardner responded by appealing to the newly created Court of Veterans Appeals (the "Veterans Court").

The Veterans Court, sitting as a three-judge panel, reversed the Board and struck down the VA's regulation as inconsistent with Section 1151 and beyond the VA's scope of authority. *Gardner v. Derwinski, Secretary of Veterans Affairs,* 1 Vet. App. 584 (1991). The court held that the statute on its face imposed no requirement that an injured veteran show either fault or accident, a conclusion the court found neither absurd nor contrary to congressional intent as evidenced by Section 1151's legislative history. The court was unpersuaded by the VA's argument that subsequent Congresses had ratified its statutory interpretation by re-enacting the statute. In essence, the Veterans Court declined to defer to the VA's interpretation of what the court thought was clear statutory language. The court sent the case back to the VA for further proceedings on Gardner's claim.

Dissatisfied with this result, the VA appealed to the Court of Appeals for the Federal Circuit. That court, however, also held that the VA's fault-or-accident requirement was invalid. *Gardner v. Brown,* 5 F.3d 1456 (Fed. Cir. 1993).

Dismissing the VA's argument that Section 1151 is ambiguous, the Federal Circuit held that the statute contained no literal reference either to fault by VA personnel or to an accident as a precondition to compensation. The Federal Circuit then reviewed Section 1151's original enactment and concluded that the omission appeared intentional. The court noted that congressional discussion prior to passage spoke both of fault-based liability and no-fault liability and reasoned that Congress must have known what it was doing when it failed to use the word fault or some similar word somewhere in the statute, except to require that the veteran must be fault-free in order to receive compensation. According to the Federal Circuit, the legislative history of Section 1151 demonstrates that Congress' main concern was to compensate veterans injured by VA medical treatment and, to further that purpose, drafted language that would relieve them of the burden of proving negligence or an accident.

The Federal Circuit also examined the statute's re-enactment and the VA's interpretation of the statute. In doing so, the court found that the VA had failed to show that it had definitively interpreted the statute to require fault prior to Congress' 1936 re-enactment of the statute.

The Federal Circuit also brushed aside the VA's plea that the judiciary should defer to a long-standing administrative interpretation. On this point, the court reasoned that where statutory language is clear on its face, there is no room for a contrary judicial interpretation. Moreover, the court noted that the VA's interpretation may have stood for nearly 60 years but only because, until 1988, VA interpretations of its regulations enjoyed a "splendid isolation" from any form of judicial review.

The VA then turned to the Supreme Court, which granted its petition for a writ of certiorari to review the decision of the Federal Circuit. 114 S. Ct. 1396 (1994).

Case Analysis

When facing a question of statutory interpretation, the logical starting point is the statute's language. *Watt v. Alaska,* 451 U.S. 259, 265 (1981). Section 1151, the statutory provision at issue in this case, declares that "[w]here any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, [or] medical or surgical treatment . . . awarded under any of the laws administered by the [VA], . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran," the VA will award compensation for the incremental disability or death in the same way as if it were service connected.

A court, not an administrative agency such as the VA, is also the final authority in any question of statutory interpretation. Thus, if an agency's statutory interpretation is inconsistent with the clear intent of the legislative body that enacted the statute, here, Congress, a court "must give effect to that unambiguously expressed intent." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

On the other hand, if an agency's interpretation of a statute it administers neither contradicts the statute's language nor frustrates its purpose, the role of a reviewing court is much more limited. In such a case, the agency's construction will be upheld as long as it is reasonable in the eyes of the court.

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The degree of deference shown to an agency's statutory interpretation will increase, where, for instance, the interpretation was made contemporaneously with the statute's passage, *National Wildlife Fed'n v. Gorsuch,* 693 F.2d 156 (D.C. Cir. 1982), or has been consistent and long-standing, *SEC v. Sloan,* 436 U.S. 103 (1978).

Complicating matters is the meaning to be given to an agency's interpretation of a statute that is re-enacted by a later Congress. For example, does re-enactment say anything about Congress' view of the pre-existing agency interpretation of the re-enacted statute?

As a general rule, Congress is presumed to be aware of and to accept well-established agency interpretations of a statute it later re-enacts. *Young v. Community Nutrition Inst.,* 476 U.S. 974, 983 (1986). However, much less weight attaches to a re-enactment if it is unclear that Congress was aware of a pre-existing agency interpretation of the re-enacted statute. *Sloan,* 436 U.S. at 121; *National Wildlife Fed'n,* 693 F.2d at 167.

The agency interpretation at issue in this case states that

> compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of . . . fault [by the VA]. However, compensation is payable in the event . . . of an "accident" (an unforeseen, untoward event), causing additional disability or death . . . . 38 C.F.R. § 3.358(c)(3).

Unlike the regulation, Section 1151 contains no literal reference to fault or accident as a condition to compensation. The VA argues, however, that the language of Section 1151 is not so clear that it can be applied without interpretation. The VA's contention in this regard rests largely upon the statutory requirement that a veteran suffer "injury . . . as the result of" VA medical care. Thus, according to the VA, a veteran must show both injury and causation.

Although conceding that the most common definition of the word injury is some sort of hurt or damage, the VA asserts that the word could also include some connotation of fault. Thus, argues the VA, a veteran must prove that the injury he or she suffered is the kind for which Congress meant to provide compensation — in this case, an injury which the VA caused through its own fault.

The VA continues by noting that it would be presumptuous to assume that Congress meant to adopt a no-fault standard back in 1924. According to the VA, such an approach would have represented a sharp break with traditional medical malpractice doctrine prevailing at the time — a breach that the VA implies would have been discussed expressly had Congress intended to take such a dramatic step. Viewed in this way, the VA contends that the language of Section 1151 is ambiguous and that its long-standing interpretation of that language is a reasonable one. Accordingly, the VA maintains that the Federal Circuit erred when it failed to defer to the agency's interpretation of Section 1151.

Gardner, on the other hand, argues that the VA has ignored the plain meaning of the statute in an effort to create and then exploit an ambiguity in the text. In doing so, Gardner contends that the VA has failed to give statutory terms their ordinary and common sense meaning.

Gardner also asserts that Congress' failure to use a fault standard was no oversight. According to Gardner, the fact that Congress explicitly prohibited the award of compensation benefits where a veteran is guilty of willful misconduct indicates that Congress had considered and rejected the notion of applying a fault concept to VA medical personnel. Here, Gardner insists that Congress knew how to create a fault-based standard and did so, albeit in a very modest way, by conditioning a veteran's compensation on his or her lack of fault.

Gardner proceeds to point out that Congress was not wedded to traditional negligence, i.e., fault, concepts in 1924. Thus, Gardner argues that the willful misconduct standard applicable to a veteran would protect the veteran against his or her own negligence despite the fact that a claimant's own negligence was widely recognized as a standard defense to negligence actions in 1924. Moreover, Gardner argues that the no-fault approach was a common ingredient in both federal and state worker's compensation schemes at the time of the statute's original enactment.

While the word injury may not have been defined by Congress, the word, according to Gardner, is used in its ordinary sense elsewhere in the statute. For example, the sections that provide disability compensation for conditions arising out of wartime and peacetime service use similar language and do not require a veteran to prove fault. Thus, argues Gardner, a veteran who suffers a surgical injury while being treated for a service-related ailment is entitled to compensation without any showing of fault. The regulation under attack

here, however, would require a veteran who is identically situated — except for the fact that the injury for which treatment was sought was not service-related — to establish fault or accident or, otherwise, receive nothing. Gardner contends that there is no indication that Congress intended to treat these two cases in such radically different ways.

Gardner next argues that a no-fault standard is consistent with the paternalistic nature of the overall scheme for providing VA benefits. Here, Gardner notes that the VA has a duty to help a veteran investigate and present his or her case at the administrative level and that the VA is required to resolve all doubt in the veteran's favor. In 1924, and, indeed, until 1988, there was a $10 congressionally-imposed limit on attorneys' fees for representing a veteran before the VA. Gardner, thus, concludes that a no-fault approach is an essential aspect of the VA system. He insists that it would have been unreasonable for Congress, even in 1924, to believe that a veteran could prove fault when he was not only forbidden to spend more than $10 on an attorney but had to rely on the VA itself for evidence of its fault.

While recourse to legislative history is sometimes said to be unnecessary if a statutory provision has a plain meaning, *Darby v. Cisneros,* 113 S.Ct. 2539 (1993), there is no rule of law that would forbid the Supreme Court from reviewing the legislative materials. *Train v. Colorado Public Interest Group,* 426 U.S. 1 (1976). Where the statutory language is clear, however, it would take an extraordinarily strong showing of legislative intent to overcome the provision's plain meaning. *Glaxo Operations UK Ltd. v. Quigg,* 894 F.2d 392 (Fed. Cir. 1990). And, even if the language is not entirely clear, there is no guarantee that the legislative history will cast much light upon the problem.

The VA contends here that the ambiguity it finds in the text of Section 1151 is reinforced by the legislative history. In support of this contention, the VA identifies several places where testimony on the bill referred to compensation in the event of accident or negligence. Nevertheless, even the VA is forced to acknowledge that the legislative history also refers to the availability of compensation under a no-fault arrangement, a reference that renders the legislative history less than conclusive.

The VA argues, however, that its early interpretation of Section 1151 suggests that Congress never intended to create a broad no-fault insurance type of program. Despite the fact that some VA field offices adjudicated cases on a no-fault basis between 1924 and 1926, the VA points to several restrictive, fault-based regulations it adopted between 1926 and 1930.

The Federal Circuit, however, was unpersuaded. According to that court, none of these restrictive regulations explicitly precluded the award of compensation in the absence of fault. Nevertheless, the VA insists that it applied its restrictive regulations to require proof of fault in two of its adjudications occurring in 1928 and 1930.

Gardner challenges the VA's assertions by pointing out that neither the 1928 nor the 1930 adjudication turned on the question of fault. In fact, Gardner contends, as the Federal Circuit held in this case, that proof of fault did not become an absolute prerequisite until August 1934, five months after Congress had re-enacted the statute.

The resolution of the foregoing point is important in two respects. First, an interpretation contemporaneous with the statute's re-enactment would heighten the degree of judicial deference, if any, accorded the VA's statutory interpretation. Second, Congress re-enacted the entire statute, including the provision at issue here, in March 1934. If Congress was aware of, or is presumed to have been aware of, the VA's interpretation, one could say that it had ratified the VA's position.

The VA argues, of course, that Congress adopted its interpretation when the statute was re-enacted in 1934. Although asserting that Congress is ordinarily presumed to be aware of established administrative interpretations, the VA also tries to show that Congress was *actually* aware of its prior construction. In doing so, the VA emphasizes that the senator who introduced the amendment restoring certain benefits described his proposal as covering cases in which a veteran was disabled due to "mistreatment" or "in a case of malpractice by a government surgeon." Finally, the VA points out that the 1934 legislation was passed in the midst of the Great Depression, hardly a time when Congress would enact a costly scheme of no-fault insurance.

Gardner responds that there was no definitive agency interpretation vis-a-vis fault at the time Congress acted; that interpretation came later in August 1934. In any case, Gardner maintains that re-enactment cannot serve as proof of approval because there is no indication and no evidence that Congress was aware of the VA's position. With regard to the senator who referred to the statute in terms of malpractice and mistreatment, Gardner claims that such isolated and cryptic remarks should be given no weight.

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Since 1934, Congress has re-enacted Section 1151 several times. The VA asserts that, due to Congress's close attention to veterans' benefits, it is safe to assume that Congress knew about the VA's construction of Section 1151. Moreover, the VA maintains that if Congress was upset about the fault-or-accident requirement found in the VA's regulations since at least 1936, it would have said so.

Gardner counters by arguing that it is dangerous to read too much into congressional silence. In any event, Gardner argues that no amount of judicial deference can save the VA's interpretation if it runs counter to the plain meaning of the statute.

Significance

The question of no-fault liability for injuries that occur during VA medical treatment is a matter of great importance to veterans and the VA alike. The VA is a huge social-service agency that, in a typical year, pays veterans and their dependents over $12 billion in compensation benefits. Accordingly, the imposition of no-fault liability could place a tremendous financial burden upon the VA, a burden which could affect adversely the availability or delivery of some of its services. On the other hand, the imposition of no-fault liability certainly lightens the not inconsiderable burden that currently rests on veterans to prove either negligence or unforeseeable accident before qualifying for benefits. Such a change, coupled with the newly established judicial review of VA decisions concerning benefits, could help improve the VA's provision of medical services, to the resounding applause of veterans and their dependents.

Arguments

For Jesse Brown, Secretary of Veterans Affairs (Counsel of Record: Drew S. Days, III, Solicitor General; Department of Justice, Washington, DC 20530; (202) 514-2217):
1. The VA's long-standing interpretation of Section 1151 rests on a permissible construction of the statutory language.
2. The history of the provision's enactment, re-enactment, and consistent application supports the VA's interpretation.

For Fred P. Gardner (Counsel of Record: Joseph Michael Hannon, Jr.; Thompson, O'Donnell, Markham, Norton & Hannon; 805 15th Street, NW, Suite 705, Washington, DC 20005; (202) 289-1133):
1. The plain language and legislative history of Section 1151, the overall no-fault scheme of benefits legislation for veterans, and the contextual use of "injury" and "as a result of" in the statute preclude the imposition of a fault requirement.
2. The VA's interpretation of this provision is not entitled to any deference.
3. The re-enactment and amendment of the statute fail to justify the VA's fault-based regulation.
4. These regulations are not entitled to deference under *Chevron* and should, therefore, be subject to rigorous review.

Amicus Briefs

In support of Fred P. Gardner

National Veterans Legal Services Project (Counsel of Record: Ronald S. Flagg; Sidley & Austin; 1722 Eye Street, NW, Washington, DC 20006; (202) 736-8000);

Joint brief of the Paralyzed Veterans of America; Veterans of Foreign Wars; American Veterans of WW II, Korea, and Vietnam; Blinded Veterans Association; and Vietnam Veterans of America (Counsel of Record: Lawrence B. Hagel, Deputy General Counsel of the Paralyzed Veterans of America; 801 18th Street, NW, Washington DC 20006; (202) 416-7637);

The State of Texas (Counsel of Record: Don Morales, Attorney General of the State of Texas; P.O. Box 12548, Capitol Station, Austin, TX 78711-2548; (512) 463-2055).