

Tobacco - VA



Department of Veterans Affairs

Washington, DC 20420

Office of Public Affairs

Office of the Deputy Assistant Secretary

Fax Cover Sheet

DATE: 6.19.97

TO:

Elizabeth Dye
Domestic Policy
Council

PHONE: 456-2216

FAX: 456-2818 & 456-1028

FROM:

Jim Holley

PHONE: (202) 273-5710

FAX: (202) 273-5719

Number of pages including cover sheet: 8

Message

Per Harold Gracely, COS, Dept.
of Veterans Affairs
Subj: Nicotine Dependence Issue
Please deliver to Elizabeth Dye - 222
OEGB.

**Department of
Veterans Affairs****Memorandum**

Date May 13, 1997 VAOPGCPREC 19-97

From: General Counsel (022)

Subj: Secondary Service Connection Based on Nicotine Dependence

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

COMMENTS:

1. Section 3.310(a) of title 38, Code of Federal Regulations, provides, in pertinent part, that, "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." The disabling condition stemming from the service-connected disease or injury is referred to in the regulation as a "secondary condition." Where a claimant can establish that a disease or injury resulting in disability or death was a direct result of tobacco use during service, e.g., damage done to a veteran's lungs by in-service smoking gave rise to lung cancer, service connection may be established without reference to section 3.310(a). However, where the evidence indicates a likelihood that a veteran's disabling illness had its origin in tobacco use subsequent to service, and the veteran developed a nicotine dependence during service which led to continued tobacco use after service, the issue then becomes whether the illness may be considered secondary to the service-incurred nicotine dependence and resulting disability or death may be service connected on that basis pursuant to section 3.310(a).

2. VAOPGCPREC 2-93 (O.G.C. Prec. 2-93) held that determination of whether nicotine dependence may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. That opinion also noted in passing that, if nicotine dependence is considered a disease for compensation purposes, such dependence began in service, and resulting tobacco use led to disability, the issue would become whether secondary service connection could be estab-

2.

Director, Compensation and Pension Service (21)

lished for that disability pursuant to 38 C.F.R. § 3.310(a). The threshold question which must be answered with regard to claims for secondary service connection of tobacco-related disability or death is whether nicotine dependence may be considered a disease within the meaning of the veterans' benefit laws. See VAOPGCPREC 2-93, paras. 2-4. In a May 5, 1997, memorandum, the Under Secretary for Health, relying upon the criteria set forth in VAOPGCPREC 67-90 (O.G.C. Prec. 67-90), stated that nicotine dependence may be considered a disease for VA compensation purposes.

3. Assuming the conclusion of the Under Secretary for Health that nicotine dependence may be considered a disease for compensation purposes is adopted by adjudicators, secondary service connection may be established, under the terms of 38 C.F.R. § 3.310(a), only if a veteran's nicotine dependence, which arose in service, and resulting tobacco use may be considered the proximate cause of the disability or death which is the basis of the claim. We note initially that a determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). "Proximate cause" is defined by *Black's Law Dictionary* 1225 (6th ed. 1990) as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

An act which directly produced the injury * * *.
That cause which naturally leads to and which
might have been expected to produce the result.
That from which the effect might be expected to
follow without the concurrence of any unusual cir-
cumstances. That which immediately produces the
effect as distinguished from a predisposing cause.
(32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

4. A subsequent event, which is referred to as an "intervening" cause, may interrupt the causal connection between an event or circumstance and subsequent incurrence of disability or death. See, e.g., *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051-52 (5th Cir. 1983). An "intervening" cause which "turns aside the[] course [of events],

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Director, Compensation and Pension Service (21)

prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated" may be considered a supervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 Warren's N.Y. Negligence § 5.08).¹

5. Again, assuming that adjudicators adopt the Under Secretary for Health's conclusion that nicotine dependence may be considered a disease, the two principal questions which must be answered by adjudicators in resolving a claim for benefits for tobacco-related disability or death secondary to nicotine dependence are: (1) whether the veteran acquired a dependence on nicotine during service; and (2) whether nicotine dependence which arose during service may be considered the proximate cause of disability or death occurring after service. With regard to the first question, determination of whether a veteran is dependent on nicotine is a medical issue. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) at 243, the criteria for diagnosing substance dependence are generally to be applied in diagnosing nicotine dependence. Under those criteria, as applied to the specific circumstances surrounding nicotine use, nicotine dependence may be described as a maladaptive pattern of nicotine use leading to clinically significant impairment or distress, as manifested by three or more of the following criteria occurring at any time in the same 12-month period: (1) tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of

¹ Relevant considerations in determining whether an "intervening" cause supercedes an earlier event as the proximate cause of an injury include: (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the original event; (2) the extraordinary, rather than normal, nature of the force's operation; (3) the fact that the intervening force is operating independently of any situation created by the original event or is or is not a normal result of such an event; (4) the fact that the operation of the intervening force is due to another's action or failure to act; (5) the fact that the intervening force is due to an act of another which is wrongful and subjects the actor to liability; and (6) the degree of culpability of a wrongful act of another which sets the intervening force in motion. Restatement (Second) of Torts § 442 (1965).

4.

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nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to constitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

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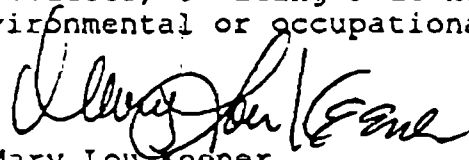
Director, Compensation and Pension Service (21)

the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.


Mary Lou Keener

**Department of
Veterans Affairs****Memorandum**

Date: MAY 5 1997

From: Under Secretary for Health (10)

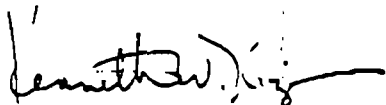
Subj: Request for Opinion – Nicotine Dependence

To: General Counsel (022)

1. In response to your request of April 9, 1997, regarding VHA's opinion as to whether nicotine dependence may be considered a disease for compensatory purposes, please be advised that the Diagnostic and Statistical Manual of Mental Disorders (4th edition) classifies nicotine dependence as a substance use disorder. Thus, I suppose that nicotine dependence may be considered a disease, as illustrated in your reference to VAOPGCPREC 67-90 (which states that a disease is usually capable of improvement or deterioration).
2. An individual who becomes dependent on nicotine can go into remission by eliminating the use of products/substances containing nicotine, such as tobacco products. Sometimes this is facilitated by or requires medical treatment.
3. I must point out that, however, another important issue in this regard is the time at which a person becomes dependent on nicotine, or for that matter, any substance. At present, there are no physiologic criteria, medical data, or other scientific bases to determine how long it takes to become dependent on nicotine. Dependence may occur after smoking the first few packs of cigarettes, or after the first month of smoking, or many months after starting to smoke.
4. For those persons whose nicotine dependence requires medical treatment, please be advised that there exists a variety of treatment regimens, including use of tapering doses of nicotine delivered by a skin patch or gum. When one quits smoking, with or without the assistance of medical treatment, I suppose you could consider the nicotine dependence to be in remission, although it is not customarily thought of in this way. However, since everyone is susceptible to the addictive potential of nicotine, as far as we know, it cannot be scientifically stated, at this time, whether the reoccurrence of nicotine dependence that would occur with resumption of tobacco use is a relapse of the original condition or a *de novo* reoccurrence of the condition.
5. Finally, please be advised that the use of "proximate" as related to disability or death caused by conditions associated with nicotine dependence, and as commonly defined, is not supported by medical evidence. For example, it cannot be medically determined that an individual who smoked and died from atherosclerosis or congestive heart failure (CHF) due to chronic obstructive pulmonary disease would not have died from CHF if

he/she did not smoke. Other risk factors such as diet, exercise, cholesterol levels, etc., also substantially influence the development of heart disease and the relative etiologic contribution of such factors cannot be scientifically apportioned.

6. If I may be of further assistance to you in this matter, please do not hesitate to contact my office.

A handwritten signature in dark ink, appearing to read "Kenneth W. Kizer", with a long horizontal flourish extending to the right.

Kenneth W. Kizer, M.D., M.P.H.



U.S. DEPARTMENT
OF
VETERANS AFFAIRS

OFFICE OF THE ASSISTANT SECRETARY
FOR PUBLIC AND INTERGOVERNMENTAL
AFFAIRS

FAX: (202) 273-5717
PHONE: (202) 273-5750

DATE: 6/20/97
TO: Kitty Higgins and Rahm Emanuel
FAX #: 456-2983 456-2530

FROM: Kathy Jurado

COMMENTS: Talking Points on Nicotine Dependence

TRANSMITTING COVER PAGE PLUS 22
PAGE(S)

Tobacco-KA 001

TO:
Elizabeth
From:
Ann



DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS
WASHINGTON DC 20420

Memorandum To: Kitty Higgins and Rahm Emanuel
From: Kathy Jurado *Kathy Jurado*
Subject: VA talking points on nicotine dependence including:

- 1) VA Under Secretary for Health opinion as to whether nicotine dependence may be considered a disease for compensatory purposes,
- 2) VA General Counsel opinion on eligibility for compensation based on nicotine dependence, and
- 3) Administration's proposed legislation.

Date: June 20, 1997

1) May 5, 1997 Opinion of VA Under Secretary for Health
May nicotine dependence be considered a disease for VA compensation purposes?

VA Under Secretary for Health determined that nicotine dependence may be considered a disease for compensation purposes, however, there are no scientific bases to determine how long it takes to become nicotine dependent. (See Attachments 1 & 2)

2) May 13, 1997 Opinion of VA General Counsel
Can VA pay compensation for disabilities or deaths attributable to veterans' use of tobacco products?

Veterans and their survivors are entitled to compensation for "service connected" disabilities or deaths, i.e. those due to injuries or diseases incurred or aggravated during military service. In a 1993 opinion, the former General Counsel determined that compensation is payable for disabilities or deaths attributable to veterans' use of tobacco products during service.

VA historically has also considered service connected on a "secondary" basis disabilities proximately due to service-connected diseases. In 1997, VA program officials asked the General Counsel for a formal opinion as to whether nicotine dependence acquired in service, leading to postservice smoking which ultimately causes physical illness (such as lung cancer or cardiovascular disease), can be the predicate for service connecting the smoking-related illness. In other words, is compensation payable for the results of even postservice smoking if it is due to nicotine dependence acquired in service?

The resulting May 13, 1997 opinion stated that the initial inquiry must be whether nicotine dependence is a disease. Citing a May 5, 1997, memorandum from the Under Secretary for Health to the effect that nicotine dependence may be considered a disease for VA-compensation purposes, the General Counsel stated that the remaining issues which must be decided in judging these claims are 1) whether the nicotine dependence was acquired in service, and 2) whether the nicotine dependence was the "proximate" cause of the claimed illness -- both acknowledged to be very difficult questions of fact.

Regarding the proximate-cause issue, the opinion stated the causal connection would be broken if, for example, there had been sustained full remission of the nicotine dependence following service and subsequent resumption of tobacco use, or exposure to a toxic substance which constituted a supervening cause of the claimed disability or death. (See Attachment 3)

Page 2

VA Talking Points on Nicotine Dependence

3) Administration's proposed legislation

Under current law, VA adjudicators in resolving a claim would have the burden of determining whether a veteran acquired a nicotine dependence during service and whether that nicotine dependence, which arose during service, is the proximate cause of disability -- both acknowledged to be very difficult questions of fact. However, the Administration has submitted legislation to Congress that would make it unnecessary to ascertain any link between inservice tobacco use and postservice diseases.

The Administration proposes to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or became manifest to the requisite degree of disability during an applicable statutory presumptive period. Under current law, a veteran could be service-connected for diseases and conditions that could be caused by tobacco use and manifest themselves during service or an applicable presumptive period, regardless of whether the veteran used tobacco.

The proposed legislation defines the limits of the government's responsibility as not encompassing a veteran's risks from smoking. This proposal would apply to the adjudication of new claims for monthly compensation filed after enactment and would not affect pending claims. The proposal is not an argument against the health consequences of smoking or the addictive nature of tobacco, which are well-recognized, but is a statement that reinforces the traditional role of the benefits system. The system was designed to aid veterans disabled while serving their country, who to varying degrees put themselves at risk, while carrying out their responsibilities as soldiers. (See Attachment 4)

Department of
Veterans Affairs

Memorandum

Date: APR 9 1997

From: General Counsel (022)

Subj: Request for Opinion -- Nicotine Dependence

To: Under Secretary for Health (10)

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VETERANS AFFAIRS
CONFERENCE

1. As you know, under 38 U.S.C. §§ 1110, 1131, and 1310, compensation is payable for disability "resulting from personal injury suffered or disease contracted in line of duty . . . in the active military, naval, or air service" and for death from a service-connected disability. Disability which is proximately due to or the result of a service-connected disease or injury is considered service connected under 38 C.F.R. § 3.310(a). A 1993 precedent opinion, VAOPGCPREC 2-93 (O.G.C. Prec. 2-93), held that direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service. The opinion also noted that, if nicotine dependence is considered a disease or injury for compensation purposes, such dependence began in service, and resulting tobacco use led to disability subsequent to service, service connection could be established for that disability pursuant to 38 C.F.R. § 3.310(a).

2. The Veterans Benefits Administration (VBA) recently requested an opinion from this office regarding the circumstances under which service connection may be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service. In VAOPGCPREC 2-93, the General Counsel stated that nicotine dependence, which was classified by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, as a psychoactive substance-use disorder, clearly would fall outside the scope of the term "injury." The same conclusion would follow under the Fourth Edition of the Diagnostic and Statistical Manual, which classifies nicotine dependence as a "substance use

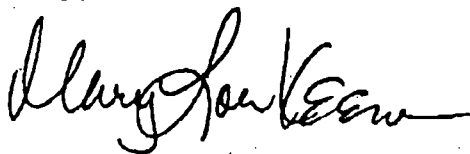
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Under Secretary for Health (10)

disorder." Resolution of the question posed by VBA, therefore, necessarily depends upon whether nicotine dependence may be considered a disease for compensation purposes.

3. In VAOPGCPREC 82-90 (O.G.C. Prec. 82-90), a precedent opinion discussing the definition of the term "disease" as used in 38 U.S.C. §§ 1110 and 1131, the General Counsel cited *Dorland's Illustrated Medical Dictionary* 385 (26th ed. 1974) as defining the term "disease" as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." The most recent edition of *Dorland's Illustrated Medical Dictionary* 478 (28th ed. 1994) provides virtually the same definition of "disease." The General Counsel also pointed out that, in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), the United States Court of Appeals for the District of Columbia Circuit indicated that the term "disease" refers to a condition which is capable of improvement or deterioration. See also VAOPGCPREC 67-90 (O.G.C. Prec. 67-90) (stating that a disease is usually capable of improvement or deterioration). As stated in VAOPGCPREC 2-93, a determination of whether nicotine dependence may be considered a disease for compensation purposes requires application of accepted medical principles relating to that condition. We therefore request your opinion as to whether, under the above criteria, and in light of the latest available information on nicotine dependence, including newly reported material concerning its etiology, pathology, and prognosis, nicotine dependence may be considered a disease for compensation purposes.

4. We request your prompt attention to this matter so that we may advise VBA, which is awaiting guidance prior to adjudicating numerous claims which have been set aside pending resolution of issues relating to tobacco-related disabilities.



Mary Lou Keener

Department of
Veterans Affairs

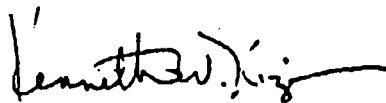
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Kenneth W. Kizer, M.D., M.P.H.

Department of
Veterans Affairs

Memorandum

Date May 13, 1997 VAOPGCPREC 19-97

From: General Counsel (022)

Subject: Secondary Service Connection Based on Nicotine Dependence

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

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An act which directly produced the injury * * *. That cause which naturally leads to and which might have been expected to produce the result. That from which the effect might be expected to follow without the concurrence of any unusual circumstances. That which immediately produces the effect as distinguished from a predisposing cause. (32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

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prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated'" may be considered a supervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 Warren's N.Y. Negligence § 5.08).¹

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4.

Director, Compensation and Pension Service (21)

nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to constitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

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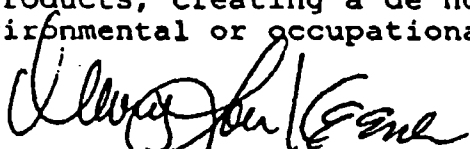
Director, Compensation and Pension Service (21)

the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.



Mary Lou Keener



THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON

MAY 9 1997

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is a draft bill, the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997," to authorize a cost-of-living adjustment (COLA) for fiscal year (FY) 1998 in the rates of disability compensation and dependency and indemnity compensation (DIC), and to revise and improve certain veterans compensation, pension, and memorial affairs programs, and for other purposes. I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment.

Section 101 of the draft bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 1997. The rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.7 percent. We believe this proposed COLA is necessary and appropriate in order to protect the benefits of these most deserving recipients from the eroding effects of inflation. We estimate that enactment of this section, in conjunction with section 102 of this draft bill, would result in benefit costs of \$330.7 million during FY 1998 and \$1.94 billion over the five-year period beginning in FY 1998. The costs associated with the compensation COLA are considered to be part of the compensation baseline and not subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 102 would require the Secretary of Veterans Affairs, in computing new rates of (or limitations affecting) disability compensation and DIC pursuant to the enactment of any legislation requiring the Secretary to increase such rates to provide a COLA for fiscal year 1998 and thereafter, to round down to the next lower whole dollar any rate that is not evenly divisible by one dollar. This proposal is consistent with the congressionally-mandated calculation methods applied to COLA's for fiscal years 1994, 1995, and 1996. We estimate this proposal would reduce FY 1998 benefit cost associated with the COLA proposed in section

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101 of this draft bill by \$17 million and reduce the five-year benefit cost for FY 1998 through FY 2002 by \$287 million, as compared to the cost of that COLA and future COLAs based on rounding odd dollar amounts to the nearest whole dollar. The savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 103 would amend titles 26 and 38 of the United States Code to make permanent the authority of the Department of Veterans Affairs (VA) to access unearned income information from the Internal Revenue Service (IRS) and wage, self-employment, and retirement income information from the Social Security Administration (SSA) for purposes of income verification in determining eligibility for VA means-tested benefits such as pension and medical care for certain non-service-related illnesses or conditions.

Experience has shown that authority to match unearned income information from IRS and wage, self-employment, and retirement income information from SSA with VA data for purposes of income verification in determining eligibility for or the proper amount of VA means-tested benefits has been an effective savings measure and has had a significant program-abuse deterrent effect. We estimate that enactment of this proposal would result in savings in monetary benefits of \$10 million in FY 1999 and \$120 million during the four-year period beginning in FY 1999. These savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 104 would amend section 5503(f) of title 38, United States Code, to make permanent the \$90 limitation on monthly VA pension payments that may be made to beneficiaries, without dependents, who are receiving Medicaid-covered nursing-home care. The current payment limitation, which is due to expire at the end of fiscal year 1998, works to the advantage of these nursing-home residents because it permits them to keep the \$90 to apply toward personal expenses rather than have it "pass through" to the Medicaid program. This section would simply remove the existing September 30, 1998, expiration date for section 5503(f). We estimate this proposal would result in government-wide savings because a beneficiary's nursing-home care costs, previously paid for with VA pension benefits, would be paid for by the Medicaid program, which shares a portion of the costs with the States. Government-wide savings are estimated to be \$206 million in FY 1999 and a total of \$893 million during the four-year period beginning in FY 1999.

Under current law, direct service connection of a disability or death may be established if the evidence establishes that

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injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service, notwithstanding that the disability or death did not occur until after service and expiration of any applicable presumptive period. Section 105 would amend title 38, United States Code, by adding a new section that would have the effect of prohibiting service connection of a death or disability on the basis that it resulted from injury or disease attributable, in whole or in part, to the use of tobacco products by the veteran during the veteran's service. This amendment is consistent with the 1990 budget reconciliation act, in which Congress prohibited compensation for disabilities which are the result of veterans' abuse of alcohol and drugs. This was fiscally responsible action which enhanced the integrity of our compensation program, and our proposal regarding tobacco use is offered in that same spirit. In addition, claims based upon tobacco-related disorders present medical and legal issues which could impede ongoing efforts to speed claim processing by placing significant additional demands on the adjudicative system. This provision would not preclude establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of title 38, United States Code. This amendment would apply to claims filed after the date of its enactment.

This provision would result in some level of benefit cost avoidance and avoid potential delays in claim processing resulting from increased workload.

Section 106 would authorize the Veterans Benefits Administration (VBA) to reimburse, from the general operating expenses account, the Veterans Health Administration (VHA) for the cost of medical examinations conducted with respect to veterans' claims for compensation or pension. Currently, such examinations are paid for out of VA's medical-care fund.

In order to assure that funding for compensation and pension medical examinations is available throughout FY 1998, appropriate language would need to be included in both the "Medical care" and "General operating expenses" appropriations. It is contemplated that VBA will enter into a memorandum of understanding with VHA to provide that, should funds budgeted under general operating expenses for the purpose of "purchasing" compensation and pension medical examinations prove insufficient, alternate funding under "Medical care" would be available to permit VHA to continue to provide these examinations. Medical care funds would be used for this purpose only in the event of a shortfall in general operat-

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ing expenses. There are no costs or savings associated with this proposal.

Section 201(a) would amend section 2408(b) of title 38, United States Code, to make state cemetery grants more attractive to States. Section 2408 authorizes the Secretary of Veterans Affairs to make grants to States to assist them in establishing, expanding, or improving State veterans' cemeteries. Currently, the amount of a State cemetery grant is limited to 50 percent of the total of the value of the land to be acquired or dedicated for a cemetery and the cost of improvements to be made on the land. The remaining amount must be contributed by the State receiving the grant. Pursuant to the amendments proposed in this section, the amount of a State cemetery grant could not exceed, in the case of the establishment of a new cemetery, the total of the cost of improvements to be made on land to be converted into a cemetery and the initial cost of equipment necessary to operate the cemetery. In the case of the expansion or improvement of an existing cemetery, the amount of the grant could not exceed the total of the cost of improvements to be made on any land to be added to the cemetery combined with the cost of improvements to be made to the existing cemetery. If the amount of a grant should, for any reason, be less than the amount of those costs, the State receiving the grant would be required to contribute the remaining amount, in addition to providing any land necessary for the cemetery project.

Also, under current law, if at the time of a grant the State receiving the grant dedicates for the cemetery land which it already owns, the value of the land may constitute up to 50 percent of the State's contribution. Once that land value is so used, it may not constitute part of the State's contribution for any subsequent grant under section 2408. Under the amendments proposed in section 201(a) of this draft bill, a State would be responsible for providing any land required for a cemetery project, since the grant amount would no longer be based partly on the value of land to be acquired or dedicated for a cemetery.

We believe that excluding the value of land to be acquired for a cemetery from the basis of a grant would encourage states to be active partners in the cemetery grants program. In our experience, no State has acquired land for a cemetery in connection with a grant under section 2408. In every case, the State has dedicated land that was donated or transferred for that purpose, or land that it already owned. Further, any reduction of the basis from which a grant is calculated may be offset by an increase from 50 percent to up to 100 percent in the proportion of the amount of a project's cost that could be assumed by the Federal Government. Moreover, since, under the proposal, a grant may

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The Honorable Newt Gingrich

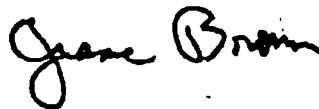
cover the entire cost of improvements (and initial cost of equipment in certain cases), a State may not have to contribute cash toward the initial cost of a project.

Another feature that would make grants more attractive to States is the inclusion in the basis of a grant of the initial cost of equipment necessary to operate the cemetery. Providing funds to acquire the equipment necessary to operate a cemetery will, we believe, be a critical financial incentive to encourage States to establish new cemeteries. Such equipment is as essential to the establishment of an operational cemetery as are the land and the improvements made on it. However, because our proposed amendment includes only the initial cost of equipment for the establishment of a cemetery, the State would retain the responsibility for long-term maintenance and operation of the cemetery, including costs associated with the acquisition of replacement equipment. Each Federal grant would assist in the establishment and activation of new veterans' cemeteries, or in the expansion or improvement of existing cemeteries, but the States would bear the costs of continuing operation and long-term maintenance.

Section 201(b) of the draft bill would authorize "no-year" appropriations for the State cemetery grants program. Under current 38 U.S.C. § 2408(d), funds appropriated for State cemetery grants remain available only until the end of the second fiscal year following the fiscal year for which they are appropriated. However, in Public Law No. 104-204, 110 Stat. 2874 (1996), Congress appropriated funds for State cemetery grants, "to remain available until expended." Section 201(b) would amend section 2408(d) to reflect this no-year-funding policy.

The Office of Management and Budget advises that there is no objection to the submission of this draft bill to the Congress, and that its enactment would be in accord with the Administration's program.

Sincerely yours,



Jesse Brown

Enclosures
JB/fjb

105th Congress
1st Session

A BILL

To amend title 38, United States Code, to authorize a cost-of-living adjustment in the rates of disability compensation for veterans with service-connected disabilities and dependency and indemnity compensation for survivors of such veterans and to revise and improve certain veterans compensation, pension, and memorial affairs programs; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) **SHORT TITLE.**--This Act may be cited as the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997".

(b) **REFERENCES.**--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision,

the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I-COMPENSATION AND PENSIONS

SEC. 101. INCREASE IN COMPENSATION RATES AND LIMITATIONS.

(a) IN GENERAL.--(1) The Secretary of Veterans Affairs shall, as provided in paragraph (2), increase, effective December 1, 1997, the rates of and limitations on Department of Veterans Affairs disability compensation and dependency and indemnity compensation.

(2) The Secretary shall increase each of the rates and limitations in sections 1114, 1115(1), 1162, 1311, 1313, and 1314 of title 38, United States Code, that were increased by the amendments made by the Veterans' Compensation Cost-of-Living Adjustment Act of 1996 (Public Law 104-263; 110 Stat. 3212). This increase shall be made in such rates and limitations as in effect on November 30, 1997, and shall be by the same percentage that benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1997, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

(b) SPECIAL RULE.--The Secretary may adjust administratively, consistent with the increases made under subsection (a)(2), the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 (72 Stat. 1263) who

**SEC. 104. EXTENSION OF LIMITATION ON PENSION FOR CERTAIN
RECIPIENTS OF MEDICAID-COVERED NURSING HOME CARE.**

Section 5503(f) is amended by striking out paragraph (7).

**SEC. 105. PROHIBITION REGARDING PAYMENT OF COMPENSATION FOR
DISABILITY OR DEATH DUE TO TOBACCO USE.**

(a) SERVICE CONNECTION.—Chapter 11 is amended by adding at the end of subchapter I the following new section:

**"§ 1103. Special provisions relating to claims based upon
effects of tobacco products.**

"(a) Notwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service.

"(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated in active military, naval or air service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 11 is amended by adding the following new item after the item relating to section 1102:

"1103. Special provisions relating to claims based upon effects of tobacco products."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to claims filed after the date of enactment of this Act.

**SEC. 106. REIMBURSEMENT OF COSTS ASSOCIATED WITH
COMPENSATION AND PENSION MEDICAL EXAMINATIONS.**

(a) AUTHORIZATION.—Chapter 77 of title 38, United States Code, is amended by adding at the end of subchapter I the following new section:

"7705. Reimbursement for compensation and pension medical examinations.

"(a) REIMBURSEMENT.—The Under Secretary for Benefits is authorized to reimburse the Veterans Health Administration for costs associated with the conduct of medical examinations requested by the Veterans Benefits Administration in connection with claims for benefits under this title.

"(b) SOURCE OF FUNDS.—Reimbursements under this section shall be made from amounts available to the Secretary of Veterans Affairs for payment of general operating expenses."

(b) CLERICAL AMENDMENT.-The table of sections at the beginning of chapter 77 is amended by adding the following new item after the item relating to section 7703:

"7705. Reimbursement for compensation and pension medical examinations."

TITLE II - MEMORIAL AFFAIRS

SECTION 201. STATE CEMETERY GRANTS PROGRAM.

(a) (1) AMOUNT OF GRANT RELATIVE TO PROJECT COST.-Section 2408(b) is amended by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

"(1) The amount of any grant under this section may not exceed—

"(A) in the case of the establishment of a new cemetery, the total of—

"(i) the cost of improvements to be made on the land to be converted into a cemetery, and

"(ii) the initial cost of equipment necessary to operate the cemetery; or

"(B) in the case of the expansion or improvement of an existing cemetery, the total of—

"(i) the cost of improvements to be made on any land to be added to the cemetery, and

"(ii) the cost of any improvements to be made

to the existing cemetery.

"(2) If the amount of a grant under this section is less than the amount of costs referred to in paragraph (1), the State receiving the grant shall contribute the amount by which the costs exceed the grant, in addition to any land acquired or dedicated by the State for the cemetery."

2) EFFECTIVE DATE.-The amendment made by this subsection shall become effective 60 days after the date of enactment of this Act.

b) AUTHORIZATION OF NO-YEAR APPROPRIATIONS.-Section 2408(d) is amended by striking out "the end of the second fiscal year following the fiscal year for which they are appropriated" and inserting in lieu thereof "expended".

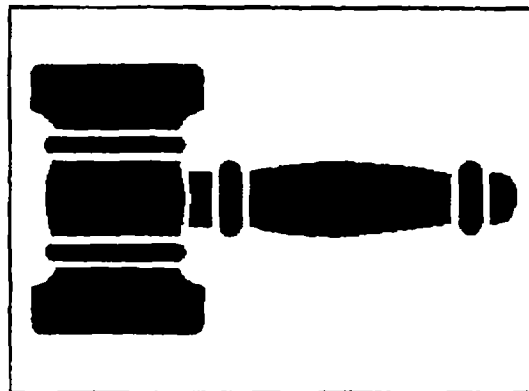
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF THE GENERAL COUNSEL

PHONE: (202) 690-6318

FAX: (202) 690-7998

DATE: April 24, 1997

TO: ELIZABETH DRYE
fax: 456-7028



FROM: ANDREW D. HYMAN
Special Assistant to the General Counsel
Office of the General Counsel, Room 707F
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, D.C. 20201

COMMENTS: Attached is the draft transmittal letter to Gingrich from the VA. The problematic language is on page 3.

No. of Pages (including cover): 18



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Legislation Division
Washington, D.C. 20201

April 16, 1997

TO: LH
HCFA
ASPE
CDC
FDA
OPHS

FROM: Sondra Wallace *SW*
Associate General Counsel

SUBJECT: VA draft bill on Veterans' Compensation COLA and Benefit Programs
Improvement Act of 1997

The Office of Management and Budget has asked for the Department's views on the above-mentioned draft bill.

In order that we may respond promptly to this request, please give your comments as soon as possible, but no later than 2:00pm. MONDAY, APRIL 21 to PAUL SPIEGEL of this Division, who can be reached at 690-7773. IF YOU INTEND TO RESPOND BY E-MAIL, PLEASE cc: SPURGEON MONTGOMERY.

Oral comments are generally acceptable. Extensive comments, however, should be in writing (either a mark-up or note).

If you have any questions concerning this referral, please call our Legislative Reference Service, 690-7750.

Attachments

cc: GC/HCF
GC/FD
GC/H
DIG (St Cyr 5272Cohen)



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is a draft bill, the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997," to authorize a cost-of-living adjustment (COLA) for fiscal year (FY) 1998 in the rates of disability compensation and dependency and indemnity compensation (DIC), and to revise and improve certain veterans compensation, pension, and memorial affairs programs, and for other purposes. I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment.

Section 101 of the draft bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 1997. The rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.7 percent. We believe this proposed COLA is necessary and appropriate in order to protect the benefits of these most deserving recipients from the eroding effects of inflation. We estimate that enactment of this section, in conjunction with section 102 of this draft bill, would result in benefit costs of \$313.5 million during FY 1998 and \$1.84 billion over the five-year period beginning in FY 1998.

Section 102 would require the Secretary of Veterans Affairs, in computing new rates of (or limitations affecting) disability compensation and DIC pursuant to the enactment of any legislation requiring the Secretary to increase such rates to provide a COLA for fiscal year 1998 and thereafter, to round down to the next lower whole dollar any rate that is not evenly divisible by one dollar. This proposal is consistent with the congressionally-mandated calculation methods applied to COLA's for fiscal years

2.

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1994, 1995, and 1996. We estimate this proposal would reduce FY 1998 benefit cost associated with the COLA proposed in section 101 of this draft bill by \$17 million and reduce the five-year benefit cost for FY 1998 through FY 2002 by \$266 million, as compared to the cost of that COLA and future COLAs based on rounding odd dollar amounts to the nearest whole dollar.

Section 103 would amend titles 26 and 38 of the United States Code to make permanent the authority of the Department of Veterans Affairs (VA) to access unearned income information from the Internal Revenue Service (IRS) and wage, self-employment, and retirement income information from the Social Security Administration (SSA) for purposes of income verification in determining eligibility for VA means-tested benefits such as pension and medical care for certain non-service-related illnesses or conditions.

Experience has shown that authority to match unearned income information from IRS and wage, self-employment, and retirement income information from SSA with VA data for purposes of income verification in determining eligibility for or the proper amount of VA means-tested benefits has been an effective savings measure and has had a significant program-abuse deterrent effect. We estimate that enactment of this proposal would result in savings in monetary benefits of \$10 million in FY 1999 and \$120 million during the four-year period beginning in FY 1999.

Section 104 would amend section 5503(f) of title 38, United States Code, to make permanent the \$90 limitation on monthly VA pension payments that may be made to beneficiaries, without dependents, who are receiving Medicaid-covered nursing-home care. The current payment limitation, which is due to expire at the end of fiscal year 1998, works to the advantage of these nursing-home residents because it permits them to keep the \$90 to apply toward personal expenses rather than have it "pass through" to the Medicaid program. This section would simply remove the existing September 30, 1998, expiration date for section 5503(f). We estimate this proposal would result in VA benefit savings of \$806 million in FY 1999 and a total of \$2.1 billion during the four-year period beginning in FY 1998.

Under current law, direct service connection of a disability or death may be established if the evidence establishes that

3.

The Honorable Newt Gingrich

injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service, notwithstanding that the disability or death did not occur until after service and expiration of any applicable presumptive period. Section 105 would amend title 38, United States Code, by adding a new section that would have the effect of prohibiting service connection of a death or disability on the basis that it resulted from injury or disease attributable, in whole or in part, to the use of tobacco products by the veteran during the veteran's service. This provision would not preclude establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of title 38, United States Code. This amendment would apply to claims filed after the date of its enactment.

We believe that it is inappropriate to compensate for death or disability resulting from veterans' personal choice to engage in conduct damaging to their health. The health consequences of cigarette smoking have been widely known since 1964, when the Surgeon General of the United States reported that cigarette smoking was causally related to cancer of the lung and larynx. Smoking has since been linked to cardiovascular disease, including stroke, heart attack, and aortic aneurysm, cancers of the stomach, pancreas, kidney and bladder, bronchitis, emphysema, and pregnancy complications. The use of other tobacco products presents similar health hazards. Unlike other injuries for which veterans' benefits are paid, which result from happenstance or being placed in harm's way, these well-known tobacco-related disorders are voluntarily acquired. We do not believe the Government should be obligated to compensate persons who are injured as a result of their voluntary use of a product the Surgeon General long ago determined to be harmful. The injuries related to tobacco are truly self-inflicted, and persons who undertake this habit should assume the risk of their conduct. The Government should not be an insurer against those risks.

Further, claims based upon tobacco-related disorders present complicated medical and legal issues which are time-consuming and extremely difficult to resolve. Adjudication of such claims could impede ongoing efforts to speed claim processing by placing significant additional demands on the adjudication system.

4.

The Honorable Newt Gingrich

This provision would result in some level of benefit cost avoidance and avoid potential delays in claim processing resulting from increased workload.

Section 106 would authorize the Veterans Benefits Administration (VBA) to reimburse, from the general operating expenses account, the Veterans Health Administration (VHA) for the cost of medical examinations conducted with respect to veterans' claims for compensation or pension. Currently, such examinations are paid for out of VA's medical-care fund.

In order to assure that funding for compensation and pension medical examinations is available throughout FY 1998, appropriate language would need to be included in both the "Medical care" and "General operating expenses" appropriations. It is contemplated that VBA will enter into a memorandum of understanding with VHA to provide that, should funds budgeted under general operating expenses for the purpose of "purchasing" compensation and pension medical examinations prove insufficient, alternate funding under "Medical care" would be available to permit VHA to continue to provide these examinations. Medical care funds would be used for this purpose only in the event of a shortfall in general operating expenses. There are no costs or savings associated with this proposal.

Section 107 would amend section 1502(a) of title 38, United States Code, to establish a presumption of total disability in the case of a person who is age 65 or older and who is a patient in a nursing home, for purposes of establishing basic eligibility under VA's non-service-connected disability pension program.

For many years, former section 502(a) (redesignated as section 1502(a)) of title 38, United States Code, provided that a person was presumed to be permanently and totally disabled at age 65 for the purpose of establishing basic pension eligibility. However, in 1990 Congress amended this provision via the Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508, § 8002) to eliminate the presumption of total disability at age 65 for claims filed after October 31, 1990. Consequently, it is now necessary that a rating decision be rendered on the issue of permanent and total disability before pension can be paid to any person, regardless of age or circumstances.

5.

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Under current law, an incongruous situation arises in the case of a pension claimant who is a patient in a nursing home. Pursuant to 38 U.S.C. § 1502(b), such a person would be considered to be in need of regular aid and attendance (a level of disability which assumes the existence of permanent and total disability) and, therefore, entitled to pension at a higher rate. Nonetheless, the person could not establish eligibility for any pension until a determination is made through a rating activity that the person is permanently and totally disabled. Consequently, under current law, if an 85-year old veteran in a nursing home were to file an original pension claim, it would still be necessary to prepare a rating decision on the issue of permanent and total disability to establish the veteran's basic pension eligibility under section 1502(a), although the veteran would, once determined to be eligible, be considered under section 1502(b) to be eligible for a higher payment of pension based on the need for regular aid and attendance.

Enactment of the proposed amendment to section 1502(a) would be advantageous to VA and to claimants for pension and other benefits administered by VA. Processing times for original and reopened pension claims would be reduced because development of medical evidence of a nursing home patient's level of disability would no longer be necessary. This improvement in efficiency would have a salutary effect on the processing of other types of claims because rating specialists and development personnel would have more time to devote to other activities, including adjudication of service-connected disability compensation claims.

The proposed amendment would not threaten the integrity of the pension program. An individual age 65 years or older who is a patient in a nursing home would almost certainly qualify as being permanently and totally disabled under 38 U.S.C. § 1502(a) as it is currently worded. The likelihood that such an individual would eventually leave the nursing home is slim. However, procedures are already in place for reevaluating aid and attendance entitlement when a notice of discharge from a nursing home is received in the case of a veteran whose aid and attendance benefit is based on nursing-home-patient status. These procedures could easily be adapted to require a rating decision upon a person's discharge from a nursing home if the basic eligibility determination was premised on the person's status as a patient in a nursing home.

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Enactment of this section would merely speed the processing of claims of persons who would otherwise qualify for pension. Its enactment would result in no additional benefit cost.

Section 201(a) would amend section 2408(b) of title 38, United States Code, to make state cemetery grants more attractive to States. Section 2408 authorizes the Secretary of Veterans Affairs to make grants to States to assist them in establishing, expanding, or improving State veterans' cemeteries. Currently, the amount of a State cemetery grant is limited to 50 percent of the total of the value of the land to be acquired or dedicated for a cemetery and the cost of improvements to be made on the land. The remaining amount must be contributed by the State receiving the grant. Pursuant to the amendments proposed in this section, the amount of a State cemetery grant could not exceed, in the case of the establishment of a new cemetery, the total of the cost of improvements to be made on land to be converted into a cemetery and the initial cost of equipment necessary to operate the cemetery. In the case of the expansion or improvement of an existing cemetery, the amount of the grant could not exceed the total of the cost of improvements to be made on any land to be added to the cemetery combined with the cost of improvements to be made to the existing cemetery. If the amount of a grant should, for any reason, be less than the amount of those costs, the State receiving the grant would be required to contribute the remaining amount, in addition to providing any land necessary for the cemetery project.

Also, under current law, if at the time of a grant the State receiving the grant dedicates for the cemetery land which it already owns, the value of the land may constitute up to 50 percent of the State's contribution. Once that land value is so used, it may not constitute part of the State's contribution for any subsequent grant under section 2408. Under the amendments proposed in section 201(a) of this draft bill, a State would be responsible for providing any land required for a cemetery project, since the grant amount would no longer be based partly on the value of land to be acquired or dedicated for a cemetery.

We believe that excluding the value of land to be acquired for a cemetery from the basis of a grant would not discourage States from participating in the State cemetery grants program. In our experience, no State has acquired land for a cemetery in

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connection with a grant under section 2408. In every case, the State has dedicated land that was donated or transferred for that purpose, or land that it already owned. Further, any reduction of the basis from which a grant is calculated may be offset by an increase from 50 percent to up to 100 percent in the proportion of the amount of a project's cost that could be assumed by the Federal Government. Moreover, since, under the proposal, a grant may cover the entire cost of improvements (and initial cost of equipment in certain cases), a State may not have to contribute cash toward the initial cost of a project.

Another feature that would make grants more attractive to States is the inclusion in the basis of a grant of the initial cost of equipment necessary to operate the cemetery. Providing funds to acquire the equipment necessary to operate a cemetery will, we believe, be a critical financial incentive to encourage States to establish new cemeteries. Such equipment is as essential to the establishment of an operational cemetery as are the land and the improvements made on it. However, because our proposed amendment includes only the initial cost of equipment for the establishment of a cemetery, the State would retain the responsibility for long-term maintenance and operation of the cemetery, including costs associated with the acquisition of replacement equipment. Each Federal grant would assist in the establishment and activation of new veterans' cemeteries, or in the expansion or improvement of existing cemeteries, but the States would bear the costs of continuing operation and long-term maintenance.

Congress created the National Cemetery System (NCS) within VA to provide for the interment of deceased service members and veterans. Most national cemeteries are a part of the NCS. VA wishes to provide every eligible veteran with the option of burial in a veterans' cemetery. The NCS has determined, however, that burial in a veterans' cemetery is a reasonable option only if the cemetery is located within 75 miles of a veteran's home. Statistics indicate that about 80 percent of veterans interred in national cemeteries resided within 75 miles of the cemetery in which they are interred. We believe it is not practicable for VA to build and operate national cemeteries in sufficient numbers to ensure that all eligible veterans reside within 75 miles of a national cemetery. Increasing the number of State veterans' cemeteries would broaden the accessibility of veterans' cemeteries,

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reduce the need for additional national cemeteries to meet the burial needs of our Nation's veterans, and foster an enhanced partnership with the States in satisfying our Nation's obligations to those who served.

Section 201(b) of the draft bill would authorize "no-year" appropriations for the State cemetery grants program. Under current 38 U.S.C. § 2408(d), funds appropriated for State cemetery grants remain available only until the end of the second fiscal year following the fiscal year for which they are appropriated. However, in Public Law No. 104-204, 110 Stat. 2874 (1996), Congress appropriated funds for State cemetery grants, "to remain available until expended." Section 201(b) would amend section 2408(d) to reflect this no-year-funding policy.

105th Congress
1st Session

A BILL

To amend title 38, United States Code, to authorize a cost-of-living adjustment in the rates of disability compensation for veterans with service-connected disabilities and dependency and indemnity compensation for survivors of such veterans and to revise and improve certain veterans compensation, pension, and memorial affairs programs; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) SHORT TITLE.--This Act may be cited as the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997".

(b) REFERENCES.--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I-COMPENSATION AND PENSIONS

SEC. 101. INCREASE IN COMPENSATION RATES AND LIMITATIONS.

(a) IN GENERAL.--(1) The Secretary of Veterans Affairs shall, as provided in paragraph (2), increase, effective December 1, 1997, the rates of and limitations on Department of Veterans Affairs disability compensation and dependency and indemnity compensation.

(2) The Secretary shall increase each of the rates and limitations in sections 1114, 1115(1), 1162, 1311, 1313, and 1314 of title 38, United States Code, that were increased by the amendments made by the Veterans' Compensation Cost-of-Living Adjustment Act of 1995 (Public Law 104-263, 110 Stat. 3212). This increase shall be made in such rates and limitations as in effect on November 30, 1997, and shall be by the same percentage that benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective

December 1, 1997, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

(b) SPECIAL RULE.-The Secretary may adjust administratively, consistent with the increases made under subsection (a)(2), the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 (72 Stat. 1263) who are not in receipt of compensation payable pursuant to chapter 11 of title 38, United States Code.

(c) PUBLICATION REQUIREMENT.-At the same time as the matters specified in section 215(i)(2)(D) of the Social Security Act (42 U.S.C. 415(i)(2)(D)) are required to be published by reason of a determination made under section 215(i) of such Act during fiscal year 1998, the Secretary shall publish in the Federal Register the rates and limitations referred to in subsection (a)(2) as increased under this section.

SEC. 102. ROUNDING DOWN OF COMPENSATION-RATE INCREASES.

In computing rates and limitations pursuant to legislation enacted for fiscal years 1998 and thereafter which increases by a specified percentage, or which directs the Secretary of Veterans Affairs to adjust administratively, the rates and limitations in sections 1114, 1115(b), 1162, 1311, 1313, and 1314 of title 38, United States Code, the Secretary of Veterans Affairs shall round

down to the next lower whole-dollar amount any amount which as so computed is not an even multiple of \$1.

SEC. 103. EXTENSION OF INCOME-VERIFICATION AUTHORITY.

(a) Section 5317 is amended by striking out subsection (g).

(b) Section 6103(1)(7)(D) of the Internal Revenue Code of 1986 is amended by striking out the penultimate sentence.

SEC. 104. EXTENSION OF LIMITATION ON PENSION FOR CERTAIN RECIPIENTS OF MEDICAID-COVERED NURSING HOME CARE.

Section 5503(f) is amended by striking out paragraph (7).

SEC. 105. PROHIBITION REGARDING PAYMENT OF COMPENSATION FOR DISABILITY OR DEATH DUE TO TOBACCO USE.

(a) **SERVICE CONNECTION.**—Chapter 11 is amended by adding at the end of subchapter I the following new section:

"§ 1101. Special provisions relating to claims based upon effects of tobacco products.

"(a) Notwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service.

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"(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated in active military, naval or air service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 11 is amended by adding the following new item after the item relating to section 1102:

"1103. Special provisions relating to claims based upon effects of tobacco products."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to claims filed after the date of enactment of this Act.

**SEC. 106. REIMBURSEMENT OF COSTS ASSOCIATED WITH
COMPENSATION AND PENSION MEDICAL EXAMINATIONS.**

(a) AUTHORIZATION.—Chapter 77 of title 38, United States Code, is amended by adding at the end of subchapter 1 the following new section:

"7705. Reimbursement for compensation and pension medical examinations."

"(a) REIMBURSEMENT.-The Under Secretary for Benefits is authorized to reimburse the Veterans Health Administration for costs associated with the conduct of medical examinations requested by the Veterans Benefits Administration in connection with claims for benefits under this title.

"(b) SOURCE OF FUNDS.-Reimbursements under this section shall be made from amounts available to the Secretary of Veterans Affairs for payment of general operating expenses."

(b) CLERICAL AMENDMENT.-The table of sections at the beginning of chapter 77 is amended by adding the following new item after the item relating to section 7703:

"7705. Reimbursement for compensation and pension medical examinations."

SEC. 107. PRESUMPTION OF TOTAL DISABILITY FOR PENSION PURPOSES.

That portion of subsection (a) of section 1502 preceding paragraph (1) is amended is read as follows:

"(a) For purposes of this chapter, a person shall be considered to be permanently and totally disabled if such person is 65 years of age or older and is a patient in a nursing home or, regardless of age, is unemployable as a result of a disability reasonably certain to continue throughout the life of the disabled person, or is suffering from-"

TITLE II - MEMORIAL AFFAIRS

SECTION 201. STATE CEMETERY GRANTS PROGRAM.

(a) (1) AMOUNT OF GRANT RELATIVE TO PROJECT COST.--Section 2408(b) is amended by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

"(1) The amount of any grant under this section may not exceed--

"(A) in the case of the establishment of a new cemetery, the total of--

"(i) the cost of improvements to be made on the land to be converted into a cemetery, and

"(ii) the initial cost of equipment necessary to operate the cemetery; or

"(B) in the case of the expansion or improvement of an existing cemetery, the total of--

"(i) the cost of improvements to be made on any land to be added to the cemetery, and

"(ii) the cost of any improvements to be made to the existing cemetery.

"(2) If the amount of a grant under this section is less than the amount of costs referred to in paragraph (1), the State receiving the grant shall contribute the amount

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by which the costs exceed the grant, in addition to any
land acquired or dedicated by the State for the cemetery."

2) EFFECTIVE DATE.-The amendment made by this subsection
shall become effective 60 days after the date of enactment of
this Act.

b) AUTHORIZATION OF NO-YEAR APPROPRIATIONS.-Section 2408(d)
is amended by striking out "the end of the second fiscal year
following the fiscal year for which they are appropriated" and
inserting in lieu thereof "expended".