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FOR THE RELIEF OF GUY ALBERT WHEATON

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

EIGHTIETH CONGRESS

SECOND SESSION

ON

S. 847

A BILL FOR THE RELIEF OF
GUY ALBERT WHEATON

MAY 26, 1948

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CONTENTS

Statement of— Page

Wagener, Frederick, attorney at law, Lincoln, Nebr. 3

Letters, statements, reports, etc., submitted for the record by—

S. 847 1

Millikin, Eugene D., a United States Senator from the State of Colorado:

Report of the Veterans' Administration on S. 847 1

Report of Justice Department on S. 847 11

Letter from Veterans' Administration enclosing medical and other information 13

Wagener, Frederick, attorney at law, Lincoln, Nebr., general affidavit re Guy Wheaton 7

Wherry, Kenneth S., a United States Senator from the State of Nebraska 8

FOR THE RELIEF OF GUY ALBERT WHEATON

WEDNESDAY, MAY 26, 1948

UNITED STATES SENATE,
COMMITTEE ON FINANCE,
Washington, D. C.

The committee met, pursuant to call, at 12:30 p. m., in room 312, Senate Office Building, Senator Eugene D. Millikin (chairman) presiding.

Present: Senators Millikin, Butler, and Johnson.

Present also: Guy H. Birdsall, Assistant Administrator for Legislation, Veterans' Administration.

The CHAIRMAN. This hearing is on S. 847, a bill for the relief of Guy Albert Wheaton.

The bill and the report of the Veterans' Administration will be made a part of the record at this point.

(The bill and the report are as follows:)

[S. 847, 80th Cong., 1st sess.]

A BILL For the relief of Guy Albert Wheaton

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Administrator of Veterans' Affairs is authorized and directed to pay from appropriate funds, to Guy Albert Wheaton, of Omaha, Nebraska, the insured under Government life insurance policy numbered K-854419, and to any and all other beneficiaries under such policy and laws pertaining thereto, the sum of and all moneys which would have been or would be paid had it been determined that the said Guy Albert Wheaton was and had been permanently and totally disabled since August 30, 1932, to the date of the enactment of this Act. The insured and beneficiaries shall hereafter be and are possessed of whatever rights, under the terms of policy K-854419 and laws in connection therewith, he and they would enjoy had it been determined he was and has been permanently and totally disabled since August 30, 1932: *Provided*, That no part of the moneys authorized in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

VETERANS' ADMINISTRATION,
Washington 25, D. C., April 21, 1947.

Hon. EUGENE D. MILLIKIN,
Chairman, Committee on Finance, United States Senate,
Washington 25, D. C.

DEAR SENATOR MILLIKIN: Further reference is made to your letter of March 11, 1947, requesting a report by the Veterans' Administration on S. 847, Eightieth Congress, a bill for the relief of Guy Albert Wheaton, which provides:

"That the Administrator of Veterans Affairs is authorized and directed to pay from appropriate funds, to Guy Albert Wheaton, of Omaha, Nebraska, the insured under Government life insurance policy numbered K-854419, and to any and all

other beneficiaries under such policy and laws pertaining thereto, the sum of and all moneys which would have been or would be paid had it been determined that the said Guy Albert Wheaton was and had been permanently and totally disabled since August 30, 1932, to the date of the enactment of this Act. The insured and beneficiaries shall hereafter be and are possessed of whatever rights, under the terms of policy K-854419 and laws in connection therewith, he and they would enjoy had it been determined he was and has been permanently and totally disabled since August 30, 1932; *Provided*, That no part of the moneys authorized in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000."

S. 847, Eightieth Congress, is similar to S. 1412, Seventy-eighth Congress, and S. 894, Seventy-ninth Congress, on which the Veterans' Administration submitted adverse reports to the Committee on Finance, United States Senate, under dates of November 3, 1943, and February 26, 1945, respectively.

The purpose of the bill is to authorize the Administrator of Veterans' Affairs to pay to Guy Albert Wheaton from appropriate funds monthly installments of $57.50 per month, effective August 30, 1932, on the ground that he has been permanently and totally disabled since that date. It is also provided that no part of the amount authorized to be paid in excess of 10 percent shall be delivered to, or received by, any agent or attorney on account of service rendered in connection with the claim.

While in active service in World War I, Mr. Wheaton was granted yearly renewable term insurance in the amount of $10,000, upon which premiums were paid to include December 1918. Effective July 1, 1927, he reinstated and converted this amount to a 5-year convertible term policy, which expired June 30, 1932. Renewal of this policy was granted in July 1932, and premiums were piad to include the month of August 1933.

Mr. Wheaton filed a claim for benefits of insurance, alleging that he was permanently and totally disabled in August 1932. All of the evidence was reviewed and a decision rendered on September 7, 1933, holding that the veteran was not permanently and totally disabled for insurance purposes either on the date alleged or at the time of the decision. Subsequently, suit was filed in the District Court of the United States for the District of Nebraska, Omaha division, and litigation was terminated in favor of the Government on January 10, 1936. In the special findings of fact made by the court, it was stated that the evidence disclosed the veteran to have been employed by the United States Government on a CWA project from January 11 to May 3, 1934, drawing $33.06 per week and missing very little time from his work; also, that he was intelligent, a good administrator and that his work was satisfactorily performed, and that he left the position only because the project was discontinued. The court also found that the veteran was employed in educational and vocational training work on a Government FERA project between November 17, 1934, and August 15, 1935, that during this time he was paid $14 per week, but only expected to work 28 hours per week, that his work was satisfactory, and that it was intelligently performed. The court also found that on August 15, 1935, the veteran was appointed acting director of the Carter Lake transient camp, in the city of Omaha, Nebr., that the appointment was confirmed on September 15, 1935, and that the remuneration received was $80 per month, plus subsistence, that he was still so employed, and performing his duties in a satisfactory manner, at the time of the trial.

It appears obvious from the facts above stated that the veteran cannot be considered to have been permanently and totally disabled for insurance purposes at any time while the contract was in effect.

Enactment of the proposed legislation to grant insurance benefits which must be denied under existing law and which were denied by a court of competent jurisdiction would work an injustice as to other cases where insurance benefits must be denied under similar circumstances.

It is noted that the bill directs the Administrator to pay the authorized benefit from "appropriate funds." The only funds pertaining to Government life insurance are the annual military and naval insurance appropriation and the United States Government life insurance fund. Under existing law, the latter is a fund held and administered for the sole benefit of the policyholders, and it is believed that the payment therefrom of any part of the gratuity contemplated by the bill would be of doubtful legality as well as prejudicial to the vested rights of the

other policyholders in the fund. Accordingly, it is suggested that in the event of further consideration of the bill it be clarified in this respect by an amendment which would specifically direct that payment be made from the current appropriation for military and naval insurance.

The veteran was rated as permanently and totally disabled from non-service-connected disability since September 4, 1940, and at present is entitled to receive pension at the rate of $60 per month under the provisions of part III, Veterans Regulation No. 1 (a), as amended.

In view of the foregoing, the Veterans' Administration is unable to recommend favorable consideration of the bill.

Advice has been received from the Bureau of the Budget that there would be no objection by that office to the submission of this report to your committee.

Sincerely yours,

OMAR N. BRADLEY,
General, United States Army, Administrator.

The CHAIRMAN. We will now hear from Mr. Frederick Wagener on behalf of this bill.

Identify yourself, Mr. Wagener.

STATEMENT OF FREDERICK WAGENER, ATTORNEY AT LAW, LINCOLN, NEBR.

Mr. WAGENER. Mr. Chairman and members of the committee; I am Frederick Wagener, an attorney from Lincoln, Nebr.

I am appearing here in respect to S. 847, which is a bill for the relief of Guy Albert Wheaton.

Guy Wheaton is, at the present time, a California citizen, having resided in California for a period of approximately 10 years.

Previous to his residence in California, he was a resident of Omaha, Nebr.

Guy Wheaton was a veteran of World War I. At that time, as all other veterans did, he applied for and received a $10,000 war-risk term insurance policy.

Following his discharge from the United States Army, I think in the spring of 1919, he continued to keep his insurance in force. And when it became necessary, he converted that insurance to a type of policy which the Government then called "converted insurance."

He was disabled. He was ill when he was discharged, and he lapsed his insurance because of financial inability to keep it in force in August of 1932. That insurance carried a disability clause providing for the payment of $57.50 per month in the event the veteran became permanently and totally disabled.

Guy Wheaton felt he was totally and permanently disabled and brought suit against the United States Government, I think, along in August 1933, approximately a year after his insurance lapsed in August of 1932.

That suit was brought in the Omaha Federal District Court, and at that time I was associated with the Department of Justice, as a trial attorney, and tried that particular litigation.

The case was tried, as I recall, in January 1936 in Omaha.

The veteran at that time produced as witnesses his wife, family, and medical testimony, and the testimony of fellow- and co-workers who had worked with him on certain jobs which he did do. Most of these jobs were in Federal agencies, and some of these jobs required that he be on the job just 28 hours a week. Many of these jobs provided sustenance for this man purely in the nature of a gratuity. This man did not work continuously. He did not work regularly. He was unable

to work regularly, and according to my view, he was at that time, and according to the view which I have now, he was at that time permanently and totally disabled within the terms of the definition as set out for a war-risk term policy.

I will get to that distinction between the definitions as we then viewed it as attorneys for the Government, the distinction which was drawn at that time between the definition of total disability under a term policy and the definition of total disability under a converted policy.

The trial lasted 2 or 3 days. I forget exactly how long. I want to impress on this committee that I appeared as attorney for the Government. At this time I am appearing as the attorney for this veteran.

At the close of the plaintiff's case, we made a motion for a directed verdict, and we argued, based upon the plaintiff's action, this veteran's own evidence, that the man was not permanently and totally disabled although I firmly believe now that the man was so disabled.

I, at this time, firmly believe that the man was at that time totally disabled and permanently so, which is definitely established now because the man is now unable to work, and he is in need of help.

We had an idea at that time that because there had been a transposition of an adverb—the adverb "continuously"—because of the transposition of an adverb from one position under the old term definition to another position under the then new converted policy that the requirements were more stringent. In other words, a definition of "total disability" under the old term policy was any impairment of mind or body which rendered it impossible for the person so disabled to continuously follow and—watch the word "continuously"—to continuously follow a substantially gainful occupation.

They had no particular policy under the old term insurance. It, at most, was a certificate, and it did not give the terms nor the condition of the insurance, nor the requirements for permanent and total disability.

But when the Veterans' Administration and the Government required veterans to convert their insurance, they did put out a policy. That policy then carried the definition of total disability which is this:

> Any impairment of mind or body which continuously renders it impossible for the person so disabled to follow some substantial gainful occupation.

So that in presenting and arguing this motion for directed verdict to the court, I contended, by virtue of the transposition of that adverb "continuously" from one place to another that the requirements to establish total disability under the converted policy were and did become much more rigid than previously.

The Federal district judge followed our argument and upheld our contention that the requirements were more rigid under the converted policy than were previously set forth under the old-term policy.

The court sustained our motion for a directed verdict and directed a verdict against this man, Guy Wheaton, the plaintiff.

Guy Wheaton was poor and could not afford to take an appeal in the Eighth Circuit Court of Appeals, and consequently appeal was not taken and was not processed, and Guy Wheaton, at this time is without the benefit of insurance payments which I now firmly believe he is entitled to. This was one of the earliest cases tried in

the country on this question. And it was one of the first converted-insurance cases tried in the United States.

Subsequent to the trial of our case in the Federal district court in Omaha, cases were appealed to the circuit courts of appeals over the country, and the circuit courts of appeals did not take the version which the district court of Omaha had, and it is now definitely established by the law that the requirement for permanent and total disability under a converted policy is the same as they were previously interpreted under the old-term policy.

So, what we did with our so-called legal brainstorm that we had in Omaha, back in the spring of 1936, we beat this veteran out of his insurance, and out of his $13,800 to which he was entitled under the $10,000 face value of his policy, and that is why I am here today.

I wish to try to get this committee to assist in righting a legal wrong that was done this man back in the spring of 1936, and I wish to do what I can to rectify a legal mistake that was made by the Government, by our Government, against this veteran.

I know there is an adverse report of record with this committee from the Veterans' Administration. However, let me say this for the benefit of the committee:

I was on the ground floor. I tried this case as the attorney representing the Veterans' Administration, with the title as trial attorney in the Department of Justice. It was my mistake foisted on the Federal district court in Omaha which beat this man out of his insurance policy.

I have gone over the letters which the Veterans' Administration has sent to Senator Wherry of Nebraska who introduced this bill and who is interested also in the passage of this measure. I know that the facts which the Veterans' Administration set out therein are based upon the finding of facts and the conclusions of law which I, myself, drew for the Federal court in Omaha and which were accordingly signed by the district judge.

I heard the testimony at the trial and had that case tried under the old legal theory of a term policy as it defined permanent and total disability, that man would have recovered in the fall of 1933. He was permanently and total disabled and a jury would have so found. I do not have any doubt about it at all.

I might say in passing, that the letter which Senator Wherry has received from the Veterans' Administration makes reference to those very findings of facts and conclusions of law which I myself drew and submitted to the judge of the Federal district court in Omaha at that time.

I know exactly what they provide. And for that reason I say that this man is entitled to relief.

In presenting this matter to the committee,—and I can tell you how cagily these findings of fact and conclusions of law were drawn—and I know all of the facts, sir; I know this man worked at impairment to his health. He would work 2 days and lay off 3, work 3 days and lay off 1. He would even have a cot on the job where he could lie down and rest during the day, and on one job he was only required to work 28 hours a week in order to satisfy the Government.

The CHAIRMAN. What does he do at the present time?

Mr. WAGENER. He is not doing anything. He was recently confined in the veterans' hospital in California.

His wife is working and supporting the family.

I have no doubt this man has been permanently and totally disabled and will so continue the rest of his life. I do not think the man will live very long.

Here, for example, is one phraseology I myself put in the findings of fact: "He was on the job with fair continuity * * *."

Under that kind of a definition, under the old war-risk term policy, he could have recovered.

The CHAIRMAN. What is this man's difficulty?

Mr. WAGENER. I do not know what it is now, sir, but at the time we tried this case, his difficulty—I just do not exactly recall. I know he had a migraine syndrome. That is one thing that runs in my mind.

I am testifying largely from memory on a case that we tried 10 or 12 years ago.

Note when the court entered this judgment, and I will just read this very briefly:

> As we view the evidence in this case, it is not sufficient to establish such an impairment of mind or body, either in the month of August 1932 or at any time while the converted policy of insurance was in force which continuously rendered it impossible for the plaintiff to follow any substantially gainful occupation.

And that is my writing, and the court goes right to the very phraseology of the definition which was in the converted policy at that time, and which we contended was different than the old term policy, and the court has since said there is no distinction and no difference.

So the committee can very easily see what we had in our mind at that time, and we made it more difficult for this veteran to recover under the policy. But the circuit court of appeals did not follow such erroneous legal theory.

The CHAIRMAN. The veteran had a converted policy?

Mr. WAGENER. Yes; if the Senator please, he had a converted policy. He converted his policy, paid his premium up until August of 1932, and brought this action in the year 1933, and we tried the case, as I recall, in the spring of 1936.

So he almost had his insurance in force at the time of trial.

The CHAIRMAN. Your contention is that later decisions have established a rule consonant with the old-term policy?

Mr. WAGENER. Yes, Senator.

The CHAIRMAN. And that they would not now sustain the same findings which were sustained then?

Mr. WAGENER. That is exactly it, Senator. We did this man an injustice. I did this man an injustice. The Government did this man an injustice, and he has no avenue to which to turn at this time. He cannot try his case again. He has had his so-called day in court. but under an erroneous legal theory we foisted off on the court and which the courts now do not sustain at all. He cannot go to the Veterans' Administration because the Veterans' Administration can say that he had his day in court.

They can say, "We have no authority, nor duty, nor responsibility at this time because we cannot pay his insurance."

The court erred in this particular case and this is the only avenue open to this veteran at this time.

I am here because, if it may be said, my conscience bothers me. I did this man a wrong. We did him a wrong. Inadvertently, of

course. We did not so intend, but it happens in view of the subsequent decisions of the circuit courts of appeals over the country, we did this man a wrong.

I am firmly convinced any jury in the United States would hold this man totally and permanently disabled from the date of lapse of his insurance policy. I have no doubt about that at all, because the man never worked continuously, and was unable to do so.

We were dead wrong, as Government attorneys, in insisting there was a difference in the two definitions.

The CHAIRMAN. I think you have made that very clear.

Mr. WAGENER. That is all the time of this committee I care to take. I simply wish to see a wrong righted insofar as this veteran is concerned.

I also have here an affidavit from the attorney who represented this man at the time of trial, Mr. Carl Self, from Omaha, Nebr., and I ask permission to enter his affidavit into the record at this time.

The CHAIRMAN. It will be put into the record.

(The affidavit is as follows:)

GENERAL AFFIDAVIT RE GUY WHEATON

STATE OF NEBRASKA,
County of Douglas:

Carl T. Self, being duly sworn and cautioned, deposes and says:

1. That he is a resident of Omaha, Nebr., and has been since the year 1902, and that he is a practicing attorney in the city of Omaha, Nebr., and has been since the year 1912, and that he is qualified to practice in the State courts of Nebraska, and in the Federal Court in and for the District of Nebraska, and the Eighth Circuit Court of the Federal Courts and that he represented and acted as attorney for Guy Wheaton in his action against the United States of America which case was filed in the Omaha division of the Federal Court of Nebraska, and that said action was on a converted insurance policy issued by the United States of America, to World War Veterans No. 1 known as war-risk insurance and that said policy contained a disability clause providing that in the event that the insured became totally and permanently disabled that he was entitled to recover under the policy and that said policy had matured on that event. That said action was brought on that provision of the said policy of insurance issued to the said Guy Wheaton.

2. That the issues were drawn in the said action and the case came to trial in Omaha, in the said Federal court and that the Honorable James Donohoe, judge of the court, was the presiding judge at the trial. That this affiant tried said action for the said Guy Wheaton in the said court, and that a number of witnesses testified in the said action, and that all of the witnesses, including the doctors, testified that the said Guy Wheaton was not able to carry on any substantial gainful occupation continuously. The doctors testified that his physical ailments and disability was of a permanent character and that he was totally disabled so that any physical or mental work or occupation would be injurious to his health and would precipitate serious injury to his health and might even cause death to said veteran. He was a veteran of said World War and had taken out war-risk insurance and has been disabled and was discharged on account of said disability and remained continuously under a doctor's care to the time of said trial. He obtained some employment in a facility for the reclamation of transient sojourners and other men out of employment which was operated under the sanction of the Government, but sponsored by local businessmen of the community, and it was his duty to arrange programs and recreation for said men and he received a small allowance for said employment, but his employer said and testified, which testimony was supported by a number of witnesses, that he would work from an hour to 3 hours at a time and then he would have to retire to his bed, a cot which was provided for him in his place of employment, and he would have to rest for from 1 to 3 hours, before he would be able to continue with his work. His employer testified that he only retained said Wheaton in this disabled condition because he knew he was a disabled veteran and wanted to help him as he wanted to help all disabled veterans. Wheaton's doctor said in his testimony that the kind of work was injurious to his health for he would

never get any better and would continue to grow worse if he continued in his occupation. The testimony of all the witnesses was conclusive, and all agreed that said Wheaton had been sick and unable to work at any employment that would give him a substantial gainful occupation. But the testimony was that he had, although he was continuously sick and disabled, worked some due to his ardent desire to support his wife and children, for they were in hard circumstances and had no funds upon which to live, and part of the time their relatives contributed toward their support, all of which was brought out in the evidence in the case.

3. At the conclusion of the case a motion was made by the attorneys trying the case for the Government for a directed verdict for the Government, and the motion was argued, and it was urged that due to the transposition of the word "continuously" in the converted insurance policy that it conveyed a different meaning than it had in the former war-risk insurance policies. It was contended that while under the former war-risk insurance policies a disabled veteran could carry on an occupation if it was injurious to his health or if his disability would recur because of such employment he might even work for several months, which the courts and the law had determined was not continuously carrying on a substantial occupation, but under the converted policy of insurance if the veteran worked at all it was continuous even though it did injure his health or that he was obliged to quit on account of his disability. The court held to the contention of the Government attorneys and directed a verdict for the Government. That the said Wheaton was without funds and that his relatives had no funds so that he was unable to appeal the case to the circuit court of appeals.

4. Since the time for appeal had expired in said action the courts have decided that the said converted policies of insurance containing the word "continuously" that it had the same meaning as in the former war-risk-insurance policies as pertaining to disability of veterans and that even though the disabled veteran did do some work for short periods of time it would not be continuous and would therefore permit him to recover under his converted policy of insurance. This veteran was thus deprived of his rights through error, and the last account this affiant had of this veteran he was unable to work and was not employed but was a complete invalid. This information was conveyed to this affiant a few months ago.

CARL T. SELF.

OMAHA, NEBR.

Subscribed and sworn to by Carl T. Self, before me this 21st day of May A. D. 1948, at Omaha, Nebr.

[SEAL]

JOHN P. FORD,
Notary Public.

Mr. WAGENER. I wish also to say that I visited with Senator Wherry, and I am privileged to state that Senator Wherry has the same view on this legislation I have.

Senator Wherry was unable to be here this morning, and he is very much in favor of this legislation and would make the same remarks in the same vein, in the same light, and along the same lines I have made here today. He expects to file his statement with the committee.

Thank you.

(The statement is as follows:)

STATEMENT OF SENATOR KENNETH S. WHERRY A UNITED STATES SENATOR FROM THE STATE OF NEBRASKA, IN CONNECTION WITH S. 847, A BILL FOR THE RELIEF OF GUY ALBERT WHEATON

Guy Albert Wheaton was a veteran of World War I, and during his service applied for and was granted war-risk term insurance in the face-value amount of $10,000. Such insurance in the event of maturity provided benefits based on permanent and total disability.

Subsequent to this veteran's discharge, he carried his insurance and paid premiums thereon, converting the same, and continuing to pay premiums on the converted policy until August of 1932. Mr. Wheaton felt that he was permanently and totally disabled and discontinued paying premiums, claimed maturity of the policy, and brought suit, as was permitted under war-risk legislation.

His claim was denied by the Veterans' Administration, and trial was had in the Omaha Federal District Court, either in the late fall of 1935 or early spring of 1936.

It was contended by the Government at the time of trial that the definition of "permanent and total disability," as set forth in Wheaton's converted policy, made the requirements for proving such permanent and total disability more stringent, and such contention of the Government was sustained by the Federal district court, when, upon defendant's motion for new trial, the court granted such motion and entered judgment for the defendant, the United States of America.

Motion for new trial was filed by plaintiff, was overruled, and no appeal taken because the veteran could not afford the expense of further litigation.

Subsequent to this decision, the Federal courts and more particularly the appellate courts held that the requirements for proving permanent and total disability under a converted policy were no different than as required under the old term policies; and, thus, established definitely that in Wheaton's case an error was committed to the injustice of this veteran, Wheaton.

Veterans' Administration files disclose a definite disability as of the date of August 1932, when this veteran claims permanent and total disability; and the evidence adduced in the trial of this case established that this man would have been permanently and totally disabled if such disability were interpreted under the war-risk term policy.

The veteran was rated permanently and totally disabled by the Veterans' Administration September 4, 1940, and their files disclose a disability prior to that date and prior to August of 1932.

Investigation of Department of Justice files indicates that the case was tried under the erroneous legal theory that the definition of "permanent and total disability" under a converted policy was different than the definition of "permanent and total disability" under a term policy. Department of Justice files establishes that on January 7, 1936, the court stated in its opinion that the requirements were more stringent under the new definition.

The report of the trial by Mr. Wagener, the then trial attorney for the Department of Justice who tried this case, and which report is dated January 8, 1936, also establishes that the case was tried under this erroneous legal theory.

Furthermore, the Department of Justice files also in two paragraphs, namely, 4 and 5 of plaintiff's motion for new trial, which motion was filed in the court on January 9, 1936, establishes definitely that the case was tried under the theory that the requirements for recovery under the converted policy were much more stringent.

The assumption of the Government that there was a difference in the definitions of "permanent and total disability" and that the requirements for maturity of the policy were more stringent, and this theory of the Government, as sustained by the Federal district court, Omaha division, in its opinion of January 7, 1936, is one, which, while not reversed in this particular case, was definitely established by subsequent appellate court rulings as erroneous.

For the foregoing reasons and conclusions, definitely based upon and established by Government records, I am convinced that a grave injustice was done this veteran. For that reason I have introduced this legislation and sincerely urge a favorable report of the same by this committee and passage by the Senate of the United States.

The CHAIRMAN. Mr. BIRDSALL, do you have anything to add?

Mr. BIRDSALL. Unless there is a possibility of correlating this testimony to see whether there is any supplemental information should be in your possession. That is about the only angle I could see.

The CHAIRMAN. What do you have to say about the later construction of the court of this particular policy?

Mr. BIRDSALL. I think Mr. Lawler is acquainted with litigation and the history of that point and probably would be helpful to you on this.

Mr. LAWLER. Mr. Chairman, as Mr. Wagener stated, the original definition of "permanent and total disability" was inability to continuously follow a substantially gainful occupation.

As the cases were tried, over a period of several years, courts emphasized the provision in the definition that the insured be able to

continuously follow a gainful occupation, so that short breaks in employment due to any cause was regarded as sufficient evidence to meet the definition of total disability.

The Veterans' Administration, in the converted policy, defined "permanent and total disability" as one which continuously prevented the disabled person from following a substantially gainful occupation.

When that change in definition was urged in the defense of a converted policy, the courts held there was no substantial difference intended between ability to continuously follow a substantially gainful occupation and ability to follow a substantially gainful occupation continuously.

The CHAIRMAN. In other words, as far as this particular point is concerned, the court saw no difference between the two policies?

Mr. LAWLER. That was the ruling.

The CHAIRMAN. As to this particular case, did the court in this particular case hold there was a difference, and did it base its opinion on that assumed difference?

Mr. LAWLER. I do not recall, Senator. My recollection is that the court simply made the finding that the evidence did not show he had any impairment of mind which continuously rendered it impossible for him to work.

The CHAIRMAN. Do you recall the nature of his illness?

Mr. LAWLER. I do not recall.

The CHAIRMAN. I think we ought to have that in the record.

Mr. WAGENER. I might say, Senator, as I recall it and have so testified at the time we tried this case it was migraine syndrome, whatever that is.

I know the man was afflicted with terrific headaches that would be brought on by some mental or physical effort. He still has the same affliction, and we could very easily get his affliction into the record from the Veterans' Administration. This veteran has been, since the trial, rated as permanently and totally disabled by the Veterans' Administration.

The CHAIRMAN. One or the other of you should put something in the record on this. We cannot consider the case completely blind.

Mr. LAWLER. The Veterans' Administration will be glad to.

The CHAIRMAN. Give us a quick letter on that.

Mr. LAWLER. Yes.

(The information requested will be found on p. 13.)

The CHAIRMAN. I am particularly interested in the point which has been asserted here that the court misconstrued, in a legal sense, the meaning of the converted policy. If the opinion of the court rested upon a misconstruction of the legal import of the converted policy, if later decisions set the matter at rest and are contrary to the opinion of the court, I think that is an important fact in the case.

Mr. WAGENER. I can testify to that positively, Senator Millikin, because I tried the case for the Government. I drafted the findings of fact and conclusions of law and the judgment which the court signed, and the judgment was so written up in the terminology and phraseology of what we thought was the new definition of "total disability."

The CHAIRMAN. Was there any opinion?

Mr. WAGENER. The court did not render an opinion, all the court did was sign the findings of fact, the conclusions of law, and the judgment; and I will state positively that the court did enter the judgment in the phraseology of what we thought was the new definition.

The CHAIRMAN. I should think the Veterans' Administration would have some record of the case which would indicate the legal theory upon which you were proceeding.

Mr. LAWLER. The litigation records in that case are with the Department of Justice. The Veterans' Administration does not, or has not, since 1933, defended war-risk-insurance cases in the Federal court. That was transferred to the Department of Justice.

The CHAIRMAN. Can you take a look at the Justice Department's file?

Mr. WAGENER. I think so.

The CHAIRMAN. If you have any difficulty, the clerk will request the Justice Department to allow you to examine the file.

Mr. WAGENER. Fine.

(The following was submitted:)

DEPARTMENT OF JUSTICE,
Washington, May 28, 1948.

Mr. SHERWOOD B. STANLEY,
Clerk, Committee on Finance,
United States Senate, Washington, D. C.

DEAR MR. STANLEY: This acknowledges your letter of May 27, 1948, addressed to Mr. D. Vance Swann, Chief of the Veterans Affairs Section, Claims Division, Department of Justice. You request that you be advised as to what the Department of Justice records disclose with respect to the case of *Guy Albert Wheaton* v *United States*, in which judgment was rendered against Wheaton in the United States District Court for the District of Nebraska, to be used in connection with a hearing being held on S. 847, a measure pending before this committee for the benefit of said Guy A. Wheaton.

A review of the Department of Justice files discloses that this insured brought an action in the United States District Court for the District of Nebraska on September 28, 1933, alleging that he became permanently and totally disabled on August 30, 1932, at which time he had in force a $10,000 contract of United States Government life insurance, and that by reason of such permanent total disability the contract matured as of August 28, 1932. The case came on for trial in January 1936 and resulted in a finding for the defendant against the plaintiff. In its opinion dated January 7, 1936, the court stated:

"The Government contends that under the terms of the converted policy, a greater degree of disability is required to mature the policy than is required under the regular term insurance. Both contracts provide that the policy shall mature in case of permanent and total disability. The term 'permanent and total' as contained in the term insurance was defined by the Bureau as 'any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation,' and this definition has been generally accepted by the courts.

"In the converted policy we find a clause defining the term 'total permanent disability' within the meaning of the policy, in the following language: 'Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation.'

"This latter definition, we think, is much more restricted. To our mind there is a decided difference between the language 'follow continuously any substantially gainful occupation' and 'continuously renders it impossible to follow any substantially gainful occupation.' However, we do not deem it necessary to our decision for us to undertake to determine just what extra degree of proof is required, other than to determine that it is a greater degree than under the regular term policy. As we view the evidence in this case, it is not sufficient to establish such an impairment of mind or body, either in the month of August 1932 or at any time while the converted policy of insurance was in force, which continuously

rendered it impossible for the plaintiff to follow any substantially gainful occupation, or which rendered it impossible for him to follow continuously any substantially gainful occupation."

Counsel for the plaintiff filed a motion for new trial, which was subsequently denied, and among the grounds stated in the motion for new trial was the contention that "* * * the court erred in the application of the law in regard to converted policies of war risk insurance as regards the meaning of the term 'permanent total disability' and that the court erred in the application and meaning of the term 'continuously renders it impossible to follow any substantially gainful occupation' and that the court erred 'in its finding that a greater degree of proof is required in this case than under the regular term policy of war risk insurance'."

The above information is all a matter of record and the original instruments relating thereto may be found in the office of the United States district clerk for the district of Nebraska, Omaha division, in the case of *Guy A. Wheaton* v. *United States*, No. 3188 Law.

In his report of the trial of the case to Mr. Will G. Beardslee, the then Director of the Bureau of War Risk Litigation, Department of Justice, by letter dated January 8, 1936, Mr. Frederick A. Wagner, who was the field attorney for the Bureau of War Risk Litigation and who represented the Government upon the trial of the case, states that the evidence produced upon the trial showed that the plaintiff, although employed at a salary of $80 per month, was never continuously on the job. He would report to the CWA camp "* * * for several hours a day for 2 or 3 days and then would be home sick for a day or so. Thus, his employment was not even continuous through the day, let alone being continuous throughout any week. He was always off 2 or 3 or 4 days a week and under those circumstances could hardly be held as continuously working, under the definition of permanent and total disability in a term policy.

"The defendant did not dispute the foregoing facts, but defended on the ground that the definition of total disability under a converted policy was, as the court states in its opinion, more restricted, and therefore placed a greater burden on the plaintiff and while he was not continuously employed, yet it was not continuously impossible for him to work."

It is hoped that this information will be of assistance to the committee, but if further information is desired, I should be pleaesd to have you call upon me.

Sincerely yours,

NEWELL A. CLAPP,
Acting Assistant Attorney General.

The CHAIRMAN. My thought, of course, is that the file itself may give an additional confirmation—without challenging anything you say—of your theory.

Mr. WAGENER. I know the Department of Justice files will bear out what I have testified to, because I represented the Department of Justice in this case, and our correspondence back and forth should be in that file, and I am personally very happy to have Mr. Lawlor here today because he was a boss of mine back in those days when we were trying this lawsuit, and I am glad to have Mr. Lawlor bear me out on the legal theory I am trying to show to the committee which was changed to this man's disadvantage.

The CHAIRMAN. We are a little handicapped here because we do not have the opinion of the court to confirm what you say is the theory of the case.

Take a look at the Justice files and maybe you can buttress that angle a little bit.

Mr. WAGENER. Thank you.

The CHAIRMAN. Mr. Birdsall?

Mr. BIRDSALL. I think we ought to examine our report more carefully to be sure you have all the facts in that case we have of record.

The CHAIRMAN. Give us a quick letter for the record.

Mr. BIRDSALL. Yes, sir.

(The information referred to follows:)

MAY 28, 1948.

Hon. EUGENE D. MILLIKIN,
Chairman, Committee on Finance,
United States Senate, Washington 25, D. C.

DEAR SENATOR MILLIKIN: This is in response to your request for medical and other information relative to the case of Guy Albert Wheaton made in connection with the hearing on S. 847, Eightieth Congress, a bill for the relief of Guy Albert Wheaton.

The claims folder of this veteran is in the Los Angeles regional office of the Veterans' Administration and the reports of his medical examinations are not presently available. The available records in central office indicate that the veteran was admitted to the Veterans' Administration facility, Lincoln, Nebr., on June 26, 1933, for examination and observation and that on discharge therefrom July 25, 1935, the following diagnoses were returned:

"1. Psychoneurosis, hysteria, mild to mod.
"2. Synechia, mod., right iris, nonsym.
"3. Perforation nasal septum, mild, nonsym.
"4. Visceroptosis.
"5. Cicatrix, appendiceal, old, nonsym.
"6. Missing teeth Nos. 1, 7, 19, 20, 29, 30.
"7. Caries, teeth Nos. 15, 16, 17, 32.
"8. Salivary calculus."

The Veterans' Administration was furnished a copy of the special findings of fact and declarations of law and memorandum opinion of the court rendered in the case of *Guy H. Wheaton* v. *United States* on his United States Government life-insurance policy, copies of which are enclosed. It will be noted that the special findings of fact and declarations of law was "Dated this ——— day of January, 1936," indicating that this case was tried some time in January 1936.

Attention is invited to the decision rendered by the Fifth Circuit Court of Appeals, under date of April 27, 1931, in the case of *Ross* v. *United States* (49 F. (2d) 541), in which the court stated:

"Appellant requested the court to charge the following definition of total disability: 'Total disability means any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation.'

"Instead of giving the charge requested, the court charged the definition as follows: Total and permanent disability means 'any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it'."

* * * * * * *

"There is no substantial difference between the definition given and the definition asked. What slight difference there is results from the transposition of the word 'continuously,' which could be left out altogether without weakening the regulation. To be able 'to follow any substantially gainful occupation,' within the practical common-sense meaning of the phrase, implies ability to work at it all the time. Under neither the definition requested nor the one given by the court could the jury reasonably have found that Ross was permanently and totally disabled so as to mature the policy while it was in force. * * *"

Attention is also invited to the decision rendered by the Fifth Circuit Court of Appeals, under date of December 19, 1931, in the case of *United States* v. *Martin* (54 F. (2d) 554), in which the court made the following statement as to the variations in the definition of permanent total disability:

"As to the definition, we do not think that when properly construed, it adds anything to the policy terms. Whether that definition, or the one appearing in the 1925 Veterans' Bureau schedule of disability ratings, with the 'continuously' transposed to modify 'renders' is used, the result of a reasonable construction should be the same."

It will be observed that as early as 1931 the courts have attached the same practical significance to both definitions. Moreover, it will be noted that the findings of fact and declarations of law, as well as the opinion of the court, do not contain any indication that the court would have entered judgment for the plaintiff under either of the definitions in question.

Very truly yours,

G. H. BIRDSALL,
Assistant Administrator for Legislation.

Enclosures.

In the District Court of the United States for the District of Nebraska—Omaha Division

Guy A. Wheaton, Plaintiff versus United States of America, Defendant—No. 3188, Law—Special Findings of Fact and Declarations of Law

This cause coming on for hearing upon the defendant's motion for special findings of fact and declarations of law, and the court being advised in the premises, makes the following special findings of fact and declarations of law:

SPECIAL FINDINGS OF FACT

1. That the plaintiff, Guy A. Wheaton, was at the time of the filing of this action and now is a citizen and resident of the Omaha division of the District of Nebraska.

2. That the plaintiff, Guy A. Wheaton, was insured by the defendant; that the plaintiff, Guy A. Wheaton, on July 1, 1927, applied for and was granted a 5-year term converted policy which expired midnight of June 30, 1932.

3. That plaintiff, Guy A. Wheaton, was on July 8, 1932, to be effective July 1, 1932, granted a further extension of said policy upon his representation that he was not on July 8, 1932, permanently and totally disabled.

4. That premiums on said extended 5-year term converted policy were paid to and including the month of August 1933, and that no premiums were paid by the plaintiff, Guy A. Wheaton, after the month of August 1933.

5. That claim of permanent and total disability was filed by the plaintiff, Guy A. Wheaton, with the defendant on May 25, 1933, and that said claim for permanent and total disability was denied by the defendant before this action was brought.

6. That the policy herein sued upon provided for maturity of the policy in the event the insured, this plaintiff, Guy A. Wheaton, became permanently and totally disabled while the policy was in force, and said policy provided that the total disability referred to in the policy herein sued upon was "any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation."

7. That this plaintiff, Guy A. Wheaton, was employed by the United States Government on a CWA project as a compensation clerk from January 11, 1934, until May 3, 1934, during said period of time drew $33.06 each and every week during said employment, while so employed was away from his desk on a few occasions, was on the job with fair continuity, was intelligent, a good administrator, his work was satisfactory, he substantially performed the duties of his occupational position, and he left said employment because the Federal CWA project was discontinued.

8. That Guy A. Wheaton was employed by the United States Government on an FERA project in educational and vocational-training work, his duties being to contact transients and interest them in the United States Government's educational program for transients; that said employment began November 17, 1934, and continued until August 15, 1935; that sometime in February 1935 plaintiff, Guy A. Wheaton, was placed in charge of said program at the Twenty-second and Hickory Street transient center, and continued in such capacity until August 15, 1935; that during said period of time he was expected to work 28 hours per week and would average 28 hours per week from November 17, 1934, to August 15, 1935, and drew $14 per week; that this plaintiff's work was satisfactory, he was intelligent, performed the work expected of him, and substantially performed the duties of his occupational position.

9. That this plaintiff, Guy A. Wheaton, on August 15, 1935, was appointed acting director of the Carter Lake transient camp in the city of Omaha; that said appointment was confirmed September 15, 1935, since which date this plaintiff, Guy A. Wheaton, has been in charge of and responsible for the activities of said camp; that he has since the date of September 15, 1935, drawn a monthly salary of $80 plus subsistence or groceries sufficient to maintain a family of four; that while his time at said camp has been intermittent, yet since August 15, 1935, down to the present time, he has been responsible for the camp and its activities, he has been a good administrator or director of the camp, his work in such capacity has been intelligent and satisfactory, he has performed the work expected of him, and he has substantially performed the duties of his occupational position.

10. That this plaintiff is and has been since August 1932 afflicted with a condition of migraine syndrome, which periodically causes headache spells, and only during said spells is it disabling.

11. That this plaintiff has since being employed by the Federal Government during the periods of January 11, 1934, to May 3, 1934, and November 17, 1934, to the present time, done the things that constitute a substantial performance of his occupational duties with satisfaction to his employer, and said employment has been substantially gainful."

DECLARATIONS OF LAW

1. That under the pleadings, evidence, and law herein, total disability is "any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation."

2. That under the pleadings, evidence, and law herein, plaintiff's disability of migraine syndrome has not since August 1932, or at any time while the policy was in force, existed to such an extent as to continuously render it impossible for the plaintiff to follow any substantially gainful occupation.

3. That under the pleadings, evidence, and law herein, plaintiff did not in August 1932, or at any time while this converted policy of insurance was in force, have such an impairment of mind or body which continuously rendered it impossible for him to follow any substantially gainful occupation.

4. That under the pleadings, evidence, and law herein, plaintiff did not become permanently and totally disabled within the terms of this converted policy herein sued upon in August of 1932, or at any time while the policy was in force.

5. That under the pleadings, evidence, and law herein, the plaintiff is not entitled to recover from the defendant and the decision and judgment of the court is in favor of the defendant.

The plaintiff will be granted its exceptions.

Dated this ...... day of January 1936.

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District Judge.

In the District Court of the United States for the District of Nebraska—Omaha Division

Guy H. Wheaton, Plaintiff, versus United States of America, Defendant.—No. 3188, Law

MEMORANDUM

Donohoe, D. J.: A trial of this cause was commenced before a jury. When plaintiff rested at the close of his case, the defendant moved for a directed verdict for the reason that there was no substantial evidence which would sustain a verdict for the plaintiff, and that there was no substantial evidence that the plaintiff became totally and permanently disabled within the meaning of the terms of the converted policy, while the contract was in force. Thereupon, the plaintiff likewise moved for a directed verdict claiming that he was entitled upon the evidence which he had introduced to a verdict in that he had made a prima facie case. The jury was thereupon discharged, and the court has had the matter under consideration, the parties having submitted their written briefs in support of their motions.

Under the state of the record, necessarily there are no disputed facts. They are set forth in the special findings and will not be herein recited.

The Government contends that under the terms of the converted policy, a greater degree of disability is required to mature the policy than is required under the regular term insurance. Both contracts provide that the policy shall mature in case of permanent and total disability. The term "permanent and total" as contained in the term "insurance" was defined by the Bureau as "any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation," and this definition has been generally accepted by the courts.

In the converted policy we find a clause defining the term "total permanent disability" within the meaning of the policy, in the following language:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation."

This latter definition we think is much more restricted. To our mind there is a decided difference between the language "follow continuously any substantially gainful occupation" and "continuously renders it impossible to follow any substantially gainful occupation." However, we do not deem it necessary to our decision for us to undertake to determine just what extra degree of proof is required, other than to determine that it is a greater degree than under the regular term policy. As we view the evidence in this case, it is not sufficient to establish such an impairment of mind or body, either in the month of August 1932, or at any time while the converted policy of insurance was in force, which continuously rendered it impossible for the plaintiff to follow any substantially gainful occupation, or which rendered it impossible for him to follow continuously any substantially gainful occupation.

The special findings of fact and conclusions of law, requested by the defendant, will be entered herein. Judgment will be for the defendant, and the cause dismissed with exceptions to the plaintiff.

The CHAIRMAN. The hearing is closed.

(Whereupon, at 1 p. m., the committee recessed subject to the call of the chairman.)

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