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TEXT:

Administrative Allowances by Board of Veterans Appeals

QUESTIONS PRESENTED:

(a) Does the Secretary have authority, through "administrative allowances," to reverse a prior un-appealed decision of the agency of original jurisdiction (AOJ) on the basis of a "difference of opinion"?

(b) Does the Secretary have authority, through "administrative allowances," to reverse a prior decision of the Board of Veterans Appeals (BVA) on the basis of a "difference of opinion"?

(c) If the Secretary has the legal authority to administratively allow cases involving AOJ or BVA finality, does the practice contemplated by the provisions of 38 C.F.R. §§ 19.5(b) and 19.184, by which the Chairman and Vice Chairman of the BVA grant these allowances, represent a valid exercise of the Secretary's statutory authority to promulgate rules and regulations and to assign duties and delegate authority to officers and employees?

COMMENTS:

1. Administrative allowances by the BVA Chairman or Vice Chairman are currently granted in cases involving AOJ finality, as well as cases containing a prior BVA decision. For reasons which will become apparent, these two types of grants will be examined separately in this opinion.

2. In its scheme for granting veterans' benefits, Congress specifically included several equitable relief provisions, but none expressly provide legal authority for the BVA practice of allowing the Chairman or Vice Chairman to reverse final decisions of the AOJs or the BVA based on a difference of opinion. Administrative allowances are apparently available in every case reviewed by the BVA, regardless of the subject matter. There are, however, no equitable provisions enacted by Congress broad enough in scope to serve as legal authority for the administrative allowance practice. See, e.g.,38 U.S.C. § 103(a) (circumstances under which invalid marriages deemed valid); 38 U.S.C. § 1802(b) (if circumstances deemed appropriate Secretary may waive some statutory conditions concerning home loan guaranties); 38 U.S.C. § 3102

(Secretary may waive recovery of overpayments when against equity and good conscience).

3. By far, the broadest equitable relief provision contained in title 38 is the grant of authority contained in subsection § 210(c). It authorizes the Secretary (formerly, the Administrator) to grant equitable relief when benefits were not provided by reason of an administrative error or when a veteran or his family has experienced a loss as a result of reliance upon an erroneous VA eligibility or entitlement determination. See 38 U.S.C. § 210(c)(2) and (3). In view of the requirement that there be "error" before this relief is authorized, section 210(c) cannot be construed as providing legal authority for administrative allowances, which are based on a "difference of opinion" rather than a finding of error. Also, the Secretary's section 210(c) authority is one which has not been delegated. See 38 C.F.R. § 2.7(c).

4. Without a specific legal authority for this practice, it becomes necessary to examine the more general statutory provisions concerning the Secretary's authority to assign duties and delegate authority to his executive heads. See 38 U.S.C. §§ 210(b) and 212(a). These provisions are cited in both 38 C.F.R. § 19.5(b) and s 19.184 as the legal authority for administrative allowances. Those cites have remained unchanged in the proposed BVA appellate regulations and rules of practice published for comment in August 1989. See proposed sections 19.13 and 20.904, 54 Fed. Reg. 34341, 34360 (August 18, 1989).

5. In pertinent part, 38 U.S.C. § 212 (a) grants the Secretary authority to assign duties and delegate authority to officers and employees. Similarly, 38 U.S.C. § 210(b) provides that "(e)xcept to the extent inconsistent with law, the Secretary may consolidate, eliminate, abolish, or redistribute the ... activities in the Department of Veterans Affairs, ... and fix the functions thereof and the duties and powers of the executive heads." (Emphasis added). The Secretary clearly has broad statutory authority to "fix" the functions and duties of his executive heads, including the Chairman and Vice Chairman of the BVA. However, that authority may only be exercised to the extent that it is consistent with law. See 38 U.S.C. § 210(b)(1). See also Traynor v. Turnage, 485 U.S. 535 (1988). Marozsan v. United States, 852 F.2d 1469 (7th Cir.1988) (en banc); and United States v. Transou, 572 F. Supp. 295 (M.D. Tenn. 1983).

6. Chapter 71 of title 38, United States Code, describes the operation of the Board of Veterans Appeals. In this chapter, Congress has specifically placed with the Board of Veterans Appeals the authority to make final decisions on all appeals to the Secretary on questions on claims involving veterans' benefits. See 38 U.S.C. § 4004(a). Congress has provided, with some specificity, how the Chairman will divide the Board into sections and designate which claims will be heard by each section. See 38 U.S.C. § 4002(a) and (b). In subsection (c), section 4002 provides that:

A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding.

7. Prior to passage of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), 38 U.S.C. § 4003 elaborated on the manner in which a "determination of the section" was to be made. It provided that:

The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board ... When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of the members of such section shall constitute the final determination of the Board.

8. Currently, 38 U.S.C. § 4003 provides, in pertinent part, that:

(a) Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case.

(b) If the Chairman orders reconsideration in a case, ... the decision of a majority of the members of the expanded section shall constitute the final decision of the Board. (As amended Pub. L. No. 100-687, Title II, sec. 202(a), 102 Stat. 4105, 4110 (1988)).

9. Both section 4002(c) and section 4003 squarely place decision-making in BVA proceedings with the Board sections. In fact, even the Chairman's previous authority to concur in less than unanimous decisions has been removed. Under general rules of statutory construction, there is a presumption of change where statutory language is changed, and each and every word of the statute must be given effect. See 1A N.J. Singer, Sutherland Statutory Construction §§ 22.29, 22.30 (4th ed. 1985). Under these rules, the change in language deleting the Chairman's "vote" in cases involving a dissent is significant. It signals an intent on the part of Congress to further remove the Chairman from voting on the merits of individual cases. In view of this, we believe that the practice of administrative allowances by the Chairman or the Vice Chairman is inconsistent with the cited provisions of chapter 71 of title 38, United States Code. Illustrating this inconsistency is the actual format of the decision, in which a Board section ostensibly upholds the previous denial of benefits. That denial is then "overridden" by an administrative allowance, signed by the Chairman or Vice Chairman. This practice allows the Chairman or Vice Chairman, acting alone, to determine the outcome of certain BVA decisions in contravention of the provisions of chapter 71 of title 38, United States Code.

10. To summarize, we find that the Secretary does not have authority to promulgate regulations authorizing administrative allowances by the Chairman or Vice Chairman of the BVA in cases involving AOJ finality. However, we note that the applicable statutes do not foreclose further action or designate the standard of review applicable to such further action when AOJ finality is involved. See 38 U.S.C. § 4005(c) and (d)(3). Under 38 C.F.R. § 3.104, a decision of the AOJ which is not timely appealed is final but may be revised if there is "clear and unmistakable error" or if a "difference of opinion" is involved. See 38 C.F.R. § 3.105(a). In view of this, a "difference of opinion" standard of review could be used by BVA sections examining cases involving AOJ finality and this would represent a valid exercise of the Secretary's rule-making authority in 38 U.S.C. § 210(c).

11. On the other hand, Congress has long dictated the standard of review for cases involving a prior BVA decision. Prior to the Veterans' Judicial Review Act, 38 U.S.C. § 4003 provided that the determination of a section of the Board "shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record." Section 4003 also allowed for reaching a contrary conclusion on the basis of additional official information from a service department. Congress retained the "obvious error" language when it revised section 4003 to provide for reconsideration of BVA decisions. Pub. L. No. 100-687, 102 Stat. 4105, 4110 (1988). Congress likewise codified the right to reopen a claim based on new and material evidence. 38 U.S.C. § 3008. There is no question that, other than in a reconsideration setting, prior BVA decisions will be considered final and a different outcome can only be reached if an "obvious error" is identified or new and material evidence is obtained. Therefore, we believe that the "difference of opinion" standard of review which is intrinsic to the administrative allowance practice cannot legally be applied to cases involving a prior BVA decision denying the same benefit. Therefore, not only do administrative allowances by the Chairman or Vice Chairman run counter to the statutory provisions concerning the appropriate decision-maker but, when BVA finality is involved, the practice also involves a standard of review which is inconsistent with that established in 38 U.S.C. § 4003.

12. In your recent memorandum, you recommended that any change in these policies be effectuated through rulemaking rather than by issuance of a General Counsel opinion. While we agree the proposed 38 C.F.R. §§ 19.13(b) and 20.904 should be withdrawn and a new rulemaking undertaken in conformance with this opinion, we nevertheless believe the unauthorized practices described above should be discontinued immediately. I, therefore, designate this memorandum a binding precedent.

HELD:

Under 38 U.S.C. § 4005(c) and (d)(3) and the broad authority of the Secretary to

promulgate rules and regulations necessary or appropriate to carry out the laws administered by the Department of Veterans Affairs, there is legal authority to establish a procedure whereby cases involving a prior un-appealed determination of an agency of original jurisdiction (AOJ) may, while on appeal to the Board of Veterans Appeals (BVA), be allowed based on a "difference of opinion." However, the current provision for "administrative allowances" contained in 38 C.F.R. §§ 19.5(b) and 19.184 places the authority to make that determination with the Chairman or Vice Chairman of the BVA. Despite some changes in the wording of these provisions as a result of Public Law No. 100- 687, 102 Stat. 4106 (1988), chapter 71 clearly specifies that it is the sections of the BVA which are charged by Congress with reaching "decisions" and "determinations" on all appeals to the Secretary. Therefore, administrative allowances by the Chairman or Vice Chairman are inconsistent with the current legislative scheme. For cases involving BVA finality, Congress has established, in 38 U.S.C. §§ 3008 and 4003, that BVA decisions are final unless reopened by new and material evidence, reconsidered, or corrected based on an "obvious error." The "difference of opinion" standard employed in granting administrative allowances in cases previously denied by the BVA is inconsistent with these provisions. Therefore, under current law the Secretary does not have legal authority to promulgate regulations establishing such a practice with regard to cases involving BVA finality. For the reasons given, 38 C.F.R. §§ 19.5(b) and 19.184 do not represent a valid exercise of the Secretary's authority to promulgate regulations or to delegate authority to executive heads under the provisions of 38 U.S.C. §§ 210 and 212.

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