DATE: 07-17-90

CITATION: VAOPGCPREC 31-90
Vet. Aff. Op. Gen. Couns. Prec. 31-90

TEXT:

Subject: Preservation of Disability Ratings (38 U.S.C. § 110)

(This opinion, previously issued as General Counsel Opinion 8-79, dated October 2, 1978, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

Does section 110 of title 38, United States Code, operate to protect for compensation purposes the 100% temporary convalescent disability rating assigned a veteran?

COMMENTS:

The veteran in this case was separated from service November 30, 1952, by reason of physical disability (shell fragment wounds). He was entitled to receive disability retirement pay, and when in April 1953 he was assigned a 100% convalescent disability rating by the Veterans Administration for residuals of his service-incurred injuries effective the day following his service separation, he did not elect to receive compensation in lieu thereof.

Then, as now, convalescent ratings were temporary evaluations, limited by law to a period of no longer than 12 months, whereupon the disabilities are to be reevaluated based upon current clinical findings under the generally applicable rating criteria.38 C.F.R. § 4.28. A Veterans Administration examination of the veteran for rating purposes was originally scheduled for May 1, 1953. However, he was notified on April 13, 1953, that the VA had received information from the service department that he was in receipt of retired pay, and that he should complete and return an enclosed form within 30 days if he chose to receive compensation in lieu of that pay. The letter also clearly advised him that his current 100% rating was subject to reduction based upon the findings of the physical examination to be conducted by the Veterans Administration. He was also notified that unless he responded within 30 days, it would be presumed that he did not wish to receive compensation. His claims file indicates that he did not so reply.

As a result, no further efforts were made by the VA to examine the veteran for rating purposes. However, in April 1976 he was hospitalized at a VA facility, and based upon the records of this treatment was assigned a 10% disability rating for residuals of the shell fragment wound of his head, and a 0% rating for a shell fragment wound scar of his right hand, effective April 28, 1976. It was determined that the convalescent rating should have been terminated effective June 30, 1953, and that there was insufficient evidence upon which to base a rating for the period June 30, 1953, to April 28, 1976. He was notified of the reduced ratings, and now through his accredited representative challenges the validity of this rating action.

The first sentence of the current section 110 of title 38, upon whose protective provisions the veteran relies, had its origin with Pub. L. No. 83- 311 (68 Stat. 29), and became effective March 17, 1954. This act provided that:

"... a rating of total disability or permanent total disability which has been made for compensation, pension, or insurance purposes under laws administered by the Veterans Administration, and which has been continuously in force for twenty or more years shall not be reduced thereafter, except upon a showing that such rating was based on fraud."

A review of the legislative history of this measure discloses its dual purpose: to spare a veteran the inconvenience, and the Government the expense, of repeated clinical examinations once a disability has been demonstrably static over a prolonged period of time, and, to prevent the reduction in monetary benefits upon which a veteran would understandably come to rely for support over the course of this length of time. Nowhere was this intent expressed more clearly than in the report on the proposal by the House Committee on Veterans Affairs:

"The effect of the bill would be to prevent future physical examinations in the case of veterans who have had such a disability rating for 20 or more years. Under existing laws, veterans who have a total or permanent total disability rating based on conditions other than disabilities resulting from blindness or anatomical losses are apprehensive that an examination ordered at some future date may not adequately represent their true condition of health and that, as a result of such examination, a reduction in rating may cause them to lose the benefits provided for such total or permanent total disability.

In the course of 20 or more years, veterans become accustomed to rely upon such benefits for the support of themselves and their dependents and are in constant uncertainty as to their future security. The enactment of the bill will eliminate such fear of loss and give veterans having total or permanent total disabilities which have persisted for 20 or more years assurance that they will not be deprived of benefits in their old age when continuance of support is most

needed.

The committee is of the opinion that there is but little or no probability of recovery from total or permanent total disability which has persisted for 20 or more years continuously and that in such cases it is most likely a waste of Government funds to require a physical examination to determine whether total or permanent total disability will continue after that date." H.R. Rep. No. 533, 83d Cong., 1st Sess. 1, 2 (1953).

Using the exact language of the first paragraph of the preceding quoted passage, the Senate Committee on Veterans Affairs reiterated in its report on the measure the concern that long-received benefits not be reduced (S. Rep. No. 1027, 83d Cong., 2d Sess. 1, 2 (1954)).

These valid, practical considerations were the basis for a decision by the Administrator that Pub. L. No. 83-311 did not operate to protect ratings of permanent total disability for purposes of pension and United States Government Life Insurance benefits when the awards were suspended before the expiration of 20 years when the whereabouts of two recipients became unknown, and it was later (after 20 years) clearly established that the two had become employable and no longer totally disabled during the period (and remained so). After referring to the legislative intent, the Administrator stated that:

"It cannot be said in either of these cases that the veteran had become accustomed to rely upon such benefits for the support of himself and his dependents in the course of 20 or more years for the reason, as pointed out above, that payments of benefits in each case were suspended many years prior to the expiration of the 20-year period because of the veteran's disappearance. Moreover, upon the basis of the facts as now revealed, it is believed that it cannot properly be said that permanent total disability has persisted in either case for 20 or more years."
1955, A.D.V.A. 954.

It was concluded that under the circumstances of those cases, where the veterans' locations had become unknown during the 20-year period, it could not be said that there were ratings of permanent and total disability continuously in force for 20 or more years within the meaning of Pub. L. No. 311, 83d Congress, and that the ratings could not be considered protected unless the veterans were subsequently found to have remained so disabled continuously over the required period.

Protection was extended to less than total ratings under § 110 by Pub. L. No. 445, 88th Congress (78 Stat. 464) approved August 19, 1964, which provided that:

"A disability which has been continuously rated at or above any percentage for twenty or more years for compensation purposes under laws administered by the Veterans' Administration shall not thereafter be rated at less than such percentage, except upon a showing that such rating was based on fraud."

Despite the choice of slightly different language ("Continuously rated" as opposed to "continuously in force") from that employed in Pub. L. No. 83-311 for total ratings, the legislative history of the act makes clear that the purpose for its enactment was to extend the same protection to less than total ratings, and that the same rationales for so doing applied. Hearings before the Committee on Veterans Affairs, House of Representatives, 88th Congress, Second Session, February 19, 1964; H.R. Rep. No. 1407, 88th Cong., 2d Sess. 1, 2 (1964); S. Rep. No. 1324, 88th Cong., 2d Sess. 1, 2 (1964).

Unpublished General Counsel opinions transmitted to the Chairman, Board of Veterans Appeals, in 1970 and 1971 dealt with the question here in issue in cases whose factual situations were substantially similar. In each case a veteran was assigned a service-connected disability evaluation for compensation purposes, opted instead to receive retirement pay for over 20 years, and thereafter was found to merit a disability rating considerably lower than that originally assigned. In the first of the two opinions, an originally assigned 60% rating was held to be protected notwithstanding that a current examination had resulted in a reduction in the rating to 0%. Citing this opinion as authority, it was concluded in the second opinion that a total rating was protected although current evidence indicated that a 60% rating was warranted under pertinent rating schedule criteria.

A review of these two earlier opinions discloses that, in interpreting 38 U.S.C. § 110 insufficient weight was given to the intent of Congress. In neither case were the ills Congress sought to cure by offering the protection present, since there had been no reliance on receipt of compensation for 20 years and there was not the prospect of needless, repetitive physical examinations of a veteran whose disability was shown to have stabilized over a period of 20 years.

HELD:

This office is now of the opinion that section 110 of title 38 protects against reduction only those ratings for compensation purposes which have been the foundation for the payment of awards for a period of at least 20 years, such that recipients have grown to rely upon the payments and the rating authorities have had reason to monitor the level of disability for possible changes. To interpret the language requiring that ratings be "continuously in force" or that disabilities be "continuously rated" to include other than "live" disability awards for which benefits are being paid was not the intention of Congress. Congress clearly would not have countenanced the absurd results which can and have flowed from a strictly literal interpretation of §110, and such constructions are not

favored when they lead to absurd results. United States v. Bryan, 339 U.S. 323 (1950); United States v. Second National Bank of North Miami, 502 F.2d 535 (5th Cir., 1974). Also, in the instant case, there is an additional factor which operates to compel the conclusion that protection of the rating is not afforded under § 110. The total convalescent rating assigned effective in December 1952 was limited by law to an effective duration of one year. Hence, by law, the rating assigned could not have been continuously in force, nor the disability continuously so rated, for a period of 20 years as required.

VETERANS ADMINISTRATION GENERAL COUNSEL
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