DATE: 07-18-90

CITATION: VAOPGCPREC 66-90
Vet. Aff. Op. Gen. Couns. Prec. 66-90

TEXT:

SUBJECT: Protection of Disability Ratings Assigned Under Superceded Criteria

(This opinion, previously issued as General Counsel Opinion 11-88, dated October 27, 1988, 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.)

QUESTIONS PRESENTED:

a. Whether it is legally appropriate to revise the rating schedule as it applies to evaluating defective hearing while at the same time requiring by memorandum that the change in rating methods results in no decrease in any evaluation assigned under the old criteria, regardless of the results of current audiometric testing under the new criteria.

b. Whether the Board of Veterans Appeals must maintain the prior rating levels under the old criteria if the audiometric findings under the new criteria would result in a reduction or discontinuance of compensation benefits.

COMMENTS:

The questions presented arose from the following situation. Effective December 18, 1987, the VA adopted new regulations for testing and evaluating the degree of disability attributable to hearing loss. 52 Fed. Reg. 17607-17611 (1987). The revised regulations were implemented to provide more accurate measurement of hearing impairment and, by providing for a 100% rating in the most severe cases, to recognize that profound deafness may be totally disabling. The new schedule requires evaluation of hearing loss based on a combination of pure tone averages and speech discrimination, as well as incremental ratings from 0% to 100%. It was prompted, in part, by a congressional request that the VA reassess the validity of its testing and evaluation methods, which had remained unchanged for nearly 30 years. After study, the VA found that advances in hearing-loss testing and improvement in hearing aid devices justified such revisions.

By memorandum dated April 6, 1988, the Chief Benefits Director instructed VA field stations that hearing disability ratings properly in effect on the day preceding the effective date of the change in testing methods are not to be reduced or discontinued in the absence of a finding of change in physical condition, citing paragraph 50.13b of M21-1 as authority. Paragraph 50.13b provides that, if a decrease in evaluation is due to changed criteria or testing methods rather than a change in disability, adjudicators

should apply the old criteria and make no reduction. In effect, the memorandum would grandfather in and protect the ratings of those veterans whose ratings were already in effect at the time of adoption of the new criteria.

With respect to the first question, grandfather or savings provisions are a generally acceptable means of avoiding hardship when new laws are implemented. They not only "protect against loss to those who may have relied upon prior laws or regulations but they serve a rational and useful purpose in encouraging orderly change in government to meet new and desirable ends...." Poynter v. Dreydahl, 359 F. Supp. 1137, 1143 (W.D.Mich.1972).

The grandfather provision at issue would, in effect, establish dual rating schedules for evaluating hearing impairment. Those individuals whose evaluations would be reduced solely by reason of the new rating methods would be maintained under the former, superceded criteria, presumably to avoid financial hardship. Although the purpose of the provision is laudable, we believe it contravenes the Administrator's statutory authority.

Congress has not specifically authorized the Administrator to institute multiple rating schemes. To the contrary, 38 U.S.C. § 355 directs, in part:

"The Administrator shall adopt and apply a schedule of ratings of reduction in earning capacity from specific injuries or combinations of injuries."

(Emphasis supplied). Section 355 literally provides for no more than one rating schedule.

Congressional intent to bar the use of multiple rating schedules is also clear from the legislative history of earlier statutes. For example, when the 1945 Schedule for Rating Disabilities was adopted to replace the 1925 Schedule under Public Law 458 (1946), House Report No. 1800 noted:

"As set forth in more detail in the report of the Administrator of Veterans' Affairs, this bill will accomplish a threefold purpose: (1) Provide uniform effective dates for increased disability pension or compensation awards resulting from the changes in ratings provided in the revised Schedule for Rating Disabilities, 1945; (2) permit application of the revised schedule in pending and certain other initial claims over periods prior to April 1, 1946, which will remove the necessity for use of two rating schedules, and facilitate the training of rating officers; and (3) as to World War I veterans, eliminate the necessity for applying as many as three different schedules, and protect existing ratings and awards under the 1925 schedule. Under the bill the need of more than one schedule in practically all future ratings will be eliminated."

H.R. Rep. No. 1800, 79th Cong., 2d Sess. 2 (1946).

Where savings clauses have been adopted by the VA to protect individuals in receipt of

benefits under former criteria, such clauses have been explicitly authorized by statute. For example, Public Law 458 (1946) provided in part:

"Sec. 2. Nothing in the revised Schedule for Rating Disabilities, 1945, shall be construed as requiring any reduction or discontinuance of compensation in cases rated and awarded under the Schedule of Disability Ratings, 1925, but on and after the first day of April 1946, except as to statutory awards and ratings provided under the World War Veterans' Act, 1924, as amended, as restored with limitation by the Act of March. 28, 1934, Public Law 141, Seventy-third Congress, as amended, awards in all cases shall be based upon the degree of disability determined in accordance with the revised schedule, 1945."

Similarly, in repealing the law authorizing graduated ratings for inactive tuberculosis, Congress specifically provided in Public Law 90-493 (1968) for protection of ratings in effect prior to adoption of the statute. Consequently, the former schedule of ratings was preserved for application in claims involving protected ratings.

We note in passing that VA statutory authority contemplates that the Schedule for Rating Disabilities will be periodically revised and improved. Section 355 of title 38, United States Code, provides in part:

"The Administrator shall from time to time readjust this schedule of ratings in accordance with experience."

Also, of some pertinence is 38 U.S.C. § 110 which implies that ratings are subject to change, unless in effect for twenty years or more.

Adoption of new rating criteria does not ipso facto abrogate the existing disability evaluations of veterans, but it does require the Agency, when subsequently evaluating veterans' claims, to apply the revised criteria. 6 Comp. Gen. 232 (1926). Moreover, to mitigate the harshness of any reduction or discontinuance of benefits upon re-rating, the VA must provide due notice and a grace period. Section 3012(b)(6) of title 38, United States Code, provides that 60 days notice will be given to a veteran entitled to disability compensation prior to reduction or discontinuance of benefits by reason of a change in law or administrative issue. The legislative history of the statute suggests that the grace period was intended to provide a recipient with a reasonable time to adjust to diminished benefits occasioned by a change in law or administrative issue or the interpretation of law or administrative issue. S. Rep. No. 2042, 87th Cong., 2d Sess. 8, reprinted in 1962 U.S. Code Cong. & Ad. New 3260, 3266-67.

In our view, the clear implication of these statutes is that, upon adoption of new rating standards, individual claims, including claims for increased ratings filed by veterans evaluated under prior methods, are subject to the new standards. The provisions of section 3012 apply to any reduction in benefits called for by the re-rating. Based upon the foregoing, our response to the second question is that the April 6 memorandum and paragraph 50.13b of M21-1 are not binding upon the Board of Veterans Appeals. As

noted above, there is no statutory authority for a grandfather or savings clause designed to protect ratings assigned under superceded criteria. In our opinion, such a provision must be authorized by statute rather than instituted by administrative issuance. Moreover, under38 U.S.C. § 4004(c), the Board is only bound by regulations duly promulgated, instructions of the Administrator, and precedent opinions of the General Counsel. See Carter v. Cleland, 643 F.2d 1 (D.C.Cir.1980). Manual provisions and the like offer guidance but are not binding upon the Board. Digested Opinion, 10-17-86 (14-9c Effective Date-Pension).

HELD:

The manual provision that purports to protect disability evaluations assigned under superceded regulations on defective hearing is neither legally appropriate nor binding upon the Board of Veterans Appeals.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 66-90