DATE: 07-18-90

CITATION: VAOPGCPREC 69-90
Vet. Aff. Op. Gen. Couns. Prec. 69-90

TEXT:

SUBJECT:
Application of Change in Law during Pendency of Appeal

(This opinion, previously issued as General Counsel Opinion 4-88, dated June 14, 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.)

QUESTION PRESENTED:
Did the Board of Veterans Appeals exceed its authority by rendering a decision based upon criteria superceded by 38 C.F.R. § 3.311b, which was adopted during the pendency of the appeal, and, if so, should the Board be required to reconsider such a decision, presumably with application of the new regulation?

COMMENTS:

In this case a veteran's claim for disability compensation for hypothyroidism, allegedly incurred as a result of ionizing radiation exposure incident to the veteran's participation in a 1956 nuclear weapon test series, was filed with the VA in December 1983 and denied by the Regional Office Adjudication Division in January 1985. The basis for denial was that hypothyroidism was not shown prior to 1983 and radiation exposure in service was not shown to be a causative factor in its development. The veteran timely appealed the decision and the appeal was placed on the docket of the BVA in August 1985. A section of the Board denied the claim on appeal, but its decision was later vacated in order to afford the veteran a personal hearing, as requested by the veteran's representative. The claim on appeal was then assigned to a different section of the BVA, which conducted the hearing, and, by decision in February 1987, granted service connection for hypothyroidism under the provisions of 38 U.S.C. § 331 and the doctrine of reasonable doubt, 38 C.F.R. § 3.102. In its decision, the Board acknowledged that new adjudication procedures under 38 C.F.R. § 3.311b had been adopted by the Agency during the pendency of the appeal but declined to apply those procedures because the veteran's claim had been neither developed nor adjudicated initially under the new regulation.

Pursuant to the requirements of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (hereafter, the Act), the VA conducted rulemaking and adopted 38 C.F.R. § 3.311b governing the adjudication of all compensation claims based on the disabilities or deaths of veterans who were exposed to ionizing radiation in connection with the American occupation of Hiroshima

and Nagasaki or atmospheric testing of nuclear weapons. The final regulation, which took effect on September 25, 1985, prescribes specific steps for the development and disposition of radiation claims. Subsection (b)(2) sets forth certain radiogenic diseases for which service connection may be established. The list of radiogenic diseases was developed by the Agency after exhaustive review of published studies and investigations, consideration of public comments to the proposed rules, and consultation with the Veterans' Advisory Committee on Environmental Hazards. It represents the Agency's assessment of all diseases that are shown by sound medical and scientific evidence to be epidemiologically related to ionizing radiation exposure. See 50 Fed. Reg. 15850 (Apr. 22, 1985). The list is exclusive, Undigested Opinion, 2-20-87 (Vet File, C-XX XXX XXX), and does not include hypothyroidism. FN1 1 We note that, in the compromise agreement upon which the Act is based, Congress specifically deleted hypothyroidism from consideration as a radiogenic disease. See 130 Cong. Rec. H11162 (Oct. 3, 1984). Therefore, to the extent 38 C.F.R. § 3.311b applies to a compensation claim pending administratively on the effective date of the regulation, service connection for hypothyroidism caused by radiation exposure would be unauthorized by law.

In general, agencies must apply the law in effect at the time a decision is rendered, even if that law has changed during the course of a proceeding. Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969); Aaacon Auto Transport, Inc. v. ICC, 792 F.2d 1156 (D.C. Cir. 1986), cert. denied, --- U.S. ----, 107 S. Ct. 2178 (1987); Chilcott v. Orr, 747 F.2d 29 (1st Cir.1984). FN2 2 The rule of retroactivity of legislative acts applies equally to changes in agency rules and regulations. Thorpe, supra; Springdale Convalescent Center v. Mathews, 545 F.2d 943 (5th Cir.1977). There is a presumption in favor of retroactive application of new law, unless there is statutory direction or
legislative history to the contrary or where to do so would result in manifest injustice. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

Bradley does not require a clear or explicit legislative direction to the contrary to displace the presumption of retroactivity, but only a "fair indication" that the law is to have solely prospective effect. Campbell v. United States, 809 F.2d 563, 572 (9th Cir.1987); see Litton Systems, Inc. v American Telephone and Telegraph Co., 746 F.2d 168,174 (2d Cir.1984). Compare Home for Crippled Children v. Prudential Insurance Co. of America, 590 F.Supp.1490 (W.D.Pa.1984) (an intent to apply a regulation retroactively must appear clearly and unequivocally on the face of the regulation). Silence on the question of retroactivity in the statute and legislative history is not to be construed as a congressional directive for prospective application only. Brown v. GSA, 507 F.2d 1300 (2d Cir.1974), aff'd, 425 U.S. 820 (1976). If the legislative history could support either position, the presumption in favor of retroactivity should control. Campbell, 809 F.2d at 572.

Neither the regulation nor the underlying statute and legislative history state that the law is to be applied retroactively. Conversely, there is no directive to the contrary. We observe that Congress imposed a stringent rulemaking deadline upon the Agency under

the Act. In debate, Representative Edgar, Chairman of the Hospitals and Health Care Subcommittee of the House Committee on Veterans' Affairs declared that it was Congress' "intention and directive" that the new procedures for handling radiation claims be implemented "as soon as possible." 130 Cong. Rec. H11166 (Oct. 3, 1984). This is some indication that Congress believed application of the regulation was urgent, which at least militates against displacing the presumption of retroactivity. See e.g., Matter of Reynolds, 726 F.2d 1420 (9th Cir.1984). Moreover, the Act was intended to establish permanent and specific standards for the adjudication of radiation claims and to promote consistency in claims processing and decisions. Because the qualifying events giving rise to radiation claims, i.e., exposure during the post-war occupation of Hiroshima or Nagasaki or early weapons-testing programs, necessarily predated adoption of the regulation, it is at least arguable that the likelihood of pending claims was foreseen by Congress and the new regulation was intended to apply to them.

In Bradley, the Court articulated three elements to be considered in weighing the "manifest injustice" exception to the rule favoring retroactivity: the nature and identity of the parties; the nature of their rights; and the nature of the impact of the change in law upon those rights. Bradley, 416 U.S. at 717. "No one factor is dispositive." Campbell, 809 F.2d at 575; City of Great Falls v. United States Department of Labor, 673 F.2d 1065, 1068 (9th Cir.1982) (per curiam).

With reference to the first factor, retroactivity is to be avoided in disputes between private parties. Litton Systems, Inc., supra. Where the operation of a governmental entity in furthering an important public purpose is implicated, however, the dispute is not of the private nature envisioned by the Bradley test. Seniors United for Action v. Ray, 675 F.2d 186 (8th Cir.1982); Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796 (8th Cir.), cert. denied, 455 U.S. 907 (1981). In national concerns, the law must be given retroactive application, even if to do so may affect the rights of private parties. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). Here, the national concern in uniform standards and their consistent application is exemplified by the congressional hearings and debate leading to enactment of the Act and public participation in the development of the regulation.

The second factor examines the nature of the rights involved. Courts have refused to apply an intervening change of law to a pending action where to do so would impair a right that had matured or become unconditional. Greene v. United States, 376 U.S. 149 (1964); Litton Systems, Inc., supra. See Koger v. Ball, 497 F.2d 702 (4th Cir.1974); Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323 (N.D.Cal.1976). By contrast, the present veteran's right to disability compensation had not matured or become unconditional prior to adoption of the new regulation. Claimants for VA disability compensation do not have a vested property interest in receipt of such benefits. See Walters v. National Association v. Radiation Survivors, 473 U.S. 305, 332-333 (1985). Hyatt v. Heckler, 757 F.2d 1455 (4th Cir.1985) (claimant for Social Security benefits has no vested right to have claim evaluated under standards in effect prior to new law); Sprouse v. Schweiker, 677 F.2d 1029 (4th Cir. 1982) (claimant for Supplemental Security Income does not acquire a vested right to benefits until adjudged eligible);

Salling v. Bowen, 641 F. Supp. 1046, 1068 (W.D.Va.1986) (no protected property interest in a VA claim).

The third factor concerns the substantive effect of retroactivity upon the parties, Colyer v. Harris, 519 F. Supp. 692 (S.D. Ohio 1981), and the imposition of additional and unforeseeable obligations or burdens, Litton Systems, Inc., supra. Retroactivity is permitted where the regulatory changes are essentially procedural or remedial rather than substantive in nature. See Sam v. United States, 682 F.2d 925 (Ct.Cl.1982), cert. denied, 459 U.S. 1146 (1983); United States v. Holcomb, 651 F.2d 231 (4th Cir.1981), Sperling v. United States, 515 F.2d 465 (3d Cir.1975), cert. denied, 426 U.S. 919 (1976); Koger v. Ball U, supra. However, if the new regulation conditions a benefit on matters of proof where no such condition existed before, the new regulation may not be applied retroactively. Coe v. Secretary of HEW, 502 F.2d 1337 (4th Cir.1974); St. Francis Memorial Hospital, supra; Johnson v. Finch, 328 F. Supp. 1169 (E.D.La.1971). For example, courts have retroactively applied newly adopted rating guidelines to pending Social Security claims where the guidelines merely consolidated or elaborated upon earlier agency rules or where the application of the new guidelines would produce the same result as under the prior practice. See Vega v. Harris, 636 F.2d 900 (2nd Cir.1981); Parker v. Harris, 626 F.2d 225 (2nd Cir.1981); Hicks v. Califano, 600 F.2d 1048 (4th Cir.1979); Rodriguez v. Schweiker, 520 F. Supp. 666 (S.D.N.Y.1981); Stallings v. Harris, 493 F. Supp. 956 (W.D.Tenn.1980). Retroactive application of new rules has been avoided where to do so would operate to the detriment of the claimant. See Colyer v. Harris, supra; White v. Califano, 473 F. Supp. 503 (S.D.W.Va.1979). Contra Brown, supra; Sprouse, supra.

Although the regulation at issue accomplishes more than merely refining earlier procedures in radiation claims, no unconditional or vested right would be affected by retroactive application of 38 C.F.R. § 3.311b. Inasmuch as the veteran's expectation of entitlement to VA disability compensation had not matured when the new regulation was adopted by the Agency, the third element of the Bradley "manifest injustice" test is not for consideration. We also observe that retroactive application of the regulation would not impose "new and unanticipated obligations" upon the veteran without notice or an opportunity to comment. Bradley, 416 U.S. at 720. Like all individuals, the veteran was on constructive notice of the proposed regulation and had the opportunity to present his views concerning the list of radiogenic diseases.

On balance, we are of the opinion that the presumption of retroactivity prevails and that 38 C.F.R. § 3.311b was for application in the veteran's appeal. There is neither statutory direction nor definitive legislative history to the contrary. Further, retroactive application of the regulation would not offend the Bradley "manifest injustice" test. Had this issue been posed to us by the BVA prior to its decision, we would have advised the Board to apply the new regulation. That having not been done, the decision is nevertheless final, unless the Board chooses to reconsider it. 38 U.S.C. § 4003. See 38 C.F.R. § 19.185(a). Of course, the exercise of the Board's reconsideration authority is discretionary.

HELD:

The criteria set forth in 38 C.F.R. § 3.311b are properly for application to any decision entered by the Board of Veterans Appeals after adoption of the new regulation, notwithstanding that the appeal may have been pending before the regulation became effective. The Board may be requested to reconsider any decision based upon criteria superceded by 38 C.F.R. § 3.311b, but any decision to do so is at the discretion of the Board.

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