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**CITATION:** VAOPGCPREC 89-90  
Vet. Aff. Op. Gen. Couns. Prec. 89-90

**TEXT:**

Reconsiderations by the Board of Veterans Appeals pursuant to 38 U.S.C. § 4003

**QUESTION PRESENTED:**

When, pursuant to 38 U.S.C. § 4003 the Chairman of the Board of Veterans Appeals (BVA) orders reconsideration of a previous Board decision, what type of review is to be conducted by the reconsideration section?

**COMMENTS:**

1. This is in reply to an informal request for an opinion on the impact of the changes made to 38 U.S.C. § 4003 by the Veterans' Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105 (1988).

2. Prior to enactment of the Veteran's Judicial Review Act, there was no statutory reference to reconsideration of previous BVA decisions. Instead, the entire procedure was governed by regulations currently contained in 38 C.F.R. §§ 19.185 through 19.190. The standard of review described therein is that of "obvious error," which was derived from 38 U.S.C. § 4003 (b) (1982 & Supp.1987):

When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion. (Emphasis supplied).

The current regulatory provisions also reflect the fact that reconsideration is limited, in most instances, to a review of the evidence of record at the time of the previous decision. 38 C.F.R. § 19.187. As will be explained in greater detail, these two aspects of BVA reconsiderations--the standard of review and the evidentiary record to be considered on reconsideration--are inconsistent with the new statutory provisions concerning reconsiderations.

3. While 38 U.S.C. § 4003 does not provide details concerning what evidence is to be considered or what standard of review is appropriate on reconsideration, the section outlines a procedure by which a final BVA decision is replaced by a new decision following deliberations of an expanded reconsideration section. Specifically, section 4003 provides 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.

(c) Notwithstanding subsections (a) and (b) of this section, the Board on its own motion may correct an obvious error in the record.

(As amended by Pub.L. No. 100-687, Title II, sec. 202(a), 102 Stat. 4105, 4110 (1988) (emphasis added)).

4. The plain language of this statute demonstrates that, instead of a review limited to the question of whether the previous BVA section erred, the earlier decision is vacated and is replaced with a decision by an expanded section. Finally, as subsection (c) provides for correction of obvious error in a manner other than through reconsideration, the most rational interpretation of section 4003 is that it contemplates a broader standard of review on reconsideration than that of "obvious error." Also, nothing in the statute supports the regulatory limitation that only the evidence of record at the time of the previous decision can be considered by the expanded reconsideration section.

5. Examination of the legislative history for confirmation that this interpretation accurately reflects the intent of Congress in amending section 4003 is of little assistance. Passage of the Veterans' Judicial Review Act, although culminating several years of legislative consideration of the matter, occurred during the last hurried weeks of the 100th Congress and required extensive compromises over the provisions of vastly different House and Senate bills. See 34 Cong.Rec. S 16,638 (daily ed., Oct. 18, 1988). As a result, the legislative history of the changes made to 38 U.S.C. § 4003 is somewhat abbreviated and interpretation of the congressional intent which led to the altered wording of section 4003 must be based to a large extent upon the nature of amendments brought about by merger of these very different legislative proposals. See 2A N.J. Singer, Sutherland's Statutory Construction, s 48.18 (4th ed. 1984).

6. The Senate bill, S. 11, would have amended section 4003, but did not include any reference to reconsideration of BVA decisions. The House version, taken from H.R. 5288, would have converted the BVA to an independent agency and provided it a mixed reconsideration/remand authority. That is, it would have been empowered to reconsider/remand for correction of obvious errors in the decision or in the claims folder. In addition, new evidence was to have been handled in a reconsideration format. H.R. 5288, 100th Cong., 2d Sess. § 203 (1988).

7. What emerged upon compromise was a section very different from either of the two proposals. It was explained by Senator Cranston, Chairman of the Senate Veterans' Affairs Committee, in the following manner:

Title II would codify and establish various internal procedures of the Board of Veterans

Appeals BVA applicable in adjudications of claims for benefits under laws administered by the VA... With respect to determinations by the BVA, to: (a) provide for decisions, for either an allowance or a denial, to be by a majority vote; (b) provide that such a decision is final unless the Chairman orders a reconsideration; and (c) require that, if the Chairman orders a reconsideration, the Chairman must expand the panel which entered the original decision. 38 Cong.Rec. S 16,640 (daily ed., Oct. 18, 1988).

Comments by G.V. "Sonny" Montgomery, Chairman of the House Veterans' Affairs Committee, also mentioned reconsiderations.

What we have basically done is to adopt the House provision, but because the BVA is retained in the compromise agreement, we have extended the coverage of the attorney fee provisions contained in the House bill to proceedings before the BVA. If the BVA disallows an appeal and the veteran then retains an attorney who attempts to have the claim reopened or reconsidered by the BVA, a fee may be charged. 34 Cong.Rec. H 10,342 (daily ed., Oct. 19, 1988).

The legislative history shows that these members of Congress, who were instrumental in drafting the compromise agreement, recognized reconsiderations by the BVA as a way in which veterans could have an additional review of their claim at the administrative level, before pursuing judicial review. This history supports an interpretation of the statutory language to require a reconsideration procedure, which, unlike the current one, involves a full BVA review. Therefore, the aspects of the current regulations, which are inconsistent with the new statutory reconsideration scheme, are not for application. See *Scofield v. Lewis*, 251 F.2d 128, 132 (5<sup>th</sup> Cir.1958).

8. Section 4003, of title 38, United States Code, is obviously premised on the assumption that reconsideration sections, who will be replacing the previous BVA decision with their own, will grant each claimant a thorough review. In other words, the expanded reconsideration section is to consider all available evidence and employ an appropriate standard of review. In this regard, we note that several "standards of review" are employed by the BVA when reviewing cases on appeal to the Secretary. For example, under 38 C.F.R. § 3.104, an unappealed decision of the agency of original jurisdiction (AOJ) is final and, with some exceptions, will only be revised to correct "clear and unmistakable errors." See 38 C.F.R. § 3.105(a). Also, once a claim has been disallowed by the BVA it, except as provided in 38 U.S.C. § 3008, "may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." See 38 U.S.C. § 4004(b) (as amended by Pub.L. No. 100-687, 102 Stat. 4105 (1988)). Thus, a simple description of the appropriate standard warranted is not possible. It is sufficient; however, to state that the reconsideration section is to review the appealed issues as if the prior decision by a three-member section had not been rendered.

**HELD:**

Under 38 U.S.C. § 4003 as amended by the Veterans' Judicial Review Act,

reconsideration by the Board of Veterans Appeals results in vacating the original BVA decision. The reconsideration section then sits in the same position as would a Board panel initially deciding the appeal, i.e.; it should employ the same standard of review and consider the same evidence as would be appropriate for such a panel. Regulations contained in 38 C.F.R. §§ 19.185 through 19.190, which are inconsistent with this interpretation of the statute, are without effect.

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