DATE: 07-18-90

CITATION: VAOPGCPREC 68-90
Vet. Aff. Op. Gen. Couns. Prec. 68-90

TEXT:

SUBJECT: Applicability of 38 U.S.C. § 410 (b) Where Total Disability May Have Preceded Effective Date of Total Disability Rating

(This opinion, previously issued as General Counsel Opinion 7-88, dated September 22, 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:

(1) Whether the previously adjudicated effective date of a total service- connected disability rating assigned by the originating agency is final, for purposes of entitlement to benefits under section 410(b), absent clear and unmistakable error, or whether 38 C.F.R. s 19.196 mandates a de novo review by the Board of Veterans Appeals; and

(2) Whether, if it were determined from a medical standpoint that an unemployed veteran was totally disabled for a continuous period of 10 or more years immediately preceding his death, a date of claim less than 10 years before date of death and more than 1 year after the date it is factually ascertainable that total disability has occurred, would permit an award of section 410(b) benefits.

COMMENTS:

This opinion arises from two claims for survivors' benefits based upon identical facts. We will treat it as one matter for purposes of our analysis. The facts are these. At the time of death, the veteran allegedly had been totally disabled and unemployed for more than 10 years but had not continuously been rated as totally disabled for 10 years. The claim for a total (individual unemployability) rating was filed more than 1 year after the veteran reportedly became totally disabled and unemployed, and less than 10 years prior to the date of death. The effective date assigned for the total disability rating was not appealed during the veteran's lifetime.

Section 410(b)(1) of title 38, United States Code, as in effect at the time of the veteran's demise, provides that:

"when any veteran dies, not as the result of the veteran's own willful misconduct, if the veteran was in receipt of or entitled to receive (or but for the receipt of retired or

retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either (A) was continuously rated totally disabling for a period of ten or more years immediately preceding death, or (B) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty, the Administrator shall pay benefits under this chapter to the veteran's surviving spouse, if such surviving spouse was married to such veteran for not less than two years immediately preceding such veteran's death, and to such veteran's children, in the same manner as if the veteran's death were service-connected."

Since the veteran in the case presented was not rated as totally disabled for 10 years, was not a retired military member, and had not continuously been rated at total disability from release from active duty until death, our analysis must focus on the statutory language giving rise to eligibility for survivors of veterans who at death were "in receipt of or entitled to receive ... compensation ... for a service-connected disability ... continuously rated totally disabling for a period of 10 years." (Emphasis supplied.) More specifically, we must decide whether a veteran may be considered to have been "entitled to receive" compensation for such disability, even though an actual continuous rating had not been in effect for 10 or more years immediately preceding his or her death (with no clear and unmistakable error implicated), for purposes of establishing such eligibility. The ensuing discussion assumes that all other statutory criteria for eligibility have been met.

A search of Agency precedents does not reveal any definition of "or entitled to receive" relevant to the facts presented by this case. However, the meaning of this expression is illuminated by a review of the background of Public Law No. 97-306 § 112 (1982), by which the phrase was introduced into the text of section 410(b)(1). The year prior to passage of Public Law 97-306, this office rendered an opinion in which it was held that: "As a matter of law, 38 U.S.C. § 410(b)(1) does not provide a basis for finding entitlement to survivors' benefits where a veteran, at death, had been in receipt of compensation for total disability but not for the requisite duration solely because of VA error in the rating assigned." Op. G.C. 2-81 (3-24-81). That opinion considered a situation in which the veteran had died in 1980, following assignment of a total disability rating with an effective date in 1978. Thereafter, the VA determined the correct rules specified in 38 U.S.C. § 3010 (1976). Our opinion was based on a plain-meaning analysis of section 410(b)(1) (as added in 1978 by Public Law No. 95-479), with emphasis on the fact that the history of the legislation revealed that a House bill initially had provided for entitlement to survivor benefits in the event a veteran "was in receipt of or entitled to receive" compensation at the total disability rate for the requisite duration. (Emphasis supplied.) The deletion of the "or entitled to receive" language in the compromise legislative agreement ultimately enacted in 1978 was presumed to reflect a considered choice by the Congress. This conclusion was reinforced by the record of legislative consideration, which demonstrated that the duration of receipt of total disability compensation, with consequent reliance and dependence thereon by the veteran and his or her family, was Congress' main concern. In other words, actual receipt of total disability benefits for a minimum period of 10 years, not entitlement

thereto, was thought to be the central focus of the 1978 amendment to section 410.

We further reasoned, in Op G.C. 2-81, that policy considerations supported our conclusion. We pointed out that prior rating decisions that had become final because of failure to file a timely appeal could be retroactively amended only on the basis of "clear and unmistakable error," i.e., not merely upon valid differences in the exercise of rating judgment, in accordance with 38 C.F.R. § 3.105(a). Since the veteran had remedies available to contest an asserted error in assignment of the disability rating, such as requesting the regional office to reconsider its decision or appealing to the Board of Veterans Appeals, there was no sound basis for not requiring recourse to such avenues of redress while he or she was alive. Our opinion concluded with expression of serious reservations as to the Administrator's authority to create entitlement to survivors' benefits under section 410(b) when means had been provided by which the underlying eligibility defect might have been appealed and cured.

Op. G.C. 2-81 provides a necessary backdrop to assessment of Congress' intent in enacting section 112 of Pub.L. No. 97-306. The opinion comprises part of the legislative record of that amendment. S. Rep. No. 97-550, 97th Cong., 2d Sess. 32-34 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2877, 2895-97. The Senate Committee on Veterans' Affairs expressed concern about the Agency's interpretation of section 410(b)(1) and espoused a liberalizing amendment to clarify that a veteran need not actually have been "in receipt" of total disability benefits for the requisite period of time in order to provide eligibility to survivorship benefits where a clear and unmistakable error had been made that resulted in a period of receipt shorter than 10 years. Id. at 2898. The House and Senate finally agreed that section 410(b)(1) should be amended to provide that the requirement that the veteran have been in receipt of compensation for a service-connected disability rated as total for 10 years prior to death would be met if the veteran would have been in receipt of such compensation but for a clear and unmistakable error regarding the award of a total disability rating. See Explanatory Statement of Compromise Agreement 128 Cong. Rec. 7777 et seq. (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 3013. Clearly, therefore, the addition of the phrase "or entitled to receive" to section 410(b)(1) was for the purpose of reversing the holding in Op. G.C. 2- 81, and establishing entitlement to section 410(b) benefits under specific circumstances, i.e., when the minimum 10-year total disability criterion would have been met at the date of death but for clear and unmistakable error implicated in assignment of the effective date of the total rating.

With respect to the first question presented, the above-summarized legislative history clearly evinces Congress' intent that a specific test be applied to claims for entitlement to survivorship benefits under section 410(b) (as amended in 1982) when based on the deceased veteran's asserted entitlement to receive total disability compensation for the minimum 10-year period immediately preceding death. In other words, where no appeal has been taken within the one-year period provided by law, 38 U.S.C. § 4005 38 C.F.R. § 19.129, the decision is final under 38 C.F.R. § 3.104(a), and no modification of the decision is permitted unless it is demonstrated that such entitlement would have existed but for clear and unmistakable error on the part of the originating agency in its

assignment of a total-rating effective date. To invoke the provisions of 38 C.F.R. § 19.196 for purposes of a de novo review of the question of entitlement to receipt for the minimum period, without regard to the clear-and-unmistakable error test, would flout Congress' objective that only such error should form the basis for assigning an earlier effective date. For the Board to go further and readjudicate, sua sponte, an effective date issue which was adjudicated and became final years previously would be overreaching on its part and would exceed its authority to decide appealed issues. 38 C.F.R. § 19.1.

We read section 19.196 as empowering the Board to make independent determinations on those survivors' benefit issues over which it has appellate factfinding jurisdiction, such as whether a veteran's death was related to service-incurred disability in a section 410(a) claim, or whether there was clear and unmistakable error in the assignment of a total-rating effective date in a section 410(b) claim. This interpretation is borne out by the regulatory history, indicating that section 19.196 was intended to assure that a denial of a claim for service-connection during a veteran's lifetime would not preclude the Board from reviewing a claim for service-connection of the same veteran's cause of death. See 45 Fed. Reg. 56,094 (1980). The regulation cannot, however, override Congress' firm 1978 mandate, amplified in 1982, that, barring VA error, a veteran must meet the 10-year requirement for a survivor to invoke section 410(b). Accordingly, 38 C.F.R. § 19.196 is inapplicable to review of claims to an earlier effective date for assignment of a total rating for purposes of entitlement to section 410(b) survivors' benefits, where such determination of effective date has previously become final.

As regards the second question presented, the analysis set forth in the preceding paragraph would apply: namely, an award of section 410(b) benefits would not be precluded if clear and unmistakable error by the originating agency in assigning the effective date to a total rating was the cause of the veteran's total rating failing to meet the 10-year duration requirement. Such error could, under 38 U.S.C. § 3010(b)(2), consist of incorrect determination of the date of receipt of claim for entitlement to a total rating and/or of the date when it is ascertainable that the veteran was totally disabled from a medical standpoint. Based upon the facts presented, posting that the veteran did not apply for an individual unemployability rating within one year of becoming totally disabled and ceasing substantially gainful employment, the provisions of section 3010(b)(2), 38 C.F.R. s 3.400(o)(2) (permitting an effective date of increased rating earlier than date of claim where disability actually increased within one year before the date of filing), would not have been applicable in the determination of the effective date of the total rating.

The language in section 3010(b)(2) was added to title 38 via Public Law No. 94-71 s 104 (1975) and was simply intended to conform with an amendment concerning pension awards which had been enacted during the preceding Congress. Section-by-Section Analysis Regarding House-Senate Compromise on H.R. 7767, 94th Cong., 1st Sess., 121 Cong. Rec. S13598 (1974), reprinted in 1975 U.S. Code Cong. & Ad. News 771. The earlier amendment, adding what is now section 3010(b)(3) (permitting an award of disability pension from the date of permanent and total disability if the

veteran files a claim therefor within one year of such date), was derived from an Administration proposal designed to alleviate hardship where the disability precludes prompt application for the benefit. Both the statutory language and the legislative history plainly indicate that the liberalization does not apply where the claim is not filed within one year of the onset of or increase in disability. See H.R. Rep. No. 93-398, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S. Code Cong. & Ad. News 2759, 2761, 2771-2. Accordingly, there can be no entitlement to compensation before the date of claim in the instant case.

Reference should be made to our memorandum opinion of July 17, 1987, which was subsequently serialized as Op. G.C. 4-87. That opinion concerned a veteran who had been accorded a 100 percent VA disability-compensation rating more than 30 years prior to his death but had elected to receive military- retirement pay in lieu of VA compensation. We concluded that a posthumous disability-status determination was necessary since many years had passed since the 100 percent rating was assigned and it was not shown that he met the criteria for such an evaluation "at the time of death" and during the preceding 10 years. The opinion should be read in light of the unusual facts it concerned, i.e., nonwaiver of military-retirement pay and a long-dormant rating, and not as a generalized directive to conduct posthumous determinations of veterans' disability status during the 10 years immediately preceding death for purposes of possible entitlement of their survivors to benefits based on section 410(b).

Held:

In summary it is held that:

(1) The effective date of a total service-connected disability rating assigned by the originating agency is final (subject to timely appeal), for purposes of entitlement of a veteran's survivors to benefits under 38 U.S.C. § 410(b), in the absence of clear and unmistakable error; and

(2) Where a claim for total service-connected disability rating was filed more than one year after the onset of total disability and granted effective on the date of claim, the death of the veteran less than ten years after such effective date precludes entitlement to section 410(b) benefits, absent clear and unmistakable error in the assignment of that effective date.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 68-90