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Vet. Aff. Op. Gen. Couns. Prec. 04-91

TEXT:

Failure to Submit to Medical Examination--Insistence on the Presence of an Attorney and Use of a Recording Device

QUESTION PRESENTED:

Has a veteran failed to report for a scheduled examination for purposes of 38 C.F.R. § 3.655 if he or she appears but refuses to be examined unless accompanied by a private attorney and allowed to record the evaluation?

COMMENTS:

1. This is in response to your request for an opinion concerning the possible "right" of Department of Veterans Affairs' (VA) beneficiaries to be accompanied by an attorney during scheduled VA medical examinations. The veteran appeared for a scheduled psychiatric examination but refused to be examined unless the veteran's attorney was present and the veteran was permitted to use a tape recorder during the evaluation. Section 3.329 of title 38, Code of Federal Regulations, provides that every person applying for or in receipt of compensation or pension shall submit to examinations when required by VA under proper authority. Section 3.655 of that title provides for discontinuance of benefits when a veteran fails "without adequate reason" to report for examination. Determination of the facts surrounding a claimant's failure to report is a factual matter which rests with VA adjudication and appellate personnel. See 38 C.F.R. §§ 3.100 and 19.111. This opinion addresses the legal issue of whether denial of assistance of counsel and use of a recording device in connection with a VA-required examination constitutes adequate reason for failure to submit to examination for purposes of section 3.655.

2. A "right to counsel" in administrative proceedings does not exist unless it can be found in some constitutional clause, statutory measure, or regulation. Barker v. Hardway, 283 F.Supp. 228 (S.D.W.Va.), aff'd, 399 F.2d 638 (4th Cir.1968), cert. denied, 394 U.S. 905 (1969); Suess v. Pugh, 245 F.Supp. 661 (N.D.W.Va.1965) (proceeding before Professional Standards Board of Veterans Administration). Turning first to the United States Constitution, we note that the sixth amendment provides for the assistance of counsel "in all criminal prosecutions." It has no bearing on the question of assistance of counsel in civil matters before administrative agencies. Hannah v. Larche, 363 U.S. 420 (1960); Smith v.

United States, 250 F.Supp. 803 (D.N.J.1966), appeal dismissed, 377 F.2d 739 (3d Cir.1967); Suess, 245 F.Supp. at 665. The fifth amendment is less specific than the sixth and contains a very powerful guarantee, requiring that one not be "deprived of life, liberty, or property, without due process of law." U.S. Const. amendment V. However, in interpreting that clause, the courts have been reluctant to find that "due process" includes a right to representation by counsel in administrative activities of an investigatory or preliminary nature. E.g., In Re Groban, 352 U.S. 330, 335 (1957) (no right to assistance of counsel in testifying at an investigatory proceeding); Bowles v. Baer, 142 F.2d 787, 789 (7th Cir.1944) (investigations held in private, without representation by counsel-- held no provision of the Constitution required public hearing); see also Hannah, 363 U.S. at 440-51 (no right to cross-examine witnesses before commission performing investigative function). See generally Torras v. Stradley, 103 F.Supp. 737, 739 (N.D.Ga.1951) (noting cases recognizing distinction between fact-finding functions and those involving determination of legal rights).

3. In applying this case law to the situation under consideration, we note that medical examinations conducted by VA are investigative in nature. Within VA, there is a clear delineation between the role of the Veterans Health Services and Research Administration (VHS & RA) and that of the Veterans Benefits Administration (VBA). Compare the Department of Veterans Affairs Act, Pub.L. No. 100-527, § 7, 102 Stat. 2635, 2640 (1988), with 38 U.S.C. § 4101(a). As set out in 38 C.F.R. ss 2.67 and 3.100(a), authority is delegated to VBA personnel to make findings and decisions as to entitlement of claimants to monetary benefits under laws administered by VA. Thus, even though medical examinations conducted by VHS & RA provide important information relevant to claims for benefits, the examinations are not conducted by the same individuals who participate in benefit decisions, and the reports of those examinations represent only one piece of information which will be considered by adjudication personnel in determining eligibility for benefits. Given the nature of the examination function, there is thus, in our view, no constitutional right to the presence of an attorney at a VA medical examination.

4. With regard to pertinent statutory provisions, assistance of counsel for persons appearing before administrative agencies is addressed in the Administrative Procedure Act (APA) in the first two sentences of 5 U.S.C. § 555(b). The first sentence provides that " a person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." The second sentence adds that " a party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." The legislative history of the predecessor to this provision indicates that the second

sentence was intended to supplement the first sentence by providing a rule to govern situations where appearance of an individual is not compelled. 92 Cong.Rec. 2156 (1946) (statement of Senator McCarran). Since the veteran in this case was required to appear for examination at the risk of termination of benefits, we believe that only the first sentence of section 555(b) is for consideration here.

5. The predecessor to section 555 was described in congressional committee reports as prescribing "the rights of private parties in a number of miscellaneous respects which may be incidental to rulemaking, adjudication, or the exercise of any other agency authority." H.R.Rep. No. 1980, 79th Cong., 2d Sess. 18, reprinted in 1946 U.S.Code Cong.Service 1195, 1206; S.Rep. No. 752, 79th Cong., 1st Sess. 8 (1945). The reference to "any other agency authority" suggests a broad application of the section. Further, a section-by-section analysis in the House report on the measure stated broadly " t he section is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private." H.R.Rep. No. 1980, supra, at 31.

6. Given that Congress intended the provision to apply to a broad range of agency functions, the question remains as to whether Congress intended that any limitations apply with respect to the scope of representation activities. This issue was addressed in House floor debate on the measure by Congressman Walter of the Committee on the Judiciary, who stated " t he representation of counsel contemplated by the bill means full representation as the term is understood in the courts of law." 92 Cong.Rec. 5652 (1946). Thus, it appears that the scope of representation was intended to be consistent with that recognized in judicial proceedings. A review of analogous situations in judicial proceedings reveals that medical examinations in both adversarial and nonadversarial settings are almost uniformly conducted without the presence of attorneys. For example, parties do not have the right, under discovery rules, to have an attorney present during mental or physical examinations conducted by physicians pursuant to Rule 35(a) of the Federal Rules of Civil Procedure. E.g., Wheat v. Biesecker, 125 F.R.D. 479 (N.D.Ind.1989) (by attending the examination the attorney might have to choose between participating at trial as a litigator or as a witness); Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588 (S.D.W.Va.1988) (nature of psychological examination particularly dictates against allowing the attorney to be present).

7. Courts considering the issue of assistance of counsel in administrative proceedings have frequently ignored the possible applicability of the APA. Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir.1967) (APA not mentioned in discussion of right of military academy cadet to counsel

during expulsion hearing); Schwartzberg v. United States Board of Parole, 399 F.2d 297 (10th Cir.1968) (upheld regulation excluding counsel from parole hearings without mentioning APA). In F.C.C. v. Schreiber, 329 F.2d 517 (9th Cir.1964), modified on other grounds, 381 U.S. 279 (1965), the Ninth Circuit held that application of the "right to counsel" as provided in the APA varies with the circumstances of the case. In its turn, the Supreme Court noted, in F.C.C. v. Schreiber, 381 U.S. 279, 290 (1965), that administrative agencies should be free to fashion their own procedures and pursue methods of inquiry capable of permitting them to discharge their "multitudinous duties."

8. Significantly, it has been held that, under the social security statutes, a claimant for social security benefits may not insist on the presence of an attorney during disability examinations conducted by the Department of Health, Education, and Welfare. Neumerski v. Califano, 513 F.Supp. 1011 (E.D.Pa.1981). The reasoning in Neumerski is illuminating. The court rejected the plaintiff's argument that the presence of counsel was justified because the proceedings had been given an adversarial taint by the agency's request for further examination. Consistent with the legislative history of the APA the court pointed out that attorneys have no right to be present at medical or psychological examinations in truly adversarial civil litigation. 513 F.Supp. at 1016. Quoting from Brandenberg v. El Al Airlines, 79 F.R.D. 543, 546 (S.D.N.Y.1978), which labeled as "frivolous" the claim that an attorney should be present at such an examination, the court indicated that " t his is especially true in psychological examinations which depend on 'unimpeded one- on-one communication between doctor and patient.' " 513 F.Supp. at 1017. In addition to the concern that the presence of an attorney would undermine the communication process of an examination, courts have also recognized that there is very little an attorney can contribute in certain settings. Cf. Cruz v. Skelton, 543 F.2d 86, 96 (5th Cir.1976), cert. denied, 433 U.S. 911 (1977) (parole board hearing does "not present a forum in which the special analytical, research or forensic skills of the lawyer are necessary, nor even likely to prove particularly helpful"). In light of these considerations, we cannot conclude that the APA provides a right to be represented by counsel at the examination itself.

9. Turning to relevant VA statutes and regulations, we note that there is no provision in title 38, United States Code, or in VA regulations, specifically granting a claimant the right to have his or her attorney, or other representative, present during a medical evaluation. Further, the involvement of claimants' representatives in VA proceedings is clearly not without limits. For example, while the provisions of 38 C.F.R. § 3.103(e) state that claimants "are entitled to representation of their choice at every stage in the prosecution of a claim," this provision is specifically made subject to the general provisions governing representation by attorneys and

other representatives of claimants and beneficiaries in the "preparation, presentation, and prosecution" of matters affecting veterans' benefits. See 38 U.S.C. § 3404(a); 38 C.F.R. § 14.626, et seq. See also 38 U.S.C. § 4005(a) (representation rights to be accorded in administrative appeals pursuant to VA regulations); 38 C.F.R. § 19.150 (full right to representation by "authorized" individuals in all stages of an appeal). Even assuming that a regularly scheduled medical examination represents a "stage in the prosecution of a claim" for purposes of section 3.103(e), the scope of representation must be considered in light of the generally recognized limitations on the role of attorneys in judicial and administrative proceedings. Such limitations, as discussed above, generally preclude the presence of attorneys at medical examinations, particularly those of a psychiatric nature. Thus, the provisions of titles 38 of the United States Code and the Code of Federal Regulations cannot be read to grant attorneys authority to participate in such activities. In view of the foregoing, we conclude that a veteran does not have a right to be accompanied by counsel at a scheduled VA examination and cannot justifiably refuse to submit to examination on the basis of denial of counsel.

10. Similarly, there is no constitutional, statutory, or regulatory requirement that would allow beneficiaries to use recording devices during VA medical examinations. Again, it must be noted that the examinations at issue are investigative and preliminary in nature. Further, while case law on the subject is not extensive, it supports the conclusion that one has no "right" to record such activities. See, e.g., Baer, 142 F.2d at 788-89 (no constitutional infirmity where court reporter ordered to leave investigative-hearing room); In Re Neil, 209 F.Supp. 76, 77 (S.D.W.Va.1962) (APA does not extend to any party the right to bring a stenographer to report the proceedings at an agency hearing); Torras, 103 F.Supp. at 740 (witness in investigative proceeding did not have right under the APA to the presence of a personal stenographer). As discussed above with respect to the presence of an attorney, use of a recording device would threaten to impede free communication between the examinee and the examining physician. VA regulations do not authorize the use of recording devices at medical examinations, and we find that their use is not otherwise required by law. Thus, denial of the use of such a device would not be an adequate reason to refuse to submit to examination.

HELD:

Neither the Constitution, the Administrative Procedure Act, nor VA statutes and regulations provide a right to counsel at medical examinations scheduled by VA for evaluation of beneficiaries, including psychiatric evaluation. As, under the relevant constitutional, statutory, and regulatory provisions, there is no "right" to be accompanied by an attorney to this type of agency activity, refusal to participate unless accompanied by an

attorney may be considered a failure to report for purposes of VA regulations at 38 C.F.R. § 3.655 providing for discontinuance of benefits for failure to report for examination. Similarly, a beneficiary may not insist on using a recording device at a VA medical examination, and refusal to participate due to absence of such a device may be considered a failure to report for purposes of VA regulations governing termination of benefits.

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