Date: 9/26/91

Citation: PREC 68-91, VET. AFF. OP. GEN. COUNS. PREC. 68-91

Title: Clear and Unmistakable Error; Change in Diagnosis; Minimum Rating for Multiple Sclerosis * * *

Text:

Subject: Clear and unmistakable error; change in diagnosis; minimum rating for multiple sclerosis

QUESTIONS PRESENTED:

a. Where service connection for a veteran's disability is protected under 38 U.S.C. § 1159 (formerly 38 U.S.C. § 359) and the disability is based on an erroneous diagnosis, should the veteran's rating be increased retroactively based on clear and unmistakable error if the original rating was below the minimum rating provided for the disability under the VA Rating Schedule?

b. If a veteran's rating is increased retroactively based on a finding of clear and unmistakable error, does that rating become protected under the provisions of 38 U.S.C. § 110 and 38 C.F.R. § 3.951, if more than 20 years have passed since the retroactive effective date of the rating?

COMMENTS:

1. You have requested our opinion in the case of a veteran who, in 1949, was rated as 0% disabled with a diagnosis of multiple sclerosis, whose diagnosis has now been changed, and who argues that a minimum 30% rating should be assigned effective in 1949. In your April 3, 1990, memorandum to us, you presented the following question:

Does protection ... extend to the minimum rating of 30 percent under the provisions of 38 C.F.R. §§ 3.951 and 4.124(a) even though the veteran does not have multiple sclerosis and has been rated at 0 percent since 1949?

2. The veteran was discharged from the Navy in March 1944 with a diagnosis of "disseminated sclerosis." Based on the veteran's service medical records, VA rated him 100% disabled based on disseminated sclerosis (diagnostic code 1019) in April 1944 (effective March 22, 1944), under the 1933 Rating Schedule. In October 1944, VA examined the veteran; a special neuro-psychiatric examination reached a diagnosis of multiple sclerosis. Based on that examination, the veteran's rating of 100% for disseminated sclerosis was continued. In April 1948, the veteran was re- rated under the 1945 Rating Schedule as 100% disabled based on the October 1944 diagnosis of multiple sclerosis (diagnostic code 8018). In June 1948, the veteran was again

examined. The examining physician found the veteran to be "completely negative for signs of M.S.," that the veteran had "been so for years," and concluded that the veteran "must be considered to be in remission." In June 1948, based on that examination, VA rated the veteran 30% disabled based on multiple sclerosis, effective August 16, 1948. In September 1949, the veteran was again examined by VA; the examining physician concluded simply, "Multiple sclerosis in Remission." In October 1949, based on that examination, VA rated the veteran 0% disabled for " multiple sclerosis in remission," effective December 12, 1949.

3. In July 1988, the veteran's rating diagnosis was changed from diagnostic code 8018 to diagnostic code 9309, with the following description:

Organic brain syndrome, post operative, residual of CVA [cerebral vascular accident] and excision of meningioma (previously diagnosed multiple sclerosis).

The discussion of this change by the rating board was as follows:

After review of all the evidence, including VA neurologic examination of May 1988, and resolving the doubt in the veteran's favor, it is found that the condition previously service connected as multiple sclerosis was in fact a CVA, which in the opinion of the medical member of the rating board was probably due to early angioblastic meningioma.

The veteran was rated 10% disabled as a result of this condition, effective March 26, 1987, the date of the veteran's reopened claim. 1/

4. We start with the proposition that service connection for the disability originally although erroneously diagnosed as resulting from multiple sclerosis in remission is protected from severance pursuant to 38 U.S.C. § 1159 (formerly 38 U.S.C. § 359). However, as a preliminary matter, we want to clarify your assertion that "service connection for multiple sclerosis is protected under the provisions of 38 C.F.R. § 3.957 and may not be severed." "Disability" and "diagnosis" are not interchangeable terms. Thus, both 38 U.S.C. § 1159 (formerly 38 U.S.C. § 359) and 38 C.F.R. § 3.957 protect "[s]ervice connection for any disability or death," not diagnoses. Similarly, under 38 U.S.C. § 1110 (formerly 38 U.S.C. § 310), disability compensation is paid for "disability resulting from personal injury suffered or disease contracted in line of duty," not for mere incurrence of disease. Accordingly, we believe it is more accurate in this case to speak in terms of the disability resulting from "multiple sclerosis in remission" rather than the "disability" of multiple sclerosis.

5. Generally, once a claim for benefits has been denied, and either the Board of Veterans' Appeals (BVA) has rendered a final decision, or the time for appeal has expired without an appeal, the decision on the claim is final and the claim cannot be allowed or reopened except on the basis of new and material evidence. 38 U.S.C. §§ 5108, 7104(b) and 7105(c) (formerly 38 U.S.C. §§ 3008, 4004(b), and 4005(c)). However, claimants for veterans' benefits are specifically relieved of this finality burden under certain circumstances by, among other provisions, 38 C.F.R. § 3.105(a), which

provides as follows:

Error. Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision.

This case involves whether the failure to award the Rating Schedule's minimum rating of 30% for multiple sclerosis in 1949 amounts to "clear and unmistakable error."

6. The Court of Veterans Appeals (COVA) has recently examined the question of what constitutes clear and unmistakable error. Bentley v. Derwinski, U.S.Vet.App. No. 89-70 (Sep. 13, 1990). In Bentley, COVA examined this issue in the context of a veteran who was assigned a 40% rating for a cardiac condition classified by VA as being an aneurysm with cardiac involvement. Such a rating was below the minimum rating of 60% provided for such a disability in the Rating Schedule. After an indepth examination of the medical information contained in the record, COVA remanded the case to BVA with instructions to vacate the prior 40% award effective the date it was entered. Id. COVA rejected VA's assertion that the inclusion of the phrase "with cardiac involvement" was a clerical error and that the veteran's condition did not merit such a description stating, "[a]fter the fact justification of a past error cannot make right that which is already wrong." Bentley, slip op. at 5. In further support of its ruling COVA referenced the narrative summary of a hospitalization prior to the 40% rating; «the summary noted "incipient congestive heart failure, shortness of breath at night, Grade III aortic systolic murmur, and the need to use digitalis." Id. In arriving at its conclusion the court stated:

[T]he veteran was entitled under the Schedule, to a 60% rating for arteriovenous aneurysm, traumatic, with cardiac involvement. To have provided the veteran with a 40-percent rating for this condition constitutes clear and unmistakable error pursuant to 38 C.F.R. § 3.105(a).

The reasoning of COVA's decision in Bentley parallels the longstanding policy that a veteran should not suffer as a result of a mistake by VA. See generally A.D. 963 (4-27-59) (discussing effective dates where rating was corrected under "clear and unmistakable error" standard).

7. A primary factor in any decision to reverse a prior determination and grant retroactive benefits based on clear and unmistakable error is the evidence of record at the time of the initial decision. Here the medical evidence of record at the time of the veteran's original adjudication supported a rating for multiple sclerosis. As previously noted, the minimum rating assignable when a veteran is service connected for multiple sclerosis is

30%. Even though the veteran was service connected for multiple sclerosis from the time of his separation, the veteran was rated as 0% disabled from December 1949 until July 1988.

8. Since the purpose of relief under the clear and unmistakable error standard is to provide the claimant with the benefits he or she would have been entitled to but for the error, VA is therefore required to retroactively correct the error and thereby establish a 30% rating effective the date of separation. See 22 Op.Sol. 722-A (1935), Digested Opinion 7-17-84 (1-17 38 C.F.R. § 3.400). The fact that current medical evidence supports a conclusion that the veteran never had multiple sclerosis does not change the fact that VA rated the veteran as being disabled as a result of multiple sclerosis. 2/ Having done so, VA may not now use current medical reports to reinterpret the evidence of record in 1944-1949.

9. We reiterate that the holding by COVA in Bentley was based on its determination that the veteran was originally entitled to the 60% rating because the evidence supported a conclusion that the veteran suffered from an arteriovenous aneurysm with cardiac involvement which, under the Rating Schedule, provided a minimum 60% rating. Here, the evidence of record at the time of the initial determination supported a conclusion that the veteran had multiple sclerosis. Therefore, application of the Bentley holding to this case suggests that it was clear and unmistakable error to incorrectly assign the veteran a rating below 30%.

10. Having determined that it was clear and unmistakable error for VA not to assign a 30% rating, we must next examine whether that rating will be protected. Section 110 of title 38, United States Code provides in pertinent part:

A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under the laws administered by the Department of Veterans Affairs shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud.

An examination of the legislative history of section 110 reveals that the original intent of the statute was to spare the veteran the inconvenience, and the government the expense of repeated examinations once a rating of total disability was determined to be static, and to prevent reduction of benefits upon which the veteran had become accustomed. H.R.Rep. No. 533, 83rd Cong., 1st Sess. 2 (1953). Congress expanded this protection in 1964 to include protection against reduction of disability ratings that were less than 100% but in effect for at least 20 years. Pub.L. No. 88-445, 78 Stat. 464 (1964) This protection applies whether the disability rating was correct or erroneous. See O.G.C.Prec. 16-89. Further, protected status is only granted to ratings that have "been the foundation for the payment of awards for a period of at least 20 years." See O.G.C.Prec. 31-90 (previously issued as Op.G.C. 8-79). In this case, but for clear and unmistakable error, the veteran should have been rated at 30% rather than 0% in 1949. The date which the 30% status commenced for rating purposes is March 22, 1944 (the date of separation) and the period of payment, including that covered by the retroactive

payments due and payable, exceeds 20 years. Accordingly, under section 110 and 38 C.F.R. § 3.951 the veteran's 30% evaluation is protected.

HELD:

a. Provided that the medical evidence then of record supported a finding of disability, VA's failure to assign the minimum rating required for a service-connected disability under the Rating Schedule is clear and unmistakable error warranting a retroactive correction of the rating.

b. Because protection of a disability pursuant to 38 U.S.C. § 110 requires that such a rating be the basis for compensation for twenty years, where a disability rating is retroactively increased and the effective date of such increase is more than twenty years in the past, the revised disability percentage is protected under 38 U.S.C. § 110 and 38 C.F.R. § 3.951.

1/ The July, 1988, rating also assigned the veteran a 20% rating for focal seizures, and a 10% rating for the residuals of a left frontal craniotomy. These ratings were also made effective March 26, 1987, the date of the veteran's reopened claim.

2/ Currently VA has assigned the veteran a 10% rating for organic brain syndrome under diagnostic code 9309 indicating that this disability was previously diagnosed as having resulted from multiple sclerosis. The retroactive 30% rating for multiple sclerosis under diagnostic code 8018 would be the limit of the veteran's rating for that disability; «that is, the veteran should not be rated under both diagnostic code 8018 and 9309 for the same disability. See 38 C.F.R. § 4.14 (Avoidance of pyramiding).