DATE: 09-27-91

CITATION: VAOPGCPREC 69-91
Vet. Aff. Op. Gen. Couns. Prec. 69-91

Attached: VAOPGCADV 28-90
Vet. Aff. Op. Gen. Couns. Adv. 28-90

TEXT:

SUBJECT: Retroactive payment of chapter 35 due to establishment of service connection for non-Hodgkin's lymphoma

QUESTIONS PRESENTED:

In 1990, VA promulgated 38 C.F.R. § 3.313, a regulation which provides that, effective August 5, 1964, a person who served in Vietnam during the Vietnam era and who subsequently developed non-Hodgkin's lymphoma (NHL) shall be deemed to have service connection for that disease. Assume that a veteran died in 1976 as the result of NHL and that subsequent to the issuance of the mentioned regulation VA rated the death of the veteran from NHL as being service connected:

a. May a child of the veteran be awarded chapter 35 educational benefits retroactive to 1988 if the child first applied in 1990, at age 19, following the issuance of section 3.313 and the service-connected death rating based thereon?

b. May a surviving spouse of the veteran, who also first applies at that time for chapter 35 benefits, elect a beginning date for his or her period of eligibility, under 38 U.S.C. § 3512(b)(3), which is retroactive to any date on or after the date of the veteran's death?

c. If the surviving spouse filed a claim for death benefits and was denied in 1976, and a child of the veteran was age 19 on that date, may the child be accorded chapter 35 benefits retroactively for training between his or her 18th and 26th birthdays if the child files an original claim for chapter 35 benefits in 1990, at age 33, following the issuance of the regulation and rating?

d. In the example described in (c), may the surviving spouse be awarded chapter 35 benefits retroactively for any period beginning on or after the date of the veteran's death based upon an original application in 1990?

COMMENTS:

1. We note that in the cases cited in the inquiry the only rating action taken was

to determine that the veteran, upon whose status the dependents' chapter 35 claims are based, died of a service-connected disability. We will limit our discussion to that category and reserve judgment upon legal issues to be considered in cases wherein the veteran is or was rated as being permanently and totally disabled from NHL prior to his death or who died while so rated. For a general discussion of congressional intent and partial application of section 3512 of title 38, United States Code, regarding the latter category, we invite attention to O.G.C. Precedent Opinion 56-91.

2. On May 1, 1990, this office issued O.G.C. Advisory Opinion 28-90 which is attached and incorporated herein as though fully set forth. In that opinion we advised that:

(a) The Secretary of Veterans Affairs has authority to promulgate a regulatory issue liberalizing the burden of proof for establishing eligibility for a VA benefit and make it effective earlier than the date of its final publication in the Federal Register; and

(b) The effective date of VA benefits awarded pursuant to such issue will be based on the date of original claim therefor, even if the claim had been previously denied under VA issues in effect prior to issuance of the liberalizing regulation, but in no event earlier than the effective date of the liberalizing issue.

3. Thereafter, on October 26, 1990, VA promulgated 38 C.F.R. § 3.313, providing service connection for NHL for certain veterans effective August 5, 1964, the beginning of the Vietnam era. This rule reads as follows:

§ 3.313 Claims based on service in Vietnam.

(a) Service in Vietnam. "Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

(b) Service connection based on service in Vietnam. Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

4. The pertinent statutory provision governing the effective date of compensation awarded under such liberalization, 38 U.S.C. § 5110(g), provides as follows:

(g) Subject to the provisions of section 3001 of this title, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such

award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier. (Emphasis added.)

5. The companion provision governing effective dates for education benefits, section 5113, provides as follows:

Effective dates relating to awards under chapters 30, 31, 32, 34, and 35 of this title shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation.

6. Under section 5110(g), as construed by O.G.C. Advisory Opinion 28-90, the earliest award date of disability compensation based on service connection for NHL established under 38 C.F.R. § 3.313(b) would be the date 1 year prior to the date of claim for the benefit, which may be retroactive to, but not earlier than August 5, 1964. We find this interpretation reasonably consistent with the regulations applicable to chapter 35 concerning the timeliness of application and the effective date of benefits awarded pursuant to a VA administrative issue: i.e., 38 C.F.R. § 21.4131(a)(2) and (f), respectively. Therefore, we conclude that, with one qualification, establishing retroactive award effective dates for chapter 35 claims corresponding to those applicable to disability compensation claims under section 3.313 is "feasible" within the meaning of section 5113.

7. The one qualification, which must be accommodated, derives from the eligibility periods prescribed by 38 U.S.C. § 3512. Chapter 35 benefit eligibility, unlike disability compensation, is time limited for the various categories of chapter 35 claimants (e.g., children and surviving spouses) by the substantive law governing the program. Moreover, such statutory eligibility periods exist independent of the award effective date, although, in practical effect, the two factors may limit each other. Thus, for example, the award effective date must be a date within the applicable eligibility period, and such date, when falling after the beginning of the eligibility period, necessarily will foreshorten that period.

8. Under section 3512, a surviving child has eligibility for chapter 35 benefits generally during the 8-year period between ages 18 and 26, while a surviving spouse has eligibility during the 10-year period following the veteran's service-connected death. (As noted above, we address here only the case of a veteran who is found to have died as a result of a service-connected disability but whose condition prior to death has not been rated for service connection.) Thus, in the cases postulated, where the veteran from whom entitlement derives died in 1976, the basic eligibility periods for the veteran's children, one age 19 and one age 5 on the date of the veteran's death, would be 1976-1983 and 1989-1997, respectively. The surviving spouse's eligibility period would be the 10-year period from 1976 to 1986.

9. As can be seen, in two of the above cases, and in part in the third, the basic period of eligibility for using chapter 35 benefits would have expired before VA would have determined the claimants' entitlement to those benefits under the 1990 administrative issue (38 C.F.R. § 3.313(b)). To mitigate this kind of adverse effect on a claimant's eligibility due to circumstances outside his or her control, Congress included in section 3512 certain exceptions to the basic eligibility periods delineated, affording claimants who are without fault a reasonable period during which to avail themselves of such educational assistance.

10. The exceptions either extend the eligibility period for children (section 3512(a)(1)-(6) and (c)) or allow selection of a commencing date of eligibility most advantageous to the surviving spouse (section 3512(b)). As to the former, only the exception found in section 3512(a)(3) applies on the facts here at issue; as to the latter, only section 3512(b)(1)(C) and (b)(3) provisions apply.

11. Under section 3512(a)(3), if the veteran's service-connected death occurred during the period between the child's 18th and 26th birthdays, the eligibility period would run for 8 years from the date of the veteran's death. Thus, in the example of the child age 19 in 1976 when the veteran died, the period of eligibility would extend from 1976 to 1984 based upon the exception. (Note that the child age 5 in 1976 does not fall within the exception, and his or her eligibility period remains 1989-1997.)

12. In the case of the surviving spouse, the normal 10 years from date of death rule would be subject to the exception derived from section 3512(b)(1)(C) and (b)(3). Together, these provisions provide that the 10-year period, at the election of the spouse, may start on any date between the date of the veteran's death (1976 in the examples) and the date VA determines the death was service connected (for the examples given, a date in 1990 or 1991, respectively, when the rating of service connection for the veteran's death was issued).

13. In sum, then, 38 U.S.C. § 5113 requires that, where chapter 35 benefits are awarded based on entitlement derived from the service-connected death of the veteran parent or spouse from NHL, established pursuant to 38 C.F.R. § 3.313, the effective date of the award shall correspond, to the extent feasible, to the effective date for disability compensation awarded pursuant to that section. The feasibility of establishing such corresponding dates is impeded only to the extent of the need to accommodate the chapter 35 eligibility period mandated by 38 U.S.C. § 3512.

14. Thus, consistent with the requirements of section 5113, we find that three factors will determine the effective date of a chapter 35 award under the facts posed. First, under the ruling in O.G.C. Advisory Opinion 28- 90, the effective date of the administrative issue on which eligibility is founded determines the maximum extent of award retroactivity, not the date of issuance of any

subsequent VA eligibility determination based thereon. Next, the delimiting date provisions of section 3512 determine the maximum period of the claimant's eligibility to use his or her chapter 35 entitlement, which period may begin before, on, or after the effective date of the administrative issue. (In each of the examples given, the eligibility period begins after 1964, the effective date of 38 C.F.R. § 3.313, the liberalizing issue in question.) Last, section 3010(g) and 38 C.F.R. §§ 21.4131(a)(2) and 21.4131(f), the regulations governing timeliness of chapter 35 applications and the effective date of awards based on a liberalizing issue, determine the date on or after the effective date of the administrative issue and within the applicable eligibility period when benefits may commence.

15. Thus, even though the claimant's entire period of eligibility under section 3512 falls within the period of retroactivity permitted under section 5110(g), the earliest award date cannot predate the date of application by more than 1 year under the express language of the same statute, as well as the pertinent implementing regulation, 38 C.F.R. § 21.4131(a). As determined in the Advisory Opinion, if the claimant (child or surviving spouse) had applied for service-connected death benefits and been denied prior to the issuance of the administrative issue but after its retroactive effective date, VA would award benefits based on the date of that claim. For chapter 35 purposes, that date would be the date 1 year prior to the date of receipt of the application in VA (38 C.F.R. § 21.4131(a)) but could not, of course, precede the effective date of the liberalizing administrative issue (1964), the date of the veteran's death (1976), or the earliest eligibility period commencing date fixed under 38 U.S.C. § 3512 as described in paragraphs 11 and 12 above.

16. If the initial claim is submitted after issuance of the liberalizing administrative issue, then, despite the period of retroactivity accorded the person under 38 U,S.C. § 3512 for purposes of fixing the period of eligibility, and the period of retroactivity accorded by the effective date of the liberalizing administrative issue, the award cannot be effective earlier than 1 year prior to the date the application is received.

HELD:

a. Concerning the first example presented here, we find the child's eligibility period for chapter 35 extends from age 18 to age 26 (1989-1997), but the child is entitled to receive benefits under that chapter only for training pursued during the period beginning no earlier than 1 year prior to the date of original application in 1990.

b. In the second example, the surviving spouse of the veteran is eligible under chapter 35 during the 10-year period beginning on such date as the spouse selects between 1976 and the date of rating establishing entitlement under that chapter. However, as in the previous example, an award cannot be effective

more than 1 year prior to date of application.

c. In the third example, the facts are unclear as to whether the child filed a claim in 1976 for chapter 35 at the same time as the surviving spouse. If not, the child's period of eligibility, from 1976 to 1984, would have expired more than 1 year prior to filing the initial chapter 35 application in 1990. Thus, no chapter 35 benefits could be awarded. If, however, an application had been filed in 1976, benefits could be awarded for the period beginning on the later of the date of the veteran's death or 1 year prior to the date of application. No benefits would be payable beyond the date in 1984, 8 years after the veteran's death (unless the child qualifies for an extension as provided in other provisions of section 3512).

(Note: In the first part of the foregoing third example, the fact that the child was age 33 when the original application was filed in 1990 is not relevant in determining the period of eligibility in a death case under section 3512(a)(3). The age 31 limitation only applies in the case of a child seeking to extend the basic eligibility period under subsections 3512(a)(4), (a)(5), or (c). Thus, on the facts presented by the example, the award based on an application in 1990 at age 33 would be barred as untimely under 38 C.F.R. § 21.4131(a), but not due to the child's age at the time of application.)

d. Finally, as to the fourth example, the same period of eligibility applies to the surviving spouse as in paragraph 2 above, except that, since the initial chapter 35 application was filed in 1990, no award could be made for any period earlier than 1989. Further, an award back to 1989 could only be made if the surviving spouse elects a delimiting period under section 3512(b)(3) which includes the period from 1989 to the end of the award period. Note that, if the surviving spouse's death benefit claim in 1976 had included a claim for chapter 35 benefits and he or she now selects a delimiting period beginning on the date of the veteran's death, benefits could be paid for pursuit of an approved program of education during the 10-year period thereafter, due to the retroactivity accorded awards under 38 U.S.C. § 5110(g) as interpreted by O.G.C. Advisory Opinion 28-90.

Attachment

ADV 28-90
05-01-90

SUBJECT: Effective Date of Regulations Establishing Service Connection Between Vietnam Service and Non-Hodgkin's Lymphoma

QUESTIONS PRESENTED:

1. Does the Secretary have the authority, in amending part 3, title 38, Code of Federal Regulations, to establish an effective date for that amendment earlier

than the date of publication of the amended regulation in the Federal Register?

2. If so, in cases where benefit eligibility arises by reason of the amendment, may benefits be paid retroactively based on the dates of previously- denied claims?

COMMENTS:

1. On March 29, 1990, the Centers for Disease Control (CDC) released a study entitled "The Association of Selected Cancers with Service in the U.S. Military in Vietnam" (hereinafter "SCS Study"). In Part I of that study, CDC stated in part:

Results of this study strongly suggest that Vietnam veterans have a roughly 50% increased risk of developing NHL non-Hodgkin's lymphoma, a cancer about 15-25 years after military service in Vietnam . The results do not show a similar increased risk among veterans who served in other locations during the Vietnam era; this finding suggests that the association is specific to Vietnam service, rather than military service in general. SCS Study, Part I at 16.

As a result of the SCS Study, the Secretary will be proposing regulations which provide that, where a veteran with Vietnam service subsequently develops NHL, the resultant disability will be service connected. He has stated that VA will "extend as much latitude as possible in awarding retroactive benefits" under the regulations. Statement of Secretary Derwinski, March 29, 1990. We have been asked whether the Secretary has the authority to establish an effective date for the new regulation which would predate its publication in the Federal Register, and, if so, whether the regulation could authorize retroactive awards of benefits in cases of previously-denied claims.

Authority of the Secretary to Establish Service Connection Between a Disease and Service in Vietnam

2. As a preliminary matter, we must discuss the Secretary's authority to propose this kind of regulation, i.e., one which establishes service connection between a disability resulting from a disease and service in Vietnam during the Vietnam era. Generally, the Secretary has broad rulemaking authority. Thus, 38 U.S.C. § 210(c)(1) provides in part as follows:

The Secretary has authority to make all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department of Veterans Affairs and are consistent therewith, including regulations with respect to the nature and extent of proofs and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws, the forms of application by claimants under such laws, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards.

There is precedent for the establishment of service connection by regulation. In 1976, Congress authorized a scientific study to determine if there was a causal relationship between amputations of extremities and the subsequent development of cardiovascular disorders. Pub.L. No. 94-433, § 403, 90 Stat. 1374, 1378 (1976), 38 U.S.C. § 301 note. The resulting study indicated that veterans who suffered an amputation of both lower extremities, or of one lower extremity at or above the knee, had a significantly higher risk of dying from diseases of the cardiovascular system. In response to that study, the Administrator promulgated those provisions now contained in 38 C.F.R. § 3.310(b), which provide that cardiovascular disease developing in a veteran who has a service-connected amputation shall be held to be the proximate result of the service-connected amputation. See 44 Fed.Reg. 26762- 63 (May 7, 1979); 44 Fed.Reg. 50339-40 (August 28, 1979). The Secretary's authority to promulgate section 3.310(b) has not been questioned.

3. In our opinion, the results of the SCS study are analogous to the study which resulted in 38 C.F.R. § 3.310(b). Both studies were specifically commissioned by the Congress and both resulted in a scientific conclusion of an association between an incident of military service and a disability. Following review of this latest study, the Secretary has determined that proof of service in Vietnam during the Vietnam era and the subsequent development of NHL is sufficient evidence to establish that the resulting disability was contracted in the line of duty in the active military, naval, or air service. See 38 U.S.C. § 310. Accordingly, we conclude that the Secretary has the authority to establish, by regulation, that the disability of a veteran of Vietnam service during the Vietnam era resulting from the development of non- Hodgkin's lymphoma shall be service connected.

Authority To Issue Retroactive Regulations Under the Administrative Procedure Act

4. Rulemaking is generally subject to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551--552, 553-559, 701-706, 1305, 3105, 3344, 5372, 7521. By its terms, the so-called "informal" rulemaking procedures of 5 U.S.C. § 553 did not apply to rules of the Department of Veterans Affairs (VA) related to loans, grants or benefits. Id. § 553(a)(2). However, in 1972, by regulation, VA voluntarily adopted the substance of the procedures set forth for rulemaking in id. § 553. 38 C.F.R. § 1.12. Further, in 1988, Congress specifically provided that 5 U.S.C. § 553 would apply to such VA rulemaking. 38 U.S.C. § 223(b), added by Pub.L. No. 100-687, Div. A, title I, § 102(a)(1), 102 Stat. 4105, 4106 (1988). The issue which must be addressed, therefore, is whether the APA would bar the Secretary from making the application of the rule retroactive, so that claims filed and denied in prior years could be reconsidered and benefits paid based on the date of the original claim.

5. Although the courts have struck down a number of retroactive rules on APA principles, the APA does not per se prohibit the establishment of retroactive

rules. Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 471 (1988). See also K. Davis, Administrative Law Treatise § 7:23 (2d ed. 1979).

6. The Supreme Court in Bowen enunciated criteria concerning agency authority under the APA to adopt retroactive rules. With respect to criteria relating to retroactivity the Court stated that, "as a general matter," in the absence of express statutory language, statutory rulemaking authority does not include the authority to make a rule retroactive. In that case, the Court applied this general rule to disallow retroactive application of a rule that would have decreased amounts of reimbursement for expenses already incurred in providing medical services to Medicare beneficiaries. The court in Bowen, did not, however, foreclose the authority, at least under some circumstances, to adopt a retroactively effective rule. The court clearly recognized that statutory rulemaking which had an explicit retroactive effect may be honored. Moreover, the language of the opinion qualifies the general bar against interpreting statutes which are nonspecific as to retroactive effect as including retroactive authority, with the aforementioned words, "as a general matter." The concern underlying the clear bias in Bowen against finding authority to make rules retroactive is the harshness, or burden, that can be imposed on those who had acted in reliance on rules (or the absence of rules) which were later changed. As in the Bowen case, where the retroactive effect of rules has caused an "unreasonably harsh result," courts have reacted unfavorably. In contrast, however, our research to date has failed to identify any cases in which a court has struck down a retroactive rule granting benefits or liberalizing restrictions. We believe it is this type of a retroactive rule to which the qualification imposed by the Bowen court refers. Since the rule in question would not disadvantage anyone, but instead would allow individuals to collect retroactive benefits now determined to be due them, we do not believe that Bowen precludes its adoption. Accordingly, we conclude that the APA does not bar the contemplated retroactive application of the rule in question.

Finality

7. A separate issue regarding retroactive payments is that of finality. 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. §§ 3008, 4004(b), and 4005(c). Under that general rule, even if a regulation liberalized standards of proof, a previously-denied claim could not be allowed or reopened unless the claimant filed a new claim, together with new and material evidence.

8. However, claimants for veterans' benefits are specifically relieved of this finality burden under certain circumstances by the language of 38 U.S.C. § 3010 (g), which authorizes a fresh look at a disallowed claim--even in the absence of

new and material evidence--when a statute or regulation liberalizes burdens of proof. Section 3010(g) provides as follows:

Subject to the provisions of section 3001 of this title, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefore or the date of administrative determination of entitlement, whichever is earlier.

This statute must be considered an exception to the finality requirements of 38 U.S.C. §§ 4004(b) and 4005(c). It does not require new and material evidence and, in one sense, a claim reviewed under it is not considered a "reopened claim." Indeed, VA regulations speak of "review" of a claim under liberalizing regulations, not of a "reopening." 38 C.F.R. § 3.114(a).

9. This conclusion is supported by the legislative history of section 3010(g). That provision was contained in H.R. 7600, 87th Congress, 1st Session, a bill requested by VA. 108 Cong.Rec. 15,623 (1962) (remarks of Mr. Teague). The Senate Committee on Finance, in reporting H.R. 7600, described the purpose of the section as follows:

A uniform rule would be provided, for the first time, governing the effective dates of liberalizing laws or administrative issues that are enacted or promulgated in the future. This provision would, in many cases, obviate the necessity of a potential beneficiary filing a specific claim for the new benefit and would instead permit the Veterans' Administration, where feasible, to identify such beneficiaries and apply the provisions of the liberalized law and administrative issue on its own initiative.

The provision would permit a retroactive period of payment of not more than 1 year, but in no event prior to the effective date of the law or issue. S.Rep. No. 2042, 87th Cong., 2d Sess. 2, reprinted in 1962 U.S.Code Cong. & Admin.News 3260, 3260-61. This articulated purpose was taken verbatim from a letter from the Administrator of Veterans Affairs to the Chairman of the Committee on Finance, August 28, 1962, reprinted in S.Rep. 2042, 87th Cong., 2d Sess. 4, reprinted in 1962 U.S.Code Cong. & Admin.News 3260, 3262. The Senate report on the legislation which embodied that provision indicated it would "in many cases, obviate the necessity of a potential beneficiary filing a specific claim for the new benefit" (emphasis added) and would instead allow VA on its own initiative to identify beneficiaries and apply the liberalized law. S.Rep. No. 2042 at 2, 1962 U.S.Code Cong. & Admin.News at 3261. Since section 3010(g) is specifically subject to section 3001, which requires that a claim be filed before benefits may be paid, the above-quoted language could not be a reference to

beneficiaries who had never filed claims. Further, the reference to "many cases" renders it unlikely that Congress was referring only to beneficiaries with pending claims. Rather, it seems clear Congress intended that VA would conduct administrative reviews of previously-decided claims, and pay retroactive benefits as appropriate, without regard to the finality statutes. Accordingly, it is our opinion that the finality provisions cited above do not present an obstacle to the retroactive application of a regulation, with a retroactive effective date, to a previously-denied claim.

Effective Date of Retroactive Payments

10. Our conclusions, that the Secretary can establish a retroactive effective date for the subject regulations and that finality provisions are not a bar to the application of these regulations to previously-disallowed claims, leave a final question: whether VA is authorized to pay benefits based on the date of an original claim, although the claim was filed prior to the issuance of the regulation. The question appears to be one of first impression. In the case of 38 C.F.R. § 3.310(b), discussed in paragraph 4, supra, the effective date chosen was the date of the Administrator's final approval of the regulation--August 22, 1979--which was prior to publication of the final regulations, but subsequent to publication of the proposed regulations. 44 Fed.Reg. 50,339 (August 28, 1979). There is no indication, however, that this date was chosen as the result of an opinion rendered by the General Counsel.

11. The effective date of the payment of benefits is governed by several statutes and regulations. As a preliminary matter, under 38 U.S.C. § 3001 VA is prohibited from paying benefits unless a claim has been filed. Under 38 U.S.C. § 3010(a), the effective date of an award of benefits generally cannot be earlier than the date of receipt of the application for the benefit. See 38 C.F.R. § 3.400 (same rule).

12. The relationship between the effective date of a statute or regulation and the effective date of an award of benefits is set forth in 38 U.S.C. § 3010(g), quoted in paragraph 8, supra. By its terms, section 3010(g) deals with an award of benefits made pursuant to any statute or regulation. The essence of the rule is twofold: (1) benefits pursuant to a statute or regulation cannot be authorized prior to the effective date of the statute or regulation; and, (2) an award may be retroactive, but not more than one year prior to the earlier of (a) the date of application or (b) the date VA determines eligibility.

13. The VA regulation implementing section 3010(g), found at 38 C.F.R. § 3.114(a), provides as follows:

Effective date of awards. Where pension, compensation, or dependency and indemnity compensation is awarded or increased pursuant to a liberalizing law or a liberalizing Department of Veterans Affairs issue, approved by the Secretary or

by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue.

(1) If a claim is reviewed on the initiative of the Department of Veterans Affairs within 1 year from the effective date of the law or Department of Veterans Affairs issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or Department of Veterans Affairs issue.

(2) If a claim is reviewed on the initiative of the Department of Veterans Affairs more than 1 year after the effective date of the law or Department of Veterans Affairs issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or Department of Veterans Affairs issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.

14. It is clear that section 3010(g) on its face authorizes payments retroactive to the "effective date" of the statute or regulation creating entitlement, with the only qualification being that retroactive benefits may not be awarded for a period more than one year before the earlier of the date of application for benefits or the date of determination of entitlement. The opening paragraph of section 3.114(a) tracks the statute in authorizing payments to the effective date of the statute or regulation creating entitlement. The regulation goes on, in paragraphs (1) through (3) of section 3.114(a), to establish effective-date rules applicable in three specific situations involving changes of law giving rise to entitlement. Which of these paragraphs applies in a given claim turns on whether or not a request for review is received or an administrative review is initiated within one year of the effective date of the change in law creating entitlement. Attempting to apply these rules to a situation involving a retroactive change of law leads to a different result than would be reached under the terms of 38 U.S.C. § 3010(g).

15. Assume, for example, that the Secretary chose an effective date of August 5, 1964, for a regulation establishing service connection for NHL based on Vietnam service, but published the final version of the regulation on June 1, 1990. Assume further that a Vietnam veteran suffering from NHL since 1982 filed a claim on June 1, 1984, which was denied, and, on June 1, 1990, requests that the claim be reviewed under the new regulation. If 38 C.F.R. § 3.114(a)(3) were applicable, payment could be authorized retroactive only to June 1, 1989. Because the request for review was received more than one year after August 5, 1964, the effective date of the regulation, section 3.114(a)(3) would seemingly provide that benefits would be authorized for the period of one year prior to the June 1, 1990 date of receipt of the request for a review of the original denial. The same result would be reached under section 3.114(a)(2) were VA to

identify and allow the claim on June 1, 1990. However, under the plain language of 38 U.S.C. § 3010(g), payment could be authorized effective June 1, 1983. In no event could benefits be paid for a period prior to the regulation's effective date of August 5, 1964. Since, in the above example, the June 1, 1984, date of application would be earlier than the date of determination of entitlement, no benefits could be paid for a period more than one year prior to the former date, i.e., no benefits could be paid for a period prior to June 1, 1983. Because, in this example, the veteran was in fact disabled on June 1, 1983, payments retroactive to that date would be authorized.

16. The legislative history of 38 U.S.C. § 3010 (g) sheds little light on the situation where a regulation is published with a retroactive effective date. See paragraph 9, supra. A section-by-section analysis of the bill, provided by VA and
incorporated in the Senate report, stated that " a retroactive period of payment of not more than 1 year would be provided." S.Rep. No. 2042 at 6, 1962 U.S.Code Cong. & Admin.News at 3264. Although the quoted sources contain reference to a one-year limitation on retroactive payments, it is not at all clear from the context of these references that Congress and VA had anything in mind other than limiting payments to no more than one year prior to the filing of a claim or to an administrative determination of entitlement, whichever is earlier, without regard to whether the claim may have been filed before enactment or issuance of the law upon which entitlement is based. The legislative history must be considered inconclusive on this point, and thus the terms of the statute itself must be considered the best guide to Congress' intention in enacting section 3010(g). Furthermore, remedial statutes such as section 3010(g) are to be liberally construed in furtherance of their purposes. See, e.g., Peyton v. Rowe, 391 U.S. 54, 65 (1968); 3 N. Singer, Sutherland Statutory Construction § 60.01 (4th ed. 1986); A.D. No. 976 (1961).

17. In our opinion, 38 C.F.R. § 3.114(a) was not intended to be applied to the case of a statute or regulation which itself contains a retroactive effective date. Rather, the regulation promulgated at 38 C.F.R. § 3.114(a) was intended to deal with the typical situation of a statute or regulation with an effective date coincident with or subsequent to the date of promulgation. The regulation simply does not deal with the special case of retroactive effective dates. We consider it noteworthy in this regard that there is no discussion of statutes or regulations with retroactive effective dates in either the Senate or House report on H.R. 7600, or in the material associated with publication of the regulation. Further, the terms of the regulation itself do not appear to contemplate the exceptional case of a statute or regulation with a retroactive effective date.

18. It further appears that Congress has not contemplated that the regulation would apply to a law with a retroactive effective date. For example, Pub.L. No. 101-201, which provides that no payments made from the Agent Orange Settlement Fund shall be considered income or resources under any Federal

program, including VA's pension and parents' DIC programs, was signed by the President December 6, 1989, but was retroactive in its effect to January 1, 1989. If 38 C.F.R. § 3.114(a) were to be applied, unless an administrative review was completed or a claim was submitted prior to January 1, 1990--less than a month after the measure became law--benefits could not be paid to the effective date of the law. We cannot ascribe to Congress an intention that such a result be reached. While we do not believe section 3.114(a) applies to payment of benefits based on a retroactively effective statute or regulation, the regulation should be amended to clarify this point and assure consistency with 38 U.S.C. § 3010(g).

19. No principle of legal construction remains more forceful with respect to title 38 than the defined and consistently applied policy of this Department to administer the law under a broad interpretation for the benefit of veterans and their dependents. 38 C.F.R. § 3.102. In this case, a number of veterans stricken with a catastrophic disease which they believed to be connected to their service in the armed forces of the United States filed claims for benefits which were denied because science had not at the time discovered evidence of the association between that disease and their service. Now that such evidence is available, the Secretary has made the compassionate decision to pay retroactive benefits to the fullest extent permissible under law. Although we acknowledge that the extent to which benefits may be authorized pursuant to a retroactively effective regulation is a question of first impression, we believe the unique circumstances here present justify a broad interpretation. In view of the foregoing, we believe both of the questions presented may be answered in the affirmative.

HELD:

1. The Secretary is not prohibited, in making a liberalizing amendment to part 3, title 38, Code of Federal Regulations, from establishing an effective date for that amendment earlier than the date of publication of the amended regulation in the Federal
Register.

2. Where the Secretary publishes a regulation with a retroactive effective date which liberalizes the burden of proof in establishing eligibility for veterans benefits, the Secretary may authorize payment of benefits to an otherwise eligible claimant whose claim was denied under prior law, based on the date of submission of the previously-denied claim, but in no event earlier than the effective date of the regulation.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff.Op. Gen. Couns. Adv. 28-90