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CITATION: VAOPGCPREC 75-91
Vet. Aff. Op. Gen. Couns. Prec. 75-91

TEXT:

Subj: Unemployability Due to Service-Connected Disability

QUESTIONS PRESENTED:

a. Are "unemployability" and inability to "secure and follow a substantially gainful occupation" interchangeable concepts within the context of 38 C.F.R. §§ 3.340, 3.341, 4.16, 4.18, and 4.19?

b. What are the specific applications and interrelationships of the cited regulations, and how should the inconsistencies therein, as perceived by the Court of Veterans Appeals, be resolved?

COMMENTS:

1. These issues arise in the context of an order issued by the Court of Veterans Appeals (CVA) in the case of Williard B. Bartusch v. Edward J. Derwinski, U.S.Vet.App. No. 91-46 (July 11, 1991), granting the parties' joint motion for remand. On October 4, 1990, the Board of Veterans' Appeals (BVA) issued a decision denying the veteran's claim for a total-disability rating for compensation purposes based on individual unemployability. The veteran contended that he is precluded by service-connected disabilities from following any substantially gainful employment. The BVA found that the veteran's service-connected disabilities are not so severe as to preclude substantially gainful employment. In its July 11 order, the CVA vacated the BVA's decision and remanded the case pursuant to the parties' Joint Motion for Remand and to Stay Further Proceedings, which cited specific deficiencies in the reasons or bases for the BVA's findings and conclusions in light of Hatlestad v. Derwinski, U.S.Vet.App. No. 90-103 (March 6, 1991). These deficiencies included the BVA's failure to address whether the term "unemployability" is interchangeable with the concept of "inability to follow a substantially gainful occupation" under Department of Veterans Affairs (VA) regulations. They also included the BVA's failure to explain whether the standard applied to the veteran's claim was an "objective" one based upon average industrial impairment or a "subjective" one based upon the veteran's actual industrial impairment.

2. In Hatlestad, the CVA had concluded that the VA regulations pertaining to unemployability and total disability are a "confusing tapestry for the adjudication of claims." Slip op. at 6. In remanding the case, the court noted "apparent conflicts". in these regulatory provisions as to whether an "objective ('average

person') or subjective ('the veteran') standard" should be used in determining unemployability in a particular case and whether the concept of "unemployability" is interchangeable with the concept of "inability to follow a 'substantially gainful occupation'." In addition, in Ferraro v. Derwinski, U.S.Vet.App. No. 90-444 (June 24, 1991), and Moore v. Derwinski, U.S.Vet.App. No. 90-133 (July 10, 1991), the CVA noted the absence of a definition of "substantially gainful employment" in the statutes and regulations governing compensation claims.

3. As to the first issue, we conclude that the term "unemployability" is synonymous with inability to "secure and follow a substantially gainful occupation" as used in VA regulations governing disability compensation. Section 4.16, title 38, Code of Federal Regulations, is entitled "Total disability ratings for compensation based on unemployability of the individual." The terms of subsection (a) of that section state that a total- disability rating is appropriate if the disabled person is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." Similarly, subsection (b) of that section states VA policy that all veterans unable to secure and follow a substantially gainful occupation by reason of service-connected disability shall be rated totally disabled. That subsection goes on to provide that " t herefore" all cases of veterans who are "unemployable" by reason of service-connected disability are to be referred to the Director, Compensation & Pension Service. Section 3.340 is entitled "Total and permanent total ratings and unemployability (sic)." Subsection (a)(1) of that section states that a total-disability rating is appropriate when an impairment renders it "impossible for the average person to follow a substantially gainful occupation." In addition, 38 C.F.R. § 3.340(a)(3)(iii), which addresses total-disability ratings in cases in which the disability has recently improved, twice uses the phrase "substantially gainful occupation." See also 38 C.F.R. § 4.18 entitled "Unemployability," which applies when a veteran, upon termination of a job which was provided on account of disability or in which special consideration was given on account of disability, is "unable to secure further employment." These sections consistently define unemployability in terms of inability to secure or follow substantially gainful employment and, in the case of section 4.16(b), use the terms interchangeably.

4. Also, paragraph 50.52 a. of the Veterans Benefits Administration Adjudication Procedures Manual M21-1, states that to establish entitlement to compensation for total disability based upon "individual unemployability," a veteran must claim an inability "to secure or retain employment by reason of service-connected disability." If the rating board determines that a veteran may be entitled to a total-disability rating based on individual unemployability, the board must request that VA Form 21-8940 be sent to the veteran, along with a letter stating that he or she may be entitled to compensation at the 100-percent rate "if you are unable to secure and follow a substantially gainful occupation because of your service-connected disabilities." VA Manual M21-1, para. 50.52 c. FN1 While the VA Manual is not regulatory in nature, it is consistent with the conclusion that the

Department considers "unemployability" to be based on inability to follow substantially gainful employment.

5. Turning to the issue of the appropriate standard to be applied in assessing whether a veteran is entitled to a total-disability rating based upon individual unemployability, we first examine the statutory authority underlying VA regulations on this subject. Generally, the "plain-meaning rule" dictates that when the language of a statute is clear and unambiguous, it must be held to mean what it plainly expresses. 2A N. Singer, Sutherland Statutory Construction § 45.01 (4th ed.1984). Congress, in authorizing VA to establish a rating schedule, directed that the ratings "shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations." 38 U.S.C. § 1155 (formerly § 355) (emphasis added). The language "as far as practicable," which has been employed since 1917 in authorizing adoption of a schedule for rating service- connected disabilities, Act of October 6, 1917, ch. 105, § 302(2), 40 Stat. 398, 406; World War Veterans' Act of 1924, ch. 320, § 202(4), 43 Stat. 607, 618-19; Vet.Reg. No. 3(a), promulgated by Exec.Order No. 6157 (June 6, 1933), by its terms leaves to VA's discretion situations where use of a schedule based on average impairments is not practicable or feasible, i.e., where applying such a schedule would not result in ratings reflective of the true measure of disability. Thus, Congress has authorized consideration in disability ratings of factors affecting the individual veteran, rather than the "average person," where necessary to reflect the veteran's true level of disability.

6. Pursuant to this authority, VA has promulgated the Schedule for Rating Disabilities found at 38 C.F.R. part 4, which includes the regulations found at 38 C.F.R. §§ 4.16, 4.18, and 4.19 pertaining to total-disability ratings for compensation purposes based upon unemployability and 38 C.F.R. § 4.15 relating to total-disability ratings generally. These regulations demonstrate VA's conclusion that inability to secure and follow a substantially gainful occupation must be evaluated upon the circumstances of the individual veteran. Section 4.15 of title 38, Code of Federal Regulations, makes reference to both an "average person" standard and to factors relevant to the individual veteran. It provides that total disability exists when the veteran's impairment is "sufficient to render it impossible for the average person to follow a substantially gainful occupation." However, section 4.15 also notes that "full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment," which preclude the usual amount of success in overcoming a handicap, and to the effect of combinations of disability. These terms, found in the same regulation, can only be interpreted as a limitation on the application of the more general "average person" rule.

7. Section 4.16(a) of title 38 focuses on the situation of the individual veteran, stating that a total-disability rating may be assigned when "the disabled person"

is unable to secure or follow a substantially gainful occupation, provided that certain minimum percentage-rating standards are met. Further, section 4.16(b) states that " i t is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service- connected disabilities shall be rated totally disabled." The clear implication of this provision is that any veteran who is in fact unemployable by reason of service-connected disability shall be rated totally disabled, regardless of whether the veteran meets some "average person" standard. Subsection (b) goes on to direct the rating board to include a full statement regarding factors bearing on the employability of the particular individual, including the veteran's service-connected disabilities, employment history, educational and vocational background, and all other factors having a bearing on the issue. Consideration of such factors is, however, subject to the limitation stated in 38 C.F.R. §§ 4.19 and 3.341(a). Section 4.19 states that " a ge may not be considered as a factor in evaluating service-connected disability" and that "unemployability, in service-connected claims, associated with advancing age or intercurrent disability, may not be used as a basis for a total disability rating." Section 3.341(a) similarly specifies that, when a total-disability rating is based on a disability or combination of disabilities evaluated at less than 100 percent, unemployability must be established without regard to advancing age.

8. Section 4.18 also focuses on individual circumstances, providing that " a veteran" who has been terminated from employment which was provided on account of disability or in which special consideration was given on account of disability may be considered to be unemployable when it is satisfactorily shown that "he or she is unable to secure further employment." This regulation goes on to state that, in evaluating unemployability with regard to static disabilities, "consideration is to be given to the circumstances of employment in individual claims."

9. As with section 4.15, section 3.340(a)(1) states that total disability will be considered to exist when an impairment renders it "impossible for the average person to follow a substantially gainful occupation." However, that regulation goes on in paragraph (a)(2) to provide that total-disability ratings are authorized under both the percentage evaluations of the rating schedule and where the requirements of section 4.16 are met. As noted above, section 4.16 specifically provides that all veterans unable to follow a substantially gainful occupation by reason of service-connected disability will be rated totally disabled. As with our interpretation of section 4.15, we believe section 3.340(a)(1) contains a general policy statement which encompasses 100- percent ratings under the rating schedule in general, while section 3.340(a)(2) represents a specific limitation on that policy in the case of veterans for whom rating under the general policy does not adequately reflect the true degree of disability.

10. Section 3.340(a)(3) provides that a veteran may receive a total- disability rating despite the fact that there has been recent improvement in the veteran's disability and sets forth specific conditions which must be met with regard to the previous severity of the disability and the extent of previous treatment or industrial incapacity. Section 3.340(a)(3)(iii) references both the capabilities of the individual veteran and an "average person" criterion in explaining what is necessary to establish entitlement under paragraph (a)(3) of that section. It states first that the rating agency must determine whether "the veteran will be unable to effect an adjustment into a substantially gainful occupation" (emphasis added). However, the next sentence states that the rating agency must consider the frequency and duration of incapacitating episodes and periods of hospitalization "in determining whether the average person could have reestablished himself or herself in a substantially gainful occupation." Section 3.340 was promulgated in 1961, 26 Fed.Reg. 1,585, while section 4.16(b), stating VA's policy of rating as totally disabled "all veterans unable to secure and follow a substantially gainful occupation" was added in 1975, 40 Fed.Reg. 42,535. To the extent these regulations conflict, the more recent issuance should be considered controlling as the more recent expression of the agency's intention.

11. Finally, section 3.341 merely states that total-disability compensation ratings "may be assigned" under section 3.340 subject to two limitations, the previously discussed proscription of consideration of advancing age and a limitation on ratings based on unemployability in the case of incarcerated veterans. The section places no general restriction on consideration of the circumstances of the particular veteran. Based on the foregoing, we conclude that VA has interpreted 38 U.S.C. § 1155 as authorizing application of factors relating to the individual veteran in evaluating employability and issuance of total-disability ratings for compensation purposes based upon whether the individual veteran may be considered unemployable without regard to the employability of an average person.

12. It is clear that Congress has been aware of and has accepted VA's interpretation regarding unemployability. Where reenactment of a statute follows interpretation of the statute by the agency charged with its administration, the agency's interpretation is accorded greater weight than it would ordinarily receive, as it is regarded as presumptively the correct interpretation of the law. It is significant for purposes of application of this rule whether the agency's interpretation has been called to the attention of the legislature. 2A Singer, supra, § 49.09. The Court of Veterans Appeals recently recognized this principle, stating that:

A recent statement of the basic doctrine of legislative reenactment is that when the agency charged with the implementation of a statute has purported to interpret it by promulgating regulations, and Congress-- without overruling or clarifying the agency's interpretation--later amends the statutory scheme, the

agency view is then deemed consistent with Congress' objectives.

Whitt v. Derwinski, U.S.Vet.App. Nos. 89-16, 89-151, 90-38, 90-122, slip op. at 4 (October 12, 1990) (quoting from Isaacs v. Bowen, 865 F.2d 468, 473 (2d Cir.1989). However, the court went on to state that "to construe an agency's interpretation as Congress' will we must find a manifestation of congressional approval." Id.

13. Authorization for extraschedular ratings such as that found in current section 4.16(a), including reference to "the disabled person," first appeared as an addition to the 1933 Schedule for Rating Disabilities in Extension No. 4, issued by the Administrator of Veterans Affairs on November 15, 1941. Prior to issuance of this extension, the rating schedule merely stated that total disability exists when any impairment renders it impossible for the average person to follow a substantially gainful occupation. As noted above, section 4.16(b), enunciating the Department's policy regarding unemployability, was promulgated in 1975. Since 1975, Congress has amended 38 U.S.C. § 1155 twice. In 1984, Congress substituted "percent" for "per centum" wherever it appeared in this section. Pub.L. No. 98-223, s 101(c), 98 Stat. 37, 38 (1984). On August 14, 1991, Congress added a sentence to section 1155 which states that a veteran's disability rating in effect on the effective date of a readjustment of the rating schedule shall not be reduced unless an improvement in the veteran's disability is shown to have occurred. Pub.L. No. 102-86, s 103, 105 Stat. 414 (1991). In neither case did Congress question VA's implementation of section 1155 with regard to assessing unemployability.

14. It is clear that Congress was aware of VA's regulations on this issue at the time of amendment of section 1155. Then Administrator of Veterans Affairs Robert P. Nimmo, in a February 19, 1982, letter to the President of the Senate regarding a legislative proposal related to the Veterans' Compensation, Education, and Employment Amendments of 1982, Pub.L. No. 97-306, 96 Stat. 1429, stated, "It has long been recognized that, in individual instances, the schedular rating is inadequate to provide fair compensation for the effect of the veteran's disability on his or her employability." He then referred to 38 C.F.R. § 4.16, informing the Senate of VA's established policy that all veterans unable to secure and follow a substantially gainful occupation by reason of service-connected disability shall be rated totally disabled. S.Rep. No. 550, 97th Cong., 2d Sess. 135, reprinted in 1982 U.S.Code Cong. & Admin.News 2877, 2985.

15. Congress made specific reference to 38 C.F.R. § 4.16 and the regulatory scheme for assessing individual unemployability in the course of discussion of the Veterans' Benefits Improvement Act of 1984, Pub.L. No. 98-543, 98 Stat. 2735, relating to trial work periods and rehabilitation programs under 38 U.S.C. §§ 1163 and 1718 (formerly §§ 363 and 618) for veterans rated totally disabled on the basis of individual unemployability. The Senate Committee on Veterans'

Affairs acknowledged that an "individualized determination" pertaining to the veteran must be made under 38 C.F.R. § 4.16 and referred to section 4.16 as an exception to usual rating practices under which determinations are made without regard to employment factors pertaining to the particular veteran. S.Rep. No. 604, 98th Cong., 2d Sess. 31, reprinted in 1984 U.S.Code Cong. & Admin.News 4479, 4495. FN2 The report stated, "A substantial element of judgment is involved in making these determinations, and consideration is given to the nature of the veteran's service-connected disability, employment history, educational and vocational attainment, and other pertinent factors." Id. at 4496. Also, in the course of discussing 38 C.F.R. § 4.17, which concerns total-disability ratings for pension purposes based on unemployability of the individual, the Senate Report stated, " a s under the service-connected disability compensation program ... the determination of total disability based on unemployability can be subjective." Id. at 4511.

16. Congress also recognized VA's practice of considering the circumstances of the individual veteran in enacting section 8051 of the Omnibus Budget Reconciliation Act of 1990, Pub.L. No. 101-508, 104 Stat. 1388, 1388- 349 (1990). That statute added 38 U.S.C. § 5317(c)(4) and (d) (formerly § 3117(c)(4) and (d)) concerning use in unemployability cases of employment information supplied to VA by other Federal agencies. The section is premised on the assumption that employment data concerning the particular individual is pertinent in determining whether that individual is unemployable for purposes of assignment of a total-disability rating.

17. We also note that, in 1988, Congress precluded review of the rating schedule by the Court of Veterans Appeals pursuant to 38 U.S.C. § 7252(b) (formerly § 4052(b)). Pub.L. No. 100-687, § 301(a), 102 Stat. 4105, 4113 (1988). Acknowledging the deference given by courts to longstanding administrative constructions, Congress nonetheless chose to expressly preclude review of the rating schedule in order to prevent the schedule from being destroyed by piecemeal review of individual rating classifications. H.R.Rep. No. 963, 100th Cong., 2d Sess. 28, reprinted in 1988 U.S.Code Cong. & Admin.News 5782, 5810. This deference to VA regarding the schedule is evidence of Congress' general acceptance of the terms of that schedule. 18. It is evident from a review of this legislative history that Congress was aware of and considered VA's implementing regulation, 38 C.F.R. § 4.16, in making various changes to laws relating to disability compensation. Congress indicated no disapproval of VA's regulations on the matter at issue. Rather, Congress' actions strongly suggest that Congress has been aware of and has accepted the Department's regulations governing determination of individual unemployability for compensation purposes and that Congress considers those regulations consistent with VA's statutory authority under 38 U.S.C. § 1155.

HELD:

a. The term "unemployability," as used in VA regulations governing total-disability ratings for compensation purposes, is synonymous with inability to secure and follow a substantially gainful occupation.

b. VA regulations governing determinations of total disability for compensation purposes based on individual unemployability generally provide that all veterans who, in light of their individual circumstances, but without regard to age, are unable to secure and follow a substantially gainful occupation as a result of service-connected disability shall be rated totally disabled, without regard to whether an average person would be rendered unemployable under the circumstances.

1 The Manual defines "substantially gainful employment" for purposes of individual unemployability as employment "which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides." VA Manual, M21-1, para. 50.55b.(8).

2 This report was issued on September 17, 1984, subsequent to enactment of Pub.L. No. 98-223 on March 2, 1984, but before the 1991 enactment of Pub.L. No. 102-86.

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