

Date: February 18, 1994

O.G.C. Precedent 5-94

From: General Counsel (022)

Subj: Effective Date of Service Connection for Non-Hodgkin's  
Lymphoma Under 38 C.F.R. § 3.313

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

How, if at all, are the provisions of 38 U.S.C. §§ 5101(a), 5110(a), and 5110(g) and 38 C.F.R. § 3.114(a) to be applied in establishing an effective date for service connection of non-Hodgkin's lymphoma (NHL) based on an original claim made pursuant to 38 C.F.R. § 3.313?

COMMENTS:

1. On May 3, 1984, the General Counsel concluded in an undigested opinion that, under the provisions of what is now 38 U.S.C. § 5110(g) (former § 3010(g)) and 38 C.F.R. § 3.114(a), retroactive benefits could be paid, under certain circumstances, for up to one year prior to the date of receipt of an original claim, where entitlement to benefits is established on the basis of a liberalizing law or VA administrative issue. See Undigested Opinion, 5-3-84 (1-17 38 C.F.R. § 3.114(a)); see also Undigested Opinion, 7-17-84 (1-17 38 C.F.R. § 3.114(a)) (confirming this conclusion). After reviewing the legislative history of what is now section 5110(g), the General Counsel also indicated in these opinions that such benefits were only available in the case of claimants having potential entitlement at the time the change in law became effective.

2. On September 28, 1988, VA proposed amendment of section 3.114(a), to provide that the provisions of that section are applicable to original and reopened claims as well as claims for increased benefits and "to clarify that in order to be entitled to retroactive benefits under this section a claimant must have met all of the eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility

existed continuously from that date to the date of claim or administrative determination of entitlement." 53 Fed. Reg. 37,797, 37,799 (1988). The preamble to the Federal Register notice proposing amendment of section 3.114(a) cited Undigested Opinion, 5-3-84, and Undigested Opinion, 7-17-84, as a basis for the amendment and noted the opinions' conclusion that the legislative history of what is now section 5110(g) indicates Congress' intent "that retroactive payments be available to individuals who were 'potential beneficiaries' on the effective date of the liberalizing law or VA issue regardless of whether they had previously filed a claim for such benefits." 53 Fed. Reg. at 37,799. A final rule amending section 3.114(a), effective May 11, 1990, was published on April 11, 1990. 55 Fed. Reg. 13,522, 13,523, 13,529 (1990).

3. On May 1, 1990, the General Counsel issued O.G.C. Advis. 28-90, which held that, in making a liberalizing amendment to 38 C.F.R. part 3, the Secretary is not prohibited from making the amendment effective earlier than the date of its final publication in the Federal Register. The General Counsel further held in O.G.C. Advis. 28-90 that, 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 based on the date of a claim which had been previously denied under the law in effect prior to the promulgation of the liberalizing regulation, but that the effective date of the award may not be earlier than the effective date of the liberalizing regulation.<sup>1</sup> In so concluding, the General Counsel reviewed the legislative history of what is now section 5110(g), noting Congress' expressed intention to "'in many cases, obviate the necessity of a potential

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<sup>1</sup> On September 27, 1991, the General Counsel issued O.G.C. Prec. 69-91, which expressly incorporated and relied on O.G.C. Advis. 28-90 in concluding that, except to the extent necessary to accommodate time limits on eligibility applicable to various categories of claimants, establishing retroactive award effective dates for chapter-35 education-benefit claims corresponding to those applicable to disability compensation claims under section 3.313 is feasible within the meaning of 38 U.S.C. § 5113, which calls for establishment of corresponding effective dates "to the extent feasible." O.G.C. Prec. 69-91 at 2, 3.

beneficiary filing a specific claim for the new benefit'" and allow VA to act on its own initiative to identify potential beneficiaries and apply a liberalizing law. O.G.C. Advis. 28-90 at 6 (quoting S. Rep. No. 2042, 87th Cong., 2d Sess. 2 (1962), reprinted in 1962 U.S.C.C.A.N. 3260, 3261 (alteration in original)). The General Counsel interpreted this history as indicative of Congress' intention that VA review and pay retroactive benefits, as appropriate, with regard to both previously-denied and pending claims. However, the General Counsel also observed that what is now section 5110(g) is specifically subject to what is now section 5101 (former section 3001), which requires that a claim be filed in order for benefits to be paid. In light of the reference to section 5101, and without reference to the 1984 opinions or the recent amendment to section 3.114, which had yet to become effective, the General Counsel opined that Congress could not have contemplated that what is now section 5110(g) would apply to beneficiaries who had never filed claims. O.G.C. Advis. 28-90 at 6.

4. On October 26, 1990, VA promulgated 38 C.F.R. § 3.313 to implement a determination by the Secretary that there is a relationship between Vietnam service and development of NHL. 55 Fed. Reg. 43,123, 43,124 (1990). Section 3.313 provides that service in Vietnam during the Vietnam Era together with the development of NHL manifested subsequent to such service is sufficient to establish service connection for that disease. Relying on O.G.C. Advis. 28-90, the Secretary made section 3.313 retroactively effective to August 5, 1964, the beginning date of the Vietnam era. 55 Fed.Reg. at 43,124; 55 Fed. Reg. 25,339 (1990) (notice of proposed rulemaking).

5. On October 23, 1990, the Chief Benefits Director issued VBA Circular 21-90-11 to provide, among other things, instructions for implementation of 38 C.F.R. § 3.313. The instructions referred to a list of cases previously provided to the regional offices which may have involved denial of service connection for NHL and indicated that a previously-denied claim for service connection for NHL could now be adjudicated as if section 3.313 were in effect when the original claim was first filed. The circular also indicated that service connection could be established from the original date of claim, if otherwise appropriate. In a series of examples, the circular indicated that the effective date for service connection for NHL based on an

original claim or a claim previously denied would be the date of the original or previously-denied claim. VBA Circular 21-90-11, para. 2.f. Consistent with these examples, on January 25, 1991, the Chief Benefits Director issued Change 1 to VBA Circular 21-90-11 to, among other things, specify that 38 C.F.R. § 3.114(a) does not apply to claims for service connection of NHL because no one could have met all the requirements for service connection of NHL on August 5, 1964, the effective date of section 3.313.

6. As recognized in O.G.C. Advis. 28-90, the effective date for a compensation award is governed by several statutes and regulations. Section 5101(a) provides that a specific claim must be filed in order for benefits to be paid or furnished to any individual under the laws administered by VA. See also 38 C.F.R. § 3.151(a). Under 38 U.S.C. § 5110(a), the effective date of an award based on an original claim for compensation cannot be earlier than the date the application for that benefit is received, in the absence of a statute specifically providing otherwise. See Crawford v. Brown, 5 Vet. App. 33, 35 (1993), and Wells v. Principi, 3 Vet. App. 307, 309 (1992) (sections 5110(a) and 5101(a) both "clearly establish that an application must be filed"); see also 38 C.F.R. § 3.400(b)(2). The relationship between the effective date of a statute or regulation and the effective date of an award is set forth in 38 U.S.C. § 5110(g). Section 5110(g) provides, in part, that, "[s]ubject to the provisions of section 5101 of [title 38], where compensation . . . is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase . . . shall not be earlier than the effective date of the Act or administrative issue." Thus, pursuant to section 5110(g), the effective date of the statute or administrative issue on which entitlement to benefits is based determines the outer limit of the period for which an award of retroactive benefits may be made. Section 5110(g) further provides that effective dates of awards shall be established "in accordance with the facts found" and that in no event shall an 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.

7. In Undigested Opinion, 5-3-84, the General Counsel reviewed the terms of what is now section 5110(g) and its legislative history and found nothing in either source

indicating an intention on the part of Congress to limit the application of that section to pending or previously-denied claims. We agree with that assessment. We note that Transmittal Sheet 267 (Dec. 1, 1962), which accompanied the issuance of 38 C.F.R. § 3.114, implementing what is now section 5110(g), discussed application of the statute purely in terms of pending or previously-denied claims. However, as noted by the General Counsel in the 1984 opinion, the statements in the transmittal sheet were by the terms of the transmittal sheet itself not regulatory in nature and, in view of the statutory terms and legislative history, appear to have been based on an overly restrictive reading of the statute.

8. We also note that Undigested Opinion, 5-3-84, did not address the significance of the reference to what is now section 5101 in the opening clause of section 5110(g). As recognized by the Court of Veterans Appeals in Wells, 3 Vet. App. at 309, section 5110(g) incorporates the provisions of section 5101(a) which require the filing of an application. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoper-ative or superfluous . . . ." 2A Norman J. Singer, Statutes and Statutory Construction § 46.06 (5th ed. 1992) (footnote omitted). In O.G.C. Advis. 28-90 at 6, the General Counsel expressed the view that, in light of the reference to what is now section 5101 in what is now section 5110(g), Congress could not have contemplated the application of the latter statute to potential beneficiaries who had never filed claims. Nonetheless, we cannot conclude that payment of retroactive benefits pursuant to section 5110(g) based on an original claim would render the opening clause of that section, referring to section 5101, superfluous. In our view, the terms of section 5110(g) and its legislative history are consistent with the construction that the reference to section 5101 in the opening clause of section 5110(g) merely requires that a claim for benefits actually have been filed with VA at some point before an award of benefits can be made. For example, in the course of an administrative review of previously-denied claims following a change in law, VA may discover that a veteran who had previously claimed benefits had died but was survived by a spouse who is potentially eligible for dependency and indemnity compensation (DIC) under the change in law. In

light of the reference to section 5101 in section 5110(g), the surviving spouse would be required to file a claim for DIC before an award of that benefit could be made. See 38 C.F.R. §§ 3.150(b) and 3.152(a). However, once such a claim is received, retroactive benefits could be paid if otherwise in order.

9. The General Counsel's 1984 opinions also did not address the potential significance of what is now 38 U.S.C. § 5110(a), which states the general rule that an award may not be effective prior to the date of receipt of an application therefor unless a statute specifically provides otherwise. We note initially that section 5110(a) places the same general restriction on reopened claims and claims for increase as it does on original claims. Section 5110(g) provides a specific exception to this general rule in cases involving liberalizing laws. Since, as discussed above, section 5110(g) draws no distinction between original claims and previously-denied claims or claims for increase, it provides an exception to section 5110(a) applicable to all three types of claims. Based on the foregoing, we believe that the conclusions reached in the 1984 opinions concerning the application of what is now section 5110(g) to original claims represent a permissible construction of the statute and that the final sentence of 38 C.F.R. § 3.114(a), as amended, which is based on that construction, is valid.

10. O.G.C. Advis. 28-90 examined the terms of what is now 38 U.S.C. § 5110(g) and of 38 C.F.R. § 3.114(a) and concluded that 38 C.F.R. § 3.114(a) was not intended to be applied to the case of a statute or regulation which has a retroactive effective date. Given this premise, the opinion went on to conclude that, in the case of a pending or reopened claim, what is now section 5110(g) "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." O.G.C. Advis. 28-90 at 8. O.G.C. Prec. 69-91 relied on O.G.C. Advis. 28-90 for its conclusion that, under section 5110(g), "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."

11. O.G.C. Advis. 28-90 did not address the second sentence of current 38 C.F.R. § 3.114(a), which requires that, in order to be eligible for benefits under the provisions of that regulation, the claimant must have met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue. At the time the advisory opinion was issued, this amendment to section 3.114(a) had yet to become effective. In view of the failure of the advisory opinion to consider the regulatory amendment and the General Counsel opinions on which it was based, we do not consider convincing for present purposes that portion of the advisory opinion dealing with the inapplicability of section 3.114(a) in claims under regulations having retroactive effective dates. Further, we do not find persuasive the argument set forth in O.G.C. Advis. 28-90 that section 3.114(a) should not be applied in cases involving changes in law having retroactive effective dates because such laws were not contemplated or addressed at the time of issuance of the regulation. The regulation is one of general applicability and future effect. See 2 Kenneth Culp Davis, Administrative Law Treatise § 7:3 (2d ed. 1979). In issuing a regulation, the Secretary rarely can foresee every possible situation in which the regulation may apply. However, this does not, in our view, justify imposition of limits on the scope of a regulation. See Atlanta Gas Light Co. v. Federal Power Comm'n, 495 F.2d 1070, 1072 (D.C. Cir. 1974) ("Administrative agencies often have to apply regulatory schemes to unforeseen circumstances.") Accordingly, we believe section 3.114(a) is relevant to determination of effective dates of awards under 38 C.F.R. § 3.313.

12. In our view, the General Counsel correctly concluded in Undigested Opinion, 5-3-84, that Congress' intention in enacting what is now section 5110(g) was to provide relief to individuals who were potentially eligible for benefits under a liberalizing law on the effective date of that law, not to assist persons who might become eligible at a later date. The committee reports on the legislation which added what became section 5110(g), referenced in the 1984 opinion, indicated Congress' intention to assist claimants who did not learn of a liberalizing change in law in time to file a prompt application. E.g., S. Rep. No. 2042 at 6,

reprinted in 1962 U.S.C.C.A.N. at 3264. Such reference strongly suggests a congressional intent to assist only those who had potential entitlement to the new benefit at the time the liberalizing law became effective. Based on the foregoing, we find that the second sentence of 38 C.F.R. § 3.114(a), requiring that, in order to be eligible for retroactive payments based on a liberalizing law, the claimant must have met all eligibility requirements on the effective date of the law in question, represents a permissible construction of governing statutory provisions and is a valid regulation applicable in the case of claims under retroactively-effective changes in law.

13. Turning to the practical application of section 3.114(a) in the case of claims under 38 C.F.R. § 3.313, it appears that the former regulation would have no application in claims under the latter. This is so not because section 3.114(a) is inapplicable to liberalizing statutes or regulations with retroactive effective dates, but rather, because, as recognized in VBA Circular 21-90-11, Change 1, no one could have qualified for benefits under section 3.313 on August 5, 1964, the effective date of that regulation. In this regard, section 3.313 provides for establishment of service connection in the case of a veteran who served in Vietnam during the Vietnam era and developed NHL subsequent to service. Since, under 38 U.S.C. § 101(29), the Vietnam era began on August 5, 1964, no one could have served in Vietnam during that era and subsequently developed NHL by that date. Because no one could have "met all eligibility criteria" under section 3.313 on its effective date, no one could qualify for a retroactive payment under section 3.114(a) based on section 3.313 in light of the second sentence of section 3.114(a).

14. It should be noted that, although retroactive benefits may not be payable under 38 C.F.R. § 3.114(a) in NHL claims, the retroactive effective date of section 3.313 permits payment of benefits for certain periods which would not otherwise have been payable in claims filed prior to the issuance of that regulation. In particular, since, under the first sentence of section 5110(g), the effective date of the regulation, rather than its date of issuance, is controlling for award purposes, benefits may be awarded under section 3.313 from the date of claim (subject, pursuant to section 5110(g), to the outer limit of August 5, 1964), if the claimant was otherwise entitled as of that

date, regardless of whether the claim was filed before the date of issuance of section 3.313. See 38 C.F.R. § 3.400(b)(2). Further, as explained in O.G.C. Adv. 28-90 at 4-6, Congress contemplated that what is now section 5110(g) would provide an exception to the statutes governing finality of administrative decisions and authorize payment of retroactive benefits, where appropriate, regardless of the fact that a claim for the benefit in question had been previously denied.

HELD:

An effective date for service connection of non-Hodgkin's lymphoma under 38 C.F.R. § 3.313 may generally be based on the date of receipt by the Department of Veterans Affairs of an original claim for that benefit filed on or after August 5, 1964, regardless of whether the claim had previously been denied, if the claimant was otherwise eligible on the date of claim. As a practical matter, the provisions of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) permitting payment of retroactive benefits for periods prior to the date of receipt of a claim under certain circumstances could not be applicable in determining the effective date of an

award of service connection under section 3.313 because no one could have met all eligibility requirements for benefits under section 3.313 on its effective date of August 5, 1964.

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