

**Department of
Veterans Affairs**

Memorandum

Date: May 2, 1994

O.G.C. Precedent 11-94

From: General Counsel (022)

Subj.: Authority to Deny Claimant's Request for Equitable Relief

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Are Veterans Benefits Administration officials authorized to deny a claimant's request for equitable relief under 38 U.S.C. § 503, or must such a request be forwarded to the Secretary of Veterans Affairs for determination?

DISCUSSION:

1. Section 503 of title 38, United States Code, authorizes the Secretary of Veterans Affairs to provide equitable relief if he or she determines that VA benefits have not been provided due to an administrative error by the Federal government or that a veteran, surviving spouse, child of a veteran, or other person has detrimentally relied upon an erroneous determination by VA regarding eligibility or entitlement to benefits. Implementing regulations at 38 C.F.R. § 2.7(c) state that the authority to provide equitable relief is reserved to the Secretary and has not been delegated. The regulations further provide that recommendations for equitable relief may be initiated by the head of the administration which is responsible for the benefit in question or of any concerned staff office, or by the Chairman of the Board of Veterans' Appeals (BVA), and must be submitted to the Secretary through the General Counsel. See also Veterans Benefits Administration Adjudication Procedure Manual M21-1, ¶ 7.08.b. (VA Central Office will consider a request for equitable relief "if the request is made by or on behalf of a claimant or if the regional office believes relief should be granted."). Section 2.7(c) provides that, when a recommendation for relief is initiated by the head of a staff office or the Chairman of the BVA, the views of the head of the administration responsible for the benefit must be obtained. While 38 C.F.R. § 2.7 does not include procedures for handling requests for equitable relief initiated by claimants, Adjudication Procedure Manual M21-1, ¶ 7.08.b., requires that "[a]ny time a claimant or

someone acting on behalf of a claimant specifically requests equitable relief, that request must be submitted to [the VA Central Office]."

2. The first question which must be answered in connection with your request for opinion is whether the Secretary may delegate to the heads of VA components the authority to determine that equitable relief is not warranted. The courts have recognized that it is frequently necessary for the head of a large agency to delegate decision-making authority, *Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 958 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981), and that a specific statutory delegation does not prohibit a delegation of that power to others. *Michigan Dep't of Educ. v. United States Dep't of Educ.*, 875 F.2d 1196, 1203 (6th Cir. 1989). Where Congress has not expressly authorized a delegation, courts have looked to the legislative intent or purpose of a statute to determine whether delegation is in fact permissible. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 119-23 (1947); *Rodriguez*, 617 F.2d at 959. If Congress clearly expresses an intent that no delegation is to be permitted, then the intent must be carried out. *Ashwood Manor Civic Ass'n v. Dole*, 619 F. Supp. 52, 66 (E.D. Pa.), *aff'd mem.*, 779 F.2d 41 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

3. We note initially that Congress has granted the Secretary of Veterans Affairs general authority to assign functions and duties and delegate authority to officers and employees of VA with respect to all laws administered by the Department. 38 U.S.C. § 512(a). Under that provision, the Secretary has "broad statutory authority" to determine the functions and duties of heads of components within VA. O.G.C. Prec. 11-90. In addition, 38 U.S.C. § 501(a) authorizes the Secretary "to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department." The Supreme Court has concluded that such rulemaking power may itself be an adequate source of authority to delegate a particular function, unless the authority has been withheld by an express statutory provision or by implication. *Mohawk Wrecking*, 331 U.S. at 121; see also *Rodriguez*, 617 F.2d at 958. There is no express statutory provision prohibiting the delegation of the authority in question here. Further, as discussed below, the history of the equitable relief statute does not suggest that such a prohibition should be implied.

4. Where Congress amends a statute following interpretation of the statute by the agency charged with its administration and does not disapprove or modify the agency's interpretation, Congress' action may be considered to be an adoption by Congress of the agency's interpretation. *Public Citizen, Inc. v. Federal Aviation Admin.*, 988 F.2d 186, 194 (D.C. Cir. 1993); *Society of Plastics Indus., Inc. v. Interstate Commerce Comm'n*, 955 F.2d 722, 728-29 (D.C. Cir. 1992); *Isaacs v. Bowen*, 865 F.2d 468, 473 (2d Cir. 1989); 2B N. Singer, *Sutherland Statutory Construction*, § 49.09 (5th ed. 1992). It is significant for purposes of application of this rule whether the agency's interpretation has been called to the attention of the legislature. *Public Citizen*, 988 F.2d at 194; *Society of Plastics Indus.*, 955 F.2d at 729; 2B N. Singer § 49.09. The United States Court of Appeals for the Second Circuit has stated that, in order to construe an agency's interpretation as Congress' intent, there must be a "manifestation of congressional approval." *Isaacs*, 865 F.2d at 473.

5. In 1972, Congress amended former section 210 of title 38, United States Code, to provide authority to the then Administrator of Veterans Affairs to grant equitable relief to a person who detrimentally relies upon an erroneous determination by VA regarding eligibility for benefits. Pub. L. No. 92-328, § 201, 86 Stat. 393, 396 (1972). In a May 8, 1972, letter to the Speaker of the House of Representatives, the Administrator of Veterans Affairs, Donald E. Johnson, informed Congress that the regulations implementing the Veterans Hospitalization and Medical Services Modernization Amendments of 1966, Pub. L. No. 89-785, § 301, 80 Stat. 1368, 1376, which authorized the Administrator to provide equitable relief to any person to whom benefits administered by VA had been denied due to an administrative error, "require a personal determination by the Administrator on recommendations for relief which may

only originate with a department head" and must be reviewed by the General Counsel. H.R. Rep. No. 1125, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2708, 2719-20. The Administrator assured Congress that these "same restrictive procedures," which were very similar to those provided in the current regulations at 38 C.F.R. § 2.7(a) and (c), *see* 31 Fed. Reg. 14,775 (1966), would be applied to determinations under the 1972 amendment. H.R. Rep. No. 1125, *reprinted in* 1972 U.S.C.C.A.N. at 2720. The report of the House Committee on Veterans' Affairs noted the Administrator's assurances. *Id.* at 2712. Thus, it is clear that Congress was aware of and considered VA's implementing regulation, 38 C.F.R. § 2.7, when it amended former section 210. Congress indicated no disapproval of the regulation. Rather, the legislative history strongly suggests that Congress accepted VA's regulation as consistent with the statute.

6. Also in 1972, Congress added the statutory requirement that the then Administrator report annually to Congress on the disposition of each case "recommended to him for equitable relief." Former 38 U.S.C. § 210(c)(3)(B) (now 38 U.S.C. § 503(c)). The fact that Congress required a report only on cases in which equitable relief had been recommended suggests an understanding on the part of Congress that the Administrator (now Secretary) would not personally review all cases considered for equitable relief, but only those which a subordinate official had determined to be worthy of consideration by the agency head.

7. While the legislative history clearly establishes that the authority to grant equitable relief is reserved to the Secretary, it also contains no indication that Congress intended to prohibit the Secretary from delegating the authority to determine that equitable relief is not warranted. *See Ashwood Manor Civic Ass'n*, 619 F. Supp. at 66. Based on the foregoing, we conclude that delegation by the Secretary of the authority to determine that equitable relief is not warranted is consistent with the terms of 38 U.S.C. § 503 and the congressional intent behind the provision.

8. We recognize there is case law suggesting that, in certain circumstances, the authority to delegate administrative power Congress has vested in a particular officer or body may be limited. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942). In *Relco, Inc. v. Consumer Prod. Safety Comm'n*, 391 F. Supp. 841, 845 (S.D. Tex. 1975), the court held that functions involving final agency action, such as administrative adjudications and rulemaking, are so fundamental to implementation of the statute governing the Consumer Product Safety Commission that they must be performed or ratified by the Commissioners themselves and cannot be delegated to subordinates. However, the "unusual" nature of the grant of authority by Congress under 38 U.S.C. § 503, which is "separate and distinct" from the Secretary's authority to determine entitlement to benefits under laws administered by the Department, *Darrow v. Derwinski*, 2 Vet. App. 303, 305 (1992), tends to distinguish it from the type of "primary" or "basic" power referred to in *Relco*, 391 F. Supp. at 845.

9. Some courts have indicated that a factor to be considered in determining whether a delegation of authority is proper is whether decisions made pursuant to the delegation are subject to judicial or administrative review. The United States Court of Appeals for the Fourth Circuit has held that the Equal Employment Opportunity Commission could delegate to district directors the authority to issue determinations as to reasonable cause regarding unfair employment practices and make and approve conciliation agreements under Title VII of the Civil Rights Act of 1964, despite the fact that the district directors' determinations cannot be appealed to the Commission, because all parties had available adequate judicial safeguards. *Equal Employment Opportunity Comm'n v. Raymond Metal Products Co.*, 530 F.2d 590, 594 (4th Cir. 1976); see also *Pistachio Group of Ass'n of Food Indus., Inc. v. United States*, 671 F. Supp. 31 (Ct. Int'l Trade 1987) (determination of exchange rate could not be delegated by the International Trade Administration to the New York Federal Reserve Bank, a private entity, the decisions of which were exempt from administrative and judicial review). However, the significance of the availability of judicial action in the *Raymond Metal Products* case appears to have been largely that such availability assured that the

Commission had not purported to delegate authority to affect substantive rights, authority which the Commission itself did not possess. See 530 F.2d at 593-94. In the *Pistachio Group* case, the fact that the delegation was to a private entity appeared to be the controlling factor.

10. Certainly, the fact that Congress has neither imposed determinative standards or criteria upon the Secretary for making decisions on requests for equitable relief, nor granted jurisdiction to the BVA or the Court of Veterans Appeals to review the Secretary's determinations on such matters, see *Darrow*, 2 Vet. App. at 305-06, suggests that caution should be exercised in determining whether a delegation of some aspect of the Secretary's equitable relief authority is permissible. However, the potential magnitude of the task of reviewing all requests for equitable relief which may be made to VA, see *Mohawk Wrecking*, 331 U.S. at 122-23 (Temporary Controls Administrator could not be expected to personally determine whether particular investigations should be initiated under the Emergency Price Control Act in view of the magnitude of the task); *Raymond Metal Products*, 530 F.2d at 594, together with the legislative history of 38 U.S.C. § 503, lead us to the conclusion that Congress did not intend to deny the Secretary the authority to delegate responsibility to determine that equitable relief is not warranted in a particular case.

11. We next consider whether the Secretary has in fact delegated the authority to determine that equitable relief is not warranted. VA General Administrative Manual MP-1, part I, ch. 6, ¶ 4.b., provides that a delegation or redelegation of authority may be established in one of two ways: by a directive/regulation signed by the Secretary or Deputy Secretary or other Department official, or by a delegation memorandum. In our view, VA regulations at 38 C.F.R. § 2.7 indicate that, while the Secretary has reserved the authority to grant equitable relief, he has impliedly delegated to VA department heads the authority to determine that equitable relief is not warranted. The regulations establish an administrative process whereby VA department heads review requests for equitable relief and refer only recommendations **for** relief to the Secretary. Section 2.7(c) of title 38, Code of Federal Regulations, by its terms, reserves to the

Secretary only the authority to "**grant**" the equitable relief authorized by 38 U.S.C. § 503 and does not mention authority to deny requests for equitable relief. Also, section 2.7(c) states only that recommendations "**for**" equitable relief will be submitted to the Secretary.¹ In addition, the regulation states that recommendations may be initiated by the head of the administration which is responsible for the benefit in question or of any concerned staff office, or by the Chairman of the BVA. Recommendations for equitable relief must be submitted to the Secretary through the General Counsel. These regulatory provisions, issued by the head of the Department, indicate an intention that subordinate officials screen potential equitable relief cases and refer to the Secretary for decision only those cases which the subordinate officials find merit equitable relief.

12. It may be permissible for the Under Secretary for Benefits, to whom the Secretary has delegated the authority to determine that equitable relief is not warranted in cases arising in his administration, to subdelegate this authority within the Veterans Benefits Administration. The courts have recognized that "[w]ithout the power to delegate the director or deputy director of large divisions of a government department would be hampered in the performance of his multifarious duties." *Rodriguez*, 617 F.2d at 958. While the *Relco* case suggests there may be circumstances in which subdelegation may be considered "excessive," 391 F. Supp. at 846, other authorities indicate that a subdelegation may be upheld even in the absence of any standards to guide the exercise of the authority subdelegated. See *Jarecha v. Immigration & Naturalization Serv.*, 417 F.2d 220, 223-24 (5th Cir. 1969). Section 512(a)

¹ Administrative Procedure Manual M21-1, ¶ 7.08.b., which states that a request for equitable relief by a claimant or claimant's representative must be forwarded to the VA Central Office, is not inconsistent with our conclusion because it does not indicate whether Central Office officials to whom requests for equitable relief are referred must forward all requests to the Secretary or only those which they determine are meritorious.

of title 38, United States Code, provides that the Secretary may authorize successive redelegation of the authority to act and to render decisions with regard to laws administered by VA. Since we have concluded that, pursuant to this statutory provision and 38 U.S.C. §§ 501(a) and 503, the Secretary may delegate the authority to determine that equitable relief is not warranted, we believe that section 512(a) also provides authority for the Secretary to authorize officials such as the Under Secretary for Benefits to subdelegate the authority to deny claims for equitable relief. However, assuming the exercise of such authority to authorize subdelegation could be implied from 38 C.F.R. § 2.7(c), there is no indication in Administrative Procedure Manual M21-1, or other sources of which we are aware, that the Under Secretary for Benefits has attempted to subdelegate authority to make determinations regarding equitable relief claims to subordinates within the Veterans Benefits Administration. ²

HELD:

The Secretary of Veterans Affairs has the authority pursuant to 38 U.S.C. §§ 501(a), 503, and 512(a) to delegate the authority to determine that equitable relief is not warranted in a particular case and has impliedly delegated that authority by regulation to VA department heads, including the Under Secretary for Benefits. In addition, we believe the Secretary may authorize the Under Secretary for Benefits to subdelegate the authority to deny requests for equitable relief to subordinate officials within the Veterans Benefits Administration. However, there is no indication that such subdelegation has been attempted.

Mary Lou Keener

² Although Administrative Procedure Manual M21-1, part IV, ¶ 7.08.d. indicates the Director, Compensation and Pension Service, will "review" equitable relief claims, it does not imply authority to deny such claims.