Date: February 6, 1995 O.G.C. Precedent 5-95

From: General Counsel (02)

Subj: Protection of Disability Rating Where Benefits Discontinued Due to Return to Active Duty

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Do the provisions of 38 U.S.C. § 110 and 38 C.F.R. § 3.951, as interpreted by the Court of Veterans Appeals (CVA) in *Salgado v. Brown*, 4 Vet. App. 316 (1993), protect a disability rating established over twenty years ago, where compensation was discontinued upon the veteran's reentry into active service shortly after the rating was established and was not reinstated upon the veteran's discharge from service?

COMMENTS:

1. In March of 1946, the veteran was granted service connection for malaria, and a 10-percent rating was established effective February 2, 1946. On August 7, 1946, the rating was increased to 30 percent effective March 13, 1946. On August 16, 1946, the veteran reentered active service. Upon learning of the veteran's reenlistment, the Veterans' Administration (VA) Adjudication Division issued a VA Form 521, Stop Payment Notice, in December 1946, effective November 30, 1946, the date of last payment, pursuant to the Act of July 13, 1943, ch. 233, § 15, 57 Stat. 554, 559. That statute, the forerunner to current 38 U.S.C. § 5304(c), prohibited payment of compensation on account of a veteran's own service while the veteran was in receipt of active service pay. On August 4, 1947, the VA Adjudication Officer issued an Amended Stop Payment Notice, VA Form 521, effective August 15, 1946.

2. The veteran was discharged from active service on August 15, 1949. On December 29, 1969, the veteran informed the VA that he wished to reopen his malaria claim, stating that he "previously was in receipt of 30% for a malaria, yellow jauntice (sic) condition which was discontinued when I re-entered service in 1946." The veteran was advised to report to a VA hospital or to submit a properly prepared blood smear taken by a physician during a malarial attack. The veteran apparently did not pursue the claim. On September 22, 1975, the veteran requested reinstatement of compensation for malaria. The veteran was informed

that his malaria was service connected, but that, to reopen the claim, the veteran would have to furnish evidence that malaria had recurred. The veteran again apparently did not pursue the claim. In October 1993, the veteran filed a claim for service connection for hearing loss and noted that he had previously received compensation. A review of the veteran's claim file generated an inquiry from the regional office concerning whether the 30-percent rating assigned the veteran on August 7, 1946, is protected in light of the CVA's decision in *Salgado.*

3. Protection of disability ratings is governed by 38 U.S.C. § 110, which provides in pertinent part that "[a] disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under laws administered by the Secretary shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud." The implementing regulation, 38 C.F.R. § 3.951(b), contains similar language.

4. In O.G.C. Prec. 31-90, the General Counsel concluded that section 110 "protects against reduction only those ratings for compensation purposes which have been the foundation for the payment of awards for a period of at least 20 years." The CVA rejected this conclusion in *Salgado*. In that case, the CVA examined whether a disability rated at the 50-percent level for over twenty years was protected even though, under what is now 38 U.S.C. § 5304(a)(1), the VA was not required to make compensation payments because the veteran had not waived military retirement pay. Relying on the plain meaning of section 110, the CVA determined that section 110 confers protection regardless of whether a monetary award had actually been paid. 4 Vet. App. at 318-20. Implicit in the CVA's holding is the conclusion that section 110 protects the status of a disability evaluation, not the payment of monetary benefits based on that status.

5. The CVA in *Salgado* relied on its interpretation of the phrase "for compensation purposes" in section 110 in concluding

that a rating does not have to be the foundation for payment of benefits in order to qualify for protection. However, the CVA in *Salgado* did not address the meaning of the phrase "continuously rated" as used in section 110. In light of *Salgado*, the mere fact that payment of benefits to the veteran was discontinued does not support a conclusion that the veteran's rating was not in force "for compensation purposes" within the meaning of section 110. However, the *Salgado* decision is not dispositive on the issue of whether the veteran's disability may be considered to have been "continuously rated" for twenty or more years for purposes of section 110.

6. It is a well-settled principle of statutory interpretation that one must first look to the literal language of a statute prior to resorting to secondary sources to determine legislative intent, and, if the statutory terms are plain and do not lead to absurd or impracticable consequences, then the literal language of the statute is the "sole evidence of the ultimate legislative intent." *Caminetti v. United States*, 242 U.S. 470, 485, 490 (1917); *see also West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991); 2A Norman J. Singer, Sutherland Statutory Construction §§ 46.01-.04 (5th ed. 1992) (plain-meaning rule). The word "continuous" in the context in which it is used in 38 U.S.C. § 110 is commonly understood to mean "characterized by uninterrupted extension in time." Webster's Third New International Dictionary 493-94 (1981). The key to resolving the issue of application of the rating-protection statute in this instance is thus whether the veteran's reentry on active duty and VA's 1946 and 1947 decisions to discontinue benefit payments to the veteran had the effect of interrupting the veteran's 30-percent rating.

7. The flat prohibition in what is now 38 U.S.C. § 5304(c) against payment of compensation for any period in which a person receives active-service pay is suggestive of an interruption in the veteran's rating, in that there can be no rating in effect for compensation purposes in the absence of underlying eligibility for compensation. In this sense, this case may be distinguished from *Salgado*, in which, under the more permissive

language of 38 U.S.C. § 5304(a)(1), the veteran could have elected at any time to receive the VA benefits for which he was

eligible, in lieu of military retirement pay. In addition, if the VA's action discontinuing compensation is construed as an adjudicative determination terminating the veteran's award, the continuity of the veteran's rating would, in our view, be interrupted along with the award, since discontinuance of the award would have been based on a determination of ineligibility for compensation.

8. Although VA regulations have been somewhat ambiguous regarding the effect of the VA's actions when a person in receipt of VA compensation or pension returns to active duty, it appears that reentry on active duty results in termination of the veteran's award and accompanying disability rating. At one time, VA regulations governing return to active duty simply provided that, where an individual in receipt of compensation returned to active duty, benefits were to be "suspended" effective the day preceding reentry and could be resumed the day following release from active duty if the individual were otherwise entitled. 38 C.F.R. § 3.1299 (1944 Supp.). However, on March 8, 1947, 12 Fed. Reg. 1595, 1601 (1947), prior to issuance of the Amended Stop Payment Notice in this veteran's case, the regulation was expanded to provide:

> § 3.1299 *Action where veteran returns to active duty status.* Compensation or pension may not be paid concurrently with the receipt of active service pay and where any person in receipt of compensation or pension returns to active duty status with any of the armed forces of the United States, or active service in the United States Coast Guard, benefits will be suspended effective the day preceding reentrance, if known, or the date of last payment. In the latter instance the correct date on which the veteran re-entered active duty status will be ascertained and a corrected Stop (or Suspended) Payment Notice, VA Form 521, or amended award then executed as of the correct date. . . . When it becomes necessary to discontinue payments of disability compensation, pension, or retirement pay

> because the veteran has re-entered active military or naval service, the representatives, including duly accredited service organization or attorney of record, will be informed by being furnished copy of the letter to the veteran notifying him of the discontinuance of payments. Payments may be resumed the day following release from active duty, provided the person is otherwise entitled. The determination of service connection upon which the award of benefits was originally made will not be disturbed. The resumption of payment of compensation as to amount, will be at a rate commensurate with the degree of disability found to exist at the time of restoration of the award. . . . [T]he claim will be adjudicated upon a basis including the pertinent facts in the most recent period of active service.

38 C.F.R. § 3.1229 (1947 Supp.).

9. Although the first sentence of former 38 C.F.R. § 3.1299 (1947 Supp.) retained the phrase "benefits will be suspended," as used in the prior regulation, the regulation also included several additional sentences which clarified to some extent the nature of the action to be taken. The regulation referred to "discontinuance of payments," indicated that service connection would not be disturbed, called for adjudication of the claim for resumption of benefits, and directed that the amount of the payment upon resumption would be at a rate commensurate with the degree of disability found to exist at the time of restoration of the award. Thus, the regulation made clear that, while service connection for a disability would not be affected by reentry on active duty, the degree of disability attributable to the condition would have to be reascertained upon release from active duty. This compels the conclusion that the previous disability rating ceased to be in effect during the period of active duty and that a new rating was therefore necessary before benefits could be resumed. No new rating was assigned in this case since the veteran did not pursue a claim for resumption of benefits upon discharge from the second period of active duty.

10. Section 3.1299 of title 38, Code of Federal Regulations, was recodified as 38 C.F.R. § 3.299 in the 1949 edition. The terms of this regulation, with minor modifications, were incorporated in 38 C.F.R. § 3.654(b) in 1962 and remain in effect. In this recodification, reference to discontinuance of the award was substituted for the prior reference to suspension of benefits. 38 C.F.R. § 3.654(b)(1). "Discontinue" may be defined as meaning "terminate . . . break the continuity of." Webster's Third New International Dictionary 646 (1981). Also, the requirement that a claim for resumption be submitted was made more explicit. 38 C.F.R. § 3.654(b)(2). These changes are consistent with the view that reentry on active duty results in termination of an award and that, as a result, a new claim and a new rating are required to resume the award.

11. In our opinion, a review of the VA Form 521 used in this case further indicates that the VA intended to terminate the veteran's disability compensation award effective the day prior to the veteran's return to active duty. This is made clear by the adjudicator's decision to delete the words "OR SUSPEND" from the top of the Form 521 and check the "stop payment" block in the form's "ACTION AUTHORIZED" section. Procedural regulations applicable at the time plainly indicated that the issuance of a "stop payment" was an adjudicative action requiring the signatures of both the "adjudicator and authorization officer." VA Regulations and Procedure Nos. 43 and 1260 (9-15-37). The word "stop" may be defined as meaning "to interrupt or prevent the continuance or occurrence of: cause to cease . . . discontinue." Webster's Third New International Dictionary 2250 (1981). The stop-payment action, under the regulations then in place, was clearly an adjudicative action. That action not only had the effect of stopping payment of benefits, it had the effect of terminating the veteran's rating because it required that a new rating be made before benefits could be resumed. This effectively interrupted the rating's continuity. Based upon this interruption, and the fact that the award was not resumed when the veteran left service, the 1946 30-percent rating does not, in our view, qualify for protection under 38 C.F.R. § 110, as

the veteran’s disability has not been "continuously rated" at or above that level for twenty or more years.

12. The United States Court of Appeals for the Federal Circuit has indicated that, even where the plain meaning of statutory language would resolve the issue before the court, “the legis-

lative history should usually be examined at least 'to determine whether there is a *clearly expressed* legislative intention contrary to the statutory language.'" *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 395 (Fed. Cir. 1990) (emphasis in original) (quoting *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629 (Fed. Cir. 1989). Legislation providing protection of total disability ratings in effect for twenty or more years was enacted in 1954. Act of March 17, 1954, ch. 100, 68 Stat. 29. The legislative history of this statute indicates that its purpose was to provide security to veterans who had come to rely on disability benefits and to save the Government the expense of examining individuals whose medical conditions are unlikely to improve. H.R. Rep. No. 533, 83d Cong., 1st Sess. 2 (1953). Congress later expanded the provision to apply to disability ratings less than total, noting the successful implementation of the prior measure. Pub. L. No. 88-445, 78 Stat. 464 (1964); S. Rep. No. 1324, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2833. The legislative history of section 110 does not specifically address the congressional intent underlying the term "continuously rated." However, in light of the stated objectives of the statute, it is clear that Congress required a rating to be continuous in order to qualify for protection because, otherwise, the veteran could not have come to rely on the rating and would not be in need of the security provided by the statute. Protection of the rating in the instant case would not further the statutory objective of providing reassurance to a veteran who had come to rely on a particular evaluation, since in this case the veteran had not been found entitled to benefits since the time of his reentry on active service. Further, protection would not further the objective of avoiding unnecessary examinations, since regulations implementing the statute in question specifically called for rerating of a disability before an award could be resumed. Thus, our reliance on the plain meaning of the term "continuously rated" does not conflict with the objectives of the statute.

13. We note that this case is also factually distinguishable from *Salgado* in another important respect. As pointed out by the CVA, Mr. Salgado's rating had been confirmed and continued by the VA no fewer than eight times over a period of some twenty-three years, based on reports of VA examinations, 4 Vet. App. at 317-18, whereas the veteran in this case declined the

VA's invitations to be examined or to otherwise verify that symptoms of malaria persisted. It is one thing to conclude that Mr. Salgado, who had presented VA every opportunity to accurately evaluate his condition, should not after twenty-three years be abruptly denied the benefit of that longstanding continuous rating. It is quite another to decide that the veteran in the instant case, whose actions denied the VA the opportunity to evaluate his condition, should benefit from that lack of cooperation. To conclude that such a rating must be protected would be to suggest that veterans could, by their failure to comply with legitimate requests for necessary information, maintain their ratings at unjustifiably high levels.

HELD:

Under 38 U.S.C. § 110, a disability which has been continuously rated at or above a particular evaluation for twenty or more years for compensation purposes cannot thereafter be rated at less than that evaluation, in the absence of fraud. The protection provided by this statute, however, is dependent upon the disability being "continuously rated" at or above the level in question. Where compensation is discontinued following reentry into active service in accordance with the statutory prohibition on payment of compensation for a period in which an individual receives active-service pay, the continuity of the rating is interrupted for purposes of the rating-protection provisions of 38 U.S.C. § 110 and the disability cannot be considered to have been continuously rated during the period in which compensation is discontinued.

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