

Date: June 22, 1995

VAOGCPREC 18-95

From: General Counsel (022)

Subj: Petition for Rulemaking -- Termination Date in Computing
Past-Due Benefits

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

QUESTION PRESENTED:

Is the Department of Veterans Affairs' (VA) definition of "past-due benefits" in 38 C.F.R. § 20.609(h) (3) inconsistent with the governing statutory provisions in 38 U.S.C. § 5904(d) (3)?

COMMENTS:

1. This responds to your request for assistance in evaluating the petition for rulemaking filed by the attorney for a successful VA claimant. Petitioner seeks revision of VA regulation, 38 C.F.R. § 20.609(h), which defines "past-due benefits" for purposes of determining the maximum amount of direct VA payment of attorney fees under 38 U.S.C. § 5904(d). He asserts that the definition in section 20.609(h) (3) conflicts with the statutory provisions of section 5904(d) (3). This opinion addresses petitioner's substantive arguments. I understand that a member of my staff has spoken with someone in your office regarding the procedure for responding to the petition.

2. Section 5904(d) authorizes VA, under certain circumstances, to pay directly to an attorney a fee called for in a fee agreement for representation in claims for VA benefits. In order to qualify for direct payment of fees by VA, the amount of the fee called for in the agreement "may not exceed 20 percent of the total amount of any past-due benefits awarded on the claim." 38 U.S.C. § 5904(d) (1). The statute does not define the term "past-due benefits." However, section 5904(d) (3) provides that "[i]n no event may the Secretary withhold for the purpose of such payment any portion of benefits payable for a period after the date of the final decision of the Secretary, the Board of Veterans'

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Appeals, or the Court of Veterans Appeals making (or ordering the making of) the award."

3. In 38 C.F.R. § 20.609(h)(3), the Secretary has defined "past-due benefits" as follows:

For purposes of this paragraph, "past-due benefits" means a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by the Board of Veterans' Appeals or the lump sum payment which represents the total amount of recurring cash payments which accrued between the effective date of the award, as determined by applicable laws and regulations, and the date of the grant of the benefit by the agency of original jurisdiction, the Board of Veterans' Appeals, or an appellate court.

Petitioner asserts that the ending date for computing past-due benefits under the regulation -- i.e., "the date of the grant of the benefit" -- is inconsistent with 38 U.S.C. § 5904(d)(3), which, he asserts, establishes that the ending date is the "date of the final decision of the Secretary." He contends that, pursuant to 38 C.F.R. § 3.104(a), when the regional office awards a benefit, the "date of the final decision" is the date on which VA provides notice of the decision to the claimant and the claimant's representative in accordance with 38 U.S.C. § 5104. Section 3.104(a) provides that "[a] decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104." Petitioner asserts that past-due benefits must include all benefits payable for a period prior to the date on which the decision becomes "final" under section 3.104(a) -- i.e., the date VA issues the notification required by 38 U.S.C. § 5104.

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4. Because section 5904 does not define the term "past-due benefits," the Secretary has authority under 38 U.S.C. § 501(a) to establish by regulation a definition of that term, provided that the regulation is not inconsistent with

the governing statutory provisions. As explained below, we believe that the definition adopted by the Secretary in 38 C.F.R. § 20.609(h)(3) is reasonable and is not inconsistent with the pertinent statutory provisions. We note, incidentally, that VA's definition of "past-due benefits" is substantially similar to the definition of that term adopted by the Secretary of Health and Human Services in 20 C.F.R.

§ 404.1703. ("Past-due benefits means the total amount of benefits payable . . . to all beneficiaries that has accumulated because of a favorable administrative or judicial determination or decision, up to but not including the month the determination is made.").

5. We believe that section 5904(d)(3) may reasonably be interpreted as indicating an intent to limit "past-due benefits" to those payable for a period prior to the date of the decision awarding the benefits. The statute provides that "[t]o the extent that past-due benefits are awarded in any proceeding before the Secretary, the [BVA], or the [CVA], the Secretary may direct that payment of any attorney's fee

. . . be made out of such past-due benefits." (Emphasis added). Inasmuch as the statute identifies past-due benefits with reference to a particular event – an "award" made in a proceeding before VA, the BVA, or the CVA – it is reasonable to conclude that the term is intended to encompass only those benefits which would have been past due at the time of the decision making the award.

6. Section 5904(d)(3) does not, as petitioner asserts, affirmatively establish the date of the Secretary's "final decision" as the ending date for computing past-due benefits. That section establishes a prohibition on including as past-due benefits any amounts payable for a period after the "final decision" but it does not purport to establish

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which payments must be considered as past-due benefits. Accordingly, the Secretary's decision to define "past-due benefits" with reference to the date of the decision awarding benefits rather than the date that decision becomes "final" under 38 C.F.R. § 3.104(a) is a reasonable exercise of his regulatory authority and is not inconsistent with 38 U.S.C. § 5904(d)(3).

7. Even if section 5904(d)(3) is interpreted as implicitly defining "past-due benefits" as those payable for a period

prior to the date of the "final decision," the regulation still must be regarded as consistent with the statute. Section 5904(d) (3) refers to "the date of the final decision of the Secretary," and not to "the date on which the Secretary's decision becomes final." Petitioner asserts that the "date of the final decision of the Secretary" is the date the decision becomes final under 38 C.F.R. § 3.104(a). However, section 3.104(a) merely identifies the point in time at which a prior field office decision will be considered "final and binding" on other VA field offices, but does not necessarily change the date of that decision or result in the issuance of a new "final" decision. Accordingly, the phrase "date of the final decision" may be construed as referring to the date on which the decision was made rather than to the date of the events which caused the decision to be considered "final." Pursuant to such an interpretation, section 5904(d) (3) would appear to prohibit including as past-due benefits any amounts payable for a period after the date of the Secretary's decision awarding benefits, but prior to the time that decision became "final" under section 3.104(a).

8. Further, there is no indication in the language or history of section 5904(d) (3) that the "finality" provisions in 38 C.F.R. § 3.104(a) are relevant in determining the "date of the final decision" under section 5904(d) (3). The term "final" or "final decision" often has different meanings in different contexts, even within a single statutory or regulatory scheme. For example, 38 U.S.C. § 3.104(a) establishes a finality standard for purposes of

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determining when a VA field office decision will become "final and binding" upon all other field offices, such that the decision will not be subject to revision on the same factual basis. Under 38 U.S.C. § 7105(c) and 38 C.F.R. §§ 20.302 and 20.1103, a VA field office decision will become "final," in the sense that it is not subject to review by the BVA, if an appeal is not initiated within one year after the date notice of the decision is mailed to the claimant. In view of these clearly distinct uses of the term "final" in the statutes and regulations governing VA field office decisions, there is no basis for concluding that the reference to "the date of the final decision" in 38 U.S.C. § 5904(d) (3) is intended to incorporate the particular "finality" standard prescribed in 38 C.F.R. § 3.104(a).

9. Black's Law Dictionary defines a "final decision" as "[o]ne which settles rights of parties respecting the subject matter of the suit and which concludes them until it is reversed or set aside." Black's Law Dictionary, 629 (6th ed. 1990). Pursuant to that definition, the "date of the final decision" referred to in 38 U.S.C. § 5904(d)(3) would be the date of the decision awarding past-due benefits and not the date on which that decision became binding on other field offices under 38 C.F.R. § 3.104(a) or became unreviewable under 38 U.S.C. § 7105(c). Accordingly, it would be reasonable to conclude that, for purposes of computing past-due benefits under section 5904(a), an RO decision awarding benefits is a "final decision" unless it is reversed, set aside, or superseded by an appellate decision.

HELD:

The definition of "past-due benefits" in 38 C.F.R. § 20.609(h)(3) is consistent with the provisions of 38 U.S.C. § 5904(d)(3). Further, because the language of section 5904(d)(3) may reasonably be construed to prohibit counting as past-due benefits any amounts payable after the
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date of the decision making, or ordering the making of, the award, we believe that the regulatory amendment sought by petitioner would be inconsistent with the statute.

Mary Lou Keener