

Date: March 25, 1997

VAOPGCPREC 11-97

From: General Counsel (022)

Subj: Application of Amended Rating Schedule Provisions in Pending Claims Involving Ratings for Mental Disorders

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

QUESTIONS PRESENTED:

a. Do any of the amendments to the Department of Veterans Affairs (VA) Schedule for Rating Disabilities pertaining to ratings for mental disorders, which became effective November 7, 1996, contain liberalizing criteria?

b. Must the Board of Veterans' Appeals (Board) remand claims involving ratings for mental disorders which were pending on November 7, 1996, to permit the agency of original jurisdiction (AOJ) to consider the effect of the amended regulations in the first instance?

DISCUSSION:

1. Effective November 7, 1996, VA amended several regulations in its "Schedule for Rating Disabilities" (rating schedule), located at 38 C.F.R. Part 4, pertaining to ratings for mental disorders. See 61 Fed. Reg. 52,695 (1996). In *Karnas v. Derwinski*, 1 Vet. App. 308, 312-13 (1991), the United States Court of Veterans Appeals (CVA) held that, when there has been a change in an applicable statute or regulation after a claim has been filed but before a final decision has been rendered, VA and the CVA must apply the version of the statute or regulation which is most favorable to the claimant, unless Congress has expressly provided otherwise or has authorized VA to provide otherwise and VA has done so. Accordingly, with respect to claims involving ratings for mental disorders which were pending on November 7, 1996, it will be necessary to determine whether the amended regulations or the previously-existing regulations are more favorable to the claimant. See *Dudnick v. Brown*, No. 96-327 (U.S. Vet. App. Jan. 28, 1997) (CVA remand for determination by VA as to whether the prior or

<Page 2>

amended regulations pertaining to rating mental disorders are more favorable to the claimant).

2. In view of the number of amendments made in the November 1996 rulemaking and the nature of those amendments, it would be inappropriate for us to attempt to determine, in the context of this opinion, whether, and under what circumstances, particular amendments may be more beneficial to a claimant. The final rule amended several regulatory provisions in 38 C.F.R. part 4 which may affect disability ratings for mental disorders in individual cases. The determination as to whether application of one or more of the amended provisions would be more beneficial to a claimant than application of the prior provisions may depend largely upon the facts of each case.

3. For example, among other changes, the November 1996 final rule established, in 38 C.F.R. § 4.130, a "general rating formula for mental disorders" which identifies specific symptoms and manifestations of mental disorders associated with different percentage disability ratings. That formula replaced the general rating formulas for psychotic disorders, organic mental disorders, and psychoneurotic disorders previously contained in 38 C.F.R. § 4.132, under which the various percentage ratings were based largely upon whether the claimant's social and industrial impairment due to a mental disorder was most accurately characterized as "total," "severe," "considerable," "definite," or "mild." The purpose of the amendment was to remove terminology in former 38 C.F.R. § 4.132, which was considered non-specific and subject to differing interpretations, and to provide objective criteria for determining entitlement to the various percentage ratings for mental disorders. See 60 Fed. Reg. 54,825, 54,829 (1995).

4. On its face, the amended regulation is neither more nor less beneficial to claimants than the prior provisions. In some cases, the amended regulation may be no more beneficial to the claimant than the prior provisions, because the evidence in the case does not reflect symptoms or manifestations associated with a higher rating under the amended regulation. In other cases, however, although the amendments were not designed to liberalize rating criteria, the amended regulation

<Page3>

may be more beneficial to a claimant because the evidence indicates that the claimant has symptoms or manifestations which, under the amended provisions, are associated with a rating higher than that which may have been assigned by the AOJ under the prior, non-specific and more subjective regulations. Accordingly, it will be necessary for those with adju-

dicative responsibilities to determine, on a case-by-case basis, whether the amended regulation, as applied to the evidence in each case, is more beneficial to the claimant than the prior provisions.

5. The response to the second question is governed by the analyses in VAOPGCPREC 16-92 (O.G.C. Prec. 16-92) and *Bernard v. Brown*, 4 Vet. App. 384, 393-94 (1993), regarding the Board's authority to consider and apply regulations not considered by the AOJ. In VAOPGCPREC 16-92 at 10, para. c., we concluded that the Board may consider regulations which were not considered by the AOJ but which are pertinent to the issues on appeal to the Board. We stated, however, that "[b]efore . . . applying statutes, regulations, or [CVA] analyses which have not been considered by the AOJ, [the Board] must first determine whether the claimant will be prejudiced by its actions." VAOPGCPREC 16-92 at 7, para. 16. We stated that adverse Board decisions based on regulations not considered by the AOJ raise concerns as to whether the claimant's procedural rights to notice, to a hearing, and to submit evidence in support of a claim have been abridged. *Id.* at 8, para. 17. Citing VAOPGCPREC 6-92 (O.G.C. Prec. 6-92), we stated that "in determining whether to consider matters which have not been addressed in the statement of the case, [the Board] should consider such factors as whether the appellant has been fully apprised of the applicable laws and regulations and whether the appellant or the appellant's representative has presented argument relative to such matters." VAOPGCPREC 16-92 at 8, para. 18. In *Bernard*, 4 Vet. App. at 394, the CVA quoted VAOPGCPREC 16-92 and concluded that "when . . . the Board addresses in its decision a question that had not been addressed by the [AOJ], it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby." The CVA stated that

<Page 4>

"[a]s with all of its decisions, a [Board] decision that a claimant will not be prejudiced by its deciding a question or questions not addressed by the AOJ must be supported by an adequate statement of reasons or bases." *Id.*

6. Under *Karnas*, when there is a pertinent change in a regulation while a claim is on appeal to the Board, the Board must take two sequential steps. First, the Board must determine whether the amended regulation is more favorable to the claimant than the prior regulation. Second, the Board must apply

the more favorable provision to the facts of the case. To the extent that either of those inquiries involves, as they ordinarily would, consideration of questions or regulations not addressed by the AOJ, the requirements of VAOPGCPREC 16-92 and *Bernard* would be applicable in determining whether the Board may address such questions in the first instance.

7. With regard to the recent amendments to the schedule of ratings for mental disorders, if a claimant has not received specific notice of the potential applicability of the amended regulations and an opportunity to submit evidence and argument pertaining to evaluation of his or her mental disorder under those amended regulations, the Board may consider and apply those regulations in the first instance only if the claimant would not be prejudiced by the Board's action. In VAOPGCPREC 16-92 at 7-8, para. 16, we stated that, "if the appellant has raised an argument or asserted the applicability of a law or [CVA] analysis, it is unlikely that the appellant could be prejudiced if the Board proceeds to decision on the matter raised," unless additional factual development is necessary to a determination regarding the argument raised by the appellant. Similarly, the CVA has indicated that, where a claimant was not given specific notice that a particular question might be addressed by the Board, but has nevertheless presented evidence and argument directly bearing upon that question, it may be reasonable to conclude that the claimant was not prejudiced by the lack of notice or by the Board's action in addressing the issue in the first instance. See *Curry v. Brown*, 7 Vet. App. 59, 66-67 (1994), appeal dismissed, 48 F.3d 1237 (Fed. Cir.), cert. denied, 115 S. Ct. 1982 (1995). In VAOPGCPREC 6-92, we discussed some considerations pertinent to determining whether a claimant would be prejudiced by the Board's ac

<Page 5>

tion in applying a regulation not considered by the AOJ. We stated that the failure to reference an applicable regulation in a statement of the case may mislead a claimant as to the true standards for eligibility and preclude the claimant from submitting appropriate evidence or argument. *Id.* at 6, para. 10. We indicated, however, that, if the Board determines that the AOJ's failure to consider a regulation or cite it in the statement of the case did not prejudice the claimant's ability to present appropriate evidence and argument, the Board may apply the regulation without first remanding the case to the AOJ. *Id.* at 6-7, paras. 9 and 12.

8. With regard to the first determination necessary under *Karnas* -- whether the amended regulations are more favorable

to the claimant than the former regulations -- we note that, in the ordinary case, where a statute or regulation grants a new basis of entitlement to benefits for a particular claimant or removes an existing basis of entitlement for that claimant, it will be clear that one provision is more favorable than the other and there will be no reasonable basis for disagreement as to that question. See, e.g., *Marcoux v. Brown*, 10 Vet. App. 3, 5-6 (1996) (additional decoration accepted as conclusive evidence of in-service stressor); *Lasovick v. Brown*, 6 Vet. App. 141, 151 (1994) (regulation restricting diseases for which service connection could be established based on radiation exposure); *Karnas*, 1 Vet. App. at 313 (regulation providing for assignment of higher rating under certain circumstances had no predecessor). Where there is no reasonable basis for disagreement as to which provision is more favorable, it is unlikely that the claimant would be prejudiced by the Board's action in identifying the more favorable provision without first remanding the matter to the AOJ. As suggested above, however, there may be circumstances where it is not facially clear which provision is more favorable and resolution of that question will involve questions of interpretation and application of the pertinent provisions of law to the facts of the particular case. In those circumstances, a Board decision initially determining which provision is more favorable to the claimant may raise concerns as to whether the claimant has had an adequate opportunity to submit evidence and argument regarding the application of the new law to the claimant's case.

9. As suggested by VAOPGCPREC 16-92, if a claimant has raised an argument that the amended regulations should be applied to

<Page 6>

his claim, the claimant ordinarily would not be prejudiced by the Board's consideration of that question, unless additional factual development is necessary. When the claimant has not specifically addressed the amended regulations and has not been given specific notice of those regulations, the Board should consider whether the lack of such notice has prejudiced the claimant's ability to submit evidence and argument pertinent to the questions to be decided in applying the amended regulations.

10. In this regard, there are potentially significant differences in the general rating formulas under the former and current regulations which may affect the type of evidence and argument submitted by a claimant. Evaluations under the former regulations, although based on review of all pertinent evidence regarding the symptoms and manifestations of a mental

disorder, were, as noted above, predicated primarily upon determinations as to whether the impairment of the claimant's occupational and social capacity was most accurately characterized as "total," "severe," "considerable," "definite," or "mild." Under the 1996 amendments, evaluations are based in large part upon identification of specific symptoms and manifestations of the mental disorder, such as persistent delusions or hallucinations, suicidal ideation, and impairment of short- and long-term memory. Under the amended regulations, different symptoms are expressly associated with different degrees of disability. There may be instances where the evidence and argument submitted by a claimant was addressed primarily to the specific terminology of the former regulations and did not adequately address the specific symptoms and manifestations of the mental disorder. In such circumstances, it may be prejudicial to the claimant to apply the amended regulations without first providing notice of the new provisions and an opportunity to submit evidence and argument concerning the specific symptoms and manifestations of the mental disorder.

11. If the Board is able to determine which version of the regulations is more favorable to the claimant, it must then consider whether, under VAOPGCPRC 16-92 and *Bernard*, it may proceed to decide the merits of the case without first remanding to the AOJ. If the Board properly determines that the regulations applied by the AOJ are more favorable than the

<Page 7>

amended regulations, there would be no need for the Board to remand the matter or take other action under VAOPGCPRC 16-92 and *Bernard*. If the Board determines that the amended regulations are more favorable, then the Board must consider, under VAOPGCPRC 16-92 and *Bernard* whether the claimant would be prejudiced if the Board were to apply the amended regulations in the first instance. That analysis would be largely similar to the analysis discussed above regarding whether the claimant would be prejudiced by the Board's determination as to which version of the regulations is more favorable. If the claimant has expressly raised an argument that the amended provisions should govern, or has submitted evidence and argument which adequately address the questions to be decided in applying the amended regulations, there may be a basis for concluding that the claimant would not be prejudiced by the Board's action in applying those regulations in the first instance. Where the claimant has not submitted evidence or argument addressing the questions to be decided under the amended regulations, or where additional evidentiary development is required for proper application of the amended regulations, the Board should

ordinarily remand the case to the AOJ, unless it is able to grant the full benefit sought on appeal.

12. The CVA has suggested in *Curry*, as an alternative to case-by-case determinations of prejudice required under *Bernard* and VAOPGCPREC 16-92, that it may be reasonable for the Board to ask the claimant whether he or she objects to the Board deciding a particular question in the first instance and, if so, to specify how the Board's adjudication of that question would be prejudicial to his or her interests. *Curry*, 7 Vet. App. at 66-67; see also *Sutton v. Brown*, 9 Vet. App. 553, 569 (1996) (suggesting that the Board provide notice of new issue and advise that, unless waiver is received within a stated period, the case will be returned to the AOJ for initial adjudication of the issue); VAOPGCPREC 16-92 at 9, para. 21 (suggesting that the Board could provide notice and opportunity to respond). Such a procedure may, similar to 38 C.F.R. § 20.1304(c) (regarding additional evidence received by the Board), permit a claimant to waive initial consideration of a question, statute, or regulation by the AOJ. The Board is not required by statute or CVA precedent to adopt such a procedure, but may do so as a matter of policy.

<Page 8>

HELD:

a. Questions as to whether any of the recent amendments to VA's rating schedule pertaining to mental disorders are more beneficial to claimants than the previously-existing provisions must be resolved in individual cases where those questions are presented. The determination as to whether a particular amended regulation is more favorable to a claimant than the previously-existing regulation may depend upon the facts of the particular case.

b. Where a regulation is amended during the pendency of an appeal to the Board of Veterans' Appeals (Board), the Board must first determine whether the amended regulation is more favorable to the claimant than the prior regulation, and, if it is, the Board must apply the more favorable provision. Under VAOPGCPREC 16-92 (O.G.C. Prec. 16-92) and *Bernard v. Brown*, 4 Vet. App. 384, 393-94 (1993), the Board may consider regulations not considered by the agency of original jurisdiction if the claimant will not be prejudiced by the Board's action in applying those regulations in the first instance. With respect to claims pending on November 7, 1996, which in-

volve ratings for mental disorders, the Board may determine whether the amended regulations, which became effective on that date, are more favorable to the claimant and may apply the more favorable regulation, unless the claimant will be prejudiced by the Board's actions in addressing those questions in the first instance. The Board is free to adopt a rule requiring notice to a claimant when a pertinent change in a statute or regulation occurs prior to a final Board decision on a claim and permitting the claimant to waive the opportunity for a remand to the agency of original jurisdiction for initial consideration of the new statute or regulation.

Mary Lou Keener