Department of Veterans Affairs

Memorandum

Date: October 28, 1999 VAOPGCPREC 13-99

From: General Counsel (02)

Subj: Date of Claim in a Montgomery GI Bill Case

To: Under Secretary for Benefits (20/225B)

ISSUES:

1. Does a liberalizing precedent opinion of General Counsel have the effect of overruling previous final decisions of the VA agency of jurisdiction?

2. If the answer is affirmative, is VA obligated to award retroactive educational assistance benefits based on new evidence received in support of a claim finally denied before the liberalizing General Counsel opinion was issued?

3. May VA pay benefits under the Montgomery GI Bill (MGIB) when no claim was filed by the veteran, but proof of enrollment in qualifying training is submitted by or on behalf of the veteran?

DISCUSSION:

1. The request for an opinion recites facts of a particular veteran's case as a basis for the issues to be addressed. The veteran had honorable active duty service in the Armed Forces from June 24, 1986, to June 13, 1990. On the latter date he was issued an honorable discharge certificate. Apparently, he immediately re-enlisted and served on active duty until March 27, 1991, at which time he was issued a general discharge for the entire period covering June 24, 1986, to March 27, 1991.

2. The veteran filed a claim for MGIB benefits on June 13, 1991, seeking to attend a technical school course, which was denied. The denial was based on 38 U.S.C. § 3011(a)(3)(B), which requires that the veteran have been "discharged from active duty with an honorable discharge." The finder of fact apparently accepted as conclusive the general discharge document, which covered the veteran's entire period of service from 1986 to 1991, without considering the veteran's honorable discharge certificate covering the initial period of enlistment from 1986 to 1990.

3. In a 1992 opinion, we considered, in part, a case similar to the one presented here with multiple periods of active duty. *See* VAOPGCPREC 10-92, paras. 14 et seq. (April 1, 1992). Recognizing the inherent conflict between the periods of service covered by the two discharge documents issued in that case, we recommended that the appropriate service department be contacted for clarification. However, we also advised that, if the confirmed facts showed that the honorable discharge certificate was issued for the veteran's qualifying initial period of enlistment, the veteran could be considered to have met the requirements of section 3011(a)(3)(B) even though he had subsequent active duty service that resulted in a

"general" discharge. Further, our opinion held that determination of the veteran's actual type and character of discharge was solely within the purview of the Department of Defense (DOD).

4. In posing the instant inquiry, you reference an advisory opinion we issued on September 22, 1992, as being relevant to this case. The issue presented there was whether a discharge, prior to completion of the individual's initial obligated enlistment period, issued for the purpose of immediate reenlistment, could be considered a "Convenience of Government" discharge for MGIB entitlement purposes. Consistent with the principles enunciated in VAOPGCPREC 10-92, we answered the question in the affirmative based on advice from DOD as to their policy on such discharges.

5. We believe the principles of both the above-mentioned opinions of this office apply here. Accordingly, if DOD considers the entire period of the veteran's active duty service from 1986 to 1991 to be covered by the general discharge issued, then, notwithstanding the 1990 honorable discharge certificate issued for the service period from 1986 to 1990, the veteran would have no eligibility for MGIB benefits. However, if DOD considers the veteran as having received an "honorable" discharge from his initial period of active duty service, then the veteran would be eligible for those benefits. (Note: The file before us indicates that the latter is the case here, apparently following an upgrade of the veteran's military records.)

6. As to the effect of VAOPGCPREC 10-92 and the subsequent pertinent advisory opinion on cases in which a final agency decision previously had been made, your first question is answered in the negative. The 1991 regional office decision to deny benefits in this case was final when not appealed by the veteran. Even if that claims decision is found, upon further development of the facts, not to have accorded with our subsequent 1992 opinions, the decision now may not be reconsidered on that basis. This is consistent with our holding in VAOPGCPREC 25-95 (BVA's application of a subsequently invalidated regulation in a decision does not constitute "obvious error" or provide a basis for reconsideration of the decision.) *See also* VAOPGCPREC 9-94 (decisions of the Court of Appeals for Veterans Claims invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to a prior "final" adjudication of a claim, but should only be given retroactive effect as they relate to a claim still open on direct review.) Further, we would point out that, in any case, an advisory opinion, by definition, is not binding and could not serve as a basis for revising a final agency decision.

7. We should clarify, as well, that the 1991 agency decision made in this case cannot be reversed or revised using our 1992 precedent opinion as evidence of Clear and Unmistakable Error (CUE) in rendering the decision. Pursuant to 38 C.F.R. § 3.105, CUE does not apply where "there is a change in law or [VA] issue, or a change in interpretation of law or [VA] issue. . . ." Further, 38 C.F.R. § 20.1403(e), a regulation applicable to revision of Board of Veterans Appeals (BVA) decisions

based on CUE, provides: “Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.” Therefore, a change in legal interpretation is not a basis for CUE revision.

8. In view of our response to your first question, no answer is required to the second question. However, your final question is based on a different set of facts and issues. For this purpose, it is assumed that the veteran, consistent with the principles enunciated in VAOPGCPREC 10-92, has been found eligible for MGIB benefits for course pursuit after issuance of that opinion. The evidence of record indicates that the veteran attended college in 1995 in pursuit of an associate degree. He submitted no application for MGIB benefits for that college enrollment, although, in 1999, VA apparently did receive a photocopy of an enrollment certification covering that training. Given these facts, you ask whether VA, based on such submissions, was obliged to approve MGIB benefits for the veteran’s 1995 enrollment.

9. In the first instance, the law requires that “[a] specific claim in the form prescribed by the Secretary . . . must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.” 38 U.S.C. § 5101(a). Further, pertinent VA regulation provides that a formal claim for educational assistance must be filed “indicating the proposed place of training, the school or training establishment, the objective of the program of education, and such other information as the Secretary may require.” 38 C.F.R. § 21.1030. (Note that this regulation and other provisions of subpart B of part 21 of title 38, Code of Federal Regulations, expressly are made applicable to MGIB applications, claims and associated time limits by 38 C.F.R. § 21.7030.)

10. In the event an “informal claim” is received, VA will furnish appropriate forms and instructions, as well as a description of required supporting evidence, to enable the individual to perfect a formal claim for the benefit. *See* 38 C.F.R. § 21.1031(a). However, educational assistance regulations specifically provide that the mere act of enrolling in an approved school is not an informal claim. 38 C.F.R. § 21.1029(d)(4). Moreover, as an extension of that principle, VA’s receipt merely of an enrollment document from a school would not constitute an informal claim on behalf of the enrolled student. (Under VAOPGCPREC 83-90, the document, in any case, would have to have been submitted by the veteran or his authorized representative, not by the school alone, for purposes of an informal claim. *See also Fleshman v. West,* 138 F. 3d 1429 (Fed. Cir. 1998).

11. If, however, a school enrollment document were submitted by the veteran, under circumstances that would indicate to a reasonable person “a desire on the part of the individual to claim or to apply for VA-administered educational assistance” (38 C.F.R. § 21.1029(d)(2)), that submission might be considered an informal claim.

In that event, VA would have a duty, as prescribed by the regulations cited in the preceding paragraph, to notify the veteran of the requirements and time limits for filing a formal claim, as well as to provide all appropriate application forms and instructions.

12. The materials presented to us do not provide sufficient facts to enable analysis of either the nature of the veteran's submission or VA's response thereto. Nevertheless, even assuming the veteran had MGIB eligibility and submitted an informal claim in 1999, followed by a timely filed formal claim, the veteran still could be awarded benefits retroactive only for the period 1 year prior to the date of his informal claim. (In this case, no earlier than May 11, 1998.) *See* 38 C.F.R. §§ 21.7131(a)(1)(ii), 21. 1029(b). Therefore, in no event could the veteran be paid for training received in 1995, based on the May 11, 1999, submission of the VA Form 22-1999 enrollment certification.

CONCLUSIONS:

1. A precedent VA General Counsel opinion that invalidates or liberalizes an existing regulatory or statutory interpretation may have retroactive effect in regard to a claim still open on direct review, but can have no such effect on a finally adjudicated agency decision.

2. In view of the preceding conclusion, it is unnecessary to address the second inquiry.

3. Under the facts given, potentially the earliest indication of the veteran's intent to claim benefits for education he pursued in 1995 would be the submission in 1999 of an enrollment certification form. Those facts, however, are insufficient to enable forming an opinion about whether submission of the enrollment form constituted an "informal claim" within the meaning of 38 C.F.R. § 21.1029(d)(2) and, consequently, about the nature of VA's responsibility to act on that submission. It does seem clear that the veteran, thereafter, did not file a formal claim for his 1995 enrollment, as required by 38 U.S.C. § 5101(a). Nevertheless, even if he had, we find the provisions of 38 C.F.R. § 21.7131(a) would have precluded paying benefits based on that claim. That regulation provides that no educational assistance benefits may be paid for education/training received prior to a date 1 year before a claim therefor is filed.

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