Department of Veterans Affairs

Memorandum

Date: September 2, 1999 VAOPGCPREC 11-1999

From: General Counsel (022)

Subj: Effect of Former Manual Provisions Concerning Authority to Pay Compensation for Retinitis Pigmentosa

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

QUESTIONS PRESENTED:

a. To the extent that provisions in the Veterans Benefits Administration (VBA) (formerly Department of Veterans Benefits) Adjudication Procedures Manual M21-1 extant in 1964 purported to constitute an absolute bar to service connection for retinitis pigmentosa, were such provisions a valid exercise of regulatory authority?

b. To the extent that provisions in VBA Manual M21-1 extant in 1964 created a valid limitation on the grant of service connection for retinitis pigmentosa, did such a limitation bar service connection for the in-service aggravation of preexisting retinitis pigmentosa?

c. If there was no previous bar to the award of service connection for retinitis pigmentosa, what statutory and regulatory provisions are for consideration in determining the effective date for the award of service connection for retinitis pigmentosa in the case giving rise to this opinion request?

d. If the award of service connection for retinitis pigmentosa was barred at the time of a claimant's application for benefits, does the application of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) permit assignment of an effective date based on the effective date of Op. G.C. 1-85 (reissued as VAOPGCPREC 82-90); Op. G.C. 8-88 (reissued as VAOPGCPREC 67-90) or a 1986 revision to VBA Manual M21-1?

DISCUSSION:

1. The pertinent facts of the case giving rise to the opinion request are as follows. In 1963, the veteran applied for compensation or pension for disability resulting from retinitis pigmentosa. A Department of Veterans Affairs (VA) regional office denied service connection in January 1964, concluding that the condition existed prior to service and was not aggravated by service. In 1990, the veteran reapplied for service connection for that condition, and the regional office subsequently awarded service connection on the basis that the condition had been aggravated by service. The regional office assigned an effective date of March 29, 1989, corresponding to the effective date of a change in VBA Manual M21-1.

2. The veteran asserted entitlement to an earlier effective date, arguing that the 1964 regional-office decision contained clear and unmistakable error (CUE) in failing to consider the presumptions of sound condition and aggravation and alleging, alternatively, that the original claim remained pending because a valid notice of disagreement (NOD) with the 1964 decision had been filed upon which VA had failed to act. In an April 1997 decision, the Board of Veterans' Appeals (Board) held that the veteran had not filed a valid NOD to appeal the 1964 decision. The Board further held that there was no CUE in the 1964 decision because that decision had properly considered the presumptions of sound condition and aggravation and, further, because the law in 1964 prohibited grants of service connection for retinitis pigmentosa, as it was considered a hereditary condition. The Board indicated that opinions of the VA General Counsel in 1985 and 1988, and corresponding changes to VBA Manual M21-1 in 1986 and 1989, had established VA's authority to pay service-connected compensation for retinitis pigmentosa. The Board explained that, because the veteran's 1990 claim was filed within one year after the "liberalizing" 1989 change to the manual, 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) permitted assignment of an effective date retroactive to, but no earlier than, the date of that change.

3. In a November 1998 decision, the United States Court of Appeals for Veterans Claims (CAVC) held that the veteran had filed a valid NOD in 1964 and that, consequently, there was no final VA decision which would preclude assignment of an earlier effective date based on the 1963 claim. The CAVC remanded for the Board to consider the extent to which the law extant at the time of the original claim, and subsequent liberalizing changes in the law, would bear upon the effective date for service connection in light of 38 U.S.C. § 5110(g) and

38 C.F.R. § 3.114(a), which generally preclude assignment of an effective date earlier than the date of the liberalizing administrative issue on which an award is based. The CAVC identified two issues which the Board should address:

> First, to the extent that the Manual M21-1 extant in 1964 purported to constitute an absolute bar to service connection for retinitis pigmentosa, the Board should address whether such a provision was a valid exercise of regulatory authority. *See Fugere v. Derwinski*, 1 Vet. App. 103, 107-10 (1990); *Earle v. Brown*, 6 Vet. App. 558, 561-62 (1994). Second, to the extent that the Manual M21-1 extant in 1964 created a valid limitation on service connection, it appears to have only considered retinitis pigmentosa to be a condition that preexisted service. The Board, therefore, should address whether such a limitation barred service connection for in-service aggravation of retinitis pigmentosa, which was the basis for the appellant's award of service connection.

4. The first two questions presented in the opinion request correspond to the issues raised in the above-quoted portion of the CAVC's opinion. Because both issues implicate the scope and effect of the manual provisions extant in 1964, we will address those issues together. The manual provisions at issue were located in chapter 50 of VBA Manual M21-1, which conveyed "Rating Procedure Relative to Specific Issues." At the time of the 1964 regional office decision, the M21-1 provisions relating to disabilities of the eyes provided, in pertinent part:

> 50.05 THE EYES
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> . . . .
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> b. Defects and Aggravation. Defects of form or structure of the eye of congenital or developmental origin, such as regular astigmatism, myopia (other than malignant or pernicious), hyperopia and presbyopia, will not, in themselves, be regarded as disabilities and may not be service connected on the basis of incurrence or progress during service. . . .
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> . . . .
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> d. Etiology. In considering actual disease of the eye, the usual consideration will be given to the probability of congenital origin. . . . Retinitis pigmentosa, notwithstanding that the disease or its effects may not be known to the disabled person be-

> fore he undertakes military service, is regarded as of familial origin, thus as existing prior to service.

Former VBA Manual M21-1, ch. 50, para. 50.05 (June 4, 1962).

5. The plain language of former paragraph 50.05.d stated that retinitis pigmentosa would be regarded as having existed prior to service, and thus purported to preclude a finding that such disease was incurred in service. However, nothing in the language of that provision purported to preclude service connection for in-service aggravation of a preexisting retinitis pigmentosa. The statement in former paragraph 50.05.d that retinitis pigmentosa will be considered to have existed prior to service cannot be construed as prohibiting a finding of aggravation in service, because a finding of aggravation would be entirely consistent with the presumption that the disease existed prior to service. The fact that the manual provision stated only that retinitis pigmentosa would be considered to have existed prior to service, rather than stating that service connection could not be granted for the disease, may be viewed as implying that service connection could be granted if the disease were aggravated in service, pursuant to generally applicable statutes and regulations authorizing compensation for in-service aggravation of diseases. Further, the statement that retinitis pigmentosa will be considered to be of "familial origin" speaks only to the issue of incurrence and would not bar a finding of aggravation, absent any language in the manual provision purporting to bar a finding of in-service aggravation of an "actual disease" of familial origin.

6. The language and structure of former paragraph 50.05 suggests an intent to draw a distinction between "defects of form or structure," on the one hand, and "actual disease," on the other hand. Former paragraph 50.05.b stated that, "[d]efects of form or structure of the eye of congenital or developmental origin . . . will not, in themselves . . . be service connected on the basis of incurrence or progress during service." This provision plainly purported to prohibit findings of either service incurrence or aggravation of such congenital "defects." Former paragraph 50.05.d identified factors relevant to consideration of claims for service connection of "actual disease of the eye," including retinitis pigmentosa. The use of the phrase "actual disease" suggests an intent to distinguish conditions which are not actually "diseases" themselves, and the implied distinction is most reasonably construed with reference to the class of "defects" addressed in former para-

graph 50.05.b. Further, if the term "defects of form or structure" were intended to encompass "actual disease" such as retinitis pigmentosa, there would have been no reason to specify in former paragraph 50.05.d that retinitis pigmentosa would be considered to have existed prior to service. The fact that retinitis pigmentosa existed prior to service would have been irrelevant if service connection of that disease were barred under any circumstances. Accordingly, we conclude that the terms "defects of form or structure" and "actual disease" in former paragraph 50.05 were intended to be mutually exclusive and that former paragraph 50.05.b, therefore, did not purport to prohibit service connection, based on a finding of aggravation in service, for an "actual disease" of familial origin.

7. The conclusion that the terms "defect" and "disease" in former paragraph 50.05 were intended to be mutually exclusive is consistent with a VA regulation extant when that manual provision was issued, which stated that "[c]ongenital or developmental defects . . . are not diseases or injuries within the meaning of applicable legislation." 38 C.F.R. § 3.303(c) (1962); *see also* former 38 C.F.R. § 3.63(f) (1956). A similar statement was included in paragraph 9 on page 3 of the 1945 Schedule for Rating Disabilities. In VAOPGCPREC 82-90 (O.G.C. Prec. 82-90) (originally issued as Op. G.C. 1-85), we concluded that 38 C.F.R. § 3.303 draws a distinction between "defects" and "diseases" and, therefore, bars service connection for congenital or developmental "defects," but not for congenital, developmental, or familial "diseases." As explained above, the language and structure of former paragraph 50.05 of Manual M21-1 is consistent with that result.

8. In response to the second question presented in the opinion request, we conclude that the provisions of former VBA Manual M21-1, ch. 50, para. 50.05.d, extant in 1964 did not bar service connection for the in-service aggravation of preexisting retinitis pigmentosa. In view of that conclusion, we believe it is unnecessary to address the first question presented in the opinion request. The first question is based on the premise that the manual provisions extant in 1964 purported to constitute an absolute bar to service connection for retinitis pigmentosa. As explained above, the manual provision extant in 1964 did not purport to bar a finding of service connection based on aggravation in service.

9. The third question presented in the opinion request raises the issue of which statutes and regulations are for considera-

tion in determining the effective date for the veteran's award if there was no previous absolute bar to service connection for retinitis pigmentosa. The effective date of an award of compensation is governed by the generally-applicable provisions of 38 U.S.C. § 5110(a) unless specifically provided otherwise in chapter 51 of title 38, United States Code. The opinion request raises the possibility that 38 U.S.C. § 5110(g) may govern the effective date of the veteran's award. As discussed below, however, we conclude that section 5110(g) does not govern the effective date under the circumstances stated in the opinion request. Accordingly, we conclude that section 5110(a) will govern the effective-date determination unless the Board determines, based on its review of the evidence of record, that another provision in chapter 51 is applicable.

10. The fourth question presented in the opinion request asks whether, if the award of service connection for retinitis pigmentosa was previously barred by the former manual provisions, the application of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) would permit an effective date earlier than March 29, 1989, based on the effective date of Op. G.C. 1-85 (reissued as VAOPGCPREC 82-90), Op. G.C. 8-88 (reissued as VAOPGCPREC 67-90), or the 1986 revision to Manual M21-1. In view of our conclusion that the manual provisions extant in 1964 did not bar service connection for the veteran's retinitis pigmentosa, we conclude that the effective dates of the referenced documents would not, under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), govern the effective date of the veteran's award. Section 5110(g) and section 3.114(a) provide that, if compensation is awarded pursuant to a liberalizing law or VA issue, the award may be made effective no earlier than the effective date of the liberalizing law or VA issue. The CAVC and the United States Court of Appeals for the Federal Circuit have indicated that a "liberalizing" law or VA issue is one which effects a substantive change in law or regulation and creates a new basis for entitlement to a benefit. *See Routen v. West*, 142 F.3d 1434, 1441-42 (Fed. Cir.), *cert. denied*, 119 S. Ct. 404 (1998); *Spencer v. Brown*, 4 Vet. App. 283, 288-89 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir.), *cert. denied*, 513 U.S. 810 (1994).

11. Based on our conclusion that the law extant in 1964 permitted an award of service connection for in-service aggravation of retinitis pigmentosa, the subsequent General Counsel opinions and the 1986 change to VA Manual M21-1 cannot be viewed as liberalizing VA issues which created the entitlement

on which the veteran's award was based. We note that the General Counsel opinions merely stated that existing statutes and regulations authorized awards of service connection for hereditary or familial diseases such as retinitis pigmentosa and did not purport to create any new basis of entitlement to benefits. The revised manual provision issued in 1986 stated that, "[i]f no other cause is shown for retinitis pigmentosa, consider it to be hereditary, and determine service connection on whether or not there has been aggravation of this preexisting condition during service." Manual M21-1, ch. 50, para. 50.09.d (change 415 Jan. 3, 1986). Although that manual provision is clearer and more specific than the manual provisions existing in 1964, it cannot be viewed as creating a new substantive basis for entitlement to benefits which did not previously exist, since, as discussed above, the 1964 manual provisions permitted service connection for in-service aggravation of retinitis pigmentosa.

HELD:

a. The provisions in paragraph 50.05 of chapter 50 of the Veterans Benefits Administration (VBA) (formerly Department of Veterans Benefits) Adjudication Procedures Manual M21-1 extant in 1964 did not purport to bar service connection for the in-service aggravation of preexisting retinitis pigmentosa.

b. The effective date of the award of compensation for retinitis pigmentosa in the case giving rise to the opinion request is governed by the generally-applicable provisions of 38 U.S.C. § 5110(a), unless the Board determines, based on its review of the record, that another provision in chapter 51 of title 38, United States Code, is applicable to that effective-date determination.

c. Because the statutes and regulations existing at the time of the veteran's claim for benefits permitted an award of service connection for in-service aggravation of retinitis pigmentosa, subsequent Department of Veterans Affairs General Counsel opinions and changes to VBA Manual M21-1 cannot be considered "liberalizing" changes which created the right to such benefits. Accordingly, the effective dates of those documents do not govern the effective date of the veteran's award under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a).

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