

**Department of
Veterans Affairs**

Memorandum

Date: March 26, 1999

VAOPGCPREC 3-99

From: General Counsel (022)

Subj: Effective Date of Award and Date of Commencement of
Payment of Monetary Allowance for Spina Bifida Under 38 U.S.C.
§ 1805

To: Director, Compensation and Pension Service (211B)

QUESTION PRESENTED:

What is the proper effective date of award and date of commencement of payment for a monetary allowance for spina bifida awarded under 38 U.S.C. § 1805 in a case where the claim for such benefits was filed prior to November 21, 1997 (the date of enactment of Pub. L. No. 105-114, which amended 38 U.S.C. § 1806 retroactive to October 1, 1997), or prior to October 1, 1997 (the date 38 U.S.C. §§ 1805 and 1806 became effective)?

DISCUSSION:

1. Public Law No. 104-204, § 421, 110 Stat. 2874, 2923-26 (1996), added a new chapter 18 to title 38, United States Code, authorizing the Department of Veterans Affairs (VA) to provide certain monetary and other benefits to children of Vietnam veterans for disability resulting from spina bifida in such children. Although Pub. L. No. 104-204 was enacted on September 26, 1996, the statute specified that the provisions of new chapter 18 would not take effect until October 1, 1997. Pub. L. No. 104-204, § 422(c), 110 Stat. at 2927. Section 1805 of title 38, United States Code, as added by Pub. L. No. 104-204, authorizes VA to pay a monetary allowance to children of Vietnam veterans for disability due to spina bifida. Section 1806 of title 38, as added by Pub. L. No. 104-204, provided that "[t]he effective date for an award of benefits under this chapter shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application for the benefits." On November 21, 1997, Congress enacted Pub. L. No. 105-114, which, among other things, amended 38 U.S.C. § 1806 to state that, "[t]he provisions of sections 5101(c), 5110(a), (b)(2), (g), and (i), 5111, and 5112(a), (b)(1), (b)(6), (b)(9), and (b)(10) of this title shall be deemed to apply to benefits under this chapter

in the same manner in which they apply to veterans' disability compensation." Pub. L. No. 105-114, § 404(b)(1), 111 Stat. 2277, 2294 (1997). Section 404(d) of Pub. L. No. 105-114 provided that the amendment would be effective as of October 1, 1997. 111 Stat. at 2295.

2. Under 38 U.S.C. § 5110(g), made applicable to chapter 18 benefits by Pub. L. No. 105-114, where benefits have been awarded pursuant to a liberalizing statute or administrative issue, the effective date of the award "shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue." Section 5110(g) further states that, "[i]n no event shall such award . . . be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier." Section 5111 of title 38, United States Code, also made applicable to chapter 18 benefits by Pub. L. No. 105-114, provides that payment of monetary benefits may not be made "for any period before the first day of the calendar month following the month in which the award . . . became effective as provided under section 5110 of this title." The opinion request notes that section 1806, as amended by Pub. L. No. 105-114, may be more favorable to claimants than it was prior to the amendment in some respects (e.g., by permitting an effective date up to one year prior to the date of application, pursuant to section 5110(g)), but may also be less favorable to claimants in other respects (e.g., by making the limitation of section 5111 applicable to payments under chapter 18). The United States Court of Veterans Appeals (CVA) has held that, in some circumstances, the question of whether a change in a statute or regulation applies to a case pending at the time of the change depends upon whether the changed statute is more favorable to the claimant than the prior statute or regulation. See *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991). In view of both the liberalizing and restrictive aspects of the November 21, 1997, amendment, our opinion has been requested concerning the proper effective dates for awards under 38 U.S.C. § 1805 in several circumstances, primarily involving cases where the claim for benefits was pending on either October 1, 1997, or November 21, 1997, or was pending on both dates.

3. In *Karnas*, the CVA addressed the effect of an intervening change in a statute or regulation upon a claim which was pending on the date of the change. The CVA concluded:

where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to appellant should and we so hold will apply unless Congress provided otherwise

or permitted the Secretary of Veterans Affairs (Secretary) to do otherwise and the Secretary did so.

1 Vet. App. at 313. *Karnas* suggests that an intervening change in a statute or regulation generally may apply to a pending claim only if the change is more favorable to the claimant than the pre-amendment statute or regulation. *But* see VAOPGCPREC 10-97 (suggesting that the effect of the CVA's decision in *Karnas* may be limited in some respects by subsequent decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit). However, *Karnas* expressly states that this rule does not apply if Congress has "provided otherwise." 1 Vet. App. at 313.

4. Subsequent to *Karnas*, the Supreme Court addressed the effect of intervening statutory changes upon cases that were pending at the time of the change or were based on facts which occurred prior to the change. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court noted the existence of two seemingly inconsistent judicially-created canons of statutory construction concerning the effect of intervening statutes. On the one hand, the Court noted, was the principle that, "'a court is to apply the law in effect at the time it renders its decision.'" *Landgraf*, 511 U.S. at 264 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). On the other hand was the principle that, "'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Landgraf*, 511 U.S. at 264 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). The Court reconciled those canons of construction by concluding that the presumption against retroactivity "remains the appropriate default rule," *Landgraf*, 511 U.S. at 272, but that the presumption would apply only to statutes that would have "genuinely 'retroactive' effect." 511 U.S. at 277. The Court then explained the governing analysis as follows:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional

presumption teaches that it does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.

5. The rules of statutory construction stated in *Landgraf* and *Karnas* are not consistent in all respects. However, *Landgraf* and *Karnas* are consistent insofar as both indicate that those rules of construction are merely default rules and are inapplicable in cases where Congress has expressly prescribed a statute's temporal reach. *Landgraf*, 511 U.S. at 280; *Karnas*, 1 Vet. App. at 313. That principle governs the issue presented in the opinion request, because Congress has expressly prescribed the temporal reach of the amendments to 38 U.S.C. § 1806 made by Pub. L. No. 105-114. When Congress amended section 1806 on November 21, 1997, it expressly provided that the amendment would be effective as of October 1, 1997, the date on which section 1806 itself--and all of chapter 18 of title 38, United States Code--first became effective. Prior to October 1, 1997, VA had no authority to award any benefit for spina bifida in children of Vietnam veterans. In Pub. L. No. 105-114, Congress unambiguously provided that the temporal reach of the amendment to section 1806 would be coextensive with VA's authority to award benefits under chapter 18. In providing that the amendment would be effective from the date on which section 1806 first became effective, Congress plainly intended that the amendment would apply to all claims under chapter 18, regardless of when those claims were filed. Accordingly, because Congress has expressly prescribed the temporal reach of the amendment to 38 U.S.C. § 1806, resort to the judicial default rules stated in either *Karnas* or *Landgraf* is unnecessary, and VA must give effect to Congress' clear command.

6. The provisions of 38 U.S.C. § 1806, as amended by Pub. L. No. 105-114, apply to all claims for benefits under chapter 18, regardless of when the claim was filed, and regardless of whether those provisions are more or less advantageous to the claimant than the provisions of section 1806 as originally enacted by Pub. L. No. 104-204. The opinion request asks what the proper "effective date of payment" for the monetary allowance under chapter 18 would be in several different circumstances. We now address each of those circumstances in accordance with the above-stated conclusion. The opinion request first asks what the correct "effective date of payment" would be for claims filed prior to, but not adjudicated by, November 21, 1997, October 1, 1997, or November 1, 1997. In each such case, the effective date of the award would be governed by the provisions of 38 U.S.C. § 5110(g), which would be applicable to all such claims by virtue of 38 U.S.C. § 1806, as amended by Pub. L. No. 105-114. Section 5110(g) provides

that the effective date of benefits awarded pursuant to a liberalizing law (here, section 421 of Pub. L. No. 104-204) shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of such law (here, October 1, 1997). Further, the effective date may not be more than one year prior to the date VA received the application for benefits. Accordingly, with respect to claims pending on October 1, November 1, or November 21, 1997, VA may assign an effective date as early as October 1, 1997, if otherwise warranted by the facts found. The proper date for commencing payment of any such award would be governed by 38 U.S.C. § 5111, made applicable to all such claims by 38 U.S.C. § 1806, as amended by Pub. L. No. 105-114. Under section 5111, the date of commencement of payment may not be earlier than the first day of the calendar month following the month in which the award became effective under section 5110.

7. The opinion request next asks what effect Pub. L. No. 105-114 would have on awards where a claim was filed after October 1, 1997, and benefits were awarded effective from the date of the claim, giving October 15, 1997, as an example. As noted above, under Pub. L. No. 105-114, 38 U.S.C. § 5110(g) would be applicable to such a claim and would permit an effective date of up to one year prior to the date of the claim, but in no event prior to the effective date of the statute authorizing benefits, which, in this case, is October 1, 1997. Accordingly, if chapter 18 benefits had been awarded only from the date of the claim, Pub. L. No. 105-114 may provide a basis for awarding an earlier effective date, if otherwise warranted by the facts found. If the decision assigning the effective date was rendered prior to enactment of Pub. L. No. 105-114, under the original terms of 38 U.S.C. § 1806, which provided that an award under chapter 18 could not be effective prior to the date of receipt of the claim, the enactment of Pub. L. No. 105-114 may provide a basis for reviewing the claim and assigning an earlier effective date. See *Spencer v. Brown*, 4 Vet. App. 283, 288-89 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994). If the decision was rendered on or after November 21, 1997, and was based on the erroneous conclusion that VA was precluded from assigning an effective date prior to the date of the claim, the decision may be revised on the basis of clear and unmistakable error, if such error is established. We note, however, that the date of commencement of payments, under 38 U.S.C. § 5111, would be the same whether an award became effective, as in the example given, on October 15, 1997, or October, 1, 1997.

8. Finally, the opinion request asks what the effective date of payment would be for awards based on claims filed prior to October 1, 1997, and for claims filed on or after October 1, 1997, but before November 21, 1997. As discussed above, the

effective date of the award and the date of commencement of payments would be governed in either case by 38 U.S.C. §§ 5110(g) and 5111, respectively. The effective date would be fixed in accordance with the facts found, but would in no event be earlier than October 1, 1997. The date of commencement of payment may be no earlier than the first day of the calendar month following the month in which the award became effective.

HELD:

Section 1806 of title 38, United States Code, as amended by Pub. L. No. 105-114, governs the determination of the effective date and date of commencement of payment for any monetary allowance awarded under 38 U.S.C. § 1805 for spina bifida in children of Vietnam veterans. Although Pub. L. No. 105-114 was enacted on November 21, 1997, Congress expressly provided that the amendment to section 1806 would be retroactive to October 1, 1997, when 38 U.S.C. §§ 1805 and 1806 first became effective. Because Congress expressly prescribed the retroactive reach of Pub. L. No. 105-114, the judicial default rules stated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Karnas v. Derwinski*, 1 Vet.

App. 308 (1991), are inapplicable. Accordingly, the provisions of section 1806, as amended, would govern the effective date and date of commencement of payment of any award under section 1805, including awards based on claims filed prior to November 21, 1997, or prior to October 1, 1997. The proper effective date and date of commencement of payment in any particular case must be determined by application of the statutory provisions referenced in section 1806, as amended.

Leigh A. Bradley