

**Department of
Veterans Affairs**

Memorandum

Date: April 10, 2000

VAOPGCPREC 3-2000

From: General Counsel (022)

Subj: Retroactive Applicability of Revised Rating Schedule
Criteria to Increased Rating Claims

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

QUESTIONS PRESENTED:

a. When the Department of Veterans Affairs (VA) issues an amendment to a provision of its rating schedule while a claim for an increased rating is pending, what is the proper analysis for determining whether, and to what extent, the pending claim is governed by the prior rating-schedule provision or the revised rating-schedule provision?

b. When the Board of Veterans' Appeals (Board) addresses an increased-rating claim involving a disability for which the rating criteria have changed during the pendency of the appeal, should the Board make separate findings of fact and conclusions of law, and provide reasons or bases in its decision, with respect to application of both the old and the new rating criteria?

c. Where there has been a change in rating criteria during the pendency of an appeal, should all evidence of record be considered when determining whether an increased rating is warranted, or should only the evidence which pre-dates or post-dates the effective date of the change in law be taken into consideration when addressing the rating prior to and after the change in law, respectively?

DISCUSSION:

1. The basic principles governing the application of a rating-schedule change to a pending claim for an increased rating derive from three sources. The first of these is 38 U.S.C. § 5110(g), which provides, in pertinent part, that, "where compensation . . . is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the

Act or administrative issue." (Emphasis added.) Second, in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), the Supreme Court concluded that, unless clearly provided otherwise, laws are presumed to operate prospectively only. Third, in *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991), the United States Court of Appeals for Veterans Claims (CAVC) held that, "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 has provided otherwise or permitted the Secretary of Veterans Affairs (Secretary) to do otherwise and the Secretary did so."

2. *Landgraf* and *Karnas* indicate that, when Congress has expressly prescribed the temporal reach of a statutory or regulatory change, there is no need to resort to the judicial default rules stated in those cases. In *Rhodan v. West*, 12 Vet. App. 55, 57 (1998), the CAVC concluded that 38 U.S.C. § 5110(g) expressly prescribes the temporal reach of liberalizing amendments to VA's rating schedule. Under section 5110(g), VA may award an increased rating based on a liberalizing regulatory amendment retroactive to, but no earlier than, the effective date of the amendment.

3. In view of section 5110(g)'s limitations on retroactive application of liberalizing regulations, an increased rating awarded pursuant to a liberalizing regulation may not fully resolve the issues presented by a veteran's claim for an increased rating. By statute and regulation, a veteran may establish entitlement to an increased rating effective from the date of application or the date on which an increase in disability is shown to have occurred. 38 U.S.C. § 5110(a), (b) (2); 38 C.F.R. § 3.400(o) (1), (o) (2). If an increase is awarded on the basis of a liberalizing regulation issued subsequent to the date of application or date on which an increase in disability occurred, the effective date assigned under section 5110(g) generally would not correspond to the earliest effective date potentially available under section 5110(a) and (b) (2). As a factual matter, it is certainly possible that a claimant may be entitled to an increased rating prior to and independent of an intervening change to the rating schedule under then-existing rating criteria.

4. The opinion request seeks our views concerning the proper analysis for addressing the issues of a claimant's entitlement to an increased rating under an intervening rating-schedule change and the claimant's entitlement to an increased rating under prior law for periods preceding the effective date of

the change. The opinion request proposes the following three-step analysis for cases where a rating schedule provision changes while an appeal is pending:

First, the Board must determine, on a case-by-case basis, whether the amended regulation is more favorable to the claimant than the prior regulation. Second, if it is more favorable, the Board must, subsequent to the effective date of the liberalizing law under 38 U.S.C. § 5110(g), apply the more favorable provision to the facts of the case, unless the claimant would be prejudiced by the Board's actions in addressing the revised regulation in the first instance. Third, the Board must determine whether the appellant would have received a more favorable outcome, i.e., something more than a denial of benefits, under the *prior* law and regulation, including for the periods both prior to and after the effective date of the change in law.

We believe this analysis is essentially correct, with one principal exception. The step-one and step-two analyses contemplate that the Board will have determined that the revised regulation governs the rating for the period beginning on the effective date of the regulatory change. The step-three analysis suggests that the Board must also apply the prior version of the regulation to determine the appropriate rating for periods both before *and after* the regulatory change. However, if the Board has properly determined that the rating-schedule change governs the rating for periods after the effective date of that change, there would be no need to apply the less-favorable prior version of the regulation to the same period under step three of the analysis.

5. We note with respect to the step-one determination that, in some cases, the determination as to which version of the regulation is more favorable may be resolved merely by facial comparison of the two versions, without regard to the specific facts of the particular case under adjudication. See *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991) (finding that "clear intent" of 1988 amendment to rating schedule was to require increased rating if evidence remained unchanged). As we noted in VAOPGCPREC 11-97, ¶ 4, however, there may also be cases in which the determination as to whether an amendment is more favorable to the claimant can be made only by examining the application of the pre-amendment and post-amendment provisions to the facts of the particular case. In such cases, the Board would have to separately apply both versions of the regulation to the facts of the case in order to determine which version was more favorable. Assuming the Board has properly found

that an amended regulation governs a veteran's rating for the post-amendment period, there would be no need to apply the less favorable pre-amendment version of the regulation to that same period. Rather, we believe that the appropriate analysis in such cases would be to rate the veteran's disability for the post-amendment period under the revised regulation and rate the veteran's disability for the pre-amendment period under the prior version of the regulation.

6. The broader step-three analysis suggested in the opinion request is apparently based on the CAVC's decision in *DeSousa v. Gober*, 10 Vet. App. 461 (1997). In *DeSousa*, the veteran sought to establish entitlement to VA educational assistance for a program of study. The Board denied the claim, finding that the veteran's program was his third "change of program" and that, under then-existing statute and regulation, benefits could not be paid for such a change in program under the circumstances presented. While the case was on appeal, the pertinent statute and regulation were amended. The CAVC vacated the Board decision and remanded for consideration of whether the amended law would apply under *Karnas*. On remand, the Board concluded that the revised law was more favorable, in that the veteran's actions would not be considered a "change of program" under the new law. However, the Board concluded that the revised law was inapplicable because 38 U.S.C. §§ 5110(g) and 5113(a) and 38 C.F.R. § 21.4131(f) prohibited VA from paying educational benefits under the new law for periods preceding its effective date. The Board did not address whether the veteran would have been entitled to any benefits under the prior version of the law. See *DeSousa*, 10 Vet. App. at 462-63. The CAVC affirmed the Board's determination that the revised statute and regulation were inapplicable. However, the CAVC held that the Board should have "render[ed] a reasoned decision under *Karnas* . . . as to whether his claim would receive a more favorable outcome, i.e., something more than a denial of benefits, under the prior law and regulation." The CAVC went on to state that, "the Court's holding in *Karnas* requires that in all cases VA fully adjudicate a veteran's claim under both the new and old law and regulation to determine the extent to which each may be favorable to the veteran." *DeSousa*, 10 Vet. App. at 467.

7. In *DeSousa*, although the intervening statute and regulation were facially more liberal than the prior law, they were inapplicable to the veteran in that case. The CAVC concluded that the Board had erred by merely finding that the new statute and regulation were inapplicable but failing to determine whether the veteran would have received a more favorable outcome than a denial of benefits under the prior statute and regulation. In contrast to the situation in

DeSousa, increased-rating claims ordinarily would not present the possibility that a facially liberalizing regulation would be inapplicable to a particular veteran's claim due to its effective date. Unlike the benefit sought in *DeSousa*, disability compensation is an ongoing benefit, and disability ratings are based on disability levels over particular periods of time rather than on a discrete past event. Section 5110(g) would not render a rating-schedule amendment inapplicable to an increased-rating claim, but would merely limit the effective date of any increase based on the amendment.

8. Because the issue in *DeSousa* related to the applicability of a legal standard to a discrete past event, it was necessary for the Board to conclude that either the pre-amendment or post-amendment version of the statute and regulation governed that determination. When the Board found that the post-amendment law was inapplicable, it was required to determine whether benefits could be awarded under the pre-amendment law. In contrast, disability-rating claims may involve determination of disability levels over periods of time both prior and subsequent to intervening changes to the rating schedule. Thus, the *DeSousa* analysis does not govern the situation of an increased-rating claim. Nothing in *DeSousa* requires VA to rely exclusively upon either the pre-amendment or post-amendment version of the rating schedule, precludes VA from applying different versions of the rating schedule to different periods of time, or requires the Board to "fully adjudicate" a claim under both versions of the law. Further, reference to a more favorable outcome as being something more than a denial of benefits is not pertinent to analysis of a claim for increase. Such a reference would be appropriate to an analysis of the effect of a change in law on a benefit which must be either awarded or denied, not to an analysis concerning the level of benefits to be provided for an ongoing award. Where VA issues an amendment to the rating schedule while an increased-rating claim is pending, and that amendment is more favorable to the claimant than the prior regulation, VA should apply the more favorable regulation to rate the disability for periods from and after the effective date of the change and should apply the prior regulation to rate the disability for earlier periods.

9. Based on the foregoing discussion, we believe that the Board's analysis in an increased-rating claim where VA has issued an amendment to the pertinent rating schedule while the claim was pending should be as follows. First, the Board should determine whether the intervening change is more favorable to the veteran. This may require the Board to apply each version of the regulation to the facts of the case, unless it is clear from the face of both versions of the

regulation that the change is more favorable. Second, if the amendment is more favorable, the Board should apply that provision to rate the disability for periods from and after the effective date of the regulatory change. Third, the Board should apply the prior regulation to rate the veteran's disability for periods preceding the effective date of the regulatory change.

10. The opinion request asks whether, when rating criteria have changed during the pendency of an appeal, the Board must make separate findings of fact and conclusions of law, and state the reasons or bases for each such finding and conclusion, with respect to the application of both the old and new rating criteria. Pursuant to the language of 38 U.S.C. § 7104(d)(1), the answer to that question depends upon whether, in the individual case, such findings and conclusions relate to an issue "material" to the Board's decision. Although the term "material" as used in this statute is not defined by statute or regulation, one of the ordinary definitions of that term is "requiring serious consideration by reason of having a certain or probable bearing on the proper determination of a law case." Webster's Third New Int'l Dictionary 1392 (1981). We believe that this definition, which relates to the meaning of the term in a legal context, properly expresses the meaning of that term as used in section 7104(d)(1). Accordingly, an issue of fact or law generally will be "material" if its resolution will have a probable bearing on the proper determination of the ultimate issue or issues in the case. Based on our above-stated analysis, the Board may be required to apply both versions of a regulation for purposes of determining which version is more favorable, and for purposes of applying each provision to rate the veteran's disability for different periods. Determination of which version of the regulation is more favorable and rating of a disability using the rating criteria applicable for a particular period are issues material to a claim for an increased rating in that they bear on the proper resolution of the rating issue. Accordingly, the Board would be required to comply with 38 U.S.C. § 7104(d)(1) in making those determinations.

11. The opinion request also asks whether the Board should consider all evidence of record in determining whether an increased rating is warranted under the governing version of an amended rating-schedule provision, or should consider only the evidence which pre-dates or post-dates the effective date of the amendment, depending on which version of the regulation governs the particular determination. Pursuant to 38 U.S.C. § 7104(a), the Board's decisions must be based on consideration of "all evidence and material of record" in the

case before it. Accordingly, the Board must consider evidence both pre-dating and post-dating the regulatory change, although the conclusions to be drawn from such evidence may vary with the circumstances of each case. It may be necessary for the Board to make findings concerning the level of disability existing during certain periods of time. For example, in determining whether a claimant was entitled to an increased rating for any period prior to the effective date of an amendment to a rating-schedule provision, under step three of the analysis discussed above, the Board must consider whether the veteran's disability had increased in severity prior to that date. See 38 C.F.R. § 3.400(o)(1) (increased ratings may be awarded from the date of claim or date entitlement arose, whichever is later). In making that determination, however, the Board may not simply ignore evidence post-dating the effective date of the amendment, because it is possible that medical examinations or opinions post-dating the regulatory change may provide evidence that the disability increased prior to the date of the regulatory change. Similarly, evidence pre-dating a regulatory change may bear upon the level of the veteran's disability for periods after the regulatory change, for example, where pre-amendment evidence indicates a steadily deteriorating condition which is found by post-amendment evidence to have resulted in increased disability.

HELD:

a. When a provision of the Department of Veterans Affairs (VA) rating schedule is amended while a claim for an increased rating under that provision is pending, the Board should first determine whether the amended regulation is more favorable to the claimant. It may be necessary for the Board to separately apply the pre-amendment and post-amendment version of the regulation to the facts of the case in order to determine which provision is more favorable, unless it is clear from a facial comparison of both versions that one version is more favorable. If the amended regulation is more favorable to the claimant, then the retroactive reach of the regulation is governed by 38 U.S.C. § 5110(g), which provides that VA may, if warranted by the facts of the claim, award an increased rating based on a change in law retroactive to, but no earlier than, the effective date of the change. Accordingly, the Board should apply the amended regulation to rate the veteran's disability for periods from and after the effective date of the amendment. The Board should apply the prior version of the regulation to rate the veteran's disability for any period preceding the effective date of the amendment.

b. Pursuant to 38 U.S.C. § 7104(d)(1), decisions of the Board

of Veterans' Appeals (Board) must contain separate findings, conclusions, and statements of the reasons or bases therefore, with respect to findings and conclusions on issues "material" to the Board's decision. Determinations of which version of an amended rating-schedule provision is more favorable to a claimant and rating of a disability using the rating criteria applicable for a particular period are issues material to a claim for an increased rating. Accordingly, the Board would be required to comply with 38 U.S.C. § 7104(d)(1) in making those determinations.

c. Pursuant to 38 U.S.C. § 7104(a), the Board's decisions must be based on consideration of all evidence and material of record, rather than merely evidence which pre-dates or post-dates a pertinent change to VA's rating schedule. In determining the extent of disability existing prior to a regulatory change, the Board may not simply ignore documents post-dating the regulatory change, since such documents could provide evidence that an increase in disability occurred at an earlier time. Likewise, in determining the level of disability existing subsequent to a regulatory change, the Board may not simply ignore evidence pre-dating the change, since such evidence may bear upon the level of disability existing subsequently.

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