Department of Veterans Affairs

Memorandum

Date: May 17, 2002

VAOPGCPREC 5-2002

From: General Counsel (022)

Subj: Judicial Review of Regulations Found in Part 4 of title 38, Code of Federal Regulations

To: Chairman, VA Regulations Rewrite Task Force

QUESTION PRESENTED:

Whether all regulations found in Part 4 of title 38, Code of Federal Regulations, are exempt from judicial review under 38 U.S.C. §§ 502 or 7252(c).

DISCUSSION:

1. The VA Regulations Rewrite Task Force has indicated that certain regulations that are currently in Part 3, "Adjudication," title 38, Code of Federal Regulations, would more appropriately be found in Part 4, "Schedule for Rating Disabilities." However, 38 U.S.C. § 502, states: "An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 1155 of the title) is subject to judicial review." Further, 38 U.S.C. § 7252(b), in pertinent part, prohibits the U.S. Court of Appeals for Veterans Claims (CAVC) from "review[ing] the schedule of ratings for disabilities adopted under section 1155 of [title 38] or any action of the Secretary in adopting or revising that schedule." The Task Force is concerned that moving any regulation from Part 3 to Part 4 may be seen as an attempt to insulate that particular regulation from judicial review. The Task Force has therefore requested an opinion on VA's position on the reviewability of regulations found in Part 4.

2. Sections 502 and 7252(b) of title 38, United States Code, were originally enacted as part of Public Law No. 100-687, §§ 102(a), 301(a), 102 Stat. 4105, 4106, 4113, on November 18, 1988. In a report of the Senate Committee on Veterans' Affairs on S. 11, 100th Cong., the Committee explained the meaning of these provisions:

> A court would not be permitted to direct or otherwise order that any part of a disability rating schedule issued or adopted by the [Secretary] be modified. It is the Committee's intention that a court should not substitute its judgment for that of the [Secretary] as to what rating a particular type of disability should be assigned. For example, if a veteran was assigned a service-connected disability rating of 10 percent by the [Board] and in

> court argued that his or her disabling condition (condition A) is as disabling as that of condition B which has a disability rating of 30 percent... the court would be prohibited from changing the veteran's rating from 10 percent to 30 percent because the veteran would, in effect, be asking the court to rewrite the provisions of the rating schedule to classify condition A at the 30-percent rate.

S. Rep. No. 100-418, at 53 (1988). The Committee contrasted this example with one in which the veteran and VA have a factual disagreement about the degree of the veteran's disability and the veteran argues that he or she is entitled to a higher disability rating under the rating schedule as it then exists because the facts demonstrate that his or her disability conforms to the established criteria for a higher rating. The Committee stated that in that instance, the court could modify the decision after a remand to the Board to reconsider its finding and decision. *Id.* The rationale for such a prohibition on judicial review of the schedule of ratings was provided in a September 23, 1988, section-by-section analysis of the proposed legislation: "Some apprehension has been expressed that the VA schedule for rating disabilities issued pursuant to 38 U.S.C. § 355 (now 1155] would be destroyed by piecemeal review of individual rating classifications.... [T]he committee has expressly precluded review of the schedule in the bill." H.R.Rep. No. 100-963, at 28 (1988). It is noted that the provision of S.11 addressing the bar to judicial review of the disability rating schedule was included in the compromise agreement, 134 Cong. Rec. H10349 (1988), and was included in the final statute.

3. The Senate committee report supports the interpretation that "review of the rating schedule" means review of those provisions that prescribe the average impairments of earning capacities divided into ten grades of disability upon which payments of compensation are based. Further, this view is supported by the statute that authorizes the Secretary to adopt the rating schedule. Section 1155, in pertinent part, provides:

> The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Secretary shall from time to time readjust this schedule of ratings in accordance with experience.

38 U.S.C. § 1155.

4. There is some support in case law for the interpretation that the prohibition on judicial review of the rating schedule refers to review of those provisions that prescribe the average impairments of earning capacities divided into ten grades of disability upon which payments of compensation are based. In *Fugere v. Derwinski,* the Secretary had rescinded ¶ 50.13(b) of the VA Adjudication Procedure Manual M21-1. The CAVC held that VA had done so in violation of both the Administrative Procedure Act and the Secretary's own regulations. *Fugere,* 1 Vet.App. 103 (1990). On appeal to the Federal Circuit, the Secretary argued that M21-1, ¶ 50.13(b), was invalid because it created a dual "schedule of ratings" in violation of 38 U.S.C. § 1155. *Fugere,* 972 F.2d 331(1992). The Secretary argued that under 38 U.S.C. § 7252(b) the CAVC did not have jurisdiction to hear Mr. Fugere's appeal. In affirming the CAVC, the Federal Circuit stated that it did not need to consider the question of whether the CAVC's jurisdiction over the case was in violation of § 7252(b) because the CAVC had not reviewed the rule in question or its applicability, "but merely the procedure by which it was repealed." *Id.* at 334. However, in rejecting the Secretary's argument that M21-1, ¶ 51.13, created a dual schedule of ratings, the Federal Circuit explained:

> A schedule, within the meaning of § 1155, is a means by which the Secretary or his designees may determine what rating of reduction in earning capacity a claimant should be assigned based upon the nature and extent of the claimant's injuries. Paragraph 50.13(b) of the VA Adjudication Procedure Manual, on the other hand, does not provide any means of determining a rating based upon the nature and extent of the claimant's injuries. It merely allows a claimant to retain a previously determined rating under certain conditions.

Id. at 335. In our view, the provisions currently in Part 4 of the C. F.R. that do not prescribe the average impairments of earning capacities divided into ten grades of disability, upon which payments of compensation are based, merely provide guidance to the raters in making evaluations. *See generally* 38 C.F.R. §§ 4.7 (Higher of two evaluations), 4.13 (Effect of change of diagnosis), 4.14 (Avoidance of pyramiding), 4.20 (Analogous ratings), 4.26 (Bilateral factor), 4.41 (History of injury), 4.68 (Amputation Rule), 4.113 (Coexisting abdominal conditions). Those regulations are not part of a "schedule of ratings"; they more appropriately fall under the category of "substantive rules of general applicability, statements of general policy and interpretations of general applicability," and are subject to CAVC review. *LeFevre v. DVA,* 66F.3d 1191, 1196 (1995) (determining that VA's published determination that a presumption of service connection is not warranted for a particular disease is a "statement of general policy... subject to judicial review under the Veterans Judicial Review Act." quoting 137 Cong. Rec. S1271 (daily ed. Jan. 30, 1991) (statement of Sen. Daschle)).

5. Also instructive is *DeLuca v. Brown,* 8 Vet.App. 202 (1995). In that case, the Court reviewed two regulations in Part 4 of the C.F.R. that were promulgated under the authority of section 1155 and found that the interpretation of the regulations by VA conflicted with the plain meaning of the regulation and, therefore, was not entitled to deference. In *DeLuca,* the Court reviewed 38 C.F.R. §§ 4.40 (Functional loss) and 4.45 (The joints). The Court held that a specific diagnostic code did not subsume section 4.40 and that section 4.14 (Avoidance of pyramiding) did not prohibit consideration of a higher rating based on a greater limitation of motion due to pain on use. Additionally, the Court held that the Board's reading of section 4.45 could not be sustained. In *DeLuca*, the Secretary did not argue that the Court did not have jurisdiction to review those regulations. Further, the Court did not address the issue of jurisdiction. Because subject matter jurisdiction cannot be waived, the *DeLuca* opinion would indicate that the CAVC has jurisdiction to review regulations that are not provisions that prescribe the average impairments of earning capacities, divided into ten grades of disability upon which payments of compensation are based. See *Palmer v. Barram,* 184 F.3d 1373,1377 (Fed. Cir. 1999) (stating "([I]t is always the duty of the court 'to determine its jurisdiction and to satisfy itself that an appeal is properly before it.'" quoting *Wang Lab., Inc. v. Applied Computer Sciences, Inc.,* 958 R.2d 355, 357 (Fed. Cir. (1992)); *Aronson v. Brown,* 7 Vet. App. 153, 155 (1994) (Court has adopted case or controversy jurisdictional requirements imposed by Article III of the United States Constitution; under Article III, a court has independent duty to examine its jurisdiction).

6. In view of the fact that the specific question of whether a regulation is exempt from judicial review, merely because it is in Part 4, has not been litigated, we understand the Task Force's concern that moving any regulations from Part 3 to Part 4 could be viewed as an attempt to insulate them from review. We also recognize that, notwithstanding this opinion, it may well be impossible to completely avoid such a concern. We do have a suggestion, however, that may, at least, minimize it. In this regard, we suggest that to avoid the appearance of trying to insulate regulations from judicial review, regulations that are moved to Part 4 that do not meet the criteria for "schedule of rating" under section 1155 should be expressly promulgated under the authority of 38 U.S.C. § 501.

HELD:

Placement of a regulation in Part 3 or Part 4 of the C.F.R. is not determinative of its susceptibility to judicial review. Whether a section in Part 4 of the C.F.R. is considered part of the "schedule of ratings" must be assessed on a case-by-case basis. Generally, the prohibition on judicial review, under 38 U.S.C. §§ 502 or

7252(c), of the schedule of ratings or disabilities refers only to the provisions that prescribe the average impairments of earning capacities, divided into ten grades of disability upon which payments of compensation are based, adopted and adjusted under 38 U.S.C. § 1155.

Tim S. McClain