Department of Veterans Affairs

Memorandum

Date: November 19, 2003 VAOPGCPREC 7-2003

From: General Counsel (022)

Subj: Application of Veterans Claims Assistance Act of 2000 to Claims Pending on Date of Enactment

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

QUESTIONS PRESENTED:

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003), have upon the rule set forth by the United States Court of Appeals for Veterans Claims (CAVC) in *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), concerning the applicability of changes in law?

B. Do the standards governing the retroactive application of statutes and regulations differ from those governing the retroactive application of rules announced in judicial decisions?

C. How should the Department of Veterans Affairs (VA) determine whether applying a new statute or regulation to a pending claim would have a prohibited retroactive effect?

D. In determining the applicability of a change in law, is there a difference between claims that were pending before VA when the change occurred and claims that had already been decided by the Board of Veterans' Appeals (Board) and were pending on direct appeal to a court when that change occurred?

E. If certain provisions of the Veterans Claims Assistance Act of 2000 (VCAA) were held to be inapplicable to claims filed before November 9, 2000 (the date the VCAA was enacted) and still pending before VA on that date, would VA have authority, from sources other than the VCAA, to continue applying its regulations implementing the VCAA to claims filed before that date?

F. Does VAOPGCPREC 11-2000 remain viable in light of the holdings in *Kuzma, Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002), and *Bernklau v. Principi*, 291 F.3d 795 (Fed. Cir. 2002)?

2.

Chairman, Board of Veterans' Appeals (01)

COMMENTS:

1. In *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), the CAVC, addressed the effect of changes in a statute or regulation occurring while a case was pending before VA or a court when such changes occurred. The 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 [of the statute or regulation] most favorable to [the] appellant should and we so hold will apply unless Congress provided otherwise or permitted the Secretary of Veterans Affairs . . . to do otherwise and the Secretary did so.

Id. at 313. To arrive at that rule, the CAVC examined four Supreme Court cases involving two seemingly conflicting rules regarding the retroactivity of statutes and regulations. In two of those cases, the Supreme Court relied on the principle that a court generally must apply the law existing at the time it renders its decision, even if the events in the case occurred before such law took effect. *See Bradley v. School Bd.*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). In the other two cases, the Court relied on the principle that intervening statutory and regulatory changes generally do not apply retroactively. *See Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204 (1988); *Bennett v. New Jersey*, 470 U.S. 632 (1985). From the facts of these four cases, the CAVC inferred a rule -- not stated by the Supreme Court -- that when a statute or regulation changes while a case involving the Government and a private party is pending, a court must apply whichever version of the law is more favorable to the private-party litigant. *Karnas*, 1 Vet. App. at 312-13. The CAVC stated that the rule "would never result in 'manifest injustice' to the United States Government because Congress controls or may permit the Secretary to control which law is to be applied." *Id.* at 313.

2. After *Karnas*, however, the Supreme Court itself explained and reconciled its precedents concerning this issue. In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court confirmed the principle stated in *Bowen* that statutes generally may not be construed to have retroactive effect unless their language requires that result. The Court explained the inquiry for determining the applicability of a change in law:

> 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.

Id. at 280. The Court stated that *Bradley* and *Thorpe* were consistent with the presumption against retroactivity and indicated that changes in law were applied in those cases because the new laws would not produce genuinely retroactive effects. *Id.* at 276-77. The Court further noted that, although the majority of its decisions relying on the presumption against retroactive application have involved intervening statutes burdening private parties, the Court had also applied the presumption in cases involving new monetary obligations that fell only on the Government. *Id.* at 271 n.25.

3. On November 9, 2000, the President approved the VCAA, Pub. L. No. 106-475, 114 Stat. 2096. Section 3(a) of the VCAA revised 38 U.S.C. § 5103 and added 38 U.S.C. § 5103A to clarify and enhance VA's duty to assist claimants in claim development. Section 4 of the VCAA revised 38 U.S.C. § 5107(a) by removing the requirement that claimants submit a well-grounded claim in order to trigger VA's duty to assist. Section 7(a) of the VCAA stated that the revised provisions of 38 U.S.C. § 5107 would apply to claims that were filed before the date on which the VCAA was enacted and were not yet final as of that date. Although the VCAA did not specify whether any of its other provisions would apply to claims pending on the date of enactment, we concluded in VAOPGCPREC 11-2000 that "all of the act's provisions apply to claims filed on or after November 9, 2000, as well as to claims filed before then but not finally decided as of that date." In reaching that conclusion, we explained that applying the provisions of the VCAA to such pending claims would not have a "genuinely retroactive effect" under the *Landgraf* analysis and would also be consistent with *Karnas*. In August 2001, VA issued regulations, now codified in pertinent part at 38 C.F.R. § 3.159, explaining its duties under the VCAA. 66 Fed. Reg. 45,620 (2001). VA stated that it would apply the regulations "to any claim for benefits received by VA on or after November 9, 2000, the VCAA's enactment date, as well as to any claim filed before that date but not decided by VA as of that date." 66 Fed. Reg. at 45,629.

4. In *Holliday v. Principi*, 14 Vet. App. 280, 286 (2001) (en banc), the CAVC relied on *Karnas* to conclude that "all provisions of the VCAA are potentially applicable to claims pending on the date of the VCAA's enactment." In *Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002), however, the Federal Circuit relied on *Landgraf* to conclude that the amendments made by section 3(a) of the VCAA do

not apply retroactively. The Court did not explain what would constitute a prohibited "retroactive" application of the VCAA, but declined to apply the VCAA to the case before it, in which the Board's decision predated the enactment of the VCAA and the claimant's appeal was pending before the Federal Circuit on November 9, 2000. In *Bernklau v. Principi*, 291 F.3d 795 (Fed. Cir. 2002), the Federal Circuit followed *Dyment*, but made clear that it did not invalidate VA's regulations applying the VCAA to claims that were pending before VA on November 9, 2000. The Court stated:

> We need not decide whether applying section 3(a) [of the VCAA] to proceedings already commenced at the time of enactment of the VCAA and still pending before the agency's Regional Office or the Board of Veterans' Appeals would constitute retroactive application of the statute. We have here a proceeding which was complete before the agency, but which was on appeal at the time the VCAA was enacted. Under these circumstances, we hold that the case should not be remanded to the Court of Appeals for Veterans Claims (or, in turn, the Board of Veterans' Appeals) for further proceedings under section 3(a) of the VCAA.

Bernklau, 291 F.3d at 806 (footnote omitted).

5. In *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003), the Federal Circuit expressly overruled the CAVC's precedents in *Holliday* and *Karnas*. In *Kuzma*, the CAVC had issued its decision on November 7, 2000, affirming a decision of the Board. The court recalled its judgment following enactment of the VCAA, and the appellant filed a motion for remand for action in compliance with section 3(a) of the VCAA. The CAVC denied the motion, relying on *Dyment* and *Bernklau*. The claimant appealed to the Federal Circuit, where he argued that neither the Federal Circuit nor the CAVC had overruled *Karnas* and that *Karnas* required that the VCAA be applied to his claim. In rejecting that assertion, the Federal Circuit stated its agreement with the Government's claim that *Dyment* and *Bernklau* implicitly overruled *Karnas*. *Kuzma*, 341 F.3d at 1328-29. The court explained that "[w]e are obligated to apply both Supreme Court precedent and our own to resolve the issues before us" (citation omitted) and that "[t]he [CAVC], in turn, is bound by our rulings." *Id.* at 1329. The court stated that "[a]pplying *Karnas* to section 3(a) of the VCAA, which makes no mention of retroactivity, would impermissibly require its retroactive application." *Id.* The court stated that, "[t]oday we remove all doubt and overrule both *Karnas* and *Holliday* to the extent they conflict with the Supreme Court's and our binding authority." *Id.*

Effect of Overruling *Karnas*

6. The first question presented concerns the impact of *Kuzma* on the rule stated in *Karnas* that, when a statute or regulation changes while a claim is pending, VA must apply whichever version of the statute or regulation is most favorable to the claimant. We conclude that the *Karnas* rule no longer applies in determining whether a statute or regulation applies to cases pending when the new provision was enacted or issued. The Federal Circuit overruled *Karnas* "to the extent [it] conflict[s] with the Supreme Court's and our own binding authority." As explained below, the precedents of the Supreme Court and the Federal Circuit establish a comprehensive framework for determining whether a new statute or regulation applies to a pending claim, and the *Karnas* rule is incompatible with that framework. Additionally, the precedents of the Supreme Court and the Federal Circuit issued subsequent to *Karnas* effectively undermine the bases upon which the CAVC created the *Karnas* rule.

7. *Landgraf* and *Karnas* both provide that, if Congress has clearly indicated the temporal reach of a new statute, the congressional intent will govern. If Congress has conveyed no clear intent, however, *Landgraf* provides that the applicability of the new statute depends upon whether applying the statute to a particular claim would have a genuinely retroactive effect. If the new statute would produce a genuinely retroactive effect, then it may not be applied. On the other hand, if applying a new statute would not produce a retroactive effect, agencies and courts ordinarily must apply the new provision. *See United States Olympic Committee v. Toy Truck Lines, Inc.*, 237 F.3d 1331, 1334 (Fed. Cir. 2001) (stating that a tribunal must apply the law existing at the time of the decision, subject to exceptions as specified in *Landgraf*). Although the discussion in *Landgraf* refers primarily to statutes, the presumption of non-retroactivity applies equally to regulations. *See Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998). In *Bradley*, 416 U.S. at 711, the Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." In *Landgraf*, the Court stated that *Bradley* is "compatible with the line of decisions disfavoring 'retroactive' application of statutes." 511 U.S. at 276. The Court stated that "application of new statutes passed after the events in suit is unquestionably proper in many situations," and discussed circumstances where applying a statute enacted after the events in the case occurred would not produce retroactive effects. *Id.* at 273-75.

8. Under the Supreme Court's precedents, if applying a new statute or regulation to a pending claim would have a genuinely retroactive effect, it may not be applied, but if there would be no such retroactive effect, the new statute or regulation must ordinarily be applied. The *Karnas* rule is incompatible with those precedents because it would require VA to ignore the determinative issue of whether applying a revised statute or regulation would produce a genuinely

retroactive effect. The *Karnas* rule would improperly require VA to apply statutes and regulations retroactively if doing so were beneficial to a claimant and would improperly prohibit VA from applying certain statutes and regulations that may be unfavorable to claimants even though such laws would govern under Supreme Court precedent because they do not have retroactive effects. Although the results of the *Landgraf* and *Karnas* analyses may often coincide, the decisional rule stated in *Karnas* conflicts with the rule stated in *Landgraf.*

9. The Supreme Court's analysis in *Landgraf* undermines the reasoning that led the CAVC to adopt the *Karnas* rule. The CAVC concluded that the Supreme Court's precedents in *Bowen, Bradley, Thorpe,* and *Bennett* implicitly mandated the *Karnas* rule and implied that retroactive burdens on the Government were essentially irrelevant in determining which law applies. With respect to the first of those premises, *Landgraf* expressly concluded that *Bowen*, *Bradley*, and *Thorpe* are consistent with the general presumption against retroactive application of statutes and regulations. *See Landgraf*, 511 U.S. at 264, 276-77. In an opinion issued the same day as *Landgraf*, the Supreme Court concluded that *Bennett* was also compatible with the *Landgraf* rule. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 317 (1994). The Court's analysis makes clear that those four decisions do not support the unique rule of retroactivity announced in *Karnas*, which would permit, and even require, retroactive application of statutes and regulations. With respect to the second premise underlying *Karnas*, the Supreme Court in *Landgraf* explained that it had applied the presumption against retroactivity "in cases involving new monetary obligations that fell only on the government." *Landgraf*, 511 U.S. at 271, n.25. Subsequent to *Landgraf*, the Federal Circuit has declined to apply new statutes that would impose retroactive burdens solely on the Government and would benefit private parties bringing claims against the Government. *See Fernandez v. Department of the Army,* 234 F.3d 553, 557 (Fed. Cir. 2000); *Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed. Cir. 1996); *Avila v. Office of Personnel Management*, 79 F.3d 128, 131 (Fed. Cir. 1996). In *Avila*, the court explained that the presumption against retroactivity "applies not only to statutes regulating the rights and duties of private parties, but also to statutes 'involving new monetary obligations that [fall] only on the government.'" 79 F.3d at 131 (quoting *Landgraf*, 511 U.S. at 271, n.25).

10. We have previously suggested that the rationale of the *Karnas* rule is inconsistent with the subsequent precedents of the Supreme Court and the Federal Circuit. *See* VAOPGCPREC 1-98; VAOPGCPREC 10-97. In view of *Kuzma*, we now clarify the extent to which the *Karnas* rule conflicts with Supreme Court and Federal Circuit precedent. *Karnas* is consistent with Supreme Court and Federal Circuit precedent insofar as it recognizes that congressional intent governs a statute's application when such intent is clearly expressed and that VA's intent will govern a regulation's application when such intent is clearly and

validly expressed. We conclude, however, that the *Karnas* rule conflicts with Supreme Court and Federal Circuit precedent insofar as it requires VA to apply the version of a statute or regulation most favorable to a claimant when a statutory or regulatory change is silent as to its application. Accordingly, we conclude that the *Karnas* rule no longer applies in determining whether a new statute or regulation applies to a pending claim in the absence of a clearly expressed congressional or agency intent.

11. We believe it is clear that, although the issue decided in *Kuzma* involved the retroactivity of the amendments made by section 3(a) of the VCAA, the effect of overruling *Karnas* is not limited to matters involving the VCAA. The precedential effect of a judicial decision extends not only to the specific holding in that decision, but also to the court's explication of the governing rules of law. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("it is not only the result but also those portions of the opinion necessary to that result by which we are bound"). The Federal Circuit's holding in *Kuzma* necessarily rests on a conclusion that there is inconsistency between the general rules of retroactivity set forth in *Karnas* and *Landgraf* -- neither of which applies solely to the VCAA -- and that *Landgraf* provides the correct rule. The Federal Circuit's analysis therefore clearly would apply in determining the application of the *Karnas* and *Landgraf* rules to statutes other than the VCAA, and VA must give effect to the court's explanation of the prevailing law as to all such determinations. Moreover, VA's obligation to comply with *Landgraf* exists independent of the *Kuzma* opinion, because *Landgraf* is an authoritative statement of law from the highest Federal court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803). By expressly overruling *Karnas*, *Kuzma* merely confirms the governing effect of *Landgraf* and makes clear that VA need not comply with the CAVC's conflicting rule in *Karnas*. *Cf. Tobler v. Derwinski*, 2 Vet. App. 8, 14 (1991) (VA must comply with CAVC decisions "unless or until overturned" by the CAVC en banc, the Federal Circuit, or the Supreme Court).

Retroactivity of Judicial Decisions

12. In response to the second question presented, we conclude that different rules govern the retroactivity of statutes and regulations, on one hand, and judicial decisions, on the other. *See Brewer v. West*, 11 Vet. App. 228, 233 (1998) (noting the distinction). With respect to judicial decisions, the Supreme Court has explained that, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); *see also Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554 (Fed. Cir. 1993); VAOPGCPREC 9-94 (CAVC decisions to be given

effect in claims still open on direct review). In contrast, as explained above, the Supreme Court's decisions in *Landgraf* and *Bowen* provide that statutes and regulations generally do not operate retroactively unless their language requires that result. Accordingly, the general rule is that "statutes operate only prospectively, while judicial decisions operate retrospectively." *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

13. The opinion request notes that the Supreme Court's post-*Landgraf* decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), contains the seemingly broad statement that "[i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" *Id.* at 227 (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)). Viewed in its proper context, this statement does not conflict with the principles stated in *Landgraf*. In *Plaut*, the Supreme Court addressed the validity of a statute that Congress had expressly made retroactive to claims pending on the date of enactment and to certain claims that had been finally adjudicated prior to the date of enactment. The broad statement quoted above was prefaced by the statement that, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Id.* at 226 (emphasis added). The Court's discussion was thus limited to circumstances where Congress has expressly provided for the statute's retroactivity and is consistent with the principle stated in *Landgraf* that a statute may apply retroactively when Congress has so provided.

Identifying Retroactive Effects

14. The third question concerns the criteria for determining whether a statute or regulation would have a genuinely retroactive effect if applied to a particular claim. In *Landgraf*, the Supreme Court stated that a statute generally would have a retroactive effect if 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." *Landgraf,* 511 U.S. at 280. The Court noted that "deciding whether a statute operates 'retroactively' is not always a simple or mechanical task," *id.* at 268, and explained:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at

> the end of a process of judgment concerning the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event.

Id. at 269-70. The Court noted that there was no single test for identifying retroactive effects, but that "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* at 270.

15. *Landgraf* discussed a number of circumstances where application of a new statute or regulation usually would not have retroactive effect. The Court stated that, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Id.* at 273. The Court also noted that intervening statutes conferring or ousting jurisdiction ordinarily may be applied to pending claims "because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 274 (quoting *Republic Nat. Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). The Court further stated that, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275. The Court explained that, "[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Id.* The Court attached a caveat to that analysis, however, by stating:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

Id. at 275 n.29. In view of the Court's admonition that determinations regarding retroactivity cannot be reduced to a simple test, but require the exercise of judgment based on a number of factors, the examples discussed in *Landgraf's* should not be considered conclusive or exhaustive.

16. In determining whether a particular statute or regulation may be applied to a pending case, VA must first determine whether the statute or regulation itself addresses that issue. If it does not, VA must determine whether applying the statute or regulation to the pending case would have a genuinely retroactive effect, taking into account such factors as whether the provision is substantive or

procedural, whether it would impose new duties with respect to transactions already completed or would only affect prospective relief, whether it would attach new legal consequences to events completed before its enactment or extinguish rights that previously accrued, and whether application of the new provision would be consistent with notions of fair notice and reasonable reliance. In making this determination, VA should consider the potential effects on the Government as well as on claimants and should consider the procedural posture of the pending claim to the extent it bears upon the factors discussed above.

17. As a general matter, most statutes or regulations liberalizing the criteria for entitlement to compensation, pension, or dependency and indemnity compensation may be applied to pending claims because their effect would be limited to matters of prospective benefits. Section 5110(g) of title 38, United States Code, provides that the effective date of benefits awarded pursuant to a liberalizing statute or regulation may be no earlier than the effective date of the statute or regulation. Because statutes or regulations liberalizing the bases for benefit entitlement must be construed to authorize only prospective benefits, they are within the general class of laws that may be applied to pending claims under *Landgraf*. In contrast, statutes or regulations that restrict the bases for entitlement to a benefit might have disfavored retroactive effects as applied to some claims that were pending when they took effect. For example, if a veteran was entitled to benefits based on the law existing when he or she filed an application with VA, and a restrictive change in the governing law occurs before VA adjudicates the claim, application of the new restriction might retroactively extinguish the claimant's previously existing right to benefits for periods before the new law took effect. In those circumstances, *Landgraf* indicates that the intervening restriction would not apply in determining the claimant's rights for such periods. In the absence of contrary congressional direction, however, the restriction may apply in determining the claimant's entitlement to benefits for periods after the restriction took effect. We note that, when Congress enacts legislation restricting the right to benefits, it often prescribes the temporal reach of the new law, thus obviating the need for VA to make determinations concerning retroactive effects. With respect to intervening statutes and regulations that govern procedural matters rather than the criteria for entitlement to benefits, the applicability of the intervening provisions may turn largely upon the procedural posture of the claim when the new provision took effect, as discussed below.

Effect of Procedural Posture of Pending Claims

18. The fourth question asks whether there is a difference, for purposes of retroactivity, between claims that were pending before VA when a change in law occurred and claims that had been finally decided by VA before the change occurred but were pending before a court on direct appeal when the change

occurred. *Landgraf* does not establish a categorical distinction between claims pending before an agency or trial court on the date of a statute's enactment and claims pending before an appellate court on that date, but makes clear that such a distinction may exist in some circumstances. *Landgraf* states that the applicability of a new procedural rule to a pending case "ordinarily depends on the procedural posture of the case." *Landgraf*, 511 U.S. at 275 n.29. The Court indicated that issuance of a new evidentiary rule would not require remand of cases pending on appeal. *Id.* at 275 n.29. *Landgraf* indicates that at least some statutory changes, such as those affecting trial-level procedures, may apply to cases that were pending before the trier of fact on the date of enactment, but would not require remand of cases that were pending before an appellate court on review of a final decision. *See also Shipes v. Trinity Industries*, 31 F.3d 347, 349 (5th Cir. 1994) (change in procedural rules while case was on appeal would not apply retroactively to require reversal of trial court ruling); *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929, 937 (7th Cir. 1992) (where a statute changed trial-level procedural rules, it would not be applied retroactively to cases pending on appeal, because retroactive application would involve the significant burden and expense of a remand and a new trial).

19. *Landgraf* indicates that a statute may produce a prohibited retroactive effect if it "impose[s] new duties with respect to transactions already completed" or "attaches new legal consequences to events completed before its enactment." 511 U.S. at 270, 280. We believe the Court's discussion concerning the procedural posture of pending claims reflects the logical conclusion that vacating a trial court or agency decision that was rendered before a new procedural rule took effect and remanding for compliance with the new rule may improperly impose new duties with respect to transactions already completed. Although a new rule governing trial-level or agency-level procedures often would not produce retroactive effects as applied to claims pending before the trial court or agency when the new rule was enacted, applying the new rule to cases that had previously been decided by the trial court or agency and were on appeal to a higher court when the new law took effect often would produce disfavored retroactive effects by requiring remand to repeat already completed proceedings using the revised procedures.

20. The distinction between cases pending before an agency and cases pending before an appellate court may present a logical boundary for identifying retroactive effects with respect to some types of procedural provisions. We cannot, however, conclude as a general matter that this would be the only relevant point of demarcation for the purposes of all procedural statutes and regulations. It is possible that statutes governing procedures in one judicial forum, such as the CAVC may be applied to cases pending before that court on the date of their enactment, but would not require remand of cases pending on appeal to the Federal Circuit on that date. It is also possible that a statute or

regulation governing initial claim-processing procedures may be applied to cases pending before a regional office on the date of enactment or issuance without raising retroactivity concerns, but may be inapplicable to cases pending before the Board on such date. For example, if Congress enacted a law requiring all regional office decisions to be rendered by a panel of three rating officers, applying that law to pending cases that had not yet been decided by the regional office would not impair any preexisting rights or impose new duties with respect to completed transactions. In contrast, applying the law to cases that had been decided by the regional office and were pending before the Board when the new law took effect arguably would impose new duties with respect to completed transactions because application of the law would invalidate the regional office decisions previously made and would require remand for readjudication. Similarly, construing a general procedural statute such as the VCAA to require wholesale remand of all cases that had been previously developed and decided by a regional office and were pending before the Board when the law was enacted arguably would have significant retroactive effect. Accordingly, as a general matter, we believe that provisions affecting procedures in many cases would not produce retroactive effects as applied to claims that were pending at a procedural stage to which the new provision applies, but may produce disfavored retroactive effects if applied to pending claims in which the stage of proceedings to which the new provision applies has already been completed.

21. Even with respect to procedural statutes, the procedural posture of the claim may not be the sole determinative factor. Retroactivity analysis may turn upon case-specific matters concerning fairness to the parties, and distinctions may exist between cases in the same procedural posture. Rather than simply drawing a bright line to include cases in one procedural posture and to exclude those in a different posture, it may be more appropriate in some circumstances to seek to balance, on a case-by-case basis, the potential for significant burdensome effects and the objectives Congress sought to further with the new statute. For example, if the notice requirement of 38 U.S.C. § 5103(a), as amended by section 3(a) of the VCAA, were applied to require remand of all cases that were pending before the Board when the law was enacted, that result could certainly be viewed as having a significant retroactive effect. This effect would be most significant in cases where VA had previously provided notice that was substantially similar to the notice required by the VCAA, or where it is clear that additional notice and assistance would not avail the claimant. In such cases, the remand merely for literal compliance with the VCAA notice requirements would vitiate previously completed regional office proceedings with no significant likelihood of advancing the claim. In other circumstances, such as where there is some question regarding the possible existence of additional evidence, the effect of a remand by the Board may be less significant, particularly in view of the Board's broad authority to remand cases for additional development. *See*

38 C.F.R. § 19.9. Thus, avoidance of impermissible retroactive effects in implementation of a new procedural rule may require drawing distinctions between cases in the same procedural posture.

22. In the context of the VCAA, the Federal Circuit's precedents and VA's regulations have, in effect, established a distinction between claims that were pending before VA and claims that were pending before a court. VA has provided that most of its regulations implementing the VCAA will apply to all claims that were pending before VA on November 9, 2000, *see* 66 Fed. Reg. at 45,629, and the Federal Circuit's decisions in *Dyment* and *Bernklau* hold that section 3(a) of the VCAA does not apply to claims that were complete before VA and were on appeal to the CAVC or the Federal Circuit on that date. We believe the Federal Circuit's decisions are clearly consistent with *Landgraf*. The VCAA revised the procedures applicable to evidentiary development in claims before VA. Applying those agency-level procedural requirements to cases pending on appeal before the CAVC or the Federal Circuit would ordinarily require those courts to vacate the Board decision and remand the matter to VA because the new provisions could be carried out only in the context of an additional administrative proceeding before VA. As discussed above, if such a proceeding were required, this would entail imposition of new duties regarding transactions already completed and would thus involve a disfavored retroactive effect. It is equally clear that applying the VCAA's procedural requirements to claims that were pending before a regional office on November 9, 2000, ordinarily would not have a disfavored retroactive effect, because those procedures would not to a significant degree require repetition of transactions previously completed. It is less clear, however, whether the VCAA would produce disfavored retroactive effects as applied to claims that had been decided by a regional office before November 9, 2000, and were pending on appeal to the Board on that date. As stated above, if the VCAA were applied in a way that required the Board to remand all claims pending before it on November 9, 2000, such application could certainly be viewed as producing disfavored retroactive effects in at least some circumstances. However, we find it unnecessary to decide whether, or under what circumstances, such remands by the Board would produce disfavored retroactive effects. As explained below, VA has expressly provided that its VCAA regulations will apply to all claims that were pending before VA on November 9, 2000, and we believe VA had authority to provide that the VCAA requirements will apply to claims pending before the Board, even if doing so would impose some retroactive burden upon VA.

VA's Authority to Issue Retroactive Regulations

23. The fifth question asks whether, if the VCAA were construed as not authorizing retroactive application of its provisions,[1] VA would nevertheless have authority, from sources other than the VCAA, to apply its VCAA regulations to claims that were filed before November 9, 2000, and were still pending before VA as of that date. We conclude that, even if application of the amendments made by section 3(a) of the VCAA to claims that were pending before VA on November 9, 2000, were construed to impose retroactive effects on VA, VA would have the authority to apply its VCAA implementing regulations to such claims.

24. The Supreme Court has stated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S at 208. In VAOPGCADV 28-90, which was incorporated in its entirety into VAOPGCPREC 69-91, we concluded that *Bowen* did not foreclose all agency authority to issue retroactive regulations in the absence of an express statutory grant of such authority. We noted that the Supreme Court qualified its statement with the phrase "as a general matter," thus suggesting that agencies may have authority to issue retroactive regulations in some circumstances. We stated that the concern underlying the general rule in *Bowen* was the harshness or burden that could be imposed on those who had acted in reliance on rules (or the absence of rules) that were later changed. We therefore concluded that, where a new rule would benefit rather than burden affected persons, *Bowen* would not preclude VA from making the rule effective retroactively. In a similar manner, the United States Court of Appeals for the Fifth Circuit has stated that "the traditional justification for judicial reluctance to apply regulations retroactively -- interference with settled expectations and antecedent rights -- [is] diminished when the change is beneficial to the claimant." *Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034, 1042 (5th Cir. 1997). The court held that the rule in that case, although beneficial to the claimant, would not be applied retroactively because the agency had not expressly made it retroactive. The court's reasoning, however, is consistent with the conclusion in VAOPGCADV 28-90 that an agency may provide for the retroactive application of a rule that benefits claimants. Accordingly, we conclude that VA has authority to provide for the retroactive application of its procedural regulations to the extent doing so will benefit rather than burden claimants.

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[1] While noting in Bernklau, 291 F.3d at 806 n.9, that VA's regulations implementing the VCAA were made applicable to claims pending before VA on November 9, 2000, the Federal Circuit declined to address whether applying the section 3(a) amendments to claims already pending on the date of their enactment would constitute retroactive application of the statute, *id*. at 806.

25. VA's authority to issue retroactive regulations is necessarily subject to the limitation in 38 U.S.C. § 501 that any such rules must be consistent with the statutes governing entitlement to veterans benefits. We conclude that applying the VCAA implementing regulations codified at 38 C.F.R. § 3.159 to claims that were pending before VA on November 9, 2000, would not be inconsistent with the statutes governing veterans benefits. The VCAA itself expressed an intent not to preclude VA from providing assistance to claimants beyond what that statute expressly required. Section 5103A(g) of title 38, United States Code, as enacted by the VCAA, states that "[n]othing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) [(directing the Secretary to make reasonable efforts to assist in obtaining evidence)] to a claimant in substantiating a claim as the Secretary considers appropriate." Additionally, the legislative history of the VCAA reflects an intent to codify and clarify VA practices that predated the VCAA. VA regulations historically have stated in general terms that "it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim." 38 C.F.R. § 3.103(a). The actions required by 38 C.F.R. § 3.159 as revised to reflect the enactment of the VCAA -- i.e., notifying claimants of the evidence necessary to substantiate their claims, seeking to obtain relevant evidence, and providing medical examinations and obtaining medical opinions -- are all consistent with that general duty. In its report on the bill enacted as the VCAA, the House Committee on Veterans' Affairs noted VA's traditional practice of providing notice and assistance to claimants and indicated its intent to codify and clarify VA's responsibilities with respect to those matters. H.R. Rep. No. 106-781, at 5, 9-10 (2000). Although the VCAA established more specific requirements than existed under prior law governing provision of notice and assistance to claimants, those requirements are not inconsistent with, nor do they restrict, VA's traditional practice of providing assistance to claimants as it existed prior to the VCAA.

26. In issuing the VCAA regulations, VA provided that most of the provisions of 38 C.F.R. § 3.159 as amended would be applied to all claims that had not yet been decided by VA as of November 9, 2000.[2] 66 Fed. Reg. at 45,629. The provisions of section 3(a) of the VCAA, as implemented by section 3.159, are more favorable to claimants than the preexisting law, because they require VA to notify claimants of the evidence necessary to substantiate their claim and they strengthen and expand VA's duty to assist claimants in obtaining such evidence.

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[2] Although VA's regulations implementing the VCAA also revised the definition of "new and material evidence" in 38 C.F.R. § 3.156 and established procedures in 38 C.F.R. § 3.159 for provision of assistance in claims to reopen, VA specified that those changes would be applied only prospectively to claims filed on or after August 29, 2001, the date the rule was revised. 66 Fed. Reg. at 45,629.

Because VA's regulations implementing those requirements would be beneficial to claimants, and because VA has expressly provided for their retroactive application, we conclude that VA may apply those regulations to claims that were pending before VA on November 9, 2000, even if section 3(a) of the VCAA were itself construed not to apply retroactively.

Validity of VAOPGCPREC 11-2000

27. The sixth question asks whether VAOPGCPREC 11-2000 remains viable in light of the Federal Circuit's decisions in *Kuzma*, *Dyment,* and *Bernklau*. We believe that those decisions, as well as the discussion in this opinion regarding distinctions among claims in different procedural postures, call into question certain aspects of our analysis in VAOPGCPREC 11-2000. Further, we believe that the issuance of VA's regulations implementing the VCAA and the issuance of this opinion obviate any further need to rely upon VAOPGCPREC 11-2000. Accordingly, we will withdraw that opinion.

28. In VAOPGCPREC 11-2000, we concluded that all of the VCAA's provisions apply to claims that were filed before November 9, 2000, but had not been finally decided as of that date. In discussing the *Landgraf* presumption against retroactivity, we noted that applying the VCAA to pending claims would impose additional duties on VA with respect to claims already denied, but reasoned that, "because the new duties that would be imposed on VA do not entail new monetary obligations, the new duties do not constitute a genuinely retroactive effect disfavored by the law." By applying the presumption against retroactivity to the VCAA, however, the Federal Circuit's decisions in *Kuzma*, *Dyment,* and *Bernklau* suggest that statutes imposing burdens on the Government other than a direct monetary obligation can, in some circumstances, produce a disfavored retroactive effect if applied to pending claims. Those decisions thus cast doubt upon the rationale for our holding in VAOPGCPREC 11-2000.

29. In VAOPGCPREC 11-2000, we did not address the possible distinction among claims pending in different procedural postures before VA on November 9, 2000. On further consideration, we believe there is a significant question as to whether applying the VCAA to a claim that was pending on appeal to the Board on November 9, 2000, would have a genuinely retroactive effect insofar as it would effectively vitiate a previously issued regional office decision and require a remand by the Board. Although we believe the intervening issuance of the VCAA implementing regulations obviates the need to resolve that issue, the failure to address that issue in VAOPGCPREC 11-2000 casts further doubt on our analysis and holding in that opinion.

30. We have concluded that VA's August 2001 final-rule notice amending

38 C.F.R. § 3.159 expressly and validly provided that VA's regulations implementing the VCAA will apply to all claims that were pending before VA as of November 9, 2000. In light of that conclusion, we believe it is unnecessary to retain VAOPGCPREC 11-2000 or to revisit the issue decided by that opinion as to whether the VCAA would, in the absence of VA's regulations, apply retroactively to all claims that were pending in any posture before VA on November 9, 2000. Accordingly, VAOPGCPREC 11-2000 is hereby withdrawn.

HELD:

A. In *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit overruled *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), to the extent it conflicts with the precedents of the Supreme Court and the Federal Circuit. *Karnas* is inconsistent with Supreme Court and Federal Circuit precedent insofar as *Karnas* provides that, when a statute or regulation changes while a claim is pending before the Department of Veterans Affairs (VA) or a court, whichever version of the statute or regulation is most favorable to the claimant will govern unless the statute or regulation clearly specifies otherwise. Accordingly, that rule adopted in *Karnas* no longer applies in determining whether a new statute or regulation applies to a pending claim. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is enacted or a new regulation is issued while a claim is pending before VA, VA must first determine whether the statute or regulation identifies the types of claims to which it applies. If the statute or regulation is silent, VA must determine whether applying the new provision to claims that were pending when it took effect would produce genuinely retroactive effects. If applying the new provision would produce such retroactive effects, VA ordinarily should not apply the new provision to the claim. If applying the new provision would not produce retroactive effects, VA ordinarily must apply the new provision.

B. Different standards govern the retroactive application of statutes and regulations and the retroactive application of rules announced in judicial decisions. As a general matter, rules announced in judicial decisions apply retroactively to all cases still open on direct review when the new rule is announced. Statutes and regulations, in contrast, are presumed not to apply in any manner that would produce genuinely retroactive effects, unless the statute or regulation itself provides for such retroactivity.

C. There is no simple test for determining whether applying a new statute or regulation to a particular claim would produce retroactive effects. Generally, a statute or regulation would have a disfavored retroactive effect if it attaches new legal consequences to events completed before its enactment or extinguishes rights that previously accrued. Provisions affecting only entitlement to prospective benefits ordinarily do not produce any retroactive effects when

applied to claims that were pending when the new provision took effect. Changes in procedural rules often may be applied to pending cases without raising concerns about retroactivity, but may have a prohibited retroactive effect if applied to cases in which the procedural events governed by the new rule had previously been completed, such as cases pending on appeal to a court when a new rule of agency procedure is issued. In considering whether a new statute or regulation would produce retroactive effects, VA should consider whether the provision is substantive or procedural, whether it would impose new duties with respect to completed transactions or would only affect prospective relief, whether it would attach new legal consequences to events completed before its enactment or extinguish rights that previously accrued, and whether application of the new provision would be consistent with notions of fair notice and reasonable reliance. VA should consider the effects on the Government as well as the claimant and should consider the procedural posture of the pending claim in relation to the foregoing factors. Most statutes and regulations liberalizing the criteria for entitlement to a benefit may be applied to pending claims because they would affect only prospective relief. Statutes or regulations restricting the right to a benefit may have disfavored retroactive effects to the extent their application to a pending claim would extinguish the claimant's right to benefits for periods before the statute or regulation took effect.

D. In determining whether application of a new statute or regulation would produce retroactive effects, there may be a difference in some circumstances between cases that were pending in different procedural postures on the date the new provision took effect. New provisions affecting procedural matters in many cases would not produce retroactive effects as applied to claims that were pending at a procedural stage to which the new provision applies, but may produce disfavored retroactive effects if applied to pending claims in which the stage of proceedings to which the new provision applies has already been completed. However, the procedural posture of the claim is not the sole determinative factor in all cases. Even among cases in the same procedural posture, distinctions may be drawn based on the circumstances of the particular case and considerations of fairness to the specific parties.

E. Even if applying the amendments made by section 3(a) of the VCAA to claims that were pending before VA on November 9, 2000, were construed to have retroactive effects on VA, VA would have the authority to apply 38 C.F.R. § 3.159, the regulation implementing these amendments, to such claims. VA has the authority to provide for the retroactive application of its procedural regulations where such regulations are beneficial to claimants and not inconsistent with the governing statutes and VA has expressly provided for their retroactive application. The provisions of section 3.159 are beneficial to claimants and not inconsistent with the VCAA or any other statute, and VA has expressly provided that they will apply to claims that were pending before VA on November 9, 2000.

19.

Chairman, Board of Veterans' Appeals (01)

Consequently, VA has authority to apply its regulations implementing the VCAA to claims filed before the date of enactment of the VCAA and still pending before VA as of that date.

F. In VAOPGCPREC 11-2000, we concluded that all of the VCAA's provisions apply to claims that were filed before November 9, 2000, but had not been finally decided as of the date. Because VA's August 2001 final-rule notice amending 38 C.F.R. § 3.159 expressly and validly provided that VA's regulations implementing the VCAA will apply to all claims that were pending before VA as of November 9, 2000, any further reliance on VAOPGCPREC 11-2000 is unnecessary. We hereby withdraw VAOPGCPREC 11-2000.

Tim S. McClain