Department of Veterans Affairs

Memorandum

Date: March 9, 2004 VAOPGCPREC 2-2004

From: General Counsel (022)

Subj: Applicability of 38 U.S.C. § 5103(a) to a Claim for Separate Ratings for Service-Connected Tinnitus in Each Ear

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Whether, pursuant to 38 U.S.C. § 5103(a) the Department of Veterans Affairs (VA) is required to provide notice of the information and evidence necessary to substantiate a claim for separate ratings for service-connected tinnitus in each ear.

DISCUSSION:

1. We understand that the Compensation and Pension Service has recently received a number of claims for separate disability ratings for each ear for bilateral service-connected tinnitus pursuant to Diagnostic Code (DC) 6260. The claims either seek an increased rating from a previous single rating of 10 percent for bilateral service-connected tinnitus or a second 10-percent rating with an effective date for the separate rating back to the date of the previous single 10-percent award. In a precedent opinion, VAOPGCPREC 2-03, the VA General Counsel held that DC 6260 as in effect prior to June 10, 1999, and as amended as of that date, authorized a single 10-percent disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head, and that separate ratings for tinnitus for each ear may not be assigned under DC 6260 or any other diagnostic code. See 38 C.F.R. § 14.507(b) (General Counsel precedent opinions binding on VA officials and employees). Effective June 13, 2003, VA amended DC 6260 by adding a note that provides that a claimant is only entitled to "a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head." 68 Fed. Reg. 25,822, 25,823 (2003). Your staff has raised the question of whether VA is required to provide notice under 38 U.S.C. § 5103(a), as amended by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, when a complete or substantially complete application for separate ratings for each ear for service-connected bilateral tinnitus is received.

2. The Supreme Court has instructed that "'[t]he starting point in interpreting a statute is its language.'" Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993). It is a basic principle of statutory construction that effect must be given, if possible, to every word and clause of a statute, so that no part will be inoperative or superfluous. 2A Norman J. Singer, Statutes & Statutory Construction § 46.06 (6th ed. 2000); United States v. Nordic Village Inc., 503 U.S. 30, 36 (1992); United States v. Menasche, 348 U.S. 528, 538-39 (1955). Section 3(a) of the VCAA revised 38 U.S.C. § 5103(a) to provide:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

The first sentence of section 5103(a) contains two qualifiers on the requirement that VA provide notice: (1) VA is only required to provide notice of information and evidence not previously provided to the Department; and (2) VA is only required to provide notice of information and evidence that is necessary to substantiate the claim. The inclusion of the two qualifiers suggests Congress' recognition that in some cases there will be additional information and evidence that must be requested and, in some cases, the criteria for providing notice will not be invoked. Further, the second sentence of section 5103(a) provides that, as part of the requisite notice, VA must "indicate which portion of [the] information and evidence [necessary to substantiate the claim], if any, is to be provided by the claimant and which portion, if any, the Secretary . . . will attempt to obtain on behalf of the claimant." (Emphasis added.) The statutory phrase "if any" in the second sentence is consistent with the reference in the first sentence requiring VA to provide notice of information and evidence not previously provided that is necessary to substantiate the claim and indicates that there will be situations in which it is not necessary to request any information from the claimant. One such situation would be where no additional information or evidence is needed because pursuant to statute or regulation the claim cannot be substantiated. In such cases, it is not necessary for VA to provide notice pursuant to 38 U.S.C. § 5103(a).

3. Another principle of statutory interpretation is that laws should be construed to avoid an absurd or unreasonable result. United States v. Female Juvenile, 103

F.3d 14, 16-17 (5th Cir. 1996), *cert. denied*, 522 U.S. 824 (1997); see In re Chapman, 166 U.S. 661, 667 (1897). The purpose of the amendments made by section 3(a) of the VCAA to 38 U.S.C. § 5103(a) was to institute a uniform practice of notifying a claimant of the evidence that must be provided to VA to support the claim. The Explanatory Statement on H.R. 4864, as amended, 146 Cong. Rec. H9913, H9914 (daily ed. Oct. 17, 2000), explained that:

> The notice would inform the claimant what information (e.g., Social Security number, address, etc.), and what medical evidence, (e.g., medical diagnoses and opinions on causes or onset of the condition, etc.) and lay evidence (e.g., statements by the veteran, witnesses, family members, etc.) is necessary to substantiate the claim.

The Explanatory Statement also noted that the terms chosen were intended to refer to "the types of evidence that could be useful to the Secretary in deciding the claim." Id. A reading of 38 U.S.C. § 5103(a) that would require VA to provide notice of the information and evidence necessary to substantiate a claim that cannot be substantiated because it is barred by statute or regulation would be nonsensical and unsupported by Congress' purpose in enacting the statute.

4. The legislative history regarding 38 U.S.C. §§ 5103(a) and 5103A(a) supports a conclusion that action on VA's part under section 5103(a) is not required where there is no relevant information or evidence to obtain because the claim is barred as a matter of law. The House Committee on Veterans' Affairs' report on legislation that became the VCAA stated with regard to the provision that became 38 U.S.C. § 5103A(a):

> This language . . . recognizes that certain claims, including those that on their face seek benefits for ineligible claimants (such as a veteran who seeks pension benefits but lacks wartime service), or claims which have been previously decided on the same evidence can be decided without providing any assistance or obtaining any additional evidence, and authorizes the Secretary to decide those claims without providing any assistance under this subsection.

H. Rep. No. 106-781, at 10 (2000), reprinted in 2000 U.S.C.C.A.N. 2006, 2012-13 (emphasis added). Thus, Congress contemplated that additional factual development would not be required with regard to claims that are barred as a matter of law. Further, the Explanatory Statement on H.R. 4864, as amended, 146 Cong. Rec. at H9914, stated with regard to the requirement of notice of any information and evidence that is necessary to substantiate the claim in what became section 5103(a) that,"[i]f information or evidence has some probative value,

there must be an effort made to obtain it or to explain to the claimant how he or she might obtain it." This statement indicates that notice was contemplated only with regard to information or evidence that VA views as having probative value, that is, where meaningful information and evidence could be obtained.

5. Our analysis is also supported by the case law of the United States Court of Appeals for Veterans Claims (CAVC).[1] In Mason v. Principi, 16 Vet. App. 129, 132 (2002), the CAVC rejected the claimant's contention that service during the 1980 Iran hostage situation constitutes wartime service for purposes of non-service-connected pension pursuant to 38 U.S.C. § 1521. The CAVC noted that there was no dispute as to the facts concerning the claimant's service and held that the claimant did not serve on active duty during a "period of war" as defined by 38 U.S.C. § 101(11). Id. The CAVC further held that the VCAA was not applicable to the claim because the statute, and not the evidence, was dispositive of the claim. Id.; see also Smith v. Gober, 14 Vet. App. 227, 231-32 (2000) (VCAA does not affect issue of whether interest on past due benefits is payable pursuant to Federal statutes), aff'd, 281 F.3d 1384 (Fed. Cir. 2002); cf. Valiao v. Principi, 17 Vet. App. 229, 231-32 (2003) (in claim for dependency and indemnity compensation by veteran's brother, CAVC concluded "[w]here the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board [of Veterans' Appeals] decision, the case should not be remanded for development [under the VCAA] that could not possibly change the outcome of the decision.") Thus, where a claim cannot be granted because, under undisputed facts, the claimant is not entitled to benefits as a matter of law, no notice to the claimant pursuant to 38 U.S.C. § 5103(a) is required.

HELD:

Under 38 U.S.C. § 5103(a), the Department of Veterans Affairs is not required to provide notice of the information and evidence necessary to substantiate a claim for separate disability ratings for each ear for bilateral service-connected tinnitus because there is no information or evidence that could substantiate the claim, as

[1] The CAVC has also held that the VCAA is not applicable where an individual seeks revision of a prior final VA decision based upon clear and unmistakable error (CUE). Livesay v. Principi, 15 Vet. App. 165, 178-79 (2001) (allegation of CUE in a final decision is not a "claim" for benefits).

entitlement to separate ratings is barred by current Diagnostic Code (DC) 6260 and by the previous versions of DC 6260 as interpreted by a precedent opinion of the General Counsel that is binding on all Department officials and employees.

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