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56 Admin. L. Rev. 207

Administrative Law Review
Winter 2004

Recent Developments in Administrative Law

Serving Our Veterans Through Clearer Rules

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Introduction

As our nation strives to care for a new wave of disabled veterans returning from anti-terrorism operations in Operation Enduring Freedom and Operation Iraqi Freedom, the U.S. Department of Veterans Affairs (VA) is taking steps to make its benefit programs easier for veterans to understand. Like most other federal agencies, many of VA's regulations reflect the ponderous "government writing style" that most Americans have had to tolerate for too long. On the initiative of Secretary Anthony J. Principi, VA now is reorganizing and rewriting in plain language its regulations for all compensation and pension benefit programs. These regulations govern programs which provide more than \$25 billion annually to approximately 3.3 million disabled veterans, their families, and their survivors. [FN1] Our goal is to rewrite these regulations in a logical, claimant-focused, and user-friendly format, in order to help veterans, their families, and VA personnel understand regulatory provisions that directly affect compensation and pension determinations.

This project began shortly after Secretary Principi took office in 2001. In May of that year, he tasked VA to "[d]evelop a plan for a comprehensive review of Title 38, CFR, to determine what regulations need modification, are out of date, or are no longer pertinent." [FN2] In October 2001, the Secretary's VA Claims Processing Task Force recommended that VA "First, rewrite and organize the C&P Regulations in a logical and coherent manner" [FN3] The Secretary endorsed that recommendation and launched the effort to totally revise VA's compensation and pension regulations. The Secretary subsequently garnered White House and congressional approval for the establishment of an independent Office of Regulation Policy and Management (ORPM), working directly for him, to provide centralized management and coordination of VA's

rulemaking process. One of the major functions of this office is to oversee the Regulation Rewrite Project as it improves the clarity of existing VA regulations.

I. Phase One: Researching the Regulations

In the spring of 2002, VA began Phase I of its Regulation Rewrite Project. When a federal agency like VA, over more than half a century old, adds new regulations and amends existing regulations, the result is predictable: its body of regulations resembles a patchwork quilt, or as one court has observed, a "confusing tapestry." [FN4] Our first task was clear. Before we could rewrite our regulations, we needed to review the current regulations and identify ways in which they might be improved. This entailed a systematic review of all 276 regulations in 38 CFR pt. 3 (Adjudication), in order to identify any gaps to be filled, ambiguities to be resolved, redundancies to be eliminated, and any need for organizational change, language clarification, or consolidation. This effort involved the exhaustive review of decisions of the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit concerning VA regulations, as these courts had often been critical of VA's regulations. This review identified more than a dozen court decisions suggesting the need for specific changes to VA's regulations. In addition, we reviewed VA General Counsel Opinions for rules to be incorporated in our regulations. [FN5] We identified fourteen of these precedential opinions that warranted inclusion in VA's regulations.

We also recognized that there were a number of stakeholder groups interested in this effort, and we decided to seek their assistance. We wanted to make sure that interested stakeholders had the opportunity to tell us how VA's compensation and pension regulations might be improved.

To accomplish this, we designed and conducted surveys to obtain stakeholder input on changes needed in our regulations. We surveyed several groups which might provide useful feedback, including Veterans Service Organizations, VA field offices, VA headquarters staff, and Congressional Veteran's Affairs committee staffs. The extensive comments we received were summarized and entered into a database so that they could be thoroughly analyzed. Specific suggestions for revision of certain regulations were added to the individual electronic folder we created for each existing regulation under review. The cumulative data allowed us to reach a number of conclusions: all stakeholder groups agreed that the current regulations needed reorganization, all agreed that the use of plain language would improve the regulations, and there was a remarkable consensus on the provisions that were the most difficult to understand and apply.

Independently, the Rewrite Project Staff concluded, based on their review, that VA's compensation and pension regulations needed to be reorganized for clarity and ease of use. A reorganization that was based on separate treatment of each specific type of benefit appeared to be the best course. The preference for this organizational structure

was also reflected in our survey results. Based on this consensus, we produced a new organizational outline for our regulations that reflected a more logical approach to VA's various compensation and pension programs. The resulting organizational structure was so dramatically different from the current structure that we decided an entirely new part would need to be added to C.F.R. Title 38. By using a new part, we reasoned that those who used the regulations would face less confusion than would be the case if we had tried to extensively renumber provisions within the existing part.

A. Reorganizing Regulations

As we discussed this idea with those who would have to use the regulations, they agreed that using a new part would help alleviate confusion. We recognized, however, that a profound reorganization of relevant materials would require a massive training effort and some information system redesigns in order to fully implement a move to a new part in the CFR. Thus, we briefed the Under Secretary for Benefits and his staff on the likely direction of the project. They then began to make plans for field training and for automated system design changes that eventually would be required. The consensus among all stakeholders was that a willingness to retrain VA employees and the large number of non-VA personnel who provide daily assistance to veterans was a price worth paying in order to achieve real improvement in VA's regulations. Thus, we began radical organizational surgery.

Some of the organizational changes were relatively straightforward. Where a number of regulations related to a single subject could be grouped together, we did so.

One example of such an organizational change is with our regulations affecting Filipino veterans who fought for or with the U.S. during World War II. Under a number of statutes, these veterans are eligible for VA benefits. The statutes represent Congress's recognition of the Filipino veterans' significant service and sacrifice on behalf of the United States. Under the current part 3 of 38 CFR, the regulations affecting this group of veterans are scattered throughout the part. Provisions applying only to this group of veterans appear under the following headings:

- General
- Special benefits
- Dependency, Income, and Estate
- Forfeiture
- Effective dates
- Reductions and discontinuances.

Under our proposed reorganization, all regulations uniquely affecting Filipino veterans are grouped together in one subpart. Thus, our Filipino veterans, their survivors, and dependents no longer will have to search through hundreds of pages of regulations to find provisions unique to their service.

Another example of our reorganization effort was the consolidation of regulations governing claimants' rights and responsibilities. These regulations presently are found under a variety of undesignated center headings:

- Administrative
- Claims
- Evidence Requirements
- Adjustments and Resumptions.

Thus, a veteran must look through a number of unrelated regulations in order to determine exactly what his or her rights and obligations are in pursuing a claim. Under our new proposed organization, all such regulations are grouped together in one subpart. This segment of the reorganization effort was a reflection of our belief that the regulations affecting the claims process should be organized in a way that would assist the veteran in processing a claim. Totally apart from the effort to group provisions concerning specific benefits together, we determined that the administrative processes for filing, developing, and adjudicating claims should be grouped together.

B. Outside Input

Members of a large network of non-attorney employees and volunteers of veterans' service organizations and state and county agencies usually assist or represent VA claimants. Since our regulations are important to these veterans' representatives, we have consistently sought their input throughout the project. After reviewing our proposed outline of the compensation and pension regulations, one group, the National Association of County Veterans Service Officers, wrote that "the proposed outline puts PART III [part 3] into a logical format which seems to be user friendly This provides for ease of research by users and is a welcome change to the tedious task of research in the current regulations by county service officers." [FN6] In addition, these organizations gave us input on which regulations required the most revision. This kind of active feedback from a large group of users outside of VA has been particularly valuable and has led us to modify many of our initial approaches to regulations under review.

C. Eliminating Confusion

Our conclusions from Phase I were that the great majority of our 276 compensation and pension regulations contain legal jargon, confusing cross-references, and language that sounds adversarial to a veteran. VA has a special statutory duty to take care of veterans in a uniquely non-adversarial framework. Any regulation that seemed to set an adversarial tone was therefore a particular concern for our review teams. In sum, the vast majority needed to be rewritten in plain language. An example of a potentially confusing provision is 38 C.F.R. section 3.551(e)(3), which states, "[w]here improved pension is being paid to a married veteran at the rate prescribed by 38 U.S.C. 1521(b) all or any part of the rate payable under 38 U.S.C. 1521(c) may be apportioned for a spouse as provided in §3.454(b). (Authority: 38 U.S.C. 5503(a))." While this provision is absolutely accurate, a reader would feel compelled to read three provisions from the

U.S. Code and another provision from C.F.R. Title 38, to ensure a full understanding of this provision. This is one instance where we discovered that the use of fewer words (and more cross-references) was not a "veteran-friendly approach." In other instances, we discovered extremely long sentences that could be greatly improved by simply dissecting them into several related sentences.

Working regulation by regulation, the Rewrite Project Teams documented all of these needed changes. Separate data sheets were prepared on each existing regulation, noting what needed to be done to improve that regulation. Each was reviewed for currency, statutory basis, judicial citation, clarity, format, possibility of restructure, and the need for plain language. When this review was completed, more than 2,000 data sheets had been completed, each outlining a specific proposal for change and the rationale for making it.

II. Phase Two: Rewriting the Regulations

Phase II of the Regulation Rewrite Project involved actually redrafting our regulations' titles and text. When originally drafted, our Phase II goal was to "[p]roduce an integrated, internally consistent Part 5, 38 CFR, which incorporates a more user-friendly organization, uses plain language wherever possible, and sets a veteran-friendly tone consistent with governing statutes." [FN7] That goal statement was both accurate and revealing of the extent of the problem we faced. We ultimately settled on a goal more consistent with our effort to simplify material and write in plain language: "Write a Part 5 that people can read, understand, and apply." [FN8]

Phase II consumed all of fiscal year 2003 (October 1, 2002 through September 30, 2003). In that period, we met our goal of revising 228 out of 276 regulations. We determined that the remaining regulations should not be revised, mainly because they were the subject of other pending rulemaking within VA or they were the subject of pending or very recent litigation.

A. Assembling the Cross-functional Regulation Rewrite Teams

We believe that our success during Phase I and Phase II was mainly the result of: (1) getting and using good people to research and rewrite our regulations, (2) getting and using good suggestions from experts outside VA, and 3) adopting a collaborative work method.

Our staff has consisted entirely of detailees: attorneys from our Office of General Counsel and the Board of Veterans' Appeals, as well as program experts, many of whom had worked as claims adjudicators in VA regional offices. These dedicated employees were divided into collaborative teams in order to bring their combined talents to bear on the rewrite effort. The Office of General Counsel attorneys' legal skills, the program experts' technical knowledge of how VA compensation and pension

programs are administered, and the first level Board appellate reviewers' perspectives on the problems caused by existing regulations, helped us produce regulations that were accurate and legally supportable without continuously leaning on the legal jargon that characterizes many federal regulations.

We do not suggest that we were able to eliminate all legalisms from VA's compensation and pension regulations. On the contrary, where the courts had clearly defined the meaning of a specific word or phrase, we sometimes retained it. However, where the word or phrase had a judicially developed, unique legal meaning, we attempted to provide a plain language explanation to accompany its continued usage.

The collaborative work environment dramatically reduced the need for serial reviews by the major entities participating in the project. We sent each draft regulation to VA's Compensation and Pension Service, and the Office of General Counsel, for their informal review, and both entities provided valuable input during the collaborative phase of our work.

B. Collaborating with Interested Parties

Drafts of rewritten regulations have been shared with stakeholders in order to obtain their informal comments during the development and writing phase. This process has generated useful dialog and aided immensely in obtaining the regulatory clarity we are seeking. This input is useful because such stakeholder groups have a different perspective than agency staff. They have experience assisting claimants who are having trouble coping with the VA claims system. Moreover, they often suggested fresh ideas because they are not bound by the agency's historical perspectives.

C. The Results

Through the employment of cross-functional teams and this open and collaborative process, we found that many regulations could be improved. We employed a combination of techniques: carefully outlining of the material to be covered, use of shorter sentences, incorporation of fewer qualifying clauses within sentences, and the use of illustrative tables and figures where possible.

One example of a regulation provision we plan to simplify is 38 C.F.R. § 3.5(c), which currently reads:

§ 3.5 (c) Exclusiveness of remedy.

No person eligible for dependency and indemnity compensation by reason of a death occurring on or after January 1, 1957, shall be eligible by reason of such death for death pension or compensation under any other law administered by the Department of Veterans Affairs, except that, effective November 2, 1994, a surviving spouse who is receiving dependency and indemnity compensation may elect to receive death pension instead of such compensation.

(Authority: 38 U.S.C. 1317)

The November 2, 1994 date referenced in current § 3.5(c) is the effective date of Public Law 103-446, which added paragraph (b) to 38 U.S.C. § 1317; thereby permitting dependency and indemnity compensation (DIC) recipients to elect to receive death pension instead of DIC. [FN9] Including the date was helpful during the time when the right to elect death pension in lieu of DIC was new. However, we plan to omit it from this revision since elections are prospective and its inclusion is no longer necessary. In addition, we plan to restructure the provision to state the general rule in one paragraph and then clearly delineate the exception in a separate paragraph.

Our revised provision would thus read more clearly:

§ 5.508 Eligibility for death compensation or death pension instead of DIC.

(a) General rule. Subject to paragraph (b) of this section, VA will not pay death compensation or death pension to any person eligible for DIC based upon a death occurring on or after January 1, 1957.

(b) Exception: Right of spouse to elect death pension. A surviving spouse receiving DIC may elect to receive death pension instead of DIC. For effective date information, see § 3.400(j)(1) of this chapter.

Another example of our effort to simplify VA's regulations can be seen in 38 C.F.R. § 3.316, "Claims based on chronic effects of exposure to mustard gas and Lewisite," which currently reads, in pertinent part:

(a) Except as provided in paragraph (b) of this section, exposure to the specified vesicant agents during active military service under the circumstances described below together with the subsequent development of any of the indicated conditions is sufficient to establish service connection for that condition:

(1) Full-body exposure to nitrogen or sulfur mustard during active military service together with the subsequent development of chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: Nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin.

(2) Full-body exposure to nitrogen or sulfur mustard or Lewisite during active military service together with the subsequent development of a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease.

(3) Full-body exposure to nitrogen mustard during active military service together with the subsequent development of acute nonlymphocytic leukemia.

We believe that using charts to clarify long and complex provisions such as these will help readers find the information they need more quickly and accurately. We are proposing to rewrite this provision as follows:

§ 5.266 Presumption of service connection for conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

(a) VA will presume service connection for a disease or disability when the

evidence of record establishes that the veteran:

- (1) Underwent full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite during active military service; and
- (2) Subsequently developed a condition associated with that specific agent, as shown in paragraph (b) of this section.

(b) List of conditions associated with full-body exposure to nitrogen mustard, sulfur mustard, or Lewisite.

Disease or disability	Associated with nitrogen mustard?	Associated with sulfur mustard?	Associated with Lewisite?
Acute nonlymphocytic leukemia	Yes	No	No
Asthma	Yes	Yes	Yes
Chronic bronchitis	Yes	Yes	Yes
Chronic conjunctivitis	Yes	Yes	No
Chronic laryngitis	Yes	Yes	Yes
Chronic obstructive pulmonary disease	Yes	Yes	Yes
Corneal opacities	Yes	Yes	No
Emphysema	Yes	Yes	Yes
Keratitis	Yes	Yes	No
Laryngeal cancer	Yes	Yes	No
Lung cancer (except mesothelioma)	Yes	Yes	No
Nasopharyngeal cancer	Yes	Yes	No
Scar formation	Yes	Yes	No
Squamous cell carcinoma of the skin	Yes	Yes	No

(Authority: 38 U.S.C. 501(a))

III. Phase Three: Publishing our Regulations

Although some of our rewritten regulations entail no substantive changes, and therefore need not be published for notice and comment under the Administrative Procedure Act, [FN10] we decided that it would be helpful to seek public input on all the rewritten regulations. We are presently publishing them for comment in twenty separate proposed rulemaking packages. Because of the sheer volume of material to be covered, we chose not to publish all of the new part in a single notice of proposed rulemaking. We plan to provide an opportunity for public comment on all proposed part 5 regulations before adopting a final version of the entire part 5.

Conclusion

On January 30, 2004, we published in the Federal Register the first portion of VA's proposed, rewritten compensation and pension regulations. The appearance of that first segment began the realization of Secretary Principi's vision and the fulfillment of a twenty-year old promise to produce better regulations. However, it is not the endpoint. That point won't arrive until the new regulations are completely implemented. But, it does represent an intermediate success.

Publication of better organized, more readable, and clearer rules represents a success on several levels. First, such a major undertaking required a unifying vision from the top of VA. Secondly, it required the dedication of substantial resources in the form of employees whose sole job during their detail was the realization of the vision for a new set of regulations. Third, it required the development of entirely new collaborative work methods in order to achieve results within a timeframe that was thought by many to be impossible. It required the active involvement of numerous stakeholders in order to achieve results that could have their support. Finally, it required the development of new, sometimes radical, ways of thinking about agency regulations. Letting go of well-worn, bureaucratically accepted structures and styles is not easy. But, those of us who have been involved in this effort believe that time will demonstrate that all of the above investments were worth the outcome.

If we achieve our goal of making VA's compensation and pension regulations more accessible and more veteran-friendly, we will have moved the Department of Veterans Affairs several more steps along the path that Abraham Lincoln set when he stated our charter: "[t]o care for him who shall have borne the battle, and for his widow, and his orphan . . ." [FN11]

[FNa1]. Major General Moorman, USAF (retired), serves as Assistant to the Secretary for Regulation Policy and Management within the Department of Veterans Affairs (VA). His primary responsibilities include managing and directing the entire VA rulemaking process for the Secretary of VA. Previously, he served for more than thirty years in the U.S. Air Force, culminating in his assignment as the Judge Advocate General of the Air Force. In that position he was responsible for the work of more than 1,400 military and civilian attorneys and all legal matters within the operational Air Force. A native of Chicago, Illinois, he graduated from the University of Illinois College of Law in 1970.

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[FN1]. VA Fact Sheets, Dept. of Veterans Affairs (April 2003) at <http://www.va.gov/opa/fact/docs/vafacts.htm>.

[FN2]. Secretary of Veterans Affairs Anthony J. Principi, Address at the Senior Leadership Retreat in Easton, Md. (May 2001) (Summary of action items identified in the address) (on file with authors).

[FN3]. VA Claims Processing Task Force, Report to the Secretary of Veterans Affairs 87 (2001) (Recommendation: M-13) (on file with authors).

[FN4]. *Hatlestad v. Derwinski*, 1 Vet. App. 164, 167 (1991).

[FN5]. See 38 U.S.C. § 7104(c) (2000) (stating that the Board of Veterans' Appeals "shall be bound in its decisions... by the precedent opinions of the chief legal officer of the Department").

[FN6]. Letter from Michael D. Murphy, President, National Association of County Veterans Service, to John F. McCourt, Deputy Director, Regulation Rewrite Project, Department of Veterans Affairs (Nov. 1, 2002) (on file with authors).

[FN7]. William A. Moorman, Assistant to the Secretary, Office of Regulation Policy and Management, Presentation to the Court of Appeals for Veterans Claims Conference (Sept. 20, 2002) (copy of presentation on file with authors).

[FN8]. *Id.*

[FN9]. Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, §111(a), 108 Stat. 4645, 4654 (1994).

[FN10]. 5 U.S.C. § 552 (a)(1)(D) (2000) (stating that "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" must be published "in the Federal Register for the guidance of the public....").

[FN11]. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), at <http://www.bartleby.com/124/pres32.html>.