

**Department of
Veterans Affairs**

Memorandum

Date: December 18, 2008 VAOPGCPREC 3-2008

From: Acting General Counsel (021)

Subj: Servicemembers' Entitlement to Rehabilitation and Vocational Benefits under Public Law 110-181

To: Director, Vocational Rehabilitation and Employment service (28)

QUESTIONS PRESENTED

1. Are the rehabilitation and vocational benefits described in section 1631(b)(1) of Public Law 110-181 to be provided by the Veterans Health Administration (VHA) under chapter 17 of title 38, United States Code, or by the Veterans Benefits Administration (VBA) under chapter 31 of that title?

2. Further, if section 1631(b)(1) relates to benefits under chapter 31, clarification is requested of the following issues:

(a) What is the mechanism for establishing eligibility and entitlement to rehabilitation and vocational services under section 1631(b)(1)? For example, would a qualifying individual be required to provide documentation of a Physical Evaluation Board to VA?

(b) What, if any, is VA's responsibility to develop potential eligibility/entitlement under Pub. L No. 110-181 if a veteran or servicemember with no VA service-connected disability rating or memorandum rating applies for chapter 31 benefits?

(c) Are individuals qualifying under Pub. L. No. 110-181 required to complete a VA Form 28-1900 or some other form of application before chapter 31 benefits can be provided by VA?

(d) Are the current limitations on services to active-duty servicemembers applicable to individuals who are entitled to rehabilitation and vocational benefits under Pub. L. No. 110-181 while they remain on active duty? For example, under current law active-duty servicemembers may not receive a subsistence allowance, a revolving fund advance, or a rehabilitation program consisting solely of independent living services under chapter 31.

(e) We believe that certain actions and processes are essential to the provision of services under chapter 31. Is VA precluded from requiring those individuals qualifying under Pub. L. No. 110-181 to complete an initial evaluation to:

- (1) Verify the information/documentation that qualifies the individual?
- (2) Determine whether an employment handicap or serious employment handicap exists?

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- (3) Determine the feasibility of achieving a vocational goal?
- (4) Complete any assessment and/or testing needed to begin rehabilitation planning?

HELD

1. The rehabilitation and vocational benefits described in section 1631(b)(1) of Public Law 110-181 (hereafter referred to as “section 1631(b)(1)”) must be provided, respectively, by both the Veterans Health Administration (VHA) under chapter 17 of title 38, United States Code, and the Veterans Benefits Administration (VBA), through the VR&E Service, under chapter 31 of that title.

2. With regard to the provision of benefits under chapter 31, addressed in questions 2 (a) through (e) of your request, please refer to paragraph 5 below.

This opinion supersedes our opinion on this subject dated June 25, 2008.

DISCUSSION

1. This responds to your request for our opinion regarding certain servicemembers’ entitlement, pursuant to Public Law 110-181, to rehabilitation and vocational benefits administered by the Department of Veterans Affairs (VA). Section 1631(b)(1) of the National Defense Authorization Act for 2008 (Pub. L. No. 110-181), approved on January 28, 2008, provides that,

[e]ffective as of the date of enactment of this Act, a member of the Armed Forces with a severe injury or illness is entitled to such benefits (including rehabilitation and vocational benefits, but not including compensation) from the Secretary of Veterans Affairs to facilitate the recovery and rehabilitation of such member as the Secretary otherwise provides to veterans of the Armed Forces receiving medical care in medical facilities of the Department of Veterans Affairs facilities in order to facilitate the recovery and rehabilitation of such members.

We interpret the plain language of this section as reflecting congressional intent that servicemembers suffering from “severe injuries or illnesses” are entitled to all benefits that relate to “recovery and rehabilitation” (not including disability compensation under chapter 11 of title 38, United States Code) to which veterans receiving care in VA medical facilities are entitled. At a minimum, this would include services and assistance under chapters 17 and 31 of title 38. Central to this interpretation is our view, based again on the plain language of the statute, that the term “recovery” is used in the medical sense and that the term “rehabilitation” includes both medical rehabilitation and vocational rehabilitation. We note further that the absence in section 1631(b)(1) of

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references to specific statutory authorities that relate to recovery or rehabilitation (i.e., no reference to either chapter 17 or 31 of title 38) would not limit the application of such authorities in implementing the requirements of section 1631(b)(1).

2. With regard to entitlement of certain hospitalized servicemembers to benefits under chapter 31, in pertinent part, section 3102 of title 38, United States Code, provides:

A person shall be entitled to a rehabilitation program under the terms and conditions of this chapter if--

(1) the person--

(A) is--

. . .

(ii) hospitalized or receiving outpatient medical care, services, or treatment for a service-connected disability pending discharge from the active military, naval, or air service, and the Secretary determines that--

(I) the hospital (or other medical facility) providing the hospitalization, care, services, or treatment is doing so under contract or agreement with the Secretary concerned, or is under the jurisdiction of the Secretary of Veterans Affairs or the Secretary concerned; and

(II) the person is suffering from a disability which will likely be compensable at a rate of 20 percent or more under chapter 11 of this title; and

(B) is determined by the Secretary to be in need of rehabilitation because of an employment handicap

3. We note two distinctions between 38 U.S.C. § 3102 and section 1631(b)(1). First, while 38 U.S.C. § 3102(1)(A) refers to a “person” who is hospitalized or receiving outpatient medical care . . .,” section 1631(b)(1) refers to a servicemember with a “severe injury or illness,” without regard to hospitalization or outpatient medical care. Likewise, 38 U.S.C. § 3102 requires that the person be suffering from a disability which “will likely be compensable at a rate of 20 percent or more under chapter 11 of [title 38].” Again, the section 1631(b)(1) reference to a “servicemember with a severe injury or illness” appears to refer to individuals whose disabilities would certainly be rated at a level of at least 20 percent disabling. Of these two noted distinctions, we consider only the latter to be of import. Specifically, if a servicemember is found to have a “severe injury or illness,” this would obviate the need for a determination by VA that he or she suffers from a disability “which will likely be compensable at a rate of 20 percent or more.” Therefore, the requirement of an application for service-connected disability compensation or of a memorandum or final rating for a service-connected disability associated with such an application would not be applicable with respect to any such servicemember.

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4. With regard to usage of the term “severe injury or illness,” we note first that such term is not defined anywhere in the relevant title of the statute (title 16). We note further that section 1631(b)(1) is the only place in the operative provisions of title 16 that the term “severe injury or illness” appears¹. It is unclear whether usage of this particular term was intentional or merely an editing error. In this regard, we note that the term “serious injury or illness,” which Congress specifically defined in section 1602(8) of the NDAA², appears in several other sections in title 16. Given Congress’s clear expression of its intent to provide a definition of “serious injury or illness” on the one hand, and the absence in the statute of a definition for “severe injury or illness” on the other, it is our view that Congress actually intended to refer in section 1631(b)(1) to a “serious injury or illness” suffered by a servicemember. Accordingly, in this instance we believe that the term “severe injury or illness” should be read as meaning a “serious injury or illness.” In any event, however, for the purpose of implementing this section, we view either term to refer to a disability incurred or aggravated in line of duty in the active military, naval, or air service that would be rated at a level of at least 20 percent disabling under the Schedule for Rating Disabilities in 38 C.F.R. part 4. Interpretation of this provision in this manner would be consistent with the disability rating required under 38 U.S.C. § 3102(1)(A)(2), noted above. This obviates the need for a formal adjudication of the service-connected nature and severity of the injury or illness suffered and will have no impact on any claim for service-connected benefits of any type to which the servicemember may otherwise be entitled.

5. With regard to the issues raised in question 2 concerning the provision of benefits under chapter 31:

(a) The mechanism for establishing eligibility and entitlement to rehabilitation and vocational services under section 1631(b)(1) should be determined through an agreement with the military secretaries concerned that would document the existence of a “severe injury or illness” suffered by a servicemember. This could be in the form of a disability evaluation by a Physical Evaluation Board or other appropriate examination or evaluation. VBA (VR&E) must develop procedures to facilitate the sharing of information and documentation between the military departments concerned and VA.

(b) In accordance with section 1631(b)(1), VA is required to provide the noted benefits without regard to the filing of an application by a servicemember for disability compensation. Upon receipt of a claim for benefits under chapter 31, VA must

¹ Although the term “severe” is used in the heading of section 1631 (“Medical care and other benefits for members and former members of the Armed Forces with severe injuries and illnesses”), it is well established that a section heading is not an operative provision of a statute.

² Section 1602(8) provides that “[t]he term “serious injury or illness, in the case of a member of the Armed Forces, means an injury or illness incurred by the member in the line of duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”

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ascertain whether documentation is of record indicating a severe injury or illness suffered by the servicemember. If such documentation is not of record, VA must seek to obtain the documentation from the military department concerned or the servicemember under procedures that will need to be established, as noted above.

(c) Pursuant to 38 U.S.C. § 5101, an application for benefits must be filed; however, in this instance, a servicemember's application for chapter 31 benefits will need to be annotated to reflect that his or her entitlement to benefits and services under chapter 31 is based initially on section 1631(b)(1) rather than 38 U.S.C. § 3102, so as to avoid confusion that could lead to a denial of entitlement because the existence of a qualifying service-connected disability has not otherwise been established in the normal fashion. We would note that, once a concerned servicemember is separated from service, VR&E will need to convert the individual's chapter 31 status to entitlement based on applicable provisions of 38 U.S.C. § 3102, although such individual's continued participation in any rehabilitation program would not otherwise be affected. In other words, such individual's entitlement to services and assistance under chapter 31 would not be readjudicated.

(d) Although an affected servicemember's entitlement to benefits and services under chapter 31 is based in this instance on section 1631(b)(1) rather than 38 U.S.C. § 3102, we see nothing in the legislative history relating to its enactment to suggest that current limitations applicable to active-duty servicemembers who are entitled to services and assistance under chapter 31 pursuant to 38 U.S.C. § 3102 would not also be applicable to the subject servicemembers who are entitled to such benefits pursuant to section 1631(b)(1). This would include the specific prohibition under current law that active-duty servicemembers may not receive a subsistence allowance. See 38 U.S.C. § 3113(a). Because the military services provide for members' subsistence, it would be duplicative and inequitable to also pay them the veterans' subsistence allowance. The language of section 1631(b)(1) makes clear that congressional intent is to equalize servicemembers' and veterans' chapter 31 eligibility, not to provide servicemembers a windfall. However, in view of the broad language in section 1631(b)(1), taking into consideration the physical condition of the servicemember concerned, a program consisting solely of independent living services under chapter 31 may be authorized. We recognize that the type of services VR&E may be able to provide to such individuals while hospitalized may be limited in nature.

(e) Nothing in section 1631(b)(1) would preclude VA from requiring individuals qualifying under that authority to complete an initial evaluation that would:

- (1) Verify the information/documentation that qualifies the individual;
- (2) Determine whether an employment handicap or serious employment handicap exists;
- (3) Determine the feasibility of achieving a vocational goal; and
- (4) Complete any assessment and/or testing needed to begin rehabilitation planning.

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Except as we have specifically noted otherwise, we believe Congress intended that the subject servicemembers should be treated in the same manner as veterans.

John H. Thompson