

**DATE:** 10-15-91

**CITATION:** VAOPGCPREC 70-91  
Vet. Aff. Op. Gen. Couns. Prec. 70-91

**TEXT:**

Reconsiderations by the Board of Veterans' Appeals

**QUESTIONS PRESENTED:**

1. If there has been a change in the statutory or regulatory standard applicable to a particular case, should a reconsideration section apply the law as it was at the time of the original decision or should it apply current legal standards?
2. To what extent, if any, do the provisions of 38 U.S.C. § 5110(g) (formerly section 3010(g)) FN1 and 38 C.F.R. § 3.114 apply with respect to establishing an effective date for the award of benefits through the use of the liberalized reconsideration procedure, established in the Veterans' Judicial Review Act and recognized in G.C. Precedent Opinion 89-90?
3. When reconsideration has been ordered, is the evidence received since the date of the original decision considered received within the appeal period or prior to the appellate decision, within the meaning of 38 C.F.R. § 3.400(q)(1)?

**COMMENTS:**

1. This is in reply to your request for an opinion in the wake of O.G.C.Prec. 89-90 (August 27, 1990). That opinion acknowledged the changes that the Veterans' Judicial Review Act (VJRA), Pub.L. No. 100-687, Div. A, 102 Stat. 4105 (1988), had made to the BVA's reconsideration procedure:

Under 38 U.S.C. § 4003, as amended by the Veterans' Judicial Review Act, reconsideration by the Board of Veterans Appeals results in vacating the original BVA decision. The reconsideration section then sits in the same position as would a Board panel initially deciding the appeal, i.e., it should employ the same standard of review and consider the same evidence as would be appropriate for such a panel. FN2

2. The general rule is that agencies must apply the law in effect at the time it renders its decision, even if that law had changed during the course of the proceeding. Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268, 281 (1969). This rule is based on a presumption that favors retroactive application of new laws, unless there is statutory direction or legislative history to the contrary or where to do so would result in manifest injustice. Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711 (1974); Karnas v. Derwinski, U.S.Vet.App. No. 90-312 (June 11, 1991). The Supreme Court in Bradley, supra set forth factors to be considered in determining whether the application

of the general rule would result in manifest injustice. Those factors were: the nature and identity of the parties; the nature of their rights; and the nature of the change in the law on those rights. Bradley, 416 U.S. at 717.

3. We are aware of one case in which the Supreme Court has held that the application of the general rule that a court must apply the law in effect at the time it renders its decision would result in manifest injustice. In Bennett v. New Jersey, 470 U.S. 632 (1985), the Court, applying the factors enumerated in Bradley, supra, held that there should be no retroactive application of changes in the substantive requirements of a federal grant program when the outcome would be to permit the state government to avoid repayment to the United States Department of Education of grant funds which had been allocated incorrectly within the state under the old law but not under the new law. The United States Court of Veterans Appeals, in Karnas v. Derwinski, U.S.Vet.App. No. 90-312, slip op. at 9 (June 11, 1991) cited Bowen v. Georgetown University Hospital, 488 U.S. 204(1988) as another example of a case in which the general rule has been held not to apply.

4. In Op.G.C. 4-88 (6-14-88), reissued as O.G.C.Prec. 69-90, we held that the criteria set forth in 38 C.F.R. § 3.311b were properly for application in any decision entered by the BVA after adoption of the new regulation, notwithstanding that an appeal may have been pending before the regulation became effective. This opinion contains a detailed analysis and discussion of the factors enumerated in Bradley and should prove useful to a reconsideration section that must determine whether application of the current law would result in manifest injustice.

5. In answer to your second question, we note that any discussion of effective dates must include a discussion of the finality rules involved, as the two principles are inextricably intertwined. The general rule concerning finality of BVA decisions is, quite simply, that such decisions represent the "final" decision of the Secretary on appeals. 38 U.S.C. § 7104(a) (formerly section 4004(a)).

6. By statute, Congress has created an exception to this finality rule. Pursuant to amendments made by the VJRA, decisions of the BVA in which reconsideration is ordered are not final. 38 U.S.C. § 7103(a) (formerly section 4003(a)) (" t he decision of the BVA section is final unless the Chairman orders reconsideration of the case"). It follows from this that the reconsideration section--faced with an appeal in which there is no final BVA decision--must reach the decision in that appeal which "shall constitute the final decision of the Board." 38 U.S.C. § 7103(b) (formerly section 4003(b)).

7. The BVA has, in the past, had occasion to "vacate" prior BVA decisions. 38 C.F.R. § 19.201. Thus, the Department has some familiarity with the assignment of benefits based on a BVA decision "replacing" the earlier, vacated one. Reconsideration represents an identical situation--one involving an appeal which by operation of a post-decision procedure is returned to an "open and undecided" status.

8. The rules established by Congress concerning effective dates of awards are set out

in 38 U.S.C. § 5110 (formerly section 3010). That provision establishes a "general rule" in subsection (a), with exceptions to the rule listed in the remaining subsections. Generally, implementing regulations are located in 38 C.F.R. §§ 3.400-3.404. We note that the reconsideration situation, in which a prior BVA decision is "vacated," is not specifically addressed. Therefore, the general rule is for application.

(T)he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a) (formerly section 3010(a)). Based on this rule, a grant of these benefits by a reconsideration section of the BVA could result in the assignment of benefits as far back as the date on which application for such benefits was received.

9. Based on the foregoing discussion, we conclude that neither the effective date of the Veterans' Judicial Review Act nor the date of O.G.C. Precedent 89-90 is an appropriate "threshold" effective date for benefits awarded by a reconsideration section of the BVA. See generally O.G.C.Prec. 22- 90 (considers what constitutes prospective application of a statute). As we conclude that benefits awarded upon reconsideration will be assigned an effective date pursuant to general effective date rules, the follow-up questions posed in numbered paragraph 3b. of your request are not addressed.

10. Finally, you asked about the effect of evidence received after issuance of the BVA's original decision, as well as evidence obtained by remand or other means by a reconsideration section. As noted, 38 C.F.R. § 3.400(q)(1) provides that the effective date of an award of benefits based upon new and material evidence (other than service department records) which is received "within appeal period or prior to appellate decision" will be as though the former decision had not been rendered. Section 3.400(q)(1) currently references two provisions of the BVA's Rules of Practice, 38 C.F.R. §§ 19.153 and 19.154, which have been renumbered as 38 C.F.R. §§ 19.192 and 19.193, respectively. These regulatory provisions provide that decisions of the agency of original jurisdiction (AOJ) become final if there is no timely appeal or, if a timely appeal is made, when affirmed by appellate decision. Regulations governing finality of AOJ decisions may also be found at 38 C.F.R. §§ 3.104 and 19.129.

11. As previously discussed, once reconsideration has been ordered, it has the effect of vacating the original BVA decision as to that issue or issues. Thus, the appeal again stands in an "undecided" status and all evidence, both that considered by the previous BVA section and that received by the Department since that earlier decision, must be considered. See 38 C.F.R. § 19.180. All such evidence received after the AOJ decision may be considered to have been "received ... prior to appellate decision." Therefore, should portions of that evidence be found to be "new and material" and lead to a grant of the benefits sought, the provisions of 38 C.F.R. § 3.400(q)(1) are for application.

**HELD:**

Reconsideration by the Board of Veterans' Appeals under 38 U.S.C. § 7103 (formerly section 4003) vacates the original decision and benefits awarded upon reconsideration should be assigned an effective date pursuant to general effective date rules. The reconsideration section should employ current legal standards during its review unless to do so would result in a manifest injustice, and, within the meaning of 38 C.F.R. § 3.400(q)(1), should consider all evidence received since the agency of original jurisdiction decision which was appealed to the BVA as having been received prior to the appellate decision.

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1 Section 402(b)(1) of Public Law No. 102-40, 105 Stat. 187, 238-39 (1991), redesignated each section in, among other chapters, chapters 51 and 71 in title 38 so that the first two digits are the same as the chapter number of the chapter containing that section.

2 The VJRA set January 1, 1989, as the effective date for section 202, which amended 38 U.S.C. § 7103 (formerly section 4003). Pub.L. No. 100-687, sec. 401(d), 102 Stat. 4105, 4122 (1988).

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