DATE: 3-6-92

CITATION: VAOPGCPREC 6-92
Vet. Aff. Op. Gen. Couns. Prec. 6-92

TEXT:

QUESTIONS PRESENTED:

1. Under what circumstances, if any, may a Department of Veterans Affairs Regional Office (VARO) rating decision reducing a total disability rating be upheld in the absence of a specific reference in the decision itself to 38 C.F.R. § 3.343(a)?

2. If section 3.343(a) need not be cited in the decision itself you requested our opinion with regard to the following:

(a) How closely must the language in the decision track the language in section 3.343(a) to reflect that the reduction is in accordance with the provisions of the regulation?

(b) (b) May BVA look beyond the four corners of the rating decision itself to determine whether consideration was given to the provisions of section 3.343(a), such as to prior rating decisions which may have continued a 100% rating while noting that improvement was shown and providing for a future examination to establish the presence of sustained improvement?

(c) If BVA cannot determine from the rating decision itself or otherwise whether section 3.343(a) was considered, can this deficiency in the rating decision be cured by the letter notifying the veteran of the reduction, by a subsequently issued statement of the case, or by a BVA decision?

(d) If the VA Regional Office rating decision disregarded section 3.343(a) and is void ab initio, can such a defect be cured by any subsequent act? Does it necessarily follow that all subsequent rating decisions and BVA decisions which sustain a rating less than 100% are likewise void?

(e) If failure to cite section 3.343(a) in the rating decision renders the decision void ab initio, must all potentially applicable law and regulations be cited in VA Regional Office decisions and BVA decisions to avoid procedural due process violations? If all potentially applicable laws and regulations do not need to be cited, what criteria are to be used in deciding whether the omission of a potentially applicable law or regulation constitutes a violation of substantive due process which cannot be cured?

3. Does an opinion set forth by General Counsel in a memorandum or brief to COVA, such as the concession in the Swan case, have any binding effect on Agency officials in any case other than the case then subject to COVA jurisdiction?

4. If an opinion set forth by General Counsel in a memorandum or brief to COVA is acted upon by COVA without comment or deliberation, does the legal opinion thereby become binding as though COVA had rendered the opinion?

COMMENTS:

1. Your inquiry arose as a result of an order dated June 28, 1991, issued by the United States Court of Veterans Appeals (COVA) directing the Board of Veterans' Appeals (BVA or Board) to make findings in this case regarding whether an April 1986 regional office rating decision which reduced a veteran's total disability rating is void ab initio for failure to take into account 38 C.F.R. § 3.343(a). The Court cites Swan v. Derwinski, U.S. Vet. App. No. 89- 75 (April 12, 1991), a case where COVA found that failure by the VA regional office to take into account section 3.343(a) rendered the rating board decision as well as that of the BVA void ab initio. Prior to deciding the issue in Swan, the court ordered both sides to file supplemental memoranda on the issue. Both sides indicated that the Department did not consider section 3.343(a) and that the failure to consider this regulation rendered the decision void.

2. It appears that the Swan decision and supporting memoranda by the parties have left the impression that failure to consider 38 U.S.C. § 3.343(a) renders a rating decision void. Such a conclusion is incorrect. Failure to consider section 3.343(a) renders the decision voidable rather than void. See e.g., PATCO v. Federal Labor Relations Authority, 685 F.2d 547, 564-65 (D.C. Cir. 1982) (violation of provision of Administrative Procedure Act did not void agency proceedings but made them voidable). Void in a strict sense means a nullity, having no legal or binding effect and ineffectual so that nothing can cure it. Voidable, on the other hand, indicates an imperfection or defect which can be cured. Black's Law Dictionary 1411 (5th Ed. 1979). A voidable act stands in full force and effect until it is voided. Houman v. Mayor and Council, Etc., 382 A.2d 413, 429 (N. J. 1977). Whether a decision by the regional office rating board will be rendered void for failure to consider section 3.343(a) will depend on the facts and circumstances in individual cases. If the claimant was not prejudiced by the error, failure to consider section 3.343(a) by the rating board does not render a decision void. See paras. 9-12.

3. In the present case, the veteran had been rated 100% disabled on a schedular basis for a service-connected psychiatric condition since 1979. Following an examination, in April 1986, the rating board reduced the veteran's rating to 70% effective from July 1, 1986. The rating contained no reference to 38 C.F.R. § 3.343(a). The veteran appealed this decision to BVA. A hearing was

conducted and at the hearing the veteran's representative argued that 38 C.F.R. § 3.343(a) should be applied to the case. Following a de novo review, the BVA issued a decision on October 29, 1987, finding that a rating in excess of 70% was not warranted. In its decision, the BVA cited the provisions of 38 C.F.R. § 3.343(a) and noted that the material improvement shown in the evidential record would in all probability be maintained under the ordinary conditions of life. In October 1988, based on additional evidence, a decision was rendered by the regional office rating board to increase the schedular rating of the veteran to 100% effective from August 9, 1988. The veteran appealed the effective date of the rating, contending that the effective date of the restoration of his total evaluation should be the effective date of the reduction, July 1, 1986. In December 1989, the BVA affirmed the rating board's decision. The veteran appealed to the Court of Veterans Appeals alleging entitlement to the 100% evaluation from July 1, 1986.

4. The regulation in question, 38 C.F.R. § 3.343(a), provides that when a veteran has a total disability rating, not granted purely because of hospital, surgical, or home treatment, or individual unemployability, the rating will not be reduced in the absence of clear error without examination showing material improvement in physical or mental condition. This section further provides:

Examination reports showing material improvement must be evaluated in conjunction with all the facts of record, and consideration must be given particularly to whether the veteran attained improvement under the ordinary conditions of life, i.e., while working or actively seeking work or whether the symptoms have been brought under control by prolonged rest, or generally, by following a regimen which precludes work, and, if the latter, reduction from total disability ratings will not be considered pending reexamination after a period of employment (3 to 6 months).

Where the evidence shows that a veteran's condition has improved, this regulation requires the regional office rating board, before reducing the veteran's total disability rating, to consider the circumstances under which the condition has improved. The rating board is directed to consider all of the facts but in particular consider a spectrum of possibilities ranging from whether the condition improved during the normal course of everyday life or whether the condition has improved as a result of a restricted life-style such as one of prolonged rest or one otherwise precluding employment. Reduction cannot be considered if the improvement was attained while the veteran was following a regimen which generally precludes work, unless improvement is sustained (as shown by reexamination) after a period of employment.

5. In this regard, we note that in the Swan case, Department attorneys in the motion for remand took the position that benefits could not be reduced if BVA finds that improvement was attained while the veteran was not working or actively seeking employment. However, the regulation does not go so far as

that. In effect, it would permit reductions if the improvement occurred during a period when the veteran, while not working or seeking work, nonetheless engaged in activities which demonstrated a capacity for work. If, however, improvement occurred only following prolonged rest or because the veteran otherwise limited himself or herself to activities which would generally preclude work, the regulation precludes a reduction until there is a reexamination after a period of resumed employment. It is not clear whether the Department used the standard set out in its motion for remand as the basis for concluding that section 3.343(a) was not considered by the regional office. If so, the Department misapplied the rule and its conclusion was incorrect.

6. You question whether a regional office rating decision may be upheld in the absence of a specific reference in it to section 3.343(a), and if it need not be cited, how closely must the language in the decision trace the language in the regulation. Neither the regulations nor statutes governing VA benefits require that where section 3.343(a) is for application, the rating board must cite it. Further, failure to cite section 3.343(a) does not mean that it was not considered. Specific reference to the citation would obviously be helpful for review purposes, but a rating decision may be upheld in the absence of the specific citation. Ideally, the rating decision would state in clear terms the legal and factual basis for it. It does not matter, however, how closely the decision tracks the language of section 3.343(a) or whether it tracks it at all. What controls, whatever form the rating decision takes, is whether the record in its entirety, including the language in the rating decision, supports a conclusion that section 3.343(a) has been applied by the rating board or, if this cannot be established, that a failure to apply it was harmless error.

7. When a case is referred to BVA on appeal, the Board is required to perform a de novo review. 38 U.S.C. § 7104(a) (formerly § 4004(a)). See also, Boyer v. Derwinski, 1 Vet. App. 531, 534 (1991). In making such a review, it may look beyond the four corners of the rating decision to determine whether the rating board considered section 3.343(a). It is required to look at all of the evidence of record. Accordingly, a prior rating noting improvement and providing for a future exam may be considered. This may not be sufficient evidence to show that section 3.343(a) was considered in the rating at issue, since the issue is not just improvement in condition but the circumstances under which the improved condition is attained. Prior ratings, however, are part of the record to be reviewed.

8. You also ask: " [I]f BVA cannot determine from the rating decision itself or otherwise whether 38 C.F.R. § 343(a) was considered, can the deficiency be cured by the letter notifying the veteran of the reduction, by a subsequently issued statement of the case or by a BVA decision?" As noted above, BVA should look to the entire record including letters and the statement of the case in making its determination of whether section 3.343(a) was considered. BVA, in reviewing the case, may look to the letter notifying the veteran of the reduction in

rating, or the statement of the case, in deciding whether the agency of original jurisdiction considered the provisions of section 3.343(a) in its decision. If it cannot be determined from the rating decision, then the letter of notification of the reduction may more clearly show that section 3.343(a) was considered. Even if it appears that the rating decision did not consider section 3.343(a), since the statement of the case is required to state pertinent laws and regulations and discuss how such laws and regulations affect the agency's decision, the inclusion of section 3.343(a) at that point would cure any deficiency attributed to the rating with respect to the failure to consider section 3.343(a).

9. As noted in paragraph 2, failure by the regional office to consider the provisions of section 3.343(a) does not render the decision void. Neither does failure to cite a pertinent regulation in the statement of the case. If BVA cannot tell from the rating board decision, statement of the case or other evidence of record whether the provisions of section 3.343(a) have been correctly applied, it must determine whether the failure to consider section 3.343(a) is prejudicial error. If BVA concludes that it is, then it should overturn the regional office decision. If BVA concludes that the rating board's failure to consider section 3.343(a) or the failure of the statement of the case to include the provisions of section 3.343(a) does not prejudice the veteran, then it may properly proceed and render a decision on the case.

10. In determining whether a failure by the regional office to consider section 3.343(a) would be prejudicial to the veteran, an important consideration is the effect of failure to provide notice to the veteran of the regulation. This may raise the issue of whether due process rights have been abridged. In this regard, we note the statement of the case affords the veteran a measure of due process in that it apprises the veteran of all pertinent laws and regulations being considered. See S. Rep. No. 1843, 87th Cong., 2d Sess., reprinted in 1962 U.S. Code Cong. & Ad. News 2576, 1577. Required by law and regulation to contain all pertinent laws and regulations, it is designed to afford the veteran an opportunity to present the case on appeal. Thus, it may be argued that if the regulation is not referenced in the statement of the case, the veteran may be misled as to the true standards for eligibility and as a result fail to make appropriate argument or supply pertinent evidence.

11. Another consideration with respect to possible prejudicial error is the Department's statutory "duty to assist". To place veterans in the position of having to find out what regulations apply to their claims would require veterans to develop expertise in laws and regulations on veterans benefits before receiving compensation. This would change the environment of the adjudication system, a result with which COVA has expressed disagreement. See Akles v. Derwinski, 1 Vet. App. 118, 121 (1991).

12. Notwithstanding the above considerations, there may be situations where the facts show that the veteran is not prejudiced by failure to include section

3.343(a) in the statement of the case, e.g., where the veteran or the veteran's representative raises the issue of the application of section 3.343(a) before the BVA on appeal. There is not a notice problem if it is apparent that the veteran was aware of the regulation and has even argued it. In such a case a subsequent BVA decision addressing section 3.343(a) would cure any defect caused by failure of the rating board to consider section 3.343(a). See Thompson v. Derwinski, 1 Vet. App. 252 (1991) (BVA decision not disturbed where the ultimate outcome of the case was not prejudiced by an error) and Whitaker v. Derwinski, 1 Vet. App. 490 (1991) (failure of the Board to correctly perform an analysis applicable to reopened claims did not prevent COVA from rendering a decision where the proper outcome is clear from the facts). But see, Schafrath, 1 Vet. App. at 589 and Lehman v. Derwinski, 1 Vet. App. 251 (1991) (where the facts showed veteran was prejudiced by failure of the Department to follow its regulations, BVA decision found to be void).

13. Questions 2(d) and 2(e) assume that VA regional office rating decisions which disregard or fail to cite 38 C.F.R. § 3.343(a) are void rather than voidable. As previously noted, since the rating board is not required to specifically cite section 3.343(a), its failure to cite this regulation does not render the decision void or voidable. Failure by the rating board to consider the provisions of this regulation renders the decision voidable, but may be an error which is curable by subsequent acts. See paragraphs 8 and 9.

14. In determining which regulations must be cited in BVA decisions, BVA must comply with the provisions of 38 U.S.C. § 7104(d). This section provides that decisions of the BVA shall include "findings and conclusions, and the reasons or bases for those findings and conclusions on all material issues of fact and law presented on the record." (Emphasis added). Material issues would be those issues which are considered to have direct bearing on the case. Where a veteran raises a well-grounded claim FN1 to which a regulation could reasonably apply, the Court of Veterans Appeals has held that BVA must apply the regulation or give an explanation of why it is not applicable. The court noted that where a VA regulation is made potentially applicable through the assertions and issues raised in the record, refusal to acknowledge or consider the regulation is "arbitrary, capricious, an abuse of discretion." Schafrath v. Derwinski, 1 Vet. App. at 593. Regardless of whether application of the regulation results in a decision favorable to the veteran, if an issue has been raised, it must be disposed of by application of the appropriate pertinent regulation. Thus, in Schafrath the court noted that where the veteran claimed disability due to pain in an elbow but was reduced based on full range of motion of his elbow, BVA should have considered the regulation which provided for functional disability due to pain. See also, Payne v. Derwinski, 1 Vet. App. 85 (1990). In our view, failure by BVA to consider the applicability of a pertinent regulation renders the Board's decision voidable.

15. You question whether legal opinions set forth in memoranda or briefs from

General Counsel to COVA such as in the Swan case have any binding effect on Department officials other than in the case then before COVA. In the representation of the Department before COVA, or indeed before all courts, it is, of course, imperative that in our briefs and legal memoranda this office strive to set forth legal opinions and arguments and the analysis upon which they are based as consistently as possible. At the same time, it must be recognized that a brief or legal memorandum submitted by Department attorneys in COVA cases represents the Department's argument on a particular case. The court may or may not accept the Department's argument. It is the court's legal conclusions with respect to a case which are binding on the Department in future cases, not the argument submitted in briefs or legal memoranda submitted by the Department (unless the court specifically notes the points of the argument and accepts them). We note that in the Swan case, COVA did not interpret section 3.343(a) or state what is necessary to determine whether it has been applied. It appears that the court issued the order because both sides agreed that the regulation had not been considered and, in that case, that the rating decision was void. It must be noted, however, that neither party's interpretation in Swan included any consideration of whether the failure to take section 3.343(a) into account may have constituted nonprejudicial error. We can only surmise that perhaps the record and decisions in Swan were so defective in this regard that consideration of this issue was precluded. In any event, this presents an issue which has not yet been decided by COVA. Accordingly, the Department may, in future cases, argue for a more appropriate application of section 3.343(a).

16. As noted above, although a party's briefs and legal memoranda are part of the court record, they do not have precedential effect. They generally contain the facts of the case, applicable law and an argument for the court to consider. A court takes the brief under advisement. If a court rules on a case without comment, the Department's brief is still only a part of the record. A legal opinion set forth in the brief does not become binding on the agency as if the court had substituted it for its opinion, and any opinions by the General Counsel which are to be given precedential effect under 38 C.F.R. § 14.507 will be clearly so designated.

17. Finally, with respect to prior uncontested decisions which involved section 3.343(a), there is a rebuttable presumption in favor of the action of an administrative agency. The determination of an administrative agency is presumed reasonable, not arbitrary or capricious, and made in accordance with the statute. 2 Am. Jur.2d. Administrative Law, § 750 (1975). See also, Pacific Employees Ins. Co. v. Industrial Accident Com'n, 122 P.2d 570, 575 (Cal. 1942); Banton v. Belt Line Ry., 268 U.S. 413, 422 (1925) (presumption is that an order was reasonable and valid, and the burden was on appellee to establish its invalidity); and Pittston Coal Group v. Sebben, 488 U.S. 105, 121-122 (1988) (Congress has not imposed on the agency a duty to reconsider finally determined claims even where improper standard was used by the agency.) All claimants were afforded the right of appeal of the rating decision and where such decisions

were appealed, there is no reason to believe that correct action was not taken with respect to section 3.343(a) in those cases. Accordingly, a mass review of past claim files is not necessary.

HELD:

1. A rating board decision may be upheld in the absence of specific reference in the decision to section 3.343(a) if all of the evidence of record, including the decision, allows a conclusion to be drawn that section 3.343(a) has been considered and applied to the case. If it cannot be determined that it was considered at the regional office level, then BVA must determine whether the claimant was prejudiced by this error. The Board may, under some circumstances, decide that issuing a decision addressing the issue without further action is appropriate. In other circumstances, the Board may conclude, based on all the evidence of record, that the failure to consider section 3.343(a) resulted in prejudicial error and reverse the rating decision reducing the veteran's rating.

2. (a) In the absence of a specific reference to section 3.343(a) in the rating decision, language closely tracking that of the regulation may be of assistance to the reviewing authority in determining whether it was considered. However, language closely tracking that of section 3.343(a) is not mandatory. If it is apparent from the findings, language of the rating and the evidence of record that section 3.343(a) has been correctly applied, the rating decision should be upheld.

(b) On appeal, BVA makes a de novo review which allows it to look beyond the four corners of the regional office rating decision to make its decision with regard to whether section 3.343(a) was applied. A previous rating showing improvement may be considered in determining the current condition of the veteran.

(c) If BVA cannot determine from the rating decision itself whether section 3.343(a) has been considered, BVA may use a letter notifying the veteran of the reduction or subsequent statement of the case as evidence that it was considered. If it is determined that the rating decision failed to include consideration of section 3.343(a) but the statement of the case demonstrates that such failure was nonprejudicial, the error is cured. Likewise, a subsequent BVA decision may cure a failure to consider section 3.343(a) in the rating decision or failure to include it in the statement of the case if it is determined that these errors did not cause substantial prejudice to the veteran's case.

(d) If it can be shown that a regional office rating board disregarded section 3.343(a), its decision reducing the veteran's rating would be voidable.

(e) Failure to cite section 3.343(a) in a rating board decision does not render the decision void ab initio. Rating decisions are not required to cite all applicable laws and regulations.BVA decisions are required to include all issues and laws material to the case. Where a veteran raises a well-grounded issue, all laws or regulations necessary to properly dispose of the claim must be cited by the BVA, and failure to do so would result in a voidable Board decision.

3. An opinion by General Counsel in a memorandum or brief to COVA sets forth the Department's position in the case in which it is filed. It has binding effect on Department officials only to the extent that the court specifically adopts the argument in its decision. In the Swan case, the court did adopt the legal interpretations made by the parties. These interpretations, however, did not include any consideration that the failure to take section 3.343(a) into account may constitute nonprejudicial error. Accordingly, there is room for clarification in this area and the Department is not bound to use the same argument regarding section 3.343(a) in appropriate cases in the future.

4. If an opinion or position set forth by General Counsel in argument before COVA is not expressly embraced by the court in its holding, the court's decision is not controlling precedent with respect to that position.

1 A well-grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation. Murphy v. Derwinski, 1 Vet. App. 78, 81 (1990).

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