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Vet. Aff. Op. Gen. Couns. Prec. 19-92

TEXT:

QUESTIONS PRESENTED:

1. In the event of a readjustment in the rating schedule, does section 103 of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414-415 (1991) prohibit any reduction in the evaluation assigned to a service-connected disability unless new medical evidence supports a reduction of the rating under the superceded rating criteria?

2. Does the protection afforded by section 103 extend to minimum ratings that have been eliminated by a readjustment of the rating schedule? This question was illustrated by the following hypothetical situation: A veteran is receiving a minimum 10 percent rating under 38 C.F.R. Part 4, Diagnostic Code 7528 for residuals of a malignancy of the genitourinary system. After the minimum rating is eliminated by a readjustment of the rating schedule, the veteran suffers a recurrence of cancer and is assigned a 100 percent evaluation for the allowable period under the new rating criteria. If as a result of treatment the cancer again disappears completely leaving no residuals, may a noncompensable evaluation be assigned under the new rating criteria or must the 10 percent minimum evaluation be assigned under the superceded criteria?

3. Does section 103 permit, in a case where a veteran has a combined disability evaluation, the reduction of individual evaluations by reason of new rating criteria rather than an improvement in the veteran's disability as long as the combined evaluation, and hence, the total monetary benefit is not reduced?

4. In the event of legislative changes to those provisions of 38 U.S.C. § 1114 which prescribe the circumstances under which special monthly compensation is payable, would the protection afforded by section 103 extend to veterans who are no longer entitled to payment of special monthly compensation by reason of changed criteria rather than an improvement in their disabilities?

COMMENTS:

1. This is in response to your request for an opinion on numerous issues relating to the application of section 103 of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414-415 (1991). Section 103 provides in part as follows:

Section 355 now 38 U.S>C. § 1155 is amended by adding at the end the following: 'However, in no event shall such a readjustment in the rating schedule cause a veteran's disability rating in effect on the effective date of the readjustment to be

reduced unless an improvement in the veteran's disability is shown to have occurred.'

2. The impetus for its enactment was the adoption by the Secretary of Veterans Affairs (Secretary), after a period of notice and public comment, of new criteria for rating hearing loss, 52 Fed. Reg. 44,119 et seq. (November 18, 1987). The application of these new criteria resulted in the reduction in the evaluations assigned to some veterans' service-connected hearing losses by reason of the changed criteria or testing methods rather than any change in their disabilities. In an effort to prevent this outcome, the Chief Benefits Director, citing Paragraph 50.13b of the VA Adjudication Procedure Manual, M21- 1, instructed VA field stations that hearing disability ratings properly in effect on the day preceding the effective date of the change in testing methods were not to be reduced or discontinued in the absence of a finding of change in physical condition. Subsequently, in Op.G.C. 11-88 (10-27-88) (later reissued as O.G.C. Prec. 66-90), the General Counsel held that paragraph 50.13b of M21-1 was not legally appropriate because Congress had not authorized VA to create dual rating schedules or to pay benefits based on superceded criteria for rating hearing loss.

3. The legislative history of section 103 discloses that Congress was fully aware of the effect of the adjustment in the rating schedule relative to hearing loss and of the General Counsel's opinion at the time of consideration of H.R. 1047, the bill which became section 103. 137 Cong. Rec. H2118-2119 (daily ed. April 10, 1991) (statement of Rep. Applegate); 137 Cong. Rec. H5928 (daily ed. July 29, 1991) (statement of Rep. Montgomery); Joint Explanatory Statement on H.R. 1047, 137 Cong. Rec. H5931 (daily ed. July 29, 1991). H.R. 1047 reflected a compromise agreement between the Senate and House Committees on Veterans' Affairs on certain bills, including S. 2100 and H.R. 5326, which had been considered but not enacted in the 101st Congress.

4. The original Senate bill, S. 2100, would have provided that a readjustment in the schedule for rating disabilities "shall not have the effect of reducing any ratings in effect on the date that the readjustment takes effect." It also would have authorized, rather than required, prospective application of changes in the disability rating schedule. S. 2100 was intended to "clarify that VA has authority to apply only to new claims a change in evaluation methods or standards under the VA disability rating schedule." 136 Cong. Rec. S1001 (daily ed. February 7, 1990); S. Rep. No. 379, 101st Cong., 2nd Sess. 97-98 (1990). The House version, H.R. 5326, contained language identical to section 103. Citing the effect of the readjustment of the rating schedule relative to hearing loss on claims for increased ratings, the House Committee on Veterans' Affairs stated that " e nactment of this provision is necessary to protect veterans' ratings, especially in light of forthcoming future readjustments to the rating schedule which otherwise could have resulted in similar reductions." H.R. Rep. No. 857, 101st Cong., 2nd Sess. 14. (1990).

5. Both the sponsor of H.R. 1047 in the House and the Chairman of the House Veterans' Affairs Committee explained that section 103 of the bill would amend 38 U.S.C. § 355 (now § 1155) "to provide that no readjustment in the schedule for rating disabilities shall cause a veteran's disability rating in effect on the date of the

readjustment to be reduced unless an actual improvement in the veterans' disability has been shown to have occured." (emphasis added). 137 Cong. Rec. H2118 (daily ed. April 10, 1991) (statement of Rep. Applegate); 137 Cong. Rec. H5928 (daily ed. July 29, 1991) (statement of Rep. Montgomery).

6. Neither the language of section 103 nor its legislative history addresses the question of how much improvement in an individual veteran's disability is required before a rating may be reduced. It is clear, however, that Congress intended that those veterans who had ratings in effect when a readjustment in the rating schedule occurred would not be harmed by reason of the changed criteria. Accordingly, we conclude that in evaluating service-connected disabilities, adjudicators should consider both the old and the new rating criteria and apply the new criteria only if there has been sufficient improvement in a disability to warrant reduction under the old criteria. If we were to apply the new criteria to those veterans whose disabilities had improved, but the improvement is not enough to justify a reduction under the old criteria, these veterans would be disadvantaged by the new criteria. When an improvement in a disability sufficient to warrant a reduction under the old criteria occurs, however, the protection afforded by section 103 ceases and the new rating criteria should be applied. The new rating criteria should be applied, even in cases where their application will result in a rating reduction greater than would result from application of the old rating criteria. At this point, it is not the adjustment of the rating schedule which causes the rating in effect at the time of the adjustment to be reduced.

7. We conclude that the answer to the question raised in your hypothetical is that after the elimination of the minimum ten percent under 38 C.F.R. Part 4, Diagnostic Code 7528 for residuals of a malignancy of the genitourinary system and the assignment of a 100 percent rating for the allowable period under new rating criteria, a noncompensable evaluation under the new rating criteria should be assigned. The protection afforded by section 103 applies only to ratings in effect when an adjustment in the rating schedule occurs. In your example, it is not the minimum 10 percent rating previously assigned under the old criteria which is being reduced. Instead, it is the 100 percent rating assigned under the new rating criteria which is being reduced.

8. As to whether the protection afforded by section 103 extends to combined ratings, the language of this provision provides no indication of any intent to exclude combined disability ratings. Further, there is no evidence in the legislative history that Congress intended to authorize an exception to the general rule established by section 103. Accordingly, we conclude that even if the total monetary benefits payable to a veteran for all service-connected disabilities would not be affected, section 103 does not permit the reduction of individual disability ratings solely by reason of new rating criteria.

9. As to whether the protection afforded by section 103 applies to legislative changes in the provisions concerning payment of special monthly compensation, we observe that the amendment made by section 103 applies by its terms only to readjustments in the rating schedule made by the Secretary of Veterans Affairs. See 38 U.S.C. s 1155. In the event of legislative changes in the provisions concerning special monthly compensation,

the language of the change and its legislative history will govern whether Congress intends to preclude reductions in the rates of special monthly compensation by reason of changed criteria.

HELD:

1. Section 103 of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414-415 (1991) requires that when evaluating service-connected disabilities, adjudicators consider both the old and the new rating criteria and apply the new criteria when an improvement in a disability sufficient to warrant a reduction under the old criteria occurs.

2. The protection afforded by Section 103 of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414-415 (1991) applies only to ratings in effect when an adjustment in the rating schedule occurs. Hence, if a veteran is receiving a minimum 10 percent rating under 38 C.F.R. Part 4, Diagnostic Code 7528 for residuals of a malignancy of the genitourinary system when the minimum rating is eliminated by a readjustment of the rating schedule and he or she subsequently suffers a recurrence of cancer and is assigned a 100 percent evaluation for the allowable period under the new rating criteria, should the cancer again disappear completely leaving no residuals, a noncompensable evaluation under the new rating criteria should be assigned.

3. Even if a combined evaluation, and hence, the total monetary benefit payable for all service-connected disabilities is not reduced, section 103 of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414-415 (1991) does not authorize the reduction of individual disability ratings under new rating criteria in the absence of evidence of improvement in a veteran's disability.

4. In the event of legislative changes to those provisions of 38 U.S.C. s 1114 which prescribe the circumstances under which special monthly compensation is payable, the language and, if necessary, the legislative history of such legislative changes will determine whether Congress intends to preclude reductions in the rates of special monthly compensation solely by reason of the changed criteria.

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