

**Department of
Veterans Affairs**

Memorandum

Date: April 25, 1994

O.G.C. Precedent 10-94

From: General Counsel (022)

Subj.: Effective Dates Of Awards Based On Judicial Precedents

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Does 38 U.S.C. § 5110(g), which governs effective dates of awards of compensation and pension benefits based on liberalizing laws or administrative issues, apply to awards based upon judicial precedents?

COMMENTS:

1. In a recent opinion, O.G.C. Prec. 9-94, we advised that court decisions invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to prior "final" adjudications of claims, but should be given such effect in relation to claims still open on direct review. Questions have now arisen as to the effective dates of awards based on court precedents when claims are filed after the precedential decisions are handed down.

2. As a general rule, the effective dates of awards of compensation or pension benefits, based upon either original claims, claims reopened after final adjudication, or claims for increased benefits, are to be determined in accordance with the facts found but in no event may they be earlier than the date of receipt of claim. 38 U.S.C. § 5110(a). Thus, if an initial claim is first filed after a controlling judicial precedent is issued, and benefits are awarded on the basis of that precedent, pursuant to section 5110(a) the date of receipt of claim would generally be the earliest possible effective date for the award. Similarly, if there had been a "final" adjudication of a claim, and a later claim is allowed on the basis of a judicial precedent, the resulting award would be effective (at the earliest) from date of receipt of the later claim.

3. Questions have arisen as to whether 38 U.S.C. § 5110(g), and the implementing VA regulation (38 U.S.C. § 3.114(a)), which offer an exception to the general rule of 38 U.S.C.

§ 5110(a), would permit a different result. Section 5110(g) authorizes awards retroactive for as much as one year from date of receipt of claims when awards are made "pursuant to any Act or administrative issue," although in no event may they be made effective earlier than the effective date of the liberalizing act or administrative issue. Thus, for example, if an administrative issue (such as a VA regulation) becomes effective December 1, 1994, and an award is made pursuant thereto on a claim received on or before November 30, 1995, the award may be made retroactive to December 1, 1994, if supported by the facts as found.

4. While court precedents may effect changes in operative rules of law no less than do acts of Congress or amendments to regulations, section 5110(g) by its terms does not apply to awards grounded solely in the former. We have reviewed the legislative history of Public Law 87-825, which added the provision as former section 3010(g) in 1962, and find no suggestion Congress intended that it apply to liberalizing interpretations of law by the courts. That is entirely understandable given the unavailability of review of individual claim decisions prior to the Veterans' Judicial Review Act of 1988. Even the reviewability of challenges to veterans benefit statutes on constitutional grounds was an unsettled point prior to Johnson v. Robison, 415 U.S. 361 (1974).

5. We conclude, therefore, that 38 U.S.C. § 5110(a) controls the effective dates of awards based solely upon preceptual decisions of courts of law. Whether a claim is pending at the time an entitlement-conferring judicial precedent is issued, or is filed after the precedent's issuance, the effective date should be fixed in accordance with the facts found but may not be earlier than the date of receipt of the claim.

6. If, however, a judicial precedent results in an administrative issue (such as a liberalizing change in a regulation), and an award may be predicated upon the administrative issue, then 38 U.S.C. § 5110(g) (which authorizes certain awards from the effective dates of acts of Congress or administrative issues) should be used to determine the effective date of award if to do so would be to the claimant's advantage.

HELD:

The effective dates of awards of compensation or pension based upon judicial precedents alone are governed by 38 U.S.C. § 5110(a) and not 38 U.S.C. 5110(g), i.e., the effective dates may generally be no earlier than dates of receipt of claims. However, if an award may be predicated upon an administrative issue, such as an amendment to a regulation, prompted by a judicial precedent, 38 U.S.C. § 5110(g) should be applied in assigning the effective date if to do so would be to the claimant's benefit.

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