Department of Veterans Affairs

Memorandum

Date: June 7, 1999 VAOPGCPREC 6-99

From: General Counsel (022)

Subj: Consideration of Claim of Total Disability Based on Individual Unemployability Where Schedular Total-Disability Rating in Effect

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

a. May a claim for a total disability rating based on individual unemployability for a particular service-connected disability be considered when a schedular 100-percent rating is already in effect for another service-connected disability?

b. Would any additional benefit be available in the case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability for which the veteran has been awarded a TDIU rating?

DISCUSSION:

1. These issues arise in the context of a memorandum decision issued by the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims (CAVC)) in which that court found that the Board of Veterans' Appeals (BVA) failed to address ambiguities in the regulation governing total disability ratings based on unemployability of the individual. The BVA had denied the veteran's claim for a rating of total disability based on individual unemployability (TDIU) due to post-traumatic stress disorder (PTSD) and determined that a TDIU rating based on all service-connected disabilities was not for consideration. The BVA found that the plain meaning of 38 C.F.R. § 4.16(a) dictated that, because the veteran already had a 100-percent schedular rating, it could not consider a claim for TDIU. The CAVC found, however, that "the language of the regulation is equally susceptible to a contrary interpretation" and that "[n]othing in the regulation addresses whether 'the schedular rating' refers to the discrete rating or rather to the combined rating."

The CAVC remanded the claim for the BVA to address the perceived ambiguity in the regulation in light of case law and to address what, if any, benefit the veteran could obtain if the veteran had a 100-percent schedular evaluation for a heart condition and a TDIU rating for PTSD.

2. The Department of Veterans Affairs' (VA) Schedule for Rating Disabilities is based "as far as practicable" on the average impairment in earning capacity in civilian occupations resulting from particular disabilities. 38 U.S.C. § 1155; 38 C.F.R. § 4.1. However, VA recognizes that the rating schedule will not in all cases reflect a veteran's true level of disability. *See Holland v. Brown*, 6 Vet. App. 443, 446 (1994). Thus, 38 C.F.R. § 3.321(b)(1) provides that, while "[r]atings shall be based as far as practicable, upon the average impairments of earning capacity[,] . . . [t]o accord justice . . . to the exceptional case where the schedular evaluations are found to be inadequate" an extra-schedular rating may be established.

3. Section 4.16(b) of title 38, Code of Federal Regulations, states VA's "established policy . . . that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled." In order to fulfill this objective, 38 C.F.R. § 4.16(a) provides that, "[t]otal disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." Section 4.16, by its terms, contemplates that all of a veteran's disabilities will be considered together in determining whether a TDIU rating under that provision is appropriate. In particular, section 4.16(a), in establishing minimum schedular requirements which allow regional office adjudicators to award TDIU ratings without reference to the Director of the Compensation and Pension Service, contains a number of examples of situations involving multiple disabilities, the combination of which is insufficient to warrant a total disability rating under the rating schedule. Section 4.16(a) also provides that nonservice-connected disabilities or previous unemployability status will be disregarded where the

specified percentage ratings for service-connected disability or disabilities are met and "in the judgment of the rating agency such service-connected *disabilities* render the veteran unemployable." (Emphasis added.) Further, the last sentence of section 4.16(b) provides that, in referring to the Director of the Compensation and Pension Service a claim in which the minimum percentage ratings are not met, the rating board will include a statement "as to the veteran's service-connected disabilities" and other factors having a bearing on unemployability. Also, 38 C.F.R. § 3.341(a) refers to establishment of a TDIU rating "based on a disability or combination of disabilities" and provides that it must be determined that "the service-connected disabilities" are sufficient to produce unemployability without regard to advancing age. Thus, in each instance, the regulations contemplate veterans with multiple disabilities and reference consideration of all service-connected disabilities from which a veteran may suffer in determining whether a TDIU rating should be established.

4. Section 3.340 of title 38, Code of Federal Regulations, also contemplates the assessment of the veteran's overall degree of disability when determining entitlement to a TDIU rating and the assignment of a total disability rating for a specific individual on *either* a schedular or non-schedular basis. That regulation provides that, "[t]otal ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation *or* . . . where the requirements of [section 4.16] are present." 38 C.F.R. § 3.340(a)(2). This regulation authorizes the assignment of a total disability rating if a veteran has one or a number of disabilities which render the veteran unemployable pursuant to either the schedular criteria *or* 38 C.F.R. § 4.16(a). The regulation thus contemplates the assessment of the combined effects of the veteran's service-connected disabilities to determine whether the veteran may be awarded a total disability rating. Further, as the CAVC has noted, 38 C.F.R. § 3.340(a)(2) recognizes two alternate means, e.g., the Schedule for Rating Disabilities and section 4.16, for assigning a total disability rating. *Holland*, 6 Vet. App. at 447. The CAVC has recognized that the Schedule for Rating Disabilities and the requirements for evaluating a TDIU rating claim complement each other and that, "a veteran may seek a

rating under the Schedule, provided that his condition manifests the symptoms listed in the appropriate diagnostic code and relevant rating, *or* a veteran may seek a total disability rating, provided that the condition renders it impossible to secure or follow a substantially gainful occupation." 6 Vet. App. at 446 (emphasis added).

5. Section 4.15 of title 38, Code of Federal Regulations, provides that, "[t]otal disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." Accordingly, a 100-percent schedular rating represents a total impairment in earning capacity in the average person, or, stated another way, unemployability. The CAVC has recognized that a 100-percent rating under the Schedule for Rating Disabilities means that a veteran is totally disabled. *Holland v. Brown*, 6 Vet. App. 443, 446 (1994), citing *Swan v. Derwinski*, 1 Vet. App. 20, 22 (1990). Thus, if VA has found a veteran to be totally disabled as a result of a particular service-connected disability or combination of disabilities pursuant to the rating schedule, there is no need, and no authority, to otherwise rate that veteran totally disabled on any other basis. As both a 100-percent schedular rating and a total-disability rating awarded pursuant to section 4.16(a) reflect unemployability, if an individual has a 100-percent schedular rating, a determination that that individual is unemployable as a result of service-connected disabilities under section 4.16(a) is unnecessary to adequately compensate the individual and superfluous. In other words, VA can find a veteran to be totally disabled either under the rating schedule or, if the veteran does not meet the criteria for a 100-percent schedular rating but is in fact unemployable, under section 4.16(a).

6. Read together, these provisions indicate that VA will first look to the rating schedule in assigning a disability rating, but will resort to other regulatory provisions such as 38 C.F.R. § 4.16(a) when the schedular ratings prove inadequate in a particular veteran's case. Further, in order to determine whether resort to an extra-schedular rating under section 4.16(a) is necessary to adequately compensate a veteran, the veteran's overall degree of disability, taking into account all service-connected disabilities must be considered.

7. This regulatory scheme is reflected in Veterans Benefits Administration Adjudication Procedure Manual M21-1 (M21-1), which directs adjudicators to make a decision as to whether the veteran meets the requirements for a schedular 100-percent evaluation before considering the issue of individual unemployability. M21-1, Part VI, para. 7.09a.(1) (Change 58, Jan. 31, 1997). There is no further directive to consider the issue of individual unemployability if the adjudicator finds that the veteran has met the requirements for a schedular 100-percent evaluation. The clear implication of this provision is that the adjudicator is to consider the issue of a schedular 100-percent evaluation first because, if he or she awards a schedular 100-percent evaluation based on service-connected disability, the issue of individual unemployability is moot. In other words, if the adjudicator finds the veteran to be totally disabled under the rating schedule, section 4.16(a) is not for application.

8. In *Goodman v. Derwinski*, 1 Vet. App. 280, 282 (1991), and *Hodges v. Brown*, 5 Vet. App. 375, 379 (1993), cited by the CAVC in the decision which gave rise to this request for opinion, the CAVC noted that the BVA should consider the impact of a veteran's service-connected disability, both alone and in combination with other service-connected disabilities, on the ability of the veteran to secure and follow a substantially gainful occupation when determining entitlement to a TDIU rating. In both of these cases, the veteran had several service-connected disabilities, the combination of which was not sufficient for a total schedular disability rating. The CAVC indicated that the BVA would be required to determine whether any of these disabilities alone, or the combined effect of these disabilities, rendered the veteran unemployable under 38 C.F.R. § 4.16(a). These decisions shed no light on the question of whether a veteran already rated as totally disabled under the rating schedule can be considered for a TDIU rating. We note that in *Kaiser v. Brown*, 5 Vet. App. 411 (1993), also cited by the CAVC in its decision regarding the instant claim, the court remanded a claim for assignment of a TDIU rating under 38 C.F.R. § 4.16, although the court appeared to believe that the same disability which justified a TDIU rating also met the rating schedule criteria for a 100-percent disability rating. However, the court's decision in *Kaiser*, which did

not address the relationship between schedular and TDIU ratings, is inconsistent with its later decision in *Vettese v. Brown*, 7 Vet. App. 31, 34-35 (1994), which stated that, "[a] claim for TDIU presupposes that the rating for the condition is less than 100%, and only asks for TDIU because of 'subjective' factors that the 'objective' rating does not consider." In our view, *Vettese* makes clear that a TDIU rating is only for consideration where a schedular rating does not reflect the true degree of the veteran's disability.

9. In the single-judge decision remanding the instant claim, the court noted what it perceived as ambiguities in 38 C.F.R. § 4.16(a) which cast into question the BVA's reliance on the plain meaning of that regulation. (However, in a dissent from an order denying panel review in this case, another judge observed that, under the "plain meaning" of section 4.16(a), "it seems clear that a TDIU rating is for consideration only when the veteran is not already assigned a 100% schedular rating.") The court stated two concerns in this regard. First, the court noted that the regulation's provision that a TDIU rating may be assigned "where the schedular rating is less than total" does not address whether the schedular rating referred to is a rating for a discrete condition or a combined rating. Second, the court noted that the regulation changes from plural to singular and back to plural in referring to ratings and disabilities. For the reasons stated below, we do not consider the regulation ambiguous.

10. The regulation does state that total disability "ratings" may be assigned where the schedular "rating" is less than total when the disabled veteran is unable to follow a substantially gainful employment as a result of service-connected "disabilities." In our view, the above discussion of the regulatory scheme of which 38 C.F.R. § 4.16(a) is a part precludes the interpretation that use of the term "ratings" suggests that more than one total disability rating could be assigned to the same veteran under section 4.16(a). *See Richards v. United States*, 369 U.S. 1, 11 (1962) (provision of law should not be read in isolation). Rather, use of the plural "ratings" in the opening phrase merely reflects that the regulation may apply to the claims of a number of veterans. The subsequent reference to the schedular "rating" reflects a shift to discussion of the rating assigned to the

particular veteran with respect to whose claim the generally applicable regulation is being applied. Because, as discussed above, a TDIU rating taking into account all of a veteran's service-connected disabilities is only for consideration when a schedular rating does not reflect the particular veteran's true degree of disability, the reference to a schedular "rating" must refer to the veteran's combined rating, and not to the rating assigned to a particular disability. If the combined rating were not considered, it would not be possible to determine whether resort to an extra-schedular rating is necessary to adequately compensate the veteran. Finally, the reference to service-connected "disabilities" as resulting in inability to secure and follow a substantially gainful occupation merely reflects that all of a veteran's service-connected disabilities are to be taken into account in determining whether a TDIU rating is appropriate. Accordingly, we do not find the regulation ambiguous and believe that, read in context, the regulation plainly provides that a TDIU rating is for consideration only if a veteran is not already rated totally disabled under the rating schedule.

11. The CAVC, in remanding the instant claim, also noted that the BVA failed to address the possible applicability of the doctrine stated in *Brown v. Gardner*, 513 U.S. 115 (1994), and *Allen v. Brown*, 7 Vet. App. 439 (1995), that interpretive doubt is to be resolved in favor of the veteran. However, the doctrine referenced in *Gardner* and *Allen* is, as recognized by the Supreme Court, applicable only to resolution of ambiguity. *Gardner*, 513 U.S. at 117-18. Further, "[a]mbiguity is a creature not of definitional possibilities but of . . . context." 513 U.S. at 118. Where, as here, the meaning of the provision in question, read in context, is plain, the doctrine of resolving interpretive doubt in favor of the veteran has no application. *See Smith v. Brown*, 35 F.3d 1516, 1525 (Fed. Cir. 1994).

12. We note that our review of the history of 38 C.F.R. § 4.16(a) has revealed nothing which sheds doubt on our reading of the regulation, i.e., that a veteran may receive a TDIU rating only if the veteran does not otherwise qualify for a schedular total disability rating on any basis. Authorization for total disability ratings such as that found in current section 4.16(a) first appeared as an

addition to the 1933 Schedule for Rating Disabilities in Extension No. 4, issued by the Administrator of Veterans Affairs on November 15, 1941. Prior to issuance of this extension, the rating schedule merely stated that total disability exists when any impairment renders it impossible for the average person to follow a substantially gainful occupation. Extension No. 4 authorized total disability ratings "without regard to the specific provisions of the rating schedule" when the disabled person was unable to secure or follow a substantially gainful occupation as a result of his disabilities, if that person met specified requirements with respect to schedular ratings. The language "without regard to the specific provisions of the rating schedule" acknowledges that if the disabled veteran could not qualify for a total rating under the rating schedule, the veteran could otherwise (without regard to the rating schedule) qualify for a total disability rating under this extension. Nothing in Extension No. 4 suggests VA intended that a veteran could obtain a total disability rating based on the inability to secure or follow a substantially gainful occupation if the veteran was already rated as totally disabled based on the rating schedule. Furthermore, nothing in Extension No. 4 suggests that VA intended the assignment of total disability ratings based on the inability to secure or follow a substantially gainful occupation for specific disabilities (unless the disabled person had only one disability and that disability was rated less than totally disabling under the rating schedule).

13. Finally, Veterans Administration Technical Bulletin TB 8-276 (Dec. 13, 1956), "Reduction of 100 Percent Ratings," noted that, when it was proposed to reduce a rating of 100-percent due to a change in the rating schedule, the veteran would be informed of the right to submit evidence of individual unemployability and, if the veteran submitted evidence establishing individual unemployability accepted by the rating agency as due to service-connected disabilities, and otherwise met the requirements, the rating board had the authority to grant or continue a 100-percent rating. The specification of the veteran's right to submit evidence of unemployability when the rating board proposed to reduce a 100-percent schedular rating apparently presumed that, if the veteran previously had a 100-percent schedular rating for a disability, the veteran did not also have a separate TDIU rating, even one

based on another disability. If the veteran had had both a 100-percent schedular rating and a TDIU rating, there would have been no need to inform him or her of the right to submit evidence of unemployability when the rating agency proposed to reduce the 100-percent schedular rating. This bulletin is thus suggestive of our reading of the terms of 38 C.F.R. § 4.16(a).

14. Turning to the question of whether any additional benefit would be available in the case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability rated totally disabling under 38 C.F.R. § 4.16(a), 38 U.S.C. § 1114 establishes the rates of compensation associated with specific levels of disability. Subsection (j) of this section specifies a monthly monetary benefit payable "if and while [a] disability is rated as total." A number of subsections provide for the payment of higher amounts for specific disabilities or combinations of disabilities. However, no provision specifically provides for additional compensation in the case of a veteran with a service-connected disability rated as totally disabling and a separate TDIU rating for another, separate disability. Section 1114(s) does provide a higher rate of compensation "[i]f the veteran has a service-connected disability rated as total, and . . . has additional service-connected disability or disabilities independently ratable at 60 percent or more." However, we do not believe this statute may be read as authorizing a higher rate of compensation where a veteran has a total disability rating under 38 C.F.R. § 4.16(a) and a schedular rating of 60 percent or more. Since, as noted above, a rating under section 4.16(a) takes into account all of a veteran's service-connected disabilities, paying a higher rate of compensation based on a combination of a TDIU rating and a schedular rating would allow the same disability to be counted twice in determining the applicable rate and would conflict with the statutory requirement for "additional" disability. Further, TDIU ratings were established by regulation to assist veterans who did not otherwise qualify for compensation at the rate provided in 38 U.S.C. § 1114(j) for total disability. *See* 38 C.F.R. § 3.340(a)(2) ("[t]otal ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, *with less disability*, where the requirements

of [section 4.16] are present" (emphasis added)). It would represent a significant departure from the purpose of TDIU ratings to allow a veteran with a TDIU rating to combine that rating with a schedular rating to qualify for additional compensation under 38 U.S.C. § 1114(s). Therefore, in our view, no additional monetary benefit would be available in the hypothetical case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability for which the veteran has been awarded a TDIU rating.

15. While no additional monetary benefit would be available to a veteran who has a 100-percent schedular rating for a service-connected disability and a TDIU rating based on a separate disability, such veteran could hypothetically obtain the benefit of the procedural protections provided in 38 C.F.R. § 3.343(c). This regulation provides that, "[i]n reducing a rating of 100 percent service-connected disability based on individual unemployability, the provisions of § 3.105(e) are for application but caution must be exercised in such a determination that actual employability is established by *clear and convincing evidence*." (Emphasis added.) *See generally Collaro v. West*, 136 F.3d 1304 (Fed. Cir. 1998) (recognizing that VA may reduce a total schedular rating upon a lesser evidentiary showing than would be necessary to reduce a total disability rating premised on individual unemployability). However, as the purpose of the TDIU rating is to ensure adequate compensation for a veteran's disabilities, not additional procedural protections, the potential availability of this additional protection does not provide a basis for allowing a veteran with one service-connected disability rated 100-percent disabling under the rating schedule to receive a TDIU rating for another, separate disability.

16. In view of the foregoing, we conclude that neither the language of 38 C.F.R. § 4.16(a) or any other associated statute or regulation, nor the regulatory history associated with that provision, provides any indication that veterans who are entitled to a schedular 100-percent rating for one service-connected disability may also be entitled to a TDIU rating based on another service-connected disability.

HELD:

a. A claim for a total disability rating based on individual unemployability for a particular service-connected disability may not be considered when a schedular 100-percent rating is already in effect for another service-connected disability.

b. No additional monetary benefit would be available in the hypothetical case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability rated totally disabling due to individual unemployability under 38 C.F.R. § 4.16(a). Further, the availability of additional procedural protections applicable under 38 C.F.R. § 3.343(c) in the case of a total disability rating based on individual unemployability would not provide a basis for consideration of a rating under section 4.16(a) where a veteran already has a service-connected disability rated 100-percent disabling under the rating schedule.

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