

DATE: 11-07-91

CITATION: VAOPGCPREC 71-91  
Vet. Aff. Op. Gen. Couns. Prec. 71-91

**TEXT:**

**SUBJECT:** Scope of 38 C.F.R. 3.105(e)

**QUESTION PRESENTED:**

Does 38 C.F.R. § 3.105(e) apply to all proposed reductions in evaluation of individual disabilities or only those reductions which result in reduction or discontinuance of compensation payments currently being made?

**COMMENTS:**

1. This question arose in a case involving a decision of the Board of Veterans' Appeals (BVA) regarding the effective date of reduction of a rating where there was no reduction in total compensation being awarded to the veteran. In the case, the veteran had previously been assigned a rating of 20% from July 25, 1970, for residuals, gunshot wound, right arm, and 70% for a separate disability from May 1, 1974, with a combined rating of 80%. He received a rating by the regional office rating board on May 9, 1990, decreasing his evaluation of residuals, gunshot wound, right arm and shoulder from 20% to 0%. The same rating, however, increased the evaluation of his other disability from 70% to 100% effective July 1, 1988, thus making his combined rating 100%. The reduction in the rating for the residuals, gunshot wound, right arm was made effective March 13, 1990, the date of the VA examination.
2. The veteran appealed the effective date of reduction for the right arm condition to BVA. By decision dated April 22, 1991, BVA found that 38 C.F.R. § 3.105(e) applied to the reduction for the right arm condition and therefore the reduction could not be effective until August 31, 1990, the last day of the month following 60 days from the date of notice to the payee of the reduction. Moreover, in this case, the 20% rating was protected as of July 25, 1990, pursuant to 38 C.F.R. § 3.951. The Board of Veterans' Appeals held that since the reduced rating should not have been effective until August 31, 1990, protection under section 3.951 was in effect, and the rating for the right arm condition should be restored to 20%.
3. For clarification with respect to the regulation, we believe it necessary to first look at the authorizing statute. The authorizing statute for section 3.105(e) is found at section 5112(b)(6) (formerly section 3012(b)(6)) of title 38, United States Code. This section provides in pertinent part:

(T)he effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension—

(6) by reason of ... for compensation purposes, a change in service-connected or employability status or change in physical condition shall be the last day of the month following sixty days from the date of notice to the payee (at his last address of record) of the reduction or discontinuance;

The above statute, respecting effective dates, literally applies only to effective dates of reductions of monetary benefits; e.g., compensation. The statute is clear on its face. It does not provide for a sixty day grace period where there is only a reduction in evaluation with no corresponding reduction in compensation.

4. Legislative history of section 5112(b)(6) as noted in S.Rep. No. 2042, 87th Cong., 2d Sess. 8 indicates Congress' intention in enacting section 3012(b)(6) to substantially follow longstanding administrative practice in this area. In its report, the Committee noted that:

This substantially follows administrative practice of some 30 years standing. It provides a person receiving service-connected disability benefits a reasonable time to adjust to the reduction or discontinuance of his compensation benefits or, on the other hand, a period of time within which he may submit evidence to show that such reduction or discontinuance is not justified. Reprinted in 1962 U.S.Code Cong. & Ad.News 3260, 3267.

The above statement further suggests that the purpose of the 60-day grace period is more of an economic nature; e.g., continuation of benefits to allow sufficient time for adjustment to any problems associated with reduction or loss of benefits or for submission of evidence to show that the decrease in evaluation was unwarranted. We note that the World War Veterans Act of 1924, Pub.L. No. 242, s 205, 43 Stat. 607, 622 provided for a delayed effective date for reductions and discontinuances of compensation based on factual review. See also, Veterans Regulation No. 2(a) (July 28, 1933). FN1

5. In light of this, title 38 C.F.R. § 3.105(e) provides in pertinent part:

Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level.... i f additional evidence is not received within that period, final

rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. (Emphasis added.)

Based on the plain language of section 3.105(e), it is applicable only when two factors are present: (1) there is a reduction in evaluation of a service-connected disability or employability status; and (2) the lower evaluation would result in a reduction and discontinuance of compensation payments currently being made.

It must be recognized that reduction in evaluation is not synonymous with reduction in compensation. Under VA's Schedule of Rating Disabilities, a reduction in a single disability does not always result in reduction in compensation. Accordingly, reduction in evaluation with no corresponding reduction in compensation simply does not meet the criteria of the regulation. Any other interpretation of the regulation would be beyond the authority granted by the statute and could be viewed as inconsistent with the intent upon which the statute is based.

6. Literal or strict statutory interpretations give way where there is clear and convincing evidence of contrary legislative intent. See generally, 73 AmJur.2d Statutes s 275 (1974 & 1981 Supp.) and 2A N. Singer, Sutherland Statutory Construction § 46.07 (4th ed. 1984). Here, however, the legislative history of section 5112(b)(6) does not provide such evidence. Moreover, we do not find the words of section 5112(b)(6) or section 3.105(e) to be ambiguous. Interpretive rules do not permit departure from the literal meaning where statutes are unambiguous. Helvering v. N.Y. Trust Co., 292 U.S. 455 (1934).

7. Provision is made for situations where the claimant disagrees with the reduction in evaluation. Any time there is a reduction in evaluation, the claimant is entitled to appeal the decision of the rating board pursuant to 38 U.S.C. § 7105 (formerly 38 U.S.C. § 4005) as did the claimant in this case. Further, where there is no reduction in the amount of benefits payable, the claimant is not subjected to economic hardship during the course of the appeal and application of section 3.105(e) has no practical utility.

8. It appears that BVA erred in the decision that you cite in your request. We would point out, however, that the decision rendered by the Board of Veterans Appeals is a final decision and is binding in the absence of reconsideration by the Board. This decision is being issued as a precedent to guide future adjudications.

**HELD:**

38 C.F.R. § 3.105(e) does not apply where there is no reduction in the amount of compensation payable. It is only applicable where there is both a reduction in evaluation and a reduction or discontinuance of compensation payable. Therefore, where the evaluation of a specific disability is reduced but the amount

of compensation is not reduced because of a simultaneous increase in the evaluation of one or more other disabilities, section 3.105(e) is not applicable.

1 Pub.L. No. 85-857 § 3012, 72 Stat. 1105, 1227 (1958), changed the effective date for reduction in compensation to the last day of the month in which the reduction was approved. Pub.L. No. 87-825, § 2, 76 Stat. 948, 949, (1962) amended 38 U.S.C. § 3012 to again add the present 60-day grace period.

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