

April 7, 1997

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021:DKD

VAOPGCPREC 14-97

SUBJ: Application of 38 U.S.C. §1151 to Vocational
Rehabilitation Program Participant

QUESTION PRESENTED

May a work related injury sustained by a veteran who is receiving employment services as part of a "vocational rehabilitation program" under chapter 31 of title 38, United States Code, be considered the result of "pursuit of a course of vocational rehabilitation under chapter 31," for purposes of entitlement to compensation under 38 U.S.C. § 1151?

DISCUSSION

1. In brief, the facts of the specific case presented show that a veteran, who was eligible for assistance under a vocational rehabilitation program authorized by chapter 31, title 38, United States Code, had entered into an individualized written rehabilitation plan calling for VA to provide for his training in a particular job training field. He completed this training, was found to have been rehabilitated to the point of employability, and was authorized employment services. The veteran, thereafter, secured employment with a private sector employer in a job consistent with his vocational rehabilitation training and, while so engaged, sustained a back injury.

2. Section 1151 provides in pertinent part as follows:

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . the pursuit of a course of vocational rehabilitation under chapter 31 of this title, . . . not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability . . . compensation under [chapter 11] shall be awarded in the same manner as if such disability, aggravation, or death were service-connected

3. The veteran was receiving chapter 31 employment services at the time of his injury and, thus, was then a participant in a "vocational rehabilitation program" under that chapter (see 38 U.S.C. § 3101(a)). However, the question before us is whether that injury was the result of "pursuit of a course of vocational rehabilitation" within the meaning and intent of section 1151.

4. We note that the term “course of vocational rehabilitation” has been used in section 1151 and its precursor provisions since 1943. It is not used, however, in the current chapter 31 program, but appears only in pre-1980 versions of the federal statute providing vocational rehabilitation benefits for service-disabled veterans. Thus, our starting point for determining the scope of that term must be to ascertain its intended meaning in the context of the law of which it was a part at the time of enactment.

5. Public Law 16, 78th Congress (57 Stat. 43, March 23, 1943), established the program that evolved into the modern chapter 31 vocational rehabilitation program. However, under this 1943 act (like its predecessor, the Vocational Rehabilitation Act of June 27, 1918), the program was limited to providing training that would qualify an eligible veteran for suitable employment. Thus, Public Law 16 added a new Part VII to Veterans Regulation Numbered 1(a), which, in section 1 thereof, provided for “such vocational rehabilitation . . . prescribed by [VA] to fit [the veteran] for employment consistent with the degree of disablement” That section further provided that “no *course of training* in excess of four years shall be approved nor shall any *training* . . . be afforded beyond six years after the termination of [WWII].” (Emphasis added.) The powers of VA were further limited by section 2 of the regulation to “the power and duty to prescribe and provide suitable *training* to persons included in paragraph I [sic].” (Emphasis added.)

6. Public Law 16 also enacted a provision, found in section 4 of Part VII of VA Regulation 1(a), which provided disability compensation benefits for additional disability “[w]here any person while following a course of vocational rehabilitation as provided for in this part suffers an injury or an aggravation of any injury, as the result of pursuit of such course of vocational rehabilitation” This provision was historically consistent in approach with earlier relief provisions under the World War Veterans’ Act, 1924, which provided benefits for injuries “as the result of training . . . awarded . . . under the Vocational Rehabilitation Act” Ch. 553, 43 Stat. 1302, 1308.

7. In 1958, the vocational rehabilitation provisions and relief provisions of VA Regulation 1(a) were codified into title 38, United States Code. The former provision was consolidated in a vocational rehabilitation program designated to new chapter 31, the latter to a new section designated as section 351. References in those codified provisions to pursuit of courses of vocational rehabilitation continued to be construed as synonymous with pursuit of training to the point of employability. See VA Regulation (VAR) 1123(B)(7), October 19, 1949, providing that compensation “is not payable unless a casual [sic] relationship exists between the training and an injury” See *also*, VAR 3.358(c)(6), February 24, 1961, which used language relating to vocational rehabilitation almost identical to the current 38 C.F.R. § 3.358(c)(5), July 22, 1996, the

latter reading in part: “For a case to fall within the statute there must have been sustained an injury which, but for the performance of a ‘learning activity’ in the prescribed *course of training*, would not have been sustained.” (Emphasis added.)

8. On October 17, 1980, the vocational rehabilitation program under chapter 31 of title 38, United States Code, was extensively revised by Public Law 96-466. The purposes of that chapter were broadened beyond merely providing service-disabled veterans training to the point of employability. The new program provided for all services and assistance to enable such veterans “to achieve maximum independence in daily living and, to the maximum extent feasible, to become employable and to *obtain and maintain* suitable employment.” (Emphasis added.) 38 U.S.C. § 3100. At the same time, the statute expanded the specific services to be provided as part of a “vocational rehabilitation program” under the chapter to include the placement, post-placement, and employment services detailed in sections 3104(a)(5) and 3117.

9. When Congress enacted Public Law 96-466, however, it did not make a conforming amendment to section 1151 to adopt the broader term “vocational rehabilitation program” defined in the expanded chapter 31 program. Instead, it retained the term “course of vocational rehabilitation,” and the requirement that injury must have occurred as a result of the veteran’s “pursuit” thereof. We believe this omission is significant, but have found no legislative history that explains it. We have considered that the omission may have been simply an oversight when Public Law 96-466 was enacted. However, we rejected that premise as unsupported, particularly given the nature and extent of subsequent legislative activity in the subject area, as later discussed herein.

10. We also have considered that such a conforming amendment may not have been deemed necessary; that one could read the language broadly to encompass the current expanded scope of chapter 31 services and assistance. In other words, “pursuit of a course of vocational rehabilitation” conceivably may translate to “following a plan of services under a vocational rehabilitation program.” Nevertheless, this seems to be an unreasonably strained, and certainly not the “best,” reading of the pertinent section 1151 language. For instance, one is not normally thought of as “pursuing a course” of employment services (or counseling, diagnostic, medical, social, psychological, independent living, etc., services). See 38 U.S.C. § 3101(9)(A). Rather, one more plainly “receives” those services. The language “pursuit of a course,” we believe, is more commonly understood as relating to training (e.g., pursuit of a course of education or on-job training), a meaning which also is consonant with the use of such language under the pre-1980 statutes discussed above.

11. A more supportable inference to be drawn from the fact that Congress did not conform the language of section 1151 to that in the enhanced chapter 31 program is

that it intended to continue in effect the narrower category of relief, afforded by that section prior to 1980, for injury resulting from vocational rehabilitation *training*.

12. In this regard, we note that Public Law 96-466 similarly omitted any conforming amendment updating the language in section 1728(a)(2)(D) of title 38, United States Code. That section provided, in the context of reimbursement for certain emergency medical expenses, that reimbursement payments for chapter 31 participants were limited to veterans “pursuing a course of vocational rehabilitation training.” In 1989, however, Congress enacted legislation broadening the coverage of that section by expressly conforming its language to refer to all participants in a “vocational rehabilitation program” as defined in section 3101(9) of chapter 31. Pub. L. No. 101-237, § 202(a), 101st Cong., 1st Sess. (December 18, 1989).

13. The legislative history for Public Law 101-237 specifically discusses the basis for the change to section 1728, noting that, under the chapter 31 vocational rehabilitation program, individuals in independent living programs or who completed a course of training but had not yet become employed, were “still . . . participant[s] in the vocational rehabilitation program and still a responsibility of VA” even though they were not involved in a “course of training.” Hence, the statute was being amended to “specifically authorize all participants in a vocational rehabilitation program (as defined in section 1501(9) [now 3101(9)] of title 38) to be eligible for emergency care reimbursement.” S. Rep. No. 101-126, 101st Cong., 1st Sess., 175 (1989).

14. Congress, on the same basis, clearly could have updated the language of section 1151 to conform to the broadened scope of the chapter 31 program, just as it did in the Public Law 101-237 amendment to section 1728. However, despite making several technical amendments to section 1151 during the period following the 1980 revision of the chapter 31 program and before the date of the instant veteran’s claim, Congress left the reference to pursuit of a course of vocational rehabilitation intact. While, as previously mentioned, we have found no discussion on this issue in the pertinent legislative history, a rational basis for such a choice can be postulated.

15. During pursuit of a course of training an individual is circumscribed as to his or her activities by VA’s exercise of its discretionary authority to approve such pursuit of the course, the place of training, and payment of its training costs. VA’s use of an educational or training institution to provide the training must be obtained by contract or agreement. VA, however, has no corresponding legal relationship with the employer on behalf of the veteran. No nexus to VA exists when the veteran has been assisted to the point of employability and seeks out and obtains a job with an independent private employer. While the individual is entitled to 2 months of post-training subsistence allowance (38 U.S.C. § 3108(a)(2)), employment assistance (38 U.S.C. § 3117), and placement and post-placement services suitable to insure satisfactory adjustment in

employment (38 U.S.C. § 3104(a)(5)), those VA responsibilities do not include job site safety in post-training employment. Hence, Congress could have concluded that no basis exists for holding VA constructively responsible for the acts or omissions of an independent third-party employer chosen by the veteran.

16. This interpretation forms the basis for 38 C.F.R. § 3.358(c)(5), which requires the finding of proximate cause between the injury and an essential activity or function within the scope of the “vocational rehabilitation course.” Apparently, in the case at hand, the injury proximately resulted from an act or omission of a third party over which VA had no control. See 35 Op. Att’y. Gen. 78 (1926) and 35 Op. Att’y. Gen. 38 (1926).

17. In any event, the case before us is not one of an injury resulting from pursuit of a VA-authorized institutional or on-job training program. Rather, the veteran had already attained the skill level necessary to obtain journeyman employment and was so engaged at the time of injury. Since the injury occurred after the individual had achieved employability and, thus, not as a consequence of pursuit of training necessary to attain that goal, he cannot be said to have incurred it as a result of “the pursuit of a course of vocational rehabilitation,” as that language is used in section 1151. The attainment of actual employment through VA intervention was not part of the course of vocational rehabilitation in the sense that the term was understood at the time of its enactment in Public Law 16, nor do we find its meaning changed in its current context.

CONCLUSION

An individual participating in a chapter 31 “vocational rehabilitation program” (as defined in 38 U.S.C. § 3101(9)) is not, solely by virtue of that status, considered in “pursuit of a course of vocational rehabilitation” for purposes of 38 U.S.C. § 1151. The intent of the section 1151 provisions pertinent to this matter is to provide compensation for injuries sustained only as a result of pursuing vocational rehabilitation training to achieve employability, not as a result of engaging in post-training employment. Thus, a chapter 31 “vocational rehabilitation program” participant who is receiving only a period of employment services while engaged in post-training employment is not pursuing “a course of vocational rehabilitation” within the meaning of section 1151 so as to qualify for disability compensation benefits under that section.

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