

Date: July 16, 1997

VAOPGCPREC 26-97

From: General Counsel (022)

Subj: Retroactive Benefits in Claims for Service Connection of
Post-Traumatic Stress Disorder
--XXXX, XXXXX X. XX XXX XX XXXX

To: Director, Compensation and Pension Service (212C)

QUESTION PRESENTED:

Was the addition of a diagnosis of post-traumatic stress disorder (PTSD) to the rating schedule, effective April 11, 1980, "a liberalizing law, or a liberalizing [Department of Veterans Affairs (VA)] issue" for purposes of 38 C.F.R. § 3.114(a)?

COMMENTS:

1. This question arose in the case of a Vietnam veteran who was granted service connection for PTSD, effective as of April 22, 1993, the date of claim. The veteran contends that an earlier effective date based on 38 C.F.R. § 3.114(a) should be established because the inclusion of rating criteria for PTSD in the disability rating schedule was a "liberalizing VA issue".

2. Under 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400, the effective date of an award of benefits is generally not earlier than the date the claim for those benefits is received. Section 5110(g) of title 38, United States Code, authorizes an exception to that rule. Section 5110(g) provides that the effective date of an award of or increase in compensation, dependency and indemnity compensation, or pension "pursuant to any Act or administrative issue . . . shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue." The statute goes on to authorize retroactive payments for up to one year prior to the date of claim or the date of administrative determination of entitlement, whichever is earlier. VA's implementing regulation, 38 C.F.R. § 3.114(a), further states that a claimant cannot receive retroactive payment based on a prospectively effective liberalizing law or a liberalizing VA issue unless the evidence establishes that "the claimant

met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim

<Page 2>

or administrative determination of entitlement." The United States Court of Veterans Appeals (CVA) has noted that this requirement fulfills the intent of section 5110(g) with regard to laws or issues that are effective prospectively. See *McCay v. Brown*, 9 Vet. App. 183, 187-88 (1996).

3. The diagnosis of PTSD, Diagnostic Code 9411, was added to the rating schedule effective April 11, 1980, the date of approval of the regulatory amendment by the Administrator of Veterans Affairs. See 45 Fed. Reg. 26,326 (1980). In a nonprecedential memorandum decision, the CVA recently found it unnecessary to reach the issue of whether the addition of PTSD to the rating schedule may be considered a liberalizing issue. See *Ballert v. Brown*, No. 94-777, 1997 WL 132999, at *6 (Vet. App. March 20, 1997). In *Dunson v. Brown*, 4 Vet. App. 327, 330-31 (1993), the CVA directed the Board of Veterans' Appeals to consider whether PTSD benefits were granted pursuant to the Former Prisoner of War Benefits Act of 1981 and, if so, whether the veteran was entitled to an earlier effective date pursuant to 38 C.F.R. § 3.114. The change of law at issue in *Dunson* concerned the expansion of the presumptions of service connection applicable to former prisoners of war. While *Dunson* suggests that the relaxation of the claimant's burden of proof may have been a liberalization of the law for purposes of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), the decision did not offer specific guidance on the subject of the addition of PTSD to the rating schedule.

4. In *Spencer v. Brown*, 4 Vet. App. 283, 289 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994), the CVA indicated that section 5110(g) applies only to acts or administrative issues that provide "a substantive basis for establishing entitlement to benefits." In affirming the CVA's decision, the United States Court of Appeals for the Federal Circuit stated that a new law or "issue" is considered "liberalizing" if it "brought about a substantive change . . . creating a new and different entitlement to a benefit". 17 F.3d at 372. In VAOPGCPREC 7-92 (O.G.C. Prec. 7-92), the General Counsel held that portions of VA Adjudication

Procedure Manual M21-1, part I, ¶ 50.45, regarding the evidence necessary to substantiate PTSD claims constituted a "substantive" rule because their effect was "to relieve combat veterans and former prisoners of war of the burden of producing evidence to substantiate their claims that they experienced a stressful event." See also VAOPGCPREC 10-95 (acceptance of a diagnosis of a mental disorder conforming

<Page 3>

to the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), rather than the third edition (DSM-III), "would not only modify the evidentiary obligations imposed on claimants under current regulations, but could alter the outcome of claims").

5. In VAOPGCPREC 9-92 (O.G.C. Prec. 9-92), the General Counsel held that an increased rating due to revision of criteria for rating psychoneurotic disorders is based on a liberalizing VA issue per 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a). In VAOPGCPREC 5-94 (O.G.C. Prec. 5-94) and VAOPGCADV 28-90 (O.G.C. Adv. 28-90), the General Counsel treated the regulatory amendment creating a presumption of service connection for non-Hodgkin's lymphoma incurred by veterans of Vietnam service as a liberalizing issue for purposes of 38 U.S.C. § 5110(g) (formerly § 3010(g)). The amendment at issue in those opinions represented in essence a liberalization of evidentiary rules making it easier for veterans to establish service connection for a particular disability. The above-referenced authorities suggest that a rating schedule change which makes it easier for a veteran to establish service connection for a disability may be considered a liberalizing VA issue for purposes of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a).

6. Analysis of the circumstances surrounding the addition of PTSD to the rating schedule indicates that that amendment may be considered a liberalizing issuance, in that it had a substantive impact on claims by liberalizing the evidentiary basis on which service connection for certain disabilities may be established. VA began using the diagnosis of PTSD in 1980 in conformity with DSM-III. See Department of Medicine and Surgery Professional Services Letter IL-11-80-15 (3-20-80) (DM&S Prof. Serv. Letter IL-11-80-15). Prior to

that time, VA had rated traumatic neurosis as an anxiety disorder and, pursuant to then-existing regulations, see former 38 C.F.R. §§ 4.125 and 4.126 (1979), had based its psychiatric evaluations on the standards of the second (1968) edition of DSM (DSM-II). DSM-II made no reference to delayed onset of anxiety neurosis. DSM-III, at 237, on the other hand, specifically noted that the symptoms of the new diagnostic category, PTSD, could "emerge after a latency period of months or years following the trauma."

7. The recognition of PTSD as a diagnostic entity represented an important change in VA's approach to service

<Page 4>

connection for traumatic neurosis. Prior to VA's adoption of the PTSD diagnosis, DSM-II criteria for neuroses, followed by VA, had the effect of requiring evidence of neurosis during service in order to establish service connection. With the recognition of PTSD came the understanding that a veteran's response to trauma may be delayed. See Department of Veterans Benefits Program Guide 21-1, § 0-12, change 282 (3-17-80) (Program Guide 21-1, change 282). Thus, the servicemember may not show signs of a psychiatric disorder during service, although the disorder was the result of service experiences. In a memo dated March 25, 1980, the Chairman of the Board of Veterans' Appeals advised his staff:

You will note that the treatment of this disorder in [revised Program Guide 21-1, change 282 and DM&S Prof. Serv. Letter IL-11-80-15] represents a considerable liberalization in the area of service connection for post-traumatic stress disorder. It is significant that these guidelines do not require that symptoms of mal-adjustment arise within a few days or months following the traumatic incident.

Since that time, it has been VA's practice that, for PTSD to be service connected, the record must reflect that the claimant experienced a stressor during service and that he or she currently exhibits PTSD symptomatology. The claimant need not demonstrate in-service manifestations of a psychiatric disorder. The recognition of PTSD as a diagnostic entity was clearly beneficial to claimants

because it significantly reduced their burden of proof in establishing service connection.

8. By its terms, section 3.114(a) applies only with respect to a liberalizing law or a liberalizing VA issue "approved by the Secretary [formerly Administrator] or by the Secretary's [Administrator's] direction." See also former 38 C.F.R. § 3.114(a) (1979). Since the Program Guide 21-1, change 282 and DM&S Prof. Serv. Letter IL-11-80-15 issued in March 1980 were not approved by the Administrator of Veterans Affairs or by his direction, neither of those directives may be considered a liberalizing issue for purposes of section 3.114(a). See VAOPGCPREC 1-96 (manual provisions approved not by the Secretary or by the Secretary's direction, but by department and staff office heads, do not constitute liberalizing VA issues). The first official recognition of VA's acceptance of the diagnosis of PTSD by the Administrator came with the addition of PTSD to

<Page 5>

the rating schedule, effective April 11, 1980. Although the rulemaking notice announcing this change stated that the "amendment to the rating schedule [was] for procedural and statistical purposes only", see 45 Fed. Reg. at 26,327, the rulemaking was the first issuance approved by the Administrator which effectuated the important change discussed in Program Guide 21-1, change 282 and DM&S Prof. Serv. Letter IL-11-80-15. Because this change liberalized the evidentiary basis on which entitlement to a benefit could be established, it may be considered a substantive change providing a new basis for establishing entitlement to benefits and, consequently, a "liberalizing VA issue" for purposes of 38 C.F.R. § 3.114(a).

9. We recognize that, despite the publication of DSM-III in 1980, the schedule for rating mental disorders continued to require diagnosis of mental disorders in accordance with DSM-II until amendment of 38 C.F.R. §§ 4.125 and 4.126 on January 4, 1988. See former 38 C.F.R. §§ 4.125 and 4.126 (1987); 53 Fed. Reg. 21, 22 (1988). Further, we held in VAOPGCPREC 10-95 that VA is bound by regulatory references to obsolete editions of the Diagnostic and Statistical Manual for Mental Disorders until such time as the regulations are amended to revise those references. However, the notice adding a diagnostic code for PTSD to the rating

schedule made clear that this action was taken to conform with DSM-III. 45 Fed. Reg. at 26,326-27. Thus, this change may be considered as establishing an exception to the then-existing general requirement that diagnoses of mental disorders for rating purposes conform to DSM-II.

10. Although we have concluded that the addition of PTSD to the rating schedule in 1980 may be considered a liberalizing VA issuance for purposes of 38 C.F.R. § 3.114(a), we note that section 3.114(a) does not authorize a retroactive award for every grant of service connection for PTSD. Both 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) require that the effective date of an award made pursuant to a liberalizing act or administrative issue "be fixed in accordance with the facts found," indicating that entitlement to a retroactive award is dependent on the existence of facts supporting a finding of entitlement from an earlier date. Where, as here, a change in law or VA issue became effective prospectively, entitlement to a retroactive effective date under section 3.114(a) does not arise unless the evidence shows that the claimant "met all eligibility criteria for the

<Page 6>

liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement." Therefore, though the addition of Diagnostic Code 9411 may be considered a liberalizing issuance, a retroactive effective date cannot be assigned unless evidence establishes that the veteran had developed PTSD as of April 11, 1980, and that the disability continued up to the date that the claim for compensation was filed.

HELD:

The addition of PTSD as a diagnostic entity in the schedule for rating mental disorders was a "liberalizing VA issue" for purposes of 38 C.F.R. § 3.114(a). However, an effective date prior to the date of claim cannot be assigned under section 3.114(a) unless the claimant met all eligibility criteria for the liberalized benefit on April

11, 1980, the effective date of the regulatory amendment adding the diagnostic code for PTSD, and such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement.

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