

Date: August 29, 1997

VAOPGCPREC 31-97

From: General Counsel (022)

Subj: Reconsideration of Regional Office Decision Reducing Rating
-- XXXX, XXXXXXXX X. X X XXX XXX

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

QUESTION PRESENTED:

If the Board of Veterans' Appeals concludes upon reconsideration that the Department of Veterans Affairs Regional Office erred in determining the effective date of a reduction in compensation pursuant to 38 U.S.C. § 5112(6) and 38 C.F.R. § 3.105(e), does that error render the decision reducing the rating void ab initio, requiring reinstatement of the prior rating?

COMMENTS:

1. This issue arises in the context of an order granting reconsideration of an October 27, 1983, Board of Veterans' Appeals (BVA) decision affirming a March 23, 1982, Department of Veterans Affairs Regional Office (VARO) decision in which the veteran's rating for a service-connected low back disorder was reduced from 40 percent to 20 percent, effective June 1, 1982. In a letter dated April 2, 1982, the VARO informed the veteran that his rating was reduced to 20 percent and that he had sixty days in which to submit additional evidence. The veteran submitted a notice of disagreement, which was received by the VARO on April 8, 1982, requesting a personal hearing if the 40 percent rating was not reinstated, and submitted evidence in support of his claim for a 40 percent rating. The VARO issued a confirmed rating decision dated April 19, 1982. In its decision of October 27, 1983, the BVA denied an evaluation in excess of 20 percent. Following several claims and appeals for an increased rating, the veteran's rating for his low back disability was increased to 40 percent, effective July 27, 1991. The veteran's representative subsequently requested reconsideration of the BVA's October 27, 1983, decision, contending that the veteran was not given sixty-days' notice of the 1982 rating reduction as required by 38 C.F.R. § 3.105(e) and 38 U.S.C. § 5112(6). The veteran's repre-

sentative argued that, because of this error, the BVA should grant reconsideration, restore the 40 percent rating and that once restored, the rating is protected under 38 C.F.R.

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§ 3.951. ¹ According to the opinion request, the rating decision erroneously set the effective date for the reduced rating as June 1, 1982, rather than June 30, 1982, as required by 38 C.F.R. § 3.105(e). On January 16, 1997, the Chairman of the BVA ordered reconsideration of the October 27, 1983, BVA decision. You inquire as to whether the VARO's error in setting the effective date renders the entire March 1982 rating decision void ab initio or whether the error may be corrected by restoring the 40 percent rating for one month, June 1982.

2. Pursuant to 38 U.S.C. § 7103(a) and (b), the BVA Chairman may order reconsideration of a Board decision. Reconsideration by the BVA results in vacating the original BVA decision and replacing it with a decision by an expanded panel. VAOPGCPREC 70-91 (O.G.C. Prec. 70-91), para. 7; VAOPGCPREC 89-90 (O.G.C. Prec. 89-90), para. 4. The reconsideration section reviews the appealed issues as if the prior BVA decision had not been rendered. ² VAOPGCPREC 89-90, para. 8. Thus, just as when an appeal is certified to the BVA, the Board is required on reconsideration to conduct a de novo review of the agency of original jurisdiction's (AOJ) decision, including all questions relating to the claim. *Boyer v. Derwinski*, 1 Vet. App. 531, 534 (1991); VAOPGCPREC 5-92 (O.G.C. Prec. 5-92); VAOPGCPREC 6-

¹ Under 38 C.F.R. § 3.951 and 38 U.S.C. § 110, a disability which has been continuously rated at or above any disability evaluation for 20 or more years will not be reduced except based upon a showing that the rating was based on fraud. However, VA first rated the veteran's low back disability at 40 percent effective January 26, 1979. Thus, section 3.951(a) would not be applicable to the instant case even if the 1982 rating decision were rendered void ab initio and reinstated effective June 1, 1982, because the rating would not have been in effect for 20 years.

² According to 38 C.F.R. § 20.1001(a), the BVA will only reconsider issues identified in the motion for reconsideration. See also *Smith v. Brown*, 8 Vet. App. 546, 550 (1996).

92 (O.G.C. Prec. 6-92); VAOPGCPREC 16-92 (O.G.C. Prec. 16-92). In reviewing a benefits decision, the BVA must consider the entire record, all evidence, and all applicable laws and regulations. *Smith v. Derwinski*, 1 Vet. App. 267, 272 (1991); VAOPGCPREC 16-92. As an administrative appellate body, the BVA may reverse or affirm in whole or part or modify the AOJ's determination. See VAOPGCPREC 16-92, para. 6; 73A C.J.S. *Public Administrative Law & Procedure* § 171 (1983).

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3. We next consider whether the BVA must void the entire 1982 rating decision if the VARO erred in setting the effective date of the reduction in the veteran's rating. We stated in VAOPGCPREC 6-92, para. 2, that the AOJ's failure to consider applicable regulations renders the AOJ's decision voidable rather than void unless the failure to consider the regulation prejudices the veteran. In determining whether failure by the VARO to consider a regulation is prejudicial to the claimant, an important consideration is the effect of failure to provide notice to the veteran of the regulation, which may raise the issue of whether the veteran's due process rights have been abridged. VAOPGCPREC 6-92, para. 9-10. See also *Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981), cert. denied, 455 U.S. 909 (1982). The Court of Veterans Appeals (CVA) has held that where VA reduces a rating without observing applicable laws and regulations, the rating is void ab initio and the prior rating must be reinstated effective the date of the reduction. *Hayes v. Brown*, 9 Vet. App. 67, 73 (1996); *Kitchens v. Brown*, 7 Vet. App. 320, 325 (1995). However, those cases in which the CVA has reinstated a prior rating retroactive to the date of reduction are distinguishable from the instant case because they involved a different element than the element at issue in the instant case. See *Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997) (notice of disagreement regarding degree of disability for eye condition filed after November 18, 1988, involved separate "element" from "element of service-connectedness" for which prior notice of disagreement was filed, thereby providing basis for CVA jurisdiction); *West v. Brown*, 7 Vet. App. 329, 332 (1995) (claimant has not successfully adjudicated case until there is decision on all elements including status, disability, service connection, rating and effective date). The error committed in the cases in which the CVA reinstated the prior rating involved determinations regarding the degree of the veteran's disability.

Hayes, 9 Vet. App. at 73; *Kitchens v. Brown*, 7 Vet. App. at 324-25;

Brown v. Brown, 5 Vet. App. 413 (1993); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991). The purported error in the instant case, however, involves setting the effective date for the rating reduction. Because the Federal Circuit and the CVA have recognized that a veteran's benefits claim involves individual elements, we conclude that each element must be considered separately in determining whether the veteran was prejudiced by the VARO's error.

4. We must next determine whether the veteran in the instant case was prejudiced by the VARO's error in applying

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section 3.105(e). Section 3.105(e) of title 38, Code of Federal Regulations, states that where a reduction in evaluation of a service-connected disability is considered warranted and the lower evaluation would result in a reduction of current compensation payments, the reduction will be made effective the last day of the month in which a sixty-day period from date of notice to the payee expires. The statutory authority for section 3.105(e) is 38 U.S.C. § 5112(6), which also provides that the effective date of a reduction of compensation by reason of change in physical condition shall be the last day of the month following sixty days from the date of notice of the reduction to the payee. This "grace period" was intended to provide a veteran receiving service-connected disability benefits a reasonable time to adjust to a reduction of benefits or to submit evidence to show that the change is not justified. S. Rep. No. 2042, 87th Cong., 2d Sess. 8, reprinted in 1962 U.S.C.C.A.N. 3260, 3267; VADIGOP 10-13-83 (Vet). The General Counsel has stated that this statement suggests that the purpose of the sixty-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 a reduction or loss of benefits or for submission of evidence to show that the decrease in evaluation was not warranted. VAOPGCPREC 71-91 (O.G.C. Prec. 71-91), para. 4. In the instant case, VA informed the veteran by letter dated April 2, 1982, of the reduction in rating effective June 1, 1982, and the right to submit additional evidence within sixty days to show that the reduction should not be made. The veteran, on April 8, 1982, submitted additional evidence to the VARO and requested a hearing. Because the veteran exercised the due process rights afforded by

38 C.F.R. § 3.105(e) by submitting evidence to show the decrease was not warranted and was provided with sixty-days' notice of the need to adjust to future reduced benefits, he was not prejudiced in this regard by the VARO's failure to correctly apply section 3.105(e). However, the veteran was prejudiced by the VARO's error because he did not receive compensation for a 40 percent disability until June 30, 1982, the end of the month in which the sixty-day period expired as required by section 3.105(e). Because the error with regard to this element of the rating decision can be corrected by awarding one additional month of compensation at the 40 percent rate,

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we conclude that the VARO's decision is rendered voidable rather than void ab initio. ³

HELD:

The reduction of a disability rating, if otherwise supportable, is not rendered void ab initio by virtue of error in the assignment of the effective date for it.

Mary Lou Keener

³ We note that the CVA stated in *Schafrath*, 1 Vet. App. at 596, that "[i]t is implicit in [38 C.F.R. § 3.105(e), (g), and (h)] that a service-connected rating reduction is invalid if these procedures are not followed." We do not believe that this statement is controlling in the case at issue for two reasons. This statement is dicta because it was not necessary to support the court's decision or to decide the issue in the case. 20 Am. Jur. 2d *Courts* § 74 (1965); *Boyer v. County of Washington*, 971 F.2d 100, 102 n. 4 (8th Cir. 1992), cert. denied, 113 S. Ct. 2966 (1993). In *Schafrath*, the CVA did not conclude that VA committed any error involving section 3.105, but rather the court held that the reduction in rating was made without following 38 C.F.R. §§ 4.40, 4.45, 4.2, 4.10, and 3.344(a). Moreover, in the instant case, VA complied with the due process requirements of section 3.105(e), and the error in setting the effective date can be rectified by providing the veteran with one additional month of compensation for his 40 percent disability.