

CITATION: VAOPGCPREC 16-89
Vet. Aff. Op. Gen. Couns. Prec. 16-89

DATE: 9-29-89

TEXT:

QUESTION PRESENTED:

Whether a protected, erroneous disability rating must be used as a basis for an award of special monthly compensation pursuant to 38 U.S.C. § 314(s) and 38 C.F.R. § 3.951 or whether the actual level of disability should be used to determine eligibility for this benefit.

COMMENTS:

1. In this case, the veteran filed his original claim for benefits on July 10, 1962. Pursuant to a rating decision dated December 11, 1962, the veteran was awarded several ratings for various disabilities, including an erroneous 50% disability rating for "loss of skull, area larger than 2 sq. inc. (inches), p.o. for intrasellar hematoma," all effective July 10, 1962. If evaluated correctly, the skull loss should have been rated at 10%. The veteran was rated on subsequent occasions in 1965, 1967, 1969, 1971, 1984 and 1986. Each of these ratings continued his erroneous 50% rating for loss of skull; the June 11, 1969 rating resulted in an increase to 100% of the veteran's schizophrenic disability, while continuing the 50% rating for skull-loss. A rating decision of January 8, 1986 reduced the veteran's rating for schizophrenia to 70%. The veteran appealed this reduction, as well as a subsequent denial of individual unemployability benefits, to the Board of Veterans Appeals (BVA). In this appeal, the veteran's service representative specifically requested benefits under 38 U.S.C. § 314(s). The BVA subsequently issued a decision dated September 1, 1987, increasing the veteran's rating to 100%, for paranoid schizophrenia. The San Juan rating board, on September 17, 1987 granted the veteran special monthly compensation pending approval by Central Office. Apparently, the 1962 error in rating the loss of skull disability at 50% rather than 10% was noticed in a review of the file in Central Office, although the claims folder lacks any documentation regarding the discovery of that error.
2. You question whether the protected, albeit erroneous, 50% rating for loss of skull should be used in calculating the total percentage of disability required to establish eligibility for benefits under 38 U.S.C. § 314(s), or whether the correct rating of 10% should be used for this purpose. VA's statute governing protection of ratings must first be examined to determine whether it permits VA to disregard a protected, erroneous rating in favor of the correct rating in determining eligibility for special monthly compensation benefits. The statute authorizing protection of certain ratings, 38 U.S.C. § 110, provides in part:

A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under laws administered by the Veterans' Administration shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud.

As the veteran's 50% evaluation for loss of skull has been continuously in effect for over 26 years, it falls within the protection provision of 38 U.S.C. § 110.

Unless this rating comes within an exception to this statutory protection, it cannot be assigned a rating lower than 50% evaluation for compensation purposes.

3. The sole statutory exception to protection arises upon a showing that the rating was based on fraud. In the present case, no allegation of fraud has been made; the only error appears to be an administrative one which originally occurred in 1962 in calculating the number of square inches of skull loss suffered by the veteran. "Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." Sutherland Stat. Const. § 47.11 (4th Ed); see Andrus v. Glover Const. Co, 446 U.S. 608, 616-17 (1980). As this rating does not fall under the fraud exception, it meets the requirements for protection pursuant to 38 U.S.C. § 110.

4. The legislative intent of section 110 must be examined to determine whether application of protection in this situation would contravene the intent of the statute. The purpose of protection, as stated in the original 1953 legislative history was to spare the veteran the inconvenience, and the government the expense, of repeated examinations once a rating of total disability was determined to be static, as well as to prevent reduction in monetary benefits upon which the veteran would come to rely. H.R. Rep. No. 533, 83d Cong., 1st Sess. 2 (1953). In 1964, this protection was expanded to include protection against reduction of less-than-total disability ratings in effect for 20 continuous years. Pub. L. No. 88-445 (78 Stat. 464). Congress, in 1969, further expanded this protection provision to include special monthly compensation cases. Pub. L. No. 91-32 (83 Stat 38), see S. Rep. No. 219, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Ad. News 1032 et seq.

5. VA consistently advised Congress that these provisions would preclude VA from correcting its errors if they were not discovered until 20 years or more after the rating was issued. H.R. Rep. No. 1407, 88th Cong. 2d Sess. 5 (1964), see also, S. Rep. No. 219, 91st Cong., 1st Sess., reprinted in 1969 U.S. Code Cong. & Ad. News 1032, 1034. Despite this advice, Congress declined to enact an exception for VA error to this protection provision. Instead, Congress endorsed a legal fiction, an exception to VA's basic concept (embodied in 38 U.S.C. § 355) that disability ratings are generally based upon the average impairment resulting from injury or disease. See H.R. Rep. No. 1407, 88th Cong., 2d Sess. 4 (1964). In the case at issue, a finding that the 50% rating is protected, although it is

erroneous, is in accord with Congress' intent in enacting the statute. Moreover, protection is appropriate because the evaluation served as the basis for actual payment for at least 20 years, during which time the veteran's disabilities were reevaluated on several occasions. Compare Op. G.C. 8-79 (section 110 does not operate to protect a 100% disability rating where payment of the award was waived in favor of receiving military retirement pay; ratings are considered protected only if they "have been the foundation for the payment of awards for a period of at least 20 years, such that recipients have grown to rely upon the payments and the rating authorities have had reason to monitor the level of disability for possible changes."). Accordingly, absent evidence of fraud, it must be concluded that Congress intended that an erroneous rating would remain protected, and as such, would serve as the basis for compensation benefits, including special compensation benefits under 38 U.S.C. § 314(s).

6. Finally, we note that the language of section 314, subsection (s) and 38 C.F.R. § 350(i) also support this result. Subsection (s) states that "if a veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, ... then the monthly compensation shall be \$1,643." Eligibility is based solely on the ratings of the veteran's service-connected disabilities. No exception for erroneous ratings is made. The sole exception made, as stated in the provisions for basic entitlement, 38 U.S.C. § 310, concerns disabilities resulting from willful misconduct. Moreover, subsection (s) states that based on a combination of ratings, benefits "shall" be paid at the specified rates. Thus, no discretion has been left to the agency to disregard protected, erroneous ratings in favor of accurate ratings. No provision has been made for looking behind a protected, erroneous rating to the accurate rating in establishing eligibility for benefits under subsection (s). Accordingly, the protected 50% disability rating must be considered in determining the veteran's eligibility for benefits under subsection (s) of section 314.

HELD:

In determining the veteran's eligibility for special monthly compensation benefits pursuant to 38 U.S.C. § 314(s), the protected, erroneous rating of 50%, as opposed to the accurate 10% rating, must be used in calculating the total percentage of disability required to establish eligibility, as neither the protection statute 38 U.S.C. § 110 nor the statute authorizing special monthly compensation, 38 U.S.C. § 314, offers any exception for, or discretion in, disregarding protected, erroneous ratings in favor of the actual level of disability.

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