

Date: November 24, 1993

O.G.C. Precedent 10-93

From: General Counsel (022)

Subj: Presumption of Permanent and Total Disability--38 C.F.R. § 3.326(b)

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

QUESTION PRESENTED:

What legal effect has the provision in 38 C.F.R. § 3.326(b) that evidence will not be required solely to establish permanent and total disability for improved-pension purposes for veterans 65 years of age or older?

COMMENTS:

1. In 1967, Congress created a presumption for pension purposes that a person "sixty-five years of age or older" was permanently and totally disabled. Veterans' Pension and Readjustment Assistance Act of 1967, Pub. L. No. 90-77, § 102(a), 81 Stat. 178 (currently codified, as amended, at 38 U.S.C. § 1502(a) (former § 502(a)). Shortly thereafter, to implement the new law, VA amended 38 C.F.R. § 3.326, relating to examinations for rating purposes, by adding a new subsection (h), which stated in part: "Evidence to establish physical disability will not be required in claims for pension . . . if the veteran has attained the age of 65 years." 32 Fed. Reg. 13,223, 13,225 (1967). In 1971, the provision was put into essentially its current form and location in 38 C.F.R. § 3.326(b). 36 Fed. Reg. 14,467 (1971). In 1975, VA amended 38 C.F.R. § 4.17, governing assignment of permanent and total disability ratings for pension purposes, "to reflect changes in laws and interpretations of laws" by providing: "At age 65 and thereafter, a veteran is conclusively presumed to be permanently and totally disabled by statute; hence, rating action for this purpose is unnecessary." 40 Fed. Reg. 42,535, 42,536 (1975). After section 201 of the Veterans and Survivors Pension Adjustment Act of 1976, Pub. L. No. 94-432,

90 Stat. 1369, amended what was then section 502(a) to add reference to persons who became unemployable after age 65, VA revised 38 C.F.R. § 4.17 to reflect that change. 43 Fed. Reg. 45,348 (1978).

2. In 1990, Congress eliminated for purposes of claims filed after October 31, 1990, the presumption of permanent and total disability for persons 65 years of age or older. Omnibus Budget Reconciliation Act of 1990 (OBRA), Pub. L. No. 101-508, § 8002, 104 Stat. 1388, 1388-342. The following year, VA amended 38 C.F.R. § 4.17 to eliminate reference to a presumption of permanent and total disability based on age. 56 Fed. Reg. 57,985 (1991). The deletion of the provision concerning the presumption of pension entitlement at age 65 was considered necessary to implement the provisions of the OBRA. *Id.* "The intended effect of this amendment [was] to remove [the] presumption of pension entitlement at age 65" *Id.* However, VA did not make a corresponding change to 38 C.F.R. § 3.326(b) to eliminate the reference to evidence required in pension claims where the veteran has attained age 65. As a result, title 38, Code of Federal Regulations, contains a regulation purporting to implement a presumption that both Congress and VA intended to repeal.

3. The provision of 38 C.F.R. § 3.326(b) concerning establishment of permanent and total disability appears in the context of several provisions explaining when VA examinations are required for rating purposes. It is in the nature of a procedural rule governing development of evidence, rather than a substantive rule creating entitlement. It merely instructs as to the circumstances under which development of additional evidence is unnecessary in certain pension claims, given the existence of the presumption of permanent and total disability at age 65. Now that Congress has repealed the presumption which that instruction was designed to implement, the instruction no longer serves any purpose and is without effect.

4. To be valid, a regulation must be consistent with the statute which it implements. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977). Further, a general grant of

rulemaking authority, such as that found at 38 U.S.C. § 501(a), does not authorize an agency to promulgate a regulation which is inconsistent with other statutes. See *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 218 (1949). A regulation which does not carry into effect the will of Congress as expressed by statute, but creates a rule out of harmony with a governing statute, is a mere nullity. *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

5. The subject provision of 38 C.F.R. § 3.326(b) is inconsistent with section 8002 of the OBRA, since it purports to implement, with regard to pension claims filed after October 31, 1990, the presumption of permanent and total disability for persons 65 years of age or older which section 8002 expressly repealed. Congress intended section 8002 of the OBRA as a cost-saving measure designed to meet budget reconciliation requirements. See H.R. Rep. No. 881, 101st Cong., 2d Sess. 217 (1990), reprinted in 1990 U.S.C.C.A.N. 2017, 2221; see also H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 981-82 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2686-87 (noting anticipated cost savings). Continuation by VA of the presumption of permanent and total disability at age 65 would frustrate the intention of Congress to effect cost savings by eliminating that presumption. In our opinion, the will of Congress, as expressed by section 8002 of the OBRA, was that there no longer be any presumption, either statutory or regulatory, of permanent and total disability at age 65. The subject provision in section 3.326(b) conflicts with Congress' will to eliminate the presumption. It creates a rule out of harmony with the governing statute. It is therefore null and of no legal effect.

6. The Veterans Benefits Administration has developed a rulemaking proposal to amend 38 C.F.R. § 3.326(b) to remove the obsolete reference regarding evidence to establish permanent and total disability in pension claims where the veteran is 65 years of age or older. We have concurred in this proposal, which is in the administrative review process.

HELD:

The provision of 38 C.F.R. § 3.326(b), that "[e]vidence solely to establish permanent and total disability will not be required in claims for pension under 38 U.S.C. [§] 1521 if the veteran has attained the age of 65 years," is inconsistent with the will of Congress as expressed in section 8002 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508. That statute eliminated for improved-pension purposes in claims filed after October 31, 1990, the presumption of permanent and total disability for persons 65 years of age or older. The referenced provision of section 3.326(b) is therefore null and of no legal effect.

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