Department of Veterans Affairs

Memorandum

Date: December 8, 2000 VAOPGCPREC 9-2000

From: General Counsel (022)

Subj: Effect of Statements in *Hix and Pardue v. Gober* Concerning Evidence to be Considered in Determinations of "Hypothetical" Entitlement for Purposes of 38 U.S.C. § 1311(a)(2)

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Does the decision of the United States Court of Appeals for the Federal Circuit in *Hix and Pardue v. Gober*, Nos. 99-7094, -7102 (Fed. Cir. Sept. 20, 2000), require the Department of Veterans Affairs (VA) to accept evidence submitted after a veteran's death to establish, under 38 U.S.C. § 1311(a)(2), that the veteran was "entitled to receive" compensation from VA during his or her lifetime for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding the death?

DISCUSSION:

1. Members of your staff have requested our views as to whether the Federal Circuit's decision in *Hix* establishes that persons seeking to show, for purposes of 38 U.S.C. § 1311(a)(2), that a deceased veteran was entitled to receive certain benefits for a specified period prior to death may rely upon evidence which was never presented to VA during the veteran's lifetime but was first submitted after the veteran's death. Section 1311(a)(2) provides that the monthly rate of dependency and indemnity compensation (DIC) payable to an eligible surviving spouse

> shall be increased by $185 in the case of the death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death.

In *Hix v. West*, 12 Vet. App. 138 (1999), the United States Court of Appeals for Veteran's Claims (CAVC) held that claimants may establish entitlement to enhanced DIC under section 1311(a)(2) by showing that the veteran was "hypothetically" entitled to receive a total disability rating for the eight-year period

preceding death. The CAVC referenced its precedents concerning a similar statutory provision, 38 U.S.C. § 1318(b), which explain that "hypothetical" entitlement exists when the "evidence in the veteran's claims file or VA custody prior to the veteran's death" nevertheless establishes that the veteran was entitled to have received a total disability rating for the specified period preceding death. In a September 20, 2000, decision, the Federal Circuit affirmed the CAVC's decision in *Hix*. In doing so, however, the Federal Circuit stated: "[w]e affirm the ruling of the [CAVC] that the 'entitled to receive' provision of § 1311(a)(2) requires *de novo* determination of the veteran's disability, upon the entirety of the record including any new evidence presented by the surviving spouse." *Hix*, slip op. at 8 (underscoring added). Accordingly, although the Federal Circuit affirmed the CAVC's decision, the underscored portion of the foregoing quotation suggests a possible difference in view regarding when evidence to establish a veteran's "hypothetical" entitlement to benefits must be obtained.

2. In order to respond to your request, it is necessary to examine the development of the principles of "hypothetical" entitlement relevant to the *Hix* case. As explained below, the concept of hypothetical entitlement originated in a series of CAVC cases interpreting a closely related statute, 38 U.S.C. § 1318. Section 1318(b) provides, in pertinent part, that VA shall pay DIC to the surviving spouse and children of a veteran who

> was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either—
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> (1) was continuously rated totally disabling for a period of 10 or more years immediately preceding death; or
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> (2) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty.

VA had interpreted this statute to provide for awards of DIC only in two circumstances—first, where a veteran actually had a total service-connected disability rating for the requisite pre-death period under existing VA rating decisions, and, second, where the veteran would have had such a rating if not for clear and unmistakable error (CUE) in a VA decision or decisions during the veteran's lifetime. *See* VAOPGCPREC 68-90 (July 18, 1990). In a series of cases beginning with *Green v. Brown*, 10 Vet. App. 111 (1997), the United States Court of Appeals for Veterans Claims (CAVC) rejected VA's interpretation and concluded that section 1318(b) established a third basis for entitlement to DIC. Specifically, the Court held that entitlement to dependency and indemnity compensation under § 1318(b) may be established when the "evidence in the veteran's claims file or VA custody prior to the veteran's death and the law then or subsequently made retroactively applicable" establish that the veteran "hypothetically would have been entitled" to receive compensation for a total

disability rating for service-connected disability for a period of ten years immediately preceding death. *Green*, 10 Vet. App. At 118 (emphasis added).

3. The CAVC relied upon *Green* in several subsequent cases. In *Carpenter v West*, 11 Vet. App. 140 (1998), the CAVC stated that claimants seeking DIC under section 1318 are "'given the right to attempt to demonstrate that the veteran hypothetically would have been entitled to receive a different decision on a service-connection related issue…based on evidence in the veteran's claims file or VA custody prior to the veteran's death and the law then or subsequently made retroactively applicable.'" *Id*. at 145 (emphasis added) (quoting *Green*, 10 Vet. App. at 118). The CAVC further stated that the appellant in *Carpenter* was "entitled to an adjudication of her DIC claim under section 1318 as though it were a claim brought by the veteran prior to his death." *Id*. at 147. In *Wingo v. West*, 11 Vet. App. 307 (1998), the CAVC concluded, based on *Green*, that it was necessary to remand the case "for a determination, based upon evidence in the veteran's claims file or before VA at the time of the veteran's death….whether, had he brought a claim more than 10 years prior to his death, he 'would have been entitled' to receive a total disability rating for the 10 years immediately preceding his death." *Id*. at 312 (emphasis added).

4. In *Cole v. West*, 13 Vet. App. 268 (1999), the CAVC summarized its precedents concerning section 1318 as follows:

> [U]nder the umbrella of a general section 1318 claim, a VA claimant may receive section 1318 DIC under any of the three following theories: (1) if the veteran was in actual receipt of compensation at a total disability rating for 10 consecutive years preceding death….; (2) if the veteran would have been entitled to receive such compensation but for CUE in previous final [regional office] decisions and certain previous final [Board of Veterans' Appeals] decisions….; or (3) if, on consideration of the "evidence in the veteran's claims file or VA custody prior to the veteran's death and the laws then or subsequently made retroactively applicable", the veteran hypothetically would have been entitled to receive a total disability rating for a period or periods of time, when added to any period during which the veteran actually held such a rating, that would provide such a rating for at least the 10 years immediately preceding the veteran's death.

Id. at 274 (emphasis added). With respect to the third of those theories, the CAVC explained that "the nature of a hypothetically 'entitled to receive' section 1318 claim is analogous to a CUE-based section 1318 'entitled to receive' claim in that the former may succeed on the basis only of the evidence and law that existed at a fixed point in the past." *Id*. at 278 (emphasis added).

5. 5. In *Hix v. West*, the CAVC concluded that survivors seeking enhanced DIC under section 1311(a)(2) could, in the same manner as survivors claiming DIC under section 1318, seek to establish that the veteran was "hypothetically"

entitled to a total disability rating for the specified pre-death period, even though the veteran had not actually received such a rating. The CAVC stated that, "[b]ecause both section 1311(a)(2) and section 1318(b) are located in chapter 13 and deal with DIC, the Court holds that the phrase 'in receipt of or…entitled to
6. receive' must have the same meaning in both sections." *Hix*, 12 Vet. App. at 141. In support of its determination, the CAVC cited its precedents in *Green*, *Carpenter*, and *Wingo*, which, as noted above, explain the circumstances under which "Hypothetical" entitlement may be established. The CAVC reached a similar conclusion regarding section 1311(a)(2) in an unpublished decision in *Pardue v. West*, CAVC No. 97-1789 (February 8, 1999).

6. The decision that gives rise to your question resulted from VA's appeal of the CAVC's decisions in *Hix* and *Pardue* to the Federal Circuit. On appeal, VA argued that section 1311(a)(2) authorized payment of enhanced DIC only in cases where the veteran's entitlement to benefits was established by decisions during the veteran's lifetime or could be established by correction of CUE in decisions rendered during the veteran's lifetime. VA argued that the CAVC erred in concluding that the veteran's entitlement could be established on the alternative basis that the veteran was "hypothetically" entitled to have received a total disability rating for the eight-year period preceding death.

7. In its September 20, 2000, opinion, the Federal Circuit affirmed the CAVC's decisions in *Hix* and *Pardue*. The Court concluded that a VA regulation, 38 C.F.R. § 20.1106 requires VA to decide issues involved in DIC claims, other than claims under section 1318, "without regard to any prior disposition of those issues during the veteran's lifetime." The Court held that this regulation refuted VA's contention that section 1311(a)(2) authorizes enhanced DIC only where the veteran's entitlement to benefits is established by decisions during the veteran's lifetime or by correction of CUE in such decisions. In the concluding paragraph of its opinion, the Federal Circuit stated: "We affirm the ruling of the [CAVC] that the 'entitled to receive' provision of § 1311(a)(2) requires *de novo* determination of the veteran's disability, upon the entirety of the record <u>including any new evidence presented by the surviving spouse</u>." *Hix and Pardue v. Gober*§, Nos. 99-7094, -7102, slip op. at 8 (Fed. Cir. Sept. 20, 2000) (underscoring added). Although the Federal Circuit merely affirmed the CAVC's decision, its statement that determinations regarding "hypothetical" entitlement may be predicated upon "any new evidence presented by the surviving spouse" appears to conflict with the statements in the CAVC's decisions indicating that hypothetical entitlement exists when the "evidence in the veteran's claims file or VA custody prior to the veteran's death" shows that the veteran was entitled to a total disability rating for the specified period prior to death.

8. Regardless of whether, or to what extent, the Federal Circuit's statement conflicts with prior statements by the CAVC, we conclude that the Federal Circuit's statement in *Hix* is non-binding *obiter dictum*. "*Obiter dicta*" (often abbreviated as "*dicta*"), are "[w]ords of an opinion entirely unnecessary for the

decision of the case." *Black's Law Dictionary* 1072 (6th ed. 1990); *see King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996), *rev'd on other grounds*, 522 U.S. 262 (1998) (quoting *Black's*). They include a "remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause." *Black's* at 1072; *King*, 89 F.3d at 1582 (quoting *Black's*). The Federal Circuit has held that "[b]road language in an opinion, which language is unnecessary to the Court's decision, cannot be considered binding authority." *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988). Dicta in a court's opinion are not binding on lower courts or administrative bodies. *See In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997) (Board of Patent Appeals and Interferences reasonably declined to follow dictum from Federal Circuit opinion); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (inferior court is free to reject dicta). Among the several reasons for this rule are the concerns that issues which are not necessary to a court's decision may not have been "refined by the fires of adversary presentation" and may not have been "as fully considered [by the court] as [they] would have been if [they] were essential to the outcome." *Crawley*, 837 F.2d at 292-93.

9. The issue of whether evidence may be first submitted after a veteran's death to show that the veteran was "hypothetically" entitled to have received a total disability rating for at least ten years prior to death was not raised or argued to the Federal Circuit and was not necessary to that Court's determination. VA's appeal in *Hix* and *Pardue* challenged the CAVC's holding that section 1311(a)(2) authorizes payment of enhanced DIC where the veteran's "entitlement" to benefits was merely "hypothetical". VA did not raise any issues or arguments concerning the ancillary question of what evidence would be competent to establish "hypothetical" entitlement in the event that the Federal Circuit affirmed the CAVC's decision. The Federal Circuit's conclusion that eligibility for enhanced DIC under section 1311(a)(2) may be predicated on the veteran's "hypothetical" entitlement to benefits resolved the appeal and provided the necessary basis for its order affirming the CAVC's decisions in *Hix* and *Pardue*. It was unnecessary for the Court to reach the ancillary question of when evidence may be submitted to establish such "hypothetical" entitlement, particularly when that question was neither raised on appeal nor disputed by the parties. Accordingly, the Court's additional observation that determinations of "hypothetical" entitlement must be based on the entire record "including any new evidence presented by the surviving spouse," was mere *dictum* without seriously impairing the analytical foundations of the holding." *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). In addition to being unnecessary to the decision, we note that the Federal Circuit offered no analysis or citation of authority regarding the legal basis for that statement, and made no acknowledgement of the CAVC's disposition of that question with respect to claims under either section 1311(a)(2) or 1318. *See Crawley*, 83 F.2d at 292 (noting that judicial statements concerning issues that are not essential to a court's disposition may not be as "fully considered as [they] would be if [they] were essential to the outcome").

HELD:

Under 38 U.S.C. §§ 1311(a)(2) and 1318(b), a survivor's right to certain dependency and indemnity compensation (DIC) benefits exists if the deceased veteran was "entitled to receive" certain benefits for a specified period prior to his or her death. In a series of precedential decisions, the United States Court of Appeals for Veterans Claims (CAVC) concluded that section 1318(b) authorizes payment of DIC when evidence in the veteran's claims file or in the custody of the Department of Veterans Affairs (VA) prior to the veteran's death establishes that the veteran was "hypothetically" entitled to the specified benefits. In *Hix v. West*, 12 Vet. App. 138 (1999), the CAVC concluded that section 1311(a)(2) must be construed in the same manner as section 1318(b). VA appealed the decision in *Hix* to the United States Court of Appeals for the Federal Circuit, arguing that entitlement to DIC under section 1311(a)(2) could not be predicated on a veteran's "hypothetical" entitlement, but could exist only if the veteran's entitlement were established by decisions during the veteran's lifetime or by correction of clear and unmistakable error in decisions rendered during the veteran's lifetime. In *Hix and Pardue v. Gober*, Nos. 99-7094, -7102 (Fed. Cir. Sept. 20, 2000), the Federal Circuit stated: "[w]e affirm the ruling of the [CAVC] that the 'entitled to receive' provision of § 1311(a)(2) requires *de novo* determination of the veteran's disability, upon the entirety of the record including any new evidence presented by the surviving spouse." To the extent the Federal Circuit's decision refers to consideration of new evidence presented by the surviving spouse, it appears to conflict with statements in CAVC decisions indicating that "hypothetical" entitlement is to be determined upon the evidence that was in the veteran's claims file or in VA custody prior to the veteran's death. Under the circumstances of this case, however, the Federal Circuit's statement concerning consideration of new evidence presented by the surviving spouse is *obiter dictum* and is not binding upon VA or the CAVC. The issue before the Federal Circuit in *Hix* was whether the CAVC erred in concluding that section 1311(a)(2) authorizes increased DIC in cases where the veteran's entitlement to benefits is merely "hypothetical". The ancillary issue of whether evidence may be submitted after a veteran's death to establish the veteran's "hypothetical" entitlement to certain benefits was not raised or argued by the parties before the Federal Circuit and the Court's isolated statement concerning that issue was not necessary to its decision on the appeal.

For these reasons, the Federal Circuit's statement in *Hix* concerning the consideration of new evidence is dicta, and it is not binding on VA. Thus, the Federal Circuit's decision in *Hix* does not require VA to accept evidence submitted after a veteran's death offered to establish, under 38 U.S.C. § 1311(a)(2), that the veteran was "entitled to receive" compensation from VA during his or her lifetime for a service-connected disability that was rated totally

disabling for a continuous period of at least eight years immediately preceding death.

Leigh A. Bradley