Department of Veterans Affairs

Memorandum

Date: April 21, 2005 VAOPGCPREC 4-2005

From: General Counsel (021)

Subj Whether Request for Equitable Relief may be considered "an Administrative Remedy" Under Section 113(b) of Public Law 106-419

To: Director, Education Service (22)

QUESTION PRESENTED:

Whether a request for equitable relief may be considered "an administrative remedy" as that terminology is used in section 113(b) of Public Law 106-419.

DISCUSSION:

1. As noted in your memorandum of April 14, 2004, section 113(a) of Public Law 106-419 amended 38 U.S.C. § 5113 to allow VA to consider an individual's original claim to have been filed on the eligibility date of the individual if that date is more than one year before the date the initial rating decision was made. Pursuant to section 113(b), the amendment to section 5113 was made effective with respect to "applications first made under section 3513 of title 38, United States Code, that-- (1) are received on or after the date of this Act [November 1, 2000]; or (2) on the date of enactment of this Act [November 1, 2000], are pending (A) with the Secretary of Veterans Affairs, or (B) exhaustion of available administrative or judicial remedies."

2. In brief, your memorandum indicates that the veteran in question was granted a permanent and total (P&T) disability evaluation for his service-connected disability by a rating action dated December 15, 1995. The rating established May 23, 1990, as both the effective date of the P&T evaluation and chapter 35 eligibility. The veteran was notified of the rating on January 22, 1996. The veteran's daughter filed an original claim for benefits under chapter 35 on April 1, 1996. Also on that date, VA received enrollment certifications from the daughter's school that certified her enrollments for the periods from June 17, 1993, to August 25, 1994, and from October 5, 1995, to June 8, 1996. Under the law then in effect, benefits were payable only for one year prior to the date of VA's receipt of an application or enrollment certification, whichever was later. In view of this, benefits were denied for the period from June 17, 1993, to August 25, 1994. On August 9, 1999, the Board of Veterans' Appeals (BVA) denied the daughter's appeal of the denial of benefits for that period.

3. On October 17, 2000, the Veterans of Foreign Wars (VFW) requested equitable relief on behalf of the claimant. VA denied the request for equitable relief because the evidence did not meet the provisions of 38 U.S.C. § 503 (a) or (b). Your request for our opinion arose out of VFW's contention that the claimant's request for equitable relief "met the requirements of PL (sic) 106-419; specifically, her request for relief was a

request for an administrative remedy and, as such, her claim was "pending" on November 1, 2000," the date of enactment of Public Law 106-419.

4. We note, initially, that a request for equitable relief under 38 U.S.C. § 503 clearly is not an application "first made . . . under section 3513 of title 38, United States Code" as referred to in section 113(b) of Public Law 106-419. Furthermore, in this case, the application "first made under section 3513 of title 38" was received in April 1996 and was finally resolved by the BVA decision dated August 9, 1999, which became final when it was not appealed to the Court of Appeals for Veterans Claims within 120 days following the date of its issuance, per 38 U.S.C. § 7266(a). As a result, no application "under section 3513" was either first received on or after the effective date of Public Law 106-419, or still "pending" in either an administrative or judicial forum on the date of enactment. In view of this, section 113(b) of that law by its terms does not apply. Thus, on these bases alone, VA should continue its denial of retroactive benefits for the period in question. Secondly, we believe the applicable statutory language, in its context, plainly contemplates remedies within the benefits adjudication process. Thus, an application for benefits can be said to be "pending" appellate review by the BVA, for example, but such an application would not be "pending" equitable relief. The latter is a personal remedy for extraordinary relief outside the claims adjudication process.

5. Equitable relief may be requested under the authority of 38 U.S.C. § 503, which permits the Secretary to grant personal relief in situations where individuals have suffered loss or been denied benefits as a result of VA or other governmental error. The grant of such relief, as well as the nature and extent thereof, are wholly discretionary with the Secretary, whose decisions thereon are not subject to appeal to the BVA, the Court of Appeals for Veterans Claims, or any other judicial body. McTighe v. Brown, 7 Vet. App 29 (Vet. App. 1994). It is an extraordinary administrative remedy available when no adequate remedy is available at law and, therefore, a request for such remedy generally would be filed and considered only after an individual's application for benefits has been finally decided.

6. Thus, in the context of the adjudication of a pending original claim for benefits, which is the context of the effective date of the statutory amendment at issue here (i.e., the amendment of 38 U.S.C. § 5113), a request for equitable relief as an administrative remedy is not within the purview of the section 113(b) language.

7. Our review of the legislative history of Public Law 106-419 reveals no intent on the part of Congress that the phrase "exhaustion of available administrative . . . remedies" in the context of pending benefit applications, as used in section 113(b) of that law, means anything other than that a final adjudicative decision has been made on such application, that all available administrative review and appeal thereof has been completed, or the period for requesting the same has expired. Requests for equitable relief are part of a mutually exclusive scheme established by Congress as a personal remedy for certain errors for which remedy is not otherwise available through the regular "administrative" process (i.e., appellate review) applicable to claims for benefits.

HELD:

A request for equitable relief, although an administrative remedy in the broad sense, does not constitute "an administrative remedy" as that terminology is used within the context of Public Law 106-419, § 113(b).

Tim S. McClain