

DATE: 08-22-90

CITATION: VAOPGCPREC **88-90**
Vet. Aff. Op. Gen. Couns. Prec. **88-90**

TEXT:

Request for opinion, effective date of compensation under 38 U.S.C. § 314(k); (5 U.S.C. § 552(b)(6))

QUESTION PRESENTED:

Is the effective date for special monthly compensation (SMC) under 38 U.S.C. § 314(k) retroactive to the original date of entitlement, or to the date of the Department of Veterans Affairs (VA) administrative issue holding that 314(k) compensation may be paid in situations where loss of use of a creative organ predates service-connected anatomical loss?

COMMENTS:

1. The question herein arose when an adjudication official recommended that two veterans, who entered service following tubal ligation surgery and were receiving compensation as a result of hysterectomies which occurred during service, receive SMC as provided in 38 U.S.C. § 314(k) retroactive to the date that initial entitlement was effective. The basis for the adjudication official's request was O.G.C. Prec. 5-89 which held that "Congress intentionally provided two bases for special monthly compensation with regard to creative organs: either anatomical loss or loss of use. The fact that loss of use is not service connected does not bar compensation for anatomical loss." Previous to the issuance of O.G.C. Prec. 5-89, this office had not definitively interpreted whether 38 U.S.C. § 314(k) should apply in this type of situation.
2. O.G.C. Prec. 5-89 is conclusive as to all VA officials and employees with respect to awards of SMC where loss of use predates anatomical loss. See 38 C.F.R. § 14.507. Generally, once a claim for benefits has been denied, and either the Board of Veterans Appeals (BVA) has rendered a final decision or the time for appeal has expired without an appeal, the decision on the claim is final and the claim cannot be allowed or reopened except on the basis of new and material evidence. FN1 38 U.S.C. §§ 3008, 4004(b), and 4005(c). FN2 Claimants for veterans' compensation and pension benefits, however, are specifically relieved of this finality burden under certain circumstances by the language of 38 U.S.C. § 3010(g), which authorizes a fresh look at a disallowed claim--even in the absence of new and material evidence when an award of benefits becomes appropriate pursuant to a liberalizing statute or administrative issue.
3. The effective date of the payment of benefits resulting from a modification or new interpretation of VA policy is governed by several statutes and regulations. As a preliminary matter, under 38 U.S.C. § 3001. VA is prohibited from paying benefits

unless a claim has been filed. Under 38 U.S.C. § 3010(a), the effective date of an award of benefits generally cannot be earlier than the date of receipt of the application for the benefit. See 38 C.F.R. § 3.400.

4. The relationship between the effective date of a statute or administrative issue and the effective date of an award of benefits authorized pursuant to such statute or issue is set forth in 39 U.S.C. § 3010(g). By its terms, section 3010(g) deals with an award of benefits made pursuant to any statute or administrative issue. The essence of the rule is twofold: (1) benefits pursuant to a statute or administrative issue cannot be authorized prior to the effective date of the statute or issue and, (2) an award may be retroactive, but not more than one year prior to the earlier of (a) the date of application or (b) the date VA determines eligibility. FN3 While section 3010(g) does not mention precedent opinions issued by the General Counsel, 38 C.F.R. § 3.101 requires all VA decisions to conform to statutes, regulations and General Counsel precedent opinions. See also 38 U.S.C. s 4004(c), (BVA bound by VA regulations, Secretary's instructions, and "precedent opinion of the chief law officer"). It follows then that a liberalization of VA policy may result from a precedent General Counsel opinion, i.e. such a G.C. opinion is an administrative issue, and the effective date of any benefit award resulting therefrom is governed by 38 U.S.C. § 3010(g).

5. The VA regulation implementing section 3010(g) is found at 38 C.F.R. § 3.114(a). The opening paragraph of section 3.114(a) tracks 38 U.S.C. 3010(g) authorizing retroactive payments limited by the effective date of the statute or administrative issue establishing entitlement. The regulation goes on, in paragraphs (1) through (3) of section 3.114(a), to establish effective-date rules applicable in three specific situations involving a change of law or administrative issue giving rise to entitlement. Which of these paragraphs applies in a given claim turns on when a request for review is received or whether VA initiated a review within one year of the effective date of the statute or administrative issue creating the entitlement. In both of the situations presented, the adjudication official initiated review within 1 year of the issuance of O.G.C. Prec. 5-89.

6. Here the adjudication official has recommended that the payment of benefits should be retroactive to the veteran's initial entitlement dates. FN4 Consistent with 38 C.F.R. § 3.400(k) and 38 C.F.R. § 3.105(a), benefits retroactive to the initial date of entitlement are limited to situations in which there was clear and unmistakable error in a previous determination. The term clear and unmistakable error does not appear in title 38, United States Code. FN5 However, there is regulatory authority for the proposition that benefits may be retroactive to the initial date of eligibility in such a situation. See 38 C.F.R. §§ 3.400(k) and 3.105(a). The fact that this term appears in the regulation can be interpreted as the codification of the longstanding VA policy that a veteran should not be deprived of a benefit as a result of a factual error (such as the loss of medical records or withholding of information by the service department) that forms the basis of a decision later shown to be clearly and unmistakably incorrect. See 22 Op.Sol. 722-A (1935); 32 Op.Sol. 472 (1935). See also Digested Opinion 7-17-84 (1-17 38 C.F.R. § 3.400). This situation must be distinguished from instances where a new statute, or administrative

issue alters the interpretation of an already existing benefit. In the later situation, 38 U.S.C. § 3010(g) and its implementing regulation 38 C.F.R. § 3.114(a) control the effective date of the benefit.

HELD:

Where a VA administrative issue provides the legal interpretation establishing a veteran's entitlement to special monthly compensation authorized in 38 U.S.C. § 314(k), the effective date of benefits is determined by the application of the criteria set forth in 38 U.S.C. § 3010(g) and its implementing regulation 38 C.F.R. § 3.114(a).

1 BVA may on its own motion correct an obvious error noted in the record. 38 U.S.C. § 4003(c).

2 If the veteran filed a notice of disagreement with the initial agency decision on or after the passage of the Veterans' Judicial Review Act, Pub.L. No. 100-687, 102 Stat. 4105 (1988), the veteran may seek review in the newly created Court of Veterans Appeals (CVA) if he files an appeal with CVA within 120 days of the date the final BVA decision is mailed. 38 U.S.C. § 4066(a).

3 Situations involving a factual determination that are found to be based on clear and unmistakable error are not addressed in [38 U.S.C. s 3010\(g\)](#). In those cases payments may be made retroactive to the initial date of entitlement. See para. 6 infra.

4 In one situation, the initial compensation date was December 6, 1975; in the other veteran's case, initial compensation was effective June 16, 1983. In both cases, the initial compensation date was the day following release from active duty.

5 The phrase "clear and unmistakable evidence" does appear in both [38 U.S.C. s 311](#) and [38 U.S.C. s 333\(b\)](#), in the context of presumptive service connection.

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