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CITATION: VAOPGCPREC 2-92 Vet. Aff. Op. Gen. Couns. Prec. 2-92

TEXT:

Subj: Interpretation of 38 U.S.C. § 7102 (formerly 38 U.S.C. § 4002)

QUESTION PRESENTED:

Does the Board of Veterans' Appeals (BVA) have the authority under 38 U.S.C. § 7102 to issue decisions by a section of the Board composed of one regularly assigned member and one "acting member" when a regularly assigned member is absent, the third position on the section is vacant as the result of a vacancy on the Board, or the third regularly assigned member is unable to serve on that section?

COMMENTS:

1. When a BVA section is composed of fewer than three members as a result of the absence of a member or a vacancy on the Board or the inability of a member assigned to a section to serve on that section, the provisions of 38 U.S.C. § 7102(a)(2)(A) permit the Chairman of the Board to assign another member of the Board to the section, to designate an employee of the Department of Veterans Affairs (VA) to serve as an "acting member" of the Board, or to direct the section to proceed without awaiting the assignment of an additional member to the section.

2. Neither the statute nor the legislative history of section 7102(a) provide a definition of a Board member "vacancy" or "absence," but we assume Congress intended that the missing member be genuinely inaccessible and unavailable for participation on his or her regularly-assigned panel. A "vacancy" would arise when the office is without an incumbent due to circumstances such as death, resignation, or removal from office. 63A Am. Jur. 2d Pub. Officers & Employees, § 138 (1984). At least one court has interpreted "the term 'absence' to mean unavailable or unreachable by any reasonable means." See McKinney v. Gannett Co., Inc., 660 F.Supp. 984, 1002 (D.N.M. 1981). Courts have found that "absence ... would make it impossible for an official to perform the act in question." Watkins v. Mooney, 71 S.W. 622, 624 (Ky. 1903); see also Commonwealth v. Wise, 351 S.W.2d 491, 491-92 (Ky. 1961), quoting Northcutt v. Howard, 130 S.W.2d 70, 71-72 (Ky. 1939) ("the commonwealth attorney is absent in legal effect when he is either disqualified or, for some reason, disabled from performing the functions of his office Unless he is physically absent from court or absent in legal effect ..., no right or authority exists ... to appoint a substitute for him"). Such absence would arise, for example, when a Board member is away due to illness or vacation.

3. Section 7102(a) does not directly answer the question presented, since the law speaks in terms of the addition of one member to a panel and therefore specifically addresses only situations in which a three-member section lacks one member.

By making no explicit provision for the possibility of a two-member deficiency, it could be inferred Congress intended that a section missing more than one member ceases to be viable, absent reconstitution as a three-member panel by the Chairman as authorized under section 7102(a)(1). Further, section 7102(a)(3), which prohibits a section from operating with more than one acting or temporary Board member, might be interpreted as suggesting that Congress did not want a section to operate with only one regular Board member.

4. We believe the better argument is that while Congress has not specifically provided a solution to the problem of a two-member deficiency, neither has it explicitly precluded BVA from proceeding in a manner not inconsistent with law or legislative policy. Cf. 2A N. Singer, Sutherland Statutory Construction, § 45.09 (4th ed. 1984) (quoting R. Keeton, Venturing To Do Justice, Harvard University, Press (1969), "If the problem falls beyond the core area that the legislature both considered and prescribed for, defer to the legislature's manifested determinations of principle and policy to the extent they can be ascertained and are relevant to the problem at hand"). We are persuaded by the policy reflected in those provisions it has made for the Board to function in shorthanded situations that Congress has tacitly authorized the practice about which you inquire. For example, the Chairman has authority under section 7102(a)(1) to detail two regular Board members from other sections, even though Congress did not expressly offer such an approach as a solution to the problem of a two-member deficiency. We believe it is also implicitly authorized that the Chairman may reassign a single regular member from another section to aid the sole remaining member so that they could function as a two-member section, an approach not inconsistent with the provisions of sections 7102 or 7103(a). The availability of these two solutions to the problem demonstrates that Congress has not foreclosed section action in a two-member-short situation.

5. In determining whether a two-member panel comprised of a regular and acting member would be inconsistent with law, we first note that Congress in section 7102(a)(3) clearly rejected the possibility of a majority decision made by two acting members over the dissent of a regular member. However, the law does not prohibit decisions by an acting member and a regular member over the dissent of another regular member. Legislative history reflects that Congress considered but ultimately did not enact a Senate bill which proposed an amendment to former section 4003(a) (now section 7103(a)) which would have precluded temporary or acting members from casting a vote in cases in which the votes of the two permanent members are split. Explanatory Statement of Compromise Agreement on S. 1388, 98th Cong., 130 Cong. Rec. H598 (daily ed. Feb. 8, 1984), reprinted in 1984 U.S. Code Cong. & Admin. News 155, 164. Although the Congressional committees expressed an intent that "the

Chairman of the Board will continue the current practice of expanding the panel, or convening another panel, in cases in which the votes of the permanent members are split and a temporary or acting member votes against the claimant," id., such a practice relates to the provisions of former section 4003(b) and 38 C.F.R. § 19.181 as they existed prior to the enactment of the Veterans' Judicial Review Act, 1988, § 202, 102 Stat. 4105, 4110, requiring as they did intervention by the Chairman whenever a dissenting opinion was offered.

6. The Judicial Review Act amended the law to permit decisions to be made by a majority of the members of a section under 38 U.S.C. § 4003(a) (now 38 U.S.C. § 7103(a)). The legislative history of that Act reveals that a Senate bill would have amended former section 4003 (now section 7103) to (a) specify that a majority vote would be sufficient for an allowance of benefits sought on appeal but that a unanimous vote would be needed for a denial; (b) preclude a temporary or acting member from casting a vote in any case where the votes of the two regular members were split and require the Chairman to expand the section by at least two members in the event of such a split; and (c) codify the Board practice as set forth in 38 C.F.R. § 19.181 under which the Chairman could either vote with the majority or expand the section when there is a disagreement among the members of a section in any case in which unanimity is required for a final determination.

Explanatory Statement on Compromise Agreement on Division A of S. 11, 100th Cong., 134 Cong. Rec. S16650 (daily ed. Oct. 18, 1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5834, 5839-40. The fact that Congress declined to adopt these provisions evidences its acceptance of decisions made by an acting member and a regular member over the dissent of another regular member. See 73 Am. Jur. 2d Statutes, § 171 (1974).

6. If decisions made by an acting member and a regular member over the dissent of another regular member are acceptable to Congress, unanimous decisions made by two-member sections comprised of a regular and acting member should also be considered authorized. In either case, the vote of the acting member in conjunction with that of a regular member is determinative, and we can conceive no compelling reason why Congress would countenance one and not the other.

HELD:

Under 38 U.S.C. § 7102, the Board of Veterans' Appeals has the authority to issue decisions made by sections of the Board composed of one regularly assigned member and one acting member when a regularly assigned member is absent, the third position in the panel is vacant due to a vacancy on the Board, or a regularly assigned member is unable to serve on that section.