DATE: 3-17-92

CITATION: VAOPGCPREC 07-92
Vet. Aff. Op. Gen. Couns. Prec. 07-92

TEXT:

Subj: Applicability of VA Manual M21-1, part I, paragraph 50.45

QUESTIONS PRESENTED:

1. Do the provisions of VA Adjudication Procedure Manual M21-1 (M21-1), Part I, paragraph 50.45 constitute approved instructions of the Secretary which are binding on the Board of Veterans' Appeals (BVA), pursuant to 38 U.S.C. § 7104 (c)?

2. Do any of the provisions of M21-1, Part I, paragraph 50.45 constitute "substantive rules" which are the equivalent of Department of Veterans Affairs (VA) regulations?

3. If it is determined that the provisions of M21-1, part I, paragraph 50.45 are binding on BVA:

a. What evidence is considered satisfactory proof that a veteran "engaged in combat with the enemy?"

b. Does a veteran's receipt of a particular citation or his military occupational specialty sufficiently prove combat stressor exposure for purposes of establishing service connection for post-traumatic stress disorder (PTSD)?

c. When the existence of combat service is established, or the veteran has provided a credible account of an in-service stressful event, and a mental health professional has diagnosed PTSD, under what circumstances, if any, may BVA and other VA adjudicators deny a claim for service connection for PTSD, notwithstanding a diagnosis of PTSD, on the grounds that the stressor as described by the veteran is of insufficient magnitude to support a diagnosis of PTSD?

d. Under what circumstances may BVA and other VA adjudicators challenge a medical opinion as to the relationship between an in-service stressor and current symptoms, in light of the Court of Veterans Appeals' (COVA) holding in Wood v. Derwinski, U.S. Vet. App. No. 89-50 (March 28, 1991)?

COMMENTS:

1. This is in response to your request for our advice regarding the applicability of

the provisions of M21-1, Part I, paragraph 50.45 to BVA decision making. For reasons which are discussed more fully below, we conclude that the provisions of M21-1 do not constitute "instructions of the Secretary" within the meaning of 38 U.S.C. § 7104(c). We also conclude that the second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to paragraph 50.45e made by Veterans Benefits Administration (VBA) Interim Issue 21-91-1 regarding the development of evidence in cases involving PTSD constitute substantive rules which are invalid because they were not promulgated in accordance with the rulemaking procedures prescribed by 5 U.S.C. §§ 552(a)(1), 553 and 38 C.F.R. § 1.12. Moreover, these substantive rules were issued by the Chief Benefits Director in violation of the delegation of rulemaking power to the Secretary of Veterans Affairs pursuant to 38 U.S.C. § 501. Accordingly, they are not binding on BVA or VBA.

2. Section 7104(c) of Title 38, United States Code provides that " t he Board of Veterans Appeals shall be bound in its decisions by the regulations of the Department of Veterans Affairs, instructions of the Secretary, and the precedent opinions of the chief law officer." This provision has its origins in Veterans Regulation (Vet. Reg.) No. 2(a), Part III, Paragraph II which was issued pursuant to Executive Order No. 6230 on July 28, 1933. The legislative history accompanying the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, Title XIII, § 1304, 71 Stat. 83, 128, which codified Vet. Reg. 2(a), contains no explanation of what was meant by the term "instructions of the Administrator." Except for the substitution of the words "chief law officer" for "Solicitor" and "Secretary" for "Administrator," the language of section 7104(c) is identical to that of Vet. Reg. No. 2(a). Congress has never substantively revised section 7104(c).

3. In O.G.C. Advis. 5-89, which was addressed to the Chairman of the Board of Veterans' Appeals, we indicated that the phrase "instructions of the Administrator" as referred to in 38 U.S.C. § 4004(c) (now § 7104(c)) is a term of art referring to a specific class of published documents providing instructions for implementation of newly enacted legislation prior to issuance of regulations. We also noted that the practice of issuing "instructions of the Administrator" had long been discontinued. Hence, the provisions of VA Manual M21-1, part I, paragraph 50.45 do not constitute "instructions of the Secretary" binding on the BVA within the meaning of 38 U.S.C. § 7104(c).

4. VA Manual M21-1 is issued by the Chief Benefits Director and its provisions are intended to provide uniform "procedures for the adjudication of claims for pension, compensation, dependency and indemnity compensation, accrued amounts, burial allowance and servicemen's indemnity." See Adjudication Procedure Manual, M21-1 Foreword. The procedures set forth in this manual are intended to be binding only upon VA officials within the Veterans Benefits Administration (VBA) who are responsible for initially adjudicating claims for benefits. See M21-1, paragraph 1.01. Generally, BVA is not bound by this manual. 38 U.S.C. § 7104 (c), 38 C.F.R. § 19.103 (b); Carter v. Cleland, 643 F.2d 1, 6-8 (D.C.Cir 1980).

5. In 1972, VA, by regulation, voluntarily adopted the policy of affording the public notice of and an opportunity to comment on proposed regulations in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553. 38 C.F.R. § 1.12. The Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, Title I, § 102(a)(1), 102 Stat. 4106 (1988), made VA's compliance with APA rulemaking mandatory. 38 U.S.C. § 501(d).

6. The APA defines a "rule" as:

[T]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ....

5 U.S.C. § 551(4). Under the APA, VA is required to provide public notice and an opportunity to comment prior to the issuance of substantive rules. 5 U.S.C. § 553. A substantive rule that must conform to APA rulemaking is one that has the force of law and narrowly limits agency discretion. Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp., 589 F.2d 658, 666-67 (D.C. 1978). "A rule is 'substantive' when it 'effects a change in existing law or policy' which 'affect s individual rights and obligations.'" Animal Legal Defense Fund v. Quigg, 932 F.2d 920, 927 (Fed. Cir. 1991) (citing Cubanski v. Heckler, 781 F.2d 1421, 1426 (9th Cir. 1986) vacated as moot, sub. nom. Bowen v. Kizer, 485 U.S. 386 (1988)). "To be 'substantive', a rule must also be promulgated pursuant 'to statutory authority ... and implement the statute.'" Animal Legal Defense Fund, 932 at 927. See also Chrysler Corp., 441 U.S. at 302-303. In contrast, an interpretative rule exempt from APA rulemaking procedures is one that merely clarifies or explains an existing regulation or statute. Guardian Federal Savings & Loan Association, 589 F.2d at 664; Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974). However, it is the substance rather than the form of a rule which is determinative of whether it is subject to notice and comment rulemaking. Carter, 643 at 8 (citing Guardian Federal Savings & Loan Association, 589 F.2d at 666). Hence, an agency cannot avoid rulemaking procedures simply by placing a rule in a manual rather than in the Code of Federal Regulations. See NI Industries, Inc. v. United States, 841 F.2d 1104, 1107-1108 (Fed. Cir. 1988).

7. We now turn to consideration of whether M21-1, Part I, paragraph 50.45 constitutes a substantive rule. The first sentence of paragraph 50.45d requires the rating board responsible for adjudicating a claim for service connection for PTSD, to obtain from the service department and to make part of the record, evidence indicating that a veteran served in the area in which the stressful event is alleged to have occurred and that the event described by the veteran actually occurred. However, pursuant to the second sentence of paragraph 50.45d, a veteran whose claimed stressor is related to combat and who was awarded a Purple Heart,

Combat Infantry Badge, Bronze Star or other similar citation is, in the absence of evidence to the contrary, presumed to have participated in a stressful episode. The fourth sentence of paragraph 50.45d provides that " prisoner of war status is conclusive evidence of an inservice stressor."

8. Prior to the issuance of VBA Interim Issue 21-91-1 (March 26, 1991), paragraph 50.45e provided, in part, that:

Development for PTSD. A history of a stressor as related by the veteran is, in itself, insufficient. Service medical records must support the assertion that the veteran was subjected to a stressor of sufficient gravity to evoke symptoms in almost anyone. The existence of a recognizable stressor or accumulation of stressors must be supported. It is important the stressor be described as to its nature, severity and date of occurrence.

Paragraph 50.45e now provides that " i f the evidence shows the veteran engaged in combat with the enemy and the claimed stressor is related to combat, no further development for evidence of a stressor is necessary."

9. In our view, the second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to M21-1, Part I, paragraph 50.45e made by VBA Interim Issue 21-91-1 regarding the development of evidence in cases involving service connection for PTSD represent a substantive rule. The effect of these manual provisions is to relieve combat veterans and former prisoners of war of the burden of producing evidence to substantiate their claims that they experienced a stressful event. A history of a stressor as related by these veterans is, in itself, sufficient to establish the existence of a recognizable stressor or accumulation of stressors. These provisions do not merely clarify or explain an existing law or regulation. Rather, these provisions mandate a favorable finding on the question of whether these veterans experienced a stressful event based solely on a finding that such veterans were prisoners of war, awarded a particular military citation, or engaged in combat with the enemy. While a finding that a veteran had a recognizable stressor does not result in an automatic grant of service connection for PTSD, it is one of the essential elements necessary to establish entitlement to service connection for PTSD.

10. Further, we believe that there would be a legal basis for the substantive rules set forth in the second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to M21-1, Part I, paragraph 50.45e made by VBA Interim Issue 21-91-1. The Secretary of Veterans Affairs is granted broad authority under 38 U.S.C. § 1154 to promulgate regulations pertaining to service connection of disabilities which require that due consideration be given to, among other things, the places, types, and circumstances of a veteran's service as shown by the veteran's service record, the official history of each organization in which the veteran served, the veteran's medical records, and all pertinent medical and lay evidence. The Secretary is also granted broad authority to promulgate

"regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits" under laws administered by VA. 38 U.S.C. § 501. Hence, we find that these substantive rules, if promulgated by the Secretary, would have been issued pursuant to statutory direction. However, because paragraphs 50.45d and 50.45e were not promulgated in accordance with the rulemaking procedures prescribed by 5 U.S.C. §§ 552(a)(1) and 553, they are invalid and do not have the force and effect of law. Chrysler Corp., 441 U.S. at 302; Bushmann v. Scheiker, 676 F.2d 352, 355-356 (9th Cir. 1982).

11. The situation presented here is in some respects similiar to, but in others quite different from, that presented in Fugere v. Derwinski, 1 Vet.App. 103 (1990), appeal argued, No. 91-7058 (Fed. Cir. November 4, 1991). In Fugere, COVA held that VA's attempted recission of M21-1, Part I, paragraph 50.13(b), which instructed VA rating boards not to reduce benefits for hearing loss where the reduction is due to changed criteria, without complying with the requirements of 5 U.S.C. §§ 552(a)(1) and 553 was "without observance of procedure required by law." COVA then remanded the appeal to BVA with a direction to reinstate the appellant's disability rating in accordance with paragraph 50.13(b). The Secretary has appealed the Fugere case to the U.S. Court of Appeals for the Federal Circuit. On appeal, the Secretary has argued that paragraph 50.13(b) was an internal agency instruction that was void ab initio because Congress had not authorized VA to create dual rating schedules or to pay benefits based on superceded criteria for rating hearing loss. In a subsequent decision involving the question of whether VA is currently bound by the Fugere decision, COVA held that unless or until overturned by the Court of Veterans Appeals en banc, the U.S. Court of Appeals for the Federal Circuit, or the Supreme Court, any rulings, interpretations, or conclusions of law contained in a COVA decision are authoritative and binding as of the date the decision is issued and are to be considered and followed by the Secretary in adjudicating and resolving claims. Tobler v. Derwinski, U.S. Vet. App. No. 91- 1366 (December 6, 1991).

12. In Fugere, COVA focused on VA's failure to comply with the requirements of 5 U.S.C. §§ 552(a)(1) and 553 when it attempted to rescind paragraph 50.13(b) as it was this action that adversely affected the rating assigned for the veteran's service-connected hearing loss. Section 552(a)(1) of title 5, United States Code provides that:

[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

The Fugere decision contains no discussion regarding the validity of paragraph 50.13(b) which, like the instruction to rescind it, had not been promulgated in accordance with the requirements of 5 U.S.C. §§ 552(a)(1) and 553. Like manual

paragraph 50.13(b), the application of the second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to M21-1, Part I, paragraph 50.45e made by VBA Interim Issue 21-91-1 would have no adverse effect on any individual's claim for service connection for PTSD. Nonetheless, a substantive rule is invalid if it is not promulgated in accordance with the notice and comment requirements of the APA. Chrysler Corp., 441 U.S. at 302.

13. The Fugere decision also did not address the question of whether the issuance of paragraph 50.13(b) by the Chief Benefits Director was a valid exercise of the rulemaking authority granted by Congress to the Secretary of Veterans Affairs. The conferral of rulemaking power is presently found in 38 U.S.C. § 501 (a), as follows:

The Secretary of Veterans Affairs has authority to prescribe all rules and regulations which are necessary and appropriate to carry out the laws administered by the Department of Veterans Affairs and are consistent with those laws including--(1) regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws; (2) the forms of application by claimants under such laws; (3) the methods of making investigations and medical examinations; and (4) the manner and form of adjudications and awards.

Section 512 of title 38, United States Code permits the Secretary to delegate authority:

Except as otherwise provided by law, the Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions, with respect to all laws administered by the Department, to such officers and employees as the Secretary may find necessary. Within the limitations of such delegations, redelegations, or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary.

14. The Chief Benefits Director is the head of VBA and is directly responsible to the Secretary for its operations. 38 U.S.C. § 7701(b). "The primary function of the VBA is the administration of nonmedical benefits programs of the Department which provide assistance to veterans and their dependents and survivors." 38 U.S.C. § 7701(a); O.G.C. Advis. 65-90. Generally, the Secretary has delegated to the Chief Benefits Director authority to act on all matters assigned to VBA. 38 C.F.R. § 2.6(b). More specific descriptions of the matters which have been delegated to the Chief Benefits Director are found in 38 C.F.R. §§ 2.50-2.55, 2.67-2.69, 2.72, 2.76, 2.78-2.79, 2.84-2.91, and 2.95-2.99. While the Chief Benefits Director has been delegated broad authority to act for the Secretary in all matters involving the administration of nonmedical benefits, including making findings and determinations under applicable laws, regulations, precedents and instructions as to a claimants' entitlement to benefits under laws administered by

VA, the authority to promulgate "substantive rules" has not been delegated to the Chief Benefits Director. In fact, such authority is specifically reserved to the Secretary. VA Manual MP-1, "General Administrative," part I, Chapter 1, paragraph 2(c). As the Chief Benefits Director had no authority to issue the substantive rules set forth in the second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to M21-1, Part I, paragraph 50.45e made by VBA Interim Issue 21-91-1, these manual provisions are not regulations of the Department of Veterans Affairs within the meaning of 38 U.S.C. § 7104(c), and because they are invalid they bind neither BVA nor VBA.

15. In view of our conclusions that the second and fourth sentences of M21- 1, Part I, paragraph 50.45d and the change to M21-1, Part I, paragraph 50.45e made by VBA Interim Issue 21-91-1 are in violation of the notice and comment requirements of the APA and the delegation of rulemaking authority, there is no need to respond to your questions relating to the type of evidence necessary to show that a veteran engaged in combat with the enemy and the weight to be afforded medical opinions proffered by mental health professionals. We do note, however, that as these questions involve assessing the credibility and weight to be given evidence, such matters are determinations which are generally within the province of BVA.

16. Given the general nature of the issues involved here and the substantial questions of law, a copy of this opinion is being furnished to the Chief Benefits Director.

HELD:

The provisions of Adjudication Procedure Manual M21-1, Part I, paragraph 50.45 do not constitute "instructions of the Secretary" within the meaning of 38 U.S.C. § 7104(c). The second and fourth sentences of M21-1, Part I, paragraph 50.45d and the change to paragraph 50.45e made by Veterans Benefits Administration (VBA) Interim Issue 21-91-1 regarding the development of evidence in cases involving post-traumatic stress disorder, constitute substantive rules which are invalid because they were not promulgated in accordance with the rulemaking procedures prescribed by 5 U.S.C. §§ 552(a)(1), 553 and 38 C.F.R. § 1.12. Additionally, because these substantive rules were issued by the Chief Benefits Director in violation of the delegation of rulemaking power to the Secretary of Veterans Affairs pursuant to 38 U.S.C. § 501 they are not binding on the Board of Veterans' Appeals or the Veterans Benefits Administration.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 07-92