DATE: 3-25-92

CITATION: VAOPGCPREC 9-92
Vet. Aff. Op. Gen. Couns. Prec. 9-92

TEXT:

Effect of Sabol v. Derwinski, U.S. Vet. App. No. 90-1123 (March 3, 1992)

QUESTIONS PRESENTED:

1. Are the changed rating criteria for psychiatric disorders, effective February 3, 1988, a "liberalizing law, or a liberalizing VA issue" subject to the provisions of 38 C.F.R § 3.114?

2. Do Fletcher and Sabol require a revision upward in ratings for neuropsychiatric disorders in the absence of evidence supporting a rating reduction? If so, at what percentage levels of disability (between 0 and 100 percent)? If so, must the BVA remand cases involving ratings of neuropsychiatric disorders for the regional office to revise the rating, or may the BVA adjust the rating itself?

3. When there is no evidence, or no evidence of a change in the level of disability, before and after February 3, 1988, must the BVA find error in rating decisions which continued disability ratings at the same level? If so, to which percentage ratings (between 0 and 100 percent) would error apply?

4. When there is evidence of a change in disability, but the evidence does not demonstrate sustained improvement, so as to justify a rating reduction under 38 C.F.R. § 3.344 for cases in which the rating has been continued for a long period at the same level, must the BVA find error in rating decisions which continued disability ratings at the same level? If so, to which percentage ratings (between 0 and 100 percent) would error apply?

5. Must the BVA make a specific finding that the evidence is sufficient to permit a reduced rating, including a reduced rating under 38 C.F.R. § 3.344, in order to conclude that a rating continuing a rating in effect prior to February 3, 1988, is supported by the evidence?

COMMENTS:

1. Your questions relate to proper application of revised schedular criteria for rating psychoneurotic disorders. Since February 3, 1988, the Schedule for Rating Disabilities has provided the following criteria for the assignment of 10 to 70% evaluations:

Ability to establish and maintain effective or favorable relationships with people is severely impaired. The psychoneurotic symptoms are of such severity and persistence that there is severe impairment in the ability to obtain or retain employment 70%

Ability to establish or maintain effective or favorable relationships with people is considerably impaired. By reason of psychoneurotic symptoms the reliability, flexibility and efficiency levels are so reduced as to result in considerable industrial impairment 50%

Definite impairment in the ability to establish or maintain effective and wholesome relationships with people. The psychoneurotic symptoms result in such reduction in initiative, flexibility, efficiency and reliability levels as to produce definite industrial impairment 30%

Less than criteria for the 30 percent, with emotional tension or other evidence of anxiety productive of mild social and industrial impairment 10%

(Underscoring supplied.) 38 C.F.R. § 4.132 (1991). The 1988 revisions were designed to bring the criteria for rating psychoneuroses into conformance with those for rating psychoses and organic brain disorders. Previously psychoneuroses had been rated according to the following schedule:

Ability to establish and maintain effective or favorable relationships with people is seriously impaired. The psychoneurotic symptoms are of such severity and persistence that there is pronounced impairment in the ability to obtain or retain employment32)4B70……..70%

Ability to establish or maintain effective or favorable relationships with people is substantially impaired. By reason of psychoneurotic symptoms the reliability, flexibility and efficiency levels are so reduced as to result in severe industrial impairment32)4B50…….50%

Definite impairment in the ability to establish or maintain effective and wholesome relationships with people. The psychoneurotic symptoms result in such reduction in initiative, flexibility, efficiency and reliability levels as to produce considerable industrial impairment……...30%

Less than criteria for the 30 percent, with emotional tension or other evidence of anxiety productive of moderate social and industrial impairment…….10%

(Underscoring supplied.) 38 C.F.R. § 41.132 (1987). The criteria for noncompensable and total-disability ratings were not changed by the 1988 amendments.

2. The Sabol decision by the U.S. Court of Veterans Appeals involved two BVA decisions the Court found difficult to reconcile. In 1989 a Board section, erroneously relying upon the rating criteria as they existed before their amendment in 1988, affirmed a regional office decision denying entitlement to a rating in excess of 50% for anxiety reaction. Referring to the old criteria, the BVA section offered as its rationale that the mental disorder was shown to be "productive of not more than substantial social impairment and severe industrial impairment." At the veteran's request, his claim for an increased rating was then evaluated by the regional office under the new rating criteria. Unsuccessful again, the veteran appealed anew to the Board which in 1990 again ruled that his disability did not warrant a rating higher than 50% even under the new standards. This time, the Board expressed its view that the veteran's psychiatric disorder "was productive of not more than considerable social and industrial impairment."

3. The court in Sabol accepted the veteran's argument that the Board may have recharacterized its view of the evidence merely to conform to the new criteria for a 50% rating. Noting that no evidence had been submitted to indicate any change in the veteran's condition between the 1989 and 1990 Board decisions, it reversed the 1990 decision and remanded the matter for the Board to enter a new one detailing the reasons or bases therefor. FN1

4. In O.G.C. Prec. 7-89, we discussed the application of the new rating criteria to previously rated cases. We advised that a Board section would not be constrained to make factual findings identical to those made by the Board in a previous appeal, even if it had been on the same evidentiary record. We hold to our view that nothing in law requires the Board to make identical factual findings in successive appeals on the same record, although as indicated by the Sabol court a BVA panel must give adequate reasons or bases in explanation of its decision. This responsibility would, if anything, be heightened if the Board were to find the veteran less disabled than it previously had. We also explained in the 1989 opinion that should the Board agree with an earlier finding that a veteran suffers "severe" impairment which warranted a rating of 50% under the old criteria, the Board would be effectively bound to rule the veteran entitled to a 70% rating under the liberalized schedule. Of course, neither would the Board be required to find that a veteran suffers from disability at a level reflective of a rating assigned by a regional office when the veteran seeks a higher evaluation on appeal; the Board is authorized to make its own findings de novo.

5. Our opinion was cited approvingly by the Court in Fletcher v. Derwinski, 1 Vet. App. 394, 397 (1991). The Court correctly concluded, based on our analysis, that

[A]ll things being equal, if the evidence remained unchanged (and so supported a finding of "severe" industrial impairment), the clear intent of the 1988 change to

the diagnostic code was that there be an upward revision to a 70-percent rating.

The parenthetical in the quotation above is crucial to the Court's holding, because it indicates the Court agreed that the Board is bound to give effect to prior findings of fact only when it decides they are supported by the record. The Court has not, in our view, held that the Board is constrained by prior findings of fact in which it does not now concur. This is a point which may be lost in reading Sabol (slip op. at 4) alone, because there the Court deletes the above parenthetical in quoting from Fletcher.

6. In both Fletcher and Sabol the court remanded with instructions for redeterminations by the Board, directing that if the Board's findings of fact differed from those it entered previously on the same record it must clearly explain those differences. It did not direct the Board to adhere to findings it had reached previously, in apparent deference to the Board's authority to perform de novo reviews based on the entire record (38 U.S.C. § 7104). Indeed, as a matter of policy, were the Board constrained to reiterate findings with which it no longer agreed, claimants would not necessarily be well served; presumably, these differences of opinion could work to their benefit as often as not.

7. We conclude, therefore, that in cases where the evidentiary record remains unchanged from that upon which pre-February 3, 1988 psychoneurotic ratings were based, the Board is not constrained to reach identical findings concerning the extent of the veteran's disability.

8. Because we conclude that automatic upward adjustments in ratings are not required in such cases, your last two questions (dealing with application of 38 C.F.R. § 3.344) seem not to require extensive discussion. That regulation expresses VA policy not to reduce ratings which have been assigned for 5 years or more except when clearly warranted by the evidence. It would not expressly apply to situations in which prior ratings are continued on the basis of changed evidence. However, where longstanding VA findings regarding disability are revised by an originating agency on the basis of evidence the Board considers insufficient to support the rating, the Board shall act accordingly to assign the proper rating.

HELD:

1. Where an increased rating is occasioned only by the revision of criteria for rating psychoneurotic disorders which became effective February 3, 1988, the increased rating is to be considered based on a liberalizing VA issue per 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114.

2. The Sabol and Fletcher decisions do not require automatic revisions upward in psychoneurotic disability ratings, even absent any change in the evidentiary record upon which they are based. However, where the same record which was

the basis for a rating of 50% under the pre-1988 criteria supports current findings of severe impairment of the ability to establish or maintain effective or favorable relationships with people and in the ability to obtain or retain employment, a rating of 70% is now warranted.

3. Consistent with the above, the Board should not automatically find error in decisions which continued pre-February 3, 1988 ratings at the same level after that date on the basis of the same evidentiary records.

4. 38 C.F.R. § 3,344 does not apply to situations in which a prior disability rating is continued despite the adoption of liberalized rating criteria in the interim.

5. If it is to affirm a post-February 3, 1988, decision continuing a rating assigned prior to that date, the Board must make factual findings supporting the rating under the current rating criteria and, as with all its decisions, provide reasons or bases which adequately justify the findings.

1 The Court apparently assumed that the Board's 1989 characterization of the veteran's disability as being productive of "not more than" substantial social and severe industrial impairment was the equivalent of a finding that the disability was productive of those levels of impairment, thus the Court's conclusion that such findings may translate into eligibility for a 70% rating under the current schedule. This assumption may be erroneous on its face, because the 1989 Board section limited itself to the issue certified to it, i.e. entitlement to a rating in excess of 50%.

VETERANS ADMINISTRATION GENERAL COUNSEL
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