DATE: 12-09-92

CITATION: VAOPGCPREC 26-92
Vet. Aff. Op. Gen. Couns. Prec. 26-92

TEXT:

QUESTIONS PRESENTED:

1. Would the filing of a motion for reconsideration with the Court of Veterans Appeals (CVA) stay the precedential effect of the court's decision in Fluharty v. Derwinski, U.S. Vet. App. No. 90-676 (April 3, 1992), as to other cases? That is, if a motion for reconsideration is filed, would the Board of Veterans' Appeals (BVA) be bound to apply the reasoning in Fluharty to cases currently under active consideration pending the court's ruling on the motion for reconsideration?

2. Is the court's statement concerning the applicability of Manio and Colvin to claims for increased ratings and total ratings determinative of the court's holding in Fluharty, or is it dicta? That is, is the Board required to apply 38 U.S.C. § 5108 to cases involving claims for increased and total ratings on the basis of Fluharty?

COMMENTS:

1. Your questions arose in the context of the April 3, 1992, CVA decision in Fluharty, a case involving both claims for increase in disability benefits and a claim for an individual unemployability rating in which CVA, citing Colvin v. Derwinski,1 Vet.App. 171, 174 (1991), found that the evidence submitted was new and material and that the case should be reopened. The court noted, " o nce reopened, 'the BVA must evaluate the merits of the veteran's claim in light of all the evidence, both new and old.' Manio v. Derwinski, 1 Vet.App. 140, 145 (1991) (emphasis in original)." Fluharty v. Derwinski, No. 90-676, slip op. at 3 (April 3, 1992). Both Manio and Colvin involved the application of 38 U.S.C. § 5108. The Department filed a motion for reconsideration in Fluharty arguing that section 5108 did not apply in claims for increase including those for individual unemployability and that the Manio two-step analysis is inapposite to such claims. On May 18, 1992, the court granted our request foreconsideration, vacated its earlier decision, and issued a new decision. Fluharty v. Derwinski, 2 Vet. App. 409 (1992). However, since motions for reconsideration will continue to be made as the need arises, we will address your question of the precedential nature of decisions of the Court of Veterans Appeals where a motion for reconsideration has been filed.

2. The issue of when decisions of CVA become precedential was specifically addressed by CVA in Tobler v. Derwinski, 2 Vet. App. 8 (1991). In Tobler, the court held that the decision of CVA is a decision of the court on the date it is

issued and any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued and, where applicable, are to be followed by VA. Id. at 14. Tobler involved the question of the precedential effect of decisions of CVA after an appeal of the decision has been filed. The court, however, did not specifically limit its holding to situations involving appeals and we believe that it is equally applicable in situations involving a motion for reconsideration.

3. Generally, in other courts, motions for rehearing or reconsideration are filed after judgment has been entered. See e.g., Fed. R. App. P. 40(a). In such instances, the United States Supreme Court has held that a timely petition for rehearing operates to suspend the finality of the court's judgment. Missouri V. Jenkins, 495 U.S. 33 (1990). The Ninth Circuit, however, has ruled that even though a rehearing petition has been filed, a judgment is nevertheless final for such purposes as stare decisis FN1 and full faith and credit unless withdrawn by the court. Wedbush, Noble, Cooke, Inc. v Securities and Exchange Comm., 714 DF.2d 923, 924 (9th Cir. 1983), See also Newberry v. City of St. Louis, 109 S.W.2d 876, 879 (Missouri 1937) (a motion for rehearing does not vacate the Supreme Court's judgment or affect its vitality and efficacy).

4. A motion for reconsideration or motion for rehearing in CVA cases differs from similar motions in other courts in that the motion is filed before judgment has been entered. Rule 35 of CVA's Rules of Practice and Procedure requires that a motion for reconsideration be made within 14 days after the date of the decision of which reconsideration is being requested. If such a motion is filed, no judgment will be entered until the motion is acted upon. This raises the question of whether entry of judgment by the clerk is required before a decision becomes precedential. We believe that it is not required. A judgment itself is not that which may be entered or recorded, but that which is considered and delivered by the court. 46 Am. Jur. 2d Judgments § 1543 (1969). The rendition of a judgment is the judicial act of the court, whereas the entry of a judgment by the clerk is ministerial and not a judicial act. See United States v. Hunt, 513 F.2d 129, 137 (10th Cir. 1975); and Western Union Telegraph Co. v. Dismang, 106 F.2d 362, 373-374 (10th Cir. 1939). Thus, it has been held that a judgment derives its force from the judicial act of the court in its rendition and not from the ministerial act of the clerk in entering it upon the record. Lieffring, v. Birt, 204 S.W.2d 935, 937 (Missouri 1947). See U.S. v. Taylor, 841 F.2d 1300, 1308 (7th Cir. 1988) (it is the rendition of the judgment that is determinative). We also note that Rule 36 of CVA's rules of Practice and Procedure provides that " u pon receipt of an opinion, the Clerk shall publish it and serve copies on all parties. The Clerk shall enter the judgment 14 days after the opinion becomes the decision of the Court unless ordered by the Court." (emphasis added). Because they provide that the court publish its opinion prior to entry of judgment and specifically note that the decision becomes that of the court prior to entry, CVA's rules of practice also recognize the decision as effective on the date that it is rendered.

5. We would also point out that stare decisis does not relate to finality of judgments, nor does it draw its force from judgments. Stare decisis relates to the principles of law arising from the court's adjudication. See 1B Jeremy C. Moore et al., Moore's Federal Practice p 0.402 2 (2d ed. 1991); United States v. Conner, 926 F.2d 81,83 (1st Cir. 1991); E.E.O.C. v. Trabucco, 791 F.2d 1,2 (1st Cir. 1986). In view of Wedbush supra, and related cases, CVA's rule 35 which views a decision as effective on the day it is rendered, and the fact that the rule regarding precedence does not involve the procedural aspect of whether the judgment has been filed or finalized, we believe that there is sufficient support for the conclusion that the Tobler interpretation of when a decision becomes precedential is appropriate for application in CVA's Rule 35 cases.

6. The court in Tobler has suggested that in situations where a decision has been appealed, the agency may wish to withhold action in similar cases pending the decision by the United States Court of Appeals. We suggest this appears to be an equally appropriate course of action in situations where a motion for reconsideration has been filed.

7. You further ask whether the court's statement in Fluharty concerning the applicability of Manio and Colvin to claims for increased ratings and total ratings is precedential (i.e., has stare decisis effect) or whether it is dicta. The doctrine of stare decisis relates to the orderly development of law. 1B Moore et al., supra p 0.402 2 . In discussing its application, the First Circuit has described two principles of stare decisis as follows: "(1) an issue of law must have been heard and been decided, and (2) if 'an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed.'" E.E.O.C. v. Trabucco, 791 F.2d at 4 (citations omitted). See also United States v. Furey, 491 F.Supp. 1048, 1069 (E.D.Pa. 1980) (for definition and discussion of stare decisis).

8. The Department submitted written argument in Fluharty regarding the application of the Manio two-step analysis to claims for increase and unemployability. In its decision granting the request for reconsideration, it appears that CVA may have agreed with the Department's analysis with respect to the claims for increase. Unfortunately, the court provided no discussion of its rationale for granting reconsideration. However, since Fluharty, CVA has rendered another decision involving the applicability of section 5108 to claims for increase which is somewhat more definitive. In Frank Proscelle v. Derwinski, U.S. Vet. App. No. 90-570 (July 24, 1992), the court ruled that section 5108 does not apply where the veteran claims that his service-connected disability has undergone an increase in severity and that the claim for increase would therefore be considered a new claim. FN2 Accordingly, it appears that section 5108 does not apply in claims for increase in cases in which the veteran alleges a service-connected disability has increased in severity since a prior rating.

9. It is unclear, however, why the court in its reconsideration of Fluharty chose to apply Manio and Colvin to the claim for individual unemployability rather than view it as a new claim. In affirming its prior determination regarding the claim for individual unemployability, CVA again noted that "new and material evidence has been submitted to reopen his previously disallowed individual unemployability claim." Quoting from Manio, it stated that once reopened "the BVA must evaluate the merits of the veteran's claim in light of all the evidence, both new and old." It does not appear that the court ignored the issues presented in our motion for reconsideration since it changed its earlier finding and excluded the claims for increase in disability evaluations from the Manio and Colvin application. Neither did CVA indicate that it wished to reserve issuing an opinion on the issue.

10. With regard to whether the court's statements regarding Manio and Colvin are dicta, we note that dictum includes that language by the court which is not necessary for deciding the case but is more of an observation. See 1B Moore et al., supra p 0.402 2 and Stare Decisis, 79 F.R.D. 509, 512 (1979). See also Manuli, USA, Inc. v. United States, 659 F.Supp. 244, 248 (CIT 1987) (all utterances not necessary to the decision are dicta). Thus, the language of the court regarding reopening of the case cannot be considered dictum in Fluharty because it formed part of the basis for the court's decision in the case. It is clear that the court decided that application of section 5108 to the claim for individual unemployability was appropriate in Fluharty. However, because there is no discussion by the court of the issues raised in the argument presented by the appellee or of why section 5108 is applicable for the individual unemployability claim, the instructional value of the decision is limited. Since Fluharty, CVA has clearly enunciated the principle that section 5108 is inapplicable to increased-rating claims (they being "new" rather than "reopened" claims) and individual-unemployability claims of course are claims for an increased rating of a veteran's service-connected disability or disabilities. As matters now stand, whether the Fluharty panel's approach to individual unemployability retains any precedent value is far from certain. Under the circumstances, we do not believe VA is bound to apply section 5108 to individual-unemployability claims, although we cannot predict with certainty how CVA would view the matter if again presented with it.

HELD:

1. The filing of a motion for reconsideration with the Court of Veterans Appeals does not stay the precedential effect of the court's decision as to other cases. Therefore, BVA is bound to apply the court's decision in similar cases pending the court's ruling on the motion for reconsideration if it chooses to adjudicate such cases before the court rules on the motion.

2. The court's statement, applying Manio and Colvin in Fluharty, is not dicta. However, the parameters of its statement in this regard, and thus its

precedential effect, are far from clear. In Proscelle the court subsequently ruled that section 5108 does not apply to claims that disability has increased. Moreover, because in Fluharty CVA gave no explanation or reason for section 5108's application to individual unemployability cases, its remaining application to even those cases is uncertain. Under the circumstances, we do not believe VA is bound to apply section 5108 to any claims for increased rating, although we cannot predict with certainty how CVA will view the matter.

1 Stare decisis is a judicial policy that a point of law decided by a court will generally be followed by a court of the same or a lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case. 20 Am. Jur. 2d, Courts § 183 (1965).

2 In Proscelle, the increased rating claim at issue followed an earlier such claim and CVA reasoned that the claim presently on appeal was not a reopened claim but rather a new one "because the veteran claims that his service-connected disability has undergone an increase in severity since that prior claim." Slip op. at 3. We do not believe it is significant to the holding that there was an earlier claim for increase, the apparently determinative factor being that a particular rating was in effect and the claim was that an increase in disability had occurred.

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