

Date: December 14, 1995

O.G.C. Precedent 22-94

From: General Counsel (022)

Subj: Effect of Judicial Invalidation of Regulations Governing
Effective Dates of Awards of REPS Benefits

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

What effect does the judicial invalidation of a portion of the regulations governing effective dates of awards of benefits under the Restored Entitlement Program for Survivors (REPS) have on the payment of benefits under that program?

COMMENTS:

1. In Cole v. Derwinski, 2 Vet. App. 400 (1992), aff'd, 35 F.3d 551 (Fed. Cir. 1994), a case involving an applicant for the REPS mother's benefit, the United States Court of Veterans Appeals (CVA) held invalid as in excess of statutory authority Department of Veterans Affairs (VA) regulations at 38 C.F.R. § 3.812(f)(2) and (3) (1992) establishing a time-specific filing requirement for REPS benefits. In Skinner v. Brown, 4 Vet. App. 141 (1993), aff'd, 27 F.3d 1571 (Fed. Cir. 1994), the CVA followed its decision in Cole in overturning a decision of the Board of Veterans' Appeals (BVA) which had denied an earlier effective date for an award of the REPS child's benefit based on the invalidated regulations. Following an amendment to section 3.812(f) revising but not eliminating the time-specific filing requirement for REPS claims, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the CVA's Skinner decision, holding that the REPS statute imposes no time restrictions on filing claims and that it mandates that a REPS claimant receive benefits for each month that he or she is eligible, regardless of when application is made. Skinner v. Brown, 27 F.3d 1571, 1574 (Fed. Cir. 1994). Relying on its decision in Skinner, the Federal Circuit subsequently affirmed the CVA's Cole decision. Cole v. Brown, 35 F.3d 551 (Fed. Cir. 1994). By memorandum to you of October 26, 1994, we recommended that VA regulations be amended to conform with the referenced court decisions. You have inquired about the impact on various classes of claimants of these decisions and

of the contemplated regulatory amendment to eliminate time-specific filing requirements for REPS benefits.

2. The three basic categories of cases in which questions may arise with respect to the effect of the Skinner and Cole decisions are: 1) new claims; 2) pending claims; and, 3) prior, finally-adjudicated claims. The conclusions of law reached by the CVA in Cole, later affirmed on appeal, as to the invalidity of former section 3.812(f)(2) and (3) were binding as of the date the CVA issued its decision. See Tobler v. Derwinski, 2 Vet. App. 8 (1991). Although in 1993 VA attempted to cure the problem identified in Cole by amending those regulations, the amended regulations were found to be invalid by the Federal Circuit in Skinner. For new claims filed after the CVA's decision in Cole, and prior to VA's issuance of amended regulations, the conclusion reached in that decision is controlling. Similarly, the Federal Circuit's decision in Skinner is controlling as to new claims filed after its issuance. Accordingly, in such claims, benefits may be paid beginning with the first month in which the claimant became eligible for REPS benefits. See 42 U.S.C. § 402(d) and (g).

3. With regard to pending claims, we advised you in O.G.C. Prec. 9-94, that, based on the ruling of the Supreme Court in Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993), court decisions invalidating VA regulations or statutory interpretations should be given retroactive effect in any VA case that can be considered "still open on direct review." In that discussion, we specifically referenced claims affected by the Cole case. All claims for REPS benefits that had not been finally adjudicated at the time of issuance of the CVA's Cole decision should be considered "open on direct review" for purposes of that decision. In the event any such claims had been decided after that decision and before issuance of the 1993 amendments to section 3.812(f), they would have been subject to the CVA's holding. As with claims pending at the time of the CVA's Cole decision, any claims not finally adjudicated at the time the Federal Circuit issued its decision in Skinner are subject to the Skinner decision

and should be adjudicated without regard to time-specific filing requirements. Effective dates of awards may be established in the same manner as with new claims.

4. Finally-adjudicated REPS claims are subject to certain finality rules affecting other claims. Under 38 U.S.C. § 3.812(d), VA has appellate jurisdiction over all determinations made in connection with REPS benefits. Pursuant to 38 U.S.C. § 7105(b)(1) and (c), an adjudication action or determination becomes final unless it is appealed within one year from the date of mailing of the notice of the result of initial review or determination and may not thereafter be reopened or allowed except as otherwise provided by regulations consistent with title 38, United States Code. Under 38 U.S.C. § 7104(b), a claim that is finally denied by the BVA may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered. An exception to these finality rules is provided by 38 U.S.C. § 5108, which states that a claim may be reopened where "new and material evidence is presented or secured."

5. The CVA and the Federal Circuit have agreed that "section 7104(b) does not preclude de novo adjudication of a claim, on essentially the same facts as a previously and finally denied claim, where an intervening and substantive change in law or regulation [has] created a new basis for entitlement to a benefit." Spencer v. Brown, 17 F.3d 368, 372 (Fed. Cir.) (quoting Spencer v. Brown, 4 Vet. App. 283, 289 (1993)), cert. denied, 115 S. Ct. 61 (1994). In Spencer, the Federal Circuit noted with approval the CVA's reasoning that, where a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement, a claim of entitlement under such law or regulation is separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. 17 F.3d at 372. Therefore, this line of reasoning continues, a later claim which asserts rights that did not exist at the time of the prior claim is necessarily a different claim. Id. In its Spencer decision, the CVA went on to explain that "the type of change in law or regulation which will justify a de novo adjudication of a claim after a final decision is a change which provides a new basis for

establishing entitlement to the relief sought so as to render the new claim legally and factually distinct from the former claim." Spencer, 4 Vet. App. at 290.

6. Under this line of reasoning, since the proper filing of a claim may be considered essential to establish entitlement to REPS benefits, and the contemplated new regulations conforming VA regulations to the Skinner and Cole decisions will establish a new rule for proper filing of claims, claims made under the new regulations for benefits previously denied due to the time-specific filing requirements for REPS claims may be considered new claims. Previously-denied benefits to which the claimant is otherwise entitled could therefore be awarded according to the new REPS regulations after they are promulgated.

7. The Spencer decision spoke in terms of changes in statutes and regulations and did not address the issue of changes in interpretation of law resulting from court decisions. In O.G.C. Prec. 10-94, we addressed the issue of effective dates for payment of compensation and pension benefits in claims based solely on liberalizing interpretations of the law by the courts. We held that the effective date of an award of compensation or pension based upon a judicial precedent is governed by 38 U.S.C. § 5110(a), which provides generally that the effective date of such an award may not be earlier than the date of receipt of a claim. However, benefits under the REPS program are a special allowance authorized by section 156 of Pub. L. No. 97-377, 96 Stat. 1830, 1920 (1982), as a replacement for certain Social Security benefits and are not governed by section 5110(a), which applies, by its terms, only to claims for compensation, pension, and dependency and indemnity compensation. Further, the Skinner and Cole decisions in large part invalidated VA's effective-date regulations governing the REPS program. Under Skinner and Cole, a REPS claimant can file a claim at any time for REPS benefits payable for a prior period. Therefore, where a claimant previously denied REPS benefits as a result of an untimely application files a new claim for those benefits based on the Skinner and Cole decisions prior to promulgation of the contemplated regulatory amendment, award of those previously-denied benefits to which the claimant is otherwise entitled

would be authorized based on the liberalizing interpretation of the REPS statute stated in those cases. Benefits may be paid beginning with the first month in which the claimant became eligible for REPS benefits.

8. In O.G.C. Prec. 9-94, we addressed the impact of a decision of the CVA on a prior, final VA determination made in reliance upon a regulation or statutory interpretation invalidated by the CVA decision. We held that a CVA decision invalidating a regulation or statutory interpretation does not have retroactive effect with regard to prior final adjudications. We further stated that, if VA changes a regulation to conform to a CVA holding, the effective date of an award of benefits pursuant to such amendment would be governed by 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114, which provide that the effective date of an award of benefits pursuant to an act or administrative issue shall not be earlier than the effective date of the act or administrative issue.

9. Cole was among the CVA decisions referenced in O.G.C. Prec. 9-94 as governed by the interpretation stated therein. However, 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114 are, by their terms, applicable only to awards of compensation, dependency and indemnity compensation, and pension. They have no bearing on determination of the effective date of an award of the special allowance authorized under the REPS statute. Accordingly, to the extent that O.G.C. Prec. 9-94 suggests that the provisions of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114 govern the determination of effective dates in claims for REPS benefits, that opinion is hereby modified.

HELD:

The United States Court of Veterans Appeals and the United States Court of Appeals for the Federal Circuit, in their decisions in the Skinner and Cole cases, found Department of Veterans Affairs regulations establishing time-specific filing requirements for claims under the Restored Entitlement Program for Survivors (REPS) to be invalid. For new claims filed after issuance of those decisions and for claims pending at the time those decisions were issued, REPS benefits may be awarded without regard to when the claims were filed.

Where claimants whose claims were finally decided prior to issuance of those decisions file claims for previously-denied REPS benefits based on the change in interpretation of law reflected in those opinions or on regulations reflecting that changed interpretation, the claims may be considered new claims and previously-denied REPS benefits for which the claimants are otherwise entitled may be awarded without regard to when the claims were filed. Benefits may be paid beginning with the first month in which the claimant became eligible for REPS benefits.

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