Date: February 2, 1994 O.G.C. Precedent 2-94

From: General Counsel (022)

Subj: Special Monthly Compensation Under 38 U.S.C. § 1114(s)

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Does a temporary total rating based on convalescence, under 38 C.F.R. § 4.30, satisfy the requirement in 38 U.S.C. § 1114(s) of a disability rated as total for entitlement to special monthly compensation?

COMMENTS:

1. Section 1114(s) of title 38, United States Code, provides a special rate of wartime disability compensation for veterans who have "a service-connected disability rated as total" and meet other criteria not relevant to the present inquiry. (Section 1134 of title 38, United States Code, provides that the same rates of compensation shall be paid for peacetime disability.) Public L. No. 86-663, 74 Stat. 528 (1960), added subsection (s) to what is now section 1114. The statutory requirement for "a service-connected disability rated as total" has remained the same in that section since that time.

2. Section 4.30 of title 38, Code of Federal Regulations, entitled "Convalescent ratings," provides a total disability rating without regard to other provisions of the rating schedule when treatment of a service-connected disability results in surgery necessitating at least one month of convalescence, surgery with severe postoperative residuals, or immobilization by cast, without surgery, of one major joint or more. The duration of these ratings is limited to a maximum of twelve months beyond the period of hospitalization or outpatient treatment during which the qualifying treatment occurred. *See* 38 C.F.R. § 4.30. VA extended the *Schedule for Rating Disabilities* to authorize such temporary total ratings, then called temporary surgical ratings, in 1950. Extension 7, Veterans Administration *Schedule for Rating Disabilities* (1945

ed.) (July 6, 1950). Thus, we may presume that Congress knew that temporary total ratings existed when it enacted Pub. L. No. 86-663 in 1960. *Ranes v. Office Employees Int'l Union Local 28*, 317 F.2d 915, 918 (7th Cir. 1963).

3. Shortly after enactment of Pub. L. No. 86-663, the Administrator of the Veterans Administration issued Instruction 1 "to implement the provisions of Public L[. No.] 86-663, pending revision of pertinent VA regulations and procedural manuals." In that instruction, the Administrator interpreted the phrase "a service-connected disability rated as total" to mean "a single disability rated 100 percent under regular schedular evaluations without employment of exceptional provisions for temporary application as in paragraphs 28, 29, and 30 . . . [of the] 1945 Schedule for Rating Disabilities." Instruction 1, Pub. L. No. 86-663, para. 3(a)(1) (Sept. 30, 1960). Shortly after the Administrator issued that instruction, the General Counsel said that this interpretation accorded with previously expressed views of the General Counsel that:

> the temporary ratings authorized by these paragraphs do not constitute regular schedular ratings in the ordinary sense but rather the granting of a monetary benefit for a specified period of hospitalization or convalescence, at the expiration of which the veterans concerned revert to the ratings to which their disabilities entitle them under the 1945 Schedule of Disability Ratings.

Memorandum to Chief Benefits Director, on Interpretation of Pub. L. No. 86-663 (Jan. 25, 1961).

4. VA incorporated this interpretation into its regulation implementing Pub. L. No. 86-663, codified at 38 C.F.R. § 3.350(i), by providing that "the special monthly compensation . . . provided by 38 U.S.C. § [1114](s) is payable where the veteran has a single service-connected disability rated as 100 percent *under regular schedular evaluation* and" meets other criteria. 27 Fed. Reg. 4739 (1962) (emphasis added).

5. In 1973, VA changed the language of the regulation to provide that the special monthly compensation is payable to veterans with "a single service-connected disability rated as 100 percent *without resort to individual unemployability*" and

who meet the other criteria. 38 Fed. Reg. 20,831, 20,832 (1973) (emphasis added). Although VA intended this change in regulatory language as a liberalization, it did not thereby intend to make section-1114(s) special monthly compensation payable to veterans with a single service-connected disability rated as total under the provisions of 38 C.F.R. § 4.28, 4.29, or 4.30. The change was "to provide a liberalization applicable to those who have a service-connected disability evaluated at 100 percent . . . pursuant to the 'extra schedular' provisions of [38 C.F.R.] § 3.321(b)." 38 Fed. Reg. at 20,832. Hence, the VBA manual provides that ratings of 100 percent under 38 C.F.R. § 4.30 may not serve as a basis for entitlement to section-1114(s) special monthly compensation. VBA Manual, M21-1, part VI, para. 8.06 (Sept. 21, 1992).

6. The first step in determining whether VA's interpretation of section 1114(s), as codified in 38 C.F.R. § 3.350(i), is inconsistent with the statute is to determine the meaning of the statute. We are not aware of any case in which the United States Court of Veterans Appeals (CVA) has interpreted the language of section 1114(s) in question. Since there appears to be no pertinent case law, we must interpret the statute ourselves. "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2157 (1993) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). The meaning of a statute must, in the first instance, be sought in the language in which the act is framed. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). If the language is plain and does not lead to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. *Id.* at 490. In our opinion, the language of section 1114(s) is plain and unambiguous. It requires "a service-connected disability rated as total." It means a service-connected disability assigned a rating such that compensation is payable at the rate authorized in 38 U.S.C. § 1114(j). Even VA's regulation on "[t]otal disability ratings," 38 C.F.R. § 4.15, provides no narrower meaning for a total rating.

7. We find nothing in the language of section 1114(s) to indicate that Congress meant to exclude service-connected disabilities rated as total under 38 C.F.R. § 4.28, 4.29, or 4.30. (Although it is not the question before us, we also find nothing in the language of section 1114(s) to indicate

that Congress meant to exclude service-connected disabilities rated as total under 38 C.F.R. § 4.16, i.e., a total rating based on individual unemployability.) Where statutory language does not establish a condition to its application, such a condition may not be construed unless a straightforward application of the language as written would violate or affect the clear purpose of the enactment. *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953) (citations omitted). The clear purpose of Pub. L. No. 86-663 was to create a rate of compensation intermediate to the rates for veterans so disabled as to warrant a higher rate of special monthly compensation under 38 U.S.C. § 1114 (such as for the permanently bedridden or those needing the regular aid and attendance of another person) and veterans with a total disability who nevertheless can supplement their disability compensation by working. S. Rep. No. 1745, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3197, 3198. Congress did not manifestly restrict the applicability of section 1114(s) to total ratings of indefinite duration, and the application of section 1114(s) to temporary total ratings would not violate the clear purpose of Pub. L. No. 86-663. Accordingly, VA may not impose its own restrictions on the applicability of section 1114(s). In our view, it is likely that the CVA would invalidate 38 C.F.R. § 3.350(i) on these grounds in an appeal in which its validity was at issue.

8. Although the General Counsel in 1961 opined that VA's interpretation of Pub. L. No. 86-663 accorded with the General Counsel's views with regard to the nature of temporary total ratings, we do not find the nature of temporary total ratings a persuasive reason for excluding them from consideration under section 1114(s). The temporary total ratings authorized by 38 C.F.R. § 4.28, 4.29, and 4.30 may well not be regular schedular ratings in the ordinary sense, but the General Counsel gave no reason for the belief that Congress intended to exclude those ratings from consideration under section 1114(s). Given that the plain and unambiguous language in which Congress expressed its intent manifests no exclusion based on the nature of certain total ratings, we conclude that there is no such exclusion.

HELD:

The plain and unambiguous language of 38 U.S.C. § 1114(s) does not restrict the nature of total ratings that may serve as a basis of entitlement to the special rate of disability compensation which section 1114(s) authorizes. A temporary

total rating based on convalescence, under 38 C.F.R. § 4.30, satisfies the requirement in section 1114(s) of a disability rated as total.

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