

Date: March 25, 1994

O.G.C. Precedent 8-94

From: Assistant General Counsel (021)

Subj: Vocational Assessments in Individual Unemployability Claims - Request for Opinion (*Poler v. Derwinski*, No. 91-1113 (Vet. App. June 26, 1992) *remanded*)

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. If no claim has been filed under the Vocational Rehabilitation program authorized by chapter 31, title 38, United States Code, does Vocational Rehabilitation Service, Veterans Benefits Administration (VBA) have statutory authority to evaluate a veteran for purposes of determining the individual's eligibility for compensation benefits under chapter 11, title 38, United States Code?

b. If such statutory authority exists, is an implementing regulation also required pursuant to section 501(a)(3), title 38, United States Code?

c. If Vocational Rehabilitation Service within VBA does not have statutory authority to provide a rehabilitation assessment for purposes of the VA compensation benefits program, is there statutory and regulatory authority for requesting an equivalent VA examination (e.g., a fee-basis consultation by a psychologist who specializes in vocational assessments)?

COMMENTS:

1. Based upon clarifying conversation with VA staff who originated the foregoing questions, we have determined that the precipitating cause of the inquiry was a case in which an applicant for an individual unemployability (IU) rating for VA compensation purposes under 38 C. F. R. § 4.16 requested that a "Vocational Rehabilitation session be scheduled --- to support his claim of individual unemployability." Apparently the case proceeded without such a session and resulted in an adverse ruling by the Board of Veterans' Appeals (BVA) which was appealed to the Court of Veterans Appeals (COVA). At this point VA successfully asked COVA to remand the case to VA for further consideration, including "a vocational rehabilitation assessment as requested by the appellant." We assume from the first inquiry above that the claimant is either ineligible to receive chapter 31 vocational rehabilitation benefits or has not elected, if eligible, to pursue such benefits.

2. The issues raised by this inquiry have been visited on two prior occasions by this office. On February 26, 1980, General Accounting Office (GAO) issued a report entitled "New Legislation and Stronger Program Management Needed to Improve Effectiveness of VA's Vocational Rehabilitation Program" in which it recommended that all persons applying for an IU rating should be referred to "the [VA] rehabilitation program counselors for a comprehensive diagnostic work evaluation." In an unpublished memorandum to Director, Rehabilitation Service, dated June 25, 1981, this office noted that just such a legislative proposal had been considered and rejected by Congress at the time of enactment of Public Law 96-466, the law which created the current chapter 31 vocational rehabilitation program.

3. Subsequently, GAO issued a report entitled "Veterans Benefits -- Improving the Integrity of the VA's Unemployability Compensation Program," dated September 21, 1987, in which their original recommendation once again was made. In response to legal inquiries raised regarding that report's recommendation, this office issued an unpublished decision, dated July 25, 1988, which is attached hereto and incorporated herein. The conclusions of that opinion still attain and substantially answer the first and second inquiries herein considered. In that opinion, we concluded:

a. In 1984, Congress enacted Public Law 98-543 mandating that individuals assigned an IU rating shall be accorded an "evaluation" to determine whether achievement of a vocational goal by the veteran is reasonably feasible. The legislative history of this provision does not indicate that Congress intended to mandate that these evaluations would be done by personnel in Vocational Rehabilitation Service assigned to administer the chapter 31 program, nor that such evaluations were contemplated for purposes other than the pilot program.

b. The Secretary has legal authority under section 513 (formerly section 210(c)) to authorize vocational rehabilitation assessments in conjunction with IU evaluations, notwithstanding that Congress had previously considered and rejected enactment of a law mandating such a procedure.

c.. Vocational Rehabilitation Service personnel under governing law and regulations, currently are only authorized to make findings and decisions regarding rehabilitation services for applicants eligible to receive benefits under chapter 31.

d. Either the rating activity or Vocational Rehabilitation Service could be delegated the task of performing such an assessment, independent of the latter's

present duties vis-a-vis the chapter 31 program, but only pursuant to a proper delegation of authority regulation.

4. We would like to expand upon the discussion in our July 25, 1988 opinion, however. The VA and COVA have agreed in the instant case to require and permit the veteran to undergo a "vocational rehabilitation assessment." Unfortunately, the term "vocational rehabilitation assessment" is not known to us as a term of art used in the compensation program, nor do we find that the nature and purpose of such an assessment are discussed anywhere in the statutes or regulations governing VA benefits. Since an understanding of the nature of the referenced assessment is indispensable to determining its legal significance, this opinion will, for convenience, characterize the assessment by our perception of its functional context, and the application of our opinion is so limited.

5. We assume from the context of the veteran's claim and the COVA remand that the function of the specified "vocational rehabilitation assessment" is to ascertain whether the veteran has the ability to obtain and pursue substantially gainful employment in light of his service-connected disabilities. (38 C. F. R. § 4.16) This assessment, therefore, is really an evaluation of the veteran's current employability (the use of the term "rehabilitation" is a misnomer) and, we note, significantly differs from a chapter 31 evaluation as described in 38 U. S. C. § 3106(a). The substantively broader objective of the chapter 31 evaluation is, in pertinent part, to determine whether the veteran has an employment handicap and whether the veteran reasonably could, with vocational rehabilitation program assistance, achieve a gainful employment status suited to his/her abilities, aptitudes, and interests.

6. Thus, if the Secretary decided to require an employability assessment as a matter of generally applicable adjudication policy for determining a veteran's entitlement to an IU rating, under authority of section 501(a)(3) of title 38, United States Code, the Secretary, in our view, must first promulgate substantive regulations defining the scope, purpose, and criteria for conducting such an assessment, as well as the manner in which VA will use the results obtained, and delegating to a specific departmental element the authority to implement and administer such assessments. Not to do so would subject the veteran to possible adverse consequences, such as revocation or denial of an IU rating, without prior knowledge of the standards used to arrive at that result. This would present serious due process concerns.

7. Finally, the Secretary clearly has broad authority to contract for personal services. (See 38 U. S. C. § 513) However, the same limits on the authority of

the Department to conduct a "vocational rehabilitation assessment" obviously would carry over to third-party contract counselors used by VA to perform the assessment. An agency may not contract for performance of a task which it has no authority to perform in its own right, except as specifically authorized or required by law. To hold otherwise would be to allow an agency to expand its activities beyond the statutory authorization governing the agency without benefit of law merely by entering into contracts with others for the performance of the desired activity. Thus, the substantive regulation described in paragraph (6) above would be a prerequisite to, and would govern formation of any contract for third-party conduct of employability assessments. Moreover, any adjudication decisions made on the basis of the facts determined by the third-party contractor must be made by VA staff. Adjudicatory decisions may not be delegated to persons outside the agency.

HELD:

a. Vocational Rehabilitation evaluations conducted under authority of chapter 31, title 38, United States Code, may be provided only to eligible persons applying for benefits under that chapter and only for the specific purposes of that chapter.

b. The Secretary has authority under section 501(a)(3), title 38, United States Code, to conduct a "vocational rehabilitation assessment" for purposes of determining the existence of facts to support an IU rating. Further, 38 U. S. C. § 512 authorizes the Secretary to delegate to any VA component the responsibility for making such assessments.

c. Under, 38 U. S. C. § 513, the Secretary theoretically may, subject to procurement rules, contract with third parties for such assessments if he deems them to be necessary for proper administration of the compensation benefits program. However, as noted in the attached opinion, the Congress has previously considered and failed to enact legislation mandating use of such assessments. Therefore, Congress may perceive that administrative implementation of such a requirement by the Secretary is an attempt to circumvent the legislative will of Congress by providing for a procedure which the latter, to date, has rejected.

d. If the Secretary elects to exercise all or any of the statutory authority cited in paragraphs (b) or (c) of this holding, the Secretary must, as a prerequisite, promulgate appropriate implementing regulations consistent therewith and with the dictates of due process. In particular, substantive regulations first would have to be promulgated detailing the scope, purpose, criteria for, and potential legal

effect of such assessments and should include a delegation of the task of administering the requirement to a particular agency activity.

e. As to the case which precipitated this inquiry, we believe that the assessment agreed to by the parties and incorporated in the COVA remand may be conducted on an ad hoc basis by any agency activity competent to do so as informally designated by the Secretary. Absent such a consensual arrangement, however, and without appropriate regulatory authority, imposing that assessment on a case-by-case basis would violate due process and would be ultra vires. Moreover, absent a policy determination on the use of an employability assessment in deciding IU claims, and absent appropriate regulations, administrative procedures, and delegation of authority implementing such a policy, we would recommend against inviting or encouraging even consensual use of the assessment on an ad hoc basis in future cases. Among other legal concerns, such action could provoke claims of unequal treatment under the law.

Mary Lou Keener

Attachment

7-25-88

15-1 Rehabilitation-Vocational

22

02

GAO Recommendation that DVB VR & C Conduct Required Vocational Evaluations of Individual Unemployability Compensation Applicants (Your memorandum of March 23, 1988)

1. You have asked for our advice concerning legal implications of a recommendation contained in a 1987 GAO report entitled "Veterans Benefits--Improving the Integrity of the VA's Unemployability Compensation Program." The recommendation is that the VA require all veterans who apply for an individual unemployability (IU) rating under the chapter 11, title 38, United States Code, service-connected disability compensation program, to be evaluated by a counseling psychologist assigned to the VR & C Division of DVB prior to a rating action by the regional office rating board.

2. The questions to which you seek guidance are:

a. Would the GAO recommendation require legislation for implementation?

b. Could the rating board activity be empowered to send cases to the VR & C activity, at its discretion, when development of information on vocational ability is needed beyond that currently available to the board?

c. Would implementation of the GAO recommendation conflict with the purposes of the temporary program for trial work periods under 38 U.S.C. s 363?

d. Would the mission of the chapter 31 vocational rehabilitation program, as intended by the latest provisions of that chapter, enacted by Public Law 96- 466, be compromised if VR & C staff became involved in gathering evidence for use of the rating board activity?

e. To which portion of the Agency's budget would funds be charged for the costs of counseling non-VA evaluation services, beneficiary travel, etc., associated with providing the evaluations contemplated by GAO, particularly as to those veterans who are not eligible for chapter 31 benefits?

3. Under the provisions of sections 310 and 331, title 38, United States Code, veterans who contract a disease or suffer a personal injury in the line of duty or who aggravate a preexisting injury or disease contracted in the line of duty while on active military naval or air service and who, as a result, have a disability therefrom may be entitled to receive disability compensation from the Veterans Administration.

4. Chapter 11 of title 38, United States Code, prescribes the rate of benefits to which such individuals may become entitled and other relevant rules for determining the benefit. Specifically, section 355 of that chapter specifies that the Administrator "shall adopt and apply a schedule of ratings of reductions in earning

capacity from specific injuries or combination of injuries." Upon the authority of this statutory provision, and the general authority to administer VA programs pursuant to 38 U.S.C. s 210, the Administrator has promulgated 38 C.F.R. ss 3.340(a)(2) and 3.341(a) permitting the VA to adjudicate a veteran whose total service-connected disabilities are rated at less than 100 percent as entitled to receive benefits at the 100 percent rate provided the disabilities "are sufficient to produce unemployability without regard to advancing age." In addition, 38 C.F.R. s 4.16 provides: "Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities...." This results in the "IU" rating.

5. In addition, veterans with compensable service-connected disabilities may be entitled to receive vocational rehabilitation benefits under chapter 31, title 38, United States Code. Section 1504 of that chapter enumerates the services authorized to be performed by the VA for purposes of that chapter. Subsection 1504(a)(1) does provide for evaluations, but only for limited purposes and not for determining whether the individual meets IU rating criteria.

6. A third relevant statutory area is found in 38 U.S.C. s 363 which establishes a limited test program operable during the period February 1, 1985, to January 31, 1989. The test provisions require veterans who receive an IU rating during this period to undergo an evaluation to determine whether "the achievement of a vocational goal is reasonably feasible." The veteran is also entitled during the test program to receive educational, vocational, psychological, employment, personal adjustment, and postplacement services as described under chapter 31 provisions, even if otherwise ineligible for chapter 31 benefits.

7. GAO argues that enactment of this test program is indicative of a new congressional intent, different from that recounted in our June 25, 1981, memorandum issued at a time when Congress was actively considering legislation to require mandatory evaluations of the sort suggested by GAO. In our view, however, the enactment of the test program as easily could be interpreted as demonstrative of an intent contrary to the GAO position. Congress only mandated post-IU rating evaluations, and then only as a part of a test program limited as to population and time. The legislative history of this enactment does not indicate that Congress considered mandating pre-IU rating evaluations by VR & C personnel, nor, if it did, that such evaluations were understood to be either generally permitted or barred outside of the test program absent specific legislation.

8. We conclude that there is no clearer explication of the will of Congress on this issue than there was in 1981 when the two houses were at odds as to requiring such preevaluations for all IU rating applicants. If anything, evidence exists only to show that a consensus was reached to allow post-IU evaluations and, then, only for the purposes of a limited test. It also should be noted that the GAO recommendation would involve thousands of veterans ineligible for chapter 31 benefits, placing a burden upon staff resources presently appropriated only for use in the chapter 31 program. The only time Congress has ever legislatively assigned to the VA the task of providing chapter 31 type benefits to persons

ineligible for that program was in enactment of the section 363 and section 524 test programs. Thus, neither chapter 11 nor 31 contains provisions which expressly or by implication either authorize or bar the VR & C counselors from providing the service recommended by GAO.

9. Moreover, the existing duties administratively assigned by the Administrator to the Chief Benefits Director for the rating activity and the chapter 31 activity are separate and distinct. Under 38 C.F.R. s 21.410 (see also, 38 C.F.R. s 2.76), supervisory and nonsupervisory personnel within VR & C are only authorized to make findings and decisions regarding rehabilitation services for veterans under chapter 31. Similarly, the delegations of authority to the Chief Benefits Director as to the rating activity are assigned only to adjudication personnel under 38 C.F.R. s 3.100(a) (see also, 38 C.F.R. s 2.67).

10. Assuming that, in the absence of a specific indication from Congress pro or con, the Administrator elects to adopt the recommendation of GAO, relying upon his general authority to administer benefit programs of the VA under 38 U.S.C. s 210(c), the existing regulatory delegations of authority to VR & C staff would have to be expanded to include conducting IU evaluations, particularly when rendered for veterans ineligible for chapter 31 benefits.

11. A review of 38 U.S.C. s 111 reveals that the Administrator, notwithstanding 38 U.S.C. s 210(c), does not have unrestricted authority to provide reimbursement to beneficiaries for travel expenses. The provisions of section 111 explicitly enumerate those activities for which such beneficiary travel payments may be authorized: vocational rehabilitation, certain education benefit counseling, and examination, treatment, or care. In our opinion, the statutory language could be broadly construed to include an employability "evaluation" for rating purposes and, thus, such an evaluation by a psychologist could qualify for payment of beneficiary travel expenses under authority of section 111.

12. Based on the above, we conclude as follows:

a. The basic GAO recommendation may only be implemented without a legislative change if the Administrator is willing to rely upon his general statutory authority under 38 U.S.C. s 210(c) to administer benefits programs assigned to the VA. However, in doing so, he would risk criticism from Congress for acting on an issue which has been considered by that body but not resolved by enactment of a specific authorizing provision. We would defend his legal right to invoke his powers under section 210(c) as being broad enough to encompass the recommended procedure, but would not recommend it in this case due to the lack of a clear-cut consensus in Congress on the issue.

b. Similarly, the rating board and VR & C activities could be empowered by the Administrator to adopt a discretionary procedure as outlined in your second inquiry, but only with appropriate changes to the delegation of authority regulations and subject to the considerations in subparagraph a, above. Furthermore, legislation to clarify the authority to provide for beneficiary travel would be recommended.

c. We believe that the GAO recommendation does conflict with the spirit of the 38 U.S.C. s 363 test program in that it mandates a procedure which is much broader

than the limited one upon which Congress was able to reach a consensus. However, absent a clear expression of contrary intent of Congress, this conflict does not establish a legal bar to implementation of the recommendation.

d. We can offer no guidance as to your fourth inquiry, inasmuch as it does not relate to a legal issue. The purpose of the chapter 31 program is clearly stated in section 1500 of title 38, United States Code. Whether the procedure proposed would thwart that purpose is a policy decision within your jurisdiction.

13. Finally, with regard to the funding of the GAO recommendation, we note that all the costs incurred by the VR & C staff consist of administrative expenses, such as employee salaries and non-VA evaluation services. Such costs are properly charged to the General Operating Expenses Appropriation, as would be appropriate beneficiary travel.

HELD: The GAO recommendation to require all persons applying for an IU rating to first be evaluated by a counseling psychologist assigned to DVB is not barred under existing law but is neither mandated by two test programs nor recommended due to conflicting legislative history; the rating boards could be given discretionary authority to refer cases for the purpose of such an evaluation provided regulations are changed; the recommendation conflicts with the spirit of 38 U.S.C. s 363; costs of implementing the recommendation, including beneficiary travel, would be chargeable to GOE.

VETERANS ADMINISTRATION GENERAL COUNSEL

Digested Opinion

END OF DOCUMENT