Date: March 25, 1994 O.G.C.Precedent 9-94

From: General Counsel (022)

Subj: Effect of Court of Veterans Appeals' Invalidation of VA Regulations or Statutory Interpretations

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Do decisions of the U.S. Court of Veterans Appeals (CVA or court) invalidating Department of Veterans Affairs (VA) regulations or statutory interpretations have retroactive effect?

COMMENTS:

1. You have requested our opinion regarding the possible retroactive effect of a decision by the CVA on prior, final Veterans Benefits Administration determinations made in reliance upon a regulation or statutory interpretation invalidated by the CVA decision. Specifically, you refer to the impact of the CVA decisions in Gardner v. Derwinski, 1 Vet. App. 584 (1991), aff'd, 5 F.3d 1456 (Fed. Cir. 1993), petition for certiorari filed, 62 U.S.L.W. 3503 (Jan. 11, 1994) (VA regulation found contrary to statutory authority); Cole v. Derwinski, 2 Vet. App. 400 (1992), motion for reconsideration denied, 3 Vet. App. 211 (1992) appeal docketed, No. 93-7003 (Fed. Cir. July 22, 1993) (regulatory subsections were void as being in excess of statutory authority); Gregory v. Brown, 5 Vet. App. 108 (1993) (regulation was unlawful as exceeding authority of the Secretary to the extent that it eliminated part of a statutory test); and Salgado v. Brown, 4 Vet. App. 316 (1993) (statutory interpretation was held invalid).

2. As a general rule, both common law and judicial decisions have recognized that constitutional decisions of courts have a retrospective effect. See Robinson v. Neil, 409 U.S. 505, 507 (1973). However, in Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court developed a doctrine under which retroactive effect was not applied to newly announced rules of criminal law. In the civil context, the Court also permitted denial of retroactive

effect to a new principle of law if such a limitation would avoid injustice or hardship without unduly undermining the purpose and effect of the new rule. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). In 1987, however, the Court overruled Linkletter and eliminated limits on retroactivity in the criminal context by holding that all newly declared rules must be applied retroactively to "criminal cases pending on direct appeal." Griffith v. Kentucky, 479 U.S. 314, 322 (1987). Subsequently, a majority of the Court agreed that a rule of federal law, once announced and applied to the parties to a controversy, must be given full retroactive effect by all courts adjudicating federal law. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). More recently, in Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510 (1993), the Court stated:

> . . . When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpreta-tion of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

113 S. Ct. at 2517. The Court stated more specifically that "we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases." Id. Thus, it appears that benefits eligibility as deter-mined by the decisions in cases such as Gardner, Cole, Gregory and Salgado would apply to any VA case that can be considered "still open on direct review."

3. The principles of finality that govern VA decisions suggest that a rule of law should not apply to prior final VA adjudications because such cases are not "still open."

Under the statutory scheme prescribed for the adjudication of veterans' benefits claims, a rating decision becomes final unless it is appealed within one year. 38 U.S.C. § 7105(c); 38 C.F.R. § 20.302(a). Moreover, once the BVA has decided a case, that decision is final unless the BVA Chairman orders reconsideration or the BVA on its own motion corrects an obvious error in the record. 38 U.S.C. § 7103(b),(c); 38 C.F.R. § 20.1000. A claim may be reopened and allowed if new and material evidence is submitted under 38 U.S.C. §§ 5108 and 7104(b), but the effective date of such an allowance would be the date the claim is reopened. 38 U.S.C. § 5110; 38 C.F.R. § 3.400. Previously denied benefits may also be awarded pursuant to a liberalizing law or VA issue, but the effective date of the award can be no earlier than the effective date of the new law or issue.
38 U.S.C. § 5110(g); 38 C.F.R. 3.114(a). See also Wells v. Principi, 3 Vet. App. 307, 309 (1992), cited approvingly in Lyman v. Brown, 5 Vet. App. 194, 196 (1993) (38 U.S.C. § 5110(g) requires a new application made pursuant to the liberalizing law or administrative issue, and entitlement may not predate the new application by more than one year). Finally, under 38 C.F.R. § 3.105(a), the Veterans Benefits Administration and the BVA may retroactively revise a final decision that was based on "clear and unmistakable error."

4. When the CVA invalidates a VA regulation or statutory interpretation, arguably the only basis that might authorize the Veterans Benefits Administration to award benefits retroactively to the date of the initially denied claim would be 38 C.F.R. § 3.105(a). The CVA has not specifically addressed the applicability of section 3.105(a) in this situation. However, in Russell v. Principi, 3 Vet. App. 310, 313 (1992), the CVA stated that "clear and unmistakable error" arises when "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied" (emphasis added). The court indicated that a finding of clear and unmistakable error "must be based on the record and the law that existed at the time of the prior . . . decision." Id. at 314. The court recently applied this analysis in Allin v. Brown, No. 90-1565, slip op. at 3-5 (Vet. App. Feb. 14, 1994), and Damrel v. Brown,

No. 93-171, slip op. at 6 (Vet. App. Feb. 18, 1994). In Allin, the CVA held that the provisions for presumptive service connection of anxiety, dysthymic disorder, post-traumatic arthritis, and irritable bowel syndrome in former prisoners of war were not applicable in a 1971 rating action because the provisions were enacted without retroactive effect after 1971. In Damrel, the CVA held that a 1967 rating action was not clearly and unmistakably erroneous due to constructive notice of a VA finding of total disability for insurance purposes because the rule of constructive notice was not formulated until the decision of Bell v. Derwinski, 2 Vet. App. 611, 613 (1992).

5. The CVA's decision in Look v. Derwinski, 2 Vet. App. 157 (1992), may also suggest that the CVA invalidation of regulations does not have retroactive effect in "finally" disallowed claims. Despite having invalidated 38 C.F.R. § 3.358(c)(3) in Gardner, the CVA in Look found that the regulation "as it previously existed" provided the basis for an award of benefits. 2 Vet. App. at 164. If the court had wished to apply Gardner retroactively, it had before it the opportunity to reverse the prior VA decision for its reliance upon the invalidated regulation at all, and not just for misapplication of the regulation. The CVA in Look may not have contemplated the issue of Gardner's retroactivity, but the court's application of the previously existing legal interpretation seems noteworthy.

6. Moreover, although agencies of original jurisdiction have authority to correct "clear and unmistakable error" in prior decisions under 38 C.F.R. § 3.105(a), that regulation by its terms does not apply where "there is a change in law or Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue." The provision for revision of decisions based on clear and unmistakable error has contained such an exception since the regulation originated under the auspices of the Veterans Bureau. See V.B. Reg. 187, § 7155 (1928); R. & P. 1074 (1930); R. & P. 1009(A) (1936, 1942, 1945, 1947, 1954, 1955); 38 C.F.R. § 3.105(a) (1959, 1962). Noting this exception to section 3.105(a), the General Counsel has in recent years distinguished between decisions based on "clear

and unmistakable error" and decisions based on a prior legal interpretation. See O.G.C. Prec. 93-90; O.G.C. Prec. 88-90; Digested Opinion, 7-1-87 (8-17 Ratings - General). Accordingly, it is our view that section 3.105(a) provides no authority, other than that provided under 38 U.S.C. § 5110(g), for retroactive payment of benefits when the CVA invalidates a VA interpretation or regulation.

7. Some early decisions of the General Counsel of the Veterans Bureau and the VA Solicitor indicate that, in the absence of statutory authority, there were no grounds for correcting errors of law in a predecessor's decision on a claim. See 31 Op. Sol. 552, 555 (1937); 30 Op. Sol. 109, 110-11 (1937); 22 Op. Sol 289, 292 (1935); 12 Op. Sol. 508, 511 (1934); 1 Op. Sol. 89, 91 (1931); 56 Op. G.C. 478, 479 (1929); 51 Op. G.C. 179, 181 (1928); 38 Op. G.C. 1461 (1926); 37 Op. G.C. 764, 765 (1926). See also 97 Op. Sol. 724, 727 (1948); 94 Op. Sol. 5, 8 (1947); 20 Op. Sol. 497, 500 (1935) (overpayments resulting from mistakes of law not recoverable). It was also held that a changed construction of a statute could not provide the basis for recovery of moneys previously paid. See 9 Op. Sol. 382, 383, 388 (1933); 1 Op. Sol. 159, 164-65 (1931); 67 Op. G.C. 375, 376-77 (1931). The early opinions instead pointed to prospec-tive discontinuance of an award if a previous policy was unmistakably erroneous. See 30 Op. Sol. 476, 480 (1937);
25 Op. Sol. 502 (1936); 23 Op. Sol. 366, 367 (1935).

8. We must note, however, that VA's historical approach has not been entirely consistent. The VA Solicitor has determined that a misinterpretation of VA regulations permitted retroactive correction where worthwhile. See 62 Op. Sol. 310, 312 (1942); 61 Op. Sol. 155, 156 (1942). In 1965, the VA General Counsel opined that retroactive pension benefits were payable under section 3.105(a) to a widow whose citizenship had been terminated based on former section 404(b) of the Nationality Act of 1940, which the Supreme Court held to be unconstitutional. See Digested Opinion, 3-19-65. Those opinions are not binding precedent, however, and we do not find their reasoning persuasive. The application of section 3.105(a) to grant retroactive benefits when the CVA invalidates a VA regulation would be

erroneous because the regulation states on its face that section 3.105(a) does not apply to changes of law or legal interpretation. Moreover, because section 3.105 and its earlier versions predated judicial review, the drafters could not have contemplated that decisions would be reversed for clear and unmistakable error as the result of judicial invalidation of VA regulations.

9. Accordingly, we find that awards based on the CVA invalidation of regulations in Gardner and the other cases you referenced should not be made retroactive with respect to claims that have been "finally" denied. If the 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.

HELD:

Decisions of the CVA invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to prior "final" adjudications of claims, but should be given retroactive effect as they relate to claims still open on direct review.

Mary Lou Keener