Date: December 6, 1995 VAOPGCPREC 25-95

From: General Counsel (022)

Subj: "Obvious Error" and Reconsideration of Board of Veterans' Appeals Decisions Based upon a Subsequently-Invalidated Regulation
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To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Does application by the Board of Veterans' Appeals (BVA or Board) of a subsequently-invalidated regulation constitute "obvious error" and provide a basis for reconsideration of the Board's decision?

COMMENTS:

1. This question arises in a case in which a motion for reconsideration is currently pending before the BVA. In April 1991, the BVA issued a decision denying compensation under 38 U.S.C. § 1151. In December 1992, the Board denied a motion for reconsideration of that decision. After the Supreme Court issued its decision in Brown v. Gardner, 115 S. Ct. 552 (1994), which invalidated the Department of Veterans Affairs (VA or Department) interpretation of section 1151 under 38 C.F.R. § 3.358(c)(3), the veteran's representative again requested reconsideration in March 1995.

2. Once the BVA renders a decision in a case, the decision is final unless the BVA Chairman orders reconsideration or the Board on its own motion corrects an obvious error in the record. 38 U.S.C. § 7103(a),(c). Under 38 C.F.R. § 20.1000(a), reconsideration may be accorded "[u]pon allegation of obvious error of fact or law."

3. In Russell v. Principi, 3 Vet. App. 310, 314 (1992) (consolidated with Collins v. Principi), the Court of Veterans Appeals (CVA) characterized "obvious error" under section 7103(c) as an "error, the existence of which . . . is undebatable, or, about which reasonable minds cannot differ." In view of the elaborate internal and external

reviews built into the rulemaking process, it is virtually inconceivable that VA would promulgate a regulation so invalid that no reasonable person could have ordered its issuance. Clearly, the pertinent provision at issue in this case, the former 38 C.F.R. § 3.358(c)(3), was not such a regulation since the United States Solicitor General advocated its validity in Gardner.

4. Moreover, the BVA is bound in its decisions by VA regulations under 38 U.S.C. § 7104(c). See also, e.g., Ternus v. Brown, 6 Vet. App. 370, 376 (1994) (the Board must apply all relevant statutes and regulations appropriate to the case before it). The Secretary has not delegated his rulemaking authority to the Board. See 38 C.F.R. §§ 2.66, 19.13, 19.14. Because the Board is performing its assigned task when it applies a regulation as promulgated by the Secretary, the proper application of a regulation is never obvious error, even if the regulation is later held invalid.

5. In Stillwell v. Brown, 6 Vet. App. 291, 303 (1994), the CVA recognized that "the evolution of VA benefits law since the creation of [the CVA] . . . has often resulted in new, different, or more stringent requirements for adjudication." The CVA noted the Supreme Court's view that "a position can be justified even though it is not correct . . . and can be substantially (i.e., for the most part) justified if a reasonable person could think it is correct, that is, if it has a reasonable basis in law and fact." See id. at 302, quoting Pierce v. Underwood, 487 U.S. 552, 566 n. 2 (1988). The CVA concluded that VA was substantially justified, though incorrect, in applying a regulation that was subsequently invalidated. See Stillwell, 6 Vet. App. at 303-04. Thus, if a reasonable person could believe that an interpretation of a statute is correct (i.e., if the interpretation is "substantially justified"), that interpretation cannot be obvious error.

6. Both the CVA and the United States Court of Appeals for the Federal Circuit have equated the term "obvious error" with the term "clear and unmistakable error" (CUE) used in

38 C.F.R. § 3.105(a).[1] See Smith v. Brown, 35 F.3d 1516, 1526 (Fed. Cir. 1994); Russell, 3 Vet. App. at 314. The CVA has held that CUE exists only when "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." Russell, 3 Vet. App. at 313. The CVA indicated that a finding of CUE "must be based on the record and the law that existed at the time of the prior . . . decision." Id. at 314. See also Ternus, 6 Vet. App. at 375-77 (BVA did not properly apply the regulation in effect at the time of proposed rating deduction); Damrel v. Brown, 6 Vet. App. 242, 245-46 (1994) (rule of constructive notice, formulated in 1992, did not apply to a 1967 rating action); Allin v. Brown, 6 Vet App. 207, 210-212 (1994) (provisions for presumptive service connection, enacted after 1971 without retroactive effect, were not applicable in a 1971 rating action).

7. In VAOPGCPREC 9-94, we concluded there is no CUE in a VA regional-office decision (i.e., the provisions of 38 C.F.R. § 3.105(a) do not apply) when the CVA invalidates a VA regulation or statutory interpretation after the regional-office decision becomes final. That opinion partially relied on CVA case law suggesting the application of existing regulations cannot be CUE.[2] Since obvious error is conceptually the same as CUE, the Board's proper application

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[1] Although there is no conceptual difference between "obvious error" and CUE, the provisions for review of obvious error in 38 U.S.C. § 7103(c) and CUE in 38 C.F.R. § 3.105(a) are procedurally distinct. Section 7103(c) applies to the Board's discretionary authority to review its own prior decisions; section 3.105(a) applies only to review of VA regional-office decisions and not to review of Board decisions. Smith, 35 F.3d at 1526, 1527.

[2] VAOPGCPREC 9-94 further relied upon the regulatory language that section 3.105(a) 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."

of a regulation as it existed at the time cannot be obvious error; and CVA decisions invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to prior final Board decisions.

8. Finally, as in VAOPGCPREC 9-94, we note that the CVA's decision in Look v. Derwinski, 2 Vet. App. 157 (1992), involved the same regulation at issue in the present case, i.e., 38 C.F.R. § 3.358. Despite having invalidated section 3.358(c)(3) in Gardner, the CVA found in Look 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 simply reverse the prior VA decision for its reliance upon the invalidated regulation, but instead reversed for misapplication of a provision of the regulation which was not invalidated. While the CVA in Look may not have contemplated the issue of Gardner's retroactivity, the court's application of the previously existing legal interpretation seems noteworthy.

9. In view of the foregoing, we conclude that the BVA did not commit obvious error in applying the former section 3.358(c)(3) prior to its judicial invalidation. Under 38 U.S.C. § 7104(c), the Board was bound to follow section 3.358(c)(3) as it existed at the time. Moreover, since obvious error is undebatable among reasonable minds, it is highly unlikely that a regulation so erroneous that its application would constitute obvious error could even be promulgated by the Department much less survive for any length of time. CVA precedent that a finding of CUE must be based on the statutory or regulatory provisions extant at the time of the previous decision is equally applicable to the finding of obvious error, since there is no substantive difference between CUE and obvious error. As we concluded in the context of CUE and regional-office decisions in VAOPGCPREC 9-94, we find that decisions of the CVA invalidating VA regulations or statutory interpretations do not have retroactive effect in relation to prior final Board decisions. Accordingly, the invalidation of a regulation does not provide a basis for reconsideration of a prior Board decision.

HELD:

The Board's application of a subsequently-invalidated regulation in a decision does not constitute "obvious error" or provide a basis for reconsideration of the decision.

Mary Lou Keener