Date: July 18, 1996 VAOPGCPREC 4-96

From: General Counsel (022)

Subj: Preservation of Disability Ratings Under 38 U.S.C. § 110 XXXXXXX, XXXXXXX X. X XX XXX XXX

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

QUESTION PRESENTED:

Are the provisions of 38 U.S.C. § 110 violated when two service-connected disabilities, which have been erroneously rated as one disability at or above a specific evaluation for 20 or more years, are rerated as two separate disabilities such that the combination of their evaluations equals or exceeds the prior specific evaluation?

COMMENTS:

1. A summary of the facts of this case follows: In May 1946, a VA rating board granted the veteran service connection for a skin disability resulting from fungus. After psoriasis was diagnosed at a VA examination in November 1947, a rating board assigned the disability a 30-percent evaluation under diagnostic code 7816, psoriasis. In December 1948, the veteran filed a supplementary claim for compensation for arthritis, a condition he contended was adjunct to his service-connected skin disability. Psoriatic rheumatoid arthritis was diagnosed in a VA hospital in early 1949, and in June 1949, a rating board, stating that "the skin condition & arthritic condition are combined into one condition——psoriatic rheumatoid arthritis," assigned a single 50-percent evaluation, coded on the rating sheet as "5002, 7816." (The diagnostic code for rheumatoid arthritis is 5002.) In December 1985, after the veteran underwent a left total knee arthroplasty, the rating was coded as "5002-5055," and diagnostic code 7816 was dropped from the rating sheet. (The diagnostic code for knee replacement (prosthesis) is 5055.) A disability evaluation of at least 50 percent remained in effect until September 1986, when a rating board, citing clear and unmistakable error in several previous rating decisions for "not providing a separate evaluation for the service[-]connected psoriasis condition,"

assigned one 30-percent evaluation under diagnostic codes 5002 and 5055 and another 30-percent evaluation under diagnostic code 7816, for a 50-percent combined evaluation, effective from September 1, 1986.

2. Preservation of disability ratings is governed by 38 U.S.C. § 110, which provides, in pertinent part:

> A rating of total disability or permanent total disability which has been made for compensation, pension, or insurance purposes under laws administered by the Secretary, and which has been continuously in force for twenty or more years, shall not be reduced thereafter, except upon a showing that such rating was based on fraud. A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes under laws administered by the Secretary shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud.

The implementing regulation, at 38 C.F.R. § 3.951(b), merely restates the statutory provision in language similar to that of section 110. It provides, in pertinent part:

> A disability which has been continuously rated at or above any evaluation of disability for 20 or more years for compensation purposes under laws administered by [VA] will not be reduced to less than such evaluation except upon a showing that such rating was based on fraud. Likewise, a rating of permanent total disability for pension purposes which has been in force for 20 or more years will not be reduced except upon a showing that the rating was based on fraud.

3. In September 1986, the rating board identified the clear and unmistakable error made in previous rating decisions as the failure to provide "a separate evaluation for the [veteran's] psoriasis condition." The rating board's

statement can be interpreted in different ways: the failure to provide a separate evaluation for the skin disability, the failure to provide a separate evaluation for the joint disability, or the failure to provide a separate evaluation for each disability. What, if anything, section 110 requires in this case depends on the nature of that clear and unmistakable error. If the 50-percent evaluation assigned in June 1949 was for either the skin disability or the joint disability alone, then section 110 prohibits that disability (whichever it is) from now being rated at less than 50 percent. It follows that, had the September 1986 rating board meant either the first or second interpretation of its statement, then to implement section 110, it should have continued the 50-percent evaluation for the disability that had been rated at 50 percent and assigned another evaluation for the disability that had not been separately evaluated. Given that the rating board instead assigned a 30-percent evaluation for each disability, it appears they believed that the 50-percent evaluation originated from both disabilities, viz., the skin and joint disabilities, without regard to whether the 50-percent evaluation resulted from the combination of separate evaluations under 38 C.F.R. § 4.25.

4. In any event, independently of the September 1986 rating board's belief, other facts support the conclusion that the 50-percent evaluation assigned in June 1949 was actually for both the skin and joint disabilities and not for either disability individually. One such fact is that the evalua-tion was coded on the 1949 rating sheet under both 5002 and 7816, an unlikely coding if the evaluation had been intended for either disability alone. Another is the June 1949 rating board's statement that "the skin condition & arthritic condition are combined into one condition." Although this statement does not necessarily mean that the 50-percent evaluation was obtained by combining separate evaluations under 38 C.F.R. § 4.25, it does indicate that a single evaluation was being assigned for the combination of two disabilities. Based on these facts, we believe the only rational conclusion is that the 50-percent evaluation assigned in June 1949 was for both disabilities resulting from psoriasis. Therefore, we have formulated the question

presented as concerning two disabilities erroneously rated as one.

5. This case involves not a rating of total disability or permanent total disability, but a less-than-total disability rating which has been continuously in effect for at least 20 years. The sentence of section 110 relating to a disability which has been rated a certain way is potentially applica-ble. 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). What is not clear is whether the two disabilities rated as one in this case were "[a] disability" within the meaning of section 110. However, we need not decide that to determine that section 110's provisions were not violated in this case.

6. If we were to assume that the two disabilities rated as one in this case are "[a] disability" within the meaning of section 110, and therefore subject to its protection, then section 110 prohibits those two disabilities rated as one from being rated at less than 50 percent. Section 110's plain language permits no other result. Nor does its legislative history indicate that Congress intended any other result. In fact, the only reference to veterans with multiple disabilities indicates that section 110 was not intended to apply to combinations of evaluations. *See* S. Rep. No. 1324, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2833 (in the case of a veteran with multiple disabilities, the prohibition against rating a protected disability at less than the preserved evaluation applies to each disability). Of course, VA regulations do not authorize rating two disabilities as one, except when evaluations are combined in accordance with 38 C.F.R. § 4.25. In September 1986, the rating board rerated as two separate disabilities the two disabilities previously rated as one, such that the separate evaluations combine to 50 percent. Thus, because the two disabilities together (the section 110 "disability") were not rated at less than 50 percent, section 110's provisions were not violated. On the other hand, if we were to assume that the two disabilities rated as one in this case are not "[a] disability" within

the meaning of section 110, then section 110 does not preserve their evaluation and its provisions are not violated.

7. Although the assignment of separate disability evaluations that combine to equal or exceed 50 percent does not violate section 110's provisions, the September 1986 rating board's correction of the clear and unmistakable error in prior rating decisions is incomplete. It appears the rating board assigned separate evaluations for the two disabilities prospectively. Section 3.105(a) of title 38, Code of Federal Regulations, however, provides, in pertinent part:

> Where evidence establishes [clear and unmistakable] error, *the prior decision will be reversed or amended*. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the correct[] decision had been made on the date of the reversed decision.

(Emphasis added.) Section 3.105(a) requires VA to amend each rating decision, all the way back to June 1949, in which VA failed to provide separate evaluations for the skin and joint disabilities resulting from the veteran's psoriasis. To properly correct the clear and unmistakable error, VA must assign separate evaluations for each disability retroactively, as if the separate evaluations had been assigned in the June 1949 rating decision. Provided that the separate evaluations combine to equal or exceed 50 percent, section 110 will not be violated. While this retroactive correction may not result in the payment of any retroactive compensation, it will have an important consequence. Section 110 will preserve those retroactive separate evaluations, for those disabilities will have been so rated for at least 20 years. *See* VAOPGCPREC 68-91 (O.G.C. Prec. 68-91) (where a disability rating is retroactively increased and the effective date of such increase is more than 20 years in the past, the revised disability percentage is protected under 38 U.S.C. § 110 and 38 C.F.R. § 3.951).

8. One more observation is in order. Neither section 110 nor the proper correction of clear and unmistakable error requires that separate evaluations be assigned in addition to the 50-percent evaluation which has been in effect for the two disabilities. Section 110 preserves a long-standing evaluation for a disability, not the evaluation assigned under any particular diagnosis. *See* VAOPGCPREC 68-91 (O.G.C. Prec. 68-91) (distinguishing "disability" from "diagnosis" with respect to the protection afforded by 38 U.S.C. § 1159 and 38 C.F.R. § 3.957). Thus, separate evaluations for each disability combining to equal or exceed 50 percent would be in lieu of, not in addition to, the 50-percent evaluation which has been assigned for both disa-bilities. The assignment of separate evaluations in addition to the 50-percent evaluation would violate the rule against pyramiding in 38 C.F.R. § 4.14.

HELD:

The provisions of 38 U.S.C. § 110, which prohibit a disability that has been continuously rated at or above any evaluation for 20 or more years for compensation purposes from thereafter being rated at less than such evaluation, are not violated when two or more service-connected disabilities, which have been erroneously rated as one disability (but not as the result of the combination of known or determinable separate disability evaluations under 38 C.F.R. § 4.25), at or above a specific evaluation for at least 20 years, are rerated as separate disabilities such that the combination of their evaluations equals or exceeds the prior specific evaluation.

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