

Date: April 7, 1997

VAOPGCPREC 13-97

From: General Counsel (022)

Subj: Reduction of a Total Disability Rating Based on Individual Unemployability Due to Removal from the "Work Possible Environment"

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

QUESTION PRESENTED:

May a total disability rating based on individual unemployability be reduced based solely on a veteran's removal from the "work possible environment"?

COMMENTS:

1. The question presented arose from the following facts. A veteran with service-connected rheumatic heart disease rated 60-percent disabling and service-connected post-traumatic stress disorder rated 30-percent disabling was assigned a total disability rating based on individual unemployability due to service-connected disabilities (IU rating). After receiving information that the veteran was incarcerated for conviction of a felony, a VA rating board effected a reduction in the IU rating on the basis that the veteran was no longer available to the work force for reasons other than service-connected disabilities. On appeal, a VA hearing officer concluded that the veteran's IU rating should be restored, noting the absence of any evidence showing that the veteran had regained employability. Upon administrative review, the Director, Compensation and Pension Service (C&P Service), concluded, in a July 8, 1993, determination, that restoration of the veteran's IU rating was not in order because the veteran had been removed from the "work possible environment" and the veteran's unemployability was not due solely to service-connected disabilities.

2. Section 5313(c) of title 38, United States Code, provides that "[t]he Secretary [of Veterans Affairs] shall not assign to any veteran a rating of total disability based on the individual unemployability of the veteran resulting from a service-connected disability during any period during which the veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony." The

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statute appears to refer to "assign[ment]" of ratings "during" a period of incarceration, rather than to reevaluation of ratings previously assigned.

3. Nothing in the legislative history of section 5313 suggests that Congress intended that an extant IU rating be reduced upon a veteran's incarceration for a felony conviction. Section 5313 originated in section 504 of the Veterans' Disability Compensation and Housing Benefits Amendments of 1980, Pub. L. No. 96-385, § 504, 94 Stat. 1528, 1534. The provision that became section 5313(c) was described in the legislative history of Pub. L. No. 96-385 as prohibiting an *adjudication* of total disability based on individual unemployability during the period of a veteran's incarceration, Explanatory Statement of House Bill, Senate Amendment, and Compromise Agreement, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 3323, 3327, suggesting an intent to prohibit the assignment of a new IU rating while a veteran is incarcerated for a felony conviction.

4. Consistent with the terms of the statute and its legislative history, VA's regulation implementing 38 U.S.C. § 5313(c) provides that:

[An IU rating] which would first become effective while a veteran is incarcerated in a Federal, State or local penal institution for conviction of a felony, shall not be assigned during such period of incarceration. However, where a rating for individual unemployability exists prior to incarceration for a felony . . . and routine review is required[,] the case will be reconsidered to determine if continued eligibility for such rating exists.

38 C.F.R. § 3.341(b). The first sentence of section 3.341(b) restates the prohibition in section 5313(c), with addition of the proviso that an IU rating subject to the prohibition is one which would first become effective while a veteran is incarcerated. This proviso indicates that the regulation's prohibition on assignment of IU

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ratings to incarcerated felons is directed at assignment of new IU ratings during the period of incarceration, since these would be the ratings which would "first become effective while a veteran is incarcerated." The second sentence of section 3.341(b), although addressing extant IU ratings rather than the assignment of new ones, does not provide for the reduction of an extant IU rating upon the incarceration of a veteran for a felony conviction. It provides only for reconsideration of an IU rating "where . . . routine review is required," "to determine if continued eligibility for such rating exists." The second sentence of the regulation appears to contemplate a determination on the issue of whether a veteran's disabilities continue to justify an IU rating, in the same manner as such determinations are made on routine review in the case of veterans who are not incarcerated. Section 3.341(b) does not authorize the reduction of an IU rating based on a veteran's removal from the work force as a result of incarceration.

5. Several regulations govern the assignment, continuation, or termination of an IU rating. Criteria governing assignment of a total disability rating for compensation purposes based on unemployability are found in 38 C.F.R. §§ 3.340(a)(1), 3.341(a), 4.15, 4.16(a), 4.18, and 4.19. In reducing an IU rating, "caution must be exercised . . . that actual employability is established by clear and convincing evidence." 38 C.F.R. § 3.343(c)(1). No regulation governing IU ratings states an eligibility requirement that a veteran be in a "work possible environment."

6. In his July 8, 1993, determination, the Director, C&P Service, appears to have found a "work possible environment" requirement in the provision in 38 C.F.R. § 4.16(a) that an IU rating may be assigned where the disabled person is unable to secure or follow a substantially gainful occupation "as a result of service-connected disabilities." The Director appears to have interpreted this provision as requiring that a veteran's unemployability be due *solely* to his or her service-connected disabilities. The Director apparently reasoned that, if a veteran is removed from means of employment due to incarceration, the veteran's unemployability

would not be attributable solely to his or her service-connected disabilities. We do not find this interpretation to be supported by the governing regulations.

7. The governing regulations do require for an IU rating that a veteran be unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities and that the service-connected disabilities themselves be sufficient to produce unemployability. 38 C.F.R. §§ 3.341(a), 4.16(a). However, a requirement that service-connected disabilities result in or be sufficient to produce unemployability is not equivalent to a requirement that they be the sole producers of unemployability. It is only required that a veteran's service-connected disability or disabilities be sufficient, without regard to other factors, to produce unemployability. This fact is acknowledged in rules that advancing age and the existence and degree of nonservice-connected disabilities are to be disregarded when determining whether a veteran is unemployable for compensation purposes. See 38 C.F.R. §§ 3.341(a), 4.16(a). If it were required for an IU rating that a veteran's service-connected disability or disabilities be the sole basis on which a veteran is unemployable, then a veteran who suffers from such disability which is sufficient in and of itself to render him or her unemployable, but also develops a nonservice-connected condition sufficient to render him or her totally disabled, or who becomes institutionalized for any reason, could not be considered eligible for an IU rating. This result is clearly not contemplated by 38 C.F.R. § 4.16(a), which provides that "the existence or degree of nonservice-connected disabilities . . . will be disregarded" where the specified percentages of disability from service-connected causes are met and service-connected disabilities render the veteran unemployable.

8. The history of VA's regulations governing unemployability ratings confirms that these regulations were not intended to require that service-connected disabilities provide the sole basis on which unemployability could be found to exist. Paragraph 18 of the Veterans Administration Schedule for Rating Disabilities (1945 ed.) required that,

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for a total disability rating for compensation purposes, the veteran's service-connected disabilities be "the prin-

principal cause of continued unemployability." Regulations issued in 1961 provided that, if a total rating is based on a disability or combination of disabilities for which the rating schedule provides an evaluation of less than 100 percent, it must be determined that the service-connected disabilities are the principal cause of unemployability without regard to advancing age. Former 38 C.F.R. § 3.341 (Supp. 1962). In 1964, section 3.341 was amended, in essentially the same form as current 38 C.F.R. § 3.341(a), to require for an IU rating that a veteran's service-connected disabilities be sufficient to produce unemployability without regard to advancing age. The purpose of that amendment was to conform the regulation to a recent rating schedule change which "authorized the granting of total ratings for compensation based upon unemployability where the required degree of disability of the service-connected condition is present in those cases previously granted pension by reason of non-service-connected disability and unemployability." VA Regulations, Compensation and Pension, Transmittal Sheet 310 (March 18, 1964). The Veterans Administration's internal explanation of the amendment was that, under the revised regulation, "it is not necessary that the service-connected disability be the principal cause of unemployability but rather that such disability be sufficient to produce unemployability." *Id.* The current provision's evolution thus reflects movement toward a less stringent causation requirement for IU ratings, i.e., change from a requirement that service-connected disabilities be the principal cause of unemployability to a requirement that they be sufficient to produce unemployability. To interpret current section 3.341(a) to require that service-connected disabilities be the sole cause of unemployability would be inconsistent with the evolution of that provision.

9. The Veterans Benefits Administration Adjudication Procedure Manual M21-1 (M21-1) addresses the question of incarcerated veterans and IU ratings. That manual provides that, if a veteran entitled to compensation is imprisoned, and the veteran's compensation includes benefits based on an IU

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rating, the case should be referred to a rating board for a decision on continued entitlement to the IU rating "in view of his or her removal from the 'work possible' environ-

ment." M21-1, Part IV, para. 25.04b.(2) (Change 36, July 25, 1993). The manual also provides that a determination as to entitlement to benefits for total-disability due to individual unemployability "is appropriate only when a veteran's unemployability is a result of service-connected disabilities." M21-1, Part VI, para. 7.55b.(6) (Change 32, March 17, 1995).

10. To the extent that manual provisions may be interpreted as imposing requirements not in the statute or regulations that are unfavorable to a claimant, those additional requirements may not be applied against the claimant. See *Cohen v. Brown*, No. 94-661, slip op. at 14 (Vet. App. Mar. 7, 1997). Accordingly, to the extent that these manual provisions may be interpreted as requiring for continuation of an IU rating that a veteran be in a "work possible environment" or that service-connected disabilities provide the sole basis on which unemployability could be found to exist, the manual provisions may not be applied against the veteran.

11. Furthermore, as noted above, 38 C.F.R. § 3.343(c)(1) requires that clear and convincing evidence establish actual employability for an IU rating to be reduced. "'Clear and convincing evidence' is an intermediate standard of proof between 'beyond a reasonable doubt' (as applied in criminal cases) and a 'fair preponderance of the evidence.'"

Caluza v. Brown, 7 Vet. App. 498, 509 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996); see also *Olson v. Brown*, 5 Vet. App. 430, 434 (1993). If a veteran's service-connected disabilities are sufficient to produce unemployability, as reflected in an IU rating, before the veteran is incarcerated for a felony conviction, and there is no evidence of any improvement in those service-connected disabilities or of any change in the veteran's circumstances that would allow him or her to work, then the veteran's incarceration for a felony conviction and his or her resultant removal from the "work possible environment" would not constitute clear and

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convincing evidence that the veteran has regained actual employability. Reduction of an IU rating based only on a

veteran's incarceration for a felony conviction would thus be inconsistent with section 3.343(c)(1).

HELD:

There is no statutory or regulatory authority for VA to reduce a total disability rating based on individual unemployability, as authorized by 38 C.F.R. §§ 3.340(a), 3.341(a), 4.16(a), based solely on a veteran's removal from a "work possible environment." Such reduction of a total disability rating based on individual unemployability would be inconsistent with the requirement of 38 C.F.R. § 3.343(c)(1) that, in order to reduce such a rating, actual employability be established by clear and convincing evidence.

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