

Date: August 7, 1997

VAOPGCPREC 29-97

From: General Counsel (022)

Subj: Application of 38 C.F.R. § 3.105(e)--Reduction in Service-Connected Disability Rating

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

QUESTION PRESENTED:

Does 38 C.F.R. § 3.105(e) apply to cases subject to the special settlement review under the provisions of the October 15, 1993, Stipulation and Order in *Fernando Giusti Bravo, et al. v. U.S. Department of Veterans Affairs, et al.*, where there is no reduction of a service-connected disability rating which results in reduction or discontinuance of compensation payments currently being made?

COMMENTS:

1. This question arose as a result of a decision of the Board of Veterans' Appeals (Board) in the appeal of a class member subject to the special settlement review under the provisions of the October 15, 1993, Stipulation and Order (Stipulation) in *Fernando Giusti Bravo, et al. v. U.S. Department of Veterans Affairs, et al.*, Civ. Act. No. 87-0590 (CCC) (D.P.R.) (*Giusti Bravo*). This class action lawsuit, filed in the United States District court for the District of Puerto Rico, involves Puerto Rican and Virgin Island veterans whose 100 percent service-connected evaluations based upon neuropsychiatric (NP) disorders were reduced pursuant to a special mass review (mass review) instituted by the Department of Veterans Affairs (VA) in March 1983. The class consists of veterans whose 100 percent disability ratings for NP conditions were reduced either as a result of the mass review commenced by the VA San Juan Puerto Rico regional office (RO) in March 1983, or as a result of other reviews conducted by the RO on or after January 8, 1982. On October 15, 1993, the district court approved the terms of the Stipulation in the settlement of the *Giusti-Bravo* case. See *Giusti-Bravo v. United States Veterans Administration, et al.*, 853 F. Supp. 34, 42 (D.P.R. 1993). The Stipulation provided,

among other things, that each class member who did not decline to participate in the settlement would receive a special settlement review in accordance with the provisions of the Stipulation. For each

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class member who participated in the special settlement review, the Stipulation vacated the first NP disability rating decision rendered after January 8, 1982, which reduced the NP rating from 100 percent, as well as all subsequent NP rating decisions, including Board decisions rendered to the date of the special settlement review. Although temporary 100 percent compensation payments were made to certain class members during the special settlement review process, the reduced disability ratings and payments resulting from the vacated decisions were maintained until the special settlement reviews were conducted.

2. In the appeal before the Board, the veteran, a *Giusti Bravo* class member, who did not decline to participate in the special settlement review, had previously been assigned a 100 percent schedular disability rating for schizophrenia prior to the mass review. As a result of the mass review, the veteran was reduced to a 0 percent disability rating, and no disability compensation payments were made to the veteran. In accordance with the Stipulation, the 0 percent rating was vacated, and as a result of the special settlement review, it was initially determined that the veteran's disability rating was 0 percent for his NP condition. No disability compensation payments were paid as a result of the 0 percent disability rating. On appeal of the denial of his claim for the restoration of his 100 percent rating for his service-connected NP disorder, a subsequent rating decision determined, among other things, that a 70 percent disability rating was warranted.

3. The veteran continued his appeal to the Board requesting, among other things, the restoration of his 100 percent schedular disability rating for his NP condition. The Board found that it did not have to determine whether the relevant regulations were incorrectly applied to the evidence as argued by the veteran's representative because it found that the RO had not followed the reduction procedures of 38 C.F.R. § 3.105 and those listed in VBA Circular 21-94-2, *Fernando Giusti Bravo, et al., Plaintiffs, v. U.S. Department of Veterans Affairs, et al., Defendants*[,] Civ. No. 87-0590 (D.P.R.) (CCC), dated

June 22, 1994, as amended by Change 1, dated October 6, 1994 (Circular). This circular contained the guidance provided by the Veterans Benefits Administration to implement the provisions of the Stipulation. The Board's decision cited the provisions of 38 C.F.R. § 3.105(e) and paragraph 9(d) of

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the Circular and concluded that because the case involved a reduction of benefits, the cited provisions of the Circular and section 3.105 should have been applied. The Board held that once the RO determined that the evidence of record only supported a 70 percent disability rating and not a 100 per-

cent schedular rating or a total rating based on individual unemployability, the RO had the obligation to issue a proposed rating informing the veteran that it was proposing to reduce the veteran's benefits. The Board found that the veteran's claims folder did not contain a proposed rating action and the correspondence between the RO and the veteran did not refer to such an action. The Board concluded, therefore, that the RO had disregarded the provisions of both the Circular and section 3.105 and this amounted to clear and unmistakable error. The Board granted the veteran's appeal and restored his 100 percent schedular disability rating for schizophrenia.

4. Section 3.105(e) states that where a reduction in evaluation of a service-connected disability is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, the reduction will be made effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating decision expires. See 38 U.S.C. § 5112(b)(6). In VAOPGCPREC 71-91, we held that section 3.105(e) does not apply where there is no reduction in the amount of compensation payable. Thus, section 3.105(e) is applicable "only when two factors are present: (1) there is a reduction in evaluation of a service-connected disability or employability status; and (2) the lower evaluation would result in a reduction and discontinuance of compensation payments currently being made." VAOPGCPREC 71-91.

5. The provisions of the Circular are consistent with the

provisions of section 3.105 and expressly provide with emphasis added in paragraph 9(d), of the Circular, (as cited in the Board decision) that, "[w]here a reduction in evaluation is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, **the provisions of 38 C.F.R. § 3.105(e) are for application**" (emphasis in original). Thus, the Circular only requires the notice provisions of section 3.105(e) to be applied where there is

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a reduction or discontinuance of compensation payments which are "currently being made."

6. In its decision on the class member's appeal, the Board apparently did not consider the fact that, at the time of the special settlement review which maintained the 0 percent disability rating that had been determined during the mass review, there was no reduction or discontinuance of a disability rating or of compensation payments currently being made. Additionally, the RO's determination of a 70 percent disability rating was in fact, an increase in the class member's disability rating (from 0 percent) and before which there were no compensation payments currently being made. Since neither decision amounted to a reduction or discontinuance of a disability rating where compensation payments were currently being made, the Circular's provisions and the terms of the section 3.105(e) clearly indicate that the provisions of section 3.105(e) would not apply in the veteran's case. Thus, the provisions of section 3.105(e) which require VA to provide a proposed rating action and a 60-day pretermination notice are inapplicable in the veteran's case and should not have served as a basis to restore the veteran's disability rating to 100 percent.

7. Paragraph 25 of the Stipulation states that "VA shall apply the provisions of 38 C.F.R. § 3.105(e), which provides that if a revised evaluation would result in a reduction or discontinuance of compensation currently being made, the reduction will be made effective only in the future" The Stipulation, and the Circular which implements the Stipulation, clearly contemplate the

application of section 3.105(e) in situations where, for example, a class member was reduced from a 100 percent service-connected disability rating for an NP condition to a 70 percent rating in the mass review, and then is reduced to a lower than 70 percent disability rating as a result of the special settlement review. In that case, the veteran would have been receiving disability compensation payments for a 70 percent disability rating when the special settlement review determines that the rating should be reduced to lower than 70 percent. Such reduction would thereby invoke the application of the provisions of section 3.105(e) which would require that the proposed rating action and the 60-day pretermination notice be provided to the affected veteran. Clearly, that situation is not present in this case, and this case should

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not have invoked the application of the provisions of section 3.105(e).

8. In light of the above analysis, we believe the Board has misapplied the provisions of both the Circular and section 3.105(e) in this case. Moreover, the Department of Justice attorneys who represent VA in the *Giusti Bravo* case agree with our analysis with respect to the provisions of the Stipulation and the Circular.

9. Accordingly, although the Board decision in the veteran's case is a final decision and is binding in the absence of a reconsideration by the Board, we are issuing this opinion as a precedent to guide future adjudications in *Giusti Bravo* cases.

HELD:

38 C.F.R. § 3.105(e) applies to cases subject to the special settlement review under the provisions of the October 15, 1993, Stipulation and Order in *Fernando Giusti Bravo, et al. v. U.S. Department of Veterans Affairs, et al.* only where there is a reduction of service-connected disability rating which results in reduction or discontinuance of compensation payments currently being made. Thus, the provisions of section 3.105(e) which require VA to provide a proposed rating action and a 60-day pretermination notice are inapplicable where there is no reduction of a service-

connected disability rating which results in reduction or discontinuance of compensation payments currently being made.

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