Date: January 13, 1998 VAOPGCPREC 1-98

From: Acting General Counsel (022)

Subj: Effective Date of Pub. L. No. 105-111--Revision of Decisions Based on Clear and Unmistakable Error

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

QUESTION PRESENTED:

Does 38 U.S.C. § 7111, which Pub. L. No. 105-111 added to title 38, apply to claims pending on the date Pub. L. No. 105-111 was enacted?

COMMENTS:

1. On November 21, 1997, the President approved an act "to allow revision of veterans benefits decisions based on clear and unmistakable error." Pub. L. No. 105-111, 111 Stat. 2271 (1997). The act added to title 38, United States Code, a new section 7111, which governs revision of Board of Veterans' Appeals (Board) decisions on grounds of clear and unmistakable error (CUE). Pub. L. No. 105-111, § 1(b)(1), 111 Stat. at 2271. A Board decision is subject to revision on the grounds of CUE and must be reversed or revised if evidence establishes such error. 38 U.S.C. § 7111(a). Review to determine whether CUE exists in a case may be instituted by the Board on its own motion, or upon request of a claimant at any time after the decision is made. 38 U.S.C. § 7111(c) and (d). A request for revision is to be submitted directly to the Board and decided by the Board on the merits, 38 U.S.C. § 7111(e), and a claim filed with the Secretary requesting such reversal or revision is to be considered a request to the Board, 38 U.S.C. § 7111(f).

2. With respect to whether a law enacted while a case is pending applies to the pending case, the intent of the legislature governs if that intent is clear. *Landgraf v. USI Film Prod.*, 128 L. Ed. 2d 229, 251, 261-62 (1994). In our opinion, Congress has clearly expressed its intent with respect to whether section 7111 applies to claims pending when Pub. L. No. 105-111 was enacted. Section 1(c) of Pub. L. No. 105-111, which is headed, "Effective Date," in part provides that, notwithstanding the general requirement for

a notice of disagreement filed on or after November 18, 1988, judicial review under 38 U.S.C. ch. 72 is available with respect to any Board decision "on a claim alleging that a previous determination of the Board was the product of [CUE]

if that claim is filed after, or *was pending* . . . on the date of the enactment" of Pub. L. No. 105-111. Pub. L. No. 105-111, § 1(c)(2), 111 Stat. at 2272 (emphasis added). Although section 1(c)(2) prescribes which Board decisions may be appealed to the United States Court of Veterans Appeals (Veterans Court) despite the lack of a qualifying notice of disagreement, we think it also clearly expresses Congress' intent that section 7111 apply to claims pending when Pub. L. No. 105-111 was enacted. The provision explicitly refers to CUE claims pending on the date of enactment and, by granting the right to judicial review of Board decisions on such claims, contemplates that the Board will decide those claims in accordance with the provisions of new section 7111.

3. Moreover, even if Congress' intent with respect to whether section 7111 applies to pending claims were not clear, case law pertaining to the application of newly enacted laws to pending cases leads us to conclude that section 7111 applies to pending claims. In *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), the Veterans Court addressed the applicability of new legislation to a pending claim for veterans' benefits. It held that, if the law changes after a claim has been filed but before the administrative or judicial appeal process has been concluded, the version of the law more favorable to the appellant applies unless Congress provided otherwise or permitted VA to do otherwise and VA did so. *Id.* at 313. To arrive at its rule, the Veterans Court tallied recent, seemingly conflicting United States Supreme Court decisions addressing retroactivity with respect to whether the Supreme Court applied the version of law more favorable to a private party litigating against a governmental entity, even though the Supreme Court did not state this as a rationale in its opinions. *Id.* at 311-12. The Veterans Court justified its rule by noting that the rule would "never result in 'manifest injustice' to the United States Government because Congress controls or may permit [VA] to control which law is to be applied." *Id.* at 313.

4. After *Karnas*, however, the Supreme Court itself attempted to reconcile its previous decisions on the applicability of a new enactment to pending cases. *Landgraf*, 128 L. Ed. 2d at 252. The Court confirmed that, if a statute contains no clear expression of legislative intent with respect to its applicability to pending cases, a reviewing court must determine whether application of the statute to pending cases would have "retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 128 L. Ed. 2d at 262. Absent a clear expression of Congress' intent on the matter, a statute will not be applied to cases pending when it was enacted if application to pending cases would result in such retroactive effect. *Id.* Furthermore, the Supreme Court noted that, although the great majority of its decisions relying on the presumption against retroactive application have involved intervening statutes burdening private parties, that Court has applied the presumption in cases involving new monetary obligations that fell only on the government. *Id.* at 256, n.25.

5. The United States Court of Appeals for the Federal Circuit has applied the anti-retroactivity presumption and declined to apply to a pending case amendments that are favorable to a private party litigating against a governmental entity. In *Caddell v. Department of Justice*, 96 F.3d 1367 (Fed. Cir. 1996), the Federal Circuit refused to apply to a pending case an amendment making an order to undergo a fitness-for-duty examination a "personnel action" subject to the Whistleblower Protection Act, even though without the amendment an employee could not challenge the order as a retaliatory personnel action. The Federal Circuit found that such application would have retroactive effect because "the amendment clearly imposes new duties on government officials wishing to utilize fitness-for-duty examinations, since they now must ensure that such examinations are consistent with any circumstances implicating whistleblowing activity, and arguably the amendments could increase a government official's liability for past conduct." *Id.* at 1371. In *Avila v. Office of Personnel Management*, 79 F.3d 128 (Fed. Cir. 1996), the Federal Circuit declined to apply a civil service retirement law enacted after the petitioner separated from government service, even though the act would have been more favorable to the private-party petitioner. Thus, it

appears that the Veterans Court's rationale for the *Karnas* rule may be inconsistent with subsequent decisions by the Federal Circuit. VAOPGCPREC 10-97.

6. To determine whether Pub. L. No. 105-111 has the retroactive effect that statutes are presumed, in the absence of clearly expressed legislative intent, not to have, we consider the changes Pub. L. No. 105-111 made in existing law. Pub. L. No. 105-111 significantly changed the law governing revision of Board decisions based on error in at least two ways. One such change concerns the Board's obligation to decide the merits of a challenge to a Board decision based on error. Before Pub. L. No. 105-111's enactment, a Board decision was final unless the Board Chairman ordered reconsideration of the decision. 38 U.S.C. § 7103(a). A claimant could move for reconsideration upon allegation of obvious error of fact or law, 38 C.F.R. § 20.1000(a), a standard substantively equivalent to that of CUE, *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994), but whether to order reconsideration was a matter within the Chairman's discretion, *id.* Under section 7111, however, a request for revision of a Board decision based on CUE must be decided by the Board on the merits. 38 U.S.C. § 7111(e).

7. Another significant change from prior law concerns the appealability of a Board decision on a challenge to a prior Board decision based on error. Before Pub. L. No. 105-111's enactment, a Board decision on reconsideration was not appealable unless the notice of disagreement associated with the underlying decision had been filed on or after November 18, 1988. *Smallwood v. Brown*, 10 Vet. App. 93, 97 (1997); Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, § 402, 102 Stat. 4105, 4122 (1988). Furthermore, the Board Chairman's decision not to order reconsideration was not subject to court review unless the Veterans Court had jurisdiction over the underlying Board decision. *Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994). Under Pub. L. No. 105-111, however, any Board decision on a claim alleging CUE in a previous Board determination is appealable without regard to the date the notice of disagreement was filed, provided that the claim was filed after, or pending on, the date of Pub. L. No. 105-111's enactment. Pub. L. No. 105-111, § 1(c)(2), 111 Stat. at 2272.

8. Application of section 7111 to pending claims would not impair a claimant's rights, increase a claimant's liability

for past conduct, or impose new duties on a claimant with respect to transactions already completed. It would impose on the Board a new duty with respect to claims seeking to revise prior Board decisions based on error. That new duty is to decide such a claim on the merits. The new duty does not, however, entail a *new monetary obligation* falling on the Government. Although it is to be expected that some Board decisions on CUE claims will result in retroactive awards to claimants, those monetary obligations existed before enactment of Pub. L. No. 105-111 and would have attached anyway if the prior Board decision had been correct or had been corrected under the reconsideration procedure. Thus, in our opinion, the Board's new duty does not under current precedents constitute a genuinely retroactive effect disfavored by the law. It does not "attach[] new legal consequences to events completed before its enactment," *Landgraf*, 128 L. Ed. 2d at 255, considering that the activity section 7111 regulates is the Board's disposition of claims seeking to revise Board decisions based on error, not claimants' bringing such claims. Therefore, the anti-retroactivity presumption of *Landgraf* does not prohibit application of section 7111 to pending claims.

9. Because section 7111 does not have the genuinely retroactive effect disfavored in law, we apply the other canon of statutory interpretation confirmed by the Supreme Court in *Landgraf*. That canon is that a court should apply the law in effect when it is making its decision, even if the law was enacted after the events giving rise to the suit. *Landgraf*, 128 L. Ed. 2d at 257. Applying that canon, we conclude that section 7111 applies to claims pending when Pub. L. No. 105-111 was enacted. Neither the fact that Board decisions were not subject to collateral attack under 38 C.F.R. § 3.105(a), *Smith*, 35 F.3d at 1526, nor the fact that provisions now in section 7111 did not exist before enactment of Pub. L. No. 105-111 renders it impossible for a claim seeking revision of a Board decision based on CUE to have been pending when Pub. L. No. 105-111 was enacted. At a minimum, any pending claim that the Board would have construed as a motion for reconsideration alleging obvious error in fact or law would appear to qualify as a request for revision under section 7111 entitled to a Board decision on the merits. In addition, any claim, alleging CUE in a prior Board decision, that the Board would have denied under *Smith* would appear to qualify as a request for revision under section 7111.

10. In conclusion, two additional points should be noted. The first is that the result we reach is consistent with the interpretation VA expressed before the Senate Veterans' Affairs Committee in opposing enactment of a substantively identical bill. *See* Sen. Rep. No. 157, 105th Cong., 1st Sess. 8 (1997) (quoting an excerpt from the testimony of Stephen L. Lemons, Acting Under Secretary for Benefits). The last point is that application of section 7111 to pending claims is consistent with the principle "that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one." *Landgraf*, 128 L. Ed. 2d at 259, n.30. That principle is one which we believe cannot be anywhere more appropriately applied than in the context of VA benefit claims.

HELD:

Section 7111 of title 38, United States Code, as added by Pub. L. No. 105-111, under which a claimant is entitled to a Board of Veterans Appeals decision on the merits on a request for revision of a prior Board decision on the grounds of clear and unmistakable error, applies to claims pending on the date Pub. L. No. 105-111 was enacted.

Robert E. Coy