

**Department of
Veterans Affairs**

Memorandum

Date: September 23, 1998

VAOPGCPREC 12-98

From: Acting General Counsel (022)

Subj: Effective Date of Increased Rating Claim -- 38 C.F.R.
§ 3.400(o)(2) and (q)(1)(i)

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. What is the effective date for an award of increased disability compensation pursuant to 38 C.F.R. § 3.400(o)(2) where a veteran files a claim for increased rating alleging an increase in disability within one year prior to receipt by the Department of Veterans Affairs (VA) of the claim and a VA examination subsequently substantiates an increase in disability?

b. Is 38 C.F.R. § 3.400(q)(1)(i) applicable to a claim for an increased rating which is based upon new and material evidence received within the appeal period or prior to an appellate decision, and if so, what is the effective date for an award of increased compensation pursuant to section 3.400(q)(1)(i)?

COMMENTS:

1. Section 5110(a) of title 38, United States Code, provides that "[u]nless specifically provided otherwise in this chapter, the effective date of . . . a claim for increase[] of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." Section 5110(b)(2) of title 38, United States Code, provides otherwise by stating that "[t]he effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date." Section 3.400(o)(1) and (2) of title 38, Code of Federal Regulations, implement sections 5110(a) and (b)(2). Section 3.400(o) provides for effective dates

as follows:

Increases . . . (1) General. Except as provided in paragraph (o) (2) of this section . . . , date of receipt of claim or date entitlement arose, whichever is later.

(2) Disability compensation. Earliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date otherwise, date of receipt of claim.

In *Harper v. Brown*, 10 Vet. App. 125, 126-27 (1997), the Court of Veterans Appeals (CVA) held that "38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2) are applicable only where the increase precedes the claim (provided also that the claim is received within one year after the increase)." The CVA further stated that the phrase "otherwise, date of receipt of claim" provides the applicable effective date when a factually ascertainable increase occurred more than one year prior to receipt of the claim for increased compensation. *Id.* As a result of the *Harper* decision, two questions regarding the applicable effective date for a claim for increased rating have arisen.

2. The first question concerns the appropriate effective date for an award of increased disability compensation pursuant to 38 C.F.R. § 3.400(o)(2) where a veteran files a claim for an increased rating alleging an increase in disability within the one year prior to VA's receipt of the claim and a subsequent VA examination substantiates the increase in disability. According to paragraphs 6, 7, and 10 of your opinion request, when a veteran submits a claim for increased rating and a subsequent VA examination substantiates the increased disability, the Veterans Benefits Administration (VBA) awards increased compensation effective the date of the claim; however, paragraph 10 of your opinion request states that some members of the Board of Veterans' Appeals (BVA) believe, based upon *Harper*, that the appropriate effective date in such a case is the date of receipt of the VA examination. The Supreme Court has instructed that, "[t]he starting point in interpreting a statute is its language." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). It is a basic principle of statutory construction that effect must be given, if possible, to every word and clause of a statute, so that no part will be inop-

erative or superfluous. 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). These canons of construction apply equally to interpretation of regulations. *Black & Decker Corp. v. Commissioner of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993). Section 5110(b)(2) states that "the [e]ffective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred," if the claim is received within one year from such date. Similarly, section 3.400(o)(2) states that the effective date is the "[e]arliest date on which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date otherwise, date of receipt of claim." Neither 38 U.S.C. § 5110(b)(2) nor 38 C.F.R. § 3.400(o)(2) refer to the date of the claim as the effective date of an award of increased disability compensation. Rather the plain language of the statutory provision and implementing regulation indicates that the effective date for increased disability compensation is the date on which the evidence establishes that a veteran's disability increased, if the claim is received within one year from such date. The effective date of an increased rating would be the date of claim only if the claim is not received within the year following the increase in disability, as explained in *Harper*.

3. The legislative history of 38 U.S.C. § 5110(b)(2) supports this conclusion. The Veterans Disability Compensation and Survivor Benefits Act of 1975, Pub. L. No. 94-71, § 104(2), 89 Stat. 395, 396, added section 3010(b)(2) to title 38, United States Code (currently codified as amended at 38 U.S.C. § 5110(b)(2)). This provision was added in order to "permit retroactive payment of increased compensation from the date of increase in disability up to 1 year when that date is ascertainable." Cong. Rec. H23,937 (daily ed. July 22, 1975) (statement of Rep. Roberts). The amendment was intended to achieve consistency with section 6(a) of Pub. L. No. 93-177, § 6(a), 87 Stat. 694, 696 (1973), which amended former section 3010(b) of title 38, United States Code (currently codified at 38 U.S.C. § 5110(b)(3)(A)), to provide that the effective date of an award of disability pension to a veteran is the date of application or the date on which the veteran became permanently and totally disabled, if an application is received

within one year from such date, whichever is to the advantage of the veteran. Section-by-Section Analysis Regarding House-Senate Compromise on H.R. 7767, 94th Cong., 1st Sess., 121 Cong. Rec. S13,598 (1974), reprinted in 1975 U.S.C.C.A.N. 771, 772. Section 6(a) of Pub. L. No. 93-177 afforded a totally disabled veteran one year from onset of disability to apply for pension and if eligible, receive payment of benefits retroactive to the date on which the veteran became permanently disabled. 119 Cong. Rec. 17,571 (1973). Pub. L. No. 93-177 was intended to provide uniformity with the effective date for disability compensation which was payable retroactively to the day following the veteran's discharge if an application is received within one year from discharge and with death compensation, dependency and indemnity compensation, and death pension, which are also payable retroactively to the first day of the month in which a veteran died if the eligible survivor's application is received within one year. H.R. Rep. No. 398, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2759, 2771-72 (letter from Mr. Donald E. Johnson, VA Administrator, dated May 10, 1973). This legislative history indicates that by adding current section 5110(b)(2) to title 38, United States Code, Congress intended to provide additional disability compensation up to one year retroactive to the date on which the event establishing entitlement to additional benefits occurred, i.e., the date on which the increase in disability occurred.

4. The regulatory history of 38 C.F.R. § 3.400(o)(2) is in accord with the legislative history of Pub. L. No. 94-71. In 1975, the Veterans Administration (now Department of Veterans Affairs (VA)) issued 38 C.F.R. § 3.400(o)(2) to implement section 5110(b)(2). According to Transmittal Sheet 584 (8-1-75), section 3.400(o)(2) was added to title 38, Code of Federal Regulations, to "permit payment of increased disability compensation retroactively to the date the evidence establishes the increase in the degree of disability had occurred." Section 3.400(o)(2) was "intended

to be applied in those instances where the date of increased disablement can be factually ascertained with a degree of certainty." Transmittal Sheet 584 also stated that 38 C.F.R. § 3.400(o)(2) was "not intended to cover situations where disability worsened gradually and imperceptibly over an extended period of time and there is no evidence of entitlement to increased evaluation prior to date of

claim." We believe that this regulatory history indicates that the effective date of an increased rating pursuant to 38 C.F.R. § 3.400(o)(2) is when the evidence establishes that the increase in disability occurred, not the date of the claim.

5. We therefore conclude that, when a veteran submits a claim alleging an increase in disability within the one year prior to VA's receipt of the claim and medical evidence substantiates the increased disability, the effective date of an award of increased disability compensation must be determined based upon the facts of the particular case. Obviously, this factfinding will be easier where sound medical evidence, particularly expert medical opinion, exists which is probative of when the disability worsened. However, the record as a whole, including testimonial evidence, must be analyzed for this purpose.

6. The next question which arises involves the application of section 3.400(q)(1)(i) of title 38, Code of Federal Regulations, which states that, when new and material evidence, other than service department records, is received within the appeal period or prior to an appellate decision, the "effective date will be as though the former decision had not been rendered." Based upon its interpretation of the *Harper* decision, VBA issued USB Letter 20-98-5, which advises that "38 C.F.R. § 3.400(q)(1)(i) has no bearing on the issue of the proper effective date of a grant of increased disability" and that claims for increased rating are "governed solely by 38 C.F.R. § 3.400(o)(1) and (2) regardless of when the supporting evidence is received." Prior to issuance of USB Letter 20-98-5, VBA's policy with regard to section 3.400(q)(1)(i) was set forth in paragraph 6.a. of Training Letter (Trg Ltr) 91-3 (July 2, 1991), which states that 38 C.F.R. § 3.400(q) "defines or clarifies" the date of a reopened claim. As explained in Examples 1 and 2 in the Training Letter, when a veteran files a claim for increased rating which is denied by VA, provides new evidence within the one-year appeal period, and has a VA examination which establishes an increase in disability subsequent to denial of the claim, the effective date for the increased rating is the date of the original claim. (In Example 1, the VA exam occurred within the one-year appeal period, while in Example 2, the VA exam occurred after expiration of the one-year period.) The question which arises is whether USB Letter 20-98-5 is a correct interpretation of *Harper*.

7. We first consider whether 38 C.F.R. § 3.400(q)(1)(i) is applicable to a claim for increased rating based upon new and material evidence submitted prior to final disallowance of a claim. The USB Letter cites *Harper* for the principle that claims for increased rating are not governed by section 3.400(q)(1)(i). However, the CVA did not address the question of the appropriate effective date where following denial of a claim for increased rating but within the appeal period, evidence is received by VA which establishes that an increase in disability now exists, *i.e.*, the facts presented in the Examples in the Training Letter.¹ The *Harper* decision, therefore, provides no support for the conclusion that 38 C.F.R. § 3.400(q)(1)(i) is not applicable to a claim for increased rating based upon new and material evidence submitted prior to final disallowance of a claim. In addition, we are unaware of any CVA decision which addresses the applicability of 38 C.F.R. § 3.400(q)(1)(i) to such a claim. We therefore turn to the regulatory history of section 3.400(q)(1)(i) for guidance in determining the applicability of the regulation.

8. Section 3.400(q)(1)(i) originated as Vet. Reg. No. 2(d), Instruction No. 3, dated October 18, 1935, which provided instructions for adjudicating claims for compensation or pension based upon new and material evidence presented after prior disallowance. Paragraph 3 of Instruction No. 3 pointed out that decisions of adjudicating agencies of original jurisdiction do not become final until the expiration of the time period within which the appeal may be filed and stated that, "[a]ccordingly, evidence received prior to the expiration of the appeal period shall be considered by the adjudicating agency of original jurisdiction . . . and an appropriate determination made." Instruction No. 3 became Regulation and Procedural Rule (R&PR)-1201, issued on January 25, 1936, Veterans Admin-

¹ We note that paragraph 4 of the USB Letter states that in *Harper*, "[f]ollowing a VA examination, the claim was denied." There is no indication in the CVA's *Harper* decision that the veteran had a VA examination or that VA denied his claim for an increased rating. However, according to your opinion request regarding 38 C.F.R. § 3.400(o)(2), following receipt of the veteran's claim for increased rating, a VA examination was scheduled, the examination report showed no evidence of increased disability, and the claim was denied.

istration Regulation (VAR) 1201, and was subsequently codified at 38 C.F.R. § 3.400(q)(1)(i). We find no indication in this regulatory history that 38 C.F.R. § 3.400(q)(1)(i) does not apply to a claim for increased rating based upon new and material evidence submitted prior to expiration of the appeal period or before an appellate decision is issued.

9. We believe that a conclusion that 38 C.F.R. § 3.400(q)(1)(i) does not apply to claims for increased rating based upon new and material evidence received within the appeal period or prior to an appellate decision would conflict with 38 C.F.R. § 3.104(a), which governs finality of decisions. Section 3.104(a) states that a decision of a rating agency or other agency of original jurisdiction "shall be final and binding on all field offices of [VA] as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104." Thus, if a rating agency or other agency of original jurisdiction issues a decision denying a claim for increased rating, new and material evidence would be required to reopen such a decision within the one-year appeal period, and section 3.400(q)(1)(i) would govern the determination of the effective date for the increased rating.

10. We next consider the appropriate effective date pursuant to 38 C.F.R. § 3.400(q)(1)(i) for a claim for increased rating based upon new and material evidence submitted within the appeal period or before an appellate decision is issued. According to the regulatory history of section § 3.400(q)(1)(i), the effective date for a successful claim based upon new and material evidence under R&PR-1201

was governed by R&PR-1212(B) (Jan. 25, 1936), which stated:

Where, upon reconsideration by a rating agency of original jurisdiction in accordance with R. & P. R-1201, a favorable decision is rendered, the effective date of an award for monetary benefits will be the date of receipt by the Veterans' Administration of the application for reconsideration, or the date the evidence establishes entitlement, whichever is the later.

However, an All Station Letter from Mr. O.W. Clark, VA Assistant Director, dated April 16, 1936, quoting excerpts from a letter signed by the VA Administrator, indicated that RP&R-1212(B) did not apply to a claim based upon new and material evidence submitted prior to expiration of the appeal period or until a decision was issued by the Board of Veterans' Appeals.² The All Station Letter stated that the effective date of an award based upon new and material evidence submitted prior to the date on which a rating decision becomes final is the date of receipt of the original

² This conclusion that R&PR-1212(B) did not apply to claims based upon new and material evidence submitted prior to final disallowance of the claim by VA is further supported by R&PR-1201(D) (Sept. 26, 1947), which stated that the effective date for claims covered under subparagraphs (A), (B) and (C), *i.e.*, claims based upon new and material evidence submitted after a final disallowance of the claim, is the date of receipt of the application for reconsideration or date of receipt of the evidence which establishes entitlement, whichever is later. Also, paragraph 3.d.(1) of VA Technical Bulletin (TB) 8-233 (March 19, 1953), entitled "Effective Dates of Awards in Philippine Death Cases Involving VA Reconsideration Or Recertification By The Service Department As To Active Duty Status," pointed out that awards based upon new and material evidence other than from the service department received prior to final disallowance of a claim "are subject to the limitations as to effective dates applicable to the claim that had not been finally disallowed." Paragraph 3.d.(2) of TB 8-233 stated that claims based upon new and material evidence received by VA subsequent to final disallowance of a prior claim were governed by VAR 1212(B) and that under such circumstances, benefits may not be awarded prior to the date of application for reconsideration.

claim or the date the evidence shows entitlement, whichever is the later date.

11. On May 29, 1959, according to Transmittal Sheet (TS) 189 (5-29-59), VA restated its regulations for purposes of simplicity, and VAR 1201 and 1212(B) were codified at 38 C.F.R. § 3.400(q)(1). New section 3.400(q)(1) stated that, when new and material evidence other than service department records is received within the appeal period or prior to an appellate decision, the effective date "will be as though the original decision had not been rendered," but when such evidence is received after the expiration of the appeal period, the effective date is the date of receipt of the evidence which constitutes a new claim or the date entitlement arose, whichever is later.³ TS 195 (May 29, 1955). There is no indication in TS 189 of a change in the policy enunciated by the VA Administrator in 1936 regarding the effective date of a successful claim based upon new and material evidence submitted prior to final disallowance of the claim by VA.

12. We also believe that the plain language of 38 C.F.R. § 3.400(q)(1)(i) supports the conclusion that the effective date for an increased rating based upon new and material evidence submitted during the appeal period or prior to an appellate decision is the date of claim or the date on which the evidence shows entitlement, whichever is later. Section 3.400(q)(1)(i) states that, when new and material evidence is received within the appeal period or prior to an appellate decision, the effective date "will be as though the former decision had not been rendered." As a result, the former decision regarding the claim for increased rating is a nullity, and the claim must be regarded as an original claim. The statutory provision and regulations governing the effective date of an original claim for increased rating, 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400, must be applied.

13. According to 38 U.S.C. § 5110(a), "[u]nless specifically provided otherwise in this chapter," the effective date of a claim for increase "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." See also 38 C.F.R. § 3.400. Thus, the effective date of an increased rating based upon new and material evidence re-

³ The word "original" was changed to "former" in 1962. TS 270 (Dec. 1, 1962).

ceived within the appeal period or prior to an appellate decision is the date on which the facts establish the increase occurred or the date of the original claim for increase, whichever is later. As noted earlier, this factual determination will be more evident where sound medical evidence exists which is probative of when the disability increased. But in any event, the record as a whole, including testimonial evidence, must be considered for this purpose.

14. We next address the hypothetical situation presented in paragraph 5 of the USB Letter where, following denial of a claim for increased rating, it is factually ascertainable based upon new and material evidence submitted within the appeal period that a veteran's disability increased within one year prior to receipt of the original claim. We believe that the effective date must be "as though the former decision had not been rendered." See 38 C.F.R. § 3.400(q)(1)(i). Section 5110(a), which applies to original claims, including claims for increase, states that "[u]nless specifically provided otherwise in this chapter," and as discussed above, 38 U.S.C. § 5110(b)(2) specifically states that the effective date of an award for increased compensation is the date on which it is factually ascertainable that an increase occurred, if the claim is received within one year from such date. Thus, while we agree that the effective date in the hypothetical presented in paragraph 5 of USB Letter 20-98-5 would be the date on which the increase in disability occurred, the regulation which must be applied to such a claim is 38 C.F.R. § 3.400(q)(1)(i).

15. Finally, we note that paragraph 2 of the USB Letter erroneously states that "[s]ubsequent case law has established that new and material evidence refers only to that evidence which is necessary to reconsider (reopen) a previously denied **claim for service connection.**" (Emphasis in original). Paragraph 4 of the USB Letter also states that "38 C.F.R. § 3.400(q)(1)(i) . . . applies only to evidence submitted within the appeal period where the issue is entitlement to service connection." In fact, the CVA has indicated that new and material evidence may be used to reopen a claim which has previously been denied on bases other than service connection. *Heebner v. Principi*, 3 Vet. App. 423 (1992) (denial of extension of eligibility for GI Bill education benefits); *Camphor v. Brown*, 5 Vet. App. 514 (1993) (status as veteran's surviving spouse); *Romero v.*

Brown, 6 Vet. App. 410 (1994) (prisoner of war status); *Villaruz v. Brown*, 7 Vet. App. 561 (1995) (forfeiture based upon providing assistance to enemy); *Mata v. Brown*, 8 Vet. App. 485 (1996) (whether decree of adoption for purported adopted children conformed with Philippine law); *Daniels v. Brown*, 9 Vet. App. 348 (1996) (willful misconduct). The CVA has stated that evidence is "material" if it is "relevant to and probative of the issue at hand," *Sklar v. Brown*, 5 Vet. App. 140, 145 (1993), but we do not believe that the CVA has stated that the only issue to which material evidence may be probative is service connection.

16. To the extent that the policies regarding the applicable effective date for a claim for increased rating, including those set forth in your opinion request, Trg Ltr 91-3, and USB Letter 29-98-5, are inconsistent with 38 U.S.C. § 5110(a) and (b) (2) and 38 C.F.R. § 3.400(o) (2) and (q) (1) (i), as explained above, and may be applied in a manner unfavorable to claimants, they are without effect. See VAOPGCPREC 12-96; VAOPGCPREC 13-97; *Cohen v. Brown*, 10 Vet. App. 128, 139 (1997).

HELD:

a. Pursuant to 38 U.S.C. § 5110(b) (2) and 38 C.F.R. § 3.400(o) (2), where a veteran files a claim for increased rating alleging an increase in disability within one year prior to receipt by VA of the claim and a VA examination or other medical evidence subsequently substantiates an increase in disability, the effective date of the award of increased disability compensation is the date as of which it is ascertainable based on all of the evidence of record that the increase occurred.

b.(1) Section 3.400(q) (1) (i) of title 38, Code of Federal Regulations, is applicable to a claim for increased rating based upon new and material evidence submitted prior to expiration of the appeal period or before an appellate decision is issued.

b.(2) When new and material evidence is submitted within the appeal period or prior to an appellate decision with regard to a claim for increased rating, the effective date for any increased rating is the date on which the facts establish the increase in disability occurred or the date of the original claim for increase, whichever is later. How-

ever, if the facts establish that a veteran's disability increased within one year prior to receipt by VA of the original claim for increased rating, the effective date of the increase is the date on which the increase in disability occurred.

John H. Thompson