

**Department of  
Veterans Affairs**

# Memorandum

Date: July 27, 2004 VAOPGCPREC 8-2004

From: General Counsel (021)

Subj: Application of 38 C.F.R. §§ 3.105(a), 3.400(k), 21.3040(d) and 21.3041(d) to Claims for Educational Assistance Benefits under Chapter 35, Title 38, United States Code

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

## QUESTIONS

(a) Does the age limitation for payment of chapter 35 benefits contained at 38 C.F.R. §§ 21.3040(d) and 21.3041(d) apply to the exception to the basic eligibility period for receipt of chapter 35 benefits contained at 38 U.S.C.A. § 3512(a)(3)?

(b) What is the effect of revision of a rating under 38 C.F.R. § 3.105(a) as regards the period of eligibility for chapter 35 benefits? Did VA "first find" the veteran in this case permanently and totally disabled in November 1999, when the corrected decision was made, or in August 1986, which was the effective date under 38 C.F.R. § 3.400(k) for that rating?

## DISCUSSION:

1. The questions here arise in the context of two brothers' appeals to the Board of Veterans' Appeals from the denial of their separate claims for chapter 35 education benefits (38 U.S.C. § 3500, et seq.). The brother' claims (filed in March 2000), based on the permanent and total (P&T) service-connected disability of their father, were denied as having been filed beyond their respective 8-year basic eligibility periods and the age-31-eligibility limitation.

2. The first issue presented is whether chapter 35 benefits may be affected in cases such as this after a child's thirty-first birthday. Section 21.3041(d) of title 38, Code of Federal Regulations, expressly bars such eligibility. However, to the extent the regulation purports to bar extensions of the basic eligibility period beyond age 31 in circumstances other than as described in either (a) 38 U.S.C. § 3512(a)(4) (following service on active duty); (b) § 3512(a)(5) (following the date the child became eligible based on the parent being a member of the Armed Forces missing in action, captured by a hostile force, or forcibly detained or interned by a foreign government or power pursuant to § 3501(a)(1)(A)(iii); or (c) § 3512(c) (following suspension of the child's program for reasons beyond the

child's control), it is overbroad and ultra vires. Under current law, an eligible child may be awarded chapter 35 assistance during the period beginning on the child's 18th birthday and ending on his or her 26th birthday. 38 U.S.C. 3512(a). However, if the child is between such ages when VA first finds that the parent from whom the child's eligibility is derived has a service-connected total disability permanent in nature, section 3512(a)(3) allows the child to select a beginning date for his or her eligibility period (approved by the Secretary) that is either the effective date of the permanent and total rating for the veteran-parent or the date of notification to the veteran-parent of that rating, or any date between those dates. Thus, for example, a child who is 25 years of age at the beginning of his or her eligibility period would, by law, be granted an extension beyond age 31. Since the statutory provision governs this matter, the regulations may not be applied in a contrary manner. Consequently, your first question is answered in the negative; that is, an extension of a child's chapter 35 eligibility period under 38 U.S.C. § 3512(a)(3) may be granted beyond age 31.

3. The remaining issues go to the effect of the November 22, 1999, finding of clear and unmistakable error ("CUE") under 38 C.F.R. § 3.105(a), which led in this case to a corrected rating of the veteran's permanent and total disability effective from the date of original claim in August 1986, and which retroactively established entitlement to chapter 35 benefits for the appellants. More particularly, you ask how that finding relates to fixing beginning date of the brothers' respective chapter 35 eligibility periods, determined pursuant to 38 U.S.C. § 3512. As discussed below, the result is different for each brother and age is a factor in such result.

4. It bears note that, during the pendency of the instant appeals, Congress enacted legislation liberalizing both the section 3512 (basic eligibility period) and section 5113 (award effective date) provisions to prevent loss of chapter 35 benefits due to delays in VA rating decisions originally establishing the P&T disability or service-connected death of the veteran-parent from whom chapter 35 eligibility was derived. See Pub.L.No. 106-419, § 112, as amended by Pub.L.No 107-330, § 308(e)(1), retroactively effective to Nov. 1, 2000 (providing for election of basic eligibility commencing date); Pub.L.No. 106-419, § 114 (effective from Nov. 1, 2000) (providing an adjustment to the award effective date). However, to the extent that application of each of these liberalizations could result in a genuine retroactive effect, we cannot consider either as applying to the appellants. For example, current section 3512, as amended effective November 1, 2000, gives eligible persons the right to elect an alternate eligibility-beginning date (any date between the effective date of a finding of total and permanent disability permanent in nature and the date of notification of such determination) earlier than was provided by the existing law at the time the appellants filed their claims in March 2000. Similarly, application of current section 5113, as amended effective November 1, 2000, could result in retroactive entitlement for one of the affected persons for chapter 35 benefits (e.g. for vocational training) dating to 1987. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is

enacted or a new regulation is issued while a claim is pending before VA, VA must determine whether the new statute or regulation would produce retroactive effects. If applying the new provision would produce such effects, VA ordinarily should not apply the new provision to the claim. See VAOPGCPREC 7-2003; Kuzma v. Principi, 341 F.3d 1327 (Fed. Cir. 2003). Thus, for purposes of this opinion, we must apply the law (i.e. §§ 3512 and 5113) in effect at the time of the November 22, 1999, finding of clear and unmistakable error.

5. Section 3512 as in effect in November of 1999, provided, in pertinent part in subsection (a)(3), that "[i]f the Secretary first finds (emphasis added) the veteran-parent has a service-connected total disability permanent in nature ... after the eligible child eighteenth birthday but before the child's twenty-sixth birthday, the eligibility period shall end 8 years after ... the date on which the Secretary first finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature ...." The term "first finds" is defined in subsection 3512(d) for this purpose to mean the effective date of the permanent and total rating for the veteran-parent or the date of notification to the veteran-parent, whichever is more advantageous to the eligible person.

6. As to your question about application of the "first finds" criteria in the instant matter, we find no basis for distinguishing the effect of the CUE rating under such criteria from simply a delayed initial P&T rating decision resulting in a retroactive compensation award. As 38 C.F.R. § 3.105(a) provides, the effect of a reversal of a prior decision based on CUE is that the corrected decision is considered made on the date of the reversed decision. Further, as you indicate, 38 C.F.R. § 3.400(k) sets the effective date for the veteran's award of disability compensation in CUE cases as follows: "(k) Error (3.105). Date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision." Thus, under the "first finds" statute, the effective date of the P&T rating and compensation award for the veteran in this case is August 19, 1986, when he filed his original claim, and the date of notice of the rating occurred in November 1999.

7. Applying the pertinent law and regulations mentioned above to the facts presented here yields the following analysis: The eldest appellant, R.C., turned age 18 on February 18, 1983, while the youngest, M.C., became 18 on October 6, 1986. Since M.C. was not between the ages of 18 and 26 either on the effective date of his father's P&T rating in August 1986 or the date of the notice of that rating in November 1999, he is not covered by the subsection 3512(a)(3) exception to the basic chapter 35 eligibility period. Accordingly, his eligibility period began on his eighteenth birthday (or his successful completion of secondary school, if earlier, but not before August 19, 1986) and ended on his twenty-sixth birthday, i.e., October 6, 1994. 38 U.S.C. § 3512(a). Appellant, R.C., on the other hand, was between the ages of 18 and 26 in August 1986 and therefore, is subject to the provisions and time limitations set forth in subsection 3512(a)(3). In other words, the beginning date of his eight-year eligibility period is either Au-

gust 19, 1986, the effective date of his father's P&T rating, or November 22, 1999, the date of notice of the decision regarding his father's P&T rating, whichever is more advantageous to R.C. Based on the date R.C. filed his chapter 35 claim, as further discussed below, November 22, 1999, would be the most advantageous beginning date.

8. The subject inquiry does not end here, however. Having established the appellants' eligibility periods for receiving chapter 35 benefits, it next must be determined whether, and from what effective date, those benefits may be awarded. As a predicate to establishing entitlement to receive chapter 35 educational assistance, the eligible person must timely file a claim therefor. 38 U.S.C. § 3513; 38 C.F.R. § 21.1029. The date of filing a claim, in turn, is integral to fixing the basic commencing date of a chapter 35 award for education or training pursued. This is reflected in the governing regulation, 38 C.F.R. § 21.4131(d), which states, in pertinent part, as follows:

When a person eligible to receive educational assistance under 38 U.S.C. chapter 35 enters or reenters into training ... the commencing date of his or her award of educational assistance will be determined as follows:

- (1) if the award is the first award ... the commencing date of the award of educational assistance is the latest of:
  - (i) The beginning date of eligibility as determined by § 21.3041(a) or
  - (b) [i.e., the beginning date of the child's eligibility period]; [or
  - (ii) One year before the date of claim as determined by § 21.1029(b) [i.e., "the date on which a valid claim or application for educational assistance is considered to have been filed with VA ...."].

9. Applying § 21.4131(d) here, the earliest possible award effective date for M.C. would be March 9, 1999, one year before his date of claim. No benefits could be awarded from that date, however, since it would fall after the termination of his chapter 35 eligibility period in October 1994. In R.C.'s case, the earliest award effective date under this regulation would be November 22, 1999, the beginning date of his eligibility period.

**HELD:**

(a) An extension of an eligible child's chapter 35 eligibility period under 38 U.S.C. § 3512(a)(3) may be granted beyond age 31. To the extent 38 C.F.R. § 3041(d) purports to bar extensions of the basic eligibility period beyond age 31 in circumstances other than as described in either 38 U.S.C. § 3512(a)(4) (following service on active duty); § 3512(a)(5) (following the date the child became eligible based on the parent being a member of the Armed Forces missing in action, captured by a hostile force, or forcibly detained or interned by a foreign government or power pursuant to § 3501(a)(1)(A)(iii)); or § 3512(c) (following suspension of

the child's program for reasons beyond the child's control, it is ultra vires and of no effect.

(b) The effect of finding clear and unmistakable error ("CUE") is that the corrected decision is considered made on the date of the reversed decision. 38 C.F.R. § 3.105(a). Based on CUE, the veteran in this case was found entitled to compensation for permanent and total service-connected disability ("P&T") effective August 19, 1986. As of the same date, each of the veteran's sons thereby became an "eligible person" (defined in 38 U.S.C. § 3501(a)(1)(A)(ii)) entitled to chapter 35 education benefits. Such entitlement may be used during an 8-year eligibility period determined pursuant to 38 U.S.C. § 3512, but in no event before the date when the affected child became an "eligible person" (i.e., August 19, 1986).

(c) The basic chapter 35 eligibility period under section 3512(a) runs from the child's 18th birthday to the child's 26th birthday, but exceptions exist. Under the "first finds" exception, when the effective date of the veteran's P&T disability is between the child's 18th and 26th birthdays, section 3512(a)(3), as in force in November 1999, establishes, by operation, the beginning date for the child's eligibility period as the date the Secretary first finds that the parent from who eligibility is derived has a service-connected disability permanent in nature. The term "first finds" is defined in subsection 3512(d) to mean the effective date of the parent's P&T rating or the date of notification to the parent, whichever is more advantageous to the eligible person. Thus, a child's chapter 35 eligibility period must be determined on the facts found and based on the eligibility-period-beginning date that is more advantageous to the child pursuant to the application of both section 3512(a)(3) and section 3512(d). In addition, an award of chapter 35 benefits is predicated on the timely filing of a claim therefor. 38 U.S.C. § 3513; 38 C.F.R. § 21.1029. The date of claim is an integral factor in determining the date from which benefits may be awarded, pursuant to 38 U.S.C. § 5113, for pursuit of an approved program of education pursued during the child's established chapter 35 eligibility period.