

**Department of
Veterans Affairs**

Memorandum

Date: January 17, 2007

VAOPGCPREC 1-2007

From: Acting General Counsel (02)

Subj: Applicability of 38 C.F.R. § 3.105(e) to TDIU Award Reinstated Based on CUE

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

QUESTION PRESENTED:

Do the procedures required by 38 C.F.R. § 3.105(e) apply where a total disability rating based on individual unemployability is reinstated for a limited period on the grounds of clear and unmistakable error in the original termination of the rating?

HELD:

Section 3.105(e) of title 38, Code of Federal Regulations, requires the Department of Veterans Affairs (VA) to follow specified procedures, including providing advance notice and an opportunity to present evidence and be heard, when terminating a total disability rating based on individual unemployability if the termination would result in reduction of compensation payments currently being made. However, if VA retroactively reinstates such a total disability rating on the grounds of clear and unmistakable error in the original termination of the rating, section 3.105(e) does not apply to the determination of the duration of the reinstated rating because there would be no reduction in compensation payments currently being made.

COMMENTS:

1. The facts giving rise to the question presented are as follows: The veteran was awarded a TDIU rating effective May 4, 1978. Based on a recent physical examination and evidence of the veteran's having been employed, a Department of Veterans Affairs (VA) regional office (RO), by means of a May 1985 rating decision, terminated the veteran's TDIU rating effective August 1, 1985. The veteran did not contest this rating termination, but years later he alleged clear and unmistakable error (CUE) in the May 1985 decision to terminate his TDIU award and submitted a new claim for a TDIU rating. In August 2000, the RO

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awarded a TDIU rating effective April 8, 2000, but denied the CUE claim. The veteran appealed the denial of the CUE claim to the Board of Veterans' Appeals (Board), which in October 2001 determined that there was CUE in the May 1985 rating decision in that the RO had failed to apply the "clear and convincing evidence" standard of proof mandated by 38 C.F.R. § 3.343(c)(1). In January 2002, when implementing the Board decision, the RO restored the veteran's TDIU rating effective from August 1, 1985, but only through December 31, 1989, noting evidence that the veteran was employed for a number of years starting in August 1989.

2. When the RO partially reinstated the veteran's TDIU award in 2000, section 3.105 of title 38, Code of Federal Regulations, provided procedures for revising VA decisions, and paragraph (e) of section 3.105 provided the procedure for reducing disability evaluations for compensation purposes. However, the introductory text to section 3.105 specified that "[t]he provisions with respect to the date of discontinuance of benefits are applicable to running awards," and paragraph (e) specified its applicability to a reduction in "employability status" "where the reduction . . . would result in a reduction or discontinuance of compensation payments currently being made." 38 C.F.R. § 3.105 (1999). Section 3.105(e) required VA: (1) to prepare a rating proposing the reduction or discontinuance and setting forth all material facts and reasons; (2) to notify the beneficiary of the contemplated action and furnish detailed reasons for it; and (3) to give the beneficiary 60 days to present additional evidence to show that compensation payments should continue at their current level. Id. The reduction or discontinuance was to be 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 action expired. 38 C.F.R. § 3.105(e) (1999).

3. The regulation's text suggests that its procedural protections do not apply to the retroactive reinstatement of a terminated TDIU rating. The text does not mention retroactive adjustments made in the course of correcting a CUE; it simply refers to "running awards" and actions that would result in a reduction or discontinuance of compensation payments "currently being made." In one sense, the 2000 retroactive reinstatement of a TDIU rating effective August 1, 1985, could be considered to have created a running award because the legal effect of correcting the CUE in the original termination of the TDIU rating is as though the correct decision had been made back in 1985. See 38 U.S.C. § 5109A(b) (for purposes of authorizing benefits, decision reversing or revising prior decision on grounds of CUE has same effect as if made on date of prior decision). However, in another sense, the retroactive reinstatement did not create a running award, as no periodic payments were made for the period in question. In reality, the limited retroactive reinstatement of the TDIU rating never resulted in a reduction or termination of compensation payments "currently being made" because no total compensation payments were "currently being made" for

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the period August 1, 1985, to January 1, 1990.¹ The original TDIU rating was terminated effective August 1, 1985, the new TDIU rating awarded in 2000 was effective April 8, 2000, and a retroactive lump sum payment was made for the period August 1, 1985, to January 1, 1990. Thus, by its terms, section 3.105(e) does not apply to the situation presented.

4. Nothing in the history of 38 C.F.R. § 3.105(e) suggests that VA ever intended the regulation to apply to the limited retroactive reinstatement of a TDIU rating on CUE grounds. Congress incorporated longstanding VA practice as embodied in that regulation in 1962 when it amended the provision now codified at 38 U.S.C. § 5112(b)(6), which governs the effective date of a reduction or discontinuance by reason of a change in employability status, to provide an effective date 60 days following notice to the veteran of the proposed reduction or discontinuance. S. Rep. No. 87-2042 (1962), reprinted at 1962 U.S.C.C.A.N. 3260, 3266-67. The purpose of the provision was to provide a veteran receiving service-connected disability benefits a reasonable time to adjust to the reduction or discontinuance of his or her compensation or to submit evidence to show why the proposed action is not warranted. Id. To interpret section 3.105(e) to apply to the determination of the duration of a reinstated TDIU rating would not further that intended purpose. The veteran would need no time to adjust to the action because the veteran would not have been receiving compensation at the higher rate. Further, the veteran would have had an opportunity, before the decision concerning retroactive benefits became final, to submit evidence to show that the termination was not warranted.

5. Furthermore, interpreting section 3.105(e) to apply to such situations would result in a manifest injustice in that VA could be required to pay compensation at a rate for which a veteran does not meet the criteria. For example, interpreting section 3.105(e) to apply to the determination of the duration of the TDIU rating in this case would result in the reinstatement of a TDIU rating and payment of compensation at the rate for total disability for a period of many years during which the veteran was engaged in substantially gainful employment. For the foregoing reasons, we conclude that section 3.105(e) does not apply to a limited retroactive reinstatement of a TDIU rating on CUE grounds.

¹ Of course, compensation payments were currently being made for that period, but at the rate appropriate for the veteran's schedular evaluation. The limited retroactive reinstatement of the veteran's TDIU rating did not result in any reduction or discontinuance of those payments.