IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FLORENCE KENNEDY, Appellant,	)	
vs.	)	Vet. App. No. 19-256
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S RESPONSE TO COURT'S ORDER OF AUGUST 19, 2020

On August 19, 2020, the Court ordered the parties to address a series of questions related to the definition of the term "issue" as used in 38 C.F.R. § 3.114(a) and whether VA has discretion to decline to award the one year earlier effective date under that regulation if it finds a law or issue liberalizing. In brief, the answers to the Court's questions are:

(1) The term "issue"—as used in 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a)—means a directive from or approved by the Secretary and is binding on VA. *See* VAOGCPREC 26-97, ¶ 8 (July 16, 1997); VAOGCPREC 88-90, ¶ 4 (Aug. 22, 1990). Fast Letter 13-04 qualifies as an "issue" because it was approved by the Secretary and is binding on VA.

(2) Section 19.5 affects the definition of an "issue" insofar as it acknowledges that some administrative issues are not binding on VA, but it does not apply

in this case because Fast Letter was an "instruction of the Secretary" by which the Board is bound under 38 U.S.C. § 7104(c).

(3) The Court should not apply the Federal Circuit's test for determining whether a law is liberalizing for purposes of creating a new cause of action, although the Fast Letter meets that test. Instead the Court should defer to the agency's reasonable interpretation of "liberalizing administrative issue."

(4) VA does not have discretion to decline to award § 3.114(a)'s one-year earlier effective date provided the claimant meets all the eligibility criteria.

1. What is the definition of an "issue," and does a VA Fast Letter qualify as an issue under that definition?

Section 3.114(a) requires that the effective date of an award made "pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction" "shall not be earlier than the effective date of the act or administrative issue." By using the terms "VA issue approved by the Secretary or at his direction" and "administrative issue" as synonyms, the plain language of 38 C.F.R. § 3.114(a) provides that an "administrative issue" is an instruction "approved by the Secretary or by the Secretary's direction."

The term encompasses more than regulations. According to VA's Office of General Counsel (OGC), its precedential decisions qualify as "liberalizing administrative issues" because all VA decisions are required to conform to those opinions. VAOGCPREC 88-90, ¶ 4. OGC has also held that changes to the rating

schedule are "administrative issues" under 38 C.F.R. § 3.114(a). VAOGCPREC 26-97, ¶ 8. In contrast, judicial decisions and "manual provisions approved not by the Secretary or by the Secretary's direction" are not "administrative issues" under the regulation. VAOGCPREC 1-96, ¶ 4, 5 (Feb. 17, 1996). Directives from VA employees that are not approved by the Secretary also do not qualify as "administrative issues" under 38 C.F.R. § 3.114(a). *See* VAOGCPREC 26-97, ¶ 8. *But see* VAOGCPREC 3-2014 (June 17, 2014) (U.S. Attorney General's letter to Congress was a liberalizing administrative issue).

Fast Letter 13-04 is an "administrative issue" under 38 C.F.R. § 3.114(a) because it is a directive issued at the Secretary's direction or, at the very least, with the Secretary's approval. It is signed by the Director of Pension and Fiduciary Service. Fast Letter 13-04, at 4. As discussed in Mrs. Kennedy's reply brief, that person acts under the direction or at the approval of the Secretary pursuant to statutory and regulatory authority.[1]

[1] In her reply brief, Mrs. Kennedy unintentionally misquoted 38 C.F.R. § 3.100(a) and argued the Secretary had explicitly delegated to the Under Secretary of Benefits the authority to "make . . . instructions . . . ." Appellant's Reply Br. at 12. Upon review of the regulation, the undersigned counsel discovered that she had read the regulation incorrectly. The regulation does not explicitly delegate authority to make instructions, but rather to make "*decisions* under the applicable . . . instructions . . . ." 38 C.F.R. § 3.100(a) (emphasis added). Counsel apologizes sincerely to the Court and to the Secretary for any confusion or inconvenience her mistake has caused. However, this mistake was immaterial to the issues on appeal, because under 38 C.F.R. § 2.6(b) (also cited in the reply brief at 12) the Secretary has delegated broad authority to the Under Secretary of Benefits to "act on all matters assigned to the Veterans Benefits Administration."

Specifically, Congress authorized the Secretary to "assign functions and duties" and "delegate [and] authorize successive redelegation of[] authority to act . . . with respect to all laws administered by the Department" to officials such as the Under Secretary for Benefits (USB). 38 U.S.C. § 512. Pursuant to this authority, the Secretary has delegated to the USB broad "authority to act on all matters assigned to the Veterans Benefits Administration . . . and to authorize supervisory or adjudicative personnel within his/her jurisdiction to perform such functions as may be assigned." 38 C.F.R. § 2.6(b) (2020); *see also* 38 U.S.C. § 512. Significantly, the Secretary did not reserve *any* matter "assigned to the Veterans Benefits administration" to require his personal approval. 38 C.F.R. § 2.6(b).

By contrast, although he delegated authority to the Under Secretary of Health "[t]o act on all matters assigned to the Veterans Health Administration," he explicitly reserved "such matters as require the personal attention or action of the Secretary" to himself. 38 C.F.R. § 2.6(a)(1). And where the Secretary uses particular language in one section of a regulation but omits it in another section of the same regulation, it is assumed that the omission was deliberate. *Jones v. Shinseki*, 26 Vet.App. 56, 62 (2012) (citing *Henio v. Shinseki*, 683 F.3d 1372, 1379 (Fed. Cir. 2012)).

The "matters assigned to the Veterans Benefits Administration" include "develop[ing], maintain[ing], cooordinat[ing], and implement[ing] the regulations polices, and procedures" governing the DIC program for survivors of veterans who die because of service-connected disabilities. *See Department of Veterans Affairs,*

Functional Organization Manual Version 5.0, pp. 21, 27-28, *available at* https://www.va.gov/FOM-5-Final-July-2019.pdf. (last accessed Oct. 5, 2020); 38 C.F.R. § 2.6(b)(1). The USB, in turn, has authorized the Pension and Fiduciary Service to perform these functions. *See id.* And, as noted, the Director of Pension and Fiduciary Service signed Fast Letter 13-04. *See* Fast Letter 13-04, at 4. Therefore, when the Director of Pension issued Fast Letter 13-04, he did so at the Secretary's direction or—at the very least—with his approval, because the Secretary has authorized him to do so via the delegation to the USB. *See* 38 C.F.R. § 2.6(b).

Further, under 38 U.S.C. § 7104(c), Fast Letter 13-04 is binding on the Board because it is an "instruction of the Secretary." It contains mandatory language directing all adjudicators to award DIC benefits based on the content of the veteran's death certificate. "The general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding." *Farrell v. Dep't Of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002). Here, the Fast Letter is a binding instruction because it "purported to set forth definitively the procedures and standards to be followed." *Service v. Dulles*, 354 U.S. 363, 376 (1957). The Fast Letter definitively established, without qualification, that the adjudicator was to "[g]rant DIC" when a veteran's service-connected condition was listed as a contributory cause on the death certificate. Fast Letter 13-04, at 2. It was not "broad, general, [and] elastic," intended to simply guide decision making. *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 601 (5th Cir. 1995); *see also Daub v. United*

States, 292 F.2d 895, 897 (1961) (holding that a "table of penalties was intended to be a guide to administrative officers, and not an immutable schedule").

In this respect, the Fast Letter is similar to an OGC precedential opinion. OGC has found that its own precedential opinions are "administrative issues" under 38 C.F.R. § 3.114(a) because they are binding on the Board under 38 U.S.C. § 7105(c). As a result, the Fast Letter—an "instruction of the Secretary" under 38 U.S.C. § 7104(c)—must also be an administrative issue under section 3.114(a). *See also* 38 C.F.R. § 2.6(e)(8) (General Counsel authorized to designate precedential legal opinions).

The Fast Letter is unlike the documents that OGC determined were not "administrative issues" in VAOGCPREC 26-97 because they were not approved by the Secretary. Neither of those documents appear to have been actual directives to VA adjudicators, much less instructions approved by the Secretary. *See* VAOGCPREC 26-97. The first—Program Guide 21-1—appears to be a compilation of explanations for regulatory changes that are generally found in the Federal Register. *See id.* at ¶ 7, 8; *see also* VA Program Guide 21-2 (Revised Feb. 5, 2002), *available at* https://www.benefits.va.gov/WARMS/docs/admin21/guide/pg21_2.doc (last accessed Oct. 5, 2020). The Program Guide section at issue in VAOGPREC 26-97 was issued mere weeks prior to the final rule adding PTSD to the rating schedule, and to the extent that it explained why PTSD would be added and how the addition would alter service connection analyses, it could not have been binding on the agency as

PTSD had not yet been actually added to the rating schedule. *See* VAOGCPREC 26-97 at ¶ 7; *Schedule for Rating Disabilities; New Diagnostic Code*; Final Rule; 77 Fed. Reg. 26326 (April 18, 1990). The Program Guide merely provided an explanation of what adjudicators could expect *when* the rule went into effect.

The second directive at issue in VAOGCPREC 26-97 was a Department of Medicine and Surgery Professional Letters explaining that "VA began using the diagnosis of PTSD in 1980 in conformity with DSM-III." VAOGCPREC 26-97, ¶ 6. But the Department of Medicine and Surgery appears to have been a component of the Veterans *Health* Administration, not the Veterans *Benefits* Administration. And the Secretary has not delegated authority to VHA to act on *any* matters assigned to VBA. *Compare* 38 C.F.R. § 2.6(a) *with* 38 C.F.R. § 2.6(b). Therefore, a letter from VHA could not be binding on VBA adjudicators and cannot have qualified as a "administrative issue" for purposes of 38 C.F.R. § 3.114(a).

The Fast Letter is also unlike the Manual M21-1 provisions that the Office of General Counsel found to not meet the criteria for an "administrative issue" under 38 C.F.R. § 3.114(a). Key to the General Counsel's analysis was the fact that the specific provisions were "not intended to establish binding standards having the force of law or regulation." VAOGCPREC 1-96, ¶ 5. "Rather, such provisions are intended merely to convey the internal operating policies and methods pertaining to the administration of the benefit programs whose basic policies have been published in VA regulations." *Id.*

By contrast, Fast Letter 13-04 "establish[ed] binding standards having the force of law or regulation" because it instructed adjudicators to "[g]rant service connection for the cause of death when the death certificate shows that the service-connected condition is the principal or contributory cause of death." *See* VAOGCPREC 1-96, ¶ 5. As argued in Mrs. Kennedy's briefs, this instruction left the adjudicator no discretion to deny the claim where the death certificate listed the service-connected condition as the principal or a contributory cause of death. Appellant's Br. at 9; Appellant's Reply Br. at 4. And the binding nature of the Fast Letter is illustrated by the fact that VA repeatedly denied Mrs. Kennedy's DIC claim until the Pension and Fiduciary Service issued Fast Letter 13-04. *See* R-289; R-348; R-433.

In *Military Order of the Purple Heart v. Secretary*, the Federal Circuit held that a Fast Letter instituting a new review policy for large benefit awards deprived veterans of their right to be heard and rejected the Secretary's position that it was merely a matter of internal housekeeping. 580 F.3d 1293, 1297 (Fed. Cir. 2009). The new policy was a rule—even though it was promulgated through a Fast Letter—because it "affect[ed] the veteran's substantive as well as procedural rights, and [was] 'a change in existing law or policy which affects individual rights and obligations.'" *Id.* at 1296.

The Fast Letter in that case bound the adjudicator by its mandatory terms: "Do not offer these [large award] rating decisions to any veteran's representative for review until the C & P Service makes a final determination regarding the propriety of the decision." *Id.* at 1297. The same is true here: "Grant DIC." Fast Letter 13-04, at

2. As an instruction from the Secretary that was substantive in nature, the Board was bound by it. 38 U.S.C. § 7104(c). And the agency demonstrated its intent that the Fast Letter be binding through its use of mandatory phrasing. *Farrell*, 314 F.3d at 590.

Even if the Fast Letter is deemed more similar to an M21-1 Manual provision than an OGC precedential opinion, the Court should still find that the Fast Letter is an "administrative issue" under 38 C.F.R. § 2.6. In concluding that the M21-1 section discussed in the 1996 OGC Opinion was not an "administrative issue," OGC did not consider the Secretary's broad delegation of authority to USB. *See* 38 C.F.R. § 2.6(b). OGC posited that "[p]rovisions in manuals such as the M21-1 are not approved by the Secretary or by the Secretary's direction," but 38 C.F.R. § 2.6(b) belies this assertion. And, contrary to OGC's conclusion in 1996, some provisions of the current version M21-1 are in fact "intended to establish binding standards having the force of law and regulation," and claimants "benefits are [] . . . awarded pursuant to a manual provision." *See Gray v. Secretary*, 884 F.3d 1379, 1380 (Fed. Cir. 2018) (denying panel rehearing and rehearing en banc) ((Taranto, J., concurring) (a provision may be a "substantive[ ] rule[ ] of general applicability" despite its publication in the Manual.). *But see* VAOGCPREC 1-96, ¶ 5. This Court is not bound by General Counsel opinions, and it should decline to adopt the General Counsel's position on this issue, as it is inconsistent with 38 C.F.R. § 2.6(b) and the current version of the M21-1. *See Splane v. West*, 216 F.3d 1058, 1067 (Fed. Cir. 2000) (holding that VA OGC opinions are not binding on the CAVC).

2. **How, if at all, does 38 C.F.R. § 19.5, which provides that "the Board is not bound by Department manuals, circulars, or similar administrative issues," affect the definition of "issue"?**

Section 19.5 affects the definition of an "issue" insofar as it acknowledges that some administrative issues are not binding on VA. *And see* VAOGCPREC 26-97 (acknowledging the same). However, as argued above, Fast Letter 13-04 is an "instruction of the secretary." It is, therefore, binding on the Board under 38 U.S.C. § 7104(c). Congress was explicit as to this point and left no gaps for VA to fill as to whether the Secretary's instructions are binding. *See* 38 U.S.C. § 7104(d). As a result, the "Department manuals, circulars, or similar administrative issues" referred to in section 19.5 cannot include "instructions of the Secretary," such as Fast Letter 13-04. The Secretary's regulations cannot trump statutes. It follows that 38 C.F.R. § 19.5 does not affect the analysis in this case.

3. **Should the Court apply the Federal Circuit's test for determining whether a provision is a liberalizing law—"one which brought about a substantive change in the law creating a new and different entitlement to a benefit"—to determine whether a provision is a liberalizing "issue"? If not, what test should the Court apply to determine whether an "issue" is liberalizing?**

The Federal Circuit's test for whether a *law* is liberalizing should not apply to liberalizing *issues*. First, the Federal Circuit case law addressing the term "liberalizing" focused on whether a claimant was entitled to readjudication of a claim based on an intervening law—it did not address how that term is to be interpreted as used in 38 C.F.R. § 3.114(a). *See Routen v. West*, 142 F.3d 1434, 1442 (Fed. Cir. 1998). Second,

VA has interpreted "liberalizing administrative issue," as that term is used in 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), to include administrative issues that "liberalize[s] the evidentiary basis on which service connection for certain disabilities may be established." VAOGCPREC 26-90, ¶ 6. Fast Letter 13-04 meets this test. But it also meets the Federal Circuit's test for liberalizing laws, so even if the Court rejects the Secretary's reasonable interpretation, it should still find that the Fast Letter is a liberalizing VA issue under 38 C.F.R. § 3.114(a).

In *Routen v. West*, the Federal Circuit described a test for determining whether a provision is a liberalizing law—"one which brought about a substantive change in the law creating a new and different entitlement to a benefit." 142 F.3d at 1442; *see also Spencer v. Brown*, 17 F.3d 368, 373 (Fed. Cir. 1994). Importantly, however, at issue in that case was whether an intervening law was sufficiently liberalizing as to create a new claim. *Routen*, 142 F.3d at 1441. Otherwise, absent new and material evidence of clear and unmistakable error, readjudication of the claim was not permitted under 38 U.S.C. § 7104(b), which provides, "[W]hen a claim is disallowed by the Board, the claim may not thereafter be readjudicated and allowed and a claim based upon the same factual basis may not be considered." The Federal Circuit made clear, "3.114 addresses a different issue." *Routen*, 142 F.3d at 1441. "It sets the effective date of awards" and "does not define 'liberalizing.'" *Id.*

However, when VA promulgated 38 C.F.R. § 3.114 in December 1962, it explained that a "liberalizing VA issue" includes "a change in rating or dependency

criteria, or in the *nature of evidence required to establish relationship*." *See* Appendix 1, p. 2 (emphasis added).[2] And OGC has interpreted the term "liberalizing administrative issue" to include to include administrative issues that "liberalize the evidentiary basis on which service connection for certain disabilities may be established." VAOGCPREC 26-90, ¶ 6. As a result, "a rating schedule change which makes it easier for a veteran to establish service connection for a disability may be considered a liberalizing VA issue for purposes of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a)." *Id.* at ¶ 5. For example, when VA added PTSD to the rating schedule, it recognized that a veteran "may not show signs of a psychiatric disorder in service, although the disorder was the result of service experiences." *Id.* at ¶ 7. Prior to the change, VA "requir[ed] evidence of neurosis during service in order to establish service connection." *Id.* Allowing veterans to establish entitlement with delayed symptoms as opposed to requiring in-service symptoms was "a liberalizing VA issuance for purposes of 38 C.F.R. § 3.114(a)." *Id.* at ¶ 10.

Changes that merely make it easier for a claimant to establish service connection—such as changing the type of evidence that can show entitlement by adding PTSD to the rating schedule—would not meet the Federal Circuit's "liberalizing law" test because they do not create a new entitlement. *See Routen*, 142

[2] This document appears to be an excerpt from the then-extant Program Guide 21-2. It is available at https://www.va.gov/FOIA/docs/Updated_Documents/AO/BVA_CAVC_Order11_3072_File1.pdf (last accessed Oct. 5, 2020).

F.3d at 1441; *Spencer*, 17 F.3d at 373. In *Foreman v. Shulkin*, this Court held that an amendment to 38 C.F.R. § 3.304(f) that relaxed the claimant's evidentiary burden for establishing an in-service stressor—a single element of a claim rather than entitlement to the benefit itself—could not be a "liberalizing law" under *Routen*. 29 Vet.App. 146, 150 (2018) (citing *Routen*, 142 F.3d at 1441). Yet, according to VA's interpretation of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), the relaxation of an evidentiary burden *is* a "liberalizing administrative issue." *See* Appendix 1, p. 2; VAOGCPREC 26-90, ¶ 10.

OGC has also interpreted "liberalizing VA issue" to include precedential OGC opinions that interpret a statute to require adjudicators to grant claims that they would otherwise have denied. *See* VAOGCPREC 88-90. For example, when OGC interpreted 38 U.S.C. § 314(k) (now 38 U.S.C. § 1114(k)) to allow for special monthly compensation for anatomical loss of a creative organ even though the veteran entered service with loss of *use* of the organ, the OGC's opinion was a "liberalizing VA issue" under 38 C.F.R. § 3.114(a). *Id.*

The OGC precedential opinion interpreting 38 U.S.C. § 314(k) did not create a new entitlement to a benefit: special monthly compensation for loss of use of a creative organ already existed. *See* VAOGCPREC 5-89 (Sept. 25, 1990). Rather, it interpreted an already-existing statute and determined that it required adjudicators to award compensation in particular circumstances. *See id.* As such, it would not meet the Federal Circuit's test for a liberalizing law. *See Routen*, 142 F.3d at 1441; *Spencer*, 17 F.3d at 373. Nonetheless, OGC determined it was a "liberalizing administrative

issue" under 38 C.F.R. § 3.114(a) because it was "a liberalization of VA policy . . . result[ing] from a precedent General Counsel opinion . . . ." VAOGCPREC 88-90, ¶ 4. So it is here. DIC existed as a benefit before and after the Fast Letter, and VA could not create that benefit had Congress not authorized it. But VA could, and did, lower the evidentiary burden for establishing entitlement to that benefit by removing the requirement that claimants submit a medical nexus opinion when the contributory cause of death appears on the death certificate.

The dictionary meaning of the term "liberalizing"—"to make laws, systems, or opinions less severe"—is consistent with VA's interpretation of the term. *See Liberalize*, Cambridge Dictionary, *available at* https://dictionary.cambridge.org/us/dictionary/english/liberalizing (last accessed Oct. 3, 2020). And generally, the plain meaning of regulatory terms must prevail. *See Petitti v. McDonald*, 27 Vet.App. 415, 422-23 (2015). But to the extent that the term "liberalizing" is genuinely ambiguous, the Court should defer to VA's interpretation of "liberalizing administrative issue" as set forth in the above-discussed OGC precedential opinions and explanatory statement. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019). VA's interpretation is reasonable, represents the agency's official position, reflects the agency's fair and considered judgment, and resolves interpretative doubt in the claimant's favor. *See id.* at 2415-18; *Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016) (citing *Gardner v. Brown*, 513 U.S. 115, 118 (1994)).

It is therefore entitled to this Court's deference. *See Kisor*, 139 S.Ct. 2415-18; *Hudgens*, 823 F.3d at 639.

The Fast Letter satisfies VA's test for a "liberalizing administrative issue." As Mrs. Kennedy argued in her briefs, it made it easier for her to establish entitlement to DIC benefits because it directed adjudicators to grant benefits based on the information in the death certificate without regard to any unfavorable evidence of record. *See* Appellant's Br. at 9-11; Appellant's Reply Br. at 1-2. Therefore, at the very least, it "liberalize[d] the evidentiary basis on which service connection for certain disabilities may be established," VAOGCPREC 26-90, ¶ 6, or represented "a liberalization of VA policy, VAOGCPREC 88-90, ¶ 4. In either case, it satisfies VA's own test for a "liberalizing administrative issue."

But even if the Federal Circuit's test for determining whether a law was sufficiently liberalizing to create a new claim applies to whether an administrative issue is "liberalizing," that test is satisfied here, as Mrs. Kennedy argued in her briefs. Appellant's Br. at 9-11; Appellant's Reply Br. at 2-4. The Fast Letter was a "liberalizing administrative issue" because it created a new and different path to a benefit; it changed the criteria for her entitlement to service connection for the cause of the Veteran's death. *See*, *e.g.*, Appellant's Br. at 9-11; Appellant's Reply Br. at 4-6. In this respect, the Fast Letter is distinguishable from the amendment to 38 C.F.R. § 3.304(f) at issue in *Foreman*, which reduced the claimant's evidentiary burden as to only *one* element of the claim. *See* 29 Vet.App. at 150. As a result, the Court should

conclude that regardless of whether VA's interpretation of "liberalizing administrative issue" or the Federal Circuit's test for determining whether an intervening law creates a new claim applies, Fast Letter 13-04 is a "liberalizing administrative issue" under 38 C.F.R. § 3.114(a).

4. **Does VA have discretion to decline to award the one year earlier effective date if it finds a law or issue liberalizing? If so, what standard applies in determining whether an earlier effective date of one year is warranted?**

VA does not have discretion to deny an effective date of one year prior to the date of the claim, where the claim is awarded based on a liberalizing VA issue, provided the claimant meets all other entitlement rules. Section 5110(g) provides an exception to the general rule found in 38 U.S.C. § 5110(a) that the effective date of an award of DIC is the date of the claim or the date entitlement arose, whichever is later. *see also Retroactive Payments due to Liberalizing Law or VA Issue*, Final rule; 62 Fed. Reg. 17706 (April 11, 1997); VAOGCPREC 5-94, ¶ 9 (Feb. 18, 1994). Its language is mandatory: where benefits are awarded "pursuant to any Act or administrative issue," the effective date "*shall be fixed* in accordance with the facts found," with only two limitations. The effective date cannot be earlier than (1) the effective date of the Act or administrative issue, and (2) one year prior to the date of the claim or the VA decision awarding compensation, whichever is earlier. *Id.* (emphasis added). The regulation repeats this mandatory language, directing that "the effective date of such an award [made pursuant to a liberalizing law or VA issue] *shall be fixed* in accordance

with the facts found, but shall not be earlier than the effective date of the act or administrative issue." 38 C.F.R. § 3.114(a) (emphasis added).

The permissive "may" in subsections (a)(1), (a)(2), and (a)(3) of the regulation does not override that mandate and is instead merely a recognition that the claimant must meet all other eligibility criteria. As both the Court and the Secretary recognized in *McCay v. Brown*, section 5110's intent was to provide a one-year grace period "to give claimants time to react after a change in the law." 9 Vet.App. 183, 188 (1996). It was meant to "assist claimants who did not learn of a liberalizing change in law in time to file a prompt application." VAOGCPREC 5-94 at ¶ 12. That purpose is defeated if VA is permitted to give less than the full year of benefits where the claimant meets the eligibility criteria for the full year.

The Court in *McCay* did describe section 5110(g) as a "permissive statute which does not require VA to make a retroactive award for a period of one year prior to the date of the appellant's claim, —but immediately explained the reason for that permissive view: "*regardless of whether the appellant met the criteria* for an award of benefits when the new law was enacted or became effective." 9 Vet.App. at 188 (emphasis added). In other words, VA is permitted to avoid the one-year period if the claimant does not meet the eligibility criteria. The mandatory nature of the one-year earlier effective date—provided all eligibility criteria are met—was reiterated when the Court explained: "where a law is enacted in 1991, and is effective from that date, a claimant filing in 1992 *will receive* a one-year retroactive award only *if he met the eligibility criteria* as

of 1991." *Id.* (emphasis added). *And see* VAOGCPREC 26-97, ¶10 ("entitlement to a retroactive effective date under section 3.114(a) does not arise unless the evidence shows that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement.").[3]

Here, the effective date of an award made based on facts found would be November 2005, the date the Veteran passed away. R-543. And the effective date of the administrative issue upon which the award was made—Fast Letter 13-04—was March 22, 2013. But Mrs. Kennedy did not file the claim that led to the award of benefits until July 2015. R-285-86; 266-69. She met all the other eligibility criteria by July 2014: she was the veteran's surviving spouse and he was service connected for the condition listed on the death certificate. *See* 38 U.S.C. §§ 1310, 1311; 38 C.F.R. § 3.312 (2020); *see also* R-543 (Nov. 2005 death certificate); R-570 (Oct. 2002 code sheet). Therefore, under 38 U.S.C. § 5110(g), Mrs. Kennedy is entitled to an effective date of July 2014—one year prior to the date of her claim—and VA's regulation

[3] The interpretation contained in the second half of this holding, "that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement" was held to be an impermissible construction of the statute in *McCay*, 9 Vet.App. at 182.

cannot be read to limit that effective date. *See Staab v. McDonald*, 28 Vet.App. 50, 55 (2016).

Moreover, section 3.114(a)(3) must be read in the context of the mandate in 38 C.F.R. § 3.103(a) (2020) that VA "render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." This Court has also affirmed the agency's duty to maximize benefits as found in § 3.103. *See*, *e.g.*, *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008) ("The Secretary is required to maximize benefits."); *AB v. Brown*, 6 Vet.App. 35, 38 (1993) (Claimants are "generally [ ] presumed to be seeking the maximum benefit allowed by law and regulation."). If the benefits are authorized by law, the agency must grant them. *See Morgan v. Wilkie*, 31 Vet.App. 162, 167 (2019). VA must "examin[e] all possible rating methods in search of the highest level of established compensation." *Id.* at 168. The law's authorization to award "retroactive award of benefits, not to exceed one year, when compensation is awarded because of an administrative issue," *Evans v. Mansfield*, 257 F.App'x 297, 300 (Fed. Cir. 2007), requires VA to award those benefits because they are benefits supported in law, *Morgan*, 31 Vet.App. at 167. *See also* 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a). There can be no legally tenable justification for VA to refuse to award those benefits.

Respectfully submitted,

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APPENDIX A

38 CFR 3.105(e)

Veterans Administration
Washington 25, D.C.

December 1, 1962

VA REGULATIONS

COMPENSATION AND PENSION--Transmittal Sheet 267

Remove pages	Insert pages
35-R and 36-R	35-2R and 36-2R
37-R and 38-R	37-2R and 38-2R
39-2R and 40-2R, 41-2R, 42-2R, 43-2R, 44-2R	39-3R and 40-3R 41-3R, 42-3R, 43-3R, 44-3R

Paragraph revised	Paragraphs added	Paragraphs canceled
1105 Introduction, (A), (D), (E)	1105(F) 1114	None

Page 35-i (contents page): Under "1113 Signature by Mark" insert "1114 Change of Law or VA Issue".

EXPLANATION

The purpose of the following comment on the changes included in this amendment of VA Regulations is to inform all concerned why these changes are being made. These comments are not regulatory.

Paragraph 1105. The revisions in this paragraph reflect changes made necessary by Public Law 87-825, enacted October 15, 1962. The provisions of this act are not for application for the purpose of awarding, reducing or discontinuing benefits prior to the effective date, December 1, 1962, specified in section 7 of the act.

This act substituted a new section 3012(b) of title 38 for the former subsections (b) and (c). Consistent with the provisions of the new subsection (b), the preamble to paragraph 1105 has been amended to eliminate reference to "fraud" and to substitute reference to acts of commission or omission by the payee. The subject of revision of decisions due to changes in law or administrative issues is specifically covered in the new VA Regulation 1114.

Subparagraph (A) has been amended to show clearly that when an earlier unfavorable decision is reversed because of clear and unmistakable error, retroactive benefits may be authorized as if the earlier decision had been favorable. The basic rule for reduction or discontinuance of awards because of error is contained in VA Regulation 1500(B).

38 CFR 3.105(e)

Subparagraph (D) as revised is based on the new section 3012(b)(6) which provides statutory authority for rules which were established by regulation. The existing procedure preliminary to severance of service connection, which is applicable only where service connection has not been in effect for 10 or more years, will be maintained. By the specific language in subsection (b)(6) relating to changes in service-connected (or employability) status, severance of service connection and reduction of compensation awards are excepted from the general provisions of subsection (b)(10) for discontinuance of awards because of administrative error or error in judgment.

Subparagraph (E), relating to reduction or discontinuance of compensation awards because of reduction in evaluation of service-connected disability, has been modified to include a change in employability status which would affect eligibility for compensation. As under existing procedure, compensation awards will not be reduced or discontinued until the veteran has been afforded a period of 60 days in which to submit additional evidence. The rating and award (if discontinuance is not in order) will reflect the lower evaluation and the reduced rate of compensation effective the first day of the third calendar month following the date of notice to the payee.

The new subparagraph (F) provides for reduction (e.g., aid and attendance allowance) or discontinuance of a pension award on the basis of a reduced evaluation where there has been a change in the disability or in employability, effective the last day of the month in which the discontinuance is approved. This action will be taken on the basis of the rating. No waiting period is authorized for the submission of additional evidence.

(Comment on par. 1109. This paragraph has not been changed. Subpar. (A)(2) provides a 1-year time limit for submission of evidence in support of a claim for benefits, which is equally applicable to original and reopened claims and claims for increase. The former 38 U.S.C. 3011, which provided that in reopened and increase claims benefits could not be paid for any period prior to date of receipt of evidence establishing entitlement, is repealed by sec. 5, PL 87-825. Under this law, payments may be authorized from the date of receipt of an informal claim for reopening or increase, if the necessary evidence is received within 1 year from the date of request. Additional comments concerning this aspect are contained in transmittal sheet 268 accompanying the revision of VA Regulation 1156.)

Paragraph 1114 combines the provisions of the new sections 3010(g) and 3012(b)(6), which affect award actions due to changes in law or VA issues, or interpretations of either. Benefits may not be authorized under this paragraph for any period prior to December 1, 1962.

Subparagraph (A) is based on section 3010(g), which provides statutory authority for payment of benefits based on pending or previously disallowed claims, when liberalized standards of entitlement are established by a liberalizing law or approval of a liberalizing VA issue; e.g., a change in

38 CFR 3.105(e)

rating or dependency criteria, or in the nature of evidence required to establish relationship. Benefits may be paid from the effective date of the law or VA issue if a claim is reviewed in the course of a general review within 1 year from the effective date of the law or VA issue, or as to other pending or finally disallowed claims, where the claimant's request for consideration is received within 1 year from the applicable effective date.

In other instances, where a general review of claims is not authorized or an individual claim was not identified in the course of a general review, benefits may be authorized retroactively either on the basis of a reopened claim or an administrative review. If a claim is reopened by the claimant, or is reviewed on the initiative of the VA more than 1 year after the effective date of the law or VA issue, benefits may be awarded retroactively covering a period of 1 year prior to the date of reopening or date of administrative determination of entitlement (e.g., the date of rating), whichever is applicable.

Subparagraph (B) is based on section 3012(b)(6), relating to discontinuance of awards because of a new law or administrative issue, or because of a change in interpretation of a law or issue. This provides a general rule for situations where a statute may require termination of running awards authorized under an earlier law, or termination is required because of a new VA issue (e.g., a change in the Schedule for Rating Disabilities, or a revision of VA Regulations) or where, because of a new interpretation of a law or VA issue, it is determined that an award which was properly made under instructions in effect at that time, should not have been authorized. Under the circumstances described, the general rule will be followed in the absence of other specific statutory or administrative provisions.

By direction of the Administrator:

W. J. DRIVER
Deputy Administrator

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