New Civil Liberties Alliance

January 11, 2023

Honorable Denis R. McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

Re: Petition to Amend 38 C.F.R. § 3.654(b)(2) to Correct an Inconsistency Between the Regulation and the Underlying Statutory Mandate, and to Ensure that Disabled Veterans Receive the Disability Benefits to Which They Are Entitled

Dear Secretary McDonough:

The New Civil Liberties Alliance (NCLA) and the Concerned Veterans for America Foundation (CVAF) hereby petition the U.S. Department of Veterans Affairs (VA) to amend its regulation regarding the payment of benefits to veterans who have been adjudged eligible for disability benefits but who later return temporarily to active duty. The current regulation, 38 C.F.R. § 3.654(b)(2), denies many disabled veterans the benefits to which they are entitled under federal law. *See* 38 U.S.C. §§ 1131 & 5304(c). We ask that the regulation be amended to provide that when the benefits due a disabled veteran are temporarily suspended because he or she has returned to active service, the effective date of resumption of benefit payments shall be the date on which the disabled veteran is released from active service.

NCLA and CVAF bring this petition pursuant to 5 U.S.C. § 553(e), which requires all federal agencies to "give an interested person the right to petition for issuance, amendment, or repeal of a rule"; and 38 U.S.C. § 501(a), which grants the VA Secretary "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the" VA.

I. Interests of Thomas Buffington, NCLA, and CVAF

Thomas Buffington, a disabled veteran, recently mounted a legal challenge to 38 C.F.R. § 3.654(b)(2), bringing his claim all the way to the U.S. Supreme Court. NCLA, a nonpartisan public-interest law firm, represented Mr. Buffington in that challenge. CVAF advocates in support of veterans' rights and filed a friend-of-the-court brief in the Supreme Court in support of Mr. Buffington. The lawsuit contended that § 3.654(b)(2) establishes rules for the commencement of disability-compensation benefits that are inconsistent with

rules mandated by legislation adopted by Congress. It further contended that by applying § 3.654(b)(2), VA awarded Mr. Buffington substantially lower disability benefits than those to which he was statutorily entitled.

II. Introduction

Importantly, *none* of the judges who reviewed Mr. Buffington's claim—three judges on the U.S. Court of Appeals for Veterans Claims (the "Veterans Court") and three judges on the U.S. Court of Appeals for the Federal Circuit—concluded that § 3.654(b)(2) provides the best interpretation of the statutes at issue. Rather, two of the three judges on each of those courts concluded that the statutory language is ambiguous and upheld VA's regulation only because they viewed it as a "reasonable" interpretation of an "ambiguous" statutory framework. *Buffington v. Wilkie*, 31 Vet.App. 293 (2019), *aff'd sub nom., Buffington v. McDonough*, 7 F.4th 1361 (Fed. Cir. 2021). Dissenting judges on each of those panels would have held that the regulation is wholly inconsistent with the statutory language, which they concluded mandated awarding Mr. Buffington the benefits he sought. *Buffington v. Wilkie*, 31 Vet.App. at 307-08 (Greenberg, J., dissenting) (stating that "[t]he majority opinion reflects nothing more than a rubber stamping of the Government's attempt to misuse its authority granted under 38 U.S.C. § 501(a)"); *Buffington v. McDonough*, 7 F.4th at 1368 (O'Malley, J., dissenting) (objecting that "[r]ather than apply traditional tools of statutory construction to determine whether there is an ambiguity in [38 U.S.C.] § 5304(c), [the majority] fast-tracks past this step and finds what it believes is a statutory gap that the agency may fill.").

Supreme Court Justice Neil Gorsuch recently joined Judges Greenberg and O'Malley in sharply criticizing 38 C.F.R. § 3.654(b)(2), the regulation challenged by Mr. Buffington. In an opinion dissenting from the denial of Mr. Buffington's petition for a writ of certiorari, Justice Gorsuch stated, "The VA's misguided rules harm a wide swath of disabled veterans. ... [T]hose who have served in the Nation's Armed Forces deserve better from our agencies and courts alike." *Buffington v. McDonough*, 2022 WL 16726027 at *1 (U.S., Nov. 7, 2022) (Gorsuch, J., dissenting from denial of certiorari).

Although the courts have deferred to VA's interpretation of the statutes at issue, VA is under no obligation to adhere to a flawed and ungenerous interpretation that denies benefit payments to which Mr. Buffington and other disabled veterans are entitled. NCLA and CVAF urge VA to do the right thing: amend 38 C.F.R. § 3.654(b)(2) to provide that disability benefits due veterans who return to active duty will be reinstated the moment they leave active duty.

III. Statutory Provisions

Congress has established a framework for providing disabled veterans with monetary benefits. A veteran generally is entitled to monetary compensation if he or she is disabled because of an injury or disease incurred "in [the] line of duty." 38 U.S.C. §§ 1110, 1131. The amount of compensation generally depends on the severity and nature of the disability. 38 U.S.C. §§ 1114, 1134.

Congress has provided that after an initial award of disability-based benefits, they may be reduced or discontinued for several different reasons. 38 U.S.C. § 5112(b). Of particular relevance here, since 1957 Congress has prohibited "double dipping": a veteran may not simultaneously receive active-duty pay and disability benefits. 38 U.S.C. § 5304(c) ("Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active duty pay."). The statute imposes no limitation on a veteran's receipt of disability benefits after he or she ceases receiving active-duty pay.

IV. VA's Implementation of 38 U.S.C. § 5304(c)

To implement 38 U.S.C. § 5304(c), the Veterans Administration (VA's predecessor) adopted a regulation in 1961 that mandated *immediate* resumption of disability payments following a veteran's release from active duty. The regulation interpreted § 5304(c) as requiring that payments "be resumed the day following release from active duty if otherwise in order." 26 Fed. Reg. 1561, 1599 (1961) (establishing 38 C.F.R. § 3.654(b)). In 1962, however, the Veterans Administration amended that regulation to create a brand-new forfeiture rule restricting veterans' ability to resume their disability benefits following active service.

Specifically, the Veterans Administration determined that any request by a veteran to resume benefits would take effect "the day following release from active duty"—but *only* "if [a] claim for recommencement of payments is received within a year from the date of such release." 27 Fed. Reg. 11,886, 11,890 (Dec. 1, 1962) (revising 38 C.F.R. § 3.654 and adding subsection (b)(2)). If such a claim was not received within a year of the veteran's release from active duty, the new regulation provided that "payments will be resumed *effective 1 year prior to the date of receipt of a new claim*." *Ibid.* (emphasis added).

The Veterans Administration thus created a forfeiture rule out of whole cloth, under which veterans lose disability benefits they have earned if they wait more than one year before notifying the government of their right to resume benefits. The rulemaking did not cite any source of statutory authority for creating this forfeiture rule. The modified version of § 3.654(b) remains in effect today.

V. The Regulation's Negative Impact on Mr. Buffington

Section 3.654(b)(2)'s negative impact on Mr. Buffington is, unfortunately, all too typical of the experience of disabled veterans who answer the Nation's call to return to active duty. He served on active duty in the U.S. Air Force from September 1992 to May 2000. After being honorably discharged, he sought disability compensation for tinnitus in July 2000. VA concluded that Mr. Buffington's tinnitus was service-connected, rated his disability at 10%, and began paying him disability compensation effective May 31, 2000. VA has never disputed that, from 2002 onward, he continued to suffer from his service-connected disability and that the proper disability rating is 10%.

When Mr. Buffington was recalled to active duty in the Air National Guard in July 2003 during the war in Iraq, he informed VA of his activation. Applying 38 U.S.C. § 5304(c), VA discontinued paying Mr. Buffington disability compensation effective July 20, 2003, the day before his active service began.

Mr. Buffington served on active duty from July 2003 to June 2004, and then again from November 2004 to July 2005. VA did not reinstate his disability payments between those two periods of active duty; nor did VA do so when the second period concluded. In January 2009, he formally requested that VA reinstate his disability benefits, including by paying the benefits he had earned in the periods of time (between June 2004 and November 2004, and after July 2005) when he had not received active-duty pay.

In August 2009, VA agreed to reinstate Mr. Buffington's benefits "at the same 10 percent service-connected disability rating [h]e w[as] awarded prior to [his] return to active duty." But VA refused to award him benefits for the entire period during which he had not been receiving active-duty pay. Instead, VA stated that disability payments would only be retroactive to February 1, 2008. VA explained: "We received your request for the reinstatement of your VA Compensation benefit more than one year after your release from active duty. By law [that is, under the "law" as interpreted by 38 C.F.R. § 3.654(b)(2)] we are only permitted to make payments retroactive to one year prior to the date we received your request." The result of that decision, which was affirmed on appeal, is that Mr. Buffington was deprived of more than three years of disability benefits that all agree he would have received had he asked for them within one year of his release from active duty.

VI. 38 C.F.R. § 3.654(b)(2) Is Inconsistent with the Plain Meaning of 38 U.S.C. § 5304(c)

Once a veteran's entitlement to disability benefits is established, VA is required to continue paying benefits (38 U.S.C. §§ 1110 & 1131)—subject to very limited exceptions. One such exception is 38 U.S.C. § 5304(c), which bars payments "for any period for which [the veteran] receives active duty pay." Another statute, 38 U.S.C. § 5112(b)(3), provides

that the § 5304(c) bar kicks in the day before any active duty pay begins. Section 5304(c) does not explicitly state the date on which the bar is no longer in effect. But as Federal Circuit Judge O'Malley explained, the absence of an explicit statement does not create a statutory ambiguity:

> While it is true that § 5304(c) does not mention a recommencement date, it is clear that Congress only wanted a veteran's benefits to discontinue for "*any period* for which such person receives active service pay." 38 U.S.C. § 5304(c) (emphasis added). While Congress did not explicitly state in § 5304(c) that disability and retirement benefits will recommence only upon active duty ceasing, it did not need to; the contrapositive of this statutory section says as much. *See id.* (noting that "any period" of active service pay will result in a loss of disability benefits). That § 5304(c) is silent on when benefits will "recommence" is of no moment. The plain text of Title 38 indicates that Congress intended for veterans' benefits to discontinue during "any period" of active service pay. Outside this "period," the veteran remains entitled to the benefits for which he originally qualified.

Buffington v. McDonough, 7 F.4th at 1369 (O'Malley, J., dissenting).

Justice Gorsuch fully concurred with Judge O'Malley's statutory analysis:

> As Judges O'Malley and Greenberg highlighted, Congress has instructed the VA to make disability payments to injured veterans like Mr. Buffington. In § 5304(c), Congress suspended that obligation only for periods when a veteran "receives active service pay." Nothing in the statute requires a veteran to ask the agency to resume benefits it is already legally obligated to pay. Nor does anything in the statute allow the VA to withhold overdue benefits.

Buffington v. McDonough, 2022 WL 16726027 at *2 (Gorsuch, J., dissenting).

VA's regulation, 38 C.F.R. § 3.654(b)(2), is inconsistent with that understanding of 38 U.S.C. § 5304(c). It provides that disabled veterans will forfeit some portion of the disability benefits they have earned if they wait more than one year before submitting a claim to resume benefits. Because the regulation is "contrary to law," 5 U.S.C. § 706, it should be repealed and replaced with a regulation that is consistent with the terms of § 5304(c).

Section 5304(c) is designed to prevent veterans from double dipping, by barring them from receiving disability benefits while they are already receiving active-duty pay. VA's regulation does nothing to further that legislative purpose. The regulation's mandated forfeiture of disability benefits is limited to periods after a veteran has left active service and thus is no longer receiving active-duty pay.

Revealingly, not a single judge involved in the *Buffington* litigation agreed with VA's contention that 38 C.F.R. § 3.654(b)(2) reflects the best reading of the underlying statute, 38 U.S.C. § 5304(c). Rather, all of the judges who rejected Mr. Buffington's claim merely concluded that VA's position was a "reasonable" interpretation of the statute, to which they ought to defer. Among those federal judges who could discern in § 5304(c) a congressional directive regarding the accrual date for disability benefits following cessation of active-duty pay, *every one* concluded that the statute mandates accrual *as soon as* the veteran is no longer on active duty, without regard to when the veteran requested resumption of payments. *Buffington v. Wilkie*, 31 Vet. App. at 308 (Greenberg, J., dissenting); *Buffington v. McDonough*, 7 F.4th at 1368-72 (O'Malley, J., dissenting); *Buffington v. McDonough*, 2022 WL 16726027 at *2 (Gorsuch, J., dissenting).

Federal judges who defer to an agency's construction of a federal statute do so based on the Supreme Court's *Chevron* doctrine, which mandates deference in appropriate circumstances—even when the judges would have adopted a different interpretation in the absence of the agency's construction. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But that doctrine does not empower VA to adopt just any statutory interpretation that it deems reasonable. Rather, an administering agency when drafting regulations, no less than a court when construing a statute, must first attempt to ascertain, "employing traditional rules of statutory construction, [whether] Congress had an intention on the precise question at issue." *Id.* at 843 n.9. If so, "that intention is the law and must be given effect" by the agency. *Ibid.*[1] For the reasons explained by Justice Gorsuch and Judges O'Malley and Greenberg, 38 U.S.C. § 5304(c) is most plausibly construed as entitling a veteran to resumption of disability benefits as soon as he or she ceases to receive active-duty pay. Accordingly, *Chevron* requires VA to adopt a new regulation that recognizes immediate accrual rights.

VII. VA's Policy Arguments in Support of 38 C.F.R. § 3.654(b)(2) Are Ill-Considered

Neither the Veterans Administration nor VA has ever claimed that 38 C.F.R. § 3.654(b)(2) represents the best reading of 38 U.S.C. § 5304(c). Rather, VA has justified

[1] The Supreme Court in recent years has declined to apply *Chevron* on multiple occasions, making clear that the principle articulated in *Chevron* Footnote 9 must be taken seriously. *See, e.g., AHA v. Becerra*, 142 S. Ct. 1896 (2022); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022); *see also ITServe Alliance, Inc. v. United States*, No. 21-1190, 2022 U.S. Claims LEXIS 1765, at *13 n. 3 (Fed. Cl. Aug. 12, 2022) ("the Supreme Court notably declined to mention *Chevron* in several statutory construction cases this term, further suggesting its decline.") (citing *West Virginia v. EPA*, *AHA v. Becerra*, and *Empire Health Found.*); *State of Texas v. Becerra*, No. 5:22-CV185-H, 2022 U.S. Dist. LEXIS 151142, at *57 (N.D. Tex. Aug. 23, 2022) (similar).

the regulation on policy grounds. In particular, VA asserted in the *Buffington* litigation that the threat of benefit forfeiture for those who delay seeking resumption provides a necessary incentive for veterans to file timely applications after leaving active service. *See, e.g.*, VA Brief in *Buffington v. Wilkie*, Fed. Cir. No. 2020-1479 (ECF #36, filed Dec. 7, 2020) at 23 (characterizing the regulation's effective-date provision as "a reasonable means of promoting the efficient administration of benefits").

Such policy arguments do not, of course, justify ignoring the plain language of the statute. At least as importantly, VA's policy arguments are ill-considered. Disabled veterans already have an incentive to notify VA as soon as their active service ends—VA can't very well resume making payments to them until it has been made aware that active service has ended, so a veteran can avoid delayed receipt of accrued benefits by quickly notifying VA.[2] For that reason, most disabled veterans are likely to quickly inform VA of their changed status even without the threat of benefit forfeiture for tardy notification.

Nor does VA suffer harm when some disabled veterans, such as Thomas Buffington, neglect to notify VA right away. On the contrary, delayed notification benefits VA by deferring VA's payment obligation. VA has pointed out that the veteran's disability status might have changed by the time he or she submits a tardy notification. *Id.* at 23-24. But a veteran's disability status is *always* subject to change, regardless of whether the veteran's receipt of disability benefits has been interrupted by a period of active duty and regardless of whether the veteran provides immediate notice that his or her period of active duty has ended. VA's obligation to monitor any such changes (and to modify disability benefits accordingly) is unaffected by the timeliness of notification.

VA is entitled to deny (or reduce) disability payments in the period following discharge from active duty if the evidence suggests that the veteran's level of disability is less than it was when VA made its initial disability determination. But there is no reason to conclude that veterans who delay providing notice of discharge are more likely than other veterans to have had a reduction in their disability level. There is no suggestion, for example, that Mr. Buffington's disability level has decreased; VA continues to rate him as 10% disabled. Yet VA penalized his tardiness by ordering forfeiture of more than three years of disability benefits, despite conceding that he remained disabled throughout that period.

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[2] VA could obviate this problem by informing the Defense Department that an individual recalled to active duty is a disabled veteran and asking DoD to inform VA as soon as the individual is released from active duty. Given that DoD and VA are two branches of the same government, it is not too much to ask that they communicate with one another regarding an issue of vital importance to disabled veterans.

VIII. 38 C.F.R. § 3.654(b)(2) Is Inconsistent with the Pro-Veteran Canon

In the *Buffington* litigation, VA defended its regulation by asserting that 38 U.S.C. § 5304(c) is ambiguous and that it adopted a "reasonable" interpretation of an ambiguous statute. For all the reasons explained above, 38 U.S.C. § 5304(c) is not ambiguous; it unambiguously provides that disability benefits begin to accrue the moment a disabled veteran stops receiving active-duty pay. But even if the statute really were ambiguous, VA is not justified in adopting a construction that so clearly cuts against the best interests of disabled veterans. Congress has repeatedly mandated that ambiguities are to be resolved in favor of veterans seeking benefits.

That mandate is most clearly expressed in 38 U.S.C. § 5107(b), which states that "the Secretary shall give the benefit of the doubt to the claimant" whenever "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." Congress imposes on VA an "obligation to provide complete assistance to the veteran or other claimant in the development of a claim." S. Rep. No. 418, 100th Cong., 2d Sess. at 322-33 (1988). As the Supreme Court has explained:

> When a claim is filed, proceedings before the VA are informal and nonadversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, *the VA must give the veteran the benefit of any doubt.*

Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 440 (2011) (emphasis added).

The solicitude for claimants continues even after a claim has moved from the VA into the Veterans Court: factual findings in the veteran's favor are not reviewable in judicial proceedings, 38 U.S.C. §§ 7252(a), 7261(a)(4), and the Veterans Court in its decision-making is directed to take "due account" of the rule that the VA should give the "benefit of the doubt" to the veteran. 38 U.S.C. § 7261(b)(1). And under the well-recognized "pro-veteran canon" of statutory construction, courts have long recognized that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21 n.9 (1991)).

In sum, even if VA concludes that 38 U.S.C. § 5304(c) is ambiguous with respect to when accrual of disability benefits should recommence following discharge from active duty, the pro-veteran canon of statutory construction requires that the ambiguity be resolved in a manner that favors claimants: benefits accrue immediately after the veteran ceases receiving active-duty pay.

CONCLUSION

NCLA and CVAF request that VA repeal the first sentence of 38 C.F.R. § 3.654(b)(2). In place of that sentence, they request that the following new sentences be inserted at the beginning of § 3.654(b)(2), so that the revised regulation would mirror the regulation adopted by the Veterans Administration in 1961:

> Accrual of benefits, if otherwise in order, will be resumed effective the day following release from active duty. The veteran should notify the Department of Veterans Affairs as soon as possible following his or her release from active duty, in order to facilitate prompt payment of accrued benefits.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Senior Litigation Counsel
rich.samp@ncla.legal

/s/ Kara Rollins
Kara Rollins
Litigation Counsel
kara.rollins@ncla.legal

cc: Catherine Mitrano, Acting General Counsel
Members, Senate Committee on Veterans' Affairs
Members, House Committee on Veterans' Affairs