United States Court of Appeals for the Federal Circuit

CLIFFORD T. HANSER,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2021-1974

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-5382, Senior Judge William A. Moorman.

Decided: December 21, 2022

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

ELIZABETH MARIE PULLIN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM; Y. KEN LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before MOORE, *Chief Judge*, LOURIE and STARK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* STARK.

Opinion dissenting filed by *Chief Judge* MOORE.

STARK, *Circuit Judge*.

Clifford T. Hanser seeks review of the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the Board of Veterans' Appeals' ("Board") denial of Hanser's challenge to the reduction of his disability rating. The Veterans Court, like the Board, determined that Hanser's rating reduction was not subject to 38 C.F.R. § 3.344, which sets out procedural requirements that must be followed before certain longstanding disability ratings are reduced. We, too, conclude that § 3.344(c) makes the procedures of §§ 3.344(a) and (b) applicable only to disability ratings which have continued at the same level for five years or more. Because Hanser's ratings do not satisfy this condition, we agree with the Veterans Court that § 3.344(c) does not apply to him, and, thus, we affirm.

I

Hanser served in the U.S. Army from October 1979 to October 1999. In April 2012, he was assigned 20% service-connected disability ratings, effective July 26, 2011, for his left leg radiculopathy and his bilateral arm radiculopathy. Thereafter, in March 2014 and November 2015, lumbar and cervical spine examinations showed improvement in his conditions. Consequently, Hanser's Department of Veterans Affairs ("VA") regional office proposed reducing his disability ratings. On March 7, 2016, the VA reduced his disability ratings to 0% for both his left leg and bilateral arm radiculopathy, effective June 1, 2016.

Hanser timely filed a notice of disagreement. Following examinations in October 2017, the VA issued a statement of the case, confirming the disability ratings reductions on December 6, 2017. Hanser subsequently appealed to the Board, which concluded that the procedural protections of 38 C.F.R. § 3.344 did not apply to Hanser and, therefore, affirmed the VA's ratings reductions on April 16, 2019. His subsequent appeal to the Veterans Court ended with a Memorandum Decision affirming the Board's decision on February 23, 2021.

Hanser then timely appealed to our Court. We have jurisdiction pursuant to 38 U.S.C. § 7292(c).

II

We have exclusive, but limited, jurisdiction to review decisions of the Veterans Court. *See* 38 U.S.C. § 7292(c); *Sullivan v. McDonald*, 815 F.3d 786, 788-89 (Fed. Cir. 2016). "We may review legal questions, including the validity of any statute or regulation or any interpretation thereof." *Sullivan*, 815 F.3d at 788-89. Such legal determinations are reviewed *de novo*. *See Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009). We may not, however, review (1) "a challenge to a factual determination" or (2) "a challenge to a law or regulation as applied to the facts of a particular case," unless the challenge presents a constitutional issue. 38 U.S.C. § 7292(d)(2).

"We may set aside any regulation or interpretation thereof if we find it: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (4) without observance of procedure required by law." *Sullivan*, 815 F.3d at 789 (citing 38 U.S.C. § 7292(d)(1)).

"When construing a regulation, it is appropriate first to examine the regulatory language itself to determine its

plain meaning." *Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017). Regulatory interpretation, like statutory interpretation, "is a holistic endeavor that requires consideration of a [regulatory] scheme in its entirety." *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000) (citing *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993)); *Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1327 (Fed. Cir. 2020) (applying same interpretive rules to regulations and statutes). "[W]e attempt to give full effect to all words contained within [a] statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible." *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999). "If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning." *Goodman*, 870 F.3d at 1386.

III

A

Hanser's contentions require us to examine 38 C.F.R. § 3.344(c), which identifies the circumstances under which the procedural requirements of §§ 3.344(a) and (b) apply. Therefore, we set out the pertinent portions of these paragraphs:

> (a) *Examination reports indicating improvement.* Rating agencies will handle cases affected by change of medical findings or diagnosis, so as to produce the greatest degree of stability of disability evaluations consistent with the laws and Department of Veterans Affairs regulations governing disability compensation and pension. . . . Examinations less full and complete than those on which payments were authorized or continued will not be used as a basis of reduction. . . . Rating boards encountering a change of diagnosis will exercise caution in the determination as to whether a

> change in diagnosis represents no more than a progression of an earlier diagnosis, an error in prior diagnosis or possibly a disease entity independent of the service-connected disability. . . .
>
> (b) *Doubtful cases.* If doubt remains, after according due consideration to all the evidence developed by the several items discussed in paragraph (a) of this section, the rating agency will continue the rating in effect . . . .
>
> (c) *Disabilities which are likely to improve.* The provisions of paragraphs (a) and (b) of this section apply to ratings which have continued for long periods at the same level (5 years or more). They do not apply to disabilities which have not become stabilized and are likely to improve. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating.

B

Resolution of this appeal turns on the first sentence of § 3.344(c): "The provisions of paragraphs (a) and (b) of this section apply to ratings which have continued for long periods at the same level (5 years or more)." The parties are in agreement that § 3.344(c) is unambiguous. They disagree, of course, as to the substance of that unambiguous meaning. Hanser contends that the provision's parenthetical reference to "5 years or more" is not a definition but is, instead, merely a guideline, so a disability rating may qualify as having been unchanged for a "long period" even if it has persisted for less than five years. *See* Appellant Br. at 16. The Secretary, by contrast, argues that the parenthetical is a definition, so for purposes of this regulation

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