104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–571

REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

MAY 10, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STUMP, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

[To accompany H.R. 1483]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1483) to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

INTRODUCTION

On April 7, 1995, the Ranking Member of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs, the Honorable Lane Evans, along with the Honorable Frank Mascara, the Honorable Bob Filner and the Honorable Luis V. Gutierrez, introduced H.R. 1483, to allow revision of veterans benefits decisions based on clear and unmistakable error.

The Subcommittee on Compensation, Pension, Insurance and Memorial Affairs met on April 17, 1996 and recommended H.R. 1483 to the full Committee. The full Committee met on May 8, 1996 and ordered H.R. 1483 reported favorably to the House by unanimous voice vote.

SUMMARY OF THE REPORTED BILL

H.R. 1483 would:

1) Codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

2) Make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

BACKGROUND AND DISCUSSION

The VA claim system is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits. When the veteran first files a claim, VA undertakes the obligation of assisting the veteran in the development of all evidence pertinent to that claim.

There is no true finality of a decision since the veteran can reopen a claim at any time merely by the presentation of new and material evidence.

Any decision may be appealed within one year and the grounds for appeal are unlimited. The appeal is initiated by a simple notice of disagreement after which VA is obligated to furnish a detailed statement of the facts and law pertinent to the claim.

The bill would make decisions by VA Regional Offices and the Board of Veterans Appeals (Board) subject to review on the grounds of clear and unmistakable error. Regional office decisions are currently reversible on this basis by regulation, but Board decisions are not. *Smith* v. *Brown*, 35 F. 3d. 1516, 1523 (Fed. Cir. 1994). The bill would effectively codify this regulation, and extend the principle underlying it to Board decisions.

The Board is an appellate body located in Washington, DC, responsible for reviewing claims on a de novo basis. Under current law, a veteran may file a motion for reconsideration at the Board at any time after the decision has been made. If the Chairman of the Board grants a motion for reconsideration, the matter is referred to an enlarged panel for a final decision. Reconsideration of the claim is conducted under the law as it existed at the time of the initial decision, and if an allowance is ordered, the veteran receives the benefit retroactive to the date of the initial decision.

During fiscal years 1991 through 1995, more than 3,600 motions for reconsideration were filed, and more than 800 (22 percent) were granted, resulting in reconsideration and a new decision by a panel of at least three Board members. Of the cases reconsidered, 77 percent resulted in allowances or remands. As of March 31, 1996, there were 59,829 appeals pending at the Board and the average Board response time was 752 days. The Committee will closely monitor the effect of this legislation on the backlog at VA.

"Since at least 1928, the VA and its predecessors have provided for the revision of decisions which were the product of 'clear and unmistakable error'". (citations omitted) The appropriateness of such a provision is manifest." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc). Congress has provided the Board (but not the regional office or agency of original jurisdiction) authority to correct obvious errors. 38 U.S.C. § 7103(c). In arguments before the Court of Veterans Appeals and testimony before this Committee, the VA has stated that there is no substantive difference between the Board's authority to correct "obvious error" and the agency of original jurisdiction's authority to correct clear and unmistakable error.

"The only real difference is that clear and unmistakable error review can be invoked as of right, whereas review for obvious error is committed to the sound discretion of the Board." *Smith*, *supra*, 1526. With regard to what constitutes clear and unmistakable error, the Court of Veterans Appeals has noted:

> It must always be remembered that clear and unmistakable error is a very specific and rare kind of "error". It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable. *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc).

Fugo v. *Brown*, 6 Vet. App. 40, 43–44 (1993). As the Court further stated in *Fugo*, clear and unmistakable error is a form of collateral attack on an otherwise final decision, and there is a very strong presumption of validity that attaches to such decisions.

As noted above, this legislation would allow a claimant to raise a claim of clear and unmistakable error with regard to a Board decision. However, it does not follow that by merely averring that such error has occurred, a veteran can collaterally attack an otherwise final decision. At least in cases brought before the Court of Veterans Appeals,

> while the magic incantation "clear and unmistakable error" need not be recited *in haec verba*, to recite it does not suffice, in and of itself, to reasonably raise the issue . . . [S]imply to claim clear and unmistakable error on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error . . . Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error".

Id. Given the Court's clear guidance on this issue, it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome.

Finally, the Committee notes that an appellate system which does not allow a claimant to argue that a clear and unmistakable error has occurred in a prior decision would be unique. That is certainly the intent of the original VA regulation allowing correction of such decisions, no matter when the error occurred or which part of the VA made the error. Given the pro-claimant bias intended by Congress throughout the VA system, the Committee concludes that this legislation is necessary and desirable to ensure a just result in cases where such error has occurred.

VIEWS OF THE ADMINISTRATION

STATEMENT OF CHARLES L. CRAGIN, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS ON OCTOBER 12, 1995, PERTAINING TO H.R. 1483

We oppose enactment of H.R. 1483 for the following reasons.

Section 1(a) of H.R. 1483 would subject decisions of an agency of original jurisdiction to revision on the grounds of clear and unmistakable error. The evidentiary establishment of such error would require reversal or revision of the decision. Reversal or revision of a prior decision on these grounds would have the same effect as if the reversal or revision had been made on the date of the prior erroneous decision. Section 1(a) would permit the Secretary to institute review of a decision for clear and unmistakable error on his or her own motion or upon request of a claimant. A request for such review could be made at any time after the original decision is made and would be decided the same as any other claim.

Section 1(a) would provide by statute what VA already provides in its regulations and claims-adjudication process. Currently, an allegation of error in an otherwise final decision of an agency of original jurisdiction requires a review of that decision for correctness. Under the provisions of 38 C.F.R. § 3.105(a), a finding of clear and unmistakable error requires reversal or amendment of the erroneous decision. The later, correct decision is effective as if it had been made on the date of the previous, incorrect decision. The time during which clear and unmistakable error may be alleged is not restricted. Such allegations are treated as other claims are, even to the extent that the United States Court of Veterans Appeals has held:

> Once there is a final decision on the issue of "clear and unmistakable error" because the [agency of original jurisdiction] decision was not timely appealed, or because a [Board of Veterans' Appeals] decision not to revise or amend was not appealed to th[e] Court, or because th[e] Court has rendered a decision on the issue in that particular case, that particular claim of "clear and unmistakable error" may not be raised again.

Russell v. *Principi*, 3 Vet. App. 310, 315 (1992). Although we have no particular objections to the provisions of section 1(a) of H.R. 1483, we believe that existing law and regulations already afford the same protections so that additional legislation is unnecessary.

Section 1(b) of H.R. 1483 would subject Board decisions to revision on the grounds of clear and unmistakable error. It would authorize claimants to request a review to determine the existence of clear and unmistakable error in a Board decision at any time after the decision is made. Under section 1(c), those provisions would apply to all Board decisions, and any Board decision on a claim of clear and unmistakable error that was filed after or was pending before VA, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on the date of enactment of H.R. 1483 would be subject to review by the Court of Veterans Appeals.

In the interests of the finality of administrative appellate decisions, VA opposes the provisions of section 1(b) and (c). The Board already has the authority, under current 38 U.S.C. § 7103(c), to correct an obvious error in the record, and the Chairman has the authority, under 38 U.S.C. § 7103(a), to order reconsideration of a prior Board decision. Under the provisions of 38 C.F.R. § 20.1000, the Chairman may order reconsideration on the Board's own motion or on an appellant's motion upon an allegation of obvious error of fact or law.

Section 1(c) would in effect rescind the limitation, in section 402 of the Veterans' Judicial Review Act, on which Board decisions are subject to review by the Court of Veterans Appeals. Under that limitation, the Court may review only those decisions in which a notice of disagreement was filed on or after November 18, 1988. Subjecting to Court review any Board decision on a claim of clear and unmistakable error in a prior Board decision would also subject the prior Board decision to Court review. Obviously, the Court could not determine whether a prior Board decision involved clear and unmistakable error without examining that prior decision. Thus, the Court could review any Board decision, regardless of when the notice of disagreement was filed, that was reviewed on a claim of clear and unmistakable error. Such wide-ranging review would seem very much at odds with the carefully circumscribed review afforded under the original Veterans' Judicial Review Act.

Enactment of section 1(b) and (c) now, when the Board is struggling to achieve acceptable response times in working its already heavy caseload, could require the Board to review, literally on demand, hundreds of thousands of its past decisions, including those entered decades ago. From FY 1977 to FY 1994, the Board issued 518,157 final decisions. If claimants challenged only five percent of those otherwise final decisions alleging clear and unmistakable error, the Board's caseload would increase by 25,908 cases. This additional caseload would exceed the Board's entire FY-1994 output of 22,045 decisions and approach the Board's projected FY-1995 output of 28,000 decisions. The Board's average response time for FY 1994 was 781 days and is projected to be 745 days in FY 1995. Assuming that no additional resources would be available to handle the nearly 26,000 additional cases that could result from enactment of section 1(b) and (c), the average response time would increase to 1,083 days. Enactment now would come at the worst possible time, and its adverse impact on decisional timeliness could more than offset any gains that may flow from enactment of Public Law 103–271, which authorized single-member Board decisions.

Because some provisions of H.R. 1483 are redundant, and others could aggravate the Board's backlog of appeals, we oppose enactment of the bill.

SECTION-BY-SECTION ANALYSIS

Section 1(a) would amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

Section 1(b) would amend chapter 71 of title 38, United States Code, to make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

Section 1(c) would make the provisions of this bill applicable to any determination made before, on, or after the date of the enactment of this Act.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The following letter was received from the Congressional Budget Office concerning the cost of the reported bill:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 8, 1996.

Hon. BOB STUMP,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office (CBO) has reviewed H.R. 1483, a bill to allow revision of veterans benefits decisions based on grounds of clear and unmistakable error, as ordered reported by the House Committee on Veterans' Affairs on May 8, 1996.

The Department of Veterans Affairs (VA) carries a large backlog of claims for benefits, including new applications and appeals based on prior decisions. According to VA, this bill would help streamline its claims adjudication process. This streamlining could result in a more efficient and economical administration of claims and, therefore, a savings in general operating expenses. On the other hand, benefits could be awarded to some veterans sooner than would currently be the case, resulting in higher costs. CBO cannot estimate either budgetary effect.

H.R. 1483 would affect direct spending and thus would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. H.R. 1483 contains no intergovernmental or private sector mandates as defined in Public Law 104–4 and would impose no direct costs on state, local or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Helen Petrus. who can be reached at 226–2840.

Sincerely,

JUNE E. O'NEILL,
Director.

INFLATIONARY IMPACT STATEMENT

The enactment of the reported bill would have no inflationary impact.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

* * * * * * *

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

* * * * * * *

CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—CLAIMS

Sec.
5101. Claims and forms.
5102. Application forms furnished upon request.

* * * * * * *

5109A. Revision of decisions on grounds of clear and unmistakable error.

* * * * * * *

SUBCHAPTER I—CLAIMS

* * * * * * *

§ 5109A. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

* * * * * * *

PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71—BOARD OF VETERANS' APPEALS

Sec.
7101. Composition of Board of Veterans' Appeals.
7101A. Members of Board: appointment; pay; performance review.

* * * * * * *

7111. Revision of decisions on grounds of clear and unmistakable error.

* * * * * * *

§ 7111. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

* * * * * * *

APPLICABILITY TO LEGISLATIVE BRANCH

The reported bill would not be applicable to the legislative branch under the Congressional Accountability Act, Public Law 104–1, because the bill would only affect certain Department of Veterans Affairs benefits recipients.

STATEMENT OF FEDERAL MANDATES

The reported bill would not establish a federal mandate under the Unfunded Mandates Reform Act, Public Law 104–4.

○