Memorandum

Date: APR − 4 2012

From: General Counsel (022)

Subj: Non-Enforcement of Regulatory Amendments Made by *Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification*, 76 Fed. Reg. 52,572 (Aug. 23, 2011)

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

1. On August 23, 2011, VA issued a final rule, *Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification*, 76 Fed. Reg. 52,572 (Aug. 23, 2011) ("hearing clarification rule"), amending its hearing regulations to clarify that the hearing provisions in 38 C.F.R. § 3.103 apply to hearings before an agency of original jurisdiction but do not apply to hearings before the Board of Veterans' Appeals ("Board"). On September 9, 2011, the National Organization of Veterans' Advocates ("NOVA") petitioned the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") for direct review under 38 U.S.C. § 502 of the procedural and substantive validity of the hearing clarification rule. In pertinent part, NOVA asserts that the hearing clarification rule is procedurally invalid because it was not issued pursuant to the notice and comment procedure prescribed by 5 U.S.C. § 553 of the Administrative Procedure Act (APA).

2. In briefing the matter, the Commercial Litigation Branch of the Department of Justice ("DOJ") informed my office that DOJ will not defend the procedural validity of the rule. DOJ believes that NOVA convincingly argues that the notice-and-comment issue of the case is governed by the Federal Circuit's decision in *Military Order of the Purple Heart v. Secretary of Veterans Affairs*, 580 F.3d 1293, 1297 (Fed. Cir. 2009), and more significantly, that advice emphatically provided to the Commercial Litigation Branch by the Solicitor General forecloses VA's proposed argument to the contrary in this case. DOJ is unwilling to defend VA's position that the hearing clarification rule is a procedural or interpretive rule that is exempt from APA notice-and-comment requirements. DOJ asked VA to repeal the hearing clarification rule, thereby mooting NOVA's petition for review. We have agreed to do so.

3. Because the Federal Circuit briefing schedule did not allow sufficient time to issue a rule repealing the hearing clarification rule before VA's brief was due, DOJ moved the Federal Circuit for an enlargement of time to give VA an opportunity to repeal the hearing clarification rule and reinstate the previous rule language. In exchange for NOVA's agreement not to oppose the Government's motion, VA agreed not to apply the hearing clarification rule and to abide by the interpretation of 38 C.F.R. § 3.103 in effect before issuance of that rule.

2.

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4. In accordance with that agreement by VA, prior to the repeal of the hearing clarification rule, Veterans Law Judges should not apply the provisions of the hearing clarification rule to appeals before the Board. Veterans Law Judges should apply the interpretation of VA's hearing regulations announced by the Court of Appeals for Veterans Claims in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010). That interpretation is that a Veterans Law Judge conducting a hearing has "a duty to fully explain the issues still outstanding that are relevant and material to substantiating the claim" and "must suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id.* at 496. I have advised Professional Staff Group VII not to apply the hearing clarification rule and in relevant cases to take positions that are consistent with the interpretation of section 3.103 in effect before issuance of the hearing clarification rule.

5. Jonathan Taylor is the attorney assigned to this matter and may be reached at 461-7662 with any questions.

Will A. Gunn