South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Military & Veterans' Law Section

"Military and Veteran's Law Update

Thursday, January 18

SC Supreme Court Commission on CLE Course No. 240029

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South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Military & Veterans' Law Section

Thursday, January 18

NDAA Impacts on Veterans and Active Duty

William A. Hudson, Jr.

TULLY RINCKEY PLLC
ATTORNEYS & COUNSELORS AT LAW

The National Defense Authorization Act (NDAA) for Fiscal Year 2024
Relevant Legal Issues

William A. Hudson, Jr.
Partner, Tully Rinckey PLLC
Attorneys & Counselors at Law

Material to be Covered

1. The FY24 NDAA provides assistance to the 8,000 servicemembers discharged for failing to take the COVID-19 vaccine and gives them a path back to service. (Sections 525-527).
2. Prohibition on certain communications regarding courts-martial. (Section 531).
3. Treatment of Records of Criminal Investigations (Section 533).
4. Responsibilities of the Individual Disability Evaluation System (IDES) (Section 722)

COVID-19 Vaccine

FY2023 NDAA ended requirement.

The FY2024 NDAA provides assistance to the 8,000 servicemembers discharged for failing to take the COVID-19 vaccine and gives them a path back to service. (Section 525-527).

Current Servicemembers:

- Continues the prohibition on adverse action on any servicemember that refuses to take the COVID-19 vaccine.

Path Back to Service

- Requires the Secretary of Defense to inform each discharged servicemember of the process they can follow to be reinstated.
- Requires the Service Secretaries to consider reinstating separated servicemembers at the same rank.
- Treats the time away from service for any servicemember reinstated as a “career intermission” so it does not impact future promotions.

COVID-19 Vaccine

Protecting Servicemember Benefits:

Prohibits the DoD from requiring cadets and midshipmen from being forced to repay tuition if they were discharged as a result of failing to take the COVID-19 vaccine.

Requires the DoD to prioritize requests to correct the personnel files of those discharged to enable them to receive full benefits in retirement.

Directs a review of military discharge review boards' implementation of "liberal consideration" when reviewing discharge applications that are based on PTSD and related conditions.

Military Justice

Prohibition on certain communications regarding courts-martial. (Section 531).

Section 837 of title 10, United States Code (article 37 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection: ‘‘

(e)(1) No court-martial convening authority, nor any other commanding officer, may provide a briefing concerning a pending court-martial, or allegations that may lead to a court-martial, to any subordinate who may be selected to serve as a member of such court-martial. ‘‘

(2) The prohibition in paragraph (1) shall not apply to a briefing provided in the course of a court-martial proceeding to a member of the armed forces who is participating in such proceeding.’’

Treatment of Records of Criminal Investigations (Section 533)

The Secretary of Defense shall develop and implement uniform guidance providing for the modification of titling and indexing systems to ensure that a record identifying a member or former member of the Armed Forces as the subject of a criminal investigation is removed from such system if that member or former member is cleared of wrongdoing as described in subsection (d).

b) REVIEW AND DOCUMENTATION.—Not later than 60 days after the date of the enactment of this Act, each Secretary concerned, pursuant to the guidance issued by the Secretary of Defense under subsection (a) and in consultation with the appropriate Judge Advocate General, shall— (1) review the titling and indexing systems of the defense criminal investigative organizations under the jurisdiction of such Secretary to identify each record in such system that pertains to a member or former member of the Armed Forces who has been cleared of wrongdoing as described in subsection (d).

Treatment of Records of Criminal Investigations (Section 533)

(2) notify the defense criminal investigative organization involved of each record identified under paragraph (1); and (3) direct the head of the organization to re2 move the record in accordance with subsection (c).

(c) DEADLINE FOR REMOVAL.—The head of a defense criminal investigative organization that receives a notice under subsection (b)(2) with respect to a record in a titling or indexing system shall ensure that the record is removed from such system by not later than 30 days after the date on which the notice is received.

Treatment of Records of Criminal Investigations (Section 533)

(d) DISPOSITION OF INVESTIGATIONS.—A member or former member of the Armed Forces who is the subject of a criminal investigation shall be considered to have been cleared of wrongdoing for purposes of subsection (a)

if— (1) the member or former member is found not guilty at military or civilian trial for the alleged offense;

(2) an investigation conducted by defense criminal investigative organization or another Federal or civilian law enforcement agency determines that— (A) the member or former member is not responsible for the alleged offense; or (B) was mistakenly identified as a subject;

(3) the alleged offence was addressed through non-judicial punishment imposed under section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice) and the involuntary separation of the member was not required or recommended as part of such punishment;

(4) the investigation into the alleged offense has been open for 10 years or more and charges have not been filed; (5) the member or former member is pardoned;

Treatment of Records of Criminal Investigations (Section 533)

(6) the reasons specified for the charges are unsupported by the evidence of the offense a for which the member or former member was under investigation as determined by— (A) a court-martial or other proceeding brought under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice). (B) an administrative proceeding within the Department of Defense or the Armed Force concerned. (C) a civilian court;

or (7) the Government makes a final determination not to prosecute the member or former member for the criminal offense for which the member or former member was under investigation.

Treatment of Records of Criminal Investigations (Section 533)

(e) PROHIBITION ON INVOLUNTARY SEPARATION.— No member of an Armed Force may be involuntarily separated solely for—(1) an offense for which the member is cleared of wrongdoing as described in subsection (d); or (2) an offense for which the punishment of separation was not specifically recommended— (A) by a court-martial under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice); or (B) by a commander pursuant to the commander's authority to impose non-judicial punishment under section 815 of such chapter (article 15 of the Uniform Code of Military Justice).

(f) EFFECT ON OTHER LAW.—The requirements of this section are in addition to any requirements imposed under section 549 of the National Defense Authorization Act for Fiscal Year 2023 (Public Law 117–263). This section shall supersede any provision of section 549 of the National Defense Authorization Act for Fiscal Year 2023 (Public Law 117–263) that is inconsistent with this section, but only to the extent of the inconsistency.

Responsibilities of the IDES (Section 722)

Commanders may pause the referral system at any point for the member if any policy, procedure, regulation, or other guidance has not been followed in the member's case.

(4) Pursuant to regulations prescribed by the Secretary of Defense, a member referred to the integrated disability evaluation system may file an appeal of such referral with the Secretary of the military department concerned. Such an appeal— ''(A) shall be in addition to any appeals process established as part of the integrated disability evaluation system; ''(B) shall include a hearing before an officer who may convene a general court-martial and who is in the chain of command of the member; and ''(C) shall be adjudicated not later than 90 days after such filing.''

Questions?

South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Military & Veterans' Law Section

Thursday, January 18

Military Divorce & Child Custody Case

Lt. Col. Timothy W. Murphy

Family Law and Military Issues

Timothy W. Murphy

Military and Veterans Law Section

Overview

- Procedural and Jurisdictional Issues
  - SCRA
- Military Pay and Benefits
  - Types of Compensation
  - Health Benefits
- Retirement Pay
  - USFSPA
  - Frozen Benefits Rule
- Child Custody and Support
  - UCCJEA and PKPA

Overview

- Service member (SM)
- Uniformed member on Active Duty, Reserve or National Guard status
  - Federal Benefits based on Active-Duty status
- DEPENDENT
  - Spouse, child, step-child and in some cases relative or parent of active-duty member entitled to benefits
    - Enrolled in DEERS system and has an ID card

Overview

- DFAS, LES, BAH, BAS, VHA, SGLI
- DEERS
- TRICARE, CHCBP
- TSP
- DIEMS, REDUX, COLA, SBP
- SCRA, USFSPA, UCCJEA, PKPA

Procedural and Jurisdictional Issues

Domicile and Residency

Service of Process

SCRA

Domicile and Residency

- Where member entered service "home state"
- Where member plans to permanently reside after service ends
- Reflected in LES
- Vote, DL, taxes
- Member not a resident of state where stationed for tax or voting purposes
- SC Code 20-3-30 establishes for divorce
- Dependents can be residents but NOT domiciled in state

Service of Process

- Service member (SM) can be served within state like any other resident;
- SM in other state can be served in accord with SC Rules of Civil Procedure 4(h);
- SM overseas MIGHT require service under Hague Conventions

Hypothetical

- SM Client (from PA) married SM (from CA) when both stationed in Texas. Couple separates when client gets orders to Shaw AFB and spouse to Dover AFB, DE. After one year in SC, SM client wishes to file for divorce in South Carolina. Spouse has never been to SC. Does SC have jurisdiction?

Hypothetical (cont'd)

- What if couple BOTH were stationed in SC for one year before SM spouse transferred to Dover?
- What if BOTH entered service from SC, met/married in Texas and neither stationed in SC?

SCRA

- Entitles SM to STAY in PROCEEDINGS
- SM is entitled to STAY if...
  - Proceedings would "Materially Effect" service
  - Member provides a specific date of availability
- Commander verifies in communication that leave not authorized
- Court MUST give 90 day stay after application

SCRA

- Default Judgments may not be entered against SM in his/her absence unless SCRA followed;
- Prior to entering default judgment, duty of court to assess status of absent party, and if a SM, take no action until attorney appointed

Hypothetical

- SM deployed to Afghanistan has been advised his ex-wife is seeking increased child support in an emergency hearing scheduled in three days.

- What are his options?

Military Compensation

Types of Compensation

Health Benefits

Military Pay

- Leave and Earnings Statement (LES)
- Basic Pay (years in service/rank)
    - Basic Allowance for Housing (BAH)
    - Basic Allowance for Subsistence (BAS)
    - Variable Housing Allowance (VHA)
    - Special Allowances (Flight, Professional)
- BAH, VHA, BAS are tax-free
- BAH and VHA not provided if in quarters

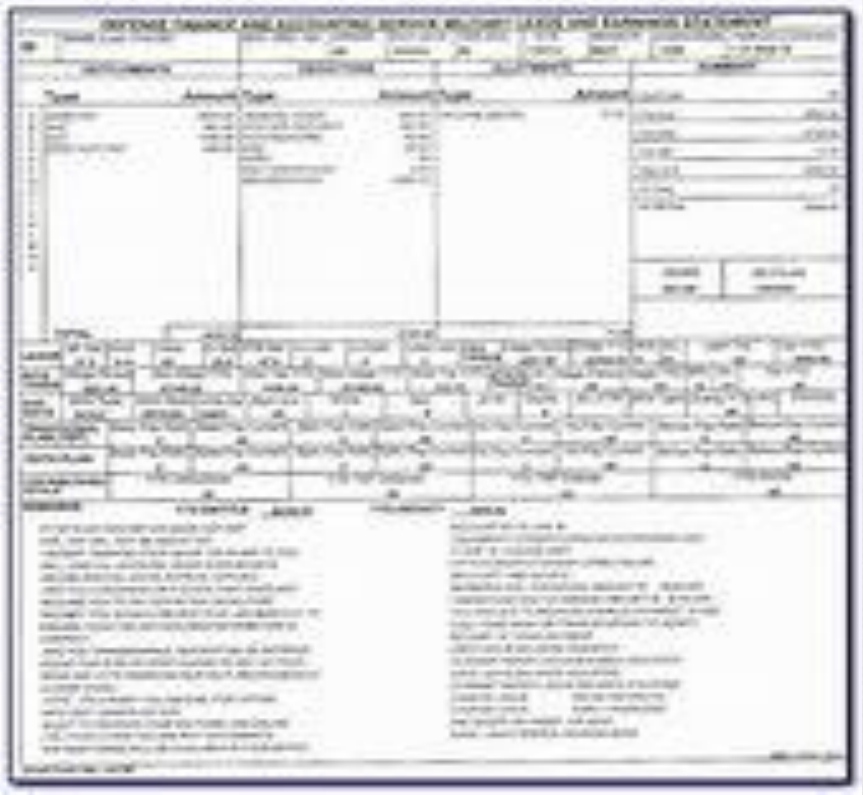
BASIC PAY—EFFECTIVE JANUARY 1, 2011

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
O-10[1]											
O-9[1]											
O-8[1]	9,530.70	9,842.70	10,050.00	10,107.90	10,366.50	10,798.20	10,899.00	11,308.80	11,426.40	11,779.80	12,291.00
O-7[1]	7,919.10	8,287.20	8,457.30	8,592.60	8,837.70	9,079.80	9,359.70	9,638.70	9,918.60	10,798.20	11,540.70
O-6[1]	5,869.50	6,448.50	6,871.50	6,871.50	6,897.60	7,193.40	7,232.40	7,232.40	7,643.40	8,370.30	8,796.90
O-5	4,893.00	5,512.20	5,893.80	5,965.80	6,203.70	6,346.20	6,659.40	6,889.20	7,186.20	7,640.70	7,856.70
O-4	4,221.90	4,887.30	5,213.40	5,286.00	5,588.70	5,913.30	6,317.40	6,632.10	6,851.10	6,976.50	7,049.10
O-3	3,711.90	4,208.10	4,542.00	4,951.80	5,188.80	5,449.20	5,617.80	5,894.70	6,039.00	6,039.00	6,039.00
O-2	3,207.30	3,652.80	4,207.20	4,349.10	4,438.50	4,438.50	4,438.50	4,438.50	4,438.50	4,438.50	4,438.50
O-1	2,784.00	2,897.40	3,502.50	3,502.50	3,502.50	3,502.50	3,502.50	3,502.50	3,502.50	3,502.50	3,502.50
O-3[2]				4,951.80	5,188.80	5,449.20	5,617.80	5,894.70	6,128.10	6,262.20	6,444.90
O-2[2]				4,349.10	4,438.50	4,580.10	4,818.60	5,002.80	5,140.20	5,140.20	5,140.20
O-1[2]				3,502.50	3,740.40	3,878.70	4,020.30	4,158.90	4,349.10	4,349.10	4,349.10
W-5											
W-4	3,836.10	4,126.50	4,245.00	4,361.40	4,562.10	4,760.70	4,961.40	5,264.40	5,529.60	5,781.90	5,988.30
W-3	3,502.80	3,648.90	3,798.60	3,847.80	4,004.70	4,313.70	4,635.00	4,786.20	4,961.10	5,142.00	5,466.00
W-2	3,099.90	3,393.00	3,483.30	3,545.40	3,746.40	4,059.00	4,213.50	4,366.20	4,552.50	4,698.00	4,830.00
W-1	2,721.00	3,013.50	3,092.40	3,258.90	3,456.00	3,745.80	3,881.40	4,070.40	4,256.70	4,403.10	4,538.10
E-9[3]							4,634.70	4,739.70	4,872.00	5,027.70	5,184.60
E-8						3,794.10	3,961.80	4,065.60	4,190.40	4,325.10	4,568.40
E-7	2,637.30	2,878.50	2,988.90	3,135.00	3,249.00	3,444.60	3,554.70	3,750.90	3,913.50	4,024.50	4,143.00
E-6	2,281.20	2,510.10	2,620.80	2,728.50	2,840.70	3,093.60	3,192.30	3,382.80	3,441.00	3,483.60	3,533.40
E-5	2,090.10	2,230.20	2,337.90	2,448.30	2,620.20	2,800.50	2,947.50	2,965.50	2,965.50	2,965.50	2,965.50
E-4	1,916.10	2,014.20	2,123.40	2,230.80	2,325.90	2,325.90	2,325.90	2,325.90	2,325.90	2,325.90	2,325.90
E-3	1,729.80	1,838.70	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00
E-2	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90	1,644.90
E-1[4]	1,467.60										

Notes:

1. Basic pay for an O-7 to O-10 is limited by Level II of the Executive Schedule which is $14,975.10. Basic pay for O-6 and below is limited by Level V of the Executive Schedule which is $12,141.60.
2. While serving as Chairman, Joint Chief of Staff/Vice Chairman, Joint Chief of Staff, Chief of Navy Operations, Commandant of the Marine Corps, Army/Air Force Chief of Staff, Commander of a unified or specified combatant command, basic pay is $20,263.50. *(See note 1 above).*
3. Applicable to O-1 to O-3 with at least 4 years and 1 day of active duty or more than 1460 points as a warrant and/or enlisted member. See Department of Defense Financial Management Regulations for more detailed explanation on who is eligible for this special basic pay rate.
4. For the Master Chief Petty Officer of the Navy, Chief Master Sergeant of the AF, Sergeant Major of the Army or Marine Corps or Senior Enlisted Advisor of the JCS, basic pay is $7,489.80. Combat Zone Tax Exclusion for O-1 and above is based on this basic pay rate plus Hostile Fire Pay/Imminent Danger Pay which is $225.00.
5. Applicable to E-1 with 4 months or more of active duty. Basic pay for an E-1 with less than 4 months of active duty is $1,357.20.
6. Basic pay rate for Academy Cadets/Midshipmen and ROTC members/applicants is $974.40.

Military LES



Other Compensation

- Thrift Savings Plan (TSP)
  - Similar to Traditional IRA with tax benefit
- GI Bill (Post 9/11)
- Service member's Group Life Insurance (SGLI)

Health Benefits

- TRICARE
- Dental
- Continued Health Care Benefit Program (CHCBP)

Retirement Pay

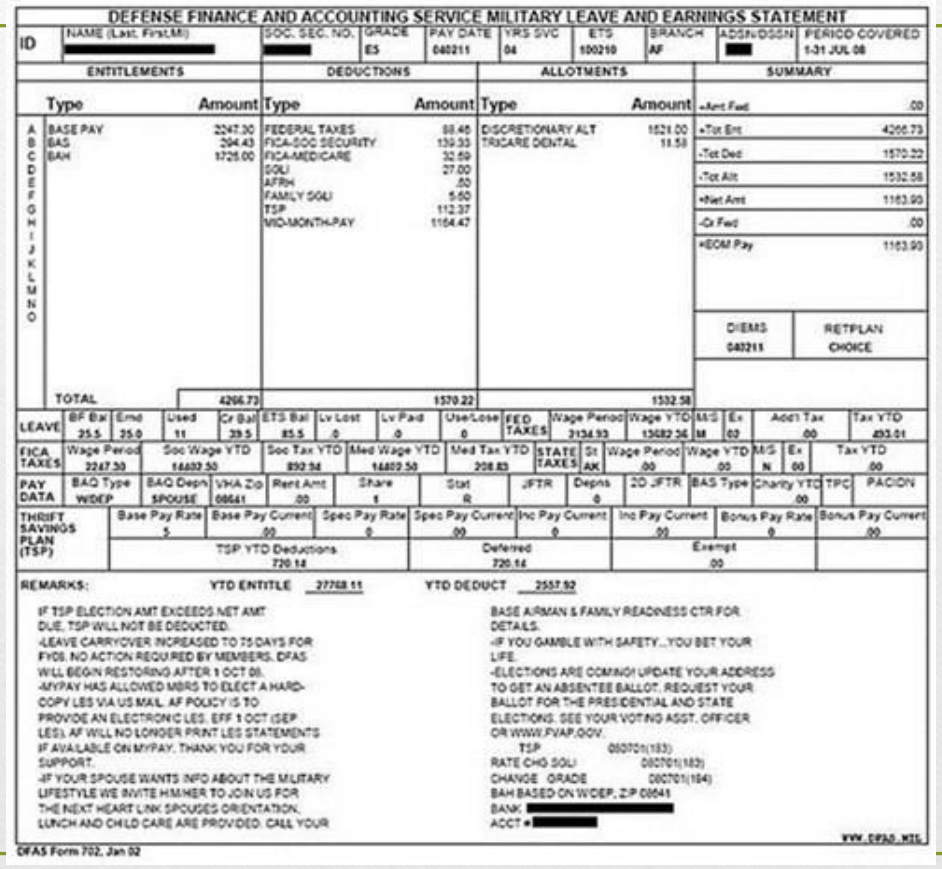
Pension, SBP

USFSPA

Military Pension

- Vests at twenty years of active service
  - Present plan has two options
    - Traditional
    - Pension plus TSP
- Survivor Benefit Plan (SBP)
- Military Pension is governed by Federal Law
- Administered by DFAS

Military Pension Statement



DEFENSE FINANCE AND ACCOUNTING SERVICE MILITARY LEAVE AND EARNINGS STATEMENT

ID	NAME (Last, First,MI)	SOC. SEC. NO.	GRADE	PAY DATE	YRS SVC	ETS	BRANCH	ADSN/DSSN	PERIOD COVERED
	[redacted]	[redacted]	E5	040211	04	100210	AF	[redacted]	1-31 JUL 08

	ENTITLEMENTS Type	ENTITLEMENTS Amount	DEDUCTIONS Type	DEDUCTIONS Amount	ALLOTMENTS Type	ALLOTMENTS Amount
A	BASE PAY	2247.30	FEDERAL TAXES	88.46	DISCRETIONARY ALT	1521.00
B	BAS	294.43	FICA-SOC SECURITY	139.33	TRICARE DENTAL	11.58
C	BAH	1725.00	FICA-MEDICARE	32.59		
D			SGLI	27.00		
E			AFRH	.50		
F			FAMILY SGLI	5.60		
G			TSP	112.37		
H			MID-MONTH PAY	1164.47		
I						
J						
K						
L						
M						
N						
O						
	TOTAL	4266.73		1570.22		1532.58

SUMMARY	
+Amt Fwd	.00
+Tot Ent	4266.73
-Tot Ded	1570.22
-Tot Alt	1532.58
+Net Amt	1163.93
-Cr Fwd	.00
=EOM Pay	1163.93

DIEMS	RETPLAN
040211	CHOICE

LEAVE	BF Bal	Ernd	Used	Cr Bal	ETS Bal	Lv Lost	Lv Paid	Use/Lose	FED TAXES	Wage Period	Wage YTD	M/S	Ex	Add'l Tax	Tax YTD
	25.5	25.0	11	39.5	85.5	.0	.0	0		3134.93	13682.36	M	02	.00	493.01

FICA TAXES	Wage Period	Soc Wage YTD	Soc Tax YTD	Med Wage YTD	Med Tax YTD	STATE TAXES	St	Wage Period	Wage YTD	M/S	Ex	Tax YTD
	2247.30	16602.50	892.54	16602.50	208.83		AK	.00	.00	N	00	.00

PAY DATA	BAQ Type	BAQ Depn	VHA Zip	Rent Amt	Share	Stat	JFTR	Depns	2D JFTR	BAS Type	Charity YTD	TPC	PACION
	WDEP	SPOUSE	00641	.00	1	R		0			.00		

THRIFT SAVINGS PLAN (TSP)	Base Pay Rate	Base Pay Current	Spec Pay Rate	Spec Pay Current	Inc Pay Current	Inc Pay Current	Bonus Pay Rate	Bonus Pay Current
	5	.00	0	.00	0	.00	0	.00
	TSP YTD Deductions 720.14		Deferred 720.14		Exempt .00			

REMARKS: YTD ENTITLE 27768.11 YTD DEDUCT 2557.92

IF TSP ELECTION AMT EXCEEDS NET AMT DUE, TSP WILL NOT BE DEDUCTED.
-LEAVE CARRYOVER INCREASED TO 75 DAYS FOR FY08. NO ACTION REQUIRED BY MEMBERS. DFAS WILL BEGIN RESTORING AFTER 1 OCT 08.
-MYPAY HAS ALLOWED MBRS TO ELECT A HARD-COPY LES VIA US MAIL. AF POLICY IS TO PROVIDE AN ELECTRONIC LES. EFF 1 OCT (SEP LES), AF WILL NO LONGER PRINT LES STATEMENTS IF AVAILABLE ON MYPAY. THANK YOU FOR YOUR SUPPORT.
-IF YOUR SPOUSE WANTS INFO ABOUT THE MILITARY LIFESTYLE WE INVITE HIMHER TO JOIN US FOR THE NEXT HEART LINK SPOUSES ORIENTATION. LUNCH AND CHILD CARE ARE PROVIDED. CALL YOUR BASE AIRMAN & FAMILY READINESS CTR FOR DETAILS.
-IF YOU GAMBLE WITH SAFETY...YOU BET YOUR LIFE.
-ELECTIONS ARE COMING! UPDATE YOUR ADDRESS TO GET AN ABSENTEE BALLOT. REQUEST YOUR BALLOT FOR THE PRESIDENTIAL AND STATE ELECTIONS. SEE YOUR VOTING ASST. OFFICER OR WWW.FVAP.GOV.
TSP 060701(183)
RATE CHG SGLI 060701(183)
CHANGE GRADE 060701(164)
BAH BASED ON WDEP, ZIP 00641
BANK [redacted]
ACCT # [redacted]

WWW.DFAS.MIL

DFAS Form 702, Jan 02

USFSPA

- States MAY make military pension divisible as marital property
- No specific formula!
  - "Marital Fraction" (DFAS regulations)
    - Present Value Off-set
- Does NOT apply to VA Disability Payments or Pension, Special Duty Pay (Flight Pay, etc…)

Marital Fraction

- FIFTY PERCENT OF Overlap of marriage and pension service DIVIDED BY total number of years of pension service by SM
- This is the MAXIMUM amount DFAS will automatically deduct from a retiree's payment
- DIEMS vs. PAY DATE
- "High-3 pay" is the calculation

Marital Fraction Issues

- **Increased rank after divorce – FROZEN BENEFITS RULE**
- Veteran Disability Payments
- Cannot force a SM to retire
- Calculating present value
- Fraction based upon Basic Pay, or Basic Pay "plus"

Frozen Benefit Rule

- Congress took effect **23 December 2016**
- Applies to Divorce Date **AFTER** 23 December 2016
- Hypothetical Division – Disposable Pay **Fixed** at Rank and Years of Service on Date of Divorce
- Hypothetical is if SM had retired at 20 years on date of divorce at rank of divorce

Frozen Benefit Rule Data Points

- SM retired base pay – actual dollar figure
- SM years of creditable service
- "Highest Three-Years"

Hypothetical

- SM and spouse are married. Couple divorce after 12 years. SM is an E-4.
- At 20 years, SM is an E-7.
- At 30 years and retirement, SM is an E-9.

- What is the "marital fraction"?

Reserve and National Guard

- Points toward CREDIBLE SERVICE
- Years of CREDIBLE SERVICE is the Overlap
- Request Total Retirement Points

Child Custody and Support

Custody and Visitation Issues

Calculating Child Support

Child Custody Issues

- Two SM parents vs. SM-Civilian parents
- Military Environment
- Deployment and change of station issues
- Visitation across state lines

UCCJEA

- **HOME STATE** retains **EXCLUSIVE JURISDICTION** unless…
- (a) **that** court determines that the child, the child's parents, or another acting as a parent no longer has a *substantial connection* to the state **and** that substantial evidence is no longer available, **or**

UCCJEA

(b) **that** court **<u>or</u> the court of another state** determines that the child, the child's parents or another acting as a parent no longer resides in the state that made the initial custody order.

PKPA

- Courts must enforce child custody and visitation orders of the **home state** of the child.
- Modification can only occur when the court either possesses jurisdiction (in conformity with the UCCJEA) or the home state jurisdiction declines to assert jurisdiction.
- A court may not exercise its own jurisdiction during the pendency of proceedings being conducted in another state that is exercising jurisdiction consistent with the Act

Hypothetical

- SM and spouse divorce in Idaho. Child support is based on SM rank of E-2. SM transfers to CA. Spouse remarries and moves with child to SC. After 6 years, SM rank increases to E-6. Spouse brings action in SC to increase child support.
- SM then files for custody in CA.

THANK YOU!

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South Carolina Bar
Continuing Legal Education Division

2024 SC BAR CONVENTION

Military & Veterans' Law Section

Thursday, January 18

VA Update

Kenny Dojaquez

61 F.4th 1360
United States Court of Appeals, Federal Circuit.

Luther D. SPICER, Jr., Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2022-1239
|
Decided: March 8, 2023

Synopsis

Background: Veteran appealed decision by Board of Veterans' Appeals denying him secondary service connection for bilateral knee disability, alleging treatment for his service-connected leukemia prevented him from undergoing surgery to treat his knee arthritis. The Court of Appeals for Veterans Claims, Joseph L. Toth, J., 34 Vet.App. 310, affirmed. Veteran appealed.

Holdings: The Court of Appeals, Stoll, Circuit Judge, held that:

statute governing basic entitlement to disability benefits provides for compensation for a worsening of functionality, whether through an inability to treat or a more direct, etiological cause, and

regulation governing whether aggravation of nonservice-connected disabilities would be considered service-connected was unlawful, to extent it was inconsistent with statute.

Vacated and remanded.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Codenotes

Held Invalid
38 C.F.R. § 3.310(b)

***1361** Appeal from the United States Court of Appeals for Veterans Claims in No. 18-4489, Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge Michael P. Allen.

Attorneys and Law Firms

Renee A. Burbank, National Veterans Legal Services Program, Arlington, VA, argued for claimant-appellant. Also represented by Christopher Glenn Murray, Barton Frank Stichman, I, Washington, DC.

Matthew Jude Carhart, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Brian M. Boynton, Mollie Lenore Finnan, Martin F. Hockey, Jr., Patricia M. McCarthy; Jonathan Krisch, Y. Ken Lee, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Taranto, Chen, and Stoll, Circuit Judges.

Opinion

Stoll, Circuit Judge.

Luther Spicer, Jr., appeals the decision of the United States Court of Appeals for Veterans Claims (Veterans Court) affirming the decision of the Board of Veterans' Appeals (Board) denying him secondary service connection for a knee disability. Because we disagree with the Veterans Court's interpretation of 38 U.S.C. § 1110, [1] we vacate and remand.

BACKGROUND

Mr. Spicer served in the United States Air Force from May 1958 to September 1959 and was exposed to hazardous chemicals, including benzene, in aircraft fuel. Years later, he developed chronic myeloid leukemia, a blood cancer. The Department of Veterans Affairs (VA) recognized the leukemia as service-connected and granted him a 100 percent disability rating. Separately, Mr. Spicer developed arthritis in both knees, which caused pain and instability and required him to use a wheelchair. He was scheduled for knee replacement surgery to address his knee condition. It is undisputed that his scheduled surgery was canceled because the medications he took to manage his leukemia lowered his hematocrit, or red blood cell level, to a level that precluded surgery. Mr. Spicer was told that his hematocrit would never rise to a level that would permit surgery because he is expected to stay on his cancer medications for life.

Mr. Spicer sought secondary service connection for his knee disability. The VA regional office denied the claim, finding

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no link between the knee disability and his service-connected leukemia. Mr. Spicer appealed to the Board, which affirmed the denial. J.A. 31–36. The Board explained ***1362** that Mr. Spicer's "inability to undergo knee replacement surgery because of the effects of his service-connected leukemia is not contemplated by the applicable laws or regulations to fall within the meaning of secondary service connection." J.A. 33. Mr. Spicer appealed to the Veterans Court.

Before the Veterans Court, Mr. Spicer argued that, notwithstanding any regulation, 38 U.S.C. § 1110 establishes entitlement to service connection in his circumstances. *Spicer v. McDonough*, 34 Vet. App. 310, 313 (2021). Section 1110 provides compensation for veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." Mr. Spicer argued that § 1110 only requires a worsening of functionality—whether through an inability to treat or a more direct, etiological cause. A divided panel disagreed and affirmed the Board's denial. *Spicer*, 34 Vet. App. at 313.

The majority analyzed whether the language "disability resulting from" in § 1110 applied to disabilities "that include the natural progression of a condition not actually caused or aggravated by a service-connected disability[,] but that nonetheless might have been less severe were it not for such disability." *Id.* at 316. The majority determined that it did not. *Id.*

The majority first determined that the plain meaning of the phrase "resulting from" requires but-for causation. It reasoned that § 1110 therefore includes an etiological component, requiring that the veteran's service be "the cause(s) or origin of a disease." *Id.* at 317 (quoting *Allen v. Brown*, 7 Vet. App. 439, 445 (1995)). Although it acknowledged that causation permits a multi-link causal chain, the majority held that Mr. Spicer's knee condition did not result from his service-connected cancer. The majority reasoned that "[u]nless we can say that the current state of his arthritis would not exist in the absence of his cancer or chemotherapy," there is "no actual but-for causation." *Id.* at 318. In the majority's view, Mr. Spicer's interpretation would require the VA to resort to "conjecture or speculation" to assess the difference between the current state of his knees and his knees post-surgery. *Id.* In addition, the majority opined that, contrary to longstanding practice, Mr. Spicer's interpretation would compensate for the natural progression of disabilities that arose independently of service. *Id.* at 318–19.

Judge Allen dissented. He agreed that the key language is "disability resulting from," but interpreted that language as requiring a much broader, causation-based standard. *Id.* at 321–22. He relied on similar caselaw as the majority, such as *Murakami v. United States*, 398 F.3d 1342, 1351–52 (Fed. Cir. 2005), where we held that "as a result of" requires showing "a consequence or effect." (relying on *Webster's Third New Int'l Dictionary* 1937 (1993)). But he determined that such causation "merely requires that one thing flow from another," especially given Congress's use of the broad language "resulting from" without any limitations. *Spicer*, 34 Vet. App. at 323. The dissent reasoned that Congress could have listed other requirements for establishing service connection in § 1110, such as an etiological cause, but it did not do so. As for the majority's concerns about the speculative nature of assessing Mr. Spicer's level of knee impairment due to his inability to have surgery, Judge Allen noted that secondary service connection already requires complex causation analyses and that VA adjudicators address similarly complex issues every day. As for the majority's concerns about compensation for the progression of a disability that arose independent of service, the dissent noted the Supreme Court's warning against relying on policy considerations when the law is clear. *Id.* at 327–28 (citing ***1363** *BP P.L.C. v. Mayor & City Council of Balt.*, —— U.S. ——, 141 S. Ct. 1532, 1542, 209 L.Ed.2d 631 (2021)).

Mr. Spicer appeals. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

I

Mr. Spicer challenges the Veterans Court's interpretation of 38 U.S.C. § 1110. We review the Veterans Court's interpretation of statutes de novo. *See* 38 U.S.C. § 7292(c); *Breland v. McDonough*, 22 F.4th 1347, 1350 (Fed. Cir. 2022).

Section 1110 provides that the United States will pay a veteran "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." The parties agree, and our caselaw provides, that "disability" in § 1110 refers to a veteran's present-day "functional impairment." *Saunders v. Wilkie*, 886 F.3d 1356, 1362–63 (Fed. Cir. 2018) (defining "disability" in § 1110 as a "functional impairment"); *see* Oral Arg. at 21:28–21:50, 28:22–30:10, https://oralarguments.cafc.uscourts.gov/

default.aspx?fl=22-1239_01102023.mp3. Thus, Mr. Spicer's claim is that his current functional knee impairment is resulting from his leukemia contracted in the line of duty.

The parties also agree that the language "resulting from" in § 1110 requires but-for causation. Appellee's Br. 12; Oral Arg. at 0:10–0:22. The parties further agree that but-for causation is a broad standard of causation, or at least broader than proximate causation, and encompasses multi-link causal chains. Appellant's Br. 9; Appellee's Br. 18–19 & 19 n.6. The parties' agreement follows Supreme Court precedent, which recognizes that (i) Congress legislates knowing that the phrase "resulting from" means but-for causation, (ii) there can be multiple causes of a harm, and (iii) "but-for" liability based on a particular cause simply means that but for the cause, the result would not have occurred. *Burrage v. United States*, 571 U.S. 204, 211–12, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014).

The dispute is thus narrow: Whether the but-for causation requirement in § 1110 is limited, as the government contends, to bringing something about or the onset or etiological link, or whether, as Mr. Spicer contends, that language may encompass situations where the service-connected disease or injury impedes treatment of a disability. For the reasons below, we adopt the latter view.

II

Our analysis begins and ends with the statutory text. *See ResCare, Inc. v. United States*, 735 F.3d 1384, 1388 (Fed. Cir. 2013). Only where there is "interpretive doubt," after using ordinary textual analysis tools, do we rely on the pro-veteran canon for guidance. *Kisor v. McDonough*, 995 F.3d 1316, 1325 (Fed. Cir. 2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 756, 211 L.Ed.2d 474 (2022). If the intent of Congress is clear from the statutory language, that is the end of our inquiry. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Section 1110 provides:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation ***1364** shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

We focus on the first clause: "For disability resulting from personal injury suffered or disease contracted in line of duty." The initial phrase, "[f]or disability," means present-day functional impairment. *See Saunders*, 886 F.3d at 1362–63. We have recognized that the word "disability" refers to a "functional impairment, rather than the underlying cause of the impairment," *id.*, a definition the parties do not dispute, Oral Arg. at 29:02–29:40. In other words, the statute refers only to the disability itself—not its cause—and thus an interpretation of the statute that requires a veteran's service to be the onset or etiological link of a disability would not be derived from this statutory language.

Next, we turn to the key language in this case: "resulting from." This phrase has no qualifiers or exceptions. No textual or contextual indication dictates a narrower interpretation of "resulting from" than but-for causality. *See Burrage*, 571 U.S. at 212, 134 S.Ct. 881. The but-for causation standard is not limited to a single cause and effect, but rather contemplates multi-causal links, including action and inaction (e.g., the failure to shovel snow can be a but-for cause of someone falling). *See id.* at 211, 134 S.Ct. 881 (explaining how poison can be a but-for cause of death even if other diseases contribute to the death); *Bostock v. Clayton Cnty.*, —— U.S. ——, 140 S. Ct. 1731, 1739, 207 L.Ed.2d 218 (2020) (describing the failure to signal a turn at an intersection as a but-for cause of a collision). Stated otherwise, but-for causation is broad, undisputedly broader than proximate cause. *See* Appellee's Br. 19 n.6; *see also Bostock*, 140 S. Ct. at 1739 (characterizing but-for causation as "a sweeping standard"). In drafting § 1110, Congress specifically invoked but-for causation and did not indicate that it meant anything else.

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Congress could have limited the § 1110 causation standard. Indeed, Congress drafted a narrower statute using qualifiers in § 1153. There, Congress excluded compensation for the aggravation of "preexisting injury or disease" when the increase in disability is due to the "natural progress of the disease." 38 U.S.C. § 1153. Congress did not similarly limit or qualify the text of § 1110. We must give meaning to this difference. *See Res-Care*, 735 F.3d at 1389 (stating the cardinal rule of statutory interpretation that Congress's use of different terms within related statutes generally implies that Congress intended different meanings); *see also Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). Thus, the causation standard of § 1110 is simply standard but-for causation.

Put together, § 1110 plainly requires compensation when a service-connected disease or injury is a but-for cause of a present-day disability. This broad language applies to the natural progression of a condition not caused by a service-connected injury or disease, but that nonetheless would have been less severe were it not for the service-connected disability. Stated another way, § 1110 provides for compensation for a worsening of functionality—whether through an inability to treat or a more direct, etiological cause. Nothing in the statute limits § 1110 to onset or etiological causes of a worsening in functionality.

The government's main argument against this interpretation focuses on the second clause of § 1110: "aggravation of a preexisting injury suffered or disease contracted in line of duty." *See* Appellee's Br. 27–28. Specifically, the government contends ***1365** that Congress in § 1110 distinguished disabilities whose onset resulted from service from disabilities that were aggravated by service and did not allow compensation for the latter. *See id.*; Oral Arg. at 22:46–24:09. Specifically, the government argues that Congress's choice of the words in the second clause of § 1110 ("aggravation of a preexisting injury") means that any aggravation (even of a non-preexisting injury or disease) must be different than what is addressed in the first clause. [2]

We do not adopt the government's view. The second clause of the statute narrowly addresses "aggravation of a preexisting injury." In other words, that clause addresses preexisting conditions, not all the diseases and injuries that § 1110 addresses. Absent some other language in the statute, this phrase cannot be fairly read to exclude *all* aggravation from the first clause of § 1110, including aggravation of post-service conditions. *See Bates*, 522 U.S. at 29–30, 118 S.Ct. 285 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (cleaned up).

Although our interpretation rests fully on the statutory text, we note that our interpretation is also consistent with the VA's treatment of "secondary conditions." The VA does not require a direct causation standard when addressing such conditions. For example, in *Wanner v. Principi*, 17 Vet. App. 4, 8 (2003), *rev'd and remanded on other grounds*, 370 F.3d 1124 (Fed. Cir. 2004), the VA awarded compensation for a disability caused by the medication used to treat a veteran's service-connected condition. There, the veteran developed tuberculosis during service. *Id.* The medication the veteran took to treat tuberculosis caused tinnitus, and the Board awarded service connection for his tinnitus. *Id.* at 8–9. Likewise, in *Payne v. Wilkie*, 31 Vet. App. 373 (2019), the VA recognized that causation could include multiple steps in the causal chain. Accordingly, the VA accepted the theory that service-connected upper extremity disabilities caused obesity, which in turn caused other non-service-connected disabilities, which in turn caused loss of a creative organ. *Id.* at 383–85 (interpreting 38 U.S.C. § 1114(k), which provides compensation when, "as the result of" a service-connected disability, a veteran suffers the loss of a creative organ). And the VA also awards compensation for a disability where a service-connected disability prevents exercise, which leads to obesity, which leads to another disability, like hypertension. Memorandum from Acting Gen. Couns. to Exec. in Charge, Bd. of Veterans' Appeals, VAOPGCPREC 1-2017 (Jan. 6, 2017), at 9–10, http://www.va.gov/OGC/docs/2017/VAOPGCPREC1-2017.pdf.

As for the government's concerns that the VA cannot "measure, evaluate, or appropriately compensate Mr. Spicer's knee functionality" in a but-for world because the assessment is too speculative, Appellee's Br. 30, we are not persuaded. Describing a but-for world necessarily requires imagining that which did not occur. *See, e.g., Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 876 (Fed. Cir. 2008) ("But for causation is a hypothetical construct.") (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)). Put differently, some speculation is naturally baked into but-for causation. Agencies and tribunals

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***1366** tasked with determining causation—like the VA—are familiar with this kind of analysis.

To illustrate, under 38 U.S.C. § 1151, the VA assesses what would have happened but for medical negligence. As the Secretary has explained, this analysis includes consideration of whether a physician's negligence caused the natural progression of a disease by failing to prevent such natural progress from occurring. *See* Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program, 69 Fed. Reg. 46,426 (Aug. 3, 2004). This could encompass, for example, the failure to perform a corrective surgery. *Id.* at 46,428. The VA also assesses the ameliorative effect of a medication for purposes of determining certain ratings. *See* Oral Arg. at 9:30–10:04; *see, e.g., Jones v. Shinseki*, 26 Vet. App. 56, 62–63 (2012); *McCarroll v. McDonald*, 28 Vet. App. 267, 273 (2016). In other words, the VA regularly evaluates how medical intervention affects or would have affected a veteran's disability. And under 38 U.S.C. § 1153, the VA assesses the delta between a condition's worsening due to active service versus the natural progression of that condition. Here, for example, Mr. Spicer seeks an assessment of the delta between his current condition and what it would have been post corrective knee surgery. Oral Arg. at 7:39–8:08. Such an assessment would seem within the VA's capabilities, especially given the VA's everyday use of medical opinions to guide its factfinding. In any event, § 1110 is clear, and we will not second guess Congress's choice of words based on such policy considerations. *BP P.L.C.*, 141 S. Ct. at 1542.

We decide this case based on our interpretation of § 1110 alone. To the extent that the VA also applied 38 C.F.R. § 3.310(b) to reject Mr. Spicer's theory of compensation, that regulation is unlawful as inconsistent with 38 U.S.C. § 1110.

CONCLUSION

We have considered the government's remaining arguments and find them unpersuasive. For the reasons above, we vacate the Veterans Court's decision and remand for proceedings consistent with this opinion.

VACATED AND REMANDED

COSTS

Costs to Appellant.

All Citations

61 F.4th 1360

Footnotes

1 Mr. Spicer's service falls outside “a period of war” so 38 U.S.C. § 1131, and not § 1110, governs. J.A. 3 n.1. The two statutes are otherwise identical, *see Gilpin v. West*, 155 F.3d 1353, 1356 (Fed. Cir. 1998), and for consistency with the parties and the decision below, we also focus on § 1110.

2 In sum, the government tries to import 38 U.S.C. § 1153’s stricter language for “aggravat[ion]” of “[a] preexisting injury or disease” to all the disabilities § 1110 contemplates, which includes post-service injuries or disabilities.

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66 F.4th 979
United States Court of Appeals, Federal Circuit.

Wilfred D. BEAN, Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2022-1447
|
Decided: April 26, 2023

Synopsis

Background: Veteran filed appeal of decision of Board of Veterans Appeals, in which the Board dismissed veteran's administrative appeal of decision of regional office (RO) of Department of Veterans Affairs (VA) denying veteran's claim for earlier effective date for disability benefits for service-connected post-traumatic stress disorder (PTSD), and dismissed veteran's claim that he had pending, unadjudicated claims before VA seeking service connection for generalized anxiety disorder and major depressive disorder. Veteran then filed petition for writ of mandamus seeking order requiring VA to issue decision on purported unadjudicated claims for service connection for anxiety and depression. The Court of Appeals for Veterans Claims, 2021 WL 1647629, denied veteran's petition, dismissed portion of appeal as to earlier effective date, and remanded to Board for determination of whether veteran had unadjudicated pending claims. On reconsideration, the Court of Appeals for Veterans Claims, 2021 WL 6143707, dismissed appeal for lack of jurisdiction over issue of whether veteran had unadjudicated, pending claims. Veteran appealed.

Holdings: The Court of Appeals, Schall, Circuit Judge, held that:

Court of Appeals for Federal Circuit had jurisdiction to review decision of Court of Appeals for Veterans Claims dismissing veteran's appeal for lack of jurisdiction, and

Board's failure to address on merits veteran's claim of unadjudicated pending claims before VA constituted decision of Board, over which Court of Appeals for Veterans Claims had jurisdiction.

Reversed and remanded.

Procedural Posture(s): Review of Administrative Decision; Petition for Writ of Mandamus.

***980** Appeal from the United States Court of Appeals for Veterans Claims in No. 19-4116, Judge Coral Wong Pietsch.

Attorneys and Law Firms

Jennifer Ann Zajac, Paralyzed Veterans of America, Washington, DC, argued for claimant-appellant. Also represented by Linda E. Blauhut.

Eric John Singley, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Brian M. Boynton, William James Grimaldi, Patricia M. McCarthy; Y. Ken Lee, Derek Scadden, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Newman, Schall, and Taranto, Circuit Judges.

Opinion

Schall, Circuit Judge.

Wilfred D. Bean appeals the December 30, 2021 decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in ***981** *Bean v. McDonough*, No. 19-4116, 2021 WL 6143707 (Vet. App. Dec. 30, 2021). In that single-judge memorandum decision, the Veterans Court dismissed Mr. Bean's appeal of the May 10, 2019 decision of the Board of Veterans' Appeals ("Board") for lack of jurisdiction. In its May 2019 decision, the Board dismissed Mr. Bean's appeal of two rulings of the Oakland, California Regional Office ("RO") of the Department of Veterans Affairs ("VA"). J.A. 19–23. In the first ruling, in a decision dated September 10, 2013, the RO denied Mr. Bean's claim for an effective date earlier than August 14, 2006, for the award of disability benefits for service-connected post-traumatic stress disorder ("PTSD"). J.A. 245–50. In the second ruling, in a Statement of the Case ("SOC") dated September 21, 2015, the RO rejected Mr. Bean's contention that he had pending before the VA an unadjudicated claim for benefits based upon service-connected generalized anxiety disorder or major depressive disorder. J.A. 51–73. For the reasons set forth below, we hold that the Veterans Court erred in ruling that it lacked jurisdiction. We therefore reverse the court's decision and remand the case to the court for further proceedings.

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BACKGROUND

I

Mr. Bean served on active duty in the U.S. Army from November 1966 to November 1969. *Bean*, 2021 WL 6143707, at *1. Following his release from service, on February 24, 1997, he presented to the RO a claim for disability compensation based upon PTSD, chloracne, and soft tissue sarcoma. *Id.* [1] On the basis of a June 26, 1997 VA examination, Mr. Bean was diagnosed with major depression and generalized anxiety disorder, but not PTSD. *Id.*; J.A. 748. In a rating decision dated July 11, 1997, the RO denied entitlement to service connection for PTSD. *Bean*, 2021 WL 6143707, at *1, *3. The rating decision noted that Mr. Bean had been diagnosed with major depression and generalized anxiety disorder. However, it did not otherwise address those conditions. *Id.* at *1–2; J.A. 741. Mr. Bean did not appeal the July 1997 rating decision. *Bean*, 2021 WL 6143707, at *1.

On August 14, 2006, the RO received an informal claim from Mr. Bean. The claim sought service connection for major depression, generalized anxiety disorder, and PTSD. *Id.* at *2. In response to Mr. Bean's informal claim, on June 12, 2007, the RO notified Mr. Bean that it was "working on [his] application for *service-connected compensation*" for major depression and generalized anxiety disorder as well as his "*claim to reopen for*" his PTSD-related claim. J.A. 626. Subsequently, Mr. Bean underwent another VA examination on July 11, 2007, as a result of which he was diagnosed with PTSD and major depressive disorder. *Bean*, 2021 WL 6143707, at *2; J.A. 563. In an October 4, 2007 rating decision, the RO found service connection for PTSD, deemed the PTSD 30% disabling, and assigned the rating an effective date of August 14, 2006. *Bean*, 2021 WL 6143707, at *2; J.A. 512–15.

On November 29, 2007, Mr. Bean filed a Notice of Disagreement ("NOD"), disagreeing with the disability rating and effective date assignment and noting his intention to submit a supplemental letter further explaining his disagreement with the decision. J.A. 502. In the promised supplemental statement, dated December 8, 2007, Mr. Bean informed the RO that he ***982** disagreed with both the rating of 30% for PTSD and the August 14, 2006 effective date assigned for the rating. He also stated: "It is my contention that my claim for service connection for [PTSD] constituted a claim for an acquired psychiatric disorder to include major depression and generalized anxiety disorder as documented in the evidentiary records to include ... the VA examination of June 26, 1997." JA. 487–88. Mr. Bean concluded that the VA's failure to consider service connection for these conditions meant that he had an "unadjudicated (pending) claim in accordance with 38 CFR 3.160(c)." J.A. 488. [2]

In an SOC dated June 11, 2008, the RO confirmed the 30% rating for PTSD and denied an effective date earlier than August 14, 2006, for PTSD. *Bean*, 2021 WL 6143707, at *2; J.A. 480. Addressing Mr. Bean's assertion of unadjudicated pending claims, the RO stated:

> You contend that your claim for service connection for [PTSD] constituted a claim for an acquired psychiatric disorder to include major depressive disorder and generalized anxiety disorder. A review of your claims folder indicates you specifically claimed service connection for [PTSD]. There was no indication that you were claiming service connection for any other disability. In addition, you[r] examination report did not relate your major depressive disorder or generalized anxiety disorder to any psychiatric disorder in service.... There is no evidence of a claim for a psychiatric disorder which was not adjudicated.

J.A. 482.

In a VA Form 9, dated August 6, 2008, Mr. Bean continued to assert to the RO that he was entitled to a rating greater than 30% for his PTSD and that his 1997 PTSD claim constituted a claim for additional psychiatric conditions. *Bean*, 2021 WL 6143707, at *2; J.A. 455–57. In that regard, Mr. Bean added that there remained pending "an unadjudicated claim in accordance with 38 CFR 3.160(c)." J.A. 457.

In a Supplemental Statement of the Case ("SSOC") dated May 20, 2010, the RO increased Mr. Bean's rating for PTSD to

70%, effective April 30, 2010, based upon a VA examination on that date. *Bean*, 2021 WL 6143707, at *2. In the SSOC, the RO continued the denial of an effective date earlier than August 14, 2006, for the award of service connection for PTSD. *Id.* In addition, the RO rejected again Mr. Bean's contention that there was an unadjudicated pending claim for an acquired psychiatric disorder. J.A. 416 ("As noted in our [SOC] dated [June] 11, 2008, there is no evidence of a claim for a psychiatric disorder which was not adjudicated."). Dissatisfied with this decision, Mr. Bean appealed to the Board. J.A. 390–91.

On May 31, 2012, the Board issued its decision in response to Mr. Bean's appeal. The Board determined that Mr. Bean was entitled to a 70% rating for service-connected PTSD, with an effective date of August 14, 2006, but not earlier. *Bean*, 2021 WL 6143707, at *2; J.A. 338–39. The Board acknowledged Mr. Bean's assertion that, because he was diagnosed with major depression and generalized anxiety disorder by the VA in June 1997, the RO, in July 1997, should have considered his claim for PTSD as a claim for an acquired psychiatric disability. In that regard, the Board stated:

> If the veteran believes that the RO made a mistake in its decision, he can file a claim alleging clear and unmistakable error (CUE) in the July 1997 RO ***983** decision (the standard is very high). However, that issue has not been properly developed and is not before the Board at this time.

J.A. 335. The Board thus did not rule on whether the RO had before it in 1997, but failed to adjudicate, claims for benefits based on major depression or generalized anxiety disorder; the Board said only that the question was not at that time before it and should be presented to the RO.

Mr. Bean did not appeal to the Veterans Court. Instead, he followed the Board's suggestion. Thus, in a VA Form 21-4138 dated July 26, 2012, that he submitted to the RO, he asked, in accordance with the Board's May 2012 decision, that "the VA reconsider the issue of the effective date" for his service-connected PTSD. J.A. 310. In addition, he repeated his contention that there was pending an unadjudicated claim in accordance with 38 C.F.R. § 3.160(c), while also citing 38 C.F.R. § 3.105(a), the VA regulation that governs CUE claims. *Id.*

Subsequently, after the RO denied an earlier effective date for service connection for PTSD on September 10, 2013, J.A. 251, and Mr. Bean submitted an NOD on September 30, 2013, J.A. 237–38, the RO issued an SOC on September 21, 2015. J.A. 53. In relevant part, the SOC stated:

> Your prior claims for service connection for acquired psychiatric disorder to include generalized anxiety disorder, major depression and/or [PTSD] became final on July 18, 1998 and October 7, 1999. There is no evidence of a clear and unmistakable error (38 CFR 3.105(a)) and no evidence that a formal or informal claim was pending which has not been finally adjudicated (38 CFR 3.160(c)). Prior decisions were found to be correct and finally adjudicated at the time you re-opened your claim on August 14, 2006.

J.A. 73. Mr. Bean then appealed to the Board both the issue of an earlier effective date for his PTSD and the issue of alleged unadjudicated claims. J.A. 49.

II

On May 10, 2019, the Board issued its decision dismissing Mr. Bean's appeal. J.A. 19. In its decision, the Board stated that, when Mr. Bean applied to the RO in July of 2012, he asked that the RO reconsider the issue of an effective date assigned for the award of service connection for PTSD. J.A. 20. The Board also stated that Mr. Bean argued before the RO that, in its May 2012 decision, "the Board should have considered whether he should have been service-connected for depression and anxiety from 1997 since his original claim had been for an 'acquired psychiatric disorder' and not just PTSD therefore it remained an unadjudicated claim." J.A. 20–21; *see* J.A. 310. The Board then noted that Mr. Bean had not appealed its May 2012 decision to the Veterans Court. J.A. 21. The Board also noted that, when the Board issued that decision, Mr. Bean was informed that, any time after issuance

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of the decision, he could file with the Board a motion for reconsideration, a motion to vacate, or a motion for revision based on CUE. *Id.* The Board stated:

> [T]he issue on appeal has already been addressed by the Board in a final, unappealed decision, and cannot be revisited in the absence of a motion for reconsideration or a motion of CUE in the May 2012 Board decision. The Veteran in this case has not, at any point, argued that his request for an earlier effective date should be construed as a motion to revise the May 2012 Board decision based on clear and unmistakable error, nor has the Veteran filed the necessary motion ***984** to have that prior decision revised or reconsidered. [3]

J.A. 21–22. On this basis, the Board dismissed Mr. Bean's appeal, stating: "[T]he May 2012 Board decision is final; the appeal for an earlier effective date for service connection for PTSD is dismissed." J.A. 23. Mr. Bean timely appealed to the Veterans Court, and at that point he obtained counsel.

III

On March 2, 2020, after his appeal had been filed, Mr. Bean sought from the Veterans Court extraordinary relief in the form of a writ of mandamus. Mr. Bean asked the court to order the VA to issue a decision on what he contended were his unadjudicated claims for service connection for anxiety and depression that had been pending since 1997. *Bean*, 2021 WL 6143707, at *3; J.A. 1025, 1033.

Responding to Mr. Bean's petition on April 9, 2020, the VA informed the Veterans Court that, on April 4, 2020, the RO had issued a decision determining that the rating decision dated July 11, 1997, did not contain CUE and that the decision did not leave unadjudicated any claims of service connection for generalized anxiety disorder and major depression because neither of those conditions were ever claimed. *Bean*, 2021 WL 6143707, at *3; J.A. 1036, 1041.

In a single-judge memorandum decision issued on April 27, 2020, the Veterans Court denied Mr. Bean's petition. J.A. 1078. The court stated that Mr. Bean had failed to carry his burden of demonstrating that he lacked alternative means of relief. Specifically, the court said that Mr. Bean had failed to explain why his appeal of the May 2019 Board decision or initiating review of the April 2020 rating decision were not adequate remedies. J.A. 1077.

Rather than appealing the April 2020 RO decision, Mr. Bean continued with the prosecution of his pending appeal in the Veterans Court. In his appeal, Mr. Bean did not challenge the Board's May 10, 2019 decision insofar as it dismissed his appeal to the extent it sought an earlier effective date for the award of service connection for PTSD. J.A. 909–10. What Mr. Bean did challenge was the Board's failure to address his contention that he had unadjudicated pending claims for service-connected generalized anxiety disorder and major depressive disorder. J.A. 912–17.

In a single-judge memorandum decision issued on April 28, 2021, the Veterans Court considered Mr. Bean's argument that he had presented to the Board the contention that he had unadjudicated pending claims for service connection for generalized anxiety disorder and major depressive disorder. After doing so, the court concluded:

> [A]ppellant ... has continually asked VA to determine whether he has an outstanding claim for generalized anxiety disorder and major depression, and VA has done little to address that argument. Thus, the Court finds that the Board erred when it failed to address his contention that he has unadjudicated pending claims for service connection for generalized anxiety and major depressive disorder dating back to 1997. These issues were raised by the record and should have been addressed by the Board.

Bean v. McDonough, No. 19-4116, 2021 WL 1647629, at *6 (Vet. App. Apr. 28, 2021). The Veterans Court concluded its decision by dismissing what it described ***985** as "the appeal for an effective date earlier than August 14, 2006, for the grant of service connection for PTSD." *Id.* at *7. [4] At the

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same time, however, the court remanded to the Board "for further proceedings consistent with this decision" the issue of whether Mr. Bean had unadjudicated pending claims. *Id.*

The court's statement just quoted above, as well as its remand to the Board, reflect the court's finding that, when Mr. Bean submitted his Form 21-1438 to the RO in July of 2012, he was not seeking reconsideration of the May 2012 Board decision. Rather, he was presenting to the RO his contention that there were unadjudicated claims for generalized anxiety disorder and major depressive disorder, allegedly pending since 1997. The statement and remand also reflect the court's finding that those claims were before the Board in 2019 and that the Board erred in failing to consider them.

On May 13, 2021, the VA Secretary moved for reconsideration of the Veterans Court's April 2021 decision. On December 30, 2021, the court withdrew its April 2021 decision and issued the single-judge memorandum decision now on appeal.

In its December 30, 2021 decision, the Veterans Court concluded that it lacked jurisdiction over Mr. Bean's appeal. *Bean*, 2021 WL 6143707, at *4. The court reached that conclusion even though Mr. Bean contended before the Board that he had unadjudicated pending claims for service-connected generalized anxiety and major depressive disorder and that the Board erred when it failed to address those claims. The Veterans Court reasoned, simply, that the Board did not actually decide that issue in the decision on appeal, but decided only the issue of whether Mr. Bean was entitled to an effective date earlier than August 14, 2006, for the grant of service connection for his PTSD and that, for that reason, the court lacked jurisdiction over the issue raised by Mr. Bean on appeal—"whether the Board erred in failing to address whether he had unadjudicated, pending claims for generalized anxiety and major depressive disorder dating back to 1997." *Id.*; *see also id.* ("[T]he only issue addressed in the May 2019 decision is whether [Mr. Bean] was entitled to an effective date earlier than August 14, 2006, for the grant of service connection for his PTSD. Thus, the Court does not possess jurisdiction over the issue raised by the appellant in his brief—specifically whether the Board erred in failing to address whether the appellant had unadjudicated, pending claims for service connection for generalized anxiety and major depressive disorder dating back to 1997."). It therefore dismissed the appeal. *Id.* at *5. This appeal followed.

DISCUSSION

I

On appeal, Mr. Bean argues that the Veterans Court erred in holding that it lacked jurisdiction to consider the issue that he raised on appeal, that issue being whether the Board erred in failing to address whether he had unadjudicated pending claims for generalized anxiety disorder and major depressive disorder dating back to 1997. Mr. Bean contends that this issue was before the Board and that the Board thus should have addressed it. Appellant's Br. 20. In making this argument, he contends that the decision of the Veterans Court is inconsistent with 38 U.S.C. § 7104(a) (1994) (formerly 38 U.S.C. § 4004(a)), the statute governing Board jurisdiction; and 38 U.S.C. § 7252 (1994) ***986** (formerly 38 U.S.C. § 4052), the statute governing the jurisdiction of the Veterans Court. Mr. Bean also contends that the decision of the Veterans Court is inconsistent with prior decisions of that court in, e.g., *Travelstead v. Derwinski*, 1 Vet. App. 344, 346 (1991), *Owens v. Brown*, 7 Vet. App. 429, 433–44 (1995), and *In re Smith*, 10 Vet. App. 311, 314 (1997), as well as the decision of this court in *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000). Mr. Bean argues that these decisions stand for the proposition, applicable in this case, that the jurisdiction of the Veterans Court extends to matters properly raised before, but not decided by, the Board. According to Mr. Bean, this was the case with respect to his assertion of unadjudicated pending claims. He presented the assertion to the Board, he says, but the Board failed to address it. Mr. Bean also argues that what he refers to as the "Secretary's failure to adjudicate [his] claims for almost 25 years" violates his Fifth Amendment constitutional due process rights. Appellant's Br. 38–43. Mr. Bean asks us to reverse the decision of the Veterans Court and order the court to direct the VA to grant him benefits for service-connected generalized anxiety disorder and major depressive disorder. Appellant's Br. 43; Appellant's Reply Br. 14–15.

The government responds by addressing first the matter of our jurisdiction. Citing *Ledford v. West*, 136 F.3d 776, 778 (Fed. Cir. 1998), the government acknowledges that generally the question of whether the Veterans Court has jurisdiction over an issue is a matter of statutory interpretation and thus within the scope of our jurisdiction under 38 U.S.C. § 7292. Appellee's Br. 17. It continues, however, that we lack jurisdiction to review factual findings of the Veterans Court relating to jurisdictional issues, or to review the Veterans

Court's application of its jurisdictional statute to the facts of a particular case, citing *Albun v. Brown*, 9 F.3d 1528, 1530 (Fed. Cir. 1993). This rule applies here, the government argues. That is because, in this case, the Veterans Court's decision did not involve the interpretation of any statute or regulation. Rather, in this case, the Veterans Court simply made (i) the determination that the only issue before the Board and addressed by the Board was whether Mr. Bean was entitled to an earlier effective date for his PTSD and (ii) the determination that Mr. Bean's arguments regarding allegedly unadjudicated pending claims were not pertinent or related to that issue. These determinations, speaking to the scope of Mr. Bean's claim and appeal, the government says, are factual determinations. Appellee's Br. 17–18 (citing *Comer v. Peake*, 552 F.3d 1362, 1372 (Fed. Cir. 2009) and *Bonner v. Nicholson*, 497 F.3d 1323, 1328 (Fed. Cir. 2007)).

Turning to the merits, the government argues that the Veterans Court correctly determined that it lacked jurisdiction to consider Mr. Bean's assertions regarding allegedly unadjudicated pending claims. Appellee's Br. 25. The government states that, in July 2012, Mr. Bean submitted to the RO a statement in support of a claim seeking reconsideration of the May 2012 Board decision. The government then states that, in its May 2019 decision, the Board found that the filing could not be a "motion for reconsideration, revision, or vacatur" of the Board's May 2012 decision because it did not meet the requirements for such a motion. Appellee's Br. 26. Because Mr. Bean made his submission to the RO and not the Board, the government states, the Board correctly determined that the filing could not constitute a motion for reconsideration or of CUE in the May 2012 Board decision. *Id.* The government also asserts that the Board correctly determined that Mr. Bean's July 2012 filing ***987** did not constitute a CUE claim in regard to the 1997 RO decision. *Id.* at 26–28.

The government further states that, in his appeal to the Veterans Court, Mr. Bean did not raise any arguments with respect to the issue that the Board did decide, entitlement to an earlier effective date for his service-connected PTSD. Instead his arguments solely addressed the issue of whether he had unadjudicated pending claims, a matter the Board did not decide. Appellee's Br. 26–27. "Thus," the government asserts, "because the scope of the [B]oard's decision defines the jurisdiction of the Veterans Court, the only issue before the Veterans Court in this matter was Mr. Bean's entitlement to an earlier effective date for his service-connected PTSD." Appellee's Br. 28. According to the government, since Mr. Bean did not contest that issue, the court properly dismissed his appeal. Appellee's Br. 28. The government urges us to reject Mr. Bean's argument, noted above, that he did present to the Board the issue of unadjudicated pending claims.

Finally, the government urges that Mr. Bean's Fifth Amendment due process rights have not been violated because he has no unadjudicated pending claims. Appellee's Br. 33–35.

The government concludes by asking us to dismiss Mr. Bean's appeal for lack of jurisdiction, or, in the alternative, to affirm the decision of the Veterans Court.

II

We address first the issue of our jurisdiction. We have jurisdiction to review decisions of the Veterans Court "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation ... or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a). More specifically, we have jurisdiction "to determine whether the legal requirement of the statute or regulation has been correctly interpreted in a particular context where the relevant facts are not in dispute." *Szemraj v. Principi*, 357 F.3d 1370, 1375 (Fed. Cir. 2004). However, except with respect to constitutional issues, we do not have jurisdiction to "review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d).

We have no difficulty concluding that we have jurisdiction in this case. That is so for two reasons. First, Mr. Bean's appeal requires us to determine whether, in its December 30, 2021 decision, the Veterans Court correctly interpreted the legal requirements of 38 U.S.C. § 7104, the Board's jurisdictional statute, and 38 U.S.C. § 7252, its own jurisdictional statute. [5] *Szemraj*, 357 F.3d at 1375. And second, "the relevant facts are not in dispute" for purposes of our jurisdiction to address legal errors in the Veterans Court's decision or to reverse its holding that it lacked jurisdiction. *Id.*

The relevant facts are established by the unchallenged documentary record of (1) Mr. Bean's July 26, 2012 application to the RO, (2) the RO's denial of the application on September 10, 2013, (3) Mr. Bean's September 30, 2013 NOD, (4) the RO's SOC on September 21, 2015, and (5) Mr.

***988** Bean's subsequent appeal to the Board, all of which are recited above. The facts evident from those documents are reflected in the Veterans Court's April 28, 2021 remand decision, also recited above, where the court expressly found that the issues of Mr. Bean's claims of generalized anxiety disorder and major depressive disorder "were raised by the record and should have been addressed by the Board." *Bean*, 2021 WL 1647629, at *6. Although that decision was withdrawn, the VA, in its motion asking the Veterans Court to reconsider the April 2021 decision, did not challenge the court's recitation of facts in the decision. Secretary's Mot. For Recons., *Bean v. McDonough*, No. 19-4116 (May 13, 2021).

This case is thus different from *Albun, Comer*, and *Bonner*, the decisions upon which the government relies to argue that we lack jurisdiction. In *Albun*, we were called upon to rule on the Veterans Court's factual determinations and the court's application of its jurisdictional statute to those factual determinations. *See* 9 F.3d at 1530. In *Comer* and *Bonner*, we were called upon to rule on the factual inquiry into the scope of a veteran's claim. *See Comer*, 552 F.3d at 1372; *Bonner*, 497 F.3d at 1328. In contrast, the question of whether the Veterans Court has jurisdiction in this case boils down to a question of statutory interpretation, *Ledford*, 136 F.3d at 778, requiring no resolution of disputed factual issues.

III

We turn now to the merits of the Veterans Court's jurisdictional ruling. Two statutes are relevant to this appeal. As noted above, 38 U.S.C. § 7104 sets forth the jurisdiction of the Board. Subsection (a) of that statute provides that "[d]ecisions of the Board shall be based on the entire record in the proceedings and upon consideration of all evidence and material of record and applicable provisions of law and regulation." As also noted above, the jurisdiction of the Veterans Court is set forth at 38 U.S.C. § 7252. Subsection (a) of that statute provides that the Veterans Court has "exclusive jurisdiction to review decisions of the [Board]." Pursuant to subsection (b), review in the court is "on the record of proceedings before the Secretary and the Board."

A prerequisite to Veterans Court jurisdiction is a decision of the Board. *Andre v. Principi*, 301 F.3d 1354, 1360 (Fed. Cir. 2002); *Maggitt*, 202 F.3d at 1375; *Ledford*, 136 F.3d at 779; *see May v. McDonough*, 61 F.4th 963, 965 (Fed. Cir. 2023). Relevant to this case, in *Maggitt* we stated that "[a] 'decision' of the Board, for purposes of the Veterans Court's jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran." 202 F.3d at 1376. Denial of a claim, which includes the failure of the Board to consider a claim that was reasonably raised before it, constitutes a decision of the Board—reviewable by the Veterans Court. *See id.*; *Travelstead*, 1 Vet. App. at 346 ("When the [Board] makes a decision (implicitly or explicitly) not to deal with an issue considered at the [RO] level, then that decision not to decide an issue is a decision by the [Board] which is properly before this Court."). In addition, the Veterans Court, upon exercising jurisdiction in such circumstances, has repeatedly held—as did the Veterans Court in its withdrawn April 2021 decision in the present case—that the Board commits error in not deciding such issues. *Smith*, 10 Vet. App. at 314 ("Where the [Board] fails to adjudicate a claim that was reasonably raised before it, the net outcome for the veteran amounts to a denial of the benefit sought. Accordingly, the Court holds as a matter of law that the Board's failure to adjudicate the ***989** TDIU claim that was properly before it constitutes a final adverse [Board] decision with respect to that claim."); *Owens*, 7 Vet. App. at 433 (remanding to the Board for consideration a claim not addressed by the Board and stating, "[w]hen the appellant reasonably raises a claim for a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit, or if appropriate, to remand the issue to the RO for development and adjudication of the issue"); *see also Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

The Veterans Court's holding that it lacked jurisdiction is clearly contrary to the legal principle that when a claim is adequately presented to the Board but not addressed by the Board, the Board's disposition of the appeal constitutes a decision of the Board on that claim that may be appealed to the Veterans Court. The Veterans Court deemed its jurisdiction to be limited to the affirmative determinations made by the Board, and not to cover a Board disposition of an appeal that is challenged as improperly failing to address contentions clearly before the Board. *See supra* pp. 985–86. That is legally incorrect.

The legal error matters here. After receiving the Board's May 2012 decision, Mr. Bean followed the Board's suggestion and submitted to the RO a Statement in Support of Claim on Form 21-4138. In that form, he not only cited the CUE regulation, 38 C.F.R. § 3.105(a), but he also argued that, in accordance with 38 C.F.R. § 3.160(c), he had pending, unadjudicated claims from 1997 for disability from service-

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connected generalized anxiety disorder and major depressive disorder. Then, after the RO denied the claim, Mr. Bean appealed to the Board. In its May 2019 decision, however, the Board failed to address the claim on its merits, even though, in the words of its jurisdictional statute, 38 U.S.C. § 7104(a), it was part of "the entire record in the proceeding." *See Cogburn v. Shinseki*, 24 Vet. App. 205, 214–15 & n.5 (2010) (finding "it was error for the Board not to address Mr. Cogburn's disagreement with the [RO]'s refusal to adjudicate what Mr. Cogburn argued were pending claims"). Instead, the Board concluded that the only matter before it was an improper request for reconsideration of its May 2012 decision, which by its terms did not decide whether the RO had before it in 1997, and did not adjudicate, the claims based on anxiety and depression now at issue. As a result, the Board in May 2019 dismissed Mr. Bean's appeal.

When Mr. Bean appealed to the Veterans Court, the Veterans Court recognized in its April 2021 decision that Mr. Bean had clearly presented his claim to the Board and that the Board had erred by failing to consider it. Accordingly, it remanded the case to the Board for the Board to address the unadjudicated claims issue. Thus, in April of 2021, the court correctly exercised jurisdiction over a "decision[ ] of the Board." That decision arose from the Board's denial of Mr. Bean's claim by reason of the Board's failure to exercise jurisdiction under 38 U.S.C. § 7104(a) and to consider the claim.

Then, however, in response to the Secretary's motion for reconsideration, the court reversed itself, withdrew its April 2021 decision and issued the December 30, 2021 decision that is now on appeal. That was error. In dismissing Mr. Bean's appeal, the Veterans Court misinterpreted the pertinent law of both this court and the Veterans Court regarding its jurisdiction under 38 U.S.C. § 7252. As seen, that law is that the Board's failure to decide a claim clearly presented to it constitutes a "decision" of the Board, which vests the Veterans Court with jurisdiction. In short, the court ***990** got the issue of its own jurisdiction right the first time.

Accordingly, the Veterans Court erred in holding that it lacked jurisdiction. Mr. Bean is entitled to have the December 30, 2021 decision of the Veterans Court reversed and his case remanded for the Veterans Court to decide an issue within its jurisdiction: whether, as the Veterans Court ruled in its withdrawn April 2021 decision, the Board erred in not addressing on the merits Mr. Bean's contention, plainly presented to the Board, that the RO had before it in 1997, and did not adjudicate, claims based on generalized anxiety disorder and major depressive disorder. Without expressing doubt about the correctness of the now-withdrawn April 2021 resolution of that issue, we do not decide it ourselves at this jurisdictional stage. Having noted above some precedent on the issue, we add that, to the extent relevant, the Veterans Court should also take account of our precedent establishing that, when the RO has not adjudicated claims before it, there is not a final decision on those claims and "a CUE analysis [with its demanding standards] is not required." *Lang v. Wilkie*, 971 F.3d 1348, 1355 (Fed. Cir. 2020); *id.* at 1352 (agreeing that "only final decisions are subject to CUE"); *see also Richardson v. Nicholson*, 20 Vet. App. 64, 72 (2006). [6]

CONCLUSION

For the foregoing reasons, the decision of the Veterans Court is reversed. The case is remanded to the court for further proceedings consistent with this opinion. [7]

REVERSED AND REMANDED

COSTS

Costs to Mr. Bean.

All Citations

66 F.4th 979

Footnotes

1 Until his appeal to the Veterans Court that resulted in the court's decision that is now before us Mr. Bean at all times acted pro se.

2 At the time, § 3.160(c) defined a "pending claim" as "[a]n application, formal or informal, which has not been finally adjudicated." 38 C.F.R. § 3.160(c) (2006).

3 Thus, the Board read Mr. Bean's July 2012 application to the RO as a request for reconsideration of the *Board's* May 2012 decision, rather than a request for the RO to correct its own earlier error.

4 As noted above, Mr. Bean did not raise the issue of an earlier effective date for service connection for PTSD in his appeal to the Veterans Court.

5 The Veterans Court did not identify these express statutory provisions in its December 30, 2021 decision. However, it is clear from the court's April 2021 decision and the Secretary's motion for reconsideration of that decision that it was those provisions on which the court based its subsequent dismissal for lack of jurisdiction. *See Bean*, 2021 WL 1647629, at *1; Secretary's Mot. for Recons., *Bean v. McDonough*, No. 19-4116 (May 13, 2021).

6 Since Mr. Bean's claim of unadjudicated pending claims was before the Board in 2019, his failure to appeal the April 2020 RO decision appears to be irrelevant under the principle, long recognized by the Veterans Court, that "where the claim was placed into appellate status by virtue of an NOD, subsequent RO decisions cannot resolve the pending claim." *Jones v. Shinseki*, 23 Vet. App. 122, 125 (2009), *aff'd on other grounds*, 619 F.3d 1368 (Fed. Cir. 2010); *see Grimes v. McDonough*, 34 Vet. App. 84, 92 (2021).

7 Because Mr. Bean's claim will be remanded to the Board for further proceedings, his constitutional due process argument is moot at this time. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). The need for a remand also suffices to answer Mr. Bean's request that we direct the VA to grant him benefits.

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71 F.4th 1377
United States Court of Appeals, Federal Circuit.

John W. WEBB, Claimant-Appellant
v.
Denis MCDONOUGH, Secretary of Veterans Affairs, Respondent-Appellee

2022-1243
|
Decided: June 29, 2023

Synopsis

Background: Veteran sought review of decision of Board of Veterans' Appeals affirming decision of regional office (RO) of Department of Veterans' Affairs (VA) assigning veteran a noncompensable rating for his unlisted service-connected condition of erectile dysfunction (ED). The Court of Appeals for Veterans Claims, 2021 WL 3625395, affirmed. Veteran appealed.

The Court of Appeals, Stoll, Circuit Judge, held that veteran was not required to show that his unlisted condition identically matched the criteria of the listed condition to which his condition was rated by analogy.

Vacated and remanded.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

***1378** Appeal from the United States Court of Appeals for Veterans Claims in No. 20-8064, Judge Michael P. Allen.

Attorneys and Law Firms

Jennifer Tracy Shannon Healy, Veterans Legal Advocacy Group, Arlington, VA, argued for claimant-appellant. Also represented by Harold Hamilton Hoffman, III, Megan Eileen Hoffman.

Andrew James Hunter, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Brian M. Boynton, Deborah Ann Bynum, Patricia M. Mccarthy; Amanda Blackmon, Brian D. Griffin, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before Taranto, Chen, and Stoll, Circuit Judges.

Opinion

Stoll, Circuit Judge.

Some veterans have service-connected conditions that are not listed in the Department of Veterans Affairs' (VA) Schedule of Disability Ratings. In those circumstances, the VA can choose an appropriate disability rating for the veteran's unlisted condition by analogizing it to a listed one. This appeal involves the framework for how the VA performs such a rating by analogy.

John W. Webb appeals a decision of the U.S. Court of Appeals for Veterans Claims (Veterans Court) affirming the Board of Veterans' Appeals' determination that he was not entitled to a compensable disability rating for his unlisted service-connected condition because he did not meet all the criteria of the analogous condition's diagnostic code. Because the Veterans Court misinterpreted the requirements of the applicable regulation, 38 C.F.R. § 4.20, we vacate its decision and remand for further consideration.

BACKGROUND

The VA promulgates a Schedule for Rating Disabilities that provides an extensive list of disabilities identified by unique diagnostic codes, each of which has at least one corresponding disability rating. 38 U.S.C. § 1155; 38 C.F.R. pt. 4. Although the Schedule is extensive, it is possible that a particular veteran's disability does not clearly fall under one of the delineated diagnostic codes. VA regulations address this possibility:

> When an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous.

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38 C.F.R. § 4.20. In other words, this regulation provides that a veteran having an "unlisted" condition, i.e., one that is not included on the Schedule, can be rated ***1379** analogously to—and given the associated disability rating of—a listed disease or injury, provided that the affected functions, anatomical location, and symptomatology of the veteran's condition are "closely analogous" to those of the listed disease or injury. For example, "a veteran's non-migraine headaches could be rated as analogous to migraine headaches." Jeffrey D. Parker, *Getting the Train Back on Track: Legal Principles to Guide Extra-Schedular Referrals in U.S. Department of Veterans Affairs Disability Rating Claim Adjudications*, 28 FED. CIR. B.J. 175, 192 (2019).

In *Lendenmann v. Principi*, the Veterans Court elaborated on this regulatory guidance, explaining that, "[i]n deciding whether a listed disease or injury is 'closely related' to the veteran's ailment, the VA may take into consideration three factors" when determining which diagnostic code is most "closely analogous" to a given unlisted disability: "(1) whether the 'functions affected' by ailments are analogous; (2) whether the 'anatomical localization' of the ailments is analogous; and (3) whether the 'symptomatology' of the ailments is analogous." 3 Vet. App. 345, 350 (1992) (quoting 38 C.F.R. § 4.20). [1]

With this brief legal background in mind, we now turn to the facts of this case. Mr. Webb served in the Army from 1968 to 1970, receiving an honorable discharge. After the conclusion of his service, Mr. Webb developed, among other ailments, service-connected prostate cancer, the treatment for which caused him to develop erectile dysfunction (ED). In 2015, after Mr. Webb reopened an earlier claim requesting disability benefits for his ED, a Regional Office (RO) of the VA issued a decision assigning Mr. Webb a noncompensable (i.e., zero percent) rating for his disability. At that time, the Schedule did not include a diagnostic code for ED. *See* 38 C.F.R. § 4.115b (2015). [2] As a result, the RO rated Mr. Webb's disability by analogy to diagnostic code (DC) 7522, which provides for a 20 percent disability rating for "[p]enis, deformity, with loss of erectile power." *Id.* DC 7522. With little discussion, the RO determined that Mr. Webb's particular disability entitled him only to a non-compensable rating. *See* J.A. 774–75, 780.

Mr. Webb appealed to the Board, which affirmed the RO's determination. J.A. 13–20. The Board acknowledged that Mr. Webb's disability had been rated by analogy, as provided for by 38 C.F.R. § 4.20, but explained that DC 7522 required Mr. Webb to show "deformity of the penis with loss of erectile power." J.A. 18–19. Because Mr. Webb did not have such a deformity, the Board determined that he was not entitled to a compensable disability rating. J.A. 19 ("As no penile deformity has been shown, a separate compensable rating for erectile dysfunction under DC 7522 is not warranted ....").

***1380** The Veterans Court affirmed. In its brief opinion, the Veterans Court determined that a prior Veterans Court decision, *Williams v. Wilkie*, 30 Vet. App. 134 (2018), was "fatal to [Mr. Webb]'s argument." *Webb v. McDonough*, No. 20-8064, 2021 WL 3625395, at *1 (Vet. App. Aug. 17, 2021). The court explained its view that "[i]mplicit in the [c]ourt's holding in *Williams* is that[,] when ED is rated under DC 7522, a claimant must establish a penile deformity to be entitled to" benefits, and thus that Mr. Webb's argument "is foreclosed by" *Williams*. *Id.* at *2.

Mr. Webb appeals. We have jurisdiction under 38 U.S.C. § 7292(c).

DISCUSSION

On appeal, Mr. Webb challenges the Veterans Court's interpretation of 38 C.F.R. § 4.20. We review the Veterans Court's interpretation of a regulation de novo. *See* 38 U.S.C. § 7292(c); *Pickett v. McDonough*, 64 F.4th 1342, 1345 (Fed. Cir. 2023).

In its brief analysis affirming the Board's conclusion that Mr. Webb was not entitled to benefits, the Veterans Court addressed neither the explicit requirements of § 4.20 nor the *Lendenmann* factors. *See Webb*, 2021 WL 3625395, at *1–3. In other words, the court did not address whether the functions affected, anatomical location, and symptomatology of Mr. Webb's condition are closely analogous to the functions affected, anatomical location, and symptomatology of the condition listed under DC 7522. The Veterans Court was not alone—indeed, at no point in Mr. Webb's case, including before the RO and the Board, did any agency or court substantively discuss the text of § 4.20 (or even the related guidance in *Lendenmann*) and analyze its application to Mr. Webb's unlisted condition. Rather, instead of engaging with the explicit language of this regulation, the VA and the Veterans Court required Mr. Webb to strictly meet the requirements of DC 7522 as if he were being directly rated under that code. J.A. 18–19, 774–76, 780; *Webb*, 2021 WL 3625395, at *1–2.

We conclude that the Veterans Court erred by requiring Mr. Webb, to be eligible for benefits, to show that his unlisted condition identically matched the criteria of the listed condition to which his condition was rated by analogy. In doing so, the Veterans Court imposed a requirement not stated in § 4.20, the sole regulation governing rating by analogy. We hold that, when rating by analogy under § 4.20, the VA must adhere to the requirements of that regulation. The listed disease or injury to which a veteran's unlisted condition is being rated by analogy must be only "closely related," not identical, to the unlisted condition. That regulation provides guidance for determining whether a listed condition is "closely related" to the unlisted condition: it is one "in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous" to the unlisted condition. 38 C.F.R. § 4.20; *see also Lendenmann*, 3 Vet. App. at 350–51. Further, once the VA has concluded that a listed disease or injury is "closely analogous" to a veteran's unlisted condition, we see no source of law directing the VA to withhold the rating based on the qualifying criteria associated with that listed disease or injury's diagnostic code.

The regulatory text supports our conclusion. Section 4.20 provides that when "an *unlisted* condition is encountered," the VA can rate that disability "under a *closely* ***1381** *related* disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous." 38 C.F.R. § 4.20 (emphases added). The regulation thus contemplates that it will be applied to certain conditions that are *unlisted*, i.e., not identical to those that are listed and assigned a specific diagnostic code. When such an unlisted condition is encountered, the VA may choose a "closely related"—again, not identical—listed condition to which it will rate the veteran's unlisted condition by analogy. As a matter of plain language, it would be nonsensical to require a veteran's unlisted disability to precisely meet the criteria for a listed disease or injury's diagnostic code. After all, if a veteran's condition did precisely meet the requirements of a listed condition, that condition could simply be rated under that listed condition's diagnostic code; there would be no need to rate by analogy. *See, e.g., Ulysses Copeland v. McDonald*, 27 Vet. App. 333, 336 (2015) ("Where, however, a condition *is* listed in the schedule, rating by analogy is not appropriate."). Concluding otherwise—and requiring a veteran's unlisted condition to satisfy each of the criteria of a listed condition—would eviscerate the text and purpose of § 4.20, which explicitly allows for rating by analogy.

Our conclusion aligns not only with the regulatory text but also with Veterans Court precedent. In *Stankevich v. Nicholson*, for example, the Veterans Court determined that the Board erred by requiring a veteran with an unlisted condition to demonstrate that his disability satisfied each requirement of a listed condition to which his disability was being rated by analogy. 19 Vet. App. 470, 472–73 (2006). Specifically, the Board rated a veteran's undiagnosed, chronic joint pain by analogy to DC 5003, for arthritis. *Id.* at 471. The Board found that the veteran could not be awarded benefits because he had not been diagnosed with arthritis, a requirement listed in the schedule for DC 5003. *Id.* at 472. The Veterans Court explained this was error, because "[t]he function affected, anatomical localization, or symptomatology of an undiagnosed illness cannot be analogous if the Board applies that rating criteria to require objective evidence of a diagnosed disability." *Id.* Strictly applying the criteria of the analogous diagnostic code, the Veterans Court explained, was "arbitrary and capricious because the analogy is, at best, illusory." *Id.* at 472–73.

Similarly, in *Lendenmann*, the Veterans Court set forth factors that the Board must consider to determine which listed disease or injury is most analogous to the veteran's unlisted condition. 3 Vet. App. at 350–51 (quoting 38 C.F.R. § 4.20). *Lendenmann* thus clearly contemplates that such an unlisted condition would, by definition, not perfectly match the symptoms of any one listed condition. *Id.* [3]

***1382** The Veterans Court determined it was bound by what it viewed as an implicit holding in *Williams* requiring a veteran seeking to be rated by analogy to DC 7522 to meet the criteria of that diagnostic code. Contrary to the Veterans Court's conclusion, *Williams* requires no such thing. There, a veteran simply sought a rating under DC 7522, arguing that he had both ED and a deformity. *Williams*, 30 Vet. App. at 135–36. The *Williams* court remanded for the Board to determine, in the first instance, whether the veteran's internal deformity was indeed a "deformity" as contemplated by DC 7522. *Id.* at 138. In other words, the veteran in *Williams* explicitly claimed that he met each of the requirements of the diagnostic code under which he sought benefits. This case is readily distinguishable—all parties agree that Mr. Webb does not meet each of the requirements of DC 7522. That is, of course, why he seeks to be rated by analogy and not directly under a listed code.

The government cites to *Green v. West* for the proposition that, "[o]nce a diagnostic code [is] assigned for an analogous rating ..., application of the criteria and the ratings for that code [is] required." 11 Vet. App. 472, 475 (1998); *see* Appellee's Br. 11–12. In the government's view, *Green* counsels in favor of affirmance. But just as *Williams* does not support the government's and Veterans Court's position, neither does this one isolated sentence in *Green*. The context of this sentence is instructive. In *Green*, the VA had erroneously applied an outdated version of the Rating Schedule to a veteran's case. *Id.* at 475. In the cited paragraph, the Veterans Court explained to the Board that, on remand, it had to apply the rating schedule as currently written, i.e., as amended, which would be more favorable to the veteran. *Id.* ("The [Board is] required to reevaluate the veteran's claim using the amended rating schedule."). In other words, this sentence in *Green* was not speaking broadly about how rating by analogy should be accomplished in all instances. Rather, properly taken in context, this statement simply informs the VA that, when determining which listed condition should be used to rate a veteran's condition by analogy, it must apply the relevant version of the rating schedule.

In this case, Mr. Webb seeks to have his unlisted condition rated by analogy under § 4.20, which explicitly does not require that he demonstrate that his condition is identical to a listed one. But no agency or court has yet appropriately applied the explicit requirements of § 4.20 to Mr. Webb's case. Instead, the Veterans Court concluded that he is not entitled to benefits because his unlisted condition did not meet each of the criteria of a listed condition—a requirement not present in the words of the regulation. Because the Veterans Court thus misinterpreted the requirements of § 4.20, we vacate and remand for that court to "suit the action to the word, the word to the action,"[4]—in other words, to reconsider Mr. Webb's case under a proper understanding of § 4.20 as informed by this opinion.

***1383** CONCLUSION

We have considered the government's remaining arguments and find them unpersuasive. For the reasons above, we vacate the Veterans Court's decision and remand for proceedings consistent with this opinion.

VACATED AND REMANDED

COSTS

Costs to appellant.

All Citations

71 F.4th 1377

Footnotes

1 We note that *Lendenmann* requires that each of these three factors be "analogous," while § 4.20 requires that these factors be "closely analogous." To the extent this inconsistency is meaningful, however, we need not address it further here, as it makes no difference to our opinion in this case.

2 The Schedule has since been revised to provide for a zero percent, i.e., noncompensable, disability rating for ED alone. *See* 38 C.F.R. § 4.115b, DC 7522 (2021) (providing a zero percent rating for "[e]rectile dysfunction, with or without penile deformity"). The government properly notes that this revised version of DC 7522 does not apply to Mr. Webb's case because nothing in the revised rule indicates that it was intended to apply retroactively. *See* 38 U.S.C. § 5110(g); *see also* Appellee's Br. 7 n.3 (agreeing that the revised version of DC 7522 does not apply to Mr. Webb's case).

3 And, as Mr. Webb highlights in his briefing, the Veterans Court has, in nonprecedential decisions, repeatedly concluded similarly in cases specifically involving rating by analogy to DC 7522. Appellant's Br. 2 & n.4. For example, in *Hernandez v. McDonough*, No. 20-0665, 2021 WL 3285043 (Vet. App. Aug. 2, 2021), the Veterans Court explained that "[u]nder an analogous rating code, the disability being rated is not expected

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to manifest all the objective criteria of the analogous rating." *Id.* at *4 (citing *Stankevich*, 19 Vet. App. at 472). Similarly, in *Ellis v. McDonald*, No. 15-1264, 2016 WL 3541006 (Vet. App. June 29, 2016), the Veterans Court reversed the Board, stating that "the Board itself rated ED by analogy," and "therefore a veteran [did] not necessarily have to show" all the requirements of the analogous diagnostic code. *Id.* at *3 (cleaned up). In another example, the Veterans Court vacated the Board's decision in *Wilkins v. McDonald*, No. 13-3260, 2015 WL 9463256 (Vet. App. Dec. 28, 2015), explaining that, "[i]n its attempt to rate by analogy, it appears that the Board explains that Mr. Wilkins is not entitled to a compensable disability rating ... because he fails to meet the requirements for a listed [condition]." *Id.* at *3. In the *Wilkins* court's view, the Board's "discussion [was] troubling because, if Mr. Wilkins had the symptoms of Diagnostic Code 7522, then rating by analogy would not be necessary." *Id.*

4 WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2, ll. 18–19.

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2023 WL 7503091
Only the Westlaw citation is currently available.
United States Court of Appeals for Veterans Claims.

Bryan J. HELD, Appellant,
v.
Denis MCDONOUGH, Secretary
of Veterans Affairs, Appellee.

No. 21-8048
|
(Argued October 5, 2023)
|
(Decided November 14, 2023)

Synopsis

Background: Agent sought review of decision of Board of Veterans' Appeals denying agent's request for fees for his work in connection with veteran's successful clear and unmistakable error (CUE) motion to revise Department of Veterans Affairs (VA) regional office (RO) decision regarding veteran's post traumatic stress disorder (PTSD) disability rating.

Holdings: The Court of Appeals for Veterans Claims, Michael P. Allen, J., held that:

to be eligible for fees under statute, agent was not required to file notice of disagreement (NOD) as to challenged decision

regulation requiring filing of NOD as prerequisite for fee award is invalid as inconsistent with statute;

ruling that regulation was invalid was not an impermissible advisory opinion; and

remand was warranted for Board to consider whether agent was entitled to fees under terms of fee contract.

Reversed and remanded.

Procedural Posture(s): Review of Administrative Decision.

West Codenotes

Held Invalid
38 C.F.R. § 14.636(c)(2)(ii)

On Appeal from the Board of Veterans' Appeals

Attorneys and Law Firms

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James R. Drysdale, with whom Catherine C. Mitrano, Acting General Counsel; Mary Ann Flynn, Chief Counsel; and Jonathan G. Scruggs, Acting Deputy Chief Counsel, all of Washington, D.C., were on the brief for the appellee.

Before ALLEN, FALVEY, and JAQUITH, Judges.

Opinion

ALLEN, Judge:

***1** Words matter. And, for a court, when Congress uses the words at issue, they matter a lot. When stripped to its essentials, this appeal is about our duty to apply the law Congress enacted—not the one the Agency might have wished Congress had put on the books.

Appellant Bryan J. Held is a VA-accredited agent who agreed to represent U.S. Army veteran Eric D. Roberts on a contingent-fee basis before VA, an arrangement in which appellant would be entitled to receive 20% of past-due benefits awarded to the veteran based on appellant's representation. Appellant assisted the veteran in making a motion to revise a February 2017 VA regional office (RO) decision dealing with the veteran's PTSD disability rating based on clear and unmistakable error (CUE). That motion was successful, leading to an award of past-due benefits in a December 2019 RO decision. Appellant then sought fees for his successful representation of the veteran in connection with the CUE motion. This appeal, which is timely and over which the Court has jurisdiction, [1] concerns an August 24, 2021, Board of Veterans' Appeals decision that denied appellant any fees for his work in connection with the veteran's successful CUE motion.

To summarize what follows, we will reverse the Board's decision that appellant is barred from receiving fees as a matter of law and remand this matter for further proceedings concerning whether agent fees are warranted under the fee agreement between appellant and the veteran. At the time of the December 2019 RO decision on the veteran's CUE motion, 38 U.S.C. § 5904(c)(1) provided that "a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on

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which a claimant is provided notice of the agency of original jurisdiction's [(AOJ's)] initial decision under section 5104 of this title with respect to the case." [2] The parties agree—and the Court concurs—that under section 5904(c)(1), the "initial decision ... with respect to the case" refers to the February 2017 RO decision concerning the veteran's PTSD rating, the decision in which the veteran later asserted CUE was present. The parties also agree—and the Court concurs—that notice of that February 2017 decision was provided under 38 U.S.C. § 5104. So, everything that Congress required under section 5904(c)(1) to warrant a fee was in place when the RO granted the veteran's CUE motion in December 2019. This would appear to be an open and shut statutory case for awarding a fee. And it should have been as far as the statute was concerned.

So, why are we here? The answer is that the Board skipped over the statute Congress enacted. Instead, the Board relied on a regulation, 38 C.F.R. § 14.636(c)(2)(ii), to deny the fees appellant sought. [3] That regulation adds requirements to what Congress included in section 5904(C)(1) as that statute existed in December 2019 when VA granted the veteran's CUE motion. Although § 14.636(c)(2)(ii) does not use the statutory phrase "initial decision ... with respect to the case," it nevertheless provides that agents (or attorneys) may charge fees in cases involving the representation of a veteran with a decision subject to a CUE motion. However, § 14.636(c)(2)(ii) conditions the entitlement to such fees on the filing of a qualifying Notice of Disagreement (NOD) on or after June 20, 2007. Both parties agree that the veteran here did not file such an NOD and that if § 14.636(c)(2)(ii) is valid, appellant is not entitled to a fee as a matter of law.

***2** Appellant challenges the validity of § 14.636(c)(2)(ii), asserting that its fee limitation based on the submission of an NOD is inconsistent with the plain language of 38 U.S.C. § 5904(c)(1). This matter was referred to a panel of the Court primarily to address whether § 14.636(c)(2)(ii) invalidly conditions eligibility for fees in connection with a successful CUE motion to revise an RO decision that had been issued before the effective date of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), [4] on an NOD having been filed with respect to the challenged decision on or after June 20, 2007. We held oral argument in this matter on October 5, 2023, at the University of Florida Levin College of Law. [5] We thank the students, staff, and faculty of the College of Law for their hospitality during our visit.

Because section 5904(c)(1) as it existed at the time of the December 2019 rating decision granting the veteran's CUE motion (and today) does not condition the eligibility for entitlement to attorney or agent fees on the filing of an NOD at any time, we hold that VA's implementing regulation, § 14.636(c)(2)(ii), that includes such a requirement is invalid. Under the statute, an agent (or attorney) is eligible for a fee once "notice of the [AOJ's] initial decision under section 5104 of this title with respect to the case" has been issued. [6] Requiring more than what Congress put into place is unlawful. Therefore, we will invalidate § 14.636(c)(2)(ii) and reverse the August 24, 2021, Board decision that relied on that regulation to deny appellant agent fees as a matter of law. We will then remand this matter for the Board to consider whether, with the regulation removed from the equation, appellant is entitled to a fee, including based on the Secretary's late-raised argument concerning the terms of the fee agreement between appellant and the veteran.

I. BACKGROUND

The veteran served on active duty in the United States Army from June 1984 to August 1984, November 1990 to June 1991, and June 2004 to June 2007. [7] In December 2016, the veteran filed a request for a temporary total disability rating (100%) for his service-connected PTSD. At the time of his request, the veteran was in receipt of disability benefits for PTSD rated at 70%, effective August 2010. [8] In February 2017, the RO granted the veteran's request for a temporary total disability rating based on a period of hospitalization. [9] The RO also stated (erroneously as it turns out) that following the temporary total disability rating, the veteran would revert to his "prior evaluation of 50%." [10]

In August 2017, the veteran submitted correspondence to VA indicating that his PTSD rating was improperly reduced. [11] The following month, VA informed the veteran that it would not take further action unless he "1) filed ... a VA Form 21-0958, NOD, to the February 2017 rating decision, 2) submitted or identified new evidence related to the previously denied issue, or 3) identified CUE in the February 2017 rating decision." [12]

In March 2018, the veteran appointed appellant to represent him in proceedings before VA and submitted a fee agreement

providing for a 20% contingency fee for appellant's representation leading to an award of past-due benefits. [13] The Board found this fee agreement "to be valid, as it was properly filed with VA and contains all required information in accordance with 38 C.F.R. § 14.636(g)." [14] In September 2018, the veteran, through appellant, moved to revise the February 2017 RO decision based on CUE. The veteran argued that the RO erroneously reduced his disability rating for PTSD from 70% to 50% after his temporary total disability rating had expired. [15]

***3** In February 2019, while the veteran's CUE motion was pending, VA implemented the AMA, the new, modernized appeal system that Congress had created. In December 2019, the RO granted the veteran's CUE motion, acknowledging that the veteran was entitled to, and should have received, a 70% disability rating for PTSD after his temporary total disability rating expired. [16]

In April 2020, appellant sought entitlement to fees that he had earned by representing the veteran throughout the successful CUE motion proceedings. [17] In March 2021, the RO denied appellant's fee request, stating that "[b]efore February 2019 fees were only payable for representation after a notice of [sic] NOD was filed with respect to a decision." [18] The RO stated that, because the February 2017 RO decision was not the subject of an appeal before the veteran made his September 2018 CUE motion, "this award warrants no direct payment of fees." [19] Appellant appealed the VA's denial of fees to the Board, contending that he was eligible to receive fees for work that resulted in the favorable December 2019 RO decision.

In the August 2021 decision on appeal, the Board continued to deny appellant fees. While the Board cited section 5904, it did not address the language Congress used in that statute. Instead, the Board relied on VA's regulation dealing with fees associated with CUE motions when the decision being challenged in such a motion had been issued before the AMA became effective. The Board explained that this regulation, § 14.636(c)(2)(ii), required that, to earn a fee when CUE is found in a pre-AMA RO decision, a qualifying NOD must have been filed on or after June 20, 2007. The Board concluded that "[a]s no NOD had been filed, the appellant is not entitled to fees for his representation with respect to the request for a revision of the February 2017 rating decision[,] ... there is no legal basis to grant the claim under ... § 14.636(c)(2)(ii)." [20] Appellant appealed that decision to the Court, leading to today's decision.

II. ANALYSIS

A. Section 5904(c)(1)'s plain language allows fees in the situation before the Court.

There is no dispute that at the time VA granted the veteran's CUE motion in December 2019, section 5904(c)(1) provided as follows as relevant to this appeal:

> A fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5140 of this title with respect to the case. [21]

Our role when interpreting a statute is well settled. "We look to the plain meaning of the statute, and when we find the plain meaning, our job is simply to apply it." [22] Here, Congress provided that a fee was permissible after VA provided notice under section 5104 of the "initial decision ... with respect to the case." [23] Congress imposed no other requirements with respect to an agent or attorney charging a fee.

***4** When we consider this plain and unambiguous statutory language in conjunction with the undisputed facts, the answer to the legal question before us is clear. Both parties agree that the "case" for which fees are at issue is the veteran's claim concerning his disability rating for PTSD. [24] Next, both parties agree that the "initial decision" with respect to that case is the February 2017 rating decision. [25] And there is no dispute that VA provided the veteran notice of the February 2017 rating decision under section 5104. [26] There simply is no doubt that appellant is entitled to a fee as far as the statute goes.

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B. 38 C.F.R. § 14.636(c)(2)(ii) is inconsistent with section 5904(c)(1).

Despite the plain language of section 5904(c)(1), the Board relied on § 14.636(c)(2)(ii) to deny appellant's claim for agent fees.[27] The Board had no discretion about whether to apply that regulation because Board members are required to apply the regulations set forth in title 38 of the Code of Federal Regulations.[28] Section 14.636(c)(2)(ii) provides:

> Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. § 5109A or the Board of Veteran's Appeals under 38 U.S.C. § 7111 based on clear and unmistakable error if notice of the challenged decision was issued before the effective date of the modernized review system as provided in § 19.2(a); a[n NOD] was filed with respect to the challenged decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.[29]

If this regulation is valid, we must affirm the Board's decision. But it's not.

On its face, § 14.636(c)(2)(ii) limits paid representation to those cases in which "a[n NOD] was filed with respect to the challenged decision on or after June 20, 2007[.]"[30] Simply stating the obvious, § 14.636(c)(2)(ii) requires more than Congress required in section 5904(c)(1) concerning when an agent or attorney may charge a fee. It is clear that section 5904(c)(1) only restricts an attorney or agent's ability to obtain fees for work performed "before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title with respect to the case." We repeat: When the words of a statute are clear, that is the end of our inquiry.[31] Because section 5904(c)(1) as it existed at the time of the December 2019 rating decision granting the veteran's CUE motion does not restrict the ability of an attorney or agent to charge fees based on the filing of an NOD, VA's regulation § 14.636(c)(2)(ii) containing that restriction is in conflict with the text of the statute.[32] We have the authority to "hold unlawful and set aside" regulations that are "in excess of statutory jurisdiction, authority, or limitations" to the extent such action is necessary to decide a given case.[33] We will exercise that authority today. We hold that § 14.636(c)(2)(ii) is invalid because it is inconsistent with section 5904(c)(1).[34]

C. Caselaw underscores the invalidity of § 14.636(c)(2)(ii).

***5** The plain language of section 5904(c)(1) as of the December 2019 decision is enough to decide this case. However, caselaw concerning the award of agent and attorney fees over the years underscores our holding.

Congress has long recognized the importance of a VA claimant's ability to retain paid representation for assistance with VA benefits claims. In fact, "Congress has thrice changed the triggering event for when attorneys' fees may be charged, each time shifting the entry point for such fees—and thus a claimant's ability to retain paid representation—earlier in the administrative appeals process."[35] Congress sets forth its fee regulations in section 5904(c)(1).[36]

In 1988, when section 5904(c)(1) was first enacted, attorneys could only charge fees for work performed after the Board made "a final decision in the case."[37] Then, in 2006, Congress amended section 5904(c)(1) to allow attorneys to charge fees for work performed after an NOD "is filed with respect to the case."[38] And in 2019, when the AMA took effect,[39] Congress amended its fee statute to state the language we have before us today:

> A fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a claimant is provided notice of the

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> agency of original jurisdiction's initial decision under section 5140 of this title with respect to the case. [40]

The Federal Circuit explained that the latest amendment "was part of a continuing congressional effort to enlarge the scope of activities for which attorneys can receive compensation for assisting veterans."[41] Although the language in section 5904(c)(1) is unambiguous, we will review the Federal Circuit's consideration of these fee statutes because that consideration underscores our conclusion in this appeal.

In 2002, the Federal Circuit interpreted the language from the 1988 version of section 5904(c)(1) in *Stanley v. Principi*.[42] In *Stanley*, an attorney was seeking fees for work performed in a veteran's case that led to a successful motion to reopen a previous unappealed adverse decision. At the time *Stanley* was decided, an attorney could not charge a fee until the Board had issued a final decision. Because the Board had issued the decision that reopened the veteran's claim, the primary issue in *Stanley* was whether that decision to reopen constituted a final decision for fee purposes.

Stanley is important for this appeal because it held that section 5904(c)(1) "was designed to allow attorneys' fees, after the initial claims proceeding, in connection with proceedings to reopen a claim [based on] ... clear and unmistakable error."[43] The Federal Circuit explained that "VA clearly concluded that the definition of a final decision on an issue must be liberal enough to allow attorneys' fees in reopening proceedings."[44] The court concluded that a Board decision reopening a claim constituted a final decision for the purposes of entitlement to obtaining fees.[45] While certainly not dispositive, *Stanley* supports appellant's position that he is entitled to fees for work performed in the connection with the veteran's CUE motion because, despite interpreting a more restrictive version of section 5904(c)(1) then in place, the Federal Circuit made clear that an attorney (or agent) can get paid for work performed on a claim to reopen an earlier final decision based on CUE.

***6** In 2006, the Federal Circuit decided *Carpenter v. Nicholson*.[46] In *Carpenter*, the Federal Circuit also considered the issue of entitlement to attorney fees where an attorney represented a veteran who sought to revise a prior final decision based on CUE. *Carpenter* was primarily about how a "case" was defined under an earlier version of section 5904(c)(1). The Federal Circuit reaffirmed the interpretation of section 5904(c)(1) set forth in *Stanley*, holding that "a veteran's claim based on the specified disability does not become a different 'case' at each stage of the often lengthy and complex proceedings, including remands as well as reopenings as in *Stanley*."[47] Particularly, the Federal Circuit emphasized that "the reopening of a claim ... [based on CUE] is within the statutory entitlement to attorney fees."[48]

Carpenter also supports appellant's position because it underscores that the December 2019 decision granting the veteran's CUE motion in our appeal was part of the same "case" as the initial decision in February 2017. And, as we have discussed, the version of section 5904(c)(1) that was in effect when VA issued the December 2019 decision granting the veteran's CUE motion allowed for an agent and an attorney to obtain a fee in that situation so long as notice under section 5014 had been provided, as it was here in connection with the 2017 initial decision in the "case."

But even more telling than these decisions concerning earlier versions of section 5904 is the Federal Circuit's 2021 decision in *MVA*. In that case, the Federal Circuit addressed challenges under the Administrative Procedure Act to several regulations VA had adopted to implement the AMA. One such challenge concerned 38 C.F.R. § 14.636(c)(1)(i) dealing with the allowance of fees to attorneys and agents for work performed at the AOJ with respect to supplemental claims.[49] VA's regulation provided that an attorney or agent could not charge a fee for a supplemental claim that was filed *more than* 1 year after the "initial decision" in a "case" even though fees were available in connection with a supplement claim filed *within* 1 year of such an "initial decision."[50] The Federal Circuit invalidated that regulation, a companion to the one before us, holding that "§ 14.636(c)(1)(i) is contrary with [sic] the plain and ordinary meaning of [section] 5904(c)(1)[,]" because it distinguished between two types of supplemental claims, allowing fees to be charged for one but not the other.[51] The Federal Circuit explained that section 5904(c)(1) unambiguously permits paid representation for "all forms of administrative review under the AMA."[52] The Federal Circuit explained that section 5904(c)(1) contained no limitation on representatives' fees other than requiring "notice of the ... initial decision ... with respect to the case."[53] Of course, that is precisely the point we have made about the Secretary's regulation concerning fees related to CUE motions addressing initial decisions before the AMA

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became effective. Further, the Federal Circuit reinforced its decisions in *Stanley* and *Carpenter*, holding that "we have never denied attorneys' fees for work performed on reopening proceedings ... § 5904(c)(1) plainly permits paid representation for all forms of administrative review after the AOJ's initial decision on the original claim for benefits."[54] There is no more justification for VA adding requirements to section 5904(c)(1) for CUE motions than there was for such an action with respect to supplemental claims.

***7** It is clear that navigating the VA benefits system can be a complicated endeavor. And there is no question that it is particularly difficult to overcome a final unappealed decision. The evolution of section 5904 reflects congressional recognition of the importance of allowing veterans to obtain representation and for their representatives to charge fees, including in the context of reopening matters, especially those involving CUE motions. Further, the caselaw makes clear that limiting fees for work performed by representatives in CUE matters to only those cases in which an NOD had been filed on or before June 2007 would preclude payment of fees in most CUE cases—an outcome the Secretary acknowledged during oral argument.[55] There is no doubt that this would be detrimental to veterans because it would deter representatives from taking cases involving CUE motions. Indeed, in many cases involving CUE, an NOD would not have been filed because the "sole purpose of a CUE [motion] is to provide a VA claimant with an opportunity to challenge a decision that is otherwise final and unappealable."[56]

During oral argument, the Secretary asserted that there was no need for representation in this matter because the error VA made in the February 2017 decision was easily corrected when brought to the Agency's attention.[57] However, the record clearly refutes the Secretary's assertion. The record shows that the veteran attempted to correct the issue on his own before obtaining representation, but he was unsuccessful in his self-represented attempt to have VA fix its obvious mistake.[58] So, if anything, this series of events underscores the importance of representation by an agent or attorney.

D. The Secretary's arguments defending § 14.636(c)(2)(ii) are unpersuasive.

We have just explained that (1) section 5904(c)(1) is unambiguous and plainly allows a fee in the situation before the Court and (2) § 14.636(c)(2)(ii) is inconsistent with the statute because it requires that an agent or attorney do more than Congress required in order to charge a fee. Our reasoning is straightforward. The statute in place at the time of the December 2019 rating decision granting the veteran's CUE motion unquestionably allowed an agent or attorney to charge a fee. And the law does not allow an Agency to preempt Congress via a regulation.

The Secretary mounts a defense of the regulation on which the Board relied that injects needless complexity into what is, in reality, a straightforward matter. In a nutshell, the Secretary argues that we should reject appellant's argument that § 14.636(c)(2)(ii) is invalid because the regulation is consistent with the legacy fee statute that was in place before the AMA took effect. The Secretary explains that the AMA applies only to claims in which VA issues a decision on or after February 19, 2019, but here the initial decision was issued in February 2017 and so, he reasons, the legacy fee statute applies even though the December 2019 decision granting the CUE motion was governed by the AMA.[59] And, the Secretary continues, under the legacy version of section 5904(a)(1), fees were only permitted for work performed after a claimant filed an NOD.[60] To reiterate, the Secretary contends that the relevant statute for determining fees for appellant's representation of the veteran in connection with a CUE motion was *not* the one in force in December 2019 when VA granted the motion but rather the one that had been in place in February 2017. We find the Secretary's argument unpersuasive.

We begin with the legacy/AMA divide because that is a critical part of the Secretary's argument. Congress provided that the AMA "shall apply to all claims for which notice of a decision under section 5104 of title 38, United States Code, is provided by the Secretary of Veterans Affairs," on or after February 19, 2019.[61] In particular, the AMA applies to all "claims, requests for reopening of finally adjudicated claims, and requests for revision based on [CUE] for which VA issued notice of an initial decision on or after [February 19, 2019]."[62] There is no question then that the AMA (including the version of section 5904(c)(1) without reference to an NOD) applied at the time of the December 2019 rating decision granting the veteran's CUE motion.[63]

***8** We pause for a moment to make an important point about terminology. The phrase "initial decision" contained in § 19.2 refers to something different from the phrase "initial decision ... with respect to the case" contained in section 5904(c)(1). An "initial decision" under § 19.2 refers to the

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decision that triggers the application of the AMA, whereas the "initial decision ... with respect to the case" under section 5904(c)(1) refers to the decision that triggers an agent's (or attorney's) ability to charge fees for representation of a claimant. No one contests—indeed, it is difficult to see how one could contest—that the December 2019 decision is an "initial decision" under § 19.2; it is the decision in which the RO found CUE in its February 2017 rating decision. To state the obvious, the December 2019 decision was issued after the effective date of the AMA and the Board itself concedes as much. [64] Therefore, the AMA governs the matter that is before us today because the "initial decision" for that purpose is the December 2019 decision granting the veteran's CUE motion. [65] But that point should not obscure that the real work in terms of the appropriateness of the fees at issue is done by the phrase "initial decision ... with respect to the case" in section 5904 that we have spent so much time discussing.

In his briefing, the Secretary contends that the AMA version of section 5904(c)(1) that was unquestionably in force at the time of the December 2019 decision granting the veteran's CUE motion is not applicable by relying on *Perciavalle v. McDonough*. [66] However, his reliance on *Perciavalle* is misplaced. In that case, there was no issue about whether the AMA should apply—the matter before the Court was strictly a legacy case. [67] The Secretary cites to a footnote that he asserts supports his position. [68] The problem is that the footnote he references simply indicates that the AMA had been signed into law in 2017, but at the time of the March 2018 Board decision on appeal in that case, the AMA had not yet gone into effect so it was not applicable to the case. [69] It was merely an informative footnote—not some sort of broad holding as the Secretary suggests.

During oral argument, the Secretary also asserted that the Court's decision in *Mattox v. McDonough* supported his position. [70] Once again, we disagree with the Secretary. In *Mattox*, the veteran was denied service connection in a *pre-AMA* decision and he filed a timely *pre-AMA* NOD with that *pre-AMA* decision. [71] Thereafter, VA issued a *pre-AMA* Statement of the Case, and appellant perfected his appeal to the Board by filing a *pre-AMA* Substantive Appeal. [72] All of these events occurred before the effective date of the AMA and appellant in *Mattox* did not opt into the AMA at any point. The only thing in *Mattox* that took place after the effective date of the AMA was that the Board issued a decision on the veteran's *legacy* claim that had proceeded in the *legacy* system. [73] Given all this, it is not the least bit surprising that the Court found it to be obvious that "the initial decision that led to appellant's administrative appeal" was the *pre-AMA* rating decision that denied service connection for an acquired psychiatric disorder. [74] We face an entirely different situation. Most importantly, the December 2019 rating decision that granted the veteran's CUE motion was issued under the auspices of the AMA. And the statute providing for the award of fees for AMA decisions is the version of section 5904(c)(1) that does not refer to an NOD. It is true that the "initial decision ... with respect to the case" was a pre-AMA February 2017 rating decision, but that fact does not matter under the language Congress used in the version of section 5904(c)(1) in effect when the CUE motion was granted. And, as we've mentioned several times, the parties agree that the "initial decision ... with respect to the case" was the February 2017 rating decision for which VA provided section 5104 notice. [75] To reiterate, that is all the statute requires to make a fee allowable.

***9** The bottom line is clear. There simply is nothing to support the Secretary's assertion that we are at liberty to apply the pre-AMA version of section 5904(c)(1) to the award of past-due benefits in the December 2019 AMA decision.

E. A final matter: We will remand for the Board to consider the potential import of the veteran's fee agreement with appellant.

During oral argument, the Secretary argued for the first time that appellant may not be entitled to a fee in this case based on the terms of the fee agreement itself. Specifically, the Secretary contended that the fee agreement included language making the receipt of fees contingent on an NOD being filed on or after June 19, 2007. [76] In other words, the Secretary posited that, regardless of whether the pre-AMA version of section 5904(c)(1) applied in this case as a matter of law, as a matter of contract the same outcome would result. The Secretary also stated that if the Court agreed with appellant on the law in this matter, remand was appropriate for the Board to consider the matter. Appellant urged the Court to refrain from considering the Secretary's late-raised argument and insisted that any questions concerning the content of the fee agreement involve factual determinations that should be decided by the Board in the first instance. [77]

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The first issue we must resolve concerning the Secretary's contract-based argument is whether it has some impact on our jurisdiction to address the validity of § 14.636(c)(2)(ii). We have adopted the case and controversy requirements of Article III of the Constitution. [78] So, we need to ensure that we would not be rendering an advisory opinion about § 14.636(c)(2)(ii) given the contract-based argument. [79]

We conclude that the contract-based argument does not undermine our jurisdiction to address the validity of § 14.636(c)(2)(ii). Our job is to review final Board decisions. [80] Not only did the Board effectively limit its consideration of appellant's fee request to § 14.636(c)(2)(ii), it had no choice to do otherwise. VA regulations provide that the Board is "bound by ... regulations of the Department of Veterans Affairs." [81] So, the Board has never had a meaningful opportunity to consider the contract-based argument because, as a practical matter, it couldn't venture beyond the terms of § 14.636(c)(2)(ii). Under these circumstances, addressing the validity of § 14.636(c)(2)(ii) is not advisory because either that regulation is unlawful (as we hold) and VA can move forward to address the contract-based argument or it is lawful and there is no need to delve into those largely unchartered waters.

But the mere fact that the contract-based argument does not deprive us of jurisdiction to address the validity of § 14.636(c)(2)(ii) says nothing about whether we should address the contract-based argument in this appeal. We decline to do so. First, this Court discourages, and generally will not consider, arguments raised by counsel at oral argument for the first time. [82] Second, as we've noted, until now the Board was bound by § 14.636(c)(2)(ii). So, the Board made no findings concerning whether fees would be precluded based on the content of the fee agreement itself. [83] Third, and relatedly, questions about the extent to which VA wishes to police contracts through its direct fee authority are ones the Agency should consider in the first instance. And finally, we believe it is best to allow the Board to consider how, if it all, its determination that the fee agreement at issue in this case is "valid" affects the Secretary's contract-based argument. [84]

***10** Because the Board relied on an invalid regulation to review the eligibility of appellant to collect fees *and* made no factual or legal determinations in the first instance about whether appellant is entitled to fees under the contract itself, or even if the fees requested are reasonable, [85] the prudent course of action is for the Court to remand this matter for the Board to consider these issues in the first instance should it consider that to be necessary. [86]

III. CONCLUSION

In sum, 38 C.F.R. § 14.636(c)(2)(ii) is invalid because it contravenes the plain and ordinary meaning of 38 U.S.C. § 5904(c)(1), which permits paid representation once a claimant receives notice of the AOJ's "initial decision ... with respect to the case." Because the Board relied on the invalid regulation in reaching its August 2021 decision, we REVERSE its decision that appellant is not entitled to a fee under the terms of the regulation that purports to implement section 5904(c)(1). We REMAND this matter for the Board to address appellant's fee request anew, including under the terms of the fee agreement itself as appropriate, without regard to the now-invalidated § 14.636(c)(2)(ii).

All Citations

--- Vet.App. ----, 2023 WL 7503091

Footnotes

1 *See* 38 U.S.C. §§ 7252(a), 7266(a).

2 38 U.S.C. § 5904(c)(1).

3 We don't fault the Board for relying on the regulation. It was bound to do so. *See* 38 C.F.R. § 20.105 (2023).

4 Pub. L. No. 115-55, 131 Stat. 1105 (2017) (codified in various sections of title 38, U.S. Code).

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5 Oral Argument (OA), *Held v. McDonough*, U.S. Vet. App. No. 21-8048 (oral argument held Oct. 5, 2023), https://www.youtube.com/watch?v=81c4iWG4zeg.

6 38 U.S.C. § 5904(c)(1).

7 Record (R.) at 4 (Aug. 2021 Board decision).

8 R. at 2919 (Feb. 2017 rating code summary).

9 R. at 2922-24 (Feb. 2017 RO decision).

10 *Id.* at 2923.

11 R. at 6 (Aug. 2021 Board decision).

12 *Id.* The August 2017 correspondence and September 2017 VA letter in response are not included in the record of proceedings before the Court. However, neither party disputes the content of these communications.

13 *See* R. at 2854.

14 R. at 6. This is a favorable finding that the Court lacks jurisdiction to review. *See Medrano v. Nicholson,* 21 Vet.App. 165, 170 (2007)*, aff'd in part, dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009).

15 R. at 2818 (Sept. 2018 CUE motion).

16 R. at 1186 (Dec. 2019 RO decision). The veteran's disability rating was reduced without affording him his due process right to contest the reduction. *Id.*; *see* 38 C.F.R § 3.105(e) (2017).

17 R. at 1153-54 (Apr. 2020 fee request).

18 R. at 564 (Mar. 2021 VA summary of the case).

19 R. at 565.

20 R. at 7-8.

21 38 U.S.C. § 5904(c)(1) (2019).

22 *Frantzis v. McDonough*, 35 Vet.App. 354, 360-61 (2022); *see Kisor v. Wilkie*, —— U.S. ——, 139 S. Ct. 2400, 2415, 204 L.Ed.2d 841 (2019); *Artis v. District of Columbia*, 583 U.S. 71, 83, 138 S.Ct. 594, 199 L.Ed.2d 473 (2018); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Frederick v. Shinseki*, 684 F.3d 1263, 1269 (Fed. Cir. 2012).

23 38 U.S.C. § 5904(c)(1).

24 OA at 16:00-:26, 50:48-:58, 57:35-58:15.

25 OA at 16:00-:26, 30:05-:35, 50:48-:58.

26 OA at 12:54-13:20. In his brief, the Secretary cites VA's letter/decision notifying the veteran of the February 2017 RO decision. Secretary's Brief (Br.) at 2 (citing R. at 2900).

27 R. at 7-8.

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28 38 C.F.R. § 20.105.

29 38 C.F.R. § 14.636(c)(2)(ii).

30 *Id.*

31 *See Frantzis*, 35 Vet.App. at 360-61; *see Kisor*, 139 S. Ct. at 2415; *Artis*, 583 U.S. at 83, 138 S.Ct. 594; *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778; *Frederick*, 684 F.3d at 1269.

32 *Bates v. United States*, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.").

33 38 U.S.C. § 7261(a)(3)(C).

34 *See, e.g*,. *Spicer v. McDonough*, 61 F.4th 1360, 1366 (Fed. Cir. 2023) (striking down a VA regulation as unlawful when it was inconsistent with a statute Congress had enacted); *Terry v. McDonough*, —– Vet.App. ——–, ——–, 2023 WL 6892631, at *——–, 2023 U.S. App. Vet. Claims LEXIS 1620, at *26 (Oct. 19, 2023) (same); *Crumlich v. Wilkie*, 31 Vet.App. 194, 203-04 (2019) (same); *Staab v. McDonald*, 28 Vet.App. 50, 55 (2016) (same).

35 *Mil.-Veterans Advoc. Inc. v. Sec'y of Veterans Affairs* (*MVA*), 7 F.4th 1110, 1135 (Fed. Cir. 2021) (providing a thorough review of the statutory history since 1864, when attorneys were first allowed to charge fees for their work on VA benefits claims).

36 Formerly 38 U.S.C. § 3404(c)(1).

37 38 U.S.C. § 3404(c)(1) (1988).

38 38 U.S.C. § 5904(c)(1) (2006).

39 AMA, Pub. L. No. 115-55 sec. 2(x) (the AMA "shall apply to all claims for which notice of a decision under section 5104 of title 38, United States Code, is provided by the Secretary of Veterans Affairs," on or after February 19, 2019, the effective date of the AMA).

40 38 U.S.C. § 5904(c)(1) (2019).

41 *MVA*, 7 F.4th at 1136.

42 283 F.3d 1350 (Fed. Cir. 2002).

43 *Id.* at 1358.

44 *Id.*

45 *Id.* at 1358-59.

46 452 F.3d 1379, 1383 (Fed. Cir. 2006).

47 *Id.* at 1384.

48 *Id.* at 1379.

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49 *MVA*, 7 F.4th at 1135-41. A "supplemental claim" is "a claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis." 38 U.S.C. § 101(36).

50 *MVA*, 7 F.4th at 1137.

51 *Id.* at 1141. In its decision on appeal, the Board also concluded that appellant was not entitled to past-due benefits under § 14.636(c)(1)(i), which, as we have explained, was invalidated per *MVA*. The Board's reliance on the invalid § 14.636(c)(1)(i) as additional support to deny appellant fees does not undercut our statutory analysis that invalidates § 14.636 (c)(2)(ii), the Board's primary reason for denying appellant fees in this appeal. Indeed, the Federal Circuit in *MVA* invalidated § 14.636(c)(1)(i) using the same support and similar analysis that we use today to invalidate § 14.636 (c)(2)(ii).

52 *Id.* at 1138.

53 *Id.*

54 *Id.* We note that the Federal Circuit also rejected VA's argument that the court should assume that Congress implicitly adopted VA's longstanding practices under the legacy system when it enacted the AMA. The court stated that "it [is] unlikely that Congress intended to preserve the VA's 'longstanding interpretation' of the fee statutory provision from the superseded legacy system, especially where the regulation at issue contradicts both the plain and ordinary meaning of the statutory provision and the statutory history." *Id.* at 1140.

55 OA at 46:30-55:46.

56 *See May v. Nicholson*, 19 Vet.App. 310, 317 (2005) (emphasis omitted), *aff'd*, 208 F. App'x 924 (Fed. Cir. 2006).

57 *See* OA at 42:40-46:30.

58 R. at 6 (Board discusses veteran's unsuccessful attempts to have VA correct its error).

59 Secretary's Br. at 6.

60 *Id.* at 7 (citing 38 U.S.C. § 5904(c)(1) (2018)).

61 Pub. L. No. 115-55 sec. 2(x).

62 38 C.F.R § 19.2(a)-(b) (2023); 38 C.F.R. § 3.2400(a)(1) (2022); *see also Mattox v. McDonough*, 34 Vet.App. 61, 69 (2021), *aff'd*, 56 F.4th 1369 (Fed. Cir. 2023).

63 *See Mattox*, 34 Vet.App. at 69.

64 R. at 8.

65 *Mattox*, 34 Vet.App. at 69.

66 *See* Secretary's Br. at 12 (citing *Perciavalle v. McDonough*, 32 Vet.App. 117, 120 n.4 (2019), *aff'd*, 847 F. App'x 914 (Fed. Cir. 2021)).

67 *Perciavalle*, 32 Vet.App. at 118-20.

68 *See* Secretary's Br. at 12.

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69 *Id.* at 120 n.4.

70 OA at 52:00-:51 (referencing *Mattox*, 34 Vet.App. at 69).

71 *Mattox*, 34 Vet.App. at 64.

72 *Id.*

73 *Id*. at 64-65.

74 *Id.*

75 OA at 16:00-:26, 30:05-:35, 50:48-:58.

76 OA at 1:01:46-:02:46 (referencing R. at 2854 (Mar. 2018 fee agreement)).

77 OA at 1:03:20-:07:34 (referencing *Tadlock v. McDonough*, 5 F.4th 1327, 1333-34 (Fed. Cir. 2021)).

78 *See Kernz v. McDonough*, —— Vet. App. ——, ——, No. 20-2365, 2023 WL 6459373, at *——, 2023 U.S. App. Vet. Claims LEXIS 1575, at *18 (Oct. 4, 2023) (en banc); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990).

79 *See Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *Waterhouse v. Principi*, 3 Vet.App. 473, 474 (1992).

80 *See* 38 U.S.C. §§ 7252(a), 7266(a).

81 38 C.F.R. § 20.105.

82 *Ray v. Wilkie*, 31 Vet.App. 58, 69 (2019); *Overton v. Wilkie*, 30 Vet.App. 257, 265 (2018).

83 *See Viterna v. McDonough*, 65 F.4th 1378,1382 (Fed. Cir. 2023) (the Board is authorized to review the terms of a fee agreement).

84 *See* R. at 8.

85 We note that VA's Office of the General Counsel has exclusive jurisdiction to review a fee agreement's reasonableness in the first instance. 38 U.S.C. § 5904; 38 C.F.R. § 14.636(i) (2023).

86 *Tadlock*, 5 F.4th at 1337-38.

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