No. 18-2569

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THURMAN HACKETT,
Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

OPENING BRIEF OF APPELLANT, THURMAN HACKETT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

APPENDIX (Historical Regulations and Statutes)

CASES

CAVC MEMORANDUM DECISIONS (Non-precedential)

OTHER AUTHORITIES

CITATIONS TO THE RECORD.

I. ISSUES PRESENTED FOR REVIEW

ISSUE #1

The Court reviews, for abuse of discretion, a BVA decision that a claimant did not file an informal claim. The BVA considered no statutes or regulations and found it was not bound by Court precedent. It did not analyze or apply the identification and intent elements of an informal claim. It did not consider whether the VA sent the required application form in response to an informal claim. It simultaneously found that there was no informal claim to service connect schizophrenia and that the informal claim to service connect schizophrenia was not adjudicated. Is the BVA's decision arbitrary, capricious, an abuse of discretion or not in accordance with the law?

ISSUE #2

The Court must take due account of the rule of harmless error. If the Court must make a finding of fact to conclude that the BVA's abuse of discretion did not harm Mr. Hackett, it must remand the BVA decision. If the uncontroverted evidence in Mr. Hackett's favor shows the 1956 Stockton Claim letter was an informal claim to service connect schizophrenia for compensation, left open and pending until 2015, the CAVC may reverse the BVA decision. Should the Court remand or reverse the BVA decision?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement.

The Court has exclusive jurisdiction to review BVA decisions. 38 U.S.C. §7252(a).

B. Statement of the Case and Relevant Facts.

In 1956, at least two types of service connection benefits were available. Service connection for disability compensation paid a veteran monthly compensation for a disability related to service. Service connection for hospital treatment allowed the VA to reimburse private hospitals that treated a veteran's psychosis, that was diagnosed within 2 years of military discharge.

1. *In 1956, the VA had to send the appropriate claim form to a claimant in response to an informal claim for service connected compensation for a disability.*

In 1933, Congress authorized payment of monthly pensions to veterans for disease or injury incurred in active military service. 73 Pub. L. No. 2 (March 1933), *attached at* Appx9-18.[1] Congress gave the Veterans Administration (hereinafter "VA") power to regulate hearings, determinations and administrative review. 38 Pub. L. No. 2., Title I, §9, *attached at* Appx11. Congress required that "payments shall not be made for any period prior to date of application." 73 Pub. L. No. 2, Title I, §9 (1933), *attached at* Appx11.

President Roosevelt issued VA Regulation No. 2(a), requiring that veterans applying for the benefit file with the VA "[a] specific claim on the form prescribed." Exec. Order No. 6090 (March 31, 1933), Part II, Section I (March 31, 1933), *attached at* Appx24,26; *accord,* Exec. Order No. 6230, Part I, Section VI (July 28, 1933), *attached at* Appx44,48. If that claim was not complete at the time of application, the VA was required to "notify the claimant of the evidence necessary to complete the application." Exec. Order No. 6230, Part I, Section I(a)(2), *attached at* Appx44, 45. In 1946, Congress began to distinguish compensation from pension claims: claims to "monetary benefits…for service-connected disability or death shall be designated compensation and not pension." 38 U.S.C. §700, 48 Stat. 526 (July 9, 1946). In 1948, the VA softened Regulation No. 2, adding an informal claim rule: "[a]ny communication from or action by…some person acting as next friend of a claimant who is not sui juris, which clearly indicates an intent to apply for disability

[1] Historical, and in some cases superseded, versions of certain statutes and regulations are attached in an Appendix. Page numbers to the Appendix are cited as Appx#.

or death compensation or pension may be considered an informal claim." 38 C.F.R. §3.27 (1948), *attached at* Appx1-2. "To constitute an informal claim, the communication must specifically refer to and identify the particular benefit sought." *Id*. The veteran had "1 year from the date a [formal application] was transmitted for execution by the claimant" to file a formal application. *Id.* "In every instance where a disallowance is effected, the veteran or his duly authorized representative will be informed of the action taken." 38 C.F.R. §3.200 (1948). These regulations were still in effect in 1956. 38 C.F.R. §3.27 (1956), *attached at* Appx6-8.

2. In 1956, the VA reimbursed a private hospital's costs to treat a veteran's psychosis by granting its claim of service connection for hospitalization.

In October 1951, Congress enacted a presumption that veterans who developed a psychosis within 2 years of their separation from service could be service connected for treatment and hospitalization purposes. 38 U.S.C. Chapter 12A (1952); 85 Pub. L. No. 239, 65 Stat. 694 (October 30, 1951), *attached at* Appx80 (hereinafter, "PL 239"). Due to limited beds for patients covered by the law, the VA secured an appropriation in 1952 to allow private hospitals to seek reimbursement for care furnished veterans under PL 239.[2] This benefit was known as service connection for hospital treatment.

3. While Mr. Hackett was hospitalized as a catatonic schizophrenic in 1956, Stockton Hospital claimed state and federal benefits for him.

Mr. Hackett served as a US Marine from October 1953 to December 1955. R. at 1018–1019. Seven months after leaving service, he was committed to a California state psychiatric

[2] 1952 Annual Report, p. 7 (June 30, 1952), *found at* https://www.va.gov/vetdata/docs/FY1952.pdf (last visited January 7, 2019).

hospital and then transferred to the Stockton State Hospital (hereinafter "Stockton"). R. at 65, 1133, 1197. Doctors at Stockton observed Mr. Hackett and found him mentally confused, irrational, delusional and having auditory hallucinations. R. at 64, 65. He was diagnosed as schizophrenic[3] (catatonic) and found mentally incompetent. R. at 19, 76 – 77.

In the weeks after his commitment to Stockton, the hospital began applying for benefits for Mr. Hackett. The hospital informed Mr. Hackett's mother that they were filing a claim for disability insurance with the state of California. *See* R. at 44. They sent a letter with Mr. Hackett's fingerprints to the VA Central Office to find out if he was a veteran.[4] They filed an "Application for Hospital Treatment or Domiciliary Care" with the San Francisco VA Regional Office (hereinafter, "VARO") on VA Form 10-P-10. R. at 48, 55. The VARO responded to this claim by preparing a "Request for Administrative and Adjudicative Action" based on the July 13,1956 letter. R. at 1185 – 1186, at Block 41. The VARO authorized Stockton to treat Mr. Hackett, at VA expense under PL 239, effective September 7, 1956. R. at 57; *accord* R. at 1160 – 1161 (notifying veteran of their decision). Stockton later sought reimbursement for the services provided prior to that date. R. at 50, 1144, 1147, 1152 – 1158. It appears that they received that reimbursement sometime after January 14, 1958. R. at 1133.

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[3] The contemporaneous medical record notes specific service-related delusions: Mr. Hackett believed the Marines "thought I was a spy taking pictures of the bombers," thought it was March 1955 and he was still in the Marines, and spoke of "delusional material concerning his experiences in the Marines." R. at 39, 64, 76.

[4] The VA Central Office confirmed Mr. Hackett was a veteran on July 23, 1956. R. at 35, 36, 1191.

The same day it requested confirmation he was a veteran (i.e., June 22, 1956), Stockton also sent the following request to the VARO:

> "If this patient is found to be a veteran kindly advise us whether or not he is in receipt of compensation of pension, and if so for what disabilities. If no claim is on file, please treat this communication as an informal claim filed in behalf of the above-named patient. If he has a service-connected disability for Mental Illness, please issue authorization for treatment and transportation from Fresno County to Stockton. At such time this patient has been identified by your Identification Bureau VA Form 10-P-10, Application for Hospital Treatment and Domiciliary Care will be submitted in behalf of our patient." R. at 46; (hereinafter, the "1956 Stockton Claim"); *see also,* R. at 819 (cleaner copy)

On August 1, 1956, the VARO requested Mr. Hackett's service medical records, seeking records of treatment of a psychosis in the Marines. R. at 1006.[5] They received some service and medical records in September 1956. R. at 1164 – 1184. In July 1957, in response to the VARO's December 1956 request to Stockton, Dr. Adams told the VARO that Mr. Hackett had been diagnosed with schizophrenia, and was admitted and treated at Stockton from June 8 to August 30, 1956. R. at 58, 1144 – 1145. Attached to the letter were two medical reports. R. at 38 – 39, 64; *accord,* R. at 56 ("Thank you for your letter of July 17, 1957, giving Mr. Hackett's admission and discharge reports.") The Stockton admission report noted a specific delusion: "I was in the Marine corps where they thought I was a spy taking pictures of the bombers. They got me in Tokyo where I was having the pictures developed." R. at 64. The Stockton discharge report noted that same

[5] The request is dated August 1, 1956 (Block 7) and it appears to have been returned to the VA after August 29, 1956. R. at 1006 (requesting more information "to facilitate a search for the these records.") The Duty Station Number "3043" which was the requestor of these records matched the duty station reference number for the San Francisco VA Regional Office "3043" found in other contemporaneous records. R. at 627, 1127, 1130, 1187.

delusion and also noted that during his treatment, he "spoke about some delusional material concerning his experiences in the Marines." R. at 38 – 39. Mr. Hackett was "on leave" from Stockton from August 1956 to November 1957, during which time, he collected unemployment compensation, worked "some odd jobs," and was making a "marginal adjustment." R. at 52 – 53.

The VA never sent Stockton the form necessary to formalize its claim for service connected disability compensation. The VA did not decide the issue of service connection of schizophrenia for compensation purposes until it granted those benefits in 2015.

4. In 2015, the VA granted service connection for Mr. Hackett's schizophrenia.

In 2014, Mr. Hackett claimed service connected disability compensation for a mental condition. R. at 1085, 1126. He detailed the circumstances surrounding his experience in the military. R. at 873 – 874. His claim was initially denied in July 2015, and Mr. Hackett sought reconsideration a month later. R. at 827, 883, 968. The claim was "reopened" in November 2015, and service connection for schizophrenia was granted with a 70% rating, and a March 11, 2015, effective date. R. at 746. In January 2016, the Secretary granted TDIU, effective November 18, 2015. R. at 634, 657, 715. Following appeal, the Secretary assigned an earlier effective date for TDIU to March 11, 2015. R. at 636.

In June 2016, Mr. Hackett told the Secretary that service connection for compensation should have been awarded in 1956. R. at 473. In October 2016, he timely filed a notice of disagreement with the schizophrenia and TDIU effective dates. R. at 449, 425. Four months later, the Secretary granted an earlier effective date of March 2014 for both TDIU and service-connection of schizophrenia. R. at 262, 377. Mr. Hackett timely appealed the effective date decisions to the

BVA, seeking an earlier effective date. R. at 231 (SOC March 28, 2017), R. at 213 (VA Form 9, April 5, 2017); R. at 183 (SOC, October 31, 2017); R. at 176 (VA Form 9, November 2, 2017). His attorney filed a brief in support of this appeal in February 2018, with substantial evidence. R. at 18 – 79. The BVA issued its decision April 18, 2018. R. at 2 – 12.

5. The BVA denied Mr. Hackett's appeal for an earlier effective date, finding there was no informal claim in 1956.

The BVA denied effective dates earlier than March 11, 2014, for the schizophrenia service connection claim and the TDIU claim. R. at 2 – 12. The BVA said that "the e-file does not contain any earlier communication from the Veteran indicating an *intent* to claim service-connected compensation benefits for schizophrenia for compensation purposes or TDIU." R. at 6 (emphasis in original). It acknowledged Mr. Hackett's argument that the 1956 Stockton Claim letter should be considered a "claim for compensation for schizophrenia." R. at 7. However, the BVA found the letter "clearly only refers to treatment and transportation." *Id; contra* R. at 46. The BVA added that since "the claim for service connection for schizophrenia for compensation purposes was not adjudicated, there is no question of finality." *Id.*

The BVA also found that "[e]ven if … the Veteran filed a claim for service connection," statutes enacted in 1958 would not apply to a claim filed in 1956. *Id.*. In response to Mr. Hackett's argument that the Court's precedent required the BVA find that the 1956 Stockton Claim letter was an informal claim, the BVA found that "[n]or would the ensuing court cases apply, which the attorney cites in his arguments, as they do not retroactively apply to 1956. *Id.*

III. SUMMARY OF THE ARGUMENT

Mr. Hackett seeks an earlier effective date for the Secretary's 2015 grant of service connection for his schizophrenia. He argues that a 1956 letter from Stockton Hospital was an informal claim for multiple benefits: service connected disability compensation for his schizophrenia, a non-service connected pension, and service connection for hospitalization and treatment of his schizophrenia. Because the VA did not adjudicate the informal claim for disability compensation and pension, it remained open and pending until the 2015 decision awarding service connection.

The BVA abused its discretion in deciding there was no claim for benefits prior to 2015. Its decision was not in accordance with the law because it did not consider any statutes or regulations, and rejected the rudimentary principle that "judicial decisions operate retrospectively." Its decision is capricious because it made the terse statement that no communication before 2015 evidenced an intent to claim disability compensation while ignoring favorable evidence that Stockton Hospital specifically referenced disability compensation in its 1956 informal claim. The BVA arbitrarily decided that letter "clearly only refers to treatment and transportation," while ignoring the immediately preceding sentences that specifically ask the VA to treat the letter as an informal claim if the veteran was not already in receipt of compensation for a service-connected mental health disability. The BVA decision is arbitrary and capricious because it failed to consider whether the VA properly responded to the 1956 informal claim letter by sending the claimant an application form to formalize the claim. Finally, since the BVA simultaneously finds both that

there was no informal claim and that the informal claim was not adjudicated, without explaining how both findings could be correct, its decision is capricious.

If the Court agrees that the BVA abused its discretion in finding that there was no informal claim for disability compensation prior to 2015, it may remand or reverse. The appropriate remedy depends on whether the Court finds the material facts favorable to Mr. Hackett to be disputed or uncontroverted. If the Court believes there is a genuine dispute whether the 1956 Stockton Claim letter was an informal claim left open and pending until 2015, it may remand to the BVA for adequate reasoning in support of its finding of facts and conclusions of law. If the Court agrees with Mr. Hackett that the uncontroverted evidence favorable to Mr. Hackett establishes that the 1956 Stockton Claim letter was a claim for disability compensation for Mr. Hackett's schizophrenia, it may reverse the BVA decision.

Mr. Hackett respectfully requests that the Court find that the BVA abused its discretion in finding that the 1956 Stockton Claim letter was not an informal claim for disability compensation, left open and pending until 2015. He asks the Court to reverse the BVA because the uncontroverted evidence favorable to his argument shows that the 1956 Stockton Claim letter is a claim for disability compensation for schizophrenia, left open and pending and unadjudicated until the Secretary granted service connection for schizophrenia in 2015. In the alternative, he asks the Court to remand the appeal so that the BVA can provide adequate statements of reasons and bases for its findings of fact and conclusions of law on Mr. Hackett's claim for an earlier effective date.

IV. STANDARD OF REVIEW

The standard of review for each asserted error is applied in its respective argument, below.

V. ARGUMENT

1. The BVA abused its discretion by deciding the 1956 Stockton Claim letter was not an informal claim while rejecting "stare decisis," failing to analyze the elements of an informal claim, ignoring whether the BVA properly responded to an informal claim, and inconsistently finding both that no informal claim had been filed and that the informal claim had not been adjudicated.

1.1. An informal claim is a written communication that expresses an intent to file a claim and identifies the benefit sought.

The effective date of a claim can, generally, be no earlier than the date of application. 73 Pub. L. No. 2, Title I, §9 (1933), *attached at* Appx11. "Any communication from or action by…some person acting as next friend of a claimant who is not sui juris, which clearly indicates an intent to apply for disability or death compensation or pension may be considered an informal claim." 38 C.F.R. §3.27 (1956), *attached at* Appx6-8. "To constitute an informal claim, the communication must specifically refer to and identify the particular benefit sought." *Id.* If the veteran submitted an incomplete claim with his application, the VA was required to "notify the claimant of the evidence necessary to complete the application." Exec Order No. 6090, Section I(a)(2) (March 31, 1933), *attached at* Appx25. Even in 1956, a veteran had "1 year from the date a [formal application] was transmitted for execution by the claimant" to file a formal application. 38 C.F.R. §3.27 (1956), *attached at* Appx6-8.

A claim remains pending until it is finally adjudicated. *See Richardson v. Nicholson,* 20 Vet. App. 64, 72 n. 8 (2006) ("A claim that has not been finally adjudicated is necessarily pending.")

In deciding if a prior claim was left open and pending, the BVA must consider all theories reasonably raised in the record. *See Roberson v. Principi,* 251 F.3d 1378 (Fed. Cir. 2001). It must look for the 3 basic elements of a claim: "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing." *See Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009).

The intent requirement is fulfilled when a veteran "sufficiently manifest[s] an intent to apply for benefits for a particular disease or injury in a VA form." *Ellington v. Nicholson*, 22 Vet. App. 141, 146 (2007). In determining whether a written communication demonstrates intent, the BVA may not require veterans file explicit claims for specific diseases or diagnoses because that would be "overly technical and generally incompatible with the 'veteran-friendly,' nonadversarial, administrative claims system." *DeLisio v. Shinseki*, 25 Vet. App. 45, 55 (2011). Instead, the BVA must consider "the conditions stated and the causes averred to determine whether a claim is reasonably raised." *See Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007). It must 'sympathetically assess' and 'liberally construe' evidence in the record. *Robinson v. Shinseki*, 557 F.3d 1355, 1359–1362 (Fed. Cir. 2009). It must investigate reasonably apparent and potential causes of a condition and theories of service connection reasonably raised by the record or a 'sympathetic reading' of the claim. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000). The BVA must consider "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim," including information gathered by the Secretary in its investigation. *Clemons*, 23 Vet. App. at 5. This includes consideration of "…the reasonable expectations of the [claimant] or the particular language of the

claim form." *Clemons*, 23 Vet. App at 5-6; *accord, Robinson v. Shinseki*, 557 F.3d 1355, 1361-1362 (Fed. Cir. 2009).

In determining whether a written communication identifies the benefit sought, the Court has held a veteran does not have to "specifically" identify the benefit he seeks. *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992). "Requiring precision as a prerequisite to acceptance of a communication as an informal claim would contravene the Court's precedents and public policies underlying the veterans' benefits statutory scheme." *Id.* Nor is an informal claim required to specifically identify regulatory or statutory provisions corresponding to the benefits sought. *See Douglas v. Derwinski*, 2 Vet. App. 103, 109 (1992)(Douglas I); *see Douglas v. Derwinski*, 2 Vet. App. 435, 442 (1992) (en banc) (Douglas II). Such a requirement "would change the [nonadversarial] atmosphere in which [VA] claims are adjudicated." *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991). The rule that the Secretary need not go on an "unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation" logically would not apply when a veteran points to a specific written communication that he alleges constitutes an informal claim. *See Brokowski*, 23 Vet. App at 86.

1.2. The Court reviews, for abuse of discretion, a BVA decision that a claimant did not file an informal claim.

The BVA determination of an effective date is a finding of fact, reviewed for clear error. 38 U.S.C. §7261(a)(4). The Court finds clear error when it is left with the "definite and firm conviction that a mistake" was made. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

However, determining whether a claimant filed an informal claim requires an application of law to the facts. *Westberry v. West*, 12 Vet. App. 510, 513 (1999); *contra e.g., Dixon v. Peake*, No. 05-2374, 2007 U.S. App. Vet. Claims LEXIS 1991, at *15 (Dec. 21, 2007) (deciding whether an informal claim has been filed is a substantially factual determination that the Court reviews under the "clearly erroneous" standard of review).[6] The Court sets aside BVA applications of law to fact when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. §7261(a)(3)(A); *see Butts v. Brown*, 5 Vet. App. 532, 538 – 540 (1993) (en banc). While this standard of review is deferential, there are several ways the BVA can abuse its discretion. First, if the BVA does not articulate a satisfactory explanation for its decision – one that includes "a rational connection between the facts found and the choice made" – that decision is arbitrary or capricious. *Lane v. Principi*, 16 Vet. App. 78, 83 (2002). Second, a BVA decision is arbitrary or capricious if it is not premised on a rational basis and supported by appropriate, relevant and properly articulated factors. *Gilbert v. Derwinski*, 1 Vet. App. 49, 58 (1990), *citing Motor Vehicle Mfrs. Ass'n of the United States, Inc., v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 – 43 (1983). Likewise, where there are two permissible views of the evidence of record, if the BVA does not include an adequate statement of reasons or bases for the view it chose, its decision is arbitrary or capricious. *Gilbert*, 1 Vet. App. at 58. Third, a lower court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous

[6] The Supreme Court has held that a clearly erroneous finding of fact is necessarily an abuse of discretion. *Cooter & Gell,* cited below.

assessment of the evidence. *Highmark Inc. v. Allcare Health Mgmt.Sys.*, 572 U.S. 559, 563 n.2 (2014), *quoting Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Mr. Hackett points to two non-precedential memorandum decisions where the Court has persuasively reasoned how the abuse of discretion standard of review applies to a BVA decision evaluating if a written communication constitutes an informal claim.

In one appeal, the BVA found that a June 1976 letter from the veteran to the VA was not an informal claim, noting the letter only mentions the veteran's inability to work, hospitalization and surgery. *Richards v. Principi*, No. 99-2127, 2002 U.S. App. Vet. Claims LEXIS 1025, at *9 (Nov. 22, 2002). The Court explained the BVA's decision was arbitrary and capricious because it failed to look at the next sentence in the 1976 letter, which discussed eligibility for compensation. *Id.* The Court further explained that if the letter was an informal claim, the BVA also failed to consider if the VA had sent the application form that would allow the claim to be formalized. *See id*; *accord, Vda De Landicho v. Brown*, 7 Vet. App. 42, 50 (1994); *Servello*, 3 Vet. App. at 199 – 200.

In another case, the Court remanded a BVA decision that did not adequately explore the identification and intent elements of a particular written communication to determine if it was an informal claim. *See Adams v. Principi*, No. 01-1927, 2003 U.S. App. Vet. Claims LEXIS 830, at *12 – 14 (Oct. 16, 2003). The BVA included only a terse statement that it had "reviewed the evidence prior to [the current effective date], and was unable to identify any statement or other evidence which meets the regulatory requirements of an informal claim for benefits." *Id.* The Court noted the abuse of discretion standard of review, and then found that the BVA failed to provide adequate reasons why the veteran's written affidavit noting a diagnosis of a condition, hospitalization for

treatment of that condition, and lay testimony recalling a doctor's statement of nexus for that condition was not an informal claim. *Id.*

1.3. The BVA's decision is not in accordance with the law when it decided it was not bound by Court precedent, arbitrary and capricious because it did not analyze the elements of an informal claim or consider if the VA properly responded to an informal claim, and capricious when it simultaneously found that no informal claim had been filed and that the informal claim had not been adjudicated.

The BVA decision was not in accordance with the law because it did not consider any statutes or regulations and found it was not bound by Court precedent. The decision was arbitrary and capricious because it did not analyze the intent and identification elements of an informal claim. The BVA abused its discretion by not considering if the VA responded to an informal claim by sending the appropriate claim form. The BVA decision is capricious because it simultaneously found both that there was no informal claim for service connection and that "the service connection claim was not adjudicated."

1.3.1. A BVA decision is not in accordance with the law if it does not consider any statute or regulation, and rejects the rudimentary principle that "judicial decisions operate retrospectively."

In choosing which law it would apply to its decision denying an earlier 1956 effective date, the BVA abused its discretion in two ways.

First, the BVA found that even if "it was determined that the Veteran filed a claim for service connection" through the 1956 Stockton Claim letter, the BVA found statutes passed in 1958 would not apply to that claim. R. at 7.

Whether or not this is true, the BVA neither considered nor explained why it did not consider that the Secretary's own regulations, in place years before and at the time of the 1956 Stockton Claim letter, included an informal claim rule that is similar, in relevant parts, to today's rule. 38 C.F.R. §3.27 (1948), *attached at* Appx1-2; *accord* 38 C.F.R. §3.27 (1956) *attached at* Appx6-8. That rule requires the VA consider "any communication … which clearly indicates an intent to apply for disability or death compensation" to be an informal claim. *Id.* It requires the VA respond to an informal claim by sending a claims form for the veteran to complete and return. *Id.* And it precludes an award of benefits from that informal claim if a formal claim form is not "received within 1 year from the date [the claim form] was transmitted for execution by the claimant." 38 C.F.R. §3.27 (1956), *attached at* Appx6-8; *see also* 73 Pub. L. 2 §9 (1933), *attached at* Appx11 (monthly payments for service connected compensation begin on the "date of application"). Further, since 1933, the VA's regulations have required the VA to "notify the claimant of the evidence necessary to complete the application." Executive Order 6090, Part I(a)(2) ("Effective Dates of Awards of Disability and Death Pensions") (March 31, 1933), *attached at* Appx25.

To say that 1958 statutes do not apply when deciding whether a written communication in 1956 is an informal claim may, by itself, be an abuse of discretion. The BVA, however, did not explain whether it considered the statutes and regulations in 1956 or the statutes and regulations at the time of the March 11, 2015, claim. Because only the BVA knows what statutes and regulations it applied to decide the 1956 Stockton Claim letter was not an informal claim for service connected disability compensation, its decision is arbitrary.

Second, the BVA decided that "the ensuing court cases" – presumably any Court decision after 1958 – does "not retroactively apply to 1956." R. at 7. This statement runs afoul of a "first principle" of American jurisprudence. The "principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Brewer v. West*, 11. Vet. App. 228, 233 (1998), *citing Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994), *quoting United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). The Court has applied this rudimentary tenet in cases exploring the very question Mr. Hackett raised at the BVA – whether a written communication constitutes an informal claim. *Criswell v. Nicholson*, 20 Vet. App. 501 (2006) (applying case law decided from 1999 to 2006 to hold that a 1947 claim could not serve as the effective date for a 1997 claim to service connect frostbite of the hands because it did not reasonably raise that claim). While this rule would not apply to a CUE claim that considers "the law that existed at the time of the prior AOJ or BVA decision," this case does not involve a CUE claim. *Russell v. Principi*, 3 Vet. App. 310, 313 – 314 (1992). This case involves the adjudication of a direct appeal of a 2016 rating decision establishing effective dates for service connection and TDIU. Stare decisis requires the BVA honor Court precedent in effect at the time of its decision "unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. FEC*, 558 U.S. 310, 362 (2010). No such reasons exist here.

1.3.2. The BVA's decision that the 1956 Stockton Claim letter was not an informal claim is arbitrary and capricious because it did not analyze the intent and identification elements of an informal claim.

If the 1956 Stockton Claim letter identified the benefit sought and expressed an intent to claim benefits it is an informal claim. The BVA's failure to explore the element of intent was

capricious, and its finding that the letter did not identify a claim for service connection of schizophrenia is arbitrary.

1.3.2.1. The BVA's finding that no communication before 2015 showed intent to claim disability compensation is capricious because it ignores favorable evidence probative of Stockton's intent in 1956.

"Any communication from or action by…some person acting as next friend of a claimant who is not sui juris, which clearly indicates an intent to apply for disability or death compensation or pension may be considered an informal claim." 38 C.F.R. §3.27 (1956), *attached at* Appx6-8.

The BVA does not discuss Stockton's intent in seeking benefits in the 1956 Stockton Claim letter. It provides only this sentence: "the e-file does not contain any earlier communications from the Veteran indicating an *intent* to claim service connected compensation benefits for schizophrenia for compensation purposes or TDIU." R. at 6 (emphasis in original).

Just as the Court persuasively reasoned in it its memorandum decision in *Adams*, the BVA's terse statement that it was unable to identify an earlier communication that could be an informal claim is inadequately reasoned when it does not mention medical or other evidence, or discuss the element of intent. *See Adams*, 2003 U.S. App. Vet. Claims LEXIS 830, at *12 – 14. As it did in *Adams,* the BVA did not mention medical or other evidence probative of Stockton's intent in sending the 1956 Stockton Claim letter to the VA while Mr. Hackett was committed to a hospital and mentally incompetent. *See id.*

First, the BVA did not consider Stockton's actual description of the claim, or its "reasonable expectations…or the particular language on the claim form." *Contra Clemons*, 23 Vet. App. at 5 – 6. The 1956 Stockton Claim letter, for example, specifically asked the VA if Mr. Hackett received

any "compensation or pension." R. at 46. If no such claim was on file, it specifically asked the VA to "please treat this communication as an informal claim." *Id.* The BVA did not discuss this language. It said only that the 1956 Stockton Claim letter "clearly only refers to treatment and transportation." R. at 7. The BVA's decision to consider some language and ignore other language in the 1956 Stockton Claim letter is capricious, based on little more than a whim.

The evidence of record tends to prove that Stockton intended to apply for any state or federal compensation benefit on Mr. Hackett's behalf. The hospital would naturally apply for any benefit that might help them recover the cost of services provided to Mr. Hackett. They claimed transportation and hospitalization benefits under PL 239. R. at 48, 55. They claimed disability insurance benefits from the State of California. R. at 35, 36. They inquired whether Mr. Stockton was receiving pension or compensation benefits. R. at 46. If not, they asked the VA to consider the letter an informal claim for those benefits. *Id.* This evidence is probative of Stockton's intent in sending the VARO the 1956 informal claim, but the BVA did not mention it.

Second, the BVA did not liberally construe evidence in the record, or consider potential theories of service connection reasonably raised from a "sympathetic reading" of the claim. *Contra Schroeder,* 212 F.3d at 1271; *contra Robinson*, 557 F.3d at 1359 – 1362. The BVA should have acknowledged that the VA received psychiatric reports noting that Mr. Hackett's schizophrenia included delusions that the Marine Corps "thought [he] was a spy taking pictures of the bombers," that during treatment at Stockton he "spoke about some delusional material concerning his experiences in the Marines," and that he believed it was March 1955 and he was still in the Marines. R. at 39, 64, 127. It should have acknowledged that the VA received evidence that, after

his release from Stockton, Mr. Hackett was receiving unemployment compensation, and only working odd jobs. R. at 53 – 54. The BVA did not discuss this evidence, even though it is probative evidence that, combined with the 1956 Stockton Claim letter, Stockton sought service connected disability compensation for schizophrenia and TDIU benefits, or, at a minimum, claimed non-service-connected pension benefits.[7]

Third, the BVA did not consider whether the VA itself interpreted the June 1956 Stockton Claim letter as an informal claim for service-connected compensation when it began to develop evidence "in support of the claim" to find out if Mr. Hackett had been treated in service for his psychosis. R. at 5 – 7; *contra Clemons*, at 5 – 6. The VARO asked the Navy to provide Mr. Hackett's service medical records. R. at 1164. It specifically sought records relating to treatment of psychosis in service. *Id.* The VA did not need these records if it interpreted the 1956 Stockton Claim letter as a claim "only [for] treatment and transportation." *See* R. at 7. The only proof needed to award PL 239 benefits to Stockton was proof that Mr. Hackett had a psychosis within 2 years of his discharge from the Marines. *See* 38 U.S.C. Chapter 12A (1952), *attached at* Appx80. Stockton and the VA Central Office supplied this evidence. R. at 35, 46.

The only reason the VA would request records of treatment of a psychosis in the Marines was to develop claim for service-connected disability compensation for schizophrenia. The only

[7] Non-service connected disability pensions were available to veterans who were permanently disabled by a condition not incurred in service. Exec. Order No. 6089, Part III, Section I (March 31, 1933), *attached at* Appx23. Congress extended that benefit to all veterans who served after June 27, 1950. 65 Stat 40, 82 Pub. L. No. 28 (May 11, 1951), *attached at* Appx86.

reason it would develop this evidence is if it understood the 1956 Stockton Claim letter to be an informal claim for that benefit.

1.3.2.2. The BVA's decision that the 1956 Stockton Claim letter did not identify that it was seeking disability compensation benefits for Mr. Hackett's schizophrenia is arbitrary because it ignored a specific reference to that benefit in the letter.

The BVA arbitrarily decided that, in the 1956 Stockton Claim letter, "the trustee clearly only refers to treatment and transportation." R. at 7. To illustrate the arbitrariness of that finding, Mr. Hackett will refer to the actual language of the 1956 Stockton Claim letter:

> "If this patient is found to be a veteran kindly advise us whether or not he is in receipt of compensation of pension, and if so for what disabilities. If no claim is on file, please treat this communication as an informal claim filed in behalf of the above-named patient. If he has a service-connected disability for Mental Illness, please issue authorization for treatment and transportation from Fresno County to Stockton. At such time this patient has been identified by your Identification Bureau VA Form 10-P-10, Application for Hospital Treatment and Domiciliary Care will be submitted in behalf of our patient." R. at 46. (emphasis added).

The first sentence asks if Mr. Hackett is in receipt of "compensation or pension." R. at 46. It then provides two options, depending on the answer. If he was not in receipt of those benefits, and there was no disability compensation claim on file, the second sentence indicates Stockton wanted the communication to be construed as an informal claim for that benefit. *Id.* If, on the other hand, there was a "service-connected disability for Mental Illness," the third sentence requests authorization for treatment and transportation. *Id.*

Stockton was not required to specifically identify any particular benefit as a prerequisite to acceptance of the letter as an informal claim. *Servello*, 3 Vet. App. at 199. It need not even identify specific regulatory or statutory provisions. *Douglas*, 2 Vet. App. at 109. Nevertheless, Stockton

clearly identified three (3) benefits: compensation, pension, and authorization for treatment and transportation. R. at 46. The BVA's statement that the 1956 Stockton Claim letter only refers to the latter benefit, without any explanation why it does not include the first two benefits (compensation or pension) specifically mentioned, is the definition of arbitrary. It is "based on random choice or personal whim, rather than any reason or system." OxfordDictionaries.com, found at https://en.oxforddictionaries.com/definition/arbitrary (last visited January 4, 2019).

The BVA's error is like its error in the *Richards* decision. *Richards,* 2002 U.S. App. Vet. Claims LEXIS 1025, at *10. The BVA decided in *Richards,* like it did in this appeal, that a document discussing hospitalization was not an informal claim for service connected disability compensation. *Id;* R. at 7. In *Richards,* as in this appeal, the BVA arbitrarily failed to mention that another sentence in that letter discussed service connection eligibility. *Id.* The conduct the Court persuasively reasoned was arbitrary in *Richards* is also arbitrary in this appeal. By finding that the 1956 Stockton Claim letter "clearly only refers to treatment and transportation," the BVA arbitrarily ignores the letter's first two sentences that specifically reference disability compensation and pension, and notes an informal claim for one or both. R. at 7.

Even if there were two ways of reading the language in the 1956 Stockton Claim letter –as a claim for service connected disability compensation or as a claim for service connection for hospitalization under PL 239 – the BVA's decision is still an abuse of discretion. Where there are two permissible views of the evidence of record, the BVA's failure to adequately reason its conclusion choosing one over the other is arbitrary or capricious. *See Gilbert*, 1 Vet. App. at 58.

1.3.3. The BVA abused its discretion because it did not consider if the VA sent an application form to Stockton in response to its informal claim.

At the time of the 1956 Stockton Claim letter, the following VA regulation was in effect:

> "[A]ny communication from or action by a claimant…or some person acting as next friend of a claimant who is not sui juris, which clearly indicates an intent to apply for disability or death compensation or pension may be considered an informal claim. To constitute an informal claim, the communication must specifically refer to an identify the particular benefit sought. When such informal claim is received and a formal application is forwarded for execution by the claimant, such application shall be considered as evidence necessary to complete the initial application." 38 C.F.R. §3.27 (1956), *attached at* Appx6-8.

Any "award…by virtue of such informal claim" could not be granted "unless a formal application is received within 1 year from the date it was transmitted for execution by the claimant." *Id.* The clear implication of the language in the regulation is that the VA must respond to an informal claim by sending a formal application to the claimant. *See id.* It has long been the precedent of the Court that the one-year period for filing a formal claim does not begin to run in cases where the VA did not send a formal application form. *Servello*, 3 Vet. App. at 199 – 200 ; *see also Quarles v. Derwinski*, 3 Vet. App. 129, 136 – 138 (1992); *Vda De Landicho*, 7 Vet. App. at 50, *superseded by statute on unrelated grounds as noted in Reeves v. Shinseki,* 682 F.3d 988, 996 (Fed. Cir. 2012). As the Court persuasively reasoned in *Richards*, the BVA's failure to consider if the VA had sent the required form to allow Mr. Hackett to formalize the claim was arbitrary or capricious.

1.3.4. The BVA's decision is capricious because it does not explain how it could simultaneously find both that there was no informal claim for service connection and that the service connection claim was not adjudicated.

A BVA decision is arbitrary and capricious when it is based on "internally inconsistent BVA factfinding." *Mason v. Brown*, 8 Vet. App. 44, 53 (1995), *citing Bailey v. Derwinski*, 1 Vet. App.

441 (1991). The BVA has made two inconsistent, and contrary, findings. First, the BVA decided the 1956 Stockton Claim letter was not "a claim for compensation for schizophrenia." R. at 7. It then finds "the claim for service connection for schizophrenia for compensation purposes was not adjudicated." *Id.*

The BVA does not explain how it is possible to have an unadjudicated claim for service connected compensation for schizophrenia while simultaneously finding that there was no claim for service connected compensation for schizophrenia. The BVA's sudden and unaccountable change of position, absent the application of any discernible rule, is the definition of "capricious." OxfordDictionaries.com, found at https://en.oxforddictionaries.com/definition/capricious (last visited January 4, 2019).

2. The remedy for the BVA's abuse of discretion turns on whether the Court finds the material facts favorable to Mr. Hackett to be disputed or uncontroverted.

The remedy for the BVA's abuse of discretion depends on how the Court perceives the material facts favorable to Mr. Hackett's argument that the 1956 Stockton Claim letter is an informal claim for disability compensation for schizophrenia left open and pending until that benefit was granted in 2015. If the Court finds those facts are in dispute, remand is the appropriate remedy. If the Court finds the uncontroverted evidence favors Mr. Hackett's argument that the 1956 Stockton Claim letter is an informal claim for multiple benefits, including disability compensation for schizophrenia, non-service connected pension, and service connection for hospital treatment under PL 239, it should reverse the BVA and assign 1956 effective dates.

2.1. Remand is appropriate if the Court must resolve disputed material facts to find that the BVA's abuse of discretion was harmless.

The Court must take due account of the rule of prejudicial error. 38 U.S.C. §7261(b)(2). In doing so, the Court may "review[ ] 'the record of the proceedings before the Secretary and the [BVA]' " in order to determine whether a BVA error is prejudicial. *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007). The Court may only disregard those "…errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. §2111.

The Court [may] go outside the facts as found by the Board to determine whether an error was prejudicial." *Newhouse v. Nicholson*, 497 F.3d 129, 1302 (Fed. Cir. 2007). However, in reviewing facts outside those found by the BVA, the Court may not make findings of fact in violation of its jurisdictional charge. 38 U.S.C. §7261(c); *Conway v. Principi*, 353 F.3d 1369, 1375 n.4 (Fed. Cir. 2004) ("In cases in which the Board itself did not make findings on the completeness of the record or on other facts permitting a conclusion of lack of prejudice…it is questionable whether the Veteran's Court could arrive at the factual conclusion regarding prejudice in the first instance."); *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1363 (Fed. Cir. 2001) ("It is not the role of the Veteran's Court to make such factual determinations *sua sponte*. Rather, it should wait until the issue is 'properly presented on appeal.' ") Therefore, if deciding whether an error was harmless requires the Court to resolve a genuinely disputed fact, an appellant has a substantial right to the BVA's adequately reasoned findings of fact, the error is prejudicial and remand is required. *See e.g., Wood v. Peake*, 520 F.3d 1345,1351 (Fed. Cir. 2008) ("Because the evidence here is split, we cannot

conduct a harmless error analysis without exceeding the bounds of our jurisdiction, which precludes fact review.")

Mr. Hackett does not believe the Secretary can genuinely dispute that the 1956 Stockton Claim letter was anything but a claim for 3 benefits: service connected disability compensation, non-service-connected pension, and/or hospitalization. However, if the Secretary can prove a genuine dispute of fact that might controvert Mr. Hackett's view of the facts and evidence, the Court cannot resolve that dispute. It must find Mr. Hackett has been deprived the substantial right to findings of fact by the BVA and remand the appeal. *See e.g.,* 38 U.S.C. §7104(d)(1) (a BVA decision shall include written and reasoned findings of fact and conclusions of law).

2.2. The Court may reverse the BVA if the uncontroverted evidence shows the 1956 Stockton Claim letter was an informal claim for disability compensation for schizophrenia, left open and pending until that benefit was granted in 2015.

When the BVA's decision is "clearly erroneous in light of the uncontroverted evidence in appellant's favor," reversal is appropriate. *Hersey v. Derwinski*, 2 Vet. App. 91, 95 (1992).

There are only 3 ways to read the 1956 Stockton Claim letter. It could be an:

1) Informal claim for service connection for hospitalization only;
2) Informal claim for service connection for compensation or pension only; or,
3) Informal claim for both.

There is no uncontroverted evidence in the record that supports the finding that the 1956 Stockton Claim letter is only an informal claim for service connection for hospitalization.[8] To the

[8] Even if there was evidence probative of such an argument, Mr. Hackett's arguments here and before the BVA show a genuine dispute of those facts and attempt to controvert that evidence and any inference drawn from them; the Court must then remand the appeal to the BVA to resolve the disputed facts and provide reasoning for any such inference.

contrary, the uncontroverted evidence of record demonstrates that the 1956 Stockton Claim letter is a claim for three benefits: service connected disability compensation for schizophrenia, service connection of schizophrenia for hospital reimbursement, and a claim for non-service connected pension. The uncontroverted evidence shows that the Secretary first granted service connection for schizophrenia for compensation purposes and TDIU in its 2015 decision. The Court may reverse the BVA's decision and assign an effective date of December 9, 1955 for the Secretary's 2015 decision to service connect Mr. Hackett's schizophrenia for compensation purposes and its 2015 decision to award TDIU benefits.

VI. RELIEF REQUESTED

Mr. Hackett respectfully requests that the Court find the BVA's rejection of a 1956 effective date was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because it failed to say which statutes and regulations it applied; rejected the rudimentary principle that the Court's precedent is binding on the BVA; failed to analyze the intent and identification elements of an informal claim; did not consider whether the VA sent an application form in response to the informal claim; and/or, simultaneously found there was no informal claim for service connection for schizophrenia and that the service connection claim for schizophrenia was unadjudicated.

Mr. Hackett believes that the uncontroverted evidence supports his argument that the 1956 Stockton Claim letter is an informal claim for disability compensation benefits for schizophrenia and respectfully requests the Court reverse the BVA's finding and assign an

effective date of December 9, 1955. *Accord,* R. at 1018 – 1019; 38 U.S.C. §3010(b) (September 2, 1958) (effective date is date of discharge if a claim is filed within one year of military discharge).

However, if the Court believes that there is a genuine dispute as to whether the 1956 Stockton Letter is an informal claim for service connection of schizophrenia for disability compensation, he respectfully requests the Court set aside the BVA's decision and remand for the BVA to provide adequate statements of reasons and bases supporting its findings of fact and conclusions of law.

DATE: January 7, 2019

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on January 7, 2019, I caused Appellant's opening brief to be served on the Appellee by and through the Court's E-Filing system:

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