

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-0807

NATALIA A. HEREDIA, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

HAGEL, *Judge*: Natalia A. Heredia appeals through counsel a December 13, 2012, Board of Veterans' Appeals (Board) decision that denied entitlement to an earlier effective date for the award of dependency and indemnity compensation benefits. Mrs. Heredia's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). Neither party requested oral argument, nor have the parties identified issues that they believe require a precedential decision of the Court. Because the Board's denial of an earlier effective date for dependency and indemnity compensation benefits is not clearly erroneous, the Court will affirm the December 2012 Board decision.

I. FACTS

Veteran Joseph J. Heredia served on active duty in the U.S. Marine Corps from January 2001 to November 2004, when he died from combat-related injuries sustained while serving in Iraq.

In September 2008, Natalia A. Heredia, Mr. Heredia's surviving spouse, filed a claim for dependency and indemnity compensation benefits. That same month, the regional office issued a decision granting Mrs. Heredia's claim and stated that,

[w]e have no record of you applying for, or expressing an intent to apply for, death benefits at any time prior to September 4, 2008. When an application for benefits is received more than one year from the date of death, benefits are only payable from the date of application. Therefore, we granted service[-]connected death benefits, called dependency and indemnity compensation . . . effective September 4, 2008, the date we received your application.

Record (R.) at 67. Mrs. Heredia filed a Notice of Disagreement with that decision contesting the effective date and ultimately appealed to the Board.

In August 2012, Mrs. Heredia testified at a Board hearing that the effective date for the award of dependency and indemnity compensation benefits should be the date of Mr. Heredia's death. She stated that she "was unaware of this benefit until I visited a local VA office in search of information regarding education benefits . . . [and] the local VA representative . . . made me aware of the [dependency and indemnity compensation] benefit." R. at 18. She further testified that the casualty assistance officer did not discuss the possibility of dependency and indemnity compensation benefits with her upon Mr. Heredia's passing.

In December 2012, the Board issued the decision on appeal. The Board explained that because "there is no evidence of record of the intent on [Mrs. Heredia's] behalf to seek[dependency and indemnity compensation] prior to September 4, 2008. . . . The Board finds that the [regional office] has granted the earliest effective date possible based upon the facts in this case and the law and regulations." R. at 11. This appeal followed.

II. ANALYSIS

On appeal, Mrs. Heredia argues that she is entitled to an earlier effective date for the award of dependency and indemnity compensation benefits. The Secretary asserts that the Board's denial of an earlier effective date is not clearly erroneous because, as a matter of law, she is not entitled to one. Although the Court is sympathetic to Mrs. Heredia's circumstances, the Court agrees with the Secretary.

The effective date for an award of dependency and indemnity compensation benefits is the date of the receipt of the claim or the date entitlement to the benefit arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400 (2014). In certain circumstances, special effective date rules

apply; for example, if a veteran's death occurs in service and a claim is made within one year of the date of the veteran's death, the effective date is the first day of the month in which the death occurred; otherwise, the effective date is the date of receipt of the claim. 38 C.F.R. § 3.400(c)(2). Moreover, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that "the Secretary's failure to provide assistance to a claimant [does not] justif[y] ignoring the unequivocal command in [section] 5110(a) that the effective date of benefits cannot be earlier than the filing of the application therefor." *Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999). A Board's determination of the proper effective date is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); see *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Here, the Board explained that because "there is no evidence of the intent on [Mrs. Heredia's] behalf to seek [dependency and indemnity compensation] benefits prior to September 4, 2008," as a matter of law, the effective date can be no earlier than September 4, 2008, the date Mrs. Heredia filed her claim for dependency and indemnity compensation benefits. R. at 11. Consequently, absent any evidence that VA was made aware of Mr. Heredia's death prior to Mrs. Heredia's application for dependency and indemnity compensation benefits, Mrs. Heredia is not entitled to an earlier effective date as a matter of law. Therefore, the Court concludes that the Board's determination that she is not entitled to an earlier effective date is not clearly erroneous. See 38 U.S.C. § 7261(a)(4); *Hanson*, 9 Vet.App. at 32.

First, insofar as Mrs. Heredia argues that pursuant to 38 U.S.C. § 6303 (formerly § 7722)¹ and 38 C.F.R. § 3.150, VA had a duty to inform her of her eligibility for dependency and indemnity compensation benefits sooner and its failure to do so was error, the Court is not persuaded.

Pursuant to 38 U.S.C. § 6303(c), the Secretary "shall distribute full information to eligible veterans and eligible dependents regarding all benefits and services to which they may be entitled under laws administered by the Secretary." 38 U.S.C. § 6303(c) (emphasis added). Further, subsection (d) of section 6303 states that the Secretary "shall provide, to the maximum extent possible, aid and assistance . . . to members of the Armed Forces, veterans, and eligible dependents

¹ On June 15, 2006, section 7722 was repealed and recodified as section 6303. See Veterans' Housing Opportunity and Benefits Improvement Act of 2006, Pub. L. No. 109-233, sec. 402(e), 120 Stat. 397, 411.

with respect to subsections (b) and (c) and in the preparation and presentation of claims under laws administered by the Department." 38 U.S.C. § 6303(d). Section 3.150(b) states that "[u]pon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity compensation."

The Court recognizes Mrs. Heredia's assertion that VA received the Certificate of Death DD Form 2064 and, in the least, received the Report of Casualty DD Form 1300 and, thus, was informed of Mr. Heredia's death. *See* R. at 33 (Certificate of Death), 143 (Report of Casualty). However, Mrs. Heredia does not offer and a review of the record does not reflect that any document was ever sent to or actually received by VA prior to Mrs. Heredia's application for dependency and indemnity compensation benefits such that VA was aware that she was an eligible dependent. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Even if the Court assumes that VA received either of those documents, the Federal Circuit has held that the Secretary's failure to provide adequate assistance does not overturn the established policy of assigning effective dates in accordance with section 5110(a). *See Rodriguez*, 189 F.3d at 1355; *see also Andrews v. Principi*, 16 Vet.App. 309, 318 (2002) (holding that the Court is bound by *Rodriguez* and "section 5110's command as to effective dates is not subject to equitable tolling based on a failure to follow section 7722(d)") *aff'd*, 351 F.3d 1134 (Fed. Cir. 2003).

Second, Mrs. Heredia argues that VA had a duty to obtain her Social Security Administration records in light of the fact that a claim filed with the Social Security Administration "will be considered a claim for death benefits, and to have been received in the Department of Veterans Affairs as of the date of receipt in Social Security Administration." 38 C.F.R. § 3.153 (2014). VA is required to make reasonable efforts to obtain all records held by a governmental entity that are relevant to the claim and that pertain to the claimant's military service if the claimant provides the Secretary information sufficient to locate such records. 38 U.S.C. § 5103A(c)(1). Although Social Security Administration records can be relevant here, Mrs. Heredia does not assert that she ever identified those records such that VA could obtain them nor does she now assert that any such

records exist. *See Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error").

Third, Mrs. Heredia argues that the Board hearing officer "did not question [her] regarding [any potential Social Security Administration documents] at the hearing." Appellant's Brief (Br.) at 6. Because Mrs. Heredia fails to offer any support for her argument, the Court declines to address it any further. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments).

Finally, the Court recognizes that Mrs. Heredia also raises an equitable argument, but this Court cannot provide equitable relief. *See Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997) (noting that "this Court is not a court of equity and cannot provide equitable relief") (citing *Harvey v. Brown*, 6 Vet.App. 416, 425 (1994)). However, the Court would be remiss if it did not note that Mrs. Heredia's circumstances, on their face, are unconscionable. Assuming the accuracy of Mrs. Heredia's testimony—that she was not informed of her ability to obtain dependency and indemnity compensation benefits until approximately four years after her husband was killed in action—the Court is troubled that in instances when a servicemember's death occurs in service, there appears to be no efficient and reliable mechanism in place to advise that servicemember's family of the benefits available to them at the earliest possible moment. The Court will not venture into a discussion of potential solutions to this alarming problem, as it is not in the best position to do so; however, it may be appropriate for the Secretary to consider this on his own, given that VA's mission statement, formulated as part of President Lincoln's Second Inaugural Address, is "to care for him who shall have borne the battle and for his widow, and his orphan."

III. CONCLUSION

Upon consideration of the foregoing, the December 13, 2012, Board decision is AFFIRMED.

DATED: October 20, 2014

Copies to:

Erika D. Edwards, Esq.

VA General Counsel (027)