In the

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

APPELLANT'S BRIEF

No. 17-0477

ROSETTA MCKNIGHT

Appellant

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS

Appellee

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July 31, 2017

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Statement of the Issues

1. The plain language of 38 C.F.R. § 3.114(a) directs that the VA is required to consider all evidence of record when determining whether a veteran has "met all eligibility criteria of the liberalizing law or VA issue, and that such eligibility existed continuously from that date to the date of a claim or administrative determination of entitlement."
2. The Board also erred in determining the effective date of the liberalizing law. The correct date is February 3, 1988.

Statement of the Case

Statement of Facts

Mr. McKnight served in the US Army from November 1965 to November 1968 with service in Vietnam. He received the combat infantryman's badge. R. at 2052. In January 1985 Mr. McKnight filed an original claim for "nerves." R. at 1860 (1859-1862). The VA provided an examination in March 1985. R. at 1864-1866. The VA denied the claim in August 1985. R. at 1835-1837. Mr. McKnight timely appealed this decision. R. at 1834.

The VA issued a SOC in December 1985. R. at 1826-1829. Mr. McKnight timely appealed to the Board. R. at 1791-1795. The Board denied his claim for a psychiatric disorder in October 1987. R. at 1705-1709.

Mr. McKnight filed a new claim for PTSD in January 2009. R. at 1336-1361. The VA provided an examination in February 2009. R. at 1316-1319. The VA awarded

service connection for PTSD, and eventually awarded a 70% rating with TDIU effective January 2009. R. at 449-455. Mr. McKnight appealed the assigned effective dates. R. at 282-284. Mr. McKnight died on May 1, 2014. R. at 259. The VA substituted Mrs. McKnight as the claimant. R. at 179.

The RO issued a SOC in August 2015. R. at 101-124. Mrs. McKnight filed a timely appeal to the Board. R. at 97. Mrs. McKnight submitted a brief to the Board in August 2016. R. at 35-38. The Board issued the decision on appeal denying earlier effective dates. R. at 2-27. The Board found that 38 C.F.R. § 3.114(a) did not apply to Mr. McKnight's case, and did not conduct analysis under § 3.114(a) as required. R. at 24-26.

Summary of the Argument

The Board committed two legal errors in its decision. First, the Board limited its review to contemporaneous evidence when determining if Mr. McKnight suffered from PTSD in the 1980s. Secondly, the Board erroneously determined the favorable change in law occurred in 1980 – the regulation did not change until 1988.

Argument

1. The plain language of 38 C.F.R. § 3.114(a) directs that the VA is required to consider all evidence of record when determining whether a veteran has "met all eligibility criteria of the liberalizing law or VA issue, and that such eligibility existed continuously from that date to the date of a claim or administrative determination of entitlement."

This is an issue of first impression with the Court. When a veteran is awarded compensation benefits under a liberalizing VA law or issue, he is entitled to an earlier effective date where the claim was filed more than one year after the liberalizing law. 38 C.F.R. § 3.114(a). Furthermore,

> in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph **the evidence** must show that the claimant met all eligibility criteria of the liberalizing law or VA issue, and that such eligibility existed continuously from that date to the date of a claim or administrative determination of entitlement.

§ 3.114(a) (emphasis added). The Board held:

> [h]ere, the Veteran underwent a VA psychiatric examination in 1985 … but he was not given a diagnosis of PTSD at that time (his initial diagnosis of PTSD came in 2008). He did not meet the eligibility criteria for such benefit then or earlier by April 1980 (previous hospitalizations in the 1970s reflected diagnoses of a psychotic disorder …, not PTSD).

R. at 25.

The Board acknowledged that Mr. McKnight submitted a report "in which Dr. Mullen opined that the Veteran began suffering PTSD in service and has suffered continuously since then …." R at 25 (*citing* Dr. Mullen's May 2012 report, R. at 620-

627). From these two statements it is clear that the Board ignored Dr. Mullen's opinion and limited its analysis to contemporaneous medical evidence.

However, the regulation does not say contemporaneous evidence. The regulation explicitly states "the evidence must show …." *See* § 3.114(a). Section 3.156(b) dictates that all new and material evidence submitted during the pendency of a claim is "will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period." 38 C.F.R. § 3.156(b).

This means the Board is required to consider all of the evidence when determining whether Mr. McKnight met the eligibility requirements from the date of the liberalizing law until the date compensation was awarded. *See,* 38 C.F.R. § 3.303(a) (requiring determinations be based on "the entire evidence of record"). Additionally, the Federal Circuit acknowledged this interpretation. *See Evans v. Mansfield*, 257 Fed.Appx. 297, FN1 (Fed. Cir. 2007) ("Evans had to establish that he exhibited symptoms consistent with a diagnosis of PTSD at the time of the liberalizing act, not that he was in fact diagnosed with PTSD at the time of the liberalizing act").

The Board's interpretation is not only contrary to the plain language of the regulation, but also would lead to an absurd result. *See Zang v. Brown*, 8 Vet.App. 246, 252-253 (1995). The regulation allows an award of an earlier effective date even if a claimant never filed a previous claim with the VA. *See* M21-1 Part III.vi.8.1.a. Under the Board's interpretation a veteran who filed his original claim for compensation within one year of the change in law, and did not receive treatment for the claimed condition,

would never be entitled to a retroactive award. This result is directly contrary to the stated purpose of the regulation which was to give claimants up to a year to file claims based on new laws. *See McCay v. Brown*, 9 Vet.App. 183, 187-188 (1996).

Therefore, the Board erred in limiting its review to contemporaneous evidence when determining if Mr. McKnight "met all eligibility criteria" for PTSD from the date of the liberalizing law to the date of his 2009 claim. This is prejudicial, because the Board ignored favorable evidence that supports entitlement to an earlier effective date. Remand is required to allow the Board an opportunity to apply the correct law.

2. The Board also erred in determining the effective date of the liberalizing law. The correct date is February 3, 1988.

The Board, relying upon VAOPGCPREC 26-97, found that the favorable change in law occurred on April 11, 1980. R. at 24. However, VAOPGCPREC 26-97 incorrectly applied the law, and is void. The correct date of the favorable change in law is February 3, 1988 – the effective date of 53 FR 21. The CAVC has jurisdiction to review this issue under 38 U.S.C. § 502 conferring jurisdiction with the CAVC for "an appeal brought under the provisions of Chapter 72 …." *See also PVA v. Sec'y of Veterans Affairs,* 308 F.3d 1262, 1265 (Fed. Cir. 2002).

GC opinion 26-97 states the effective date of the liberalizing change in the law occurred April 11, 1980, when VA added PTSD to the rating schedule. However, the final rule **actually authorizing compensation for PTSD** did not occur until published in the Federal Register on January 4, 1988. In that final rule, the Secretary

specifically noted the VA "has amended its regulations to conform with the diagnostic terms in DSM-III. Nomenclature and Descriptive Terms for Mental Disorders, 53 FR 21 (Jan. 4, 1988).

The April 11, 1980, date refers to the date DC 9411 was added to the rating schedule. *See* Schedule for Rating Disabilities; New Diagnostic Codes, 45 FR 26,326 (April 18, 1980). This change was done because PTSD "is presently being used by the psychiatric profession and as adopted will go into use in the VA health clinics on October 1, 1980. The addition of [PTSD] … will eliminate the necessity of rating by analogy …." *Id*, at 26,326. Finally, the Federal Register explicitly noted the change "is for procedural and statistical purposes only." *Id,* at 26,327.

Although PTSD was added to the rating schedule in 1980, the VA was required to use DSM-II until the January 1988 final rule was published. DSM-II did not contain a diagnosis for PTSD. A favorable change in law must be an actual change in law. The addition of PTSD to the rating schedule cannot be a change in law because prior to 1988 "[a] diagnosis not in accord with [DSM-II] is not acceptable for rating purposes …." 38 C.F.R. § 4.126 (1987). GC opinion 26-97 impermissibly identified a change in law in 1980, when in fact PTSD could not be accepted for rating until 1988. *See also*, GC opinion 10-95 ("Section[…] 4.126 … require[s] the Board … use [the current] DSM[…] nomenclature and diagnostic criteria until such time as the regulations are amended").

Therefore, the Board erred in finding the liberalized law was applied in the October 1987 Board decision. *See* R. at 24-26. This error is prejudicial because the incorrect application of the law precludes Mrs. McKnight from receiving a retroactive effective date under § 3.114(a).

Conclusion

For the reasons set forth above, Mrs. McKnight respectfully requests that this Court provide relief by vacating the Board's November 2016 decision, and remand the matter with instructions to apply the correct law

Respectfully submitted,

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