



BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
THOMAS H. BUFFINGTON

SS [REDACTED]

DOCKET NO. 10-06 046

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DATE *July 20, 2017*
MBJ

On appeal from the
Department of Veterans Affairs Regional Office in Cleveland, Ohio

THE ISSUE

Entitlement to an effective date prior to February 1, 2008, for the reinstatement of VA benefits.

REPRESENTATION

Veteran represented by: The American Legion

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

David Gratz, Counsel

INTRODUCTION

The Veteran served on active duty in the United States Air Force from September 1992 to May 2000, and on active duty in the Air National Guard from July 2003 to June 2004, November 2004 to July 2005, and February 2016 to May 2016.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2009 decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Denver, Colorado. Jurisdiction over the Veteran's file was subsequently transferred to the RO in Cleveland, Ohio.

In November 2014, the Board remanded the case in order to afford the Veteran his Board requested hearing. Thereafter, in November 2015, the Veteran testified at a Board hearing before the undersigned Veterans Law Judge (VLJ) sitting at the Cleveland RO. At such time, he submitted additional evidence with a waiver of Agency of Original Jurisdiction (AOJ). 38 C.F.R. § 20.1304(c) (2016). Therefore, the Board may properly consider such newly received evidence. Additionally, the undersigned held the record open for 60 days for the receipt of any further evidence referable to the instant appeal; however, to date, none has been received.

FINDINGS OF FACT

1. The Veteran served on active duty in pertinent part from July 2003 to June 2004, and from November 2004 to July 2005.
2. The Veteran is in receipt of service connection for tinnitus (10 percent), a low back strain (noncompensable), and a left lower lip scar (noncompensable), effective as of May 31, 2000.
3. In August 2003, the Veteran submitted VA Form 21-8951, whereby he notified VA that he elected to receive pay and allowances for the performance of active/inactive duty in lieu of his VA benefits.

4. In October 2003, the Veteran informed VA that he was recalled to active duty in July 2003, and asked that VA stop his payments.

5. On December 1, 2003, VA informed the Veteran that it had stopped his benefits effective as of July 21, 2003, the day before he was recalled to active duty. The letter informed that the Veteran that “[w]hen you have been released from active duty, please provide our office with a copy of your DD 214, so that we may reinstate your benefits.”

6. On January 20, 2009, the Veteran requested that VA restart his benefits.

CONCLUSION OF LAW

The criteria for an effective date prior to February 1, 2008, for the reinstatement of VA benefits are not met. 38 U.S.C.A. §§ 5304, 5110 (West 2014); 38 C.F.R. §§ 3.31, 3.400(j), 3.654, 3.700(a)(1)(i) (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Due Process Considerations

The Veterans Claims Assistance Act of 2000 (VCAA) and implementing regulations impose obligations on VA to provide claimants with notice and assistance. 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2016).

While the Veteran was not provided with VCAA notice prior to the adjudication of his claim in the August 2009 decision, the Board finds that any prejudice due to such error has been overcome in this case by the following: (1) based on the communications sent to the Veteran over the course of this appeal, the Veteran clearly has actual knowledge of the evidence he is required to submit in this case; and (2) based on the Veteran's contentions as well as the communications provided

to him by VA, it is reasonable to expect that the Veteran understands what is needed to prevail. See *Shinseki v. Sanders/Simmons*, 129 S. Ct. 1696 (2009); *Fenstermacher v. Phila. Nat'l Bank*, 493 F.2d 333, 337 (3d Cir. 1974) (stating that "no error can be predicated on insufficiency of notice since its purpose had been served."). In order for the United States Court of Appeals for Veterans Claims (Court) to be persuaded that no prejudice resulted from a notice error, "the record must demonstrate that, despite the error, the adjudication was nevertheless essentially fair." *Dunlap v. Nicholson*, 21 Vet. App. 112, 118 (2007).

In the instant case, the August 2009 decision and January 2010 statement of the case informed the Veteran that his VA benefits were reinstated effective February 1, 2008, as his request for such reinstatement was received more than one year after his release from active duty and, by law, VA is only permitted to make payments retroactive to one year prior to the date his request was received. The January 2010 statement of the case further explained that payment of VA benefits is resumed effective the day following release from active duty if the claim is received within one year of release from active duty. Otherwise, VA benefits are resumed one year prior to the date of receipt of claim. In the instant case, the Veteran was informed that he was released from active duty in 2005, but did not submit his claim until January 20, 2009. Thus, by law, his VA benefits were reinstated one year prior to such claim, *i.e.*, January 20, 2008; however, payment is not effective until the first of the following month, *i.e.*, February 1, 2008. Furthermore, the Veteran, in written statements and at his Board hearing, offered argument as to why he believed his VA benefits should have been reinstated prior to February 1, 2008. Therefore, the Board finds that no prejudice resulted from a notice error as the record demonstrates that the adjudication was nevertheless essentially fair. *Id.*

The VCAA also requires VA to make reasonable efforts to help a claimant obtain evidence necessary to substantiate his claim. 38 U.S.C.A. § 5103A; 38 C.F.R. §§ 3.159(c), (d). This "duty to assist" contemplates that VA will help a claimant obtain records relevant to his claim, whether or not the records are in Federal custody, and that VA will provide a medical examination or obtain an opinion when necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4).

In the instant case, the Board finds that all relevant facts have been properly developed and that all evidence necessary for equitable resolution of the issue decided herein has been obtained. The appellant's service personnel records, as well as all relevant correspondence to and from VA, have been obtained and considered.

The Veteran also offered testimony before the undersigned Veterans Law Judge at a Board hearing in November 2015. In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the Court held that 38 C.F.R. § 3.103(c)(2) requires that the Decision Review Officer or Veterans Law Judge who chairs a hearing to fulfill two duties: (1) the duty to fully explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked.

Here, during the November 2015 hearing, the undersigned Veterans Law Judge noted the issue on appeal. Also, information was solicited regarding the Veteran's contentions as to why he believed he was entitled to an effective date prior to February 1, 2008, for the reinstatement of VA benefits and the undersigned explained the basis for the assignment of February 1, 2008, as the date his VA benefits were reinstated. Therefore, not only were the issue "explained . . . in terms of the scope of the claim for benefits," but "the outstanding issues material to substantiating the claim," were also fully explained. *See Bryant*, 23 Vet. App. at 497. The hearing discussion did not reveal any outstanding evidence pertinent to the instant claim and the Veteran and his representative have not alleged any prejudice in the conduct of the hearing. Under these circumstances, nothing gives rise to the possibility that evidence had been overlooked with regard to the Veteran's claim decided herein. As such, the Board finds that, consistent with *Bryant*, the undersigned Veterans Law Judge complied with the duties set forth in 38 C.F.R. 3.103(c)(2) and that the Board may proceed to adjudicate the claim based on the current record.

Furthermore, Board finds there has been substantial compliance with the Board's November 2014 remand directives and no further action in this regard is necessary. *See D'Aries v. Peake*, 22 Vet. App. 97 (2008) (holding that only substantial, and not strict, compliance with the terms of a Board remand is required pursuant to *Stegall*

v. West, 11 Vet. App. 268, 271 (1998)). In this regard, the matter was remanded in order to afford the Veteran his requested Board hearing, which was held in November 2015. Therefore, the Board finds that there has been substantial compliance with the Board's November 2014 remand directives, and no further action in this regard is necessary.

Furthermore, as will be discussed below, the Board finds that there is no legal basis to award an effective date prior to February 1, 2008, for the reinstatement of VA benefits. In this regard, VA's General Counsel has held that in cases where a claim cannot be substantiated because there is no legal basis for the claim or because undisputed facts render the claimant ineligible for the claimed benefit, VA is not required to provide notice of, or assistance in developing, the information and evidence necessary to substantiate such a claim under 38 U.S.C.A. §§ 5103(a) and 5103A. *See* VAOPGCPREC 5-04 (June 23, 2004). Consequently, the Board finds that VA's duties to notify and assist have been satisfied. Thus, appellate review may proceed without prejudice to the Veteran. *See Bernard v. Brown*, 4 Vet. App. 384, 394 (1993).

II. Analysis

Compensation pay on account of a veteran's own service will not be paid to any person for any period for which he receives active service pay. 38 U.S.C.A. § 5304(c); 38 C.F.R. §§ 3.654(a), 3.700(a)(1)(i). That is, a veteran is prohibited from receiving VA disability compensation concurrently with active service pay.

Unless otherwise provided, the effective date of an election of VA compensation benefits is the date of VA's receipt of the veteran's election, subject to prior payments. 38 C.F.R. § 3.400(j). Payments of VA benefits following active service, if otherwise in order, will be resumed effective the day following release from active duty if a claim for recommencement of payments is received within 1 year from the date of such release; otherwise, payments will be resumed effective 1 year prior to the date of receipt of a new claim. 38 C.F.R. § 3.654(b)(2).

Notwithstanding exceptions inapplicable to this case, payment of monetary benefits based on compensation may not be made for any period prior to the first day of the calendar month following the month in which the award became effective.

38 C.F.R. § 3.31.

An effective date prior to February 1, 2008, for the reinstatement of VA benefits is impermissible under law because VA cannot resume compensation payments more than one year prior to the date of claim, and payment of monetary benefits may not be made for any period prior to the first day of the calendar month following the effective date of the award. Moreover, in 2003, the Veteran received notice that his waiver of VA benefits would remain in effect until he notified VA otherwise in writing and provided a copy of his DD 214. Finally, the provision regarding retroactive application of elections applies only if the claimant was not advised of his right of election and its effect, and applies only to elections between retirement pay and disability compensation—not between active duty pay and VA benefits.

February 1, 2008, is the earliest date on which VA can resume compensation benefits. The Veteran filed VA Form 21-8951 in August 2003, wherein he informed VA that he was receiving VA compensation benefits as a result of prior service, and was electing to receive pay and allowances for the performance of active/inactive duty in lieu of his VA benefits. In October 2003 and December 2003, he was advised that VA must stop payment of his benefits as he had returned to active duty. He was further informed that, when he was released from active duty, he should provide VA with a copy of his DD 214 so that his benefits may be reinstated.

On January 20, 2009, the Veteran wrote to VA and requested that his VA benefits be restarted; he explained that his VA benefits had stopped from July 21, 2003, the date that he was called to active duty, and that he had served on active duty from that date until June 21, 2004, and had another period of active service from November 1, 2004 to July 30, 2005. Since the Veteran's January 2009 letter was not received within one year of either his June 2004 or July 2005 date of separation from active service, his payments will be resumed effective 1 year prior to the date of receipt of a new claim. 38 C.F.R. § 3.654(b)(2). Here, one year prior to January

20, 2009 is January 20, 2008. Further, because payment of monetary benefits based on compensation may not be made for any period prior to the first day of the calendar month following the month in which the award became effective, the earliest date of his first payment is February 1, 2008. 38 C.F.R. § 3.31. In this regard, the Board observes that the Veteran does not assert that he filed a request to resume his VA compensation benefits prior to January 20, 2009; rather, he testified at his November 2015 hearing that “[b]etween that time period of 2003 until 2009, I kind of forgot about [notifying VA of his duty status and election of benefits] because I’m in the Guard and it was kind of like my full-time job.” *See transcript*, p. 5. Thus, a date prior to February 1, 2008, for the resumption of his VA compensation benefits is impermissible.

The Board also notes that the Veteran asserted in his September 2009 notice of disagreement that:

In my letter received from the Albuquerque Office dated DEC 01, 2003, it did not address the one year requirement for informing the VA of my release from active duty. Furthermore, I talked to the Cleveland VA Office in 2003 and they stated that since I am still a member of the guard I was unable to collect my compensation and drill pay.

Similarly, at his November 2015 hearing, the Veteran testified that he received a letter from VA in 2003 telling him to send in his DD 214 when he was released from active duty, but “there was no time stated on when we should notify the VA.” *See transcript*, pp. 4-5. Essentially, the Veteran contends that there was a notice problem with regard to when the DD 214s had to be submitted in order to reinstate his VA benefits, and he did not understand that he had to submit the information to VA within one year of his date of separation from active duty. *Id.*, pp. 7-9.

The Board observes that the VA Form 21-8951, which the Veteran signed and submitted to VA in August 2003, includes the following statement: “[t]his waiver will remain in effect, while you are entitled to receive VA disability payments, unless you notify VA otherwise in writing.” Additionally, in the December 2003 letter from the RO to which the Veteran refers above, VA notified the Veteran that

“[w]hen you have been released from active duty, please provide our office with a copy of your DD 214, so that we may re-instate your benefits.” Those letters clearly informed the Veteran that the consequence of failing to notify VA of his cancelling his waiver of VA benefits would be the continued waiver of those benefits. While the notice letters did not specify that the Veteran would be eligible for payment up to a year prior to his notification, VA has nevertheless afforded him those benefits pursuant to 38 C.F.R. § 3.654(b)(2). Regrettably, VA has no authority under the current laws or regulations to provide benefits prior to that date.

With respect to the communication from the Cleveland VA Office in 2003, the Board observes that the Veteran remained in active duty from the onset of active duty in July 2003 through the remainder of that year. As such, the RO was correct in informing the Veteran that he could not collect both VA benefits and active duty pay at the same time. 38 U.S.C.A. § 5304(c); 38 C.F.R. §§ 3.654(a), 3.700(a)(1)(i).

Finally, the provision regarding retroactive application of elections applies only if the claimant was not advised of his right of election and its effect, and applies only to elections between retirement pay and disability compensation—not to elections between active duty pay and VA benefits. 38 C.F.R. § 3.750(d)(2). As such, even if the Board accepted the Veteran’s contention that he was not adequately notified of the effect of waiting more than a year after his separation from active service to request the resumption of his VA benefits, the provision allowing for retroactive application does not apply in this case.

The Board appreciates the Veteran’s honesty throughout his appeal and testimony, and regrets that there is no remedy or method under current law for automatically providing him with the higher of either the VA benefits or active duty pay that he earned through his service. Absent such authority, the appeal must be denied.

ORDER

An effective date prior to February 1, 2008, for the reinstatement of VA benefits is denied.

A. JAEGER

Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cave.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. *See* 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. *See* 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).