In the

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

No. 17-0477

ROSETTA MCKNIGHT

Appellant

v.

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

Appellee

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Appellant's Reply Arguments

Mrs. McKnight stands by all arguments in her opening brief. This brief contains five replies to the Secretary's arguments.

I. The change in law did not occur until February 3, 1988.

Mrs. McKnight concedes that if the Court finds the change in law was in April 1980, then she cannot be entitled to application of 38 C.F.R. § 3.114(a). However, as argued in her opening brief GC opinion 26-97 incorrectly applied the law. Brief for the Appellant, at 5-6. We are asking this Court to overrule GC opinion 26-97 as incorrect and not in accordance with the regulations.

II. Unfortunately, the Secretary failed to provide any argument in support of GC opinion 26-97.

The Secretary, in his brief, offers no argument in support of GC opinion 26-97. Instead, he gives two statements that Mrs. McKnight is wrong. First, he alleges "[Appellant's] argument is without merit." Brief for the Appellee, at 14. He then states "Appellant's interpretation of 45 Federal Register (FR) 26326 (1997), is inaccurate." *Id*, at 16. He follows this up with a large, block quote from *Cohen v. Brown*, 10 Vet.App. 128 (1997). *Id*. However, at no time does the Secretary say why GC opinion 26-97 is correct.

The Secretary, "having defaulted in the obligation to brief [his] position and thus provide the court with the incidental benefits of his views on the facts and law, is deemed to concede the validity of [Mrs. McKnight's] legally plausible position." *See*

MacWhorter v. Derwinski, 2 Vet.App. 133, 134 (1992). Mrs. McKnight's arguments are "relevant, fair, and reasonably comprehensive." *Id.* at 136 (*quoting Alameda v. Sec'y of Health, Ed. & Welfare*, 622 F.2d 1044, 1049 (1st Cir. 1980)). However, the Secretary did not respond appropriately; therefore, he has conceded this issue.

Mrs. McKnight persuasively argued that GC opinion 26-97 did not correctly apply the law. The Secretary's own words support Mrs. McKnight's argument. The Secretary wrote, in the Federal Register "this amendment to the rating schedule is for procedural and statistical purposes only." Schedule for Rating Disabilities; New Diagnostic Codes, 45 FR 26,326 (April 18, 1980). The Courts have recognized the difference between a substantive and procedural change in regulations. The addition of PTSD to the rating schedule did not constitute substantive rule making. As the Federal Circuit explained

> [t]here are three relevant factors to whether an agency action constitutes substantive rulemaking …: (1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency. The first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law

See. Disabled Am. Veterans v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077 (Fed. Cir. 2017) (*quoting Molycorp, Inc. v. EPA,* 197 F.3d 543, 545 (D.C. Cir. 1999)).

In this case the addition of PTSD to the rating schedule was described by the Secretary as "for procedural and statistical purposes only." The change was published in the Federal Register and the CFR; however, under the general rating provisions in 38 C.F.R. § 4.126 the VA was still required to use DSM-II until that regulation was changed

in 1988. *See* 53 FR 21. Lastly, the addition of PTSD diagnostic code in 1980 did not have any binding effect on anyone. The addition of PTSD allowed the VA to use the PTSD code to rate certain disabilities, but did not mandate the use of PTSD.

Rather, § 4.126 required the VA to use DSM-II for rating purposes. The actual change in law occurred in 1988 when the VA "amended its regulations to conform with the diagnostic terms in DSM-III." *See* Nomenclature and Descriptive Terms for Mental Disorders, 53 FR 21 (Jan. 4, 1988). Therefore, GC opinion 26-97 incorrectly stated the change in law occurred in 1980. The actual change in law occurred in 1988.

III. Mrs. McKnight did not cite to *Evans v. Mansfield* as precedent.

Mrs. McKnight erroneously neglected to explain the reason for citing to *Evans v. Mansfield*, 257 Fed.Appx. 297, FN1 (Fed.Cir. 2007). Under Rule 30(a) *Evans* can only be cited for its persuasive value. The footnote cited in Mrs. McKnight's brief serves to highlight the Federal Circuit's acknowledgement that there is no requirement to show Mr. McKnight was diagnosed with PTSD at the time the liberalizing rule was established. Brief for the Appellant, at 4. There is no precedential authority on this issue; and this is the only case we could find on the issue.

Regardless, even if the citation to *Evans* is stricken, Mrs. McKnight's argument does not change, nor does a plain reading of 38 C.F.R. § 3.114(a) change. Section 3.114(a) requires the Board to consider all evidence – not just whether he was diagnosed with PTSD in 1988 – in determining whether or not Mr. McKnight met the criteria for the liberalizing law.

IV. The Secretary misunderstood Mrs. McKnight's argument. She did not argue that 38 C.F.R. § 3.114(a) is contrary to the statute; she argued the Board did not properly apply § 3.114(a).

The Secretary stated "Appellant fails to show that 3.114 is arbitrary and capricious – the rigorous, and deferential standards for challenging a regulation." Brief for the Appellee, at 20. However, Mrs. McKnight never argued there was anything wrong with § 3.114. She instead argued the Board failed to properly apply this regulation. Brief for the Appellant, at 3-5. The Board was required to consider all evidence, and not limit its inquiry to whether or not Mr. McKnight was diagnosed with PTSD in 1988.

V. Mrs. McKnight is asking for a very limited ruling. This requires much more fact finding by the Board.

Mrs. McKnight is asking the Court to consider two legal arguments. First, she is asking the Court to rule that the actual change in law was in February 1988 instead of April 1980. Brief for the Appellant, at 5-7. Secondly, she is asking this Court to rule that § 3.114(a) requires the Board to consider all evidence in determining whether or not Mr. McKnight "met all eligibility criteria of the liberalizing law …" in February 1988." *Id*, at 3-5. Assuming the Court agrees with Mrs. McKnight the Board would be required to correctly apply the regulation and determine whether she is entitled to retroactive pay. This requires a remand to the Board. *See* 38 U.S.C. § 7261(c). On this single point we agree with the Secretary. *See* Brief for the Appellee, at 22.

Conclusion

For the reasons set forth above, and in her opening brief, Mrs. McKnight respectfully requests that this Court provide relief by reversing the Board's legal errors, vacating the Board's decision, and remanding the matter with instructions for the Board to correctly apply the law.

Respectfully submitted,

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257 Fed.Appx. 297
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See
also Federal Circuit Rule 32.1 and Federal
Circuit Local Rule 32.1. (Find CTAF Rule 32.1)
United States Court of Appeals,
Federal Circuit.

Richard W. **EVANS**, Claimant–Appellant,
v.
Gordon H. **MANSFIELD**, Acting Secretary
of Veterans Affairs, Respondent–Appellee.

No. 2007–7192.
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Dec. 4, 2007.
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Rehearing En Banc Denied Jan. 24, 2008.

Synopsis

Background: Veteran appealed from final decision of the Court of Appeals for Veterans Claims, Ronald M. Holdaway, J., affirming Board of Veteran's Appeals' (BVA) determination that veteran had not established entitlement for post-traumatic stress disorder (PTSD) earlier than the date he filed his claim for benefits.

[Holding:] The Court of Appeals held that regulation implementing statute providing for retroactive benefits was not inconsistent with statute.

Affirmed.

***298** Appealed from United States Court of Appeals for Veterans Claims, Ronald M. Holdaway, Judge.

Attorneys and Law Firms

Richard W. **Evans**, of Apex, North Carolina, pro se.

Maame A.F. Ewusi–Mensah, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent-appellee. With her on the brief were Peter D. Keisler, Acting Attorney General, Jeanne E. Davidson, Director, and Donald E. Kinner, Assistant Director. Of counsel on the brief were Michael J. Timinski, Deputy Assistant General Counsel, and Jamie L. Mueller, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Before LOURIE, BRYSON and MOORE, Circuit Judges.

Opinion

PER CURIAM.

****1** Mr. Richard W. **Evans** appeals the final decision of the Court of Appeals for Veterans Claims (Veterans Court) affirming the Board of Veteran's Appeals' (BVA's) determination that **Evans** had not established entitlement for post-traumatic stress disorder (PTSD) earlier than the date he filed his claim for benefits. *See* ***Evans*** *v. Nicholson,* No. 05–3372, —— Vet.App. ——, 2007 WL 878438 (Vet.App. Mar.20, 2007). We *affirm*.

BACKGROUND

Evans served in the Army between February 1969 and December 1971. His service included a tour of duty in Vietnam. **Evans** met with a doctor in October 2003 and was diagnosed with depression and PTSD, both of which were attributable to his service. During this examination, **Evans** informed the doctor that his symptoms had existed since 1971.

On May 21, 2003, **Evans** filed a claim for veteran's benefits for his service-connected PTSD. Benefits were awarded effective as of that date. In October 2003, **Evans** filed a claim to have his rating increased from 30% to 100% disabling. That claim was granted and his rating was increased.

***299** **Evans** believed that he was entitled to an effective date earlier than the May 21, 2003 filing date of his original claim for benefits. **Evans** contended that he was entitled to an effective date of May 21, 2002 under 38 U.S.C. § 5110(g). He argued that the addition of PTSD to the rating schedule on April 11, 1980 constituted a liberalizing act that granted him entitlement to compensation. He

maintained this position before the BVA and the Veterans Court. Both tribunals concluded that **Evans** had not established that he met all of the requirements for entitlement to benefits as of the April 11, 1980 effective date under the applicable regulation, 38 C.F.R. § 3.114(a).

Evans appeals this determination. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

The effective date for an award based on an original claim "shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). Section 5110(g) provides for an exception to this otherwise general rule. That section provides:

> Subject to the provisions of section 5101 of this title, where *compensation ... is awarded ... pursuant to ... administrative issue,* the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act of administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier.

38 U.S.C. § 5110(g) (emphasis added). The Secretary has promulgated a regulation, found at 38 C.F.R. § 3.114(a), to implement this provision:

> Where ... compensation ... is awarded ... pursuant to ... a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award of increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the ... administrative issue. Where ... compensation ... is awarded ... pursuant to a liberalizing ... VA issue which became effective on or after the date of its enactment or issuance, 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 for the liberalized benefit on the effective date of the ... VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement.

****2** 38 C.F.R. § 3.114(a).

Here, the BVA concluded that **Evans** had not established that he "met all eligibility criteria for the liberalized benefit on the effective date of the ... VA issue." **Evans** challenges the validity of 38 C.F.R. § 3.114(a). **Evans** contends § 3.114(a) is contrary to § 5110(g). Specifically, **Evans** argues that under the statute he was entitled to retroactive compensation because the facts established that he has suffered symptoms of PTSD since 1971 and that the regulation is improper because it effectively requires him to prove that he had PTSD "before PTSD existed."

Review of factual issues are beyond our limited jurisdiction. *See* 38 U.S.C. § 7292(d)(2) ("Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."). Therefore, we are without the power to review the record to determine whether **Evans** can establish ***300** that he has continuously suffered from PTSD since April 11, 1980, the date PTSD was added to the rating schedule. [1]

[1] We can, however, review **Evans**' challenge to the validity of § 3.114(a). *See* 38 U.S.C. § 7292(d)(1). We interpret statutes and regulations de novo. *See, e.g., Newhouse v. Nicholson,* 497 F.3d 1298, 1301 (Fed.Cir.2007); *McCay v. Brown,* 106 F.3d 1577, 1579 (Fed.Cir.1997).

[2] We conclude that the requirement that a claimant show that they "met all eligibility criteria for the liberalized benefit on the effective date of the ... VA

issue" contained in 38 C.F.R. § 3.114 is consistent with § 5110(g). By its plain terms, section 5110(g) permits a retroactive award of benefits, not to exceed one year, when compensation is awarded because of an administrative issue. The implementing regulation includes this same requirement. For an administrative pronouncement to award benefits, the claimant must have been eligible to receive benefits at the time of the liberalizing act, thus making the liberalizing act (and not some other occurrence) the reason the claimant was eligible for compensation. In this regard, § 3.114 is a valid interpretation of § 5110(g). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Moreover, we see nothing to the contrary in the case of *McCay v. Brown,* 9 Vet.App. 183 (1996), which addresses § 3.114(a) solely in the context of a retroactive liberalizing act. Therefore, the judgment of the Veterans Court is affirmed.

All Citations

257 Fed.Appx. 297, 2007 WL 4239592

Footnotes

1 We reject **Evans**' argument that the regulation requires him to establish that he had PTSD before it existed. **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.