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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3685

ROGER W. WIKER, APPELLANT,

V.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Navy veteran Roger W. Wiker appeals through counsel a May 14, 2019, Board of Veterans' Appeals decision that denied an effective date earlier than April 12, 2007, for service connection for left eye blindness.[1] The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in finding that a January 1965 decision was final. Because the Board failed to adequately address relevant regulations, its statement of reasons or bases on the finality of that decision was inadequate. Therefore, the Court will set aside the portion of the May 2019 Board decision that denied an effective date earlier than April 12, 2007, for left eye blindness, and remand the matter for further proceedings.

[1] The Board's grant of an effective date of April 12, 2007, for left eye blindness, Record (R.) at 7, is a favorable finding that the Court will not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also remanded the matters of earlier effective dates for awards of a total disability rating based on individual unemployability, dependents educational assistance, and special monthly compensation based on bilateral blindness. Because a remand is not a final decision of the Board subject to judicial review, the Court lacks jurisdiction to consider those matters. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2020).

I. BACKGROUND

Mr. Wiker served on active duty from August 1962 to July 1964. R. at 3855. Upon separation, he filed a claim for compensation for bilateral cataracts, which was received by VA in December 1964. R. at 3855 (noting that the veteran executed a claim to be filed with VA), 3860. A January 1965 regional office (RO) rating decision denied the claim, stating that "[t]he conditions are considered congenital" and "There is no evidence of trauma or infection to the eyes." R. at 3845-46. Yet, in a January 11, 1965, letter, the RO notified the veteran that his cataracts "are service-connected, but they are less than 10% disabling and compensation is not payable." R. at 3842. The letter also stated, "[Y]ou are entitled to necessary treatment by the VA for any service-connected disability." *Id*. The letter noted that "the disabilities listed below were not incurred in or aggravated by service: eye and personality conditions which are not disabilities under the law; conversion reaction which was not found on last examination." *Id*.

In September 1965, Mr. Wiker consulted an attorney who sent a letter to the RO, appealing the 10% rating for his eye condition and notifying the RO that Mr. Wiker planned to undergo cataract removal surgery for a service-connected condition at a private hospital and would be requesting reimbursement for the medical expenses. R. at 3838-40. The attorney also informed VA that Mr. Wiker had lost four jobs since his separation and had been refused a driver's license because of his eye disability. *Id*. On October 21, 1965, the RO sent Mr. Wiker a letter stating that the "part of our letter of January 11, 1965, which stated that service connected (sic) had been established for cataracts was completely in error. The decision was that the cataract condition was not service connected." R. at 3837. It also stated that "this letter constitutes notice to you that the cataract condition is not service connected and that you have no entitlement to treatment for this condition." *Id*. Also on October 21, 1965, the RO sent a letter to Mr. Wiker's attorney noting that he would need to complete an enclosed VA Form 2-22a if he wished to represent the veteran individually before VA, and "if you desire to engage in its presentation of claims generally, please let us know and we will forward you the required forms." R. at 3836. The letter noted that "[because] you have not been recognized, we cannot accept your letter as a Notice of Disagreement on appeal." *Id*.

In June 1973, Mr. Wiker filed a claim for compensation for cataracts and glaucoma. R. at 3718. He checked boxes on the form noting that he had previously filed a claim for veterans educational assistance and had received disability severance pay, but he did not check a box that

he had previously filed a claim for disability compensation or pension. R. at 3715. In a June 1973 letter, the RO informed Mr. Wiker that he was denied disability compensation for his eye condition in January 1965, and that he was notified of the decision in a January 1965 letter in which he was advised of his right to appeal within one year. R. at 3714. The letter noted that a valid appeal was not submitted within the specified time. It also noted that "[because] no new substantiating evidence has been submitted in support of your claim, no further action may be taken by this office." *Id*.

On April 12, 2007, Mr. Wiker filed a claim for compensation or pension, stating that he was legally blind, had experienced a stroke, and was 100% disabled. R. at 3656-72. His claim was construed as a claim for pension and was denied in May 2007 because he had no wartime service—a requirement for a pension. R. at 3648. In March 2011, he again filed for compensation or pension for cataracts and glaucoma. R. at 3612-18. His claims were denied in September 2011, R. at 3424-28, and in November 2011 he filed a Notice of Disagreement (NOD). R. at 3416. In September 2013, after a VA examination, the RO granted service connection for left eye blindness with no light perception with a 90% rating effective March 23, 2011, and granted special monthly compensation based on loss of use of the left eye. R. at 3187-92.

In December 2013, Mr. Wiker filed an NOD about the rating and effective date assigned. R. at 3148-49. He stated that, as to his September 1965 appeal, VA never issued a Statement of the Case (SOC). *Id*. He asserted that, at a minimum, VA should have construed his April 2007 claim as a claim for compensation. R. at 3148-49. In a May 2016 SOC, the RO increased the rating for left eye blindness to 100% effective February 19, 2014, but did not otherwise address the earlier effective date issue. R. at 1663-82. Later in May 2016, Mr. Wiker filed a Substantive Appeal, repeating his arguments that the effective date should be at least as early as April 2007 and that his original December 1964 claim had remained pending. R. at 1621-24.

In May 2019, the Board issued the decision on appeal, granting an effective date of April 12, 2007, but no earlier, for left eye blindness. R. at 7-13 (based on the date the veteran filed a claim for compensation for blindness).

II. ANALYSIS

Mr. Wiker contends that the Board erred in finding that the January 1965 rating decision became final because VA failed to adequately notify him of that decision and of his appellate rights. Appellant's Brief (Br.) at 9-20. The veteran also argues that the Board erred in finding that the January 1965 rating decision became final because VA never informed him that the September 1965 NOD was invalid. Appellant's Br. at 20-26. The Secretary disagrees and argues for affirmance. Secretary's Br. at 8-21.

The Court reviews the Board's findings of fact, including determinations of the proper effective date for an award of VA benefits, under the "clearly erroneous" standard of review in 38 U.S.C. § 7261(a)(4). *See Ingram v. Nicholson*, 21 Vet.App. 232 (quoting *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996)). Before deciding a claim, the Board must consider all relevant evidence of record and must consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104(a); *Weaver v. Principi*, 14 Vet.App. 301, 302 (2001) (per curiam order). As with any finding on a material issue of fact and law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Here, the Board considered Mr. Wiker's argument that his December 1964 claim never became final. The Board found that the January 1965 notification letter to the veteran was "incorrect and thus confusing," but explained that, because the decision itself was clear, VA did not need to issue an amended rating decision. *See* R. at 10-11. The Board further stated that the notification letter was later corrected in an October 1965 letter, but that "the letter did not inform the [v]eteran of his right to appeal the denial." R. at 10-11. As to Mr. Wiker's argument that he had filed a valid NOD in September 1965, the Board found his attorney's letter to be an invalid NOD because the letter was not signed by Mr. Wiker and his attorney was not "a valid, recognized representative with authority to act on behalf of the [v]eteran." R. at 11. The Board stated that both Mr. Wiker and his attorney were informed of this fact in October 1965 and were provided the appropriate form to authorize representation, but neither party took any action to do so. *Id*. Lastly, the Board noted that Mr. Wiker filed nothing else that could be construed as an NOD related to

the January 1965 decision within a year of the corrected October 1965 notification letter. *Id*. As a result, the Board concluded that the 1965 decision became final. *Id*.

The Board then analyzed Mr. Wiker's June 1973 claim for compensation for cataracts and glaucoma in both eyes, finding that the RO sent him a letter later in June 1973 informing him that disability compensation for his eye condition had been denied in January 1965 and, because he had not appealed, the decision became final. R. at 10.

At the time of the January 1965 RO decision, 38 C.F.R. § 3.103 provided that a claimant "will be notified of any decision authorizing the payment of benefit or disallowance of a claim." 38 C.F.R. § 3.103 (1964). Such notice "will include the reason for the decision, the claimant's right to initiate an appeal by filing a notice of disagreement and the time limits within which such notice may be filed." *Id*. Also at the time of the January 1965 RO decision, 38 C.F.R. § 19.109(a) required VA to inform claimants of their appellate rights "in each notification of a determination of entitlement or nonentitlement." 38 C.F.R. § 19.109(a) (1964).

Generally, the effective date of an original claim or a reopened claim is the date of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a). Ordinarily, if a claimant fails to appeal from an RO decision, the decision becomes final. *See Cook v. Principi*, 318 F.3d 1334, 1336 (Fed. Cir. 2002) (en banc). But if a claimant has not been properly notified of an RO decision, the decision is rendered nonfinal. *See Best v. Brown*, 10 Vet.App. 322, 325 (1997) ("Based on the requirements of 38 C.F.R. §§ 3.103(e), 3.104(a), the Court finds that VA committed a procedural error by failing to adequately notify the appellant that it was denying him service connection for all of the diagnosed disorders including generalized anxiety disorder. Therefore, the August 1981 decision is not final."); *see also Ruel v. Wilkie*, 918 F.3d 939, 942 (Fed. Cir. 2019) (holding that, to meet the notice requirements of § 3.103, the decision must identify the claim being denied and "meet the other requirements of § 3.103(e), including the reason for the decision, the date effectuated, and notice of appellate rights"); *cf. AG v. Peake*, 536 F.3d 1306, 1310 (Fed. Cir. 2008) (holding, in the context of an appeal for an earlier effective date, that when VA fails to notify a claimant of the right to appeal an RO decision, the decision does not become final and remains pending) (citing 38 U.S.C. § 5104 and 38 C.F.R. § 3.103(b)).

Thus, if the RO failed to provide proper notice to Mr. Wiker or failed to issue an SOC, the December 1964 claim may have remained pending. *See Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995) (concluding that "where VA has failed to procedurally comply with statutorily mandated

requirements, a claim does not become final"); *see also Hauck v. Brown*, 6 Vet.App. 518, 519 (1994) (tolling the deadline for filing an NOD where an appellant did not receive notification of a denial). But if there is an intervening decision denying the claim on the merits before it is ultimately granted, that decision can extinguish the pending claim. *See Williams v. Peake*, 521 F.3d 1348, 1351 (Fed. Cir. 2008) ("[A] subsequent final adjudication of a claim which is identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim.")

Although the Board found that the January 1965 letter was "confusing" and that the October 1965 letter did not inform Mr. Wiker of his appellate rights, R. at 10-11, the Board concluded that, because he did not appeal the January 1965 decision, it became final. R. at 11 (citing 38 U.S.C. § 4005(c) (1964); 38 C.F.R. §§ 3.104, 19.118, 19.153 (1964)). The Board did not, however, address whether the January 1965 or the October 1965 notice letter adequately informed Mr. Wiker of the RO's adjudication and his appellate rights under § 3.103. Although the Board found that Mr. Wiker had not filed an NOD about the January 1965 decision, it did not address whether the Board was obligated under § 19.109(a) to provide notice to Mr. Wiker that his October 1965 NOD had been rejected. Although the Board concluded that both Mr. Wiker and his attorney had been equally informed, R. at 11 ("Both the attorney and the [v]eteran were so informed in October 1965."), it is unclear how the Board arrived at its conclusion. The RO mailed two letters on October 21, 1965, one to Mr. Wiker and one to his attorney, but they contained different information. *Compare* R. at 3837 (letter to Mr. Wiker informing him that his cataract condition was not service connected, and stating, "a copy of this letter is being forwarded to Attorney Arnold"), *with* R. at 3836 (letter to Mr. Wiker's attorney informing him that the NOD was not accepted). Although it appears that the RO may have sent Attorney Arnold both letters, R. at 3836 (noting that "we are enclosing a copy of our letter to the veteran" but including only VA Form 2-22a on the enclosure line), Mr. Wiker's letter does not indicate that the RO sent him a copy of the letter addressed to Attorney Arnold. R. at 3837 (no mention of an enclosure).

Thus, the Board did not sufficiently explain how the letter to Mr. Wiker's attorney about the NOD not being accepted, which the veteran seemingly did not receive, satisfies the notification regulations at the time of the 1965 decision, such that the decision was final. The Court concludes that the Board's analysis is inadequate, prevents the appellant from understanding the precise basis for its adverse decision, and frustrates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. As a result, the Court will set aside the Board's decision denying an effective

date earlier than April 12, 2007, and will remand the matter for further adjudication. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (finding that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

The Secretary argues that Mr. Wiker had actual notice of the RO's adjudication and his right to appeal. Secretary's Br. at 12-15. But the Secretary fails to prove actual notice because he does not explain how the RO's October 1965 letter stating that Mr. Wiker was not service connected gave him notice that he could appeal, especially given the Board's finding that it lacked notice of his appellate rights. R. at 10-11; *cf. Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018) (holding that the "Court cannot accept the Secretary's post-hoc rationalizations" to cure the Board's reasons or bases errors). Even so, because actual notice would cure a notice defect, the Board on remand should consider whether Mr. Wiker had actual notice of all three elements under § 3.103 at the time of the 1965 decision.

In addition, although Mr. Wiker asks the Court to reverse the Board's finding that the January 1965 decision was final and grant an effective date of December 1964, Appellant's Br. at 7, 10, 19, 26, reversal is warranted when the only permissible view of the evidence contradicts the Board's decision, *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004), and the Board "has performed the necessary fact-finding and explicitly weighed the evidence," *Deloach v. Shinseki*, 704 F.3d 1370, 1380-81 (Fed. Cir. 2013). Because the Board did not adequately address the relevant regulations and the 1965 RO letters, it is unclear how the Board analyzed those regulations and weighed the evidence. Further, if the Board does determine that the notice to Mr. Wiker was invalid under either § 3.103 or § 19.109(a), it must then determine whether the December 1964 claim remained pending until Mr. Wiker's now assigned effective date of April 12, 2007, or whether any other actions extinguished the claim. *See generally, Williams*, 521 F.3d at 1351. And although the Board found that it could award an effective date of April 12, 2007, based on facts found, R. at 13 (finding that service connection for left eye blindness was granted in 2013 "based upon essentially the same facts as the [v]eteran presented in his 2007 application"), we agree with the Secretary that the Board did not perform the same analysis about the nature of his disability between 1964 and 2007. *See* Secretary's Br. at 20-21. The Court cannot conduct the factfinding necessary to determine the appropriate effective date in the first instance. *See Deloach*, 704 F.3d at 1380 (holding that the Court may not weigh any evidence itself).

Mr. Wiker also asks the Court to hold that the Board erred in determining that his September 1965 NOD was invalid for two reasons. First, Mr. Wiker argues that, by releasing information to his attorney, VA acknowledged the attorney as his "duly authorized representative," under 38 C.F.R. § 1.503 (1965), and therefore the NOD was valid. Appellant's Br. at 21-22. Second, Mr. Wiker argues that he was personally involved in filing the NOD even though it was mailed by his attorney, and it was therefore valid under 38 C.F.R. § 19.111(a) (1965). Appellant's Br. at 23-25. The Court observes that Mr. Wiker raises these arguments for the first time here. In *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000), the U.S. Court of Appeals for the Federal Circuit held that, because exhaustion of administrative remedies is not a jurisdictional requirement in the veterans benefits system, this Court may hear arguments raised before it in the first instance, provided it otherwise has jurisdiction over the claim. *See Massie v. Shinseki*, 25 Vet.App. 123, 126-31 (2011) (exploring the boundaries of the Court's discretion under *Maggitt*). The Federal Circuit explained that, when presented with an argument in the first instance, this Court may address the argument, decline to do so, or remand for the Board to address it in the first instance. *Maggitt*, 202 F.3d at 1377-79.

The Court declines to review these arguments under *Maggitt* because Mr. Wiker's present counsel represented him at the Board and was aware of the RO's October 1965 letter explaining that his attorney needed to file certain forms to represent Mr. Wiker. *See* R. at 1577 (providing VA a copy of the October 1965 letter with his VA Form 9). Mr. Wiker could have raised his interpretation of §§ 1.503 and 19.111(a) when he argued in his NOD and Substantive Appeal that his September 1965 letter was a valid NOD and remained unaddressed by the RO. Even so, because the Court is remanding the claim, Mr. Wiker is free to make these arguments before the Board on remand.

In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the above and our review of the record, the portion of the May 14, 2019, Board decision denying an effective date earlier than April 12, 2007, for left eye blindness is SET ASIDE and REMANDED for further adjudication consistent with this decision. The remainder of the appeal is dismissed.

DATED: October 16, 2020

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