IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

BILL M. NOAH,	)	
	)	
Appellant,	)	
	)	**Vet. App. No. 18-7429**
v.	)	
	)	
ROBERT WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee,	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLANT'S SUPPLEMENTAL MEMORANDUM OF LAW

COMES NOW, the Appellant Bill M. Noah, by and through his Counsel Jacques P. DePlois, and submits the following Supplemental Memorandum of Law as ordered by the Court, dated March 9, 2020.

In *Noah v. McDonald*, 28 Vet. App 120 (2016), this Court, in analyzing whether or not there had been procedural due process violation regarding a VA January 1982 letter to the Appellant, cited the case *Gonzales v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990) under its analysis of whether there was a "risk of erroneous deprivation". In *Gonzales,* that Court found that a Social Security determination notice was sufficiently misleading, and that it violated the due process rights of the Appellant, however, there was no discussion by that Court upon any reliance by the Appellant.

In *Loudermilk v. Barnhart*, 290 F. 3d 1265 (11th Circ. 2002), that Court was faced with the same Social Security Administration notice that the Court in *Gonzales* had found which was sufficiently misleading, and cited the case for the proposition that the notice was, in fact, misleading. The Court in *Loudermilk*, however summarized that the

Supreme Court's view of due process violations, that "there must be a casual connection between the injury and the complained conduct," and concluded "all the Circuit Courts considering the Social Security determination notice issue, with the exception of the 9th Circuit, require a casual connection, following the Supreme Court's dictate in *Lujan* . . . in implementing this requirement, the Courts hold the claimant must have detrimentally relied upon the notice." (at 1269, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) Since *Gonzales* was decided in 1990, and the Supreme Court issued *Lujan* in 1992, it seems clear that one seeking a due process violation based upon a defective notice "must have detrimentally relied upon" that notice. The question turns to the proper legal standard for analyzing "detrimental reliance," as this Court directed in the Order of March 9, 2020

In *Gilbert v. Shalala*, 45 F.3d 1391 (10th Cir. 1995) the Court denied standing for a number of plaintiffs bringing an action based upon an alleged Fifth Amendment right to due process violation because of a defective notice from the Social Security Administration. The Court stated that "plaintiffs have failed to submit evidence that meet the Article III requirements of standing. Specifically, plaintiffs have not shown a casual connection between their injury and the alleged deficient denial notices. To the contrary, the record in this case clearly establishes a ***lack of reliance*** by the plaintiffs upon the notices. In deposition testimonies or affidavits, plaintiffs stated either ***they*** relied on sources other than the challenged language and believed ***they*** could reapply and receive retroactive benefits, or ***could not remember reading the challenged language***." (at 1394, emphasis added) This focus on the plaintiff's remembrance, or "thoughts" would suggest an individual (or subjective) approach, rather than an

objective (i.e. reasonable person) approach.

In *Day v. Shalala*, 23 F.3d 1052 (6th Cir. 1994), again in discussing the erroneous Social Security determination notice (within the context of a class action lawsuit), that Court held "although the Title II reconsideration denial notice used before February, 1990, failed to satisfy the requirements of due process, the only claimants who could have been injured by the inadequacy are ***those who detrimentally relied*** on the inadequate denial notice. A claimant relied to ***his or her*** detriment on the inadequate notice if he or she was denied benefits at the reconsideration level ***then received the inadequate notice***, and ***thereafte***r filed a new application ***rather*** than continuing the appeal process, and then were represented by the Secretary with a claim of res judicata or received less in retroactive benefits than he or she would have had they successfully appealed initially. The limited number of class members who fit this description are entitled to re-open their applications." (at 1066) Although this case seems to be more of an objective analysis (as opposed to subjective to the individual), a reading of the Court admonition that this is a "limited number of class members who fit this description," demonstrates that even as a class, the "class member" has to have received an inadequate notice, and taken action based upon that inadequate notice.

In *Burks-Marshall v. Shalala*, 7 F.3d 1346 (8th Cir. 1993), also addressing the erroneous Social Security determination notice, Appellant would submit that this case is probably the strongest argument in favor of a subjective (or individual) standard for determining whether or not the Appellant relied, to their detriment on a defective notice. Court in *Burks-Marshall* found that the Appellant had no standing for a due process violation action because she "has not shown that the alleged deficiency in the notice

had any connection in fact ***with her own failure*** to seek review of the two earlier denials . . . the claimant suggests that she was assured that she did not need a lawyer, that the AOJ would take care of her interest, but this is a different point. ***She does not say*** that after reading the notice ***she understood it to mean*** that she could apply again at any time for benefits for the periods involved in her denied claims, and that, for that reason, ***she decides to forego further review*** at the time." (at 1349-1350, emphasis added) In short, this is the clearest language that one asserting a due process violation must present evidence of what **they** (i.e. individually/subjectively) read and did (or did not due) based upon **their** reading of the notice.

In *Dealy v. Heckler*, 616 F. Supp. 880, U.S. District Court W.D. Missouri 1984, the Court was analyzing the same erroneous Social Security determination notice for a due process violation, and held "with respect to the risk of error factor, it is apparent that ***had the plaintiff been adequately notified*** of the preclusive effects of res judicata, ***she would have chosen*** to contest the denial of her initial application." (at 886, emphasis added) The Court held that the Appellant in that case "believing a subsequent application would receive a ruling on its merits by SSA, ***abandoned*** her initial application by choosing not to request a hearing or to seek an appeal. ***Had the plaintiff been aware*** that her second application would be barred by the doctrine of res judicata, ***she would have sought a hearing*** on her initial application." (at 884, emphasis added) In this case, the Court focused on the "plaintiff" and her "understanding" of the defective notice, and her subsequent decision. Further, the Court found that what the "plaintiff" would have done **IF** she had been given the correct information.

In *Butland v. Bowen*, 673 F. Supp. 638 (D. Mass. 1987) regarding due process, the Court held "third, and most importantly, the denial notice sent to the plaintiff was misleading enough to produce a high risk of error into the claims adjudication process. This form falsely assured plaintiff that she could file another claim at 'at any time' when in fact she faced a 4 year dead line. On receiving such a notice, claimants with valid entitlements might wrongly abandon their claims after initial denial and not reassert them until it is too late." (at 641) The Court went on to hold "in this instant case, plaintiff's second denial should not have been 'accorded finality' because plaintiff was misinformed as to the res judicata consequences of abandoning the action. Simply put, the Secretary 'has an affirmative obligation to avoid providing Social Security applicants with misleading information.' In *Dealy . supra*, 616 F. Supp. at 886. This is especially true in the case of Ms. Butland, who was without counsel at the time of her second application and relied upon the plain language of her denial notice. A straight forward description of the claims-preclusion process would have proven extremely valuable procedural safeguards for plaintiff and others like her." (at 642) In the description of the facts of the case, the Court cited the deficient language in the Social Security determination notice and wrote "***taking the Social Security Administration at its word, plaintiff abandoned*** her second claim and filed a third application for disability benefits on December 17, 1985." (at 640 emphasis added) The focus, again, is on the "plaintiff" and her understanding of the notice, and her actions, rather than an objective standard.

Appellant would submit that *Jernigan v. Shinseki, 25 Vet. App. 220 (2012)*, addressed the issue of an alleged due process violation based upon a defective notice.

First, the Court addressed the issue which was raised by the Appellant in that case, that because a notice "received from VA accompanying the formal application form was misleading or confusing, VA may not penalize for failing to return the form within one year by denying an effective date as of the date of the informal claim." Specifically, the Court stated they did not have to "reach this question, because, even assuming a duty to notify and a defective notice, there is nothing in the record that indicates that Ms. Jernigan relied to her detriment on the purportedly misleading notice."

All these cases point to one critical inquiry: what did the Appellant/Claimant/ Plaintiff read and what were their actions based upon what they had read. By necessity, they (subjectively) must demonstrate their reliance. An objective standard would substitute the individual's understanding of the notice, and imposed a "reasonable person" review to determine if "reasonable person" would have acted in the way that the Appellant/Claimant/Plaintiff acted.

Finally, Appellant would argue that this Court need go no further than to review the Appellant's first case on the issue of an earlier effect date, *Noah v. McDonald*, 28 Vet. App. 120 (2016), which specifically held: "[a]s discussed above, the January 1982 notice letter failed to satisfy the requirements of procedural due process and, therefore, ***if Mr. Noah successfully demonstrates*** that ***he relied*** to ***his detriment*** on the misleading notice, his December 1981 claim remained pending and unadjudicated." (at 133, emphasis added) Further, the Court directed that on remand "the Board must assess the ***weight and credibility of lay and medical evidence*** of record and determine ***whether Mr. Noah relied*** to his detriment on the 1982 misleading notice letter. If the Board concludes ***that Mr. Noah*** detrimentally relied on the misleading

notice, the Board must determine whether the evidence establishes entitlement to disability compensation for PTSD based on Mr. Noah's 1981 claim." (at 133, emphasis added)

The Court made it clear that from a legal standpoint, if the Appellant "successfully demonstrates that he relied to his detriment" then the 1981 claim remained pending and unadjudicated. The focus, yet again, is on the individual (in this case the Appellant). In addition, on remand, not only did this Court focus the Board on determining the Appellant's reliance, but it was to "to assess the weight and credibility of the lay and medical evidence of record." The conclusion of the requirement that the Board assess "medical evidence" necessarily requiring assessment of the particular individual, as opposed to a "reasonable person" or some sort of objective standard.

DATED: April 22, 2020

/s/ Jacques P. DePlois
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CERTIFICATE OF SERVICE

I certify that on April 22, 2020, I emailed a true copy of Appellant's Supplemental Memorandum of Law to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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