

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0092

CLEAMON BRYANT,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Chief Judge*, and GREENBERG and MEREDITH, *Judges*.

ORDER

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

The appellant, Cleamon Bryant, through counsel appeals a November 30, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for colon cancer, a lump on the left side of the head, and a lump on the middle breast.¹ The matter was referred to a panel of the Court on February 11, 2020, and the Court heard oral argument on May 29, 2020.

At issue in the case is whether the Board violates a claimant's constitutional right to due process when, in accordance with 38 C.F.R. § 20.1304(a) (2018) (now § 20.1305(a)), it issues a decision fewer than 90 days after an appeal has been certified and the appellate record transferred to the Board. At oral argument, the appellant clarified that he is challenging the constitutionality of the regulation both on its face and as-applied to him. However, the parties proffered differing views on what period the Court should consider when evaluating whether a claimant was afforded an opportunity to be heard "at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)), in a facial due process challenge. In that regard, the appellant maintained that the Court should consider only the period triggered by the regulation, i.e., after certification of the appeal to the Board and transfer of the record. The Secretary, on the other hand, maintained that the Court should look at the totality of the process, including the opportunities afforded to the claimant before the agency of original jurisdiction. Further, the parties appeared to dispute whether a claim transferring

¹ The Board remanded the matters of entitlement to disability compensation for a left shoulder disability; an initial compensable evaluation for a boxer's fracture, right hand; and a single 10% rating pursuant to 38 C.F.R. § 3.324 based on multiple noncompensable service-connected disabilities. The remanded matters are not before the Court. *See Breedon v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

from a regional office (RO) to the Board has any significance on what period the Court should consider. *See* 38 U.S.C. § 7104(a) ("All questions in a matter which under section 511(a) of . . . title [38] is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary.").

As further support for his position, the Secretary had asserted in his brief that the purpose of the regulation is not to give a veteran one, finite period in which to submit additional evidence or argument because other regulations serve that purpose; but, rather, it is intended to "describe what happens if evidence or argument is submitted after the expiration of the numerous finite periods a claimant already had . . . without needing to show good cause." Secretary's Brief at 7 (emphasis omitted). At oral argument, the appellant suggested that 38 C.F.R. § 19.36 provided meaning to § 20.1304(a), and the Secretary offered to respond with a supplemental brief regarding what authority, if any, supports his assertion regarding the purpose of § 20.1304(a).

Accordingly, the Court seeks supplemental memoranda from the parties answering the following questions:

1. What must the appellant show to succeed in a facial challenge to the validity of § 20.1304(a)?
2. Are there any sets of circumstances under which the regulation would be valid? If so, describe those circumstances.
3. What period should the Court consider when evaluating whether a claimant is afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" and, what, if any, significance does the transfer of a claim from an RO to a decision-maker at the Board have on the answer to that question?
4. In this case, has the appellant met his burden of demonstrating that he did not have an opportunity to be heard in a meaningful time and in a meaningful manner?
5. What is the purpose of § 20.1304(a) and what authority supports your position?

The parties' memoranda may not exceed 15 pages, "not counting the table of contents; the table of authorities; any appendix containing superseded statutes, rules, and regulations, and unpublished authorities; and the certificate of service." U.S. VET. APP. R. 28.1(e).

Upon consideration of the foregoing, it is

ORDERED that, within 30 days of the date of this order, the parties file with the Court and serve on each other, memoranda of law as described above.

DATED: June 2, 2020

PER CURIAM.

Copies to:

Michael S. Just, Esq.

VA General Counsel (027)