IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CLEAMON BRYANT,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-0092
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLANT'S RESPONSE TO THE COURT'S ORDER OF JUNE 2, 2020

On June 2, 2020, the Court issued an order requesting the parties to answer the following questions. This responds to the Court's order.

1. **What must the appellant show to succeed in a facial challenge to the validity of 38 C.F.R. § 20.1304(a).**

Mr. Bryant asserts that, in order to demonstrate that 38 C.F.R. § 20.1304(a), or particular clause of the regulation, is facially invalid, he must show that the regulation or the terms therein either are inconsistent with other regulatory provisions, contrary to statutes or are in direct contradiction of the U.S. Constitution. Mr. Bryant avers that 38 C.F.R. § 20.1304(a) is facially invalid for several reasons explained *infra*, as well as those explained in prior briefing and at oral argument. Specifically, though, the Veteran asserts that § 20.1304(a) violates the Due Process of the U.S. Constitution because it does not afford him the right to be heard and in a meaningful manner.

Regarding the latter, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Evaluating the constitutional sufficiency of VA's notice under *Mathews* requires consideration of three factors: 1) the private interest affected by government action; 2) the risk of erroneous deprivation through the procedures used and the probable value of additional safeguards; and 3) VA's efficiency interests.

Mr. Bryant's private interest is in the receipt of disability benefits, which are "nondiscretionary, statutorily mandated benefits." *See Cushman v. Shinseki*, 576 F.3d 1290,1298 (Fed. Cir. 2009). Specifically, Mr. Bryant's interest is in obtaining service connection and ultimately compensation. This Court recognized in *Noah v. McDonald*, 28 Vet.App. 120 (2016), that entitlement to benefits is a "substantial" interest which weighs heavily in favor of ensuring that an eligible veteran receives accurate. The property interest is recognized in this Court and across the other circuits. *See Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005) ("Every regional circuit to address the question ... has concluded that applicants for benefits, no less than benefits recipients, may possess a property interest in the receipt of public welfare entitlements.").

The risk of erroneous deprivation of Mr. Bryant's entitlement to service connection stemming from VA's failure to provide a date-certain was significant. If the Board can end the 90-day period at any moment, then Mr. Bryant has no idea how long he has to gather and submit evidence, request a hearing, or request a change in

representation. The notice provided to Mr. Bryant was illusory and fundamentally unfair. *See Cushman*, 576 F.3d at 1300 ("a fundamentally fair adjudication" is "constitutionally required in all cases"). By informing Mr. Bryant that he had the right to submit new evidence within 90 days but then stating that this right could be taken away at any moment without prior warning, the Board gave Mr. Bryant no actual notice at all.

There is no government interest that could outweigh the need for notice of a date certain by which the Veteran must take action, or else lose his right to do so. VA's paramount interest in veterans' benefits cases is "not that [the Government] shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

2. Are there any set of circumstances under which the regulation would be valid? If so, describe those circumstances.

There are only three circumstances that could render moot the deficiency presented by the language under section 20.1304(a). The first is if the Board issues its decision after the 90-day period expires. The second is if a veteran and his or her representative expressly waive the 90-day period.

However, the third circumstance revolves around the clause in § 20.1304(a), "or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first," since this is the language in question. This third circumstance is not trivial as the language of the regulation could be valid if it is

amended since the current language effectively read eliminates the 90-day period as argued in the pleadings and at oral argument.

The current language violates Mr. Bryant's due process. Nonetheless, amending the regulation to include the first and second circumstances identified, or more importantly eliminating the clause, "or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first," would resolve VA's violation of Mr. Bryant's due process thus providing him with a 90-day end date to respond.

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?

The question posed in the Court's order, from Mr. Bryant's understanding, seems to be based on the Secretary's assertion 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.'" *Bryant v. Wilkie,* No. 18-92, Order at 2 (June 2, 2020) (citing and quoting Secretary's Br. at 7). The simple answer is that the Court only need consider the time period from the date an appeal is certified to the Board for the purposes of this appeal and those individuals similarly situated once an appeal has been certified.

The Secretary is attempting to make the Court believe that the process at the regional office and BVA level are the same, and the process never ends and are the same process. The Secretary's prior assertion is precarious for several reasons.

To that end, it must be remembered that the functions of the regional office, or agency of original jurisdiction ("AOJ"), and the Board are entirely different. The AOJs develop evidence and render the initial decisions in accordance with the law. However, "[t]he Board is 'primarily an appellate tribunal' of the VA that decides appeals from denials of claims for veterans' benefits." *Disabled American Veterans (DAV) v. Sec'y of Veterans affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003) (citing *Scates v. Principi,* 282 F.3d 1362, 1366–67 (Fed.Cir.2002)).

The Federal Circuit explained that "[s]ection 7104, entitled 'Jurisdiction of the Board,' provides in pertinent part:

> (a) *All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.*
> (b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

Id. (quoting 38 U.S.C. § 7104(a), (b)) (emphasis added in original). The court explained that, "[t]ogether, §§ 511(a) and 7104(a) dictate that the Board acts on behalf of the Secretary in making the ultimate decision on claims and provides 'one review on appeal to the Secretary' of a question 'subject to decision by the Secretary' under §

511(a)." *Id.* at 1347. Put another way, the regional office does not review decisions of the Board but rather it is the Board that reviews decisions of the regional offices and provides that one review on appeal.

That is why the two entities are separate and perform different roles in the adjudication process. Each entity has its own prescribed time limits for which claimants must adhere in order to ultimately obtain that one review on appeal by the Board. The significance of *DAV* is that the Federal Circuit was recognizing the roles of, or distinction between, the AOJs and the Board. It is for that reason that the Federal Circuit invalidated 38 C.F.R. § 19.9(a)(2), as written then, because the Board acts on behalf of the Secretary in making the ultimate decision on claims, *i.e.*, one review on appeal, and to permit to develop evidence in the first instance (without remanding an appeal) would eviscerate the intent of Congress.

Here, Mr. Bryant's case was developed and considered by the AOJ. The AOJ continued to deny his entitlement to VA benefits and he properly appealed. This is because he was seeking one review on appeal by the Board. The AOJ's function in the adjudication process stopped when it certified Mr. Bryant's appeal to the Board. And Mr. Bryant's right to one review on appeal began at that time, which necessarily includes in accordance with § 20.1304(a) the right to, *inter alia*, submit additional evidence for consideration only by the Board—not the AOJ.

Against that backdrop, as it applies to the validity of section 20.1304(a), the Court should consider the time period from the date an appeal is certified to the

Board. Simply because there is a preceding period prior to the date of such certification, this does not obviate the paramount need for a date certain by which a veteran's time to submit evidence and argument, request a hearing or request a change in representation **expires**.

A VA regulation, 38 C.F.R. § 19.36, states that when an appeal is certified to the Board the appellant and his or her representative "will be notified in writing" "of the time limit" for submitting additional evidence, requesting a personal hearing or requesting a change in representation. As written, section 20.1304(a) renders section 19.36 moot since, in effect, the Board could issue a decision concurrently with such notice. If a veteran's claim can be denied simultaneously with notifying the veteran in writing when his time to complete any of these tasks will expire, then section 20.1304(a) is rendered entirely meaningless.

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?**

Yes. The Veteran's representative explicitly informed VA that further argument "will be advanced" on behalf of the Veteran "once BVA sends [the] 90 day letter." On September 21, 2017, the Board provided written notice to the Veteran and his representative that his case was certified to the Board in accordance with section 19.36 and section 20.1304(a). The Board issued its decision in November 2017. This was prior to the expiration of the 90-day period and deprived the Veteran

of the opportunity to submit additional evidence and argument as explicitly asserted by his representative.

5. What is the purpose of § 20.1304(a) and what authority supports your position?

The purpose of section 20.1304(a) is clear. As explained by 38 C.F.R. § 19.36, when an appeal is certified to the Board the appellant and his or her representative "will be notified in writing" "of the time limit" for submitting additional evidence, requesting a personal hearing or requesting a change in representation. The regulation explicitly states that this "time limit" is described under section 20.1304(a). The purpose of section 20.1304(a) is to provide a veteran and his or her representative notification of a date certain by which the time to submit evidence and argument, request a hearing or request a change in representation **expires**. *See Prickett v. Nicholson*, 20 Vet. App. 370, 382-83 (2006) (the Court has explicitly recognized that "38 C.F.R. §§ 19.36 and 20.1304 . . . . serves to advise the appellant, and any representative, that the appellant has 90 days from the date of that letter in which to request a change in representation, request a personal hearing, and submit additional evidence.").

This is consistent with the non-adversarial nature of the veterans' benefits claims process. If a veteran's claim can be denied simultaneously with notifying the veteran in writing when his time to complete any of these tasks will expire, then section 20.1304(a) is rendered entirely meaningless and section 19.36 would be

rendered moot. Failing to provide a date certain would place all claimants in an untenable position when proceeding with their appeals to the Board.

Respectfully submitted,

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