

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

VICTOR MANUEL AVILES-RIVERA,)

Appellant,)

v.)

DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)

Appellee.)

Vet. App. No. 19-5969

NOTICE OF CLARIFICATION OF DISCUSSION AT ORAL ARGUMENT

Appellee, Denis McDonough, Secretary of Veterans Affairs, hereby notifies the Court of a clarification regarding a statement that the undersigned counsel made during Oral Argument in this case on Friday, September 10, 2021. In particular, the Court's attention is drawn to an exchange that took place between Chief Judge Bartley and the undersigned counsel between 33:37 and 36:26.¹ In this exchange, Chief Judge Bartley asked the undersigned counsel about continuous pursuit of a claim under 38 C.F.R. § 3.2500. A transcript of the exchange is provided here:

Chief Judge Bartley: "Like you, I'm learning all the AMA regs. But I know that one of them, I think it was, 2500, I think, it might be a different number, 3.2500. Does not allow simultaneous, well it didn't allow simultaneous, but it requires a continuous pursuit. If the veteran files an appeal here, it requires a continuous pursuit of the claim, and that the veteran file, now

¹ The Secretary relies on the video recording uploaded on the Court's YouTube site.

that he has filed an appeal with the Court, which is considered continuous pursuit, he would have a year after our decision to file a supplemental claim. So, he would have to wait for a decision from us. He can't just withdraw his Court appeal. He has to follow it through to conclusion here at the Court. That's what the reg seems to provide?

Secretary's Counsel: "Right, Your Honor, but we don't believe that that survives the *MVA*² case."

Chief Judge Bartley: "Oh, so not only was 3.2500(b) voided by the *MVA* decision, but also (c)?"

Secretary's Counsel: "Yes, Your Honor. The requirement to have the appeal withdrawn was essentially found no longer applicable by the Federal Circuit. So, our position is that the appellant can file a simultaneous claim, even though a current appeal is pending before a federal court."

Chief Judge Bartley: "And that decision came out after you filed your brief? After you filed your supplemental?"

Secretary's Counsel: "I believe so."

Chief Judge Bartley: "Ok, I got you. That's a new development. Under the old process, you would have had to wait until this Court issued its decision, and then be free within the next year to file a supplemental."

Secretary's Counsel: "Right, right. Admittedly, Your Honor, because the holding is so recent, the Agency is still trying to enact the proper procedures to enforce what the Federal Circuit discussed. But that is our position, Your Honor."

Chief Judge Bartley: "Thank you."

The undersigned counsel is now filing this notice of clarification because he realizes that he may have caused some confusion during this exchange, specifically when Chief Judge Bartley asked counsel whether *MVA* voided

² *Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, __F.4th__, 2019-1600, 2021 U.S. App. LEXIS 22608 (Fed. Cir. July 30, 2021).

subsection (c) of § 3.2500 in addition to voiding subsection (b). The Secretary clarifies his response as follows.

The U.S. Court of Appeals for the Federal Circuit in *MVA* voided the second sentence of 38 C.F.R. § 3.2500(b), which previously prohibited concurrent election of a claimant filing for administrative review of the claim under § 3.500(a) if an “adjudication of a specific benefit is pending on appeal before a federal court.” See *MVA*, F.4th, 2019-1600, 2021 U.S. App. LEXIS 22608 at *73-76 (holding that the prohibition on concurrent administrative review does not extend to concurrent judicial and supplemental claim review and that 38 U.S.C. § 5104C’s statutory text permits filing a supplemental claim during the pendency of an appeal before a federal court). Accordingly, a claimant may now file a supplemental claim while an appeal is still pending at a federal court without having to either withdraw that appeal or wait for a decision by the federal court.

Thus, when Chief Judge Bartley asked counsel if *MVA* also voided subsection (c) of § 3.2500, and he responded by saying, “[y]es, *Your Honor*. *The requirement to have the appeal withdrawn was essentially found no longer applicable by the Federal Circuit*. So, our position is that the claimant can file a simultaneous claim, even though a current appeal is pending before a federal court,” he was affirming the fact that *MVA* voided the requirement in the second sentence of subsection (b) that a claimant has to wait for a decision by a federal court, not that it also voided subsection (c) and its discussion of continuously pursued issues. The undersigned counsel apologizes to the Court for not being

clearer in his response and for any confusion and inconvenience that may have caused the Court and Appellant's counsel.

While *MVA* voided the second sentence of subsection (b) of § 3.2500, this does not impact the requirement and methods for continuous pursuit in order to preserve the effective date as set forth in subsection (c). Nor does this impact the ability of a claimant to wait for a decision from the Court and then file a supplemental claim under subsection (c)(4).³ As discussed at Oral Argument, our position is that this showcases the AMA's intent to provide claimants greater variation in how they choose to process their appeals. A claimant may choose to wait for a decision from a federal court before filing a supplemental claim, or, following the *MVA* decision, a claimant may instead choose to file a supplemental claim while the adjudication of the specific benefit is pending on appeal before a federal court. And as noted at Oral Argument, the Agency is currently evaluating and promulgating additional guidance and regulatory amendments to effectuate the *MVA* decision and make clear how concurrent elections work while an appeal is still pending with a federal court. Nevertheless, as also discussed at Oral Argument, Mr. Aviles-Rivera has not filed a supplemental claim in this case. Thus, the Court need not reach any questions pertaining to how a concurrent election might work following the *MVA* decision in order to resolve this case and affirm the Board's decision.

³ Relatedly, § 3.2500(d) and (e) are similarly not addressed or voided by the *MVA* decision, which address voluntary withdrawal and changing review options while a review is pending adjudication.

Appellee submits this clarification for the Court's review, and once again apologizes for any confusion or inconvenience that may have been caused at Oral Argument.

Respectfully submitted,

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