

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-6227

WILLIAM D. COWAN,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before ALLEN, TOTH, and FALVEY, *Judge*.

ORDER

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

Army veteran William D. Cowan, through counsel, appeals a May 7, 2020, Board of Veterans' Appeals decision that stated that Mr. Cowan's right knee disability was rated as follows: (1) a 10% rating based on flexion before February 20, 2018; (2) a 10% rating based on extension from February 28, 2012, to May 12, 2014; (3) a 30% rating for extension limitation from May 12, 2014, to May 2, 2017; (4) a 40% rating for extension limitation from May 2, 2017; (5) a 10% rating for instability before and from February 20, 2018; and (6) a 50% rating for ankylosis from February 20, 2018.

Mr. Cowan argues that a January 18, 2019, VA letter, which informed him of a November 9, 2018, regional office (RO) decision, did not provide notice that complied with 38 U.S.C. § 5104. He also asserts that the Board did not provide notice that complied with section 5104.

After reviewing the parties' briefs and conducting oral argument on February 22, 2022, the Court has determined that it needs additional information to adjudicate this case:

1. If the Court finds prejudicial error in regard to the January 2019 notice letter,¹ how precisely should the Court frame its remand instructions to the Board concerning the appropriate remedy? With regard to this question, should the Court order the Board to fix the notice error itself and, if so, how would the Board do so? Or, depending in part on the response to question #2 below, does the Board remand to the RO to provide sufficient notice?

¹ The Court acknowledges the Secretary's position that any notice error here was not prejudicial; but we instruct the parties to address this question assuming (but without us deciding in this order) that there is prejudicial error.

2. In light of the Veterans Appeals Improvement and Modernization Act, does the Board have authority to remand to the RO to remedy any notice errors? If not, what action should the Board take if it concludes on review in a given case that the RO's notice was inadequate?
3. If the Court instructs the Board to remand to the RO to provide sufficient notice of its November 2018 decision, do we vacate the part of the May 2020 Board decision concerning the knee disability? And if the Court vacates that part of the decision, what should VA do with the compensable knee extension ratings and the instability rating from February 20, 2018, that the Board assigned in the May 2020 decision?
4. Could Mr. Cowan have filed a supplemental claim after appealing to the Board or now file one while his appeal is pending before the Court? If he was or is permitted to file a supplemental claim at either stage of adjudication, does this impact the Court's assessment of whether any notice error is prejudicial?

Accordingly, it is

ORDERED that, no later than 14 days after the date of this order, Mr. Cowan and the Secretary each file a response, not to exceed 20 pages, addressing the issues identified above.

DATED: March 2, 2022

PER CURIAM.

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)