United States Court of Appeals for Veterans Claims

WILLIAM D. COWAN,
Appellant,

v. Vet. App. No. 20-6227

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

MR. COWAN'S RESPONSE TO ORDER OF MARCH 2, 2022

On March 2, 2022, this Court requested additional information in order to adjudicate this case. In response Mr. Cowan submits the following responses to the Court's request for additional information.

Mr. Cowan's Responses

1. **If the Court finds prejudicial error in regard to the January 2019 notice letter, 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?**

Assuming that this Court finds as a matter of law that VA's January 2019 notice to Mr. Cowan of VA's November 9, 2018 RAMP decision was prejudicially noncompliant with the requirements of 38 U.S.C. § 5104, this Court must frame its

remand instructions to the Board in the context of a determination that VA's November 9, 2018 RAMP decision was not final as a result of the defective notice provided to Mr. Cowan. *See Ingram v. Nicholson*, 21 Vet.App. 232, 240-41 (2007) (A decision is nonfinal when the time for appealing to the Board did not commence where the Secretary failed to provide the veteran with information or material critical to the appellate process.) (quoting *Cook v. Principi*, 318 F.3d 1334, 1340 (Fed. Cir. 2002)). In *Best v. Brown*, 10 Vet.App. 322, 325 (1997), this Court held that: "For a VA decision to become final, written notification to the appellant is required." VA's notification must be compliant in order for VA's decision to be final. This Court held in *Best*, that VA had a committed procedural error by failing to **adequately** notify a claimant. The same holding is required to be made by this panel in this matter because VA's notice of its 2018 RAMP decision was defective resulting in a substantive procedural error by failing to provide Mr. Cowan with notice which was compliant with the requirements of § 5104. As a result, as in *Best*, the Board lacked subject matter jurisdiction to under take a review VA's RAMP decision because that decision was not final decision as a matter of law. Thus, VA's 2018 RAMP decision could not have been subject to review by the Board because of the defective notice VA provided Mr. Cowan. *Cf. Hauck v. Brown*, 6 Vet.App. 518, 519 (1994) (holding that the one-year period for filing an NOD did not begin to run until the veteran was notified that his claim was denied).

This Court's order must not instruct the Board to correct the notice error itself because the Board had no subject matter jurisdiction. Before addressing this question further additional context is needed. In the enactment of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Congress expressly made substantive changes to how claims were to be processed by the Secretary as well as changes to the appeals process. As an integral part of its revision Congress unambiguously amended § 5104 to impose specific notice content requirements upon VA which altered fundamentally how the Secretary processed claims prior to an appeal. Congress required that the Secretary provide claimants with specific information concerning what had been done in the adjudication of the claims, because Congress provided claimants pre-appeal options not previously available to claimants which would avoid the need for an appeal. In so doing, Congress unambiguously required the Secretary to provide claimant's with the content specific notice in order to allow claimants to make informed choices of the newly available options which could result in an award of benefits negating the need to appeal.

These structural changes are be best understood and facilitated by Congress's mandate in the amendment to § 5104 requiring that the Secretary provide claimants with information not previously required by statute to be disclosed to claimants. Congress explicitly required that the Secretary disclose to claimants in his notice the following information: (1) to identify the precise issues which have been adjudicated;

(2) a summary of the evidence considered by the Secretary; (3) a summary of the applicable laws and regulations relied upon in the adjudication of the claim or clams; (4) to expressly identify all findings favorable to the claimant made by the Secretary in adjudicating the claim or claims; (5) in the case of a denial, the Secretary is required to explicitly identify any element which had not been satisfied which lead to the denial of the claim or claims; (6) an explicit explanation to claimants of how they would be able to obtain or access evidence used by the Secretary in making the adverse or incomplete decision on a claim or claims; and (7) if applicable, expressly identify the criteria that the claimant must satisfy by submitting evidence in order for the Secretary to grant a claim for service connection or for the Secretary to be able to grant the next higher level or additional compensation for a service connected disability or disabilities.

These new requirements imposed upon the Secretary to share the above described information with claimants represented a seismic change in the information the Secretary was required to provide claimants in his notice to them of his decisions affecting benefits. By requiring the Secretary to provide this content specific information to claimants Congress was enabling claimants to avoid appealing VA decisions denying benefits or denying full benefits by authorizing pre-appeal readjudications by higher level reviews and supplemental claims. To maximize the likelihood that these new options would be successful, Congress explicitly required

the Secretary to provide, separate from his decision, content specific notice as set out in § 5104(b).

Under the legacy system, the initial denial of a claim by the Secretary was not required to provide the specific information set out in § 5104(b). This was so under legacy for two reasons. First, the only statutory option available to claimant following a denial of benefits was to appeal. Second, under the legacy system claimants were able to submit additional evidence during the appeal period literally up to the time of the Board's decision. This resulted in a very lengthy and protracted appeal process resulting in unmanageable backlogs which was the impetus for Congress to enact the AMA. Thus, Congress provided claimants with options not previously available to claimants in the legacy system. These options, however, required that claimants and their representatives be provided by the Secretary specific information previously not required to be include in a notice which was separate from the decision. By requiring the content set out in § 5104(b), claimant were able to make informed decisions regarding whether to ask for a higher level review or based on the information provide in the notice opt to present new and relevant evidence in a supplemental claim. Both of these options required the Secretary to make a new pre-appeal decision. These options can not be exercised without the content specific information set out in § 5104(b) in a notice independent of the decision mad denying the claimant the benefit or benefits sought.

It is evident that based on these now available options in the AMA, that information set out in § 5104(b) becomes critical to claimants to have in order to know what evidence remains needed for the Secretary to award the benefit sought by the claimant. Armed with this information, claimants under the AMA are able to make informed decisions about what review options are most likely result in an award of benefits sought. Without this information, claimants must, as they did in the legacy system, make assumptions or inferences based only on the content of the rating decision. Section 5104(b) unambiguously requires more.

The requirements imposed by Congress upon the Secretary in § 5104(b) are precise and serve an obvious purpose which is to allow claimants to obtain benefits without having to appeal. The information required to be provided claimants under § 5104(b) gives claimants options, other than to appeal to the Board. By compelling the Secretary to provide the specific information to claimants to be included in every notice of every decision made by the Secretary affecting benefits, Congress clearly provided claimant with the means to make informed choices either other than appealing or before appealing.

Thus, as regards the question of whether this Court should order the Board to fix the notice error made by VA, the answer is an unqualified no. The answer is no because in addition to lacking subject mater jurisdiction, the Board is not able to fix this notice error because Mr. Cowan needed this information when he received notice

the VA's RAMP decision denying his claims. Only the agency of original jurisdiction (AOJ) can correct its notice error because only the AOJ knows why the benefits were denied and what content is required in § 5104(b). The Board on the other hand would be required to assume, speculate and infer why the claims were denied. Without compliant notice by the AOJ, Mr. Cowan was unable to make an informed decision regarding his statutory review options.

It must be evident to this Court that Congress unambiguously intended that every decision made by the Secretary under the AMA include required notice of such decision. *See* 38 U.S.C. § 5104(a). The Court's attention is directed to the last sentence of §5104(a) which states, "The notice shall include an explanation of the procedure for obtaining review of the decision." The plain language of the statute provides the explicit content of the notice separate from the rating decision, as set out in § 5104(b).

It must also be evident to this Court that the information mandated by Congress to be provided to claimants under § 5104(b) is vital to claimants in order for them to make informed decisions about what review option to take under the provisions 38 U.S.C. § 5104C. This case is exemplary of why only the AOJ can fix this notice defect because Mr. Cowan was compelled to appeal to the Board to secure this required notice because he lacked the information necessary to determine whether a higher level review, supplemental claim or Board appeal would be the best

option for his individual circumstances. Without the information required by § 5104(b), the only viable option available was for Mr. Cowan to appeal in order to obtain compliant notice. Congress made these options available to claimants so they could avoid an appeal and get relief from the AOJ rather than experience the much longer delays attendant to an appeal to the Board.

It is Mr. Cowan's ability and the right to choose from these options which precludes the Board from being capable of fixing VA's notice error because Mr. Cowan was entitled to and did not receive the information the Secretary was obligated to provide under § 5104. Integral to making informed decisions Congress provided in 38 U.S.C. § 5104A that: "Any finding favorable to the claimant as described in section 5104(b)(4) of this title shall be binding on all subsequent adjudicators within the department . . .." The notice defect made by the Secretary can not be fixed by the Board because Mr. Cowan needed to know at the time VA issued its decision and notice letter denying his claim the information required pursuant to the provisions of §5104. Only after receiving compliant notice under § 5104 could Mr. Cown decide whether to request a higher level review, submit a supplemental claim with new and relevant evidence or file a Board appeal. The Board **cannot** fix VA's notice error made following VA's November 9, 2018 RAMP decision. Thus, the Board must be ordered to remand to the AOJ with instructions from this Court via the Board that they must provide Mr. Cowan and his representative the notice as

specified by Congress in § 5104 because **only** AOJ and not the Board can provide the information required in the notice of the November 9, 2018 decision by VA.

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?**

Mr. Cowan's counsel can find no provision of the Veterans Appeals Improvement and Modernization Act which explicitly addresses or expressly authorizes the Board to remand a matter to the VA in order to remedy a violation of the notice requirements of § 5104. Congress in § 5104 did not speak to or otherwise address either a consequence or a remedy for VA's failure, as here, to provide compliant notice as required by AMA. Having said that, Mr. Cowan asserts that it fair to say Congress's expectation in amending § 5104 to add the requirements set out in § 5104(b) was that they would be complied with by VA and enforced by the Board when presented. In this regard, Mr. Cowan would ask this Court to consider the unambiguous mandate of Congress as set out in the language used by Congress in 38 U.S.C. § 7104(a). The Board's jurisdictional statute expressly provides in pertinent part: "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." (emphasis added). This mandate can not have been more clear, Congress intended that the decisions of the Board were to be based

upon applicable provisions of law. In addition, Congress requires the Board to include in each decision "an order granting appropriate relief or denying relief." In the circumstances presented by this appeal, an order granting appropriate relief is for this Court to instruct the Board to remand, as an order of appropriate relief, to the RO to remedy its notice to conform with the requirements of § 5104(b) as interpreted by this panel.

To be clear, the Board already had the opportunity to determine on its review of VA's notice of its November 9, 2018 RAMP decision whether that notice was compliant. The Board made a clear error of law in concluding that it was compliant. If the Board had correctly determined that VA's notice of its November 9, 2018 RAMP decision was defective, then the Board would have been required to also recognize under the applicable law as discussed in the preceding section, such defective notice rendered VA's November 9, 2018 RAMP decision non final as a matter of law. Thus the Board's only course of action would have been to return the matter to the AOJ with instructions to provide compliant notice to Mr. Cowan.

Previously, by regulation the Secretary provided for referral when the Board lacked jurisdiction over the matter being referred. This Court held under that regulation, remand was the appropriate action only when the Board has jurisdiction over a claim but the evidence has not been sufficiently developed for proper appellate adjudication. 38 C.F.R. § 19.9; *see Young v. Shinseki*, 25 Vet.App. 201, 202-203 (2012)

(*en banc*). However, the Secretary has repealed this regulation and therefore referral is no longer expressly available to the Board. Thus, the only available remedy to this Court is to determine as a matter of law that VA's notice of its November 9, 2018 RAMP decision was defective and order the Board to remand to AOJ with instructions to correct its prejudicial error in failing to provide Mr. Cowan notice which was compliant with § 5104.

This Court has exclusive jurisdiction to review decisions of the Board of Veterans Appeals under 38 U.S.C. § 7252(a). Congress also provided that this Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate. *Id.* In this case reversal is required because there is no question that under the provisions of 38 U.S.C. § 7261(a)(4), the Board made a clearly erroneous adverse finding of material fact when it found "no due process deficiencies in the notification." RBA 22. Therefore, this Court must hold unlawful and set aside or reverse the Board's clearly erroneous finding. A reversal by this Court does not mean that this Court can not also remand as appropriate.

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?**

Mr. Cowan did not appeal the Board's Order which provided:

> Entitlement to increases in the (10 percent prior to February 20, 2018 for flexion, 10 percent prior to February 20, 2018 for instability, 0 percent from April 12, 2017 to February 20, 2018 for degenerative joint disease (extension); and 50 percent for excision. meniscus repair, with instability and ankylosis from February 20, 2018) staged ratings assigned for plica syndrome with degenerative joint disease (a right knee disability) is granted, to the following extent: separate 10 percent from February 28, 2012, 30 percent from May 12, 2014, and 40 percent from May 2, 2017 ratings for (extension limitation) and 10 percent ratings, each, for flexion limitation and instability, prior to February 20, 2018 ; and separate 10 percent (for instability) and 50 percent (for ankylosis) ratings from February 20, 2018.

RBA 7. Mr. Cowan did appeal VA's November 9, 2018 RAMP decision and the Board would have had subject matter jurisdiction to review that decision based on Mr. Cowan's notice of disagreement seeking review by the Board. Mr. Cowan acknowledges that the question of the Board's subject matter jurisdiction is conflicting, in that it had jurisdiction to review VA's November 9, 2018 RAMP decision while it lacked subject matter jurisdiction to review the notice because it was defective as a matter of law.

However, this Court's *en banc* decision in *Pederson v. McDonald*, 27 Vet.App. 276 (2015) may be instructive in addressing this conflict and the question posed by this panel when it concluded that as a matter of the exercise of prudential considerations, this Court will not review the merits of the abandoned issues. Mr. Cowan did not raise or otherwise challenge the Board's favorable order in the ratings of his service

connected knee disabilities. Mr. Cowan only challenged whether the notice provided by the AOJ was compliant and whether the Board under § 5104(b) was required to provide him § 5104(b) notice of its decision.

Therefore, it is Mr. Cowan's view that this Court can instruct the Board to remand to the AOJ to provide Mr. Cowan sufficient notice of its November 2018 decision without vacating the fully favorable part of the May 2020 Board decision concerning the ratings it assigned for his service connected knee disability. The AOJ has implemented the favorable decisions made in the Board's May 2020 decision. As a result, this Court in accordance with its decision in *Pederson* need not review that portion of the Board's 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?**

There is no question that Mr. Cowan could have filed a supplemental claim both after VA's RAMP decision as well as after an adverse decision of the Board. Additionally, he could have filed a supplemental claim while his appeal was pending before this Court. The fact that he could have done so and chose not to has **no impact** on this Court's assessment of whether any notice error by VA or by the Board was prejudicial to Mr. Cowan. To the contrary, as noted above, it is the available options for such filings which demonstrate the profound prejudice of VA's

notice error to Mr. Cowan. As discussed above, the resulting prejudice to Mr. Cowan by having not been provided compliant notice as required by § 5104 from VA following its November 2018 decision comes from his inability to make an informed decision on whether to seek a higher level review or submit new and relevant evidence following VA's RAMP decision because VA's notice was not compliant with the mandatory requirements for specific content set out in § 5104(b).

Without the information both VA and the Board were required to provide him, Mr. Cowan was unable to make an informed decision about whether to seek a higher level review or know that he needed to submit new and relevant evidence within one year of VA's November 2018 decision. In addition there were no favorable findings identified in VA's notice which would have been binding on a VA adjudicator or the Board. This also would have been the case had Mr. Cowan filed a supplemental claim after an adverse decision by the Board or if he were to have filed a supplemental claim while his appeal was pending before this Court because there would be no findings favorable to Mr. Cowan in a VA notice under § 5104(b) which are binding on all future VA adjudicators including the Board under § 5104A.

As this appeal unfortunately demonstrates Mr. Cowan was entitled to and did not receive enhanced notice under the provisions of § 5104 of VA's November of 2018 RAMP decision. Mr. Cowan is unlikely to get compliant notice required by § 5104 until sometime in 2023 following remands from this Court, and from the Board

back to the AOJ. Thus, the prejudice to Mr. Cowan has been demonstrated regardless of whether he had filed a supplemental claim after an adverse Board decision or if he were to have filed a supplemental claim while his appeal was pending before this Court. Such filings would have had **no impact** on this Court's assessment of whether any notice error by VA or by the Board was prejudicial to Mr. Cowan.

CONCLUSION

Based upon the above information, Mr. Cowan respectfully requests that this Court reverse the clearly erroneous adverse finding of material fact made by the Board that no due process deficiencies in the notification were made in VA's notice of its November 2018 decision and set the Board's decision aside as it relates to the notice VA provided. Further, that this Court find as a matter of law that the erred by failing to provide Mr. Cowan notice of it May 2020 decision as required by the provisions of 38 U.S.C. § 5104.

This Court should in the exercise of prudential considerations not review the favorable order of the Board concerning the ratings it assigned Mr. Cowan's knee disability in accordance with the rule of law established by *Pederson*, *supra*. This Court should instruct the Board to remand this matter to VA with directions to VA to provide compliant notice to Mr. Cowan and his representative its November 2018 decision as expeditiously as possible.

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