IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PAUL CARDOZA, Appellant,	)	
v.	)	Vet. App. No. 20-6380
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT'S NOVEMBER 2, 2023, ORDER

The Court's November 2, 2023, Order, directed Appellee, Denis McDonough, Secretary of Veterans Affairs, to respond and explain, "(1) why [38 U.S.C. § 5104C(a)(2)(C)] does not control this matter and (2) whether VA will accept the appellant's April 2020 [Notice of Disagreement (NOD)] seeking an earlier effective date for the grant of the date of service connection for [Post-Traumatic Stress Disorder (PTSD)] and place the matter on the docket in order of where the appellant would have been had VA initially accepted the NOD in April 2020." Order, at 4. And the Court directed that if the Secretary does not accept Appellant's April 2020 NOD, he must explain, "why (1) judicial resources are necessary to fix what appears to be an obvious agency mistake and (2) he would delegate the authority to the Court to determine what constitutes a final Board decision in this situation." *Id*. The Secretary hereby respectfully responds.[1]

[1] This response seeks to be responsive to the specific questions presented by the Court's November 2, 2023, Order. But if additional information is needed, the Secretary welcomes full briefing by the parties on specific areas of concern.

Section 5104C(a)(2)(C) does not control this matter because the downstream elements of a disability rating and an effective date are not "different issues." The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) added section 5104C, which outlines the available review options following a decision by the Agency of Original Jurisdiction (AOJ). Congress did not define the term "issue," despite adding definitions of other key terms with the AMA. *See* 38 U.S.C. 101(34)-(36); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). That lack of definition includes the part of section 5104C relied on by Appellant that says "[n]othing in this subsection shall prohibit a claimant from taking different actions set forth in paragraph (1) with respect to different claims or *different issues* contained within a claim." 38 U.S.C. § 5104C(a)(2)(C) (emphasis added).[2]

VA has thus reasonably defined the term "issue" as "entitlement to compensation for a particular disability" and specified that "different review options may not be selected for specific components of [a] claim." 38 C.F.R. § 3.151(c)(2). VA explained in the Federal Register that a claimant "may not . . . challenge the effective date assigned for [a particular disability] in one lane, and simultaneously

[2] While the term "claim" is not at issue here, VA has generally defined it as "a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary." 38 C.F.R. § 3.1(p).

challenge the assigned degree of disability for [that particular disability] in another lane." 83 Fed. Reg. at 39822.

Here, the issue is entitlement to compensation for posttraumatic stress disorder (PTSD), which is inclusive of the elements of a disability rating and an effective date for that particular disability. Consistent with VA's definition of the term "issue" and section 5104C(a)(2)(A)'s prohibition against concurrent election of different review options available under the AMA for the same issue, the Board correctly informed Appellant in its May 19, 2020, letter that it could not docket an appeal while the issue of entitlement to compensation for his PTSD was pending Higher-Level Review (HLR).

As further background, VA amended 38 C.F.R. §§ 3.151 and 3.2500 consistent with new section 5104C to provide that a claimant may request one of the three review options under § 3.2500 (higher-level review, supplemental claim, appeal to the Board) for each issue decided by VA. *See* 83 Fed. Reg. 39818, 39821-39822 (Aug. 10, 2018). Section 3.151 defined "issue" as "entitlement to compensation for a particular disability," with respect to service-connected disability compensation. 38 C.F.R. § 3.151(c)(2) (providing the example that "if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected."); *see* 83 Fed. Reg. at 39822 (noting that "[p]roposed § 3.151(c) defines an issue for this

purpose as an adjudication of a specific entitlement" and is consistent with past definitions of the term); 84 Fed. Reg. 138, 145 (Jan. 18, 2019) (stating that "[i]t is clear from § 3.151(c) that the term 'issue' refers to a distinct determination of entitlement to a benefit, such as a determination of entitlement to service-connected disability compensation for a particular disability."). Section 3.151 explains that "each specific entitlement will be adjudicated and is considered a separate issue for purposes of the review options prescribed in § 3.2500" and "a claimant may elect any of the applicable review options prescribed in § 3.2500 for each issue adjudicated." 38 C.F.R. § 3.151(c)(1). And § 3.151 states plainly that "different review options may not be selected for specific components of [a] disability claim." 38 C.F.R. § 3.151(c)(2); *see* 83 Fed. Reg. at 39822 (explaining that "[t]he option to select different review lanes would not extend to specific components of the same entitlement claim, because . . . [it would] defeat Congressional intent to streamline the review process and reduce processing times.").

Under § 3.2500, for each "issue" decided by the AOJ, a claimant may elect a request for HLR, appeal to the Board, or file a supplemental claim. 38 C.F.R. § 3.2500(a)(1)-(2). But § 3.2500 prohibits the concurrent election of these review options for an issue as defined in § 3.151(c). 38 C.F.R. § 3.2500(b); *see* 38 U.S.C. § 5104C(a)(2)(A). VA has explained that while a claimant may elect separate review options for different issues, like disability compensation for a knee disability

and disability compensation for a mental disorder, a claimant "may not . . . challenge the effective date assigned for the knee in one lane, and simultaneously challenge the assigned degree of disability for the knee in another lane." 83 Fed. Reg. at 39822.

In adopting the final rule for § 3.2500, VA addressed concerns over the concurrent election prohibition in § 3.2500(b), including that a claimant would be limited to a single review option for "downstream issues." 84 Fed. Reg. at 145. Indeed, VA addressed an example offered by a commentator like the situation presented here where the Board, rather than the AOJ, grants service connection for a particular disability and the claimant disagrees with the disability rating and effective date assigned desiring to pursue these downstream elements under different review options. 84 Fed. Reg. at 145. VA responded that "each separate benefit entitlement sought by a claimant is considered an issue as defined in § 3.[1]51(c) and cannot be split into different review lanes for purposes of [administrative] review." 84 Fed. Reg. at 146. VA explained that "allowing a claim to be splintered into several pieces for review, each potentially subject to different evidentiary rules and timelines, would render the new review system administratively unworkable, risk self-contradictory decision-making by VA, and undermine Congressional intent to streamline the review process and reduce adjudication times." 84 Fed. Reg. at 145-46; *see* 83 Fed. Reg. at 39822 (same). VA emphasized that, because it "must attempt to achieve a balance between more

flexibility for individual claimants and administrative efficiency that benefits all veterans," it "will not allow claimants to choose different review lanes for downstream issues." 84 Fed. Reg. at 146.

VA's definition of "issue" under the AMA is consistent with its prior legacy definition of the term in 38 C.F.R. § 20.1401 (2018), as interpreted by this Court. *See Hillyard* v. *Shinseki,* 24 Vet. App. 343, 353 (2011) (declining to equate the term "issue" with "a theory or an element of a claim," citing *Disabled American Veterans v. Gober,* 234 F.3d 682, 693 (2000)). Indeed, it has long been understood that the elements of entitlement for disability compensation include status as a veteran, the existence of disability, a connection between the veteran's service and the disability, the degree of the disability, and the effective date of the disability. *Maggitt v. West*, 202 F.3d 1370, 1374 (Fed. Cir. 2000). And while the term "downstream issue" is sometimes imprecisely used to refer to the elements of disability rating and effective date, these components have been more precisely recognized as "elements" of entitlement to compensation for a particular disability. *See id.*; *Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997) (noting that downstream elements such as disability rating are not part of an appeal of the denial of service connection).

Applying this understanding here, the "issue" adjudicated in the AOJ's June 4, 2019, decision was entitlement to compensation for PTSD, where it granted service connection and assigned a 50% disability rating, effective

June 15, 2018. *See* Appellant's Nov. 20, 2020, Response, Ex. 1 at 18-23. On March 5, 2020, Appellant sought HLR of that issue. *See id.*, Ex. 2 at 27-28. At that point, Appellant was prohibited from seeking concurrent review of that issue under other AMA review options. 38 U.S.C. § 5104C(a)(2)(A); 38 C.F.R. § 3.2500(b). Notwithstanding this prohibition, on April 3, 2020, Appellant also sought Board review of that issue before the HLR adjudication was completed. *See* Appellant's Nov. 20, 2020, Response, Ex. 3 at 39-43. Then, on May 19, 2020, the Board informed Appellant that it could not review his case "[b]ecause [he] already requested [HLR] for the *issue(s)* listed on the [VA Form 10182]." Secretary's Nov. 10, 2020, Motion to Dismiss, Ex. A at 5 (emphasis added). In other words, the Board informed Appellant that he could not seek concurrent review of the issue of entitlement to compensation for PTSD, and his appeal to the Board was premature given that prohibition and the pending HLR adjudication.

The Secretary reiterates, and incorporates here by reference, that the Board's May 2020 letter is not a Board decision within the Court's subject matter jurisdiction under 38 U.S.C. § 7252(a). *See* Secretary's Nov. 10, 2020, Motion to Dismiss; Secretary's Mar. 16, 2021, Response. The Board's May 2020 letter did not grant or deny any benefit, did not perform the function of providing "one review on appeal" on the issue of entitlement to compensation for PTSD, and did not announce the Secretary's final decision on that issue. *See* Secretary's Mar. 16, 2021, Response at 1-3. Instead, the Board's May 2020 letter was an informative

notice explaining that Appellant's attempt to appeal to the Board was premature given the statutory prohibition against concurrent election of different AMA review options for the same issue. 38 U.S.C. § 5104C(a)(2)(A). The Court should dismiss this attempted appeal for lack of subject matter jurisdiction because there is no final Board decision within the Court's subject matter jurisdiction.

The Secretary also reiterates that Appellant has not been deprived of Board review of the issue of entitlement to compensation for PTSD, including his concerns about the element of the effective date assigned for the grant of service connection. *See* Secretary's Mar. 16, 2021, Response at 3-4. Appellant has continued to pursue the issue of entitlement to compensation for PTSD before the agency. *See* Secretary's October 23, 2023, *Solze* Notice. Most recently, the AOJ issued a May 31, 2023, HLR decision on the issue of entitlement to compensation for PTSD. *Id*., Ex. E. As of this filing, Appellant has not taken any additional action following that decision on the issue, and the Secretary highlights that Appellant has until June 2, 2024, to file a supplemental claim or seek Board review. *See* 38 U.S.C. § 5104C(a)(2)(B) (providing for the successive election of different AMA review options for an issue). Thus, Appellant still has an avenue to seek Board review, and potential judicial review, of the issue of entitlement to compensation for PTSD.

Accordingly, the Secretary respectfully responds that (1) section 5104C(a)(2)(C) does not control this matter because the elements of entitlement

to a disability rating and an effective date are not "different issues," and (2) VA cannot accept Appellant's April 2020 NOD because concurrent election of different AMA review options of the same issue is prohibited by section 5104C(a)(2)(A). The Secretary also responds that, (1) given the above, he respectfully disagrees that this case presents "an obvious agency mistake," and (2) he, like all parties, has an obligation to raise jurisdictional objections to conserve the resources of the Court and the parties, *see Wilkins v. United States*, 143 S. Ct. 870, 876 (2023) (citing *Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011)), and the question of whether a Board notice letter is a decision within this Court's subject matter jurisdiction remains unanswered after *Kernz v. McDonough*, 36 Vet.App. 372 (2023). The Secretary continues to respectfully request that the Court dismiss this attempted appeal for a lack of subject matter jurisdiction.

WHEREFORE, the Secretary respectfully responds to the Court's order.

Respectfully submitted,

RICHARD J. HIPOLIT
Deputy General Counsel
Veterans Programs

MARY ANN FLYNN
Chief Counsel

/s/ James B. Cowden
JAMES B. COWDEN
Deputy Chief Counsel

/s/ Nicholas R. Esterman
NICHOLAS R. ESTERMAN
Senior Appellate Counsel
Office of the General Counsel (027K/N)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-4322

Counsel for the Secretary