IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MARLESA D. LYNCH, Appellant,	)	
v.	)	Vet. App. No. 16-0541
PETER O'ROURKE, Acting Secretary of Veterans Affairs, Appellee.	)	

APPELLEE'S SUPPLEMENTAL MEMORANDUM OF LAW

On May 3, 2018, the Court ordered the parties to submit supplemental memoranda of law on three questions. The Secretary's response to each, respectively, is as follows.

I. The appropriate date upon which to assess whether a person qualifies as a "child" as defined in 38 U.S.C. § 101(4)(A) is either the date upon which entitlement arose, if the application was filed within one year of that date, or if not, the date the application was filed.

For purposes of entitlement to dependency and indemnity compensation (DIC) as described in 38 U.S.C. §§ 1310 and 1313, the correct date upon which to assess whether a person qualifies as a child pursuant to 38 U.S.C. § 101(4)(A) is dependent upon whether a person's application for DIC benefits is received within one year of the date upon which entitlement arose.

Pursuant to 38 C.F.R. § 3.400(c)(4), the effective date of any DIC award for children will be the first day of the month in which entitlement arose, if the claim is received within 1 year after the date of entitlement. Otherwise, the effective date will be the date of receipt of the claim.

There are two logical dates upon which entitlement to DIC benefits may arise: the date of death of the veteran, or the date the child in question was born, whichever is later. If an application for DIC is filed on behalf of the child within one year of whichever date is applicable, then a claimant may receive DIC benefits from that date. In those cases, it is the date of the veteran's death, or the date of the child's birth, whichever is later, that would be the appropriate date on which to assess whether a claimant qualifies as a child.

However, if a claim for DIC is not filed for or by a surviving child until more than one year after entitlement arose, then the earliest date at which benefits may be received is the date of receipt of the claim. In those cases, it is the date of receipt of the claim that is the appropriate date upon which to assess whether a claimant qualifies as a child.

If other dates were selected as the appropriate dates upon which to assess whether a claimant qualifies as a child, it would effectively write 38 C.F.R. § 3.400(4)(ii) out of the regulatory scheme.

This is not inconsistent with the Court's holdings in *Sucic v. Shulkin*, 29 Vet.App. 121 (2017), and *Burris v. Principi*, 15 Vet.App. 348 (2001). Notably, both of those cases specifically involved claims for accrued benefits, based on underlying disability claims, whereas in this case, the issue of concern is entitlement to DIC. Thus, although the Court found that the date of the veteran's death was the date upon which to assess whether the claimants qualified as a child

for purposes of 38 U.S.C. § 101(4)(A), in those cases, the Court was not considering DIC claims.

In this case, the Secretary maintains that the 1969 "Application for Dependency and Indemnity Compensation by Parents," which was submitted by the Veteran's parents, was not an application submitted on behalf of the Appellants, as the claim form specifically denied that the Veteran had any surviving children. (R. at 340). As such, the date upon which to assess whether the Appellants qualify as children within the meaning of 38 U.S.C. § 101(4)(A) is the date of receipt of their claim, which is 2010. Because the Appellants do not meet the statutory definition of children on that date, as they were well over the age of 18, they are not entitled to DIC benefits.

Although it is true that the Appellants DIC claims automatically include a claim for any accrued benefits pursuant to 38 C.F.R. § 3.1000(c), the Appellants have not asserted that the Veteran, who was on active duty at the time of his death, was actually entitled to periodic monetary benefits based on disability ratings in existence at the time of his death, or based on evidence in a VA claims file at the time of his death. 38 U.S.C. § 5121(a). Moreover, even if Appellants qualified as children on the date of the Veteran's death for purposes of 38 U.S.C. § 101(4)(A), it is a moot point, as an accrued benefits claim must be filed within one year of the Veteran's death. 38 U.S.C. § 5121(c). No claim was filed on the Appellants' behalf within one year of the Veteran's death. As such, the date upon which to assess whether the claimant is a child for purposes of accrued benefits is moot.

II. The Board did not make an actual or implicit favorable factual finding as to paternity, as it was not necessary for it to reach that issue.

As the Court noted in its May 3, 2018, order, the Board's decision in this case did not address whether the Appellants are David Philpot's ("the Veteran's) biological children. Instead, the Board found that, as a matter of law, Appellants were not entitled to recognition as a "child" as of the date of their 2010 applications, as they were well over the age of 18 and there was no showing that prior to attaining that age, they became permanently incapable of self-support. (BVA dec. at 4). As such, it was unnecessary for the Board to reach the issue of whether the Appellants were in fact, the Veteran's biological children.

Similarly, the Secretary maintains that it is unnecessary for the Court to reach this issue, because the 1969 application was not an incomplete application, or an informal claim for benefits on behalf of the Appellants. As such, Appellants do not qualify for receipt of DIC benefits, because no other application was received prior to 2010, at which time the Appellants were no longer children.

However, assuming *arguendo* that the Court disagrees, the Secretary maintains that no factual finding as to paternity was made, either actual or implicit, and that a remand would be necessary for the Board to make appropriate findings of fact as to that issue.

Appellants make no argument that the Board has rendered implicit favorable factual findings concerning paternity. Instead, Appellants note that in 2012 Statements of the Case, the Regional Office (RO) explicitly conceded that the

Appellants were the "natural daughter[s] of the veteran." (App.Supp.Mem. at 6, citing R. at 127-41, 144-58). Appellants seem to suggest that the RO's statements are the end of the matter, and the Board has no authority to overturn this determination.

Appellant overlooks the fact that the Board reviews all RO decisions *de novo*, and is not bound by any findings made by a regional office decision. *See* 38 U.S.C. § 7104(a), *Boyer v. Derwinski*, 1 Vet.App. 531, 535 (1991). This includes favorable factual findings. *See McBurney v. Shinseki*, 23 Vet.App. 136, 139 (2009) (citing *Anderson v. Shinseki*, 22 Vet.App. 423 (2009) (holding that the Board, as the final trier of fact, is not constrained by favorable determinations below)). Simply because the 2012 Statements of the Case refer to the Appellants as the Veteran's natural daughters does not end the matter.

The Secretary does not dispute that whether an individual is a child within the meaning of 38 U.S.C. § 101(4)(A) is a substantially factual determination. (App. Supp. Mem. at 5). As the Court's decision illustrates in *McDowell v. Shinseki*, 23 Vet.App. 207 (2009), that determination may involve the weighing of many types of evidence. No one type of evidence, including those enumerated in 38 C.F.R. § 3.210(b), can operate as "proof" of paternity. Such an interpretation is "wholly inconsistent with this Court's caselaw that has long held that the Board has a duty to find facts and assess the weight and credibility of the evidence." *McDowell*, 23 Vet.App. at 214.

To that end, it is important to recall that fact-finding in veterans cases is to be done by the Board in the first instance, not the Court. *Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000). The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. The statement must be adequate to facilitate judicial review in this Court. 38 U.S.C. § 7104(d)(1). If the Board fails to do so, the appropriate remedy is remand, not to attribute implicit factual findings to the fact-finder. *Tucker v. West*, 11 Vet.App. 369 (1998).

Similarly, as this Court recognized in *Thompson v. Gober*, 14 Vet.App. 187 (2000), the Federal Circuit has held that 38 U.S.C. § 7261(a), (a)(4), and (c) "are consistent with the general rule that appellate tribunals are not appropriate fora for initial fact finding. Thus, the Supreme Court has held that when a court of appeals reviews a district court decision, it may remand if it believes the district court failed to make findings of fact essential to the decision; it may set aside findings of fact it determines to be clearly erroneous; or it may reverse incorrect judgments of law based on proper factual findings; 'but it should not simply [make] factual findings on its own.'" *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000) (*citing Icicle Seafoods, Inc., v. Worthington*, 475 U.S. 709, 714 (1986).

The Secretary respectfully submits that extrapolating an "implicit finding of fact" that the Appellants are the biological children of the veteran from the Board's silence, infringes upon the statutory framework that designates this Court as one of review, and reserves the role of fact-finder to the Board. This is particularly so

when the Board reasonably believed (as evidenced by this Court's initial affirmance of the Board's decision) that it was unnecessary to render a finding of fact on the matter of paternity because Appellants were not eligible claimants as a matter of law on other grounds anyway.

Moreover, the Secretary is aware of no authority that would allow the Court to hold that the Board rendered an implicit finding of fact in this situation, and Appellant has cited none.

For these reasons the Secretary maintains that if the Court reaches this issue, and believes that a factual finding of paternity is necessary to resolve this case, the appropriate remedy is remand to the Board, so that it may address this matter as the finder of fact.

III. Common dictionary definitions, Federal Circuit case law, and federal regulations suggest that the 1969 application was complete as of the date it was submitted.

The common dictionary definition of the term "complete" is "having all necessary parts, elements, or steps." https://www.merriam-webster.com/dictionary/complete (last visited July 11, 2018). A common synonym for the term "incomplete" is "unfinished." https://www.merriam-webster.com/dictionary/incomplete (last visited July 11, 2018).

The terms "complete" and "incomplete" differ from the term "incorrect," which is commonly defined as "inaccurate, faulty," or "not true, wrong." https://www.merriam-webster.com/dictionary/incorrect (last visited July 11, 2018).

In this case, though Appellants argue that the 1969 "Application for Dependency and Indemnity Compensation by Parent(s)" that was submitted by the Veteran's parents was "incomplete," (App. Supp. Mem. at 7-13), Appellants' argument ignores the ordinary definition of that term.

There is no dispute that the 1969 application contained responses to the questions posed, including, and importantly, question 21, which specifically asked, "WAS VETERAN SURVIVED BY" and provided three boxes that the applicant could check, including "WIDOW," "CHILD UNDER 18 YEARS OF AGE," OR "NEITHER." (R. at 340). Critically, this question was not left unanswered on the 1969 application. The application clearly and affirmatively indicated "neither," and provided no further information on a widow or children, although such information was requested "if applicable." *Id.*

As such, the 1969 application was not left "incomplete," within the common meaning of that term. There was no absence of a response to question 21, which would have rendered the application incomplete.

Appellants cite the Federal Circuit's decision in *Fleshman v. West*, 138 F.3d 1429 (Fed. Cir. 1998), in support of their arguments that the application was incomplete, but if anything, the case clearly supports the Secretary's position. In that case, the Court noted that pursuant to 38 U.S.C. § 5101(a), "a specific claim in the form prescribed by the Secretary. . .must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." *Fleshman*, 138 F.3d at 1431-32 (citing 38 U.S.C. § 5101(a)).

The Court found that the submission of a claim in a particular format, containing specified information and signed by the claimant, as called for by the blocks on the application form was required to comply with 38 U.S.C. § 5101(a). *Fleshman*, 138 F.3d at 1431-32. The Court held that if the applicant fails to provide "critical elements of the information requested on the form" the application was non-compliant. *Fleshman*, 138 F.3d at 1432.

In *Fleshman*, unlike in the case at bar, the application form at issue was incomplete, in that there was a missing signature which provided consent to release of information, and a waiver of certain confidentiality privileges. Without the claimant's signature, the Court noted that the application was missing a critical element because the Secretary was unable to process the claim. *Id.* at 1433. The Court's finding that the application was incomplete because it was missing a "critical element" all but mirrors the dictionary definition of the term "complete," which indicates that missing a "necessary element," would render something incomplete. https://www.merriam-webster.com/dictionary/complete (last visited July 11, 2018)

Applied to the facts of this case, there was no missing signature, or absence of information on the 1969 claim form. A clear response to Question 21 on the application form was provided. There were no critical or necessary elements missing from the application that would preclude the Secretary from processing the claim. The application was thus not incomplete, as it was in *Fleshman*. That

the Appellants now assert that the response provided on the application was *incorrect* or *inaccurate* does not render the application *incomplete*.

To that end, the Secretary notes that the claim form was signed by the Veteran's parents. (R. at 342). The signatories to that claims form "certif[ied] that the foregoing statements are true and correct to the best of my knowledge and belief." (R. at 342). VA had no reason to believe that the information provided regarding whether the Veteran had any children was incorrect; indeed, it has not been conclusively established that he does, even today. Moreover, from a public policy standpoint, the Secretary should be able to rely on the representations contained in the application forms provided to it and certified as true by claimants.

In addition to the common dictionary definitions, as well as the Federal Circuit's decision in *Fleshman*, federal regulations provide some guidance on whether a claim is complete. Although the current version of 38 C.F.R. § 3.160(a) was not in effect in 1969, that regulation is instructive as to whether a claim may be viewed as complete.

38 C.F.R. § 3.160(a) provides that a "complete claim" must provide the name of the claimant, the relationship to the veteran, if applicable; and sufficient service information for VA to verify the claimed service, if applicable. It must be signed by the claimant, or someone legally authorized to sign for him, must identify the benefit sought, provide a description of the medical conditions on which the benefit is based, and a statement of income, to the extent required. 38 C.F.R. § 3.160(a)(1)-(5) (2015).

Using this definition as to what constitutes "a complete claim," it is clear that the 1969 application would qualify. As such, it was not error for the VA to proceed with adjudication of the claim, rather than requesting further information as with an incomplete claim.

It must further be noted that to find that the 1969 claim form was in some way "incomplete," would reach an absurd result, in that it would require the Secretary to be omniscient, or at least clairvoyant. The Appellants note that if an application is incomplete, VA is under a duty to notify the claimants of the information necessary to complete the application. (App. Supp. Mem. at 8-9, citing 38 C.F.R. § 3.109(b)). The Appellants suggest that it was error for VA not to provide such notice in this case. However, this begs many questions. How was the VA to know that additional information should be requested concerning Appellant's alleged children, if it had been affirmatively told that he was not survived by any? What further information would it have requested?

The Secretary asserts that he was under no duty to provide any further notice, because Appellant's application was not incomplete on its face, and there was no reason to believe that the information provided within it was anything but "true and correct to the best of [the claimants'] knowledge and belief." (R. at 342).

Other regulations are also instructive in determining whether the 1969 application was complete, versus an incomplete informal claim. For a communication to be construed as an informal claim for benefits that communication must indicate an intent to apply for benefits. *See, e.g.*, 38 C.F.R.

§ 3.155(a) (any communication of action must indicate an intent to apply for benefits, and identify the benefit sought). The 1969 application contains absolutely no evidence of intent to apply for benefits on the Appellants' behalf; indeed, their very existence was denied. (R. at 340). Thus, even assuming *arguendo* that it might be *possible* in some cases to construe an "Application for Dependency and Indemnity Compensation by Parent(s)" application as an informal claim for benefits for persons other than the parents of a veteran, in this case it is not appropriate to do so.

The Appellants further assert that the 1969 application remained pending because marking the box "NEITHER" in response to Question 21 was simply a mistake, and the Board should have considered that. However, the case Appellant cites is inapposite. In that case, the claimant's DIC application indicated that she had never applied for burial or flag benefits, although it was clear she had in fact done so; the Court found that the Board should have considered this in determining whether the claimant had filed for DIC prior to a certain date. *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 116 (2009).

On the other hand, though the Appellants assert that they are in fact, children of the Veteran and that the response to question 21 was therefore inaccurate, this has not been conclusively established, as was the contradicting fact in *Van Valkenburg*. Frankly, at this juncture, it does not matter whether the response to question 21 was a mistake or not. The application was complete on its face, and there was no reason for the VA to believe that the information provided was not

accurate. The VA did not err in processing the 1969 application as one seeking DIC benefits for the Veterans parents, or in finding that no claim, formal or otherwise,[1] was submitted on Appellant's behalf until 2010.

Finally, the Secretary notes that Appellants' argument amounts to an apparent dispute that the "correct facts" as the Appellants believe them to be (but which have not been conclusively established even today), were not before the adjudicator at the time of the 1969 decision. The Secretary respectfully suggests that if the Appellants' intent is to collaterally attack the 1969 decision denying entitlement to DIC, there may be other avenues of relief that Appellants may avail themselves of, versus asking the Court to ignore common dictionary definitions and applicable jurisprudence to deem this claims form "incomplete," or an informal claim filed on the Appellants' behalf, when the completed form denied their very existence.

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[1] The Appellants assert for the first time in their Supplemental Memorandum, the possibility that a formal claim may be pending, if an application for survivor benefits was filed on behalf of the Appellants with the Social Security Administration, which, pursuant to 38 U.S.C. § 5105(b), could be deemed an application for benefits under chapter 13 of title 38 of the U.S. Code. (App. Supp. Mem. at 7). The Secretary respectfully requests that the Court decline to address this argument raised for the first time on appeal, pursuant to a supplemental briefing order. *See Disabled American Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Degmetich v. Brown,* 8 Vet.App. 208, 209 (1995), *aff'd,* 104 F.3d 1328 (Fed. Cir. 1997) (issues or claims not argued on appeal are deemed to be abandoned); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) (issue not raised in appellant's opening brief is waived; *Maxson v. Principi,* 15 Vet.App. 241, 242 (2001) (per curiam); *Tellex v. Principi*, 15 Vet.App. 233, 240 (2001); *Williams v. Principi*, 15 Vet.App. 189, 199 (2001) ("ordinarily this Court will not review issues that are not raised to it"); *Ford v. Gober,* 10 Vet.App. 531, 535-36 (1997).

CONCLUSION

WHEREFORE, the Acting Secretary respectfully submits this supplemental memorandum of law responding to the Court's May 3, 2018 Order, and asks that this Court affirm the January 29, 2016, Board decisions that denied entitlement to recognition as the Veteran's surviving child for the purposes of establishing eligibility for DIC, death pension, and accrued benefits.

Respectfully submitted,

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