IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MARLESA D. LYNCH, Appellant, AND CYNTHIA M. MARTINEZ, Appellant, v. PETER O'ROURKE, Acting Secretary of Veterans Affairs, Appellee.	No. 16-0541

APPELLANTS' RESPONSE TO SECRETARY'S JULY 16, 2018, SUPPLEMENTAL MEMORANDUM OF LAW

I. The appropriate date on which to assess whether a person qualifies as a "child" under 38 U.S.C. § 104(4)(A) is the date of the veteran's death (the date entitlement arose), or the date the application for DIC benefits is filed (or under certain circumstances, the date when benefits may be paid) whichever is later.

The Appellants do not disagree with the Secretary's assertion that 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 entitlement arose (the date of the veteran's death), if the application was filed within one year of that date, or the date the application was filed, if it was not filed within one year of the veteran's death. However, the Appellants do disagree with the Secretary's argument that the only appropriate application for

consideration is the 2010 application. The Appellants continue to submit that the 1969 Application for Dependency and Indemnity Compensation submitted by the Appellants' grandparents qualifies as an application on their behalf, and the date of that application is the appropriate date for consideration of whether the Appellants were children within the meaning of § 101(4)(A).

II. VA has conceded that the Appellants are the natural children of the veteran, and this is a favorable factual finding that cannot be disturbed by the Court.

The Appellants maintain that the Board implicitly found that they are the natural children of the veteran when it failed to disturb the finding by the Regional Office. In both May 2012 Statements of the Case, the Regional Office explicitly conceded that Ms. Martinez and Ms. Lynch are the "natural daughter[s] of the veteran." R. at 127-41, 144-58. 38 U.S.C. § 101(4)(A) provides that the evidence must merely be "satisfactory to the Secretary" that the veteran is the father of the illegitimate child. The Regional Office's determination that the Appellants are the natural children of the veteran indicates that the evidence was "satisfactory to the Secretary."

The Appellants have not overlooked the fact that the Board reviews all Regional Office decisions *de novo*, as asserted by the Secretary. The Appellants do not claim that the Board cannot overturn the findings of the Regional Office. The Appellants do assert that had the Board wished to make new findings, it could have, but it did not, thereby indicating that the Board accepted the finding that the Appellants are the children of the veteran.

The Board specifically discussed the meaning of "child" under 38 U.S.C. § 101(4), but found only that Appellants did not qualify as children because they were over the age of 18. Again, had the Board wished to disturb the Regional Office's finding that the Appellants are the children of the veteran, it could have done so. However, since the Board only found that the Appellants did not qualify as children due to their age, it implicitly found that the Appellants are the natural children of the veteran. This constitutes a favorable factual finding that cannot be disturbed by the Court. *See Medrano v. Nicholson*, 21 Vet.App. 165 (2009) (holding that the Court gives deference to the Board's findings of fact provided that they are not clearly erroneous).

Alternatively, should the Court disagree, the Appellants agree that this is a factual determination that should be left to the Board. Thus, remand would be required for this issue to be specifically addressed in the first instance.

III. The 1969 application was an incomplete or informal application which remained pending until the 2010 formal application was filed.

In the Secretary's Supplemental Memorandum of Law (Secretary's Memorandum or Sec. Supp. Mem.), the Secretary argues that the 1969 application was not "incomplete" because there was no absence of evidence or information, and there was no critical information missing from the application that would preclude the Secretary from processing the claim. Sec. Supp. Mem. at 7-9.

As the Court discussed in *Fleshman v. West*, 138 F.3d 1429 (Fed. Cir. 1998), an application may not be compliant if the applicant fails to provide "critical elements of information requested on the form." *Fleshman* at 1432. The Court specifically stated that

an application "may contain all the necessary 'evidence' bearing on the veteran's claimed disability, but still be missing critical information, so as to prevent the application from being in the form prescribed by the Secretary." *Id*. The Court found that the signature was a necessary element to enable VA to process the claim, and its omission prevented the application from being in "the form prescribed by the Secretary." *Id*.

Just as in *Fleshman*, the 1969 application for DIC did not contain the necessary, critical information regarding the veteran's dependents, which VA needed to process the DIC claim. The term "critical information" is not specifically defined; however, *Fleshman* provides that a particular item may be critical depending on "the role of the missing item in the application process." *Fleshman* at 1432. In the context of a DIC claim, whether there are dependents is critical information. This is supported by the current version of the VA Adjudication Procedural Manual which provides that, "the existence of dependents is a factor in determining entitlement to pension". *See* M21-III.iii.5.A.1.g.[1] The manual also provides that the persons who "claim entitlement to income-based benefits must report all dependents and their income and net worth", and outlines the steps VA can take to determine if a dependency and/or familial relationship exists. *Id*.; *see also* M21-III.iii.5.A.1.f.[2] As DIC for parents is an income-based benefit (just like pension), the existence of dependents is a critical factor in determining entitlement to the benefit. 38 U.S.C. § 1315(b); 38 C.F.R. § 3.25. Thus, the inaccurate information about the veteran's dependent children on the 1969 application was critical

[1] A copy of this portion of the M21-1 is attached in the Appendix.
[2] A copy of this portion of the M21-1 is attached in the Appendix.

information VA needed to process the DIC claim, and the absence of this information rendered the application "incomplete."

The Secretary asks how VA was to know that additional information should be requested concerning the dependent children "if it had been affirmatively told that [the veteran] was not survived by any?" Sec. Supp. Mem. at 11. However, the Secretary has known since at least the 2010 DIC applications that the veteran was survived by dependent children. The VA system is "veteran friendly" and non-adversarial, and it would appear that rules providing for VA to assist a claimant by seeking additional information to complete or correct a defective application are consistent with this mission. Thus, VA can pro-actively seek to fix problems associated with a defective claim to allow claimants who are entitled to receive benefits to do so. In this vein, there is no regulation or case law which sets a time limit from which point VA can no longer take steps to obtain additional information once it has notification that incomplete or inaccurate information was provided on an application. Here, the Secretary appears to be asserting that it does not matter that an inaccuracy is discovered, provided the application is complete on its face. Utilizing the Secretary's logic, even if VA learned of the veteran's dependent children one week after the parents' inaccurate DIC application, VA would not have made any attempt to additional information to allow for the application to be completed because the 1969 application was already complete on its face. This position is not supported by VA's adjudication manual (see below), and it goes against the entire notion of VA as a non-adversarial system.

Contrary to the Secretary's assertion that the 1969 application was not incomplete because there was "no missing signature or absence of information", the Adjudication Procedure Manual supports the determination that an application can still be incomplete even if it is signed. As quoted in *Jernigan v. Shinseki*, 25 Vet.App. 220, 228 (2012), *aff'd*, 521 F.App'x 931 (Fed. Cir. 2013), a previous version of the Adjudication Procedure Manual provided the following:

> **Defective or Incomplete Application Forms.** If an application is properly signed but is so incomplete that development for the specific information is not feasible, make a copy of the application and retain it as the file copy. Return the application to the claimant with a request to complete the indicated items checked in red. Ask the claimant to return it with any other required evidence. M21-1.III.2.01(e)(Sept. 14, 1992).

This portion of the manual supports a determination that, even though the 1969 application contained responses in the block concerning the existence of children, the fact that it contained inaccurate *and/or* incomplete information as to the dependents renders the form defective or incomplete.[3] If, as the Secretary suggests, the only question is whether the application was incomplete, and it does not matter if the application was

[3] The Appellants also note that the 1969 application contained more than one incomplete section. In addition to the defective information regarding the existence of dependent children, the form also contained inaccurate information as to the veteran's mother's date of birth, date of marriage to last spouse, cohabitation with spouse, and whether the address listed on page one was the actual address of the claimant. Section 2B of the form asked for the Mother's date of birth, and instead of responding with the date, the application contains a check mark. R. at 340 (340-42). Section 29 asked for the date of marriage to the last spouse, and instead of listing the date of marriage, stated "n/a". R. at 341 (340-42). Section 30 asked if the claimant is still living with the spouse and no answer was provided. *Id*. Section 46 asked if the address shown in item 6 is the actual home address of the claimant, and no response was provided. R. at 342 (340-42). While this information is different in nature than the dependent information, it further supports that the 1969 application was incomplete or defective.

inaccurate, then it is confusing why the manual would provide for the steps to take when an application is defective. Because the 1969 application was defective and incomplete, it remained pending until the 2010 applications were filed.

As discussed in the Appellants' Supplemental Memorandum (App. Supp. Mem.), the 1969 application filed by the veteran's parents was actually an application for DIC for the dependent children (or any other eligible recipient), or at least could be construed as one. App. Supp. Mem. at 9-11. In his response, the Secretary states that, even if it was possible to construe and application for DIC by the parents as an informal claim for benefits for persons other than the parents, "in this case it is not appropriate to do so." However, the Secretary offers no explanation as to why it is not appropriate to do so in this case, and this position is not supported by the regulations.[4] *See* App. Supp. Mem. at 9-11.

[4] The Secretary asks the Court to decline to address whether a claim for DIC benefits may be pending if an application for survivors' benefits was filed with the Social Security Administration (SSA), because it was "raised for the first time on appeal". Sec. Supp. Mem. at 13 (footnote 1). In the initial brief, the Appellants argued that the record before the agency could be incomplete because the claims file does not contain all relevant records, "including any service, personnel, or medical records of the veteran *and claims filed by the parents*." Appellant Br. at 15-16 (emphasis added). Thus, the Appellants did raise this matter in the initial brief and only provided additional detail in supplemental briefing.. *Fugere v. Derwinski*, 1 Vet. App. 103, 105 (1990). While the Court is free to disregard any argument it sees fit, addressing this argument would not harm judicial efficiency, or result in piecemeal litigation. *Id*. The Secretary has had the opportunity to respond, even though he has declined to address the merits of this argument. The Appellants' presentation of arguments regarding an SSA claim responds directly to the Court's request for more information as to a pending 1969 claim for DIC, and it would therefore be appropriate for the court to exercise its discretionary authority to address this argument. *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

Finally, in response to the Appellants' point that VA should have addressed whether the notation of "neither" on the 1969 application regarding children was a mistake or misunderstanding, the Secretary responds that the Appellants' status as dependent children of the veteran has not been "conclusively established", unlike the "contradicting fact" in *Van Valkenburg*. Sec. Supp. Mem. at 12; *see also Van Valkenburg v. Shinseki*, 23 Vet. App. 113 (2009). However, VA has determined that the Appellants are the natural born children of the veteran and that finding has not been disturbed. In light of this undisturbed factual finding, the selection of "neither" on the DIC application contradicts the fact that the veteran did have dependent children[5]. Also of note (and as mentioned above), several sections of the 1969 application asked for information which was not provided. R. at 340 (340-42). As these responses are not accurate or complete, it appears portions of the 1969 application contained mistakes or misunderstandings. *Van Valkenburg, supra*.

The Appellants believe the issue in this case turns on whether a VA has the ability to correct a mistake or inaccuracy on an application for benefits which, if not remedied, results in the denial of benefits to a veteran's dependent children. The Appellants are not asserting that VA failed to follow the rules in its handling of the 1969 claim for benefits; rather, the Appellants believe that the core principle of VA's non-adversarial system allows for VA to remedy an error on an application so as to not deny benefits to

[5] As noted above, if the Court determines VA did not make a factual finding as to whether the Appellants are the natural born children of the veteran, then Appellants agree that the Court should remand the matter for the Board to make a decision in the first instance.

individuals who were under the age of two when their father was murdered. As the Appellants satisfied the criteria for DIC at the time of the 1969 application, and because the only bar to receipt of benefits (that would have otherwise been available) was the submission of a defective application, there is no harm to VA to fix this error (retroactively) and award the Appellants the benefits they were entitled to as the surviving children of a veteran killed during active duty service.

Because the 1969 application was missing critical information, the application remained incomplete or defective until the 2010 applications were submitted which corrected the defects or omissions. Additionally, VA has the authority to construe the parents' 1969 application for DIC as an informal application for the Appellants' which remained pending until the formal applications were submitted in 2010.

MARLESA LYNCH
CYNTHIA MARTINEZ

/s/ Daniel G. Krasnegor
DANIEL G. KRASNEGOR
Lead Counsel
Goodman Allen Donnelly, PLLC
123 E. Main Street, 7th Floor
Charlottesville, Virginia 22902
(434) 817-2188
dkrasnegor@goodmanallen.com

/s/ Erin E. Ralston
ERIN E. RALSTON
Co-counsel
Goodman Allen Donnelly, PLLC
4501 Highwoods Parkway, Suite 210
Glen Allen, Virginia 23060
(804) 565 -5968
eralston@goodmanallen.com

/s/ Krystle D. Waldron
KRYSTLE D. WALDRON
Co-counsel
Goodman Allen Donnelly, PLLC
P.O. Box 29910
Richmond, VA 23242
(804) 565-5969
kwaldron@goodmanallen.com

APPENDIX

III.iii.5.A.1.e. Circumstances Under Which VA Requires Proof of Financial Dependency

VA requires proof of financial dependency in order to pay

- additional compensation for a parent to a Veteran whose service-connected (SC) disability(ies) is(are) at least 30 percent disabling, or
- DIC to the parent of a Veteran whose death was service-related.

References: For more information on determining whether

- an individual is the parent of a Veteran, see
  - **M21-1, Part III, Subpart iii, 5.I (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000015804/M21-1,-Part-III,-Subpart-iii,-Chapter-5,-Section-I---Establishing-Parental-Relationship)**, and
  - **38 CFR 3.59 (http://www.ecfr.gov/cgi-bin/text-idx?SID=b1fc5219fd4f1af8d1390f1080933d7e&node=se38.1.3_159&rgn=div8)**, and
- the parent of a Veteran is financially dependent on the Veteran, see **M21-1, Part III, Subpart iii, 5.J (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000015805/M21-1,-Part-III,-Subpart-iii,-Chapter-5,-Section-J---Establishing-Parental-Dependency)**.

III.iii.5.A.1.f. Issues to Consider When Determining Whether Dependency and/or a Familial Relationship Exists

This block discusses the issues regional offices (ROs) must consider when determining whether dependency and/or a familial relationship exists between a Veteran and another individual.

- Attempt to resolve inconsistencies in the information a claimant provides on ***VA Form 21-686c, Declaration of Status of Dependents*** **(http://www.vba.va.gov/pubs/forms/VBA-21-686c-ARE.pdf)**, through telephone contact.
- Piecemeal development and unnecessary development
  - impose an unwarranted burden on claimants, and
  - delay claims processing.
- Do not undertake development for information or evidence without first ascertaining whether or not it is already of record.
- As explained in **M21-1, Part III, Subpart iii, 5.K.1.b (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000015797/M21-1,-Part-III,-Subpart-iii,-Chapter-5,-Section-K---Verification-of-Marital-Status-and-the-Status-of-Dependents)**, every eight years, VA requires surviving spouses in receipt of DIC to verify their marital status and Veterans in receipt of disability compensation to verify the status of their dependents. Accordingly, information that is already of record regarding the marital status of a surviving spouse in receipt of DIC or the status of the dependents of a Veteran in receipt of disability compensation is considered valid for the purpose of making entitlement determinations for up to eight years from the date VA received it.
- ***Each time*** the rating activity assigns a combined disability rating of at least 30 percent, follow the instructions in **M21-1, Part III, Subpart iii, 5.L.1.b (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000032212/M21-1,-Part-III,-Subpart-iii,-Chapter-5,-Section-L---Adjusting-Awards-for-Dependents)**.

Reference: Follow the instructions in **M21-1, Part III, Subpart iii, 1.B.1.d and e (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014152/M21-1,-Part-III,-Subpart-iii,-Chapter-1,-Section-B---Evidence-Requested-From-the-Claimant)** when obtaining information from a claimant or beneficiary over the telephone.

III.iii.5.A.1.g. Undertaking Development When Processing Claims for Pension

The existence of dependents is a factor in determining entitlement to pension. Persons who claim entitlement to income-based benefits must report all dependents and their income and net worth.

If any of the following is necessary to process a claim for pension, request it up front, during *initial* development:

- information regarding the number of dependents a claimant has
- additional evidence or information required to establish the existence of a familial relationship between a Veteran and his/her dependent(s), and/or
- each dependent's income and net worth.

Reference: For more information on considering the income of dependents when determining entitlement to pension, see

- **38 CFR 3.23(d)(4) (http://www.ecfr.gov/cgi-bin/text-idx?SID=b1fc5219fd4f1af8d1390f1080933d7e&node=se38.1.3_123&rgn=div8)**, and
- **38 CFR 3.24 (http://www.ecfr.gov/cgi-bin/text-idx?SID=b1fc5219fd4f1af8d1390f1080933d7e&node=se38.1.3_124&rgn=div8)**.

III.iii.5.A.1.h. Undertaking Development When Processing Claims for Disability Compensation

The existence of dependents is ***not*** a factor in determining entitlement to disability compensation. Nevertheless, in order to ensure a Veteran receives all the benefits to which he/she is entitled in a timely manner, undertake any development necessary to establish entitlement to additional compensation for dependents during the *initial development phase* of claims processing when

- VA receives
  - an original or reopened claim for disability compensation, or
  - a claim for increased disability compensation (to include a claim for service connection (SC) for an additional disability or disabilities)
- the Veteran reports the existence of one or more dependents (that are not currently on the Veteran's award) on one of the forms listed in the bottom row of the table under **M21-1, Part III, Subpart ii, 2.B.1.b (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014119/M21-1,-Part-III,-Subpart-ii,-Chapter-2,-Section-B---Claims-for-Disability-Compensation-and-or-Pension,--and-Claims-for-Survivors-Benefits)**, and
- evidence/information required to establish the Veteran's relationship to the dependent(s) is not of record.

The upfront development referenced in the above paragraph must be undertaken, even if the Veteran's combined disability rating is currently less than 30 percent, ***unless*** there is no reasonable possibility that a favorable decision on the Veteran's claim will result in the assignment of a combined disability rating of at least 30 percent.

Example: If SC for tinnitus is the only issue a Veteran raises in his/her original claim for disability compensation, it is unnecessary to undertake the upfront development referenced in this block because the highest disability rating VA may assign for tinnitus is 10 percent.

Note: Follow the instructions in **M21-1, Part III, Subpart iii, 5.L.1.b and d (/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000032212/M21-1,-Part-III,-Subpart-iii,-Chapter-5,-Section-L---Adjusting-Awards-for-Dependents)** if

- the upfront development described in the opening paragraph of this block was mistakenly overlooked, and
- a rating decision has been completed and is awaiting promulgation.
