No. 19-217

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CONLEY F. MONK, JR.

Appellant,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

On Appeal from the
Board of Veterans' Appeals

REPLY BRIEF FOR APPELLANT
CONLEY F. MONK, JR.

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ARGUMENT

February 15, 2012, is the proper effective date for Appellant Conley F. Monk, Jr.'s disability compensation. Mr. Monk was fully eligible for VA disability compensation at the time he submitted his informal claim on February 13, 2012. The Department of Veterans Affairs (VA) was required to consider the arguments establishing eligibility at the time of his informal application, rather than relying solely on his discharge upgrade.

All issues raised by Mr. Monk are properly on appeal. The VA's September 2015 rating decision, R. at 38-46, was the first decision against which Mr. Monk could properly raise a challenge to the VA's failure to consider these arguments in assigning an effective date. Mr. Monk did not appeal the June 2015 Character of Discharge (COD) administrative decision because that decision established only that his service was "honorable for VA purposes," *see* R. at 3406 (3406-12), and, of course, no appeal lies for the prevailing party. In contrast, the September 1, 2015, rating decision was the first time the VA applied the COD administrative decision to calculate an effective date of July 20, 2012, *see* R. at 38-46, which, as argued above, was improper.

For these reasons, the court must consider the two issues that Appellant raises on appeal. *First,* whether the VA was required to consider the arguments for eligibility, and therefore an earlier effective date, that Mr. Monk presented below, notwithstanding his discharge upgrade. *Second*, whether Mr. Monk was eligible for benefits at the time of informal application for the following reasons: (1) no statutory or regulatory bars apply to his case; (2) he was insane at the time of the misconduct leading to his discharge; and (3) the VA's presumption of ineligibility for veterans with other-than-honorable (OTH) characterizations,

see 38 C.F.R. § 3.12(a) (2018), is unauthorized by and contrary to 38 U.S.C. § 101(2) (2018), and therefore improperly prevented Mr. Monk from receiving benefits.

Appellee's argument that the validity of 38 C.F.R. § 3.12(a) has been previously determined is incorrect. *Camerena v. Brown*, 6 Vet. App. 565, 567 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995), held merely that the phrase "conditions other than dishonorable" used in 38 C.F.R. § 3.12(d) did not include only those persons who had received Dishonorable discharges. In that case, neither this Court nor the Federal Circuit considered whether an OTH constitutes a discharge under "conditions other than dishonorable." The opinion does not at all validate 38 C.F.R. § 3.12(a) *as a whole*, nor does it support a regulatory presumption against eligibility for veterans with OTH discharges.

Therefore, the BVA's decision upholding an effective date of July 20, 2012, is properly on appeal and constitutes reversible error. The VA erroneously applied a regulatory bar to Mr. Monk's case and failed to consider his insanity argument. Furthermore, the presumption against eligibility established by 38 C.F.R. § 3.12(a) is contrary to statute and was used to improperly deny Mr. Monk benefits.

I. All issues raised by Appellant are properly on appeal.

Determination of the proper effective date for Mr. Monk's compensation turns on whether Mr. Monk was eligible for benefits at the time of his February 13, 2012, informal application. *See* Appellant's Brief at 6-11. Because the September 2015 rating decision setting this effective date relied heavily on the June 2015 COD administrative decision, the validity of that decision, and the September 2015 rating decision's reliance on it, is properly at issue. Mr. Monk did not appeal the June 2015 COD administrative decision itself because that decision

favorably characterized his discharge as "honorable for VA purposes," R. at 3406 (3406-12), and no appeal lies for the winning party. As noted by Appellee, the June 2015 COD decision "explained to Appellant how to appeal if he did not agree with the decision." Appellee Brief at 7, citing R. at 3408 (3406-12). The current appeal does not arise out of a disagreement with the June 2015 COD administrative decision, but from the September 2015 rating decision's reliance on erroneous findings contained in the June 2015 decision. These findings were not placed at issue until they were used to calculate the effective date set by the September 2015 rating decision, and are therefore properly on appeal.[1]

Appellee's attempt to divorce Mr. Monk's February 13, 2012, informal claim from his December 17, 2012, formalization of that claim, and thereby limit argument to "the PTSD issue" is also without merit and does not alter the issues presently on appeal. Appellee Brief at 9. Prior to March 24, 2015, when a veteran submitted an informal claim, the Secretary would forward an application form, and if the veteran returned the formal application within one year, the Secretary would deem it filed as of the date of receipt of the informal claim. 38 C.F.R. § 3.155(a) (effective until March 24, 2015). Mr. Monk's February 13, 2012, informal application, which asserted PTSD, was an informal claim which he later supplemented and "formalized" in a December 17, 2012, claim including diabetes, stroke-related disabilities, and other medical issues. *See* R. at 4339 (4339-40); R. at 4287 (4287-99). The BVA itself agreed,

[1] Importantly, the June 2015 COD administrative decision is separate and distinct from the 1971 COD administrative decision. The VA did not base its decision in the June 2015 COD administrative decision on a finding that "he was actually determined ineligible for VA benefits under 38 C.F.R. § 3.12(d)(4)," (as was the case in the 1971 administrative COD decision) as Appellee suggests. Appellee Brief at 17. Furthermore, the June 2015 COD administrative decision does not cite the 1971 decision at all, nor does it contain any reference to "willful and persistent misconduct." *See* R. at 3406–12.

stating that "[o]n February 15, 2012, the Veteran filed an informal claim for benefits, which was formalized within one year in an application for benefits received by VA on December 17, 2012." R. at 9 (4-12).

Appellee now attempts to treat the February 2012 and December 2012 claims as separate and unrelated, when in fact they are part of the same claim. Because the formal application that Mr. Monk filed on December 17, 2012, is not only required to be treated as filed together with his February 13, 2012, application, 38 C.F.R. § 3.155(a) (effective until March 24, 2015), but was indeed so treated by the BVA, R. at 9 (4-12), all the arguments raised by Appellant apply to all the issues raised in both applications.[2]

Therefore, Appellee's argument that the issues raised by Mr. Monk are not properly on appeal is meritless and serves only to further complicate and delay an already extensive litigation. Mr. Monk did not disagree with the June 2015 COD administrative decision, which found his service to be honorable, R. at 3406 (3406-12), and therefore did not appeal it. However, he *does* disagree with the September 1, 2015, rating decision setting the improper effective date, including its reliance on erroneous findings of fact and failure to fully consider his arguments. *See* R. at 2144–45. The issues raised by Mr. Monk are properly on appeal and the BVA's denial of an earlier effective date for compensation is reversible error.

II. The BVA's decision denying Mr. Monk an effective date of February 15, 2012, constitutes reversible error.

[2] The VA issued an administrative denial of the February 2012 informal claim dated August 2012. Appellee Brief at 5. Because Mr. Monk had one year to complete his informal claim, this denial was improper, evidenced by the BVA's disregard of the decision and treatment of the two claims as one. R. at 9 (4-12). In addition, Mr. Monk did not receive a copy of this decision until 2013—after the submission of his formal application. *See* Appellant's Brief at 3 n.1.

38 C.F.R. § 3.400 provides that the proper effective date for compensation is the "date of receipt of the claim or the date entitlement arose, whichever is later." Because Mr. Monk was fully entitled to disability compensation at the time he submitted his informal application, the proper effective date is the date the VA received that claim—February 15, 2012.

The BVA's use of 38 C.F.R. § 3.400(g) to establish a later effective date is reversible error, and requires no further fact-finding to remedy. By the plain text of the regulation, § 3.400(g) applies "[w]here entitlement is established *because of* the correction, change or modification of a . . . discharge" (emphasis added). Appellees appear to confuse a "grant of benefits" with "entitlement" to said benefits. Appellee Brief at 14. Although the VA did *grant* Mr. Monk benefits as a result of his discharge upgrade, he was already *entitled* to benefits at the time of his informal application, regardless of the outcome of his separate discharge upgrade application or the date on which the Navy board decided it. Therefore, it was impossible that his discharge upgrade established his (preexisting) entitlement, and § 3.400(g) is inapplicable.

Contrary to the unambiguous language of § 3.400(g), the BVA decided that in any case "involving" or "with respect to the correction of military records," § 3.400(g) controls, even if in conflict with another section of the regulation. *See* R. at 7, 9 (4-12). Beyond this impermissible reading of the regulation, the BVA also violated its obligations to grant "every benefit that can be supported in law," 38 C.F.R. § 3.103(a), and to "review all issues which are reasonably raised from a liberal reading of the appellant's substantive appeal." *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991). In this case, the BVA completely ignored Appellant's three arguments that establish his eligibility for compensation at the time of the February 2012 informal application.

A. Mr. Monk was entitled to benefits at the time of informal application because no statutory or regulatory bars applied.

The VA's improper application of the regulatory bar found in 38 C.F.R. § 3.12(d)(1) to Mr. Monk constitutes reversible error, the correction of which establishes his eligibility for compensation at the time of his informal application. As discussed above, Mr. Monk is appealing a September 2015 rating decision that is separate and distinct from the March 1971 COD administrative decision. Although the March 1971 decision characterized Mr. Monk's COD as "under dishonorable conditions" because he was discharged "by reason of willful and persistent misconduct," R. at 4401, the June 2015 COD administrative decision on which the September 2015 rating decision was based did not rely on this particular bar to benefits.[3] Rather, the June 2015 COD administrative decision erroneously found that Mr. Monk had accepted "an undesirable discharge to escape trial by **general** court-martial." R. at 3407 (3406-12) (emphasis added). As described in detail in Appellant's Brief pgs. 11-14, Mr. Monk accepted discharge in lieu of a **special** court martial, not as the result of a general court martial. R. at 3295 (3276-96); 4186 (4184-86).

The Secretary agrees that the 2015 COD administrative decision "mistakenly identified" Mr. Monk's character of discharge as a bar to benefits under 38 C.F.R. § 3.12(d)(1) (discharge to escape general court martial). Appellee Brief at 17. However, the VA's attempt to inject a post hoc rationalization of the 2015 COD administrative decision—that Mr. Monk was barred from benefits due to willful and persistent misconduct in his 1971 COD—into this appeal is improper. It is a fundamental principle of administrative law that "[t]he grounds upon

[3] Even if it had, Mr. Monk's conduct was not "willful and persistent misconduct" of the severity contemplated by 38 C.F.R. § 3.12(d). *See* Appellant's Brief at 16–17.

which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (explaining that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . [and] that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). The June 2015 COD does not list the March 1971 administrative decision as "Evidence Used." R. at 3407 (3406-12). In fact, it does not reference the March 1971 decision at all—or willful and persistent misconduct, for that matter. R. at 3406–12.

Furthermore, remand for the purpose of considering an additional bar to benefits is also improper.[4] The 2015 COD administrative decision states that the VA considered all of the "[f]acts and circumstances of discharge and DD 214 received from the National Personnel Records Center on November 7, 2014." R. at 3407 (3406-12). After considering this evidence, the VA declined to apply a bar based on willful and persistent misconduct. Appellee asks for a revision of the prior decision to include a bar based predominantly on a forty-eight-year-old administrative decision that has now been superseded by the June 2015 COD administrative

[4] Mr. Monk's failure to explicitly request a remand in his opening brief does not strip the court of its discretion to order it, contrary to Appellee's suggestion. The CAVC "shall have power to . . . remand [a] matter, as appropriate," 38 U.S.C. § 7252(a), unless an Appellant unambiguously waives it. *See Janssen v. Principi*, 15 Vet. App. 370, 374 (2001) (explaining that a veteran "must intend, voluntarily and freely, to relinquish or surrender" statutorily granted protections, or the protections are not waived). In *Coburn v. Nicholson*, for example, the CAVC concluded that the Appellant's "assertion that he does not seek remand" was meant "as an argument . . . to bolster [his] position that reversal is the appropriate remedy and not, as the dissent perceives, as an explicit waiver of a remand." 19 Vet. App. 427, 431 (2006). As in *Coburn*, Mr. Monk intends only to emphasize that reversal is the appropriate remedy in this case. He has never explicitly or intentionally waived his procedural right to remand, which the Court may order in this case.

decision. Additionally, the Secretary provides no evidence to support his contention that the VA mistakenly applied the wrong bar to benefits. Because the application of a bar to benefits under 38 C.F.R. § 3.12(d)(1) did not appear in any prior decisions, it seems likely that the VA conducted an independent analysis of Mr. Monk's record. As part of this process, the VA would certainly have considered the applicability of other regulatory and statutory bars, and would have applied them had it considered them appropriate.

B. Mr. Monk was entitled to benefits because he was "insane" at the time of the misconduct leading to his discharge.

The VA's failure to consider Mr. Monk's argument that he was "insane" at the time of conduct leading to his discharge was reversible error, the correction of which would similarly establish his eligibility for a February 15, 2012, effective date. As Mr. Monk explained in his opening brief, Appellant's Brief at 17-18, a veteran is still eligible for benefits even if a bar in 38 U.S.C. § 5303(a) or 38 C.F.R. §§ 3.12(c-d) is applied if "it is found that the person was insane" at the time the offenses in question were committed. 38 C.F.R. § 3.12(b). The BVA's refusal to consider this argument violated their obligations to "review all issues which are reasonably raised" by the Appellant's argument, *Myers v. Derwinski*, 1 Vet. App. 127, 130 (1991), and to grant "every benefit that can be supported in law," 38 C.F.R. § 3.103(a).

Appellee's argument that the insanity issue is not properly on appeal is without merit. As discussed above, the September 2015 rating decision was appealed because it was the first time the June 2015 administrative decision was effectuated. Because the effective date issue turns on whether Mr. Monk was entitled to compensation at the time he submitted his informal application, the September 2015 rating decision's reliance on insufficiently supported prior decisions is germane to this appeal. Yet another fundamental principle of administrative

law is that, in order to facilitate judicial review, decisions must be adequately supported by evidence and the reasons relied upon in making the decision must be disclosed. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943). The BVA's reliance on a conclusory statement that "[t]he issue of the claimant's sanity is NOT involved" in the face of substantial evidence justifying earlier entitlement was improper. R. at 3411 (3406-12).[5]

Contrary to Appellee's position, reversal on this point does not require remand for further factual development. The record provides extensive, undisputed evidence supporting this argument, which has been presented fully in prior briefs. *See* R. at 1840-44 (1837-53); R. at 1708 (1699-1717); R. at 1991 (1982-1995). Civilian medical professionals, the VA, and the BCNR all concluded that Mr. Monk developed PTSD as a direct result of his service in Vietnam. R. at 1991 (1982-95). Expert psychiatric assessment found that this PTSD "caused a prolonged deviation from his normal behavior . . . including heavily using substances, resorting to violence, and engaging in other behaviors that were grossly out of character for him." R. at 1841 (1837-53). As mentioned above, and despite this strong evidence of a causal relationship between Mr. Monk's PTSD and the conduct leading to his discharge, the BVA failed to provide any reasons at all for its decision that Mr. Monk's sanity was not involved in this appeal. Remand would serve only to further delay resolution of this claim.

C. 38 C.F.R. § 3.12(a) is contrary to 38 U.S.C. § 101(2), and the validity of the regulation has not been previously determined.

[5] Appellee's contention that the BVA did not address Mr. Monk's "insanity" argument because it "found" that the issue was not properly on appeal is mere speculation. *See* Appellee Brief at 22. Because the BVA has an obligation to consider all arguments before it, the reasons for any such finding should have been disclosed.

No case has determined whether the presumption of ineligibility established by 38 C.F.R. § 3.12(a) is contrary to statute. Appellee's contention that the court in *Camerena v. Brown*, 6 Vet. App. 565 (1994), "found 38 C.F.R. § 3.12 to be a valid regulation" is incorrect.[6] Appellee Brief at 24. In that case, the court's holding was limited to "[determining] that 38 C.F.R. § **3.12(d)** is a valid regulation and [that it] is consistent with 38 U.S.C. § 101(2)." *Id.* at 566 (emphasis added). Neither the regulation as a whole or the subsection at issue here, § 3.12(a), was at issue.

Furthermore, the challenge in *Camerena* turned on the proper scope of the phrase "under dishonorable conditions" used in § 3.12(d). The court held, correctly, that Congress did not intend the word "dishonorable" to encompass only those veterans receiving Dishonorable discharges. *See id.* at 567-68. The issue raised on appeal in this case is different—that the VA has interpreted 38 U.S.C. § 101(2) to mean that individuals with "discharge[s] under honorable conditions," i.e., Honorable and General discharges, are presumptively eligible for benefits. 38 C.F.R. § 3.12(a). At the same time, the VA treats OTH discharges as presumptively "dishonorable," requiring a COD evaluation in order for eligibility to be established.[7] *See* Appellant's Brief at 18-28.

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[6] This issue is properly on appeal because challenging the validity of this regulation would have been futile at the agency level; both the RO and BVA must apply the regulation as written and cannot invalidate it as unauthorized by statute. For that reason, Mr. Monk was not required to raise the issue prior to this appeal. *See McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992); *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

[7] As the court in *Camerena* notes, the legislative history of 38 U.S.C. § 101(2) suggests that the Secretary has the discretion to "deny benefits in appropriate cases where he found the *overall conditions* of service had, in fact, been dishonorable." 6 Vet. App. at 567. Discretion to deny or withhold benefits prior to such a finding is contrary to this legislative history.

Remand is not appropriate on this issue, because the "Board is bound by applicable statutes [and] regulations of the Department of Veterans Affairs." 38 C.F.R. § 19.5. The BVA lacks authority to invalidate VA regulations, so remand prevents full consideration of Appellant's arguments. Although the compensation at issue may be a "relatively paltry sum of money" for the VA, as argued by the Secretary, it is not "paltry" to Mr. Monk. Appellee Brief at 9 n.2, *quoting Jenkins v. Shulkin, M.D.*, Docket No. 16-1376 (August 16, 2017, Memorandum Decision affirming the Board decision). Remand would serve only to further delay an increasingly "extensive litigation." *Id.*

CONCLUSION

For these reasons, as well as those put forth in Appellant's opening brief, Mr. Monk respectfully request that the Court reverse the BVA's decision below, grant the earlier effective date he seeks, and hold unlawful and set aside 38 C.F.R. § 3.12(a).

Respectfully submitted,

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** This brief does not purport to state the views of Yale Law School, if any.