BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-7310

DIMAS M. VALENTIN,

Appellant

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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STATEMENT OF ISSUES

In 1996, an informal claim for benefits included any disability that was reasonably ascertained from the claimant's statements and submissions. Mr. Valentin's April 1996 VA Form 21-526 identified disability compensation as the benefit sought, broadly identified "medical problems" as the disabilities for which benefits were sought, and requested that VA obtain his service medical records. Those service medical records documented a left ankle injury, and the VA examinations that he was afforded in connection with his 1996 claim identified ongoing residuals of that injury. Was the Board's finding that Mr. Valentin did not submit a claim for a left ankle disability until July 2008 prejudicial error?

STATEMENT OF FACTS

Valentin Dimas served honorably in the United States Marine Corps from September 1977 to September 1980. R-984. From November 1990 to May 1991, he served honorably in the United States Army, including service in Southwest Asia in support of Operation Desert Shield/Desert Storm. R-1392. He was a field radio operator and combat signaler, and earned the Army Service Ribbon, Army Reserve Components Achievement Medal, the Army Commendation Medal, and the Army Achievement Medal, among others. R-1392.

In June 1980, during his first period of service, he suffered an inversion sprain of the left ankle while playing basketball. R-1435. The injury required use of crutches and an Ace wrap, but x-rays were negative for a fracture. *Id.*; R-1436. He was granted service connection and compensation for the left ankle disability in May 2009, and seeks an earlier effective date of 1996, commensurate with the date he first applied for that benefit.

In April 1996, Mr. Valentin submitted a VA Form 21-526, Veteran's Application for Compensation or Pension. R-3707-08. He listed both periods of service on the section of the form asking him to "[e]nter complete information for each period of active duty." R-3707. In the section requesting the "nature of sickness, disease or injuries for which this claim is made," Mr. Valentin listed "medical problems" and "see medical records." R-3707. He also explicitly identified several specific problems in that section of the form, to include high blood pressure, headaches, heartburn, and depression. *Id.* In the section asking Mr. Valentin to provide the branch of service and date of occurrence for disabilities incurred in active duty, he wrote "US Army (Nov-90-present) Persian Gulf illness." *Id.* He identified "Ft Meade Army Medical Hospital" as the hospital, first aid station, or infirmary at which he received in-service treatment. R-3708.

The RO requested and received service medical records relating to both periods of service. R-3667; R-3703. Those records included the June 1980 service treatment record documenting the left ankle injury. R-1435; R-1436. The RO also

received VAMC treatment records, including a June 1996 x-ray report showing a diagnosis of pes planus. R-3696. He was afforded a VA feet examination in June 1996, which revealed a diagnosis of metatarsalgic fasciitis, bilaterally, with plantar pes planus. R-3672 (3671-72). A December 1997 VA peripheral nerves examination revealed a diagnosis of right knee degenerative joint disease. R-3538 (3537-38).

In May 1998, Mr. Valentin was afforded a VA examination of the joints in connection with his claims. R-3506-08. The examiner noted a history of left ankle trauma in service, and a history of intermittent bilateral ankle and right knee pains. R-3506. His ankles and knees were examined, and mild tenderness on palpation of the right medial malleolar area was noted. R-3507. The diagnoses included "s/p bilateral injuries with recurrent sprains" and "rule out of [sic] bilateral ankles and right knee." R-3508.

A March 1999 rating decision denied all disabilities explicitly identified on the April 1996 claim form, as well as right knee degenerative joint disease and pes planus with metarsalgic fasciitis, disabilities which were not explicitly identified on the April 1996 application form. *Compare* R-3397-98 (3390-98) *with* R-3707-08. Service medical records dated December 2, 1976, through March 7, 1991, were listed as evidence that was considered in the decision. R-3391. The RO noted: "The veteran did not claim any condition of the feet nor do any lay statements note problems with the feet[,] but at the VA exam of June 17, 1996, he complained of pain of both feet in service." R-3397.

Mr. Valentin submitted a timely NOD with the March 1999 rating decision, in which he requested a hearing before the Board. R-3358. During that August 1999 hearing, he described an incident during his first period of service when he injured his right knee and ankle and that he wore a cast on the left ankle for six weeks. R-3341 (3339-49). He testified that the injuries required continuing treatment in the 1980s. *Id.*

The RO again denied service connection for a right knee disability and pes planus, but did not list the left ankle. R-3117-22. A second VA joints examination was conducted in July 2002. R-2953-54. The examiner noted a "history of left ankle fracture 1979 while in service, was treated with a cast." R-2953. Pain, swelling, giving way, and locking of the bilateral ankles was also noted. *Id.* The ankles and knees were physically examined and revealed painful range of motion. *Id.* The diagnoses were bilateral knee chondrocalcinosis and polyarthralgia of multiple joints of unknown etiology. R-2954.

A May 2003 rating decision granted service connection for polyathralgia of multiple joints of unknown etiology, and assigned an effective date of April 2001. R-2908 (2907-33). The next month, Mr. Valentin requested "reconsideration of the facts for a higher evaluation." R-2906. The RO interpreted this as a new claim for an increased rating for polyarthralgia and ordered a new VA examination. R-2902 (2901-02). The August 2003 VA examiner recorded Mr. Valentin's report of pain in both ankles as well as knees, and elbows. R-2895-96 (2895-97). Based on this examination

report, the RO increased the rating for polyarthralgia from 10 percent to 20 percent, effective June 2003. R-2882 (2880-84).

Mr. Valentin filed an NOD in December 2004 as to that October 2004 rating decision. R-2875. The RO issued a statement of the case (R-2857-70), and Mr. Valentin submitted a timely substantive appeal, explaining that he had "a deform ankel [sic] and will get worse . . . ." R-2855 (R-2854-55). In July 2008, he contacted the RO and, according to the VA employee who completed the Report of Contact form, "request[ed] to reopen his claim for feet and legs (service connected condition)." R-2831.

VA afforded Mr. Valentin an ankle examination in February 2009, but the report of that examination is not of record. *See* R-2799 (2795-2801). Based on that examiner's opinion that Mr. Valentin's current left ankle sprain was related to his service, the RO notified the Veteran that it was awarding service connection for residuals of a left ankle sprain with a noncompensable rating, effective July 2008. R-2767-73 (August 2009 award letter); R-2795-2801 (May 2009 rating decision). In November 2009, he contacted VA and stated that he had submitted an NOD in September. R-2759. VA did not respond, so in February 2010, he wrote to VA explaining his history of in-service ankle sprains, describing the problems that continued to plague him, and requesting that VA "review & reconsider." R-2754 (2754-55). He called VA in June 2010 to again report that he had already submitted an NOD to the 2009 rating decision, and was informed that there was no appeal in

the claims file. R-2749. He requested a letter explaining how to appeal the 2009 decision, which VA sent to him in June 2010. *Id.*; R-2750-51.

Two months later, in August 2010, Mr. Valentin wrote to VA that he was "still waiting for an increase of [his] benefits." R-2744. He was afforded a new examination of the ankle in October 2010 that revealed daily pain, intermittent stiffness, flare-ups, and painful motion. R-2731-33. Based on this exam, the RO increased the ankle rating to 10 percent, effective February 2010, the date of Mr. Valentin's request that VA "review & reconsider" his claim. R-2532-37; R-2754. He submitted a timely NOD, in which he disagreed with "the percent [he] was given." R-2487 (2487-88). He argued that he should have received a compensable rating for his left ankle "years ago," and noted that he "had this case for many years." *Id.* He explained: "Since 1996 when I put my claim. I never closed my case. You closed it & then gave me 10% 2 yrs [sic] later. I should have got more then [sic] 16 yrs [sic] credit. Please correct that." *Id.*

The RO issued an SOC in June 2013, denying a rating in excess of 10 percent for a left ankle condition. R-2120 (2116-20). Mr. Valentin submitted a timely substantive appeal, in which he reiterated that that he had been pursuing his claim since 1996. R-2105 (2103-07). He again requested that VA "correct this in years (1996) and a [sic] increase . . . ." R-2106. In August 2014, the RO responded by issuing a rating decision that awarded an earlier effective date of July 2008 for the 10 percent rating. R-1839-44. The RO concluded that Mr. Valentin had "continuously

prosecuted [his] claim for a left ankle condition from July 22, 2008," but that he "had never filed a claim for service connection for a left ankle condition before this date." R-1843. The RO simultaneously issued an SOC that denied an effective date earlier than July 2008 for the left ankle increased rating. R-1827-38; R-1793-1807. Mr. Valentin submitted a timely substantive appeal. R-1683-84.

In its October 2018 decision, the Board denied entitlement to an effective date prior to July 22, 2008, for the grant of an evaluation of 10 percent for the left ankle. R-5 (3-13). The Board found that "[a]lthough the Veteran was [sic] sought and was granted service connection for polyarthralgia for multiple joints prior to July 22, 2008, and VA examination reports include complaints of ankle pain prior to that date, there is no claim for service connection for a left ankle disability prior to July 22, 2008." R-7. The Board concluded: "As such, the Veteran is already in receipt of the earliest date available for service connection for [the] left ankle disability." *Id.* In addition, the Board found that "as the effective date for the award of the evaluation of 10 percent is the date assigned as the effective date for service connection for [the] left ankle disability, an earlier effective date is not available for the evaluation assigned." *Id.*

SUMMARY OF ARGUMENT

In April 1996, Mr. Valentin submitted a VA Form 21-526 that raised an informal claim for service connection for residuals of a left ankle sprain under 38 C.F.R. § 3.155(a) (1996). Although he did not specifically identify the left ankle as the disabled body part for which he sought service-connected disability compensation, his broad request for benefits for "medical problems," coupled with his reference to "medical records" sufficiently raised an informal claim for the left ankle. Indeed, just by filing the VA Form 21-526, Mr. Valentin sufficiently evidenced a belief of entitlement to the benefit of disability compensation to raise an informal claim for the left ankle disability under section 3.155(a). The Board's finding that he did not submit a claim for a left ankle disability prior to July 2008 is inconsistent with the record, the plain language of the pertinent regulations, and this Court's and the Federal Circuit's case law interpreting those regulations. Because the Board's erroneous finding prejudiced Mr. Valentin, vacatur and remand are required for the Board to issue a new decision that applies the law and facts correctly.

STANDARD OF REVIEW

The Court reviews material questions of fact under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). The determination of the proper effective date is a fact-finding determination, *see McGrath v. Gober*, 14 Vet.App. 28, 35 (2000), as

is the determination of whether a claimant's submissions raised an informal claim, *see Sellers v. Wilkie*, 30 Vet.App. 157, 163 (2018). "A finding is 'clearly erroneous' where "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The Court may not "substitute its judgment for that of the BVA on issues of material fact" and may not overturn factual determinations of the Board if there is a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). "But where the Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court . . . should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013).

The determination of whether a submission constitutes a valid NOD is a question of law that the Court reviews *de novo*. *Anderson v. Principi*, 18 Vet.App. 371, 374 (2004). The Court may reverse a decision of the Board where the case involves a legal question, where the agency analyzed the issue in the first instance, where the relevant facts were admitted, or where the only factual finding is to the issue of harmless error. *Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012).

ARGUMENT

I. The April 1996 VA Form 21-526 reasonably raised a claim for residuals of a left ankle sprain, and the Board misinterpreted the law and the record when it found that Mr. Valentin did not submit a claim for that disability prior to July 2008.

In April 1996, Mr. Valentin submitted a broad claim for "medical problems," and he explicitly directed VA to review his "medical records," which included his service medical records from both periods of service. R-3707-38. The service medical records documented that he suffered a left ankle sprain during his first period of service. R-1435; 1436. And the evidence that VA developed in the process of adjudicating the April 1996 claim demonstrated that he continued to suffer from residuals of that in-service injury. *See* R-2953-54; R-3506-08. The April 1996 VA Form 21-526, therefore, reasonably raised an informal claim for residuals of a left ankle sprain.

Although Mr. Valentin did not explicitly list the left ankle condition on the VA Form 21-526, his broad request for disability benefits for "medical problems," coupled with his reference to "medical records" sufficiently raised an informal claim under 38 C.F.R. § 3.155(a) (1996) for residuals of a left ankle sprain. *See Sellers v. Wilkie*, 30 Vet.App. 157, 161 (2018); *Shea v. Wilkie*, No. 2018-1735, -- F.3d –, 2019 WL 2528294, at *6 (Fed. Cir. 2019); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009). Under the version of section 3.155(a) that was in effect when Mr. Valentin submitted the VA Form 21-526, "any communication [could] qualify as an informal claim if it:

(1) [was] in writing; (2) indicate[d] an intent to apply for veterans' benefits; and (3) identifie[d] the particular benefits sought." *Reeves v. Shinseki*, 682 F.3d 988, 993 (Fed. Cir. 2012).

In *Sellers*, this Court held that under this rule, "a general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits." 30 Vet.App. at 161. In *Shea*, the Federal Circuit made clear that "where a claimant's filings refer to specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability under § 3.155(a)." 2019 WL 2528294, at *6. And in *Clemons*, this Court identified the following factors as relevant to determining the scope of the claim: "[T]he claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." 23 Vet.App. at 6.

Here, Mr. Valentin's left ankle sprain was a reasonably identifiable medical diagnosis reflected in the treatment records. *See* R-1435; *Sellers*, 30 Vet.App. at 161. The April 1996 claim form demonstrated a broad intent to seek benefits for all "medical problems" documented in the "medical records." R-3707. The "medical records" to which he referred in the claim form included the service treatment records from both periods of service, because he adequately identified these records on the

claim form. *Id.*; *see also Jolley v. Derwinski*, 1 Vet.App. 37, 39-40 (1991) (pre-Veterans Claims Assistance Act of 2001 case noting that VA had a statutory duty to assist the claimant in "developing the facts pertinent to the claim," including by searching service records). "VA may not ignore in-service diagnoses of specific disabilities, even those coupled with a general statement of intent to seek benefits, provided those diagnoses are reasonably identifiable from a review of the record." *Sellers*, 30 Vet.App. at 163. Mr. Valentin's service medical records documented a diagnosis of inversion sprain of the left ankle. R-1435. Therefore, his April 1996 claim form included an informal claim for residuals of a left ankle inversion sprain under 38 C.F.R. § 3.155(a), as that provision has been interpreted by this Court and the Federal Circuit. *See Shea*, 2019 WL 2528294, at *6; *Sellers*, 30 Vet.App. at 161.

The facts here are similar to those that were before the Federal Circuit in *Shea*, 2019 WL 2528294. There, the veteran identified specific medical facilities on her VA Form 21-526, and again in a later statement. *Id.* at *2. In her later statement, she requested that VA "obtain these records + grant benefits." *Id.* The Federal Circuit held that these statements may be sufficient to raise an informal claim for a psychiatric disability under 38 C.F.R. § 3.155(a), even though her application itself did not "contain words that themselves refer to a psychiatric disability or to mental-health symptoms, as opposed to language that points to records mentioning such a condition in a way that, sympathetically read, is properly understood as seeking benefits for such a condition." *Id.* at *6. The Court explained: "[W]here a claimant's filings refer to

specific medical records, and those records contain a reasonably ascertainable diagnosis of a disability, the claimant has raised an informal claim for that disability under § 3.155(a)."

Similarly, here, in his April 1996 VA Form 21-326, Mr. Valentin specifically referred to the service medical records from *both* periods of service. R- 3707-08. And he explicitly requested that VA review these "medical records" and award him service connection benefits for his "medical problems." *Id.* Under *Shea*, this was sufficient to raise a claim for any diagnosis that is reasonably ascertained from the service medical records, to include the left ankle sprain. 2019 WL 2528294, at *6. The Board failed to recognize this principle when it found that Mr. Valentin had not filed a claim for the left ankle disability prior to July 2008. R-7.

The RO recognized this principle as early as March 1999, when it adjudicated entitlement to service connection for pes planus and right knee degenerative joint disease, even though these disabilities were not explicitly listed on the April 1996 claim form. *Compare* R-3397-98 (3390-98) *with* R-3707-08. The RO appears to have construed the 1996 claim to encompass these disabilities based on the treatment records associated with the record during the processing of that claim, as well as the findings of the VA examination reports. *See* R-1573; 3397-98. But the service treatment records that were associated with the record during the processing of the April 1996 claim also documented complaints of and treatment for a left ankle injury, and the VA examinations ordered by the RO showed continuing problems with the

left ankle. R-1435; R-3506-08. This is information that "the claimant submit[ted] or that the Secretary obtain[ed] in support of" the April 1996 claim that must be considered in determining its scope. *See Clemons*, 23 Vet.App. at 5. Thus, just as the April 1996 claim for "medical problems" encompassed pes planus and right knee degenerative joint disease, it also encompassed residuals of the left ankle sprain. *See Sellers*, 30 Vet.App. 161; *Clemons*, 23 Vet.App. at 5.

However, in finding that "there is no claim for service connection for a left ankle disability prior to July 22, 2008," the Board made no mention of Mr. Valentin's broad request for service connection for "medical problems," much less discussed whether that was sufficient under section 3.155(a). R-7. Nor did it discuss the procedural history of the April 1996 claim, including the development of evidence specific to the left ankle. *See id.* As a result, just as it did in *Sellers*, the Board erred here in failing to find in the first instance whether Mr. Valentin's broad request for benefits for "medical problems," coupled with the service medical records documenting a diagnosis of a left ankle inversion sprain, raised an informal claim for residuals of that disability under section 3.155(a). *See* 30 Vet.App. at 163; *see also Shea*, 2019 WL 2528295, at *6.

In fact, just by submitting the VA Form 21-526, Mr. Valentin sufficiently raised an informal claim for service-connected disability compensation for his left ankle disability under 38 C.F.R. § 3.155(a) (1996). Section 3.155(a) required only that the claimant identify the "benefit sought." Nothing in the plain language required the

claimant to identify the specific medical condition for which benefits were sought, or even the body part or system affected by disability. *But see*, *e.g.*, *DeLisio v. Shinseki*; 25 Vet.App. 45, 53 (2011); *Brokowski v. Shinseki*, 23 Vet.App. 79, 86 (2009); *Brannon v. West*, 12 Vet.App. 32, 34-35 (1988). Rather, the plain language required only that the claimant identify whether disability compensation, dependency and indemnity compensation, pension, accrued benefits, a burial allowance, or some other type of benefit was requested.

"[T]o discern the meaning of a regulation, [the Court] begin[s] with the plain language of the regulation." *Correia v. McDonald*, 28 Vet.App. 158, 164 (2016). In construing regulatory language, the Court "must read the disputed language in the context of the entire regulation as well as other related regulatory sections in order to determine the language's plain meaning." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013). And identical regulatory terms generally bear the same meaning. *See Prokarym v. McDonald*, 27 Vet.App. 307, 310 (2015). In 1996, when Mr. Valentin submitted his VA Form 21-526, the regulations governing adjudication of VA claims specifically used the term "benefit" to refer to the pension programs then in effect (38 C.F.R. § 3.3 (1996)) and DIC payments (38 C.F.R. § 3.22 (1996)). *See also* 38 C.F.R. § 3.151(a) (1996) (providing that a claim for pension may be considered a claim for compensation and vice versa, and "the greater *benefit* will be awarded") (emphasis added)). From this language, it is clear that "benefit," as used in 38 C.F.R. § 3.155(a),

referred to the *type* of benefits sought, not the specific disability, body part, or body system involved in a request for compensation benefits.

Further, 38 C.F.R. § 3.1(p) (1996) defined a "claim" as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit." Like section 3.155(a), the plain language of section 3.1(p) did not require the claimant to identify the specific medical condition for which benefits were sought, or even the body part or system affected by disability. Rather, it required only that the veteran "request[] a determination of entitlement or evidenc[e] a belief in entitlement to a *benefit*." *See* 38 C.F.R. § 3.1(p) (1996) (emphasis added). The language of section 3.1 further supports the conclusion that a claimant was not required to specifically identify a disability in order to raise an informal claim for service connected compensation benefits for that disability.

Here, the VA Form 21-526 that Mr. Valentin submitted in April 1996 instructed him to complete certain parts only if he was claiming "compensation for a service-connected disability." R-3708. He did so; therefore, there can be no doubt that his VA Form 21-526 raised an informal claim for service-connected disability benefits. *See id.* As a result, he sufficiently identified the "benefit sought" as section 3.155(a) required. And since the ensuing development revealed that he suffered from residuals of an in-service right ankle disability, the disability compensation claim included the left ankle. *See* R-2953-54; R-3506-08. The Board's finding that he did

not file a claim for a left ankle disability prior to July 2008 is based on an erroneous interpretation of 38 C.F.R. § 3.155(a).

II. The Board's failure to recognize the April 1996 informal claim for a left ankle disability prejudiced Mr. Valentin because that claim remained pending on the date of the Board's decision on appeal.

As explained above, the April 1996 VA Form 21-526 raised an informal claim for service connection for residuals of a left ankle inversion sprain. Mr. Valentin was not awarded service connection for that disability until decades later, and an effective date of July 2008 was erroneously assigned. R-1839-44; R-2795-2801. The rating decision awarding service connection and assigning the effective date has been on appeal since November 2009 and was properly before the Board. R-2759. As a result, the Board's finding that Mr. Valentin had not submitted a claim for the left ankle disability prior to July 2008 prejudiced him, because his effective date may date back as early as the date of the claim (i.e., April 1996). *See* 38 U.S.C. § 5110(a); *see also Myers v. Principi*, 16 Vet.App. 228, 236 (2002).

Although Mr. Valentin's left ankle claim has been pending since April 1996, the RO did not award service connection until August 2009. R-2795-2801. In November 2009, Mr. Valentin called VA and expressed his disagreement with the rating decision. R-2759. Although the physical copy of the NOD is not in the claims file, neither is the February 2009 VA examination that served as the basis of the award for service

connection. *See* R-2799. But even if he had not submitted a separate NOD prior to his November 2009 phone call, the phone call itself was sufficient to constitute an NOD under the statute and regulation that controlled at that time. In 2009, an NOD was required only to be in writing; it was not required to have been submitted on any particular form. *See* 38 U.S.C. § 7105(b)(2) (2009); 38 C.F.R. § 20.201 (2009). And while it was required to be "in terms which can be reasonably construed as disagreement with [the RO's decision] and a desire for appellate review," Mr. Valentin's use of the term "notice of disagreement," which is a term of art, clearly satisfies these requirements. *See id.*; R-2759. Further, once the VA representative wrote on the Report of General Information that Mr. Valentin had filed an NOD, his expression of disagreement satisfied the requirement that it be in writing. *See* R-2759; 38 C.F.R. § 7105(b)(2) (2009); 38 C.F.R. § 20.201 (2009); *see also Felton v. Brown*, 4 Vet.App. 363, 367 (1993) (noting that VA had accepted a telephone inquiry from a U.S. Senator as an NOD); *cf.* VA Adjudication Procedures Manual, Part 3, Chapter 2, Section ii.2.C.1.e (updated Feb. 16, 2017) (providing that a telephone call from a claimant documented on a Report of General Information form is a claim for benefits).

Moreover, when his appellate pleadings are properly, sympathetically, and liberally construed together, it is clear that Mr. Valentin intended to appeal the effective date assigned for service connection for the left ankle. In his October 2012 submission, he argued that he was entitled to an effective date earlier than 2008

because he "had this case for many years," specifically, "[s]ince 1996 when I put my claim." R-2487. A pro se veteran's appellate pleadings cannot be read in isolation. *Rivera v. Shinseki*, 654 F.3d 1377, 1380 (Fed. Cir. 2011); *Evans v. Shinseki*, 25 Vet.App. 7, 14 (2011). Instead, they must be sympathetically and liberally construed together to determine the scope of an appeal. *Rivera*, 654 F.3d at 1380; *Evans*, 25 Vet.App. at 14. Therefore, the Court should conclude on *de novo* review that the November 2009 Report of General Information constituted a valid NOD as to the effective date assigned for the award of service connection for the left ankle disability. *See Archbold v. Brown*, 9 Vet.App. 124, 131 (1996); *Anderson*, 18 Vet.App. at 374.

That Mr. Valentin submitted a timely NOD with the effective date assigned in the May 2009 rating decision is further supported by the August 2014 rating decision and SOC that awarded an effective date of July 2008 for the compensable rating. R-1827-38; R-1839-44. The RO concluded that Mr. Valentin had "continuously prosecuted [his] claim for a left ankle conditions from July 22, 2008." R-1843. Although the RO's determination that he "had never filed a claim for service connection for the left ankle disability before this date" is erroneous for the reasons explained in Section I above, its conclusion that he had "continuously prosecuted [his] claim" since at least July 2008 was correct. *See id.* And the only way that the RO could have reached this conclusion is by acknowledging that it received a timely NOD with the May 2009 rating decision. The Court should conclude the same.

Because VA did not address the substance of the left ankle claim until the May 2009 rating decision, and Mr. Valentin submitted a timely NOD with that decision, Mr. Valentin is entitled to an effective date of the date of the claim or the date entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a); *Myers*, 16 Vet.App. at 236. The Board's finding that the date of the claim is July 2008 because Mr. Valentin had not submitted a claim prior to that date is factually and legally erroneous, and vacatur and remand are required for the Board to issue a new decision applying the correct law and facts.

CONCLUSION

Mr. Valentin's 1996 informal claim for a left ankle disability remained pending until 2009, when VA finally awarded service connection for residuals of the in-service left ankle sprain. But VA continues to deny him the proper effective date for that disability based on its erroneous conclusion that he did not file a claim for a left ankle disability until 2008. In fact, his 1996 VA Form 21-526 sufficiently raised an informal claim for a left ankle disability under the then-controlling regulation. The Board's finding that there was no left ankle disability claim until 2008 must be vacated, and the matter remanded for the Board to issue a new decision applying the correct law and facts.

Respectfully submitted,

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EDITORIAL NOTE: Nomenclature changes to part 3 appear at 61 FR 7216, Feb. 27, 1996.

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

AUTHORITY: 38 U.S.C. 501(a), unless otherwise noted.

GENERAL

§ 3.1 Definitions.

(a) *Armed Forces* means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their Reserve components.

(b) *Reserve component* means the Army, Naval, Marine Corps, Air Force, and Coast Guard Reserves and the National and Air National Guard of the United States.

(c) *Reserves* means members of a Reserve component of one of the Armed Forces.

(d) *Veteran* means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.

(1) For compensation and dependency and indemnity compensation the term *veteran* includes a person who died in active service and whose death was not due to willful misconduct.

(2) For death pension the term *veteran* includes a person who died in active service under conditions which preclude payment of service-connected death benefits, provided such person had completed at least 2 years honorable military, naval or air service, as certified by the Secretary concerned. (See §§3.3(b)(3)(i) and 3.3(b)(4)(i))

(Authority: 38 U.S.C. 501)

(e) *Veteran of any war* means any veteran who served in the active military, naval or air service during a period of war as set forth in §3.2.

(f) *Period of war* means the periods described in §3.2.

(g) *Secretary concerned* means:

(1) The Secretary of the Army, with respect to matters concerning the Army;

(2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;

(3) The Secretary of the Air Force, with respect to matters concerning the Air Force;

(4) The Secretary of Transportation, with respect to matters concerning the Coast Guard;

(5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

(h) *Discharge or release* includes retirement from the active military, naval, or air service.

(i) *State* means each of the several States, Territories and possessions of the United States, the District of Columbia, and Commonwealth of Puerto Rico.

(j) *Marriage* means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued.

(Authority: 38 U.S.C. 103(c))

(k) *Service-connected* means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(l) *Nonservice-connected* means, with respect to disability or death, that such disability was not incurred or aggravated, or that the death did not result from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(m) *In line of duty* means an injury or disease incurred or aggravated during a period of active military, naval, or air service unless such injury or disease was the result of the veteran's own willful misconduct or, for claims filed after October 31, 1990, was a result of his or her abuse of alcohol or drugs. A service department finding that injury, disease or death occurred in line of duty will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs. Requirements as to line of duty are not met if at the time the injury was suffered or disease contracted the veteran was:

(1) Avoiding duty by desertion, or was absent without leave which materially interfered with the performance of military duty.

(2) Confined under a sentence of court-martial involving an unremitted dishonorable discharge.

(3) Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the person was convicted by such court.

(Authority: 38 U.S.C. 105)

NOTE: See §3.1(y)(2)(iii) for applicability of *in line of duty* in determining former prisoner of war status.

(n) *Willful misconduct* means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of

Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§3.301, 3.302.)

NOTE: See §3.1(y)(2)(iii) for definition of *willful misconduct* in determining former prisoner of war status.

(o) *Political subdivision of the United States* includes the jurisdiction defined as a State in paragraph (i) of this section, and the counties, cities or municipalities of each.

(p) *Claim—Application* means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.

(q) *Notice* means written notice sent to a claimant or payee at his or her latest address of record.

(r) *Date of receipt* means the date on which a claim, information or evidence was received in the Department of Veterans Affairs, except as to specific provisions for claims or evidence received in the State Department (§3.108), or in the Social Security Administration (§§3.153, 3.201), or Department of Defense as to initial claims filed at or prior to separation.

(s) *On the borders thereof* means, with regard to service during the Mexican border period, the States of Arizona, California, New Mexico, and Texas, and the nations of Guatemala and British Honduras.

(Authority: 38 U.S.C. 101(30))

(t) *In the waters adjacent thereto* means, with regard to service during the Mexican border period, the waters (including the islands therein) which are within 750 nautical miles (863 statute miles) of the coast of the mainland of Mexico.

(Authority: 38 U.S.C. 101(30))

(u) *Section 306 pension* means those disability and death pension programs in effect on December 31, 1978, which arose out of Pub. L. 86-211; 73 Stat. 432.

(v) *Old-Law pension* means the disability and death pension programs that were in effect on June 30, 1960. Also known as protected pension, i.e. protected under section 9(b) of the Veteran's Pension Act of 1959 (Pub. L. 86-211; 73 Stat. 432).

(w) *Improved pension* means the disability and death pension programs becoming effective January 1, 1979, under authority of Pub. L. 95-588; 92 Stat. 2497.

(x) *Service pension* is the name given to Spanish-American War pension. It is referred to as a service pension because entitlement is based solely on service without regard to nonservice-connected disability, income and net worth.

(Authority: 38 U.S.C. 1512, 1536)

(y) *Former prisoner of war.* The term *former prisoner of war* means a person who, while serving in the active military, naval or air service, was forcibly detained or interned in the line of duty by an enemy or foreign government, the agents of either, or a hostile force.

(1) *Decisions based on service department findings.* The Department of Veterans Affairs shall accept the findings of the appropriate service department that a person was a prisoner of war during a period of war unless a reasonable basis exists for questioning it. Such findings shall be accepted only when detention or internment is by an enemy government or its agents.

(2) *Other decisions.* In all other situations, including those in which the Department of Veterans Affairs cannot accept the service department findings, the following factors shall be used to determine prisoner of war status:

(i) *Circumstances of detention or internment.* To be considered a former prisoner of war, a serviceperson must have been forcibly detained or interned under circumstances comparable to those under which persons generally have been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships

or abuse, malnutrition, and unsanitary conditions. Each individual member of a particular group of detainees or internees shall, in the absence of evidence to the contrary, be considered to have experienced the same circumstances as those experienced by the group.

(ii) *Reason for detainment or internment.* The reason for which a serviceperson was detained or interned is immaterial in determining POW status, except that a serviceperson who is detained or interned by a foreign government for an alleged violation of its laws is not entitled to be considered a former POW on the basis of that period of detention or internment, unless the charges are a sham intended to legitimize the period of detention or internment.

(3) *Central Office approval.* The Director of the Compensation and Pension Service, VA Central Office, shall approve all VA regional office determinations establishing or denying POW status, with the exception of those service department determinations accepted under paragraph (y)(1) of this section.

(4) *In line of duty.* The Department of Veterans Affairs shall consider that a serviceperson was forcibly detained or interned in line of duty unless the evidence of record discloses that forcible detainment or internment was the proximate result of the serviceperson's own willful misconduct. Willful misconduct means an act involving conscious wrongdoing or known prohibited action. It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(5) *Hostile force.* The term *hostile force* means any entity other than an enemy or foreign government or the agents of either whose actions are taken to further or enhance anti-American military, political or economic objectives or views, or to attempt to embarrass the United States.

(Authority: 38 U.S.C. 101(32))

(z) *Nursing home* means

(1) Any extended care facility which is licensed by a State to provide skilled or intermediate-level nursing care,

(2) A nursing home care unit in a State veterans' home which is approved for payment under 38 U.S.C. 1742, or

(3) A Department of Veterans Affairs Nursing Home Care Unit.

(aa) *Fraud:*

(1) As used in 38 U.S.C. 103 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining, or assisting an individual to obtain an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce; and

(Authority: 38 U.S.C. 501)

(2) As used in 38 U.S.C. 110 and 1159 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for Department of Veterans Affairs benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.

(Authority: 38 U.S.C. 501)

[26 FR 1563, Feb. 24, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §3.1, see the List of Sections Affected in the Finding Aids section of this volume.

CROSS-REFERENCES: Pension. See §3.3. Compensation. See §3.4. Dependency and indemnity compensation. See §3.5. Preservation of disability ratings. See §3.951. Service-connection. See §3.957.

§3.2 Periods of war.

This section sets forth the beginning and ending dates of each war period beginning with the Indian wars. Note that the term *period of war* in reference to pension entitlement under 38 U.S.C. 1521, 1541 and 1542 means all of the war periods listed in this section except the Indian wars and the Spanish-American War. See §3.3(a)(3) and (b)(4)(i).

(a) *Indian wars.* January 1, 1817, through December 31, 1898, inclusive. Service must have been rendered with the United States military forces against Indian tribes or nations.

26, 1947, is considered World War II service.

(e) *Korean conflict.* June 27, 1950, through January 31, 1955, inclusive.

(f) *Vietnam era.* The period beginning on February 28, 1961, and ending on May 7, 1975, inclusive, in the case of a veteran who served in the Republic of Vietnam during that period. The period beginning on August 5, 1964, and ending on May 7, 1975, inclusive, in all other cases.

(Authority: 38 U.S.C. 101(29))

(g) *Future dates.* The period beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of the Congress.

(Authority: 38 U.S.C. 101)

(h) *Mexican border period.* May 9, 1916, through April 5, 1917, in the case of a veteran who during such period served in Mexico, on the borders thereof, or in the waters adjacent thereto.

(Authority: 38 U.S.C. 101(30))

(i) *Persian Gulf War.* August 2, 1990, through date to be prescribed by Presidential proclamation or law.

(Authority: 38 U.S.C. 101(33))

[26 FR 1563, Feb. 24, 1961, as amended at 32 FR 13223, Sept. 19, 1967; 36 FR 8445, May 6, 1971; 37 FR 6676, Apr. 1, 1972; 40 FR 27030, June 26, 1975; 44 FR 45931, Aug. 6, 1979; 56 FR 57986, Nov. 15, 1991; 62 FR 35422, July 1, 1997]

§3.3 Pension.

(a) *Pension for veterans*—(1) *Service pension; Spanish-American War.* A benefit payable monthly by the Department of Veterans Affairs because of service in the Spanish-American War. Basic entitlement exists if a veteran:

(i) Had 70 (or 90) days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability adjudged service connected without benefit of presumptive provisions of law, or at the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(Authority: 38 U.S.C. 1512)

(2) *Section 306 pension.* A benefit payable monthly by the Department of Veterans Affairs because of nonservice-connected disability or age. Basic entitlement exists if a veteran:

(i) Served 90 days or more in either the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era, or served an aggregate of 90 days or more in separate periods of service during the same or during different war periods, including service during the Spanish-American War (Pub. L. 87–101, 75 Stat. 218; Pub. L. 90–77, 81 Stat. 178; Pub. L. 92–198, 85 Stat. 663); or

(ii) Served continuously for a period of 90 consecutive days or more and such period ended during the Mexican border period or World War I, or began or ended during World War II, the Korean conflict or the Vietnam era (Pub. L. 87–101, 75 Stat. 218; Pub. L. 88–664, 78 Stat. 1094; Pub. L. 90–77, 81 Stat. 178; Pub. L. 91–588, 84 Stat. 1580; Pub. L. 92–198, 85 Stat. 663; Pub. L. 94–169, 89 Stat. 1013; Pub. L. 95–204, 91 Stat. 1455); or

(iii) Was discharged or released from such wartime service, before having served 90 days, for a disability adjudged service connected without the benefit of presumptive provisions of law, or at the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability; and

(iv) Is permanently and totally disabled (*a*) from nonservice-connected disability not due to the veteran's own willful misconduct or vicious habits, or (*b*) by reason of having attained the age of 65 years or by reason of having become unemployable after age 65; and

(v)(*a*) Is in receipt of section 306 pension or (*b*) has an application for pension pending on December 31, 1978, or (*c*) meets the age or disability requirements for such pension on December 31, 1978, and files a claim within 1 year of that date and also within 1 year after meeting the age or disability requirements.

(vi) Meets the income and net worth requirements of 38 U.S.C. 1521 and 1522 as in effect on December 31, 1978, and all other provisions of title 38, United

States Code, in effect on December 31, 1978, applicable to section 306 pension.

NOTE: The pension provisions of title 38 U.S.C., as in effect on December 31, 1978, are available in any VA regional office.

(3) *Improved pension; Pub. L. 95–588 (92 Stat. 2497).* A benefit payable by the Department of Veterans Affairs to veterans of a period or periods of war because of nonservice-connected disability or age. The qualifying periods of war for this benefit are the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era and the Persian Gulf War. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if a veteran:

(i) Served in the active military, naval or air service for 90 days or more during a period of war (38 U.S.C. 1521(j)); or

(ii) Served in the active military, naval or air service during a period of war and was discharged or released from such service for a disability adjudged service-connected without presumptive provisions of law, or at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability (38 U.S.C. 1521(j)); or

(iii) Served in the active military, naval or air service for a period of 90 consecutive days or more and such period began or ended during a period of war (38 U.S.C. 1521(j)); or

(iv) Served in the active military, naval or air service for an aggregate of 90 days or more in two or more separate periods of service during more than one period of war (38 U.S.C. 1521(j)); and

(v) Is permanently and totally disabled from nonservice-connected disability not due to the veteran's own willfull misconduct; and

(Authority: 38 U.S.C. 1502(a))

(vi) Meets the net worth requirements under §3.274 and does not have an annual income in excess of the applicable maximum annual pension rate specified in §3.23.

(b) *Pension for survivors*—(1) *Indian war death pension.* A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of an Indian war. Basic entitlement exists if a veteran had qualifying service as specified in 38 U.S.C. 1511. Indian war death pension rates are set forth in 38 U.S.C. 1534 and 1535.

(2) *Spanish-American War death pension.* A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of the Spanish-American War, if the veteran:

(i) Had 90 days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability service-connected without benefit of presumptive provisions of law, or at time of discharge had such a service-connected disability, as shown by official service records, which in medical judgment would have justified a discharge for disability.

(Authority: 38 U.S.C. 1536, 1537)

(3) *Section 306 death pension.* A monthly benefit payable by the Department of Veterans Affairs to a surviving spouse or child because of a veteran's nonservice-connected death. Basic entitlement exists if:

(i) The veteran (as defined in §3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(2)(i), (ii), or (iii) of this section; or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for service-connected disability based on wartime service; and

(iii) The surviving spouse or child (A) was in receipt of section 306 pension on December 31, 1978, or (B) had a claim for pension pending on that date, or (C) filed a claim for pension after that date but within 1 year after the veteran's death, if the veteran died before January 1, 1979; and

(iv) The surviving spouse or child meets the income and net worth requirements of 38 U.S.C. 1541, 1542 or 1543 as in effect on December 31, 1978, and all other provisions of title 38,

United States Code in effect on December 31, 1978, applicable to section 306 pension.

NOTE: The pension provisions of title 38, United States Code, as in effect on December 31, 1978, are available in any VA regional office.)

(4) *Improved death pension, Public Law 95–588.* A benefit payable by the Department of Veterans Affairs to a veteran's surviving spouse or child because of the veteran's nonservice-connected death. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if:

(i) The veteran (as defined in §3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(3)(i), (ii), (iii), or (iv) of this section (38 U.S.C. 1541(a)); or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for a service-connected disability based on service during a period of war. (The qualifying periods of war are specified in paragraph (a)(3) of this section.) (38 U.S.C. 1541(a)); and

(iii) The surviving spouse or child meets the net worth requirements of §3.274 and has an annual income not in excess of the applicable maximum annual pension rate specified in §§3.23 and 3.24.

(Authority: 38 U.S.C. 1541 and 1542).

[44 FR 45931, Aug. 6, 1979, as amended at 56 FR 19579, Apr. 29, 1991; 56 FR 22910, May 17, 1991; 56 FR 25044, June 3, 1991; 56 FR 57986, Nov. 15, 1991]

CROSS REFERENCES: Section 306 pension. See §3.1(u). Improved pension. See §3.1(w). Improved pension rates. See §3.23. Improved pension rates; surviving children. See §3.24. Frequency of payment of improved pension. See §3.30. Relationship of net worth to pension entitlement. See §3.274.

§3.4 Compensation.

(a) *Compensation.* This term means a monthly payment made by the Department of Veterans Affairs to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957, or under the circumstances outlined in paragraph (c)(2) of this section. If the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable.

(Authority: 38 U.S.C. 101(2), (13))

(b) *Disability compensation.* (1) Basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in line of duty.

(Authority: 38 U.S.C. 1110, 1131)

(2) An additional amount of compensation may be payable for a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling.

(Authority: 38 U.S.C. 1115)

(c) *Death compensation.* Basic entitlement exists for a surviving spouse, child or children, and dependent parent or parents if:

(1) The veteran died before January 1, 1957; or

(2) The veteran died on or after May 1, 1957, and before January 1, 1972, if at the time of death a policy of United States Government Life Insurance or National Service Life Insurance was in effect under waiver of premiums under 38 U.S.C. 1924 unless the waiver was granted under the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the veteran died before return to military jurisdiction or within 120 days thereafter. (See §3.5(d) as to Public Health Service.)

(Authority: 38 U.S.C. 1121, 1141)

[26 FR 1564, Feb. 24, 1961, as amended at 38 FR 21923, Aug. 14, 1973; 39 FR 34529, Sept. 26, 1974; 44 FR 22717, Apr. 17, 1979]

§3.5 Dependency and indemnity compensation.

(a) *Dependency and indemnity compensation.* This term means a monthly payment made by the Department of Veterans Affairs to a surviving spouse, child, or parent:

§3.23 Improved pension rates—Veterans and surviving spouses.

(a) *Maximum annual rates of improved pension.* The maximum annual rates of improved pension for the following categories of beneficiaries shall be the amounts specified in 38 U.S.C. 1521 and 1542, as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the "Notices" section of the FEDERAL REGISTER. (1) Veterans who are permanently and totally disabled.

(Authority: 38 U.S.C. 1521(b) or (c))

(2) Veterans in need of aid and attendance.

(Authority: 38 U.S.C. 1521(d))

(3) Veterans who are housebound.

(Authority: 38 U.S.C. 1521(e))

(4) Two veterans married to one another; combined rates.

(Authority: 38 U.S.C. 1521(f))

(5) Surviving spouse alone or with a child or children of the deceased veteran in custody of the surviving spouse

(Authority: 38 U.S.C. 1541(b) or (c))

(6) Surviving spouses in need of aid and attendance.

(Authority: 38 U.S.C. 1541(d))

(7) Surviving spouses who are housebound.

(Authority: 38 U.S.C. 1541(e))

(b) *Reduction for income.* The maximum rates of improved pension in paragraph (a) of this section shall be reduced by the amount of the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 1521, 1541)

(c) *Mexican border period and World War I veterans.* The applicable maximum annual rate payable to a Mexican border period or World War I veteran under this section shall be increased by the amount specified in 38 U.S.C. 1521(g), as increased from time to time under 38 U.S.C 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rate will be published in the "Notices" section of the FEDERAL REGISTER.

(Authority: 38 U.S.C. 1521(g))

(d) *Definitions of terms used in this section*—(1) *Dependent.* A veteran's spouse or child. A veteran's spouse who resides apart from the veteran and is estranged from the veteran may not be considered the veteran's dependent unless the spouse receives reasonable support contributions from the veteran. (Note that under §3.60 a veteran and spouse who reside apart are considered to be living together unless they are estranged.) A child of a veteran not in custody of the veteran and to whose support the veteran is not reasonably contributing, may not be considered the veteran's dependent.

(Authority: 38 U.S.C. 1521(b)).

(2) *In need of aid and attendance.* As defined in §3.351(b).

(3) *Housebound.* As defined in §3.351(d)(2), (f). This term also includes a veteran who has a disability or disabilities evaluated as 60 percent or more disabling in addition to a permanent and totally disabling condition. See §3.351(d)(1).

(4) *Veteran's annual income.* This term includes the veteran's annual income, the annual income of the veteran's dependent spouse, and the annual income of each child of the veteran (other than a child for whom increased pension is not payable under 38 U.S.C. 1522(b)) in the veteran's custody or to whose support the veteran is reasonably contributing (to the extent such child's income is reasonably available to or for the veteran, unless in the judgment of the Department of Veterans Affairs to do so would work a hardship on the veteran.) There is a rebuttable presumption that all of such a child's income is reasonably available to or for the veteran.

(Authority: 38 U.S.C. 1521 (c), (h))

(5) *Surviving spouse's annual income.* This term includes the surviving spouse's annual income and the annual income of each child of the veteran (other than a child for whom increased pension is not payable under 38 U.S.C. 1543(a)(2)) in the custody of the surviving spouse to the extent that such child's income is reasonably available

will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. If additional evidence is not received within that period, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired.

(Authority: 38 U.S.C. 5112 (b)(6))

[27 FR 11886, Dec. 1, 1962, as amended at 55 FR 13529, Apr. 11, 1990]

§3.115 Access to financial records.

(a) The Secretary of Veterans Affairs may request from a financial institution the names and addresses of its customers. Each such request, however, shall include a certification that the information is necessary for the proper administration of benefits programs under the laws administered by the Secretary, and cannot be obtained by a reasonable search of records and information of the Department of Veterans Affairs.

(b) Information received pursuant to a request referred to in paragraph (a) of this section shall not be used for any purpose other than the administration of benefits programs under the laws administered by the Secretary if the disclosure of that information would otherwise be prohibited by any provision of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 through 3422).

(Authority: 38 U.S.C. 5319)

[58 FR 32445, June 10, 1993]

CLAIMS

§3.150 Forms to be furnished.

(a) Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished.

(Authority: 38 U.S.C. 5102)

(b) Upon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity compensation. If it is not indicated that any person would be entitled to such benefits, but there is payable an accrued benefit not paid during the veteran's lifetime, the appropriate application form will be forwarded to the preferred dependent. Notice of the time limit will be included in letters forwarding applications for benefits.

(c) When disability or death is due to Department of Veterans Affairs hospital treatment, training, medical or surgical treatment, or examination, a specific application for benefits will not be initiated.

[26 FR 1570, Feb. 14, 1961, as amended at 30 FR 133, Jan. 7, 1965]

CROSS REFERENCE: Failure to furnish claim form or notice of time limit. See §3.109(b).

§3.151 Claims for disability benefits.

(a) *General.* A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.

(b) *Retroactive disability pension claims.* Where disability pension entitlement is established based on a claim received by VA on or after October 1, 1984, the pension award may not be effective prior to the date of receipt of the pension claim unless the veteran specifically claims entitlement to retroactive benefits. The claim for retroactivity may be filed separately or included in the claim for disability pension, but it must be received by VA within one year from the date on which the veteran became permanently and totally disabled. Additional requirements for entitlement to a retroactive pension award are contained in §3.400(b) of this part.

(Authority: 38 U.S.C 5110(b)(3))

[50 FR 25981, June 24, 1985]

CROSS REFERENCE: Informal claims. See §3.155(b).

hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws may be accepted as a claim.

(Authority: 38 U.S.C. 1151)

[27 FR 11887, Dec. 1, 1962]

CROSS REFERENCES: Effective dates. See § 3.400. Disability or death due to hospitalization, etc. See § 3.800(a).

§ 3.155 Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a service organization, an attorney, or agent may not be accepted as an informal claim if a power of attorney was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of § 3.151 or § 3.152, an informal request for increase or reopening will be accepted as a claim.

[26 FR 1570, Feb. 24, 1961, as amended at 52 FR 27340, July 21, 1987]

CROSS REFERENCES: State Department as agent of VA. See § 3.108. Report of examination or hospitalization—as claim for increase or to reopen. See § 3.157.

§ 3.156 New and material evidence.

(a) *New and material evidence* means evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim.

(Authority: 38 U.S.C. 501)

(b) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 501)

(c) Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

[27 FR 11887, Dec. 1, 1962, as amended at 55 FR 20148, May 15, 1990; 55 FR 52275, Dec. 21, 1990; 58 FR 32443, June 10, 1993]

CROSS REFERENCES: Effective dates—general. See § 3.400. Correction of military records. See § 3.400(g).

United States Code Annotated
Title 38. Veterans' Benefits (Refs & Annos)
Part V. Boards, Administrations, and Services (Refs & Annos)
Chapter 71. Board of Veterans' Appeals

This section has been updated. Click here for the updated version.

38 U.S.C.A. § 7105

§ 7105. Filing of notice of disagreement and appeal

Effective: June 5, 2001 to February 1, 2013

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(C) The decision on each issue and a summary of the reasons for such decision.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

CREDIT(S)

(Added Pub.L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 553, § 4005; amended Pub. L. 99-576, Title VII, § 701(85), Oct. 28, 1986, 100 Stat. 3298; Pub.L. 100-687, Div. A, Title II, §§ 203(b), 206, Nov. 18, 1988, 102 Stat. 4111; renumbered § 7105 and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-83, § 4(b)(1), (2)(E), Aug. 6, 1991, 105 Stat. 404, 405; Pub.L. 107-14, § 8(a)(16), June 5, 2001, 115 Stat. 35.)

ENACTMENT OF SUBSECTION (E)

<Pub.L. 112-154, Title V, § 501(a), (b), Aug. 6, 2012, 126 Stat. 1190, provided that, effective on the date that is 180 days after Aug. 6, 2012, subsec. (e) is enacted to read as follows:>

<**(e)(1)** If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence.>

<**(2)** A request for review of evidence under paragraph (1) shall accompany the submittal of the evidence.>

38 U.S.C.A. § 7105, 38 USCA § 7105
Current through P.L. 116-29.

