Vet.App. No. 19-0304

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT E. SHARPE,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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ISSUE PRESENTED

Whether the Court should affirm the October 19, 2018, Board of Veterans' Appeals (Board or BVA) decision that denied an earlier effective date for the additional amount payable for the Veteran's dependent spouse, where the Board's findings are plausibly based on the evidence of record, supported by statutes and Department of Veterans Affairs (VA) regulations, and accompanied by an adequate statement of reasons or bases.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the BVA. 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

Robert E. Sharpe, hereinafter "Appellant," appeals an October 19, 2018, Board decision, wherein the BVA denied an effective date earlier than September 11, 2011, for additional amount for his dependent spouse. (Record Before the Agency (R.) at 6-9).

C. STATEMENT OF FACTS

By rating decision dated in September 2003, Appellant was awarded (1) a 50% rating for his service-connected post-traumatic stress disorder (PTSD, (2) a 10% rating for his service-connected forehead scar, and (3) a 10% rating for amputation of the distal phalanx, 4th left fingertip, each effective February 11, 2003. (R. at 1760-67). The notification letter to the decision indicated that Appellant was being paid "as a single veteran with no dependents" and that he was "eligible for an additional monthly allowance for. . . dependents." (R. at 1755 (1755-58)). The letter instructed Appellant to complete and return the enclosed VA Form 21-686c, declaration of status of dependents, within one year from the date of the letter so that any dependents he wished to claim could be included as dependents from the effective date of his award. (*Id.*).

In October 2003, Appellant returned an incomplete VA Form 21-686c. (R. at 1751-53). Appellant reported that he was currently married to Jessie Sharpe and had previously been married to Gloria Williams. (R. at 1751). He also reported that Jessie had previously been married to Leo Eaglin and Herman Taylor. (*Id.*). That same month, Appellant was notified that the Secretary required three pieces of additional information to establish a dependent status for his current spouse. (R. at 1748-49). Specifically, the agency of original jurisdiction (AOJ) requested the following:

- The month of Appellant's divorce from Gloria
- The month of Jessie's divorce from Leo
- The city and state of Jessie's divorce from Herman

(R. at 1748). The letter also advised Appellant that he could "take up to a year from the date of this letter to send us what we need" and that if he took more than a year, he "may lose money because we won't be able to pay you back to the date you filed your claim." (R. at 1749). An additional VA Form 21-686c was enclosed. (*Id.*).

Nearly eight years later, in February 2011, Appellant sought increased ratings for PTSD and skin condition. (R. at 1649-50). The AOJ denied his increased-rating claim August 2011. (R. at 1524-29). In the notification letter, the AOJ advised Appellant that he could establish additional benefits for dependents by completing the enclosed VA Form 21-686c, and returning it to VA. (R. at 1515-16). On September 13, 2011, the AOJ received a VA Form 21-686c dated September 11, 2011. (R. at 1508-09). Appellant subsequently submitted copies of Herman Taylor's death certificate, a judgment of divorce between Jessie Eaglin and Leo Eaglin, Gloria Sharpe's death certificate, and his marriage certificate for his marriage to Jessie. (R. at 1093-97). In November 2012, Appellant requested to add his spouse, Jessie Sharpe, as a dependent. (R. at 1085 (1085-89)). Appellant alleged that he should have been receiving additional compensation for his spouse since August 2011 and that his additional compensation should be retroactive from August 2011. (R. at 1087).

On April 12, 2013, by administrative decision, Jessie was added as a dependent, effective September 11, 2011. (R. at 1050-52). This decision further stated that the dependency was established based on the VA Form 21-686c

received on September 11, 2011, and the divorce, marriage, and death certificates received in October 2012. (R. 1051).

In May 2013, Appellant indicated that he was seeking retroactive dependency benefits from March 2001. (R. at 992 (991-92)). The following month, Appellant reported that he had been married to his spouse since 2003. (R. at 989). In July 2013, Appellant again stated that he had been married to his spouse since March 1, 2003, and requested payment for compensation as a veteran with one dependent from March 1, 2003. (R. at 985). Appellant stated that the relevant information was in his records and that no one had ever told him and that he did not know or read anywhere that a request for compensation was required. (*Id.*).

On January 24, 2014, Appellant was notified that his monthly compensation remained unchanged. (R. at 819-21). The AOJ explained that, because it did not receive the additional information regarding dependents within a year following its October 2003 request, his claim was denied. (R. at 819). Shortly thereafter, Appellant submitted a notice of disagreement (NOD) with the January 2014 decision. (R. at 789-93). In December 2014, a statement of the case (SOC) denied an earlier effective date for the additional amount payable for Appellant's dependent spouse. (R. at 432-56). Appellant filed a substantive appeal in December 2015. (R. at 299-303). Along with his substantive appeal, Appellant argued that he provided VA with notice of his marriage to Jessie in May 2003 and that he provided this same information in October 2003 on a VA Form 21-686c. (R. at 299). Appellant indicated that he submitted this same information in

September 2011, April 2013, January 2014, and February 2014. (*Id*).

In March 2016, Appellant provided additional evidence and argument in support of his claim. (R. at 236-56). Appellant indicated that he notified VA of his marriage to his spouse in March 2003 and that, between 2003 and 2011, he repeatedly requested spousal allocation without a response. (R. at 251). He also stated that VA requested death certificates and/or divorce papers in 2003 and that his responses to VA's requests were sent to VA on four occasions. (R. at 251). Returned receipts for mail dated in May 2003, January 2014, and another illegible date in 2014 were also enclosed. (R. at 236-40).

A March 2016 SOC determined that Appellant's substantive appeal was untimely. (R. at 217-35). Appellant submitted a substantive appeal in April 2016 stating that the he sent confirmation of death and/or divorce information related to the former spouses involved on three or more occasions. (R. at 205-09). In a letter attached to his substantive appeal, Appellant explained that the requested information was sent to VA with returned receipts on May 27, 2003, October 6, 2003, September 13, 2011, April 2, 2013, January 31, 2014, and February 21, 2014. (R. at 207).

The Board remanded the issue as to the timeliness back to the AOJ in August 2017 for Appellant to be provided with a hearing. (R. at 111-14). On November 4, 2017, Appellant participated in a hearing before a Board member. (R. at 79-96). Appellant testified that he applied for dependency benefits in March 2003 when he got married to Jessie. (R. at 86). He also reported that each time

VA requested information, he responded. (R. at 89). He also stated that, after he submitted the request for compensation in 2003, he did not hear anything until 2010 or 2011. (R. at 90).

In February 2018, the Board found that Appellant's appeal was timely and the merits of his claim were remanded to the AOJ for readjudication. (R. at 52-59). In June 2018, a supplemental SOC (SSOC) denied an earlier effective date for dependency allowance. (R. at 20-43).

On October 19, 2018, the Board issued the decision on appeal. (R. at 6-9). Appellant appealed that decision to this Court.

SUMMARY OF THE ARGUMENT

The Court should affirm the October 19, 2018, Board decision denying an effective date earlier than September 11, 2011, for the grant of additional disability compensation in the form of dependency allowance for Appellant's spouse. The Board correctly applied the relevant statutes and regulations and plausibly and adequately found that there was no legal basis to grant an effective date earlier than September 11, 2011, because Appellant failed to provide VA with the information needed to establish dependency until that date. Appellant's arguments to the contrary should be wholly rejected by the Court.

ARGUMENT

Appellant Fails To Establish Entitlement to an Effective Date Earlier than September 11, 2011, for Compensation Based on His Dependent Spouse

Appellant argues that the Board improperly required him to submit an application for dependent compensation in violation of the Court's holding in *Sharp v. Shinseki*, 23 Vet.App. 267 (2009), and that it failed to properly apply VA regulations in denying an earlier effective date. (Appellant's Brief (App. Br.) at 7-10). He also argues that the Board failed to address an argument explicitly raised in the record. (App. Br. at 5-6). He urges the Court to reverse the Board's decision and hold that October 6, 2003, is the appropriate effective date for Appellant's additional compensation based on marriage to his current wife. (App. Br. at 11). His assertions are without merit and are based on a misreading of the Board's decision and the law and regulations applicable to this case. Here, the Board properly applied 38 U.S.C. § 5110 and 38 C.F.R. § 3.109 when denying an effective date earlier than September 11, 2011.

The Board's determination of the proper effective date is a finding of fact reviewed under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Ellington v. Nicholson*, 22 Vet.App. 141, 146 (2007); *Ross v. Peake*, 21 Vet.App. 528, 531 (2008). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)

(explaining how an appellate court reviews factual findings under the "clearly erroneous" standard) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held, under the "clearly erroneous" standard of review, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Thus, if there is a plausible basis for the Board's findings in the instant case, those findings must stand. In making those findings, as it did here, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990).

Generally, VA awards do not have effective dates prior to the date of receipt of the application for benefits. 38 U.S.C. 5110(a).[1] The statute provides a number of exceptions to the general rule, however, among which is the award for additional

[1] Specifically, that provision states:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

compensation on account of dependents based on the establishment of a disability rating in the percentage evaluation established by law. 38 U.S.C. 5110(f).

Congress has mandated, "Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent, shall be entitled to additional compensation for dependents . . ." 38 U.S.C. § 1115. In relevant part, § 1115 lists spouses as qualifying dependents. *Id*.

Pursuant to § 5110(f), the effective date for this additional compensation shall be payable from the effective date of the underlying disability rating, but only if VA receives proof of dependents within "one year from the date of notification of such rating action." 38 U.S.C. § 5110(f). The language of § 5110(f) does not allow any dispute as to the effective date it fixes so long as proof of such dependency is received within one year of the qualifying rating action. *See Id.* VA regulations provide that VA will accept the written statement of a claimant as proof of marriage, dissolution of marriage, or death of a dependent, for purposes of determining entitlement to benefits, as long as the statement contains the month, year, and place of the event, the full name and relationship of the other person to the claimant, and the dependent's social security number. 38 C.F.R. § 3.204(a)(1).

Here, the qualifying rating action at issue is dated in September 2003. (R. at 1760-67). The September 2003 notification letter for this decision informed Appellant that he was being paid as a single veteran and that he was "eligible for an additional monthly allowance for. . . dependents." (R. at 1755 (1755-58)). Appellant was instructed to complete and return the enclosed VA Form 21-686c

within one year from the date of the letter so that any dependents he wished to claim could be included as dependents from the effective date of his award. (*Id.*). On October 6, 2003, Appellant returned an incomplete VA Form 21-686c. (R. at 1751-53). In its October 2019 decision, the Board correctly noted that, in October 2003, the AOJ then requested the month of Appellant's divorce from his previous wife and the month, city, and state of his spouse's dissolution of marriage from her previous spouses in order to establish dependent status. (R. at 8 (citing to R. at 1748-49)); *See* 38 C.F.R. § 3.204(a)(1). This information was missing from the VA Form 21-686c that Appellant submitted in October 2003, and Appellant does not raise any assertions to the contrary. (R. at 1751-53); (*See* App. Br.). The Board recognized that the October 2003 letter to Appellant notified him that he must provide the requested information within one year of the date of the letter or VA would be unable to pay back to the date of his original claim if his claim was granted. (R. at 8 (citing to R. at 1748-49)).

Based on a review of the record, the Board properly concluded that Appellant did not respond with the requested information within one year of the October 2003 letter. (R. at 8). As such, the Board plausibly found that the October 2003 dependency application was incomplete, and that compensation may not be paid by reason of that application. (*Id.*). Instead, the Board found that Appellant did not submit a complete application for dependency allowance for his wife prior September 11, 2011. (*Id.*). In making this determination, the Board cited to and correctly relied on 38 C.F.R. §3.109, which states in pertinent part that, "[i]f a

claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application" and that, "[i]f evidence is not received within 1 year from the date of such notification . . . compensation . . . may not be paid for reason of that application." 38 C.F.R. § 3.109(a)(1).

1. The Court's Holding in Sharp v. Shinseki Does Not Change the Outcome of This Case

Appellant argues that a request for additional compensation for a dependent does not require a separate claim or application under 38 U.S.C. § 1115 and that the Board's application requirement violates this Court's holding in *Sharp v. Shinseki*, 23 Vet.App. 267 (2009). (App. Br. at 8-9). His reliance on 38 U.S.C. § 1115 and *Sharp* is entirely misplaced. In *Sharp*, the Court held that "entitlement to additional compensation for dependents is premised on any rating decision establishing compensation under [§] 1114 and rating the disability not less than 30%," not just the first rating decision meeting the criteria of § 1115. *Sharp,* 23 Vet.App. at 276. The Court further explained that "there can be multiple rating decisions that establish entitlement to additional dependency compensation." *Id*. Contrary to the arguments advanced by Appellant, the Court in *Sharp* did not discuss 38 C.F.R. § 3.109(a)(2), let alone eliminate the applicability of time limits for "applications," "filing evidence," or "submissions" for compensation under 38 C.F.R. § 3.109(a)(2). Not only does § 3.109 specifically provide that the provisions of this paragraph apply to "the existence of a dependent," but the Court in *Sharp* also reiterated that eligibility for dependent benefits arises each time VA grants a

veteran a disability rating of 30% or higher if proof of dependents is submitted within one year of notice of the rating action. *Id*. at 276 (holding that "entitlement to additional compensation for dependents shall be the same as the date of the rating decision giving rise to such entitlement, irrespective of any previous grants of [dependency] benefits, if proof of dependents is submitted within one year of the rating decision"); *see also* 38 C.F.R. § 3.109(a)(2). As a necessary corollary, the determination of whether proof of dependency is satisfied and whether timely proof is filed, is independent and an application demonstrating poof of dependency is required.

Here, there is only one rating decision in question, dated in September 2003, that established entitlement to a dependent allowance under § 1115. The issue in this case does not relate to multiple qualifying rating actions and instead involves the effective date for dependency where Appellant failed to submit proof of dependents within in a year of a single qualifying rating action and/or the October 16, 2003, letter requesting additional information. The Board's determination that Appellant did not submit a complete application for dependency allowance until September 11, 2011, nearly 8 years from the date of the October 16, 2003, AOJ's request for additional information is supported by the record, and such a finding is harmonious with the Court's holding in *Sharp v. Shinseki*.

2. Application of 38 C.F.R. § 3.401(b) Does Not Result in an Effective Date Earlier than September 11, 2011

Appellant contends that the Board failed to apply 38 C.F.R. § 3.401(b), and that, it if it had done so, it would have resulted an effective date of October 6, 2003, because this is the latest date of the four possibilities identified in this regulation. (App. Br. at 10). Section 3.401(b) provides for an effective date for additional compensation for dependents based on the latest of four possibilities: (1) date of claim; (2) date dependency arises; (3) effective date of the qualifying disability rating provided evidence of dependency is received within a year of notification of such rating action; or (4) date of commencement of the veteran's award. *See* 38 U.S.C. § 5110(f); 38 C.F.R. § 3.401(b) (2019). The "date of claim" for additional compensation for dependents is the date of the veteran's marriage, if evidence of the event is received by the Secretary within a year of the event. *See* 38 U.S.C. § 5110(n); 38 C.F.R. § 3.401(b)(1). Otherwise, the effective date is the date notice is received by VA that there exists a dependent, if evidence is received within one year of VA's request. 38 C.F.R. § 3.401(b)(1).

Options one and three each explicitly qualify that Appellant provide proof of dependency within one year. While the second option (date dependency arose) and fourth (date of commencement of veteran's award) do not explicitly contain the same qualifier, to argue otherwise, as Appellant does, would produce absurd results and impermissibly conflict with § 5110(a) and (f). *See Atencio v. O'Rourke*, 30 Vet.App. 74, 83 (2018) (noting that absurd results are "something courts should

avoid in statutory and regulatory interpretation"); *see also, e.g., United States v. Wilson*, 503 U.S. 329, 334 (1992) (stating that "[A]bsurd results are to be avoided."); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 886 (Fed. Cir. 1998) (applying "the canon that a statutory construction that causes absurd results is to be avoided if at all possible"). That is, § 5110(a) governs the assignment of general effective dates for awards of benefits, and § 5110(f) provides an exception for an award for additional compensation on account of dependents based on the establishment of a disability rating in the percentage evaluation established by law with the caveat that proof of dependents is received within one year from the date of notification of such rating action. 38 U.S.C. § 5110(f). According to Appellant's interpretation of § 3.401(b), he should receive dependency allowance for the submission of proof of dependency well beyond the period prescribed under § 5110(f) and other provisions of § 3.401(b). Yet, these provisions do not allow for a submission period of eight years, or more, to submit proof of dependency. In this case, Appellant did not provide the necessary information requested by the AOJ in October 2003 related to his previous marriages and those of his current spouse to establish proof of his current wife's dependent status until he resubmitted a declaration as to status of dependents and supporting documentation in 2011. (R. at 1093-97, 1508-09, 1748-49); *See* 38 C.F.R. § 3.204(a)(1). Appellant's own statements reflect that he did not provide any additional information to the AOJ related to dependency following its October 16, 2003, letter until 2011. (R. at 207, 299).

To the extent that the application of 38 C.F.R. § 3.401(b) could result in an earlier effective date, those provisions are not applicable. Congress created an unambiguous effective date for awards of this kind, whose applicability to this case is equally unambiguous. If regulatory provisions conflict with the statute, when the meaning of the statutory language is plain, any conflicting interpretation of agency regulations is invalid. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter."). Because Appellant proposes alternate effective dates, each earlier than September 11, 2011, based on a misunderstanding of § 3.401(b), the Court should reject his arguments.

3. *The Court Should Reject Appellant's Additional Argument that the Board Provided an Inadequate Statement of Reasons or Bases*

In addition to the arguments discussed above, Appellant contends that the Board ignored his assertions that he mailed the information requested by the AOJ and submitted returned mail receipts as proof of mailing. (App. Br at 5-6). This argument is misguided for several reasons. First, the Board directly addressed Appellant's assertions that he submitted the requested information in 2003, but it found that the record showed that Appellant did not submit a complete application until September 2011. (R. at 8); *See Schroeder v. West*, 212 F.3d 1265, 1271 (2000), *Solomon v. Brown*, 6 Vet. App. 396, 402 (1994). This finding is also supported by the record.

Second, Appellant's argument misrepresents his previous statements and the evidence of record. Here, the record reflects that, in December 2015, Appellant argued that he provided VA with notice of his marriage to Jessie in May 2003 and that he provided this same information in October 2003 on a VA Form 21-686c and in September 2011, April 2013, January 2014, and February 2014. (R. at 299). In March 2016, Appellant indicated that he notified VA of his marriage to his spouse in March 2003 and that, between 2003 and 2011, he repeatedly requested spouse allocation without a response. (R. at 251). He also stated that VA requested death certificates and/or divorce papers in 2003 and that all requests were sent to VA on four occasions. (R. at 251). Returned receipts for mail dated in May 2003 and two from 2014 were also enclosed. (R. at 236-40). In April 2016 Appellant stated that he sent confirmation of death and/or divorce information related to the former spouses involved on three or more occasions. (R. at 205-09). Appellant further stated that the requested information was sent to VA on May 27, 2003, October 6, 2003, September 13, 2011, April 2, 2013, January 31, 2014, and February 21, 2014, with returned receipts. (R. at 207). By Appellant's own admission, it was not until September 2011 that he submitted information pursuant to the October 6, 2003, letter. In this regard, even though Appellant eventually submitted the information needed to establish dependency, he stated on several occasions that, following the AOJ's October 2003 request, he next supplied information in September 2011. (*See* R. at 207, 299). Moreover, the first returned mail receipt following the October 2003 request was dated in 2014. (*See* R. at 236-40).

Additionally, Appellant fails to cite to any place in the record supporting that argument that he furnished all three pieces of the information requested by the AOJ in October 2003 prior to 2011. Instead, he relies solely on vague inferences drawn from his own previous statements and indistinct returned mail receipts.

Third, Appellant's argument presented in his brief is entirely premised on providing mail to the United States Postal Service and the mailing of requested information rather than demonstrating that VA received a complete application for dependency allowance prior to September 2011. (*See* App. Br. at 5-6). Assuming arguendo that the information mailed by Appellant to VA was the information requested in October 2003, arguments related to the mailing of certain documents does not secure an earlier effective date. Rather, an award of dependency benefits is not contingent on the "mailing" of the required evidence, but rather its "receipt" by VA. *See* 38 C.F.R. § 3.401(b) (providing that an effective date for award of dependency compensation contingent on date evidence "received"). Contrary to his assertions, the evidence he cites to does not and cannot provide "proof of submission of physical evidence to the VA." (App. Br. at 6). Here, Appellant simply fails to demonstrate that the Board clearly erred or failed to support its decision with an adequate statement of reasons or bases.

In the absence of any evidence that the requested information was received by VA prior to September 11, 2011, there is no contested fact to support a contrary finding. Thus, the Board did not clearly err in its October 19, 2018, decision, and Appellant has not demonstrated any error – let alone prejudicial error – or that the

only permissible view of the evidence is contrary to the Board's decision. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). Because Appellant limited his allegations of error to those noted above, he has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007).

CONCLUSION

In light of the foregoing, the Secretary urges the Court to affirm the Board's October 19, 2018, decision.

Respectfully submitted,

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