No. 18-6606

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

JIM A. ADAMS,

Appellant,

versus

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

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Arguments

Summary of Rebuttal Arguments

Mr. Adams' appeal does not seek to undo the finality of any decision. As a result, the Secretary's reliance on the Federal Circuit's decision in *Bingham v. Nicholson*, 421 F.3d 1346 (Fed. Cir. 2005) is misplaced. Nothing in *Bingham* precludes Mr. Adams from obtaining the benefit of reconsideration of his original claim. The Secretary misunderstands the distinction as law between a proceeding under his regulation at 38 C.F.R. § 3.156(a) to reopen a previously denied claim and a proceeding under his regulation at 38 C.F.R. § 3.156(c) to reconsider an original claim when the Secretary receives service department records which had not been associated with the veteran's clams file at the time of VA's decision on the original claim.

I.

The Secretary's reliance upon the Federal Circuit's decision in *Bingham v. Nicholson*, 421 F.3d 1346 (Fed. Cir. 2005) is mistaken.

The conclusion of the Federal Circuit in its *Bingham v. Nicholson*, 421 F.3d 1346 (Fed. Cir. 2005) decision was:

> . . . the 1950 Board's alleged failure to consider the theory of presumptive eligibility did not serve to vitiate the finality of its decision to deny Bingham's 1949 claim for service connection.

Bingham, 421 F.3d 1349. The holding of the Federal Circuit in *Bingham* was that any purported failure of the Department of Veterans Affairs (VA) to consider

presumptive-service-connection theory for hearing loss did not render veteran's claim for service connection for hearing loss unadjudicated. Mr. Adams' appeal does not involve an allegation that his claim was unadjudicated based on a failure in a prior adjudication to consider an alternative theory for the establishment of service connection or seek recognition that such a theory remains pending. To the contrary, and as distinguishable from *Bingham* where he made clear to the Veterans Court that his appeal was not predicated upon an allegation of "clear and unmistakable error," Mr. Adams' appeal is predicated upon an allegation of "clear and unmistakable error" in order to vitiate the finality of VA's 2005 VA rating decision which adjudicated Mr. Adams' claim by applying the wrong provision of law. Namely, the provisions of 38 C.F.R. § 3.156(a), when the correct provisions of law were 38 C.F.R. § 3.156(c).

The Secretary is incorrect when he asserts that based on *Bingham* that:

> . . . any failure to properly apply the provisions of § 3.156(c) would have been made in the June 1993 and June 1994 Regional Office and Board decisions, and those errors would have become final when Appellant failed to appeal the latter.

Sec. Brf., p. 8. There would have been no error made in VA's June 1993 and June 1994 Regional Office and Board decisions because neither of those decisions resulted in an award of service connection and thus were only final as to the jurisdiction issue of reopening. *See Jackson v. Principi*, 265 F.3d 1366 (Fed. Cir 2001)(the Board has jurisdictional responsibility to consider whether it was proper to reopen claim). Since

neither case was reopened, even though it was error to have proceeded under § 3.156(a) and not under § 3.156(c), any such error was both harmless and immaterial due to the lack of an award and the assignment of an effective date. Although an appeal of any of these decisions might have resulted in an order of remand directing the Secretary to apply the applicable provision of law, § 3.156(c), the failure to appeal does not preclude Mr. Adams' right to seek revision of VA's 2005 decision. More importantly, the holding in *Bingham* does not mandate such a result and the Secretary has cited to no authority which does mandate that result.

The Secretary also claims:

> But even assuming that the duty to reconsider a claim based on the receipt of a previously unassociated service department record is not absorbed into, or terminated by, the first final adjudicative decision issued after (and upon acknowledgment of) the receipt of that record, the Board in this case specifically found that both the Regional Office in June 1993 and the Board in June 1994 considered Appellant's claim in light of the Environmental Support Group report. RBA at 12. Indeed, as the Board explained, the June 1994 Board decision specifically concluded after a review of the evidence that service connection for posttraumatic stress disorder was not warranted. RBA at 1329 (1317-29). Appellant fails to show that the Board's conclusions in this regard are clearly erroneous.

Sec. Brf., pp. 8-9. (footnotes omitted). Here the Secretary relies upon a rule of law which does not exist or at least if it does the Secretary failed to direct either Mr. Adams or this Court to such authority. The would be rule of law the Secretary relies upon is

apparently that a failure of VA to apply the requirements of § 3.156(c) in its adjudications after the Secretary's receipt of service department records which had not been associated with the veteran's claim file at the time of an original decision, "is not absorbed into, or terminated by, the first final adjudicative decision issued after (and upon acknowledgment of) the receipt of that record." In other words, the Secretary only imagines that such a rule of law exists because "the Board in this case specifically found that both the Regional Office in June 1993 and the Board in June 1994 considered Appellant's claim in light of the Environmental Support Group report. RBA at 12." The Secretary's claim might have some traction if there existed such a rule of law. Since no such rule of law exists, this Court will be required to proceed with the law as it exists unless this Court adopts such a rule.

The Secretary further asserts:

> While the standard for when a claim must be reconsidered based on a newly received service department record may be different than the standard for when a claim must be reopened based on new and material evidence, neither standard is relevant here because the Board, in its June 1994 decision, conducted a *de novo* review and readjudicated Appellant's claim on merits. RBA at 1317-29.

Sec. Brf., pp. 9-10. The Board's June 1994 *de novo* review does not provide a get out of jail free card to the Secretary when he made his March 2005 decision. When the Secretary made his March 2005 decision, RBA 339-342, he was obligated to make that decision by correctly applying the applicable law. Were the Secretary not required to

apply the applicable law correctly, there would be no reason for the provisions of 38 C.F.R. § 3.105(a) and 38 U.S.C. § 5109A to exist to correct clear and unmistakable errors. The question of law presented by this appeal is whether it was a clear and unmistakable error for the Secretary to have adjudicated that decision using the provisions of § 3.156(a) rather than the correct provisions of § 3.156(c).

The Secretary is wrong when he contends:

> In other words, while Appellant makes a big deal about the potential distinction between the terms "reconsideration" and "reopening," he fails to explain the significance of any such distinction once a claim is reopened, readjudicated and denied.

Sec. Brf., p. 10. Mr. Adams apologizes if he failed to explain the significance of the distinction between the provisions of the Secretary's regulations. First, § 3.156(a) has a statutory predicate in the now former provisions of 38 U.S.C. § 5108 which means that the Secretary was implementing the expressed intent of Congress and filling a gap by defining the terms "new and material" evidence. Whereas, § 3.156(a) has no statutory predicate and it's solely the creation of the Secretary promulgated under his rule making authority under 38 U.S.C. § 501(a). As such, the Secretary's intent controls the purpose and function of this regulation as opposed to the express intend of Congress. The Secretary's intent having been undisclosed until his amendment clarifying the purpose of § 3.156(c).

As set out in Mr. Adams' opening brief:

> As the Secretary explained: "In practice, when VA receives service department records that were unavailable at the time of the prior decision, VA may reconsider the prior decision, **and the effective date assigned will relate back to the date of the original claim, or the date entitlement arose, whichever is later**." 70 Fed.Reg. at 35,389.

Appellant's Opening Brief, p. 12. (emphasis added). This explanation makes clear the significance as well as distinction between § 3.156(a) and § 3.156(c) which is the assignment of the effective date. Under § 3.156(a), the effective date can not by statute, 38 U.S.C. § 5110, be set earlier than the date of the request to reopen. Whereas, the Secretary has published his unambiguous intent in amending § 3.156(c) that upon reconsideration, the effective date assigned will relate back to the date of the original claim, or the date entitlement arose, whichever is later. This is not possible when as here VA's 2005 decision adjudicated Mr. Adams' claim under § 3.156(a).

Thus the following conclusion by the Secretary in his brief is contrary to the correct interpretation of both § 3.156(a) and § 3.156(c):

> In short, because the Board, in June 1994, readjudicated Appellant's claim and denied it on the merits after and in light of the receipt of the Environmental Support Group report, any distinction between "reconsideration" and a "reopening" is irrelevant and any failure to correctly apply the provisions of § 3.156(c) would at most be harmless.

Sec. Brf., p. 10. Contrary to the Secretary's conclusion had the Board in its June 1994 decision with its receipt of supplemental service department records in the form of the Environmental Support Group report because it adjudicated under § 3.156(a) and not

under § 3.156(c), the effective date could have been earlier than the date of the claim to reopen. More importantly, it could not have been an effective date which related back to the date of the original claim, or the date entitlement arose, whichever is later because it was adjudicated under § 3.156(a) and not under § 3.156(c). The Secretary's conclusion relies upon a legal fiction that it is possible and lawful to the both at the same time. Such a legal fiction does not and can not exist because these regulations require two different adjudications, one to reopen and one to reconsider. One if the matter is reopened, the effective date can by law be no earlier than the date of the claim to reopen. The other, if the matter is reconsidered, the effective date can relate back to the date of the original claim, or the date entitlement arose, whichever is later. These regulations are mutually exclusive. The Secretary's creation of § 3.156(c) results in a binary choice of adjudication. The Secretary must chose under which regulation to adjudicate, under § 3.156(a) to reopen or under § 3.156(c) to reconsider. The Secretary can only lawfully adjudicate under § 3.156(c) when he has received relevant supplemental service department records not associated with the veteran's claims file at the time of the original decision.

When, as here, the Secretary unlawfully adjudicated Mr. Adams' claim under § 3.156(a) when he was in receipt of relevant supplemental service department records not associated with the veteran's claims file at the time of the original decision, he has made a clear and unmistakable error. This error is outcome determinative because the error

requires that the Secretary comply with his own regulation, § 3.156(c) to reconsider the original claim.

CONCLUSION

The Board's decision to deny Mr. Adams revision of VA's March 2005 rating decision must be reversed based on the Board's misinterpretation of the function of the provisions of § 3.156(**c**)(2005). This Court must instruct the Board on remand to revise VA's March 2005 rating decision based on the application of the correct interpretation of § 3.156(**c**)(2005) and order the Secretary to determine whether effective date for VA's award of service connected compensation for his disability from post traumatic stress disorder can be related back to the date of the original claim, July 6, 1982, or the date in which entitlement arose, whichever is later and to assign an appropriate rating for his disability from the effective date assigned to June 24, 2003, the current effective date assigned by VA.

Respectfully submitted by:

/s/Kenneth M. Carpenter
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Electronically filed on January 3, 2020

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