United States Court of Appeals for Veterans Claims

Vet.App. No. 19-0304

ROBERT E. SHARPE

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The appellant, Robert E. Sharpe, appeals the October 19, 2018 decision of the Board of Veterans' Appeals (Board) that denied an effective date earlier than September 11, 2011 for additional compensation for a dependent spouse. (R. 4-11). On September 6, 2019, Mr. Sharpe filed an initial brief (App. Br.). The Secretary filed a responsive brief (Sec. Br.) on December 20, 2020. Pursuant to Vet. App. Rule 28(c), Mr. Sharpe. maintains the arguments raised in his initial brief and files this Reply brief. In preparing this Reply Brief, Appellant realized a simple yet critical issue to this disposition of this appeal warrants bringing to the Court's and the Secretary's attention for consideration in hopes of efficiently resolving this appeal and preserving judicial economy.

ARGUMENT

I. THE BOARD FAILED TO MAKE THE REQUISITE FINDINGS REGARDING THE SUFFICIENCY OF THE 21-686c DATED OCTOBER 6, 2003 AS PROOF OF APPELLANT'S DEPENDENT SPOUSE FOR THE PURPOSES OF RECEIVING ADDITIONAL COMPENSATION FOR A DEPENDENT.

The Board is required to base its decisions upon "all evidence and material of record" and to consider "all applicable provisions of law and regulation". 38 U.S.C. §7104(a); 38 C.F.R. §3.303(a). Additionally, the Board is required to provide an adequate written statement of the reasons or bases for its findings and conclusions on all material issues of fact or law presented on the record. 38 U.S.C. §7104(d)(1). A material issue of fact in this case that was omitted from the Board's decision is whether or not Appellant's entries on the VA FORM 21-

686(c) dated October 6, 2003, were sufficient proof of his current marriage for the purposes of receiving additional compensation for his dependent spouse. In the absence of such a determination by the Board in the first instance, effective judicial review in this Court on the underlying material issue is frustrated, thus remand is warranted.

Appellant contends that Board was required to make this material finding of fact because the veteran's benefit regulations provide that "the VA will accept, for the purposes of determining entitlement to benefits under the laws administered by the VA, the statement of the claimant as proof of marriage, dissolution of a marriage provided that the statement contains: the date (month and year) and place of the event; the full name and relationship of the other person to the claimant…In addition, a claimant must provide the social security number of any dependent on whose behalf he is seeking benefits." 38 C.F.R. §3.204. Appellant contends he provided all of this information with respect to his current wife. (R. 1751, *see* BLOCKS 6A, 6B and 6C)

This regulatory guidance has been adopted into the M21-1, Part III, Subpart iii, Chapter 5, Section A(b)(2)(b) which provides that

> "except as noted in 38 C.F.R. §3.204(a)(2, VA will accept the entries a claimant makes on a VA Form 21-686c as sufficient proof of marriage, dissolution of marriage unless there is inconsistencies in a claimant's statement. It is appropriate to request further evidence from a claimant if there is substantial reason to challenge his/her entries on a VA Form 21-686c. A substantial reason is something beyond mere suspicion or doubt." (Appendix 1, pp. 11-12)

Appellant contends by completing and returning the VA Form 21-686(c) dated October 6, 2003 with all of the aforementioned information for his wife, he provided sufficient proof of his marriage. Thus for the purposes of Appellant's entitlement to the additional compensation for his dependent spouse, the crux of his argument has been that he provided proof of his marriage to the VA within one year of the September 27, 2003 notification letter. Therefore, the Board was required to make a factual determination as to whether or not the information provided by Appellant on the VA Form 21-686c dated October 6, 2003 was sufficient proof of his marriage for the purposes of receiving additional compensation for a dependent. Additionally, the Board was also required to make a factual determination as to whether or not Appellant's entries to the VA-Form 21-686 led to substantial reasons to challenge or otherwise call into question the validity of his current marriage. In the absence of these two material findings by the Board in the first instance, vacatur and remand is warranted.

A review of the Board's October 19, 2018 decision reveals that it made no such determination. (R. 6-9) Resolving the aforementioned material facts was necessary to determine whether the request for information regarding the prior marriages of the veteran and his spouse called into question the validity of Appellant's current marriage or were for all intents in purposes more of an administrative request for the file on the part of the VA. Appellant continues his argument that there was no need for the VA to request additional information regarding his divorce from Gloria as such information was previously provided to

the VA on a VA Form 21-686(c) dated November 22, 1989 (R. 1748-1749; 2209) Appellant contends there was no city and state *per* se to provide regarding his wife's divorce from Herman because their marriage ended due to Herman's death as opposed to a divorce. (R. 1748-1749; 1751-1753)

CONCLUSION

For the foregoing reasons, and those raised in Appellant's initial brief, he respectfully requests that this Court issue an order vacating the Board's October 19, 2018 decision that denied entitlement to an effective date earlier than September 11, 2011 for additional compensation for a dependent spouse.

Respectfully submitted,

February 18, 2020
Date

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Section A. General Information on Relationship and Dependency

Overview

In This Section This section contains the following topics:

– Topic	– Topic Name
– 1	– General Policies Surrounding the Issues of Relationship and Dependency
– 2	– Burden of Proof and the Weighing of Evidence
– 3	– Jurisdiction Over Relationship Determinations
– 4	– Handling Notices and Claims From Beneficiaries and Claimants Regarding Their Dependents
– 5	– Requirement for Disclosure of Social Security Numbers (SSNs) to the Department of Veterans Affairs (VA)
– 6	– Medical Records That Reveal the Existence of a Dependent That Is Not on a Veteran's Award

1. General Policies Surrounding the Issues of Relationship and Dependency

Introduction

This topic contains general policies for establishing dependency and the existence of familial relationships, including

- definition of relationship
- definition of dependency
- importance of establishing the relationship of an individual to a Veteran
- circumstances under which VA assumes financial dependency exists
- circumstances under which VA requires proof of financial dependency
- issues to consider when determining whether dependency and/or a familial relationship exists
- undertaking development when processing claims for pension
- undertaking development when processing claims for disability compensation
- handling claims from an individual that VA does not recognize as a Veteran's dependent
- interplay between Federal, State and foreign laws, and
- duty of claimants to report familial relationships and family composition.

Change Date

July 21, 2015

a. Definition: Relationship

The term ***relationship*** refers to an individual's legal status with respect to the Veteran.

Examples:
- Can the individual be recognized as the Veteran's child?
- Have the individual and the Veteran fulfilled the requirements for a legal marriage?

References: For a definition of
- spouse, see 38 CFR 3.50
- child, see 38 CFR 3.57, or
- parent, see 38 CFR 3.59.

b. Definition:

The term ***dependency*** refers to the question of whether or not an individual is

Dependency	financially "dependent" on a Veteran.

c. Importance of Establishing the Relationship of an Individual to a Veteran

Establishing an individual's relationship to a Veteran is critical in determining benefits because

- the Department of Veterans Affairs (VA) may pay additional disability compensation to a Veteran for his/her dependent(s) if the Veteran has a combined disability rating of at least 30 percent
- VA may pay additional Dependency and Indemnity Compensation (DIC) to a surviving spouse for any of his/her children that VA recognizes as children of the Veteran on whose death the DIC award is based
- the existence of dependents and the amount of their income is a factor in determining entitlement in both Veterans pension and survivors pension cases, and
- a claimant's entitlement to survivors benefits, such as DIC and survivors pension, is contingent on his/her relationship to the Veteran on whose death the benefit is based.

References: For more information on

- establishing the existence of a familial relationship between a Veteran and another individual, see 38 CFR 3.50 through 38 CFR 3.60
- the payment of additional
  - disability compensation for dependents, see 38 CFR 3.4(b)(2), and
  - DIC for children of a deceased Veteran, see 38 CFR 3.10(e)(1), and
- establishing an individual as a Veteran's parent, see M21-1, Part III, Subpart iii, 5.I.

d. Circumstances Under Which VA Assumes Financial Dependency Exists

Once VA determines that a marital relationship exists between a Veteran and his/her spouse, VA assumes the spouse is financially dependent on the Veteran. Similarly, once VA establishes that an individual is the child of a Veteran, VA assumes the child is financially dependent on the Veteran. VA does ***not*** require proof of financial dependency under either of these circumstances.

References: For more information on

- determining whether a marital relationship exists, see
  - M21-1, Part III, Subpart iii, 5.B
  - 38 CFR 3.50 (spouse and surviving spouse)
  - 38 CFR 3.52 (marriages deemed valid)
  - 38 CFR 3.53 (continuous cohabitation)
  - 38 CFR 3.54 (marriage dates), and
  - 38 CFR 3.55 (reinstatement of a surviving spouse's eligibility based on

termination of a marital relationship), or

- determining whether an individual is the child of a Veteran, see
  – M21-1, Part III, Subpart iii, 5.F
  – 38 CFR 3.57, and
  – 38 CFR 3.58 (child adopted out of family).

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e. Circumstances Under Which VA Requires Proof of Financial Dependency

VA requires proof of financial dependency in order to pay

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

References: For more information on determining whether

- an individual is the parent of a Veteran, see
  – M21-1, Part III, Subpart iii, 5.I, and
  – 38 CFR 3.59, or
- the parent of a Veteran is financially dependent on the Veteran, see M21-1, Part III, Subpart iii, 5.J.

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f. Issues to Consider When Determining Whether Dependency and/or a Familial Relationship Exists

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

- Attempt to resolve inconsistencies in the information a claimant provides on *VA Form 21-686c*, *Declaration of Status of Dependents,* through telephone contact.
- If development for additional information or evidence is necessary, undertake it at the earliest possible point in time.
- Piecemeal development and unnecessary development
  – impose an unwarranted burden on claimants, and
  – delay claims processing.
- Do not undertake development for information or evidence without first ascertaining whether or not it is already of record.
- As explained in M21-1, Part III, Subpart iii, 5.K.1.b, VA requires beneficiaries to verify their marital status and the status of any dependent for whom VA is paying additional benefits every eight years. Accordingly, information that is already of record regarding a beneficiary's marital status or the status of his/her dependents is considered valid for up to eight years from the date VA received it.

References: Follow the instructions in M21-1, Part III, Subpart iii, 1.B.1.d and e when obtaining information from a claimant or beneficiary over the telephone.

g. Undertaking Development When Processing Claims for Pension

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

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

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

Reference: For more information on considering the income of dependents when determining entitlement to pension, see
- 38 CFR 3.23(d)(4), and
- 38 CFR 3.24.

h. Undertaking Development When Processing Claims for Disability Compensation

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

- an original or reopened claim for disability compensation, or
- a claim for increased disability compensation.

The table below contains additional instructions that might apply when processing the types of claims described in the above bullets.

– **If ...**	– **Then ...**
– a claim for additional compensation for a dependent is received while an end product (EP) 110 or 010 is pending	• add *Dependency* as a tracked item in the applicable claims-processing system, and • do ***not*** establish an EP 130.
– the upfront development described in the opening paragraph of this block was mistakenly overlooked	– follow the instructions in M21-1, Part III, Subpart iii, 5.L.1.e.

Reference: For information about adding a tracked item in
- Modern Awards Processing – Development (MAP-D), see the *MAP-D User's Guide*, or

- the Veterans Benefits Management System (VBMS), see the *VBMS User Guide*.

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i. Handling Claims From an Individual That VA Does Not Recognize as a Veteran's Dependent

If a claimant lacks status as the dependent of a Veteran *for VA purposes*, deny his/her claim without further development.

Example: A deceased Veteran's grandchild claims entitlement to VA survivor's benefits.

Reference: For more information on whom VA may recognize as a Veteran's dependent, see M21-1, Part III, Subpart iii, 5.A.1.a.

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j. Interplay Between Federal, State and Foreign Laws

VA benefit programs are authorized by Federal law (38 U.S.C.) that determines who is and who is not eligible for benefits. Some of the rules concerning VA's recognition of a familial relationship between a Veteran and another individual are unique to VA benefit programs.

Example: The continuous cohabitation requirement of 38 CFR 3.53.

In many instances, VA incorporates State law or the law of foreign countries by reference. When making decisions on the issue of relationship, State law is relevant only to the extent that it is incorporated by reference into the body of Federal law governing VA eligibility determinations.

Example: 38 CFR 3.1(j) refers to local law for determining the basic validity of marriage.

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k. Duty of Claimants to Report Familial Relationships and Family Composition

Family composition is determined objectively under applicable VA regulations. Claimants *must* accurately report familial relationships and family compositions when requested to do so by VA.

Claimants seeking entitlement to disability compensation have the option of claiming or not claiming dependents. However, claimants seeking entitlement to any of VA's income-based benefits *must*

- report *all* dependents and their income, and
- *not* manipulate family composition to maximize benefits.

Example: Failure of a pension claimant to report a spouse with income or substantial assets would be considered manipulation to maximize benefits.

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2. Burden of Proof and the Weighing of Evidence

Introduction

This topic contains information on a claimant's burden of proof and the weighing of evidence, including

- responsibilities of VA and claimants for securing evidence
- accepting entries a claimant makes on *VA Form 21-686c* as proof of an event, and
- evaluating and weighing evidence.

Change Date

June 8, 2015

a. Responsibilities of VA and Claimants for Securing Evidence

VA must make reasonable efforts to assist a claimant in securing evidence, but the claimant *always* has the initial burden of proof. This means that unless the claimant furnishes evidence on each element needed to establish the point at issue, VA must deny his/her claim.

Example: A claimant alleging the existence of a deemed-valid marriage must meet the requirements in 38 CFR 3.52 to establish the marriage as valid for VA purposes. If the claimant fails to provide evidence showing he/she meets those requirements, VA must deny his/her claim. Nevertheless, VA may, because of its duty to assist, provide reasonable assistance to secure the evidence.

References: For more information on

- VA's duty to assist in developing claims, see
  - 38 CFR 3.159
  - M21-1, Part III, Subpart iii, 1.A.1, and
  - M21-1, Part I, 1.D, and
- the requirements for establishing a deemed-valid marriage, see M21-1, Part III, Subpart iii, 5.E.7 through 10.

b. Accepting Entries a Claimant Makes on VA Form 21-686c as Proof of an Event

Except as noted in 38 CFR 3.204(a)(2), VA will accept the entries a claimant or beneficiary makes on *VA Form 21-686c* as sufficient proof of

- marriage
- dissolution of a marriage
- birth of a child
- introduction of a stepchild into a Veteran's family, or
- death of a dependent.

Notes:

- Unless there are inconsistencies in a claimant's statement, the policy described in the above paragraph allows ROs to establish the existence of a familial relationship between a Veteran and another individual *without* reviewing the claims folder.
- It is appropriate to request further evidence from a claimant *if* there is substantial reason to challenge his/her entries on *VA Form 21-686c*. (A substantial reason is something beyond mere suspicion or doubt.)

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c. Evaluating and Weighing Evidence

– Once all procurable evidence is of record, Veterans Service Representatives (VSRs) *must*

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- evaluate the competency, credibility, and persuasiveness of the evidence, and
- determine if the competent and credible evidence in favor of the claimant's position is of equal or greater weight than the evidence to the contrary.

Use the table below to determine whether or not a point is established.

– **If scales weighing the evidence …**	– **Then …**
– tip in favor of the claimant	– the point is established.
– tip against the claimant	– the point is ***not*** established.
– are approximately balanced	– resolve reasonable doubt in favor of the claimant. – – ***Reference***: For more information about resolving reasonable doubt in a claimant's favor, see • 38 CFR 3.102, and • M21-1, Part III, Subpart v, 1.A.2.f.
