

**In the**  
**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**  
**APPELLANT'S REPLY BRIEF**

**No. 19-41**

**PHILLIP L. POOLE**

**Appellant**

**v.**

**ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS**

**Appellee**

**February 14, 2020**

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## **Appellant's Reply Arguments**

Mr. Poole stands by all arguments in his opening brief. This brief contains three replies to the Secretary's arguments.

### **I. Notice of relevant information.**

Since Mr. Poole filed his brief, the RO issued a decision on October 1, 2019, awarding an earlier effective date of August 15, 2007, for Mr. Poole's service connection psychiatric disorder. Mr. Poole has appealed this effective date, and this issue is currently before a higher level reviewer. However, as explained below, this claim and appeal are only relevant to the instant case because it reduces the total amount of benefits sought in Mr. Poole's 2007 request for reconsideration of the 1992 claim.

### **II. The primary issue in this appeal is the definition of "benefit" as used in 38 C.F.R. § 3.1(p).**

Although discussed in his opening brief, it deserves reiterating here the procedural history and sequence of events in Mr. Poole's appeal.

**1992 claim.** First, in 1992 Mr. Poole sought benefits for a psychiatric disability. The RO denied this claim, in part because the VA could not locate any service records. R. at 2576-2578.

**2007 request for reconsideration.** In 2007 Mr. Poole filed a claim requesting a "determination of entitlement to" benefits for a psychiatric disability. R. at 2385. Under operation of law, this claim became a request for reconsideration of the 1992 claim upon the receipt of new and relevant service records. See 38 C.F.R. § 3.156(c). In

fact, the Board acknowledged this fact in its prior 2014 denial. R. at 1214 (1213-1231). This Court vacated the Board's denial of this request for reconsideration and this is the claim at issue in the instant appeal.

**2016 claim to reopen and appeal of the assigned effective date.** In 2016 Mr. Poole requested the VA reopen his prior denial for a psychiatric disability. R. at 662. This claim was granted by the RO; and Mr. Poole timely appealed the assigned effective date. The appeal of the 2016 claim is currently pending before a higher level reviewer as a separate matter.

The VA defines a claim as a "communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (2007). The VA further tells us exactly what a benefit is. Pertinent to this appeal, a benefit is "any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3(e).

In this case there were two, separate claims dealing with establishing service connection for an acquired psychiatric disorder. In 2016 Mr. Poole asked the VA to reopen his previously denied claim. R. at 662 (requesting to reopen the previously denied claim). The second claim was the 2007 request to reconsider the previously denied 1992 claim for the same disorder. R. at 5 (4-9) & R. at 1214.

The 2016 claim sought to reopen under 38 C.F.R. § 3.156(a). A claim awarded under § 3.156(a) is paid from no earlier than the date of that claim. 38 U.S.C. § 5110(a).

Thus, the benefit sought by, and awarded to, Mr. Poole based on his 2016 request to reopen was entitlement to a monthly compensation payment. This award resulted in an entitlement to future compensation payments and a payment of retroactive benefits.

A "compensation" benefit is "a monthly payment ... to a veteran because of service-connected disability ...." 38 U.S.C. § 101(13). The retroactive benefit is calculated by "the sum of each month's unpaid compensation—as determined by the claimant's disability rating—beginning on the effective date and continuing through the date of the award." See *Snyder v. Nicholson*, 489 F.3d 1213, 1218 (Fed. Cir. 2007). Thus, when Mr. Poole sought to reopen his claim in 2016, his benefit was capped (i.e. limited to) the sum of monthly compensation from the date of his request to reopen to the date of the award. The submission of the VA Form 526b, asking the VA to reopen his previously denied claim, "evidenced a belief in entitlement" to compensation benefits from 2016 until the date of award. See § 3.1(p). This 2016 claim never reached the Board. The RO granted the benefit and paid Mr. Poole. R. at 178-181.

On the other hand, the 2007 claim "request[ed] a determination of entitlement" to compensation benefits based on the reconsideration of the 1992 claim under § 3.156(c). A claim awarded under § 3.156(c) is paid from no earlier than the date of the original claim. See § 3.156(c)(3). Thus, the benefit sought by Mr. Poole based on his request to reconsider the 1992 claim is entitlement to monthly compensation payments

resulting in a payment of retroactive benefits from as early as 1992 until his current effective date of August 15, 2007<sup>1</sup>.

Consequently, the instant appeal concerns money owed from 1992 to 2007; while the 2016 claim concerned money owed from 2007 until the date of that award. These two claims ask for two entirely different benefits; thus the Board erred in dismissing the appeal. Furthermore, as explained in his opening brief, the RO does not have jurisdiction to adjudicate the reconsideration of the 1992 claim because that issue rests with the Board. Brief for the Appellant, 3-5. The Board did not remand or refer to the RO the issue of reconsideration.

Rather, the Board remanded "[t]he issue of an effective date prior to December 7, 2015, for the grant of service connection for PTSD with MDD and episodic psychosis." R. at 7. This issue was never before the Board; and Mr. Poole never asked the Board to consider this issue.

**III. Mr. Poole never asked the Board to award an earlier effective date. Mr. Poole only asked the Board to reconsider the 1992 claim.**

The Secretary argues this Court does not have jurisdiction because "the Board did not adjudicate the downstream issue of entitlement to an earlier effective date." Brief for the Appellee, at 7. This is correct. R. at 7. The Secretary also asserts "there is no dispute that Appellant is seeking an earlier effective date ... for his service connected acquired psychiatric disorder. Brief for the Appellee, at 7. This is also

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<sup>1</sup> As explained above, the RO recently awarded an August 2007 effective date for Mr. Poole's disability.

technically correct, but lacks context. Mr. Poole is seeking an earlier effective date.

This is the entire purpose of his appeal of the 2016 claim to reopen. R. at 86-87.

However, as explained above the issue before the Board in October 2018 had nothing to do with an earlier effective date based on the 2016 claim to reopen. Rather, the Board's jurisdiction was over the 2007 request to reconsider the 1992 claim. The Secretary fails to appreciate the difference between an appeal of the assigned effective date and the application of effective date rules under § 3.156(c)(3)-(4) upon an award made pursuant to reconsideration under §3.156(c)(1).

In *Emerson* this Court explained this difference. See *Emerson v. McDonald*, 28 Vet.App. 200 (2016). Citing the Federal Circuit's ruling in *Blubaugh v. McDonald*, 773 F.3d 1310 (Fed. Cir. 2014) this Court explained

Paragraph (c)(1) 'requires the VA to reconsider only the merits of a veteran's claim whenever it associates a relevant service department record with his [or her] claims file. *Blubaugh*, 773 F.3d at 1314. 'Only if the VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1) must it consider an earlier effective date under [paragraphs] (c)(3) and (c)(4).' *Id.* In other words, (c)(3)'s discussion of the proper effective date for '[a]n award' refers to an award resulting from (c)(1)'s reconsideration of the claim's merits.

Although Mr. Emerson's ultimate goal may be to obtain an earlier effective date pursuant to (c)(3), we address in the present appeal mainly whether, in the circumstances of this case, he was entitled to reconsideration pursuant to (c)(1).

*Emerson*, at 207. The Court ultimately ruled "based on the plain language of § 3.156(c)(1), VA was required to reconsider the veteran's claim for service connection for PTSD." *Id.*, at 208.



The Court emphasized "the question of an earlier effective date under (c)(3) arises only if VA determines that an award is warranted based all or in part on the newly associated official service department records." *Id.*, at 210.

Thus, the Secretary's assertion in this case that the issue of an earlier effective date and reconsideration of the 1992 claim are the same is directly contrary to the plain language of the regulation and this Court's precedent.

### **Conclusion**

For the reasons set forth above, and in his opening brief, Mr. Poole respectfully requests that this Court provide relief by reversing the Board's October 2018 decision to dismiss Mr. Poole's appeal, and remand the matter with instructions to the Board to provide an adjudication of his request to reconsider the 1992 claim.

Respectfully submitted,

/s/ Kenneth H. Dojaquez, Esq.

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