

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-0304

ROBERT E. SHARPE, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

MEREDITH, *Judge*: The appellant, Robert E. Sharpe, through counsel appeals an October 19, 2018, Board of Veterans' Appeals (Board) decision denying an earlier effective date for the award of additional compensation for his dependent spouse. Record (R.) at 5-11. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

**I. BACKGROUND**

The appellant served on active duty from August 1944 to August 1946 and from August 1950 to August 1955. *See* R. at 6. In October 1955, he informed VA that he had married his then-current spouse in December 1954. R. at 2758. In September 2003, a VA regional office (RO) increased to 50% his disability rating for service-connected post-traumatic stress disorder (PTSD) effective February 11, 2003; increasing his combined disability rating from 20% to 60% as of that date. R. at 1760-67. The accompanying notification letter informed the appellant that veterans with a combined disability rating greater than 30% are eligible for an additional monthly allowance for their dependents and instructed him to complete and return an enclosed VA Form 21-686c

Declaration of Status of Dependents (dependency form) within 1 year if he wished to claim any dependents. R. at 1755-58. The appellant returned the form on October 6, 2003, indicating that he was divorced from his previous wife; he had married his current wife on March 1, 2003, in Raleigh, North Carolina; and his current wife had two previous marriages. R. at 1751-53. On October 16, 2003, the RO informed the appellant that he needed to provide the following information: the month of divorce from his previous wife; the month of his current wife's divorce from her first husband; and the city and state of his current wife's divorce from her second husband. R. at 1748-49.

The appellant submitted another dependency form on September 11, 2011. R. at 1508-09. In October 2012, he provided a certificate of marriage for his current marriage, death certificates for his previous wife and his current wife's second husband, and a divorce decree regarding his current wife's marriage to her first husband. R. at 1093-97. The following month, he asserted that he should have been receiving benefits for his spouse since August 2011. R. at 1087-89. In April 2013, the RO awarded additional compensation for his spouse effective September 11, 2011. R. at 1050-52.

The appellant subsequently asserted that the additional compensation for spousal dependency should have been retroactive to the date of his marriage in March 2003. R. at 985, 991-92. In January 2014, the RO notified him that it had requested additional information from him on October 16, 2003, and, because it did not receive the information within a year of the request, it denied his claim. R. at 837-39. The appellant filed a Notice of Disagreement that same month, indicating that he had responded to the RO's October 2003 request within the 1-year period. R. at 789-90. In a December 2014 Statement of the Case (SOC), the RO determined that, "[b]ased on [the appellant's] most recent rating decision of 100% combined evaluation we have established [his] spouse [] as a dependent effective March 1, 2011." R. at 456; *see* R. at 432-56. He perfected an appeal to the Board in December 2015, asserting that he mailed all the necessary or requested information to VA on March 3, 2003; May 27, 2003; October 6, 2003; September 13, 2011; April 2, 2013; January 31, 2014; and February 14, 2014. R. at 299-300; *see* R. at 299-302.<sup>1</sup> During the course of his appeal, the appellant continued to contend that he provided all the necessary or

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<sup>1</sup> The RO determined in a March 2016 SOC that the Substantive Appeal was untimely. R. at 217-35. In February 2018, the Board found the Substantive Appeal timely and remanded the effective date matter. R. at 52-59.

requested information to VA to obtain an effective date back to his date of marriage. R. at 205, 206-09, 236-53.

On October 19, 2018, the Board denied entitlement to an earlier effective date for additional benefits for the appellant's dependent spouse. R. at 5-11. In relevant part, the Board found that the appellant's October 6, 2003, dependency form was incomplete and that he failed to respond to VA's request for additional information within 1 year of that request. R. at 8. Citing 38 C.F.R. § 3.109, the Board determined that benefits could not be awarded based on the October 6, 2003, application. *Id.* The Board also found that the appellant did not submit a complete application for spousal dependent benefits until after September 2011. *Id.* This appeal followed.

## II. ANALYSIS

The appellant argues that the Board failed to address his assertions that he provided the requested information regarding his current marriage to VA via U.S. postal mail and that he had proof of those mailings. Appellant's Brief (Br.) at 5-6. He further argues that the Board failed to discuss 38 C.F.R. § 3.401(b) and that, pursuant to that regulation, he is entitled to an effective date of October 6, 2003, for the additional benefits for his spouse. Appellant's Br. at 7-10. Accordingly, he contends that reversal is warranted and that the Court should hold that October 6, 2003, is the appropriate effective date. Appellant's Br. at 11. The Secretary generally disputes these arguments and requests affirmance of the Board decision. Secretary's Br. at 9-18. In response, the appellant additionally argues that the Board failed to make a necessary factual finding whether the October 6, 2003, dependency form contained sufficient evidence of his current marriage. Reply Br. at 1-3.

Any veteran who has a service-connected disability rated at least 30% disabling is entitled to additional compensation for dependents. 38 U.S.C. § 1115. If the award of additional compensation is based on establishment of a qualifying disability rating, the effective date for this additional compensation shall be payable from the effective date of the underlying disability rating, if VA receives "proof of dependents" within "one year from the date of notification of such rating action." 38 U.S.C. § 5110(f). If the additional compensation is based on occurrence of a marriage, the effective date for the additional compensation is "the date of such event if proof . . . is received . . . within one year from the date of the marriage." 38 U.S.C. § 5110(n). Additionally, VA regulations provide that the effective date for additional compensation for a veteran's dependents will be the latest of the: (1) date of claim; (2) date the dependency arises; (3) effective date of the

qualifying disability rating provided evidence of dependency is received within 1 year of notification of such rating action; or (4) date of commencement of the veteran's award. 38 C.F.R. § 3.401(b) (2019). For purposes of § 3.401(b), the "date of claim" for additional compensation for a dependent spouse is the date of the veteran's marriage, if evidence of the marriage is received by the Secretary within a year of the event, 38 C.F.R. § 3.401(b)(1)(i), otherwise, the effective date is the date notice is received by VA that there exists a dependent, if evidence is received within 1 year of VA's request, 38 C.F.R. § 3.401(b)(1)(ii). VA regulations further provide that, if a veteran submits an incomplete application for increased benefits based on "the existence of a dependent," VA will notify the veteran of the evidence necessary to complete it, but if the veteran does not submit the completed application within 1 year of such notification, he or she will not be entitled to an effective date of the original application for any subsequent payment of VA benefits. 38 C.F.R. § 3.109(a) (2019).

A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *Evans v. West*, 12 Vet.App. 396, 401 (1999). A finding of fact is clearly erroneous when the Court, after reviewing 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); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board acknowledged that VA received a VA Form 686c in October 2003 indicating that the appellant had married his current wife in March 2003, but that VA requested additional information from the appellant—specifically, the month of the appellant's divorce from his previous wife, and the month, city, and state of his current wife's divorces from her previous husbands—and instructed him to provide that information within 1 year. R. at 7-8. The Board then found that the appellant did not respond to that request within 1 year and concluded that the October 6, 2003, application for benefits was incomplete and therefore compensation could not be paid based on that application. R. at 8. The Board also acknowledged the appellant's contention that he had submitted all of the necessary evidence in 2003 but determined that a complete application was not submitted until after September 2011. *Id.*

The crux of the appellant's argument is that, because he submitted evidence of his marriage to his current wife on October 6, 2003, pursuant to § 3.401(b), he is entitled to an effective date back to the date of that submission and that the Board thus erred in instead denying an earlier effective date pursuant to § 3.109, which pertains to incomplete applications. Appellant's Br. at 7-10. The Court is not persuaded by his arguments. First, he does not acknowledge that § 3.109 expressly references requests for additional benefits for dependents nor provide any relevant legal or factual support for asserting that the regulation should not apply in this case. 38 C.F.R. § 3.109(a)(2) ("The provisions of this paragraph are applicable . . . to applications for increased benefits by reason of . . . the existence of a dependent."); see *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (Court unable to find error when arguments are undeveloped). Although he relies on *Sharp v. Shinseki*, 23 Vet.App. 267 (2009), for the proposition that a request for additional compensation for dependents is not a freestanding claim, and therefore the Board erred in applying § 3.109, that opinion is not applicable in this context.

In *Sharp*, the Court held 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 1 year of notice of the rating action. *Sharp*, 23 Vet.App. at 276. The Court did not discuss the applicability of § 3.109 or the requirement that a claimant submit a complete application for benefits within a certain time limit. And, the appellant here presents no further analysis or support for his contention that § 3.109 was inapplicable. Further, in the present case, the Board expressly found that the October 6, 2003, application was incomplete and therefore insufficient to establish entitlement to dependent spouse benefits. R. at 8. The appellant does not challenge the Board's finding that his application was incomplete or that he thereafter failed to satisfy § 3.109 by submitting the requested evidence within 1 year. Thus, in light of the above, he has not carried his burden of demonstrating error in the Board's decision. See *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (On appeal to this Court, the appellant "always bears the burden of persuasion."); see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Further, even assuming that the Board erred in relying on § 3.109, the appellant has not shown how any such error was prejudicial. 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) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that

the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). As noted above, he essentially contends that he did not need to submit a claim for a dependent allowance because it was part of the claim that resulted in a higher disability rating in 2003. Appellant's Br. at 8-9. However, he does not explain in his initial brief why the information provided to VA in October 2003 was sufficient to establish proof of his current marriage or explain why the information VA requested later that month regarding the dissolution of prior marriages would not be necessary to satisfy either section 5110(f) or § 3.401(b) under those circumstances. *See* 38 U.S.C. § 5110(f) ("An award of additional compensation on account of dependents based on the establishment of a disability rating in the percentage evaluation specified by law for the purpose shall be payable from the effective date of such rating; but only if proof of dependents is received within one year from the date of notification of such rating action."); 38 C.F.R. § 3.401(b). Similarly, he does not acknowledge in his opening brief either 38 U.S.C. § 5124 or 38 C.F.R. § 3.204, which prescribe the proof necessary to establish a marriage or dissolution of marriage, or explain how he may have satisfied those provisions. *See* 38 U.S.C. § 5124 (the Secretary may accept the written statement of a claimant as proof of the existence of a marriage and dissolution of marriage); 38 C.F.R. § 3.204 (the statement of a claimant as proof of dissolution of marriage will be accepted, provided that the statement contains "the date (month and year) and place of the event").<sup>2</sup>

The appellant also argues that the Board erred because it failed to address his assertions that he mailed information regarding his current marriage to VA in 2003, 2011, 2013, and 2014. Appellant's Br. at 5-6 (citing R. at 1751). However, as discussed above, the appellant does not challenge the Board's express finding that the October 6, 2003, form was an incomplete application for benefits, nor does he provide any legal support for his contention that the application contained all information necessary to show evidence of dependency. *See* R. at 7-8. The Board also determined that a complete application was not submitted until after September 2011. *Id.* at 8. Although he states that he provided mail return receipts as proof that he submitted evidence to VA,

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<sup>2</sup> The Court declines to address the new arguments raised for the first time in the appellant's reply brief. *See Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief), *aff'd sub nom. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."); *see also Untalan v. Nicholson*, 20 Vet.App. 467, 471 (2006); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990).

Appellant's Br. at 5-6, "[a]n award of dependency benefits is not contingent on the 'mailing' of the required evidence, but rather its 'receipt' by VA." *McColley v. West*, 13 Vet.App. 553, 556 (2000) (citing § 3.401(b)). In any event, he does not explain how information regarding his current marriage—submitted in October 2003 and then not again until September 2011—undermines the Board's finding that VA did not receive a complete application for additional benefits for a dependent spouse *prior* to September 11, 2011. *See* R. at 8. His argument is therefore inadequate to demonstrate error in the Board's decision. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

### III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 19, 2018, decision is AFFIRMED.

DATED: April 27, 2020

Copies to:

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