UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT SHARPE Appellant, v. ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)))))))))	Vet.App. No. 19-0304

APPELLANT'S MOTION FOR RECONSIDERATION AND, IN THE ALTERNATIVE, FOR A PANEL DECISION

Pursuant to U.S. Vet.App. Rules 35(a) and 35(b), Appellant, Robert E. Sharpe, respectfully moves this Court for reconsideration of the April 27, 2020 Memorandum Decision ("Decision"), and in the alternative, for a panel decision. That Decision affirmed the Board of Veterans' Appeals ("Board") October 19, 2018 decision denying an earlier effective date for additional compensation for a dependent spouse. For the reasons set forth below, Appellant asks that the single judge reconsider the April 27, 2020 Decision and remand the Board's decision. In the alternative that this motion for reconsideration is denied, Appellant respectfully moves for a decision by a panel of this Court.

ARGUMENT

Pursuant to Rule 35(e)(1), Appellant addresses the points of law or fact that he believes the Court may have overlooked or failed to resolve in its Decision.

I. THE COURT FAILED TO RESOLVE APPELLANT'S ARGUMENT THAT DETERMINATION OF THE EFFECTIVE DATE FOR ADDITIONAL COMPENSATION FOR A DEPENDENT SPOUSE REQUIRES ANALYSIS OF 38 C.F.R §3.401(b) AND THE FACTS OF RECORD.

In his initial brief, Appellant raised the argument that determining the effective date of compensation for a dependent spouse requires analysis of 38 C.F.R. §3.401(b) because the entitlement to such is not a "claim" within the meaning of veteran's benefits law. (App. Br. 6-9) Appellant cited to *Sharpe v. Shinseki,* 23 Vet.App. 267, 272 (2009) for the proposition that "entitlement to section 38 U.S.C. §1115 compensation does not require a separate claim…" therefore "the Board erred in [analyzing] Appellant's Declaration of Status of Dependents as it would an application [or claim] for disability compensation". (App. Br. 8-9)

The Memorandum Decision correctly states that "[t]he crux of 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[1], which pertains to

[1] It is worth noting that the Board cited to 38 C.F.R. § 3.109 concerning time limits for submitting evidence. (R. 8). Section 3.109 cites to 38 U.S.C. § 5103(a) as authority for the one-year time limit. Pursuant to the provisions of 38 U.S.C. § 5103, the VA is required to issue a decision. "Nothing in paragraph (1) shall be construed to prohibit the Secretary from ***making a decision*** on a claim before the expiration of the period referred to in that subsection." 38 U.S.C. § 5103(b)(3); (bold-italics emphasis added). Since there was no denial of additional compensation based on the Veteran's 2003 VA Form 21-686c concerning his wife J.S., then the claim remained pending and implicated the Court's holding in

incomplete applications. (Mem. Decision at 5) However, Appellant respectfully asserts that the decision failed to resolve this issue as it contains no discussion or analysis on the implications or sufficiency of the reasons or bases of the Board's decision, notwithstanding its failure to discuss an applicable regulatory provisions, namely §3.401(b).

Appellant further contended that the Secretary's promulgation of §3.401(b) governed determining the effective date when evidence of dependency is received both within one year and after one year of the date of notice of the qualifying rating decision. (App. Br. 9-10) Appellant maintains that sufficient proof of his marriage was provided to the VA within one year of the qualifying rating decision but "even if we assume *arguendo,* that Appellant did not provide proof of dependency within one year of the notification from the VA, 38 C.F.R. §3.401(b)(2) and (b)(4) are instructive on how the effective date should be calculated". Yet the Court did not address this argument in the Memorandum Decision. (App. Br. 10)

McGrath.

> [I]n an original claim for benefits, the date the evidence is submitted or received is irrelevant when considering the effective date of an award. As noted above, the effective date of an award "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). Thus, when an original claim for benefits is pending . . . the date on which the evidence is submitted is irrelevant even if it was submitted over twenty years after the time period in question.

McGrath v. Gober, 14 Vet.App. 28, 35 (2000).

The Court posits that "even assuming the Board erred in relying on §3.109, the appellant has not shown how any such error was prejudicial." (Mem. Decision at 5) However, Appellant's initial brief "argue[d] that because the Board's effective date assessment did not fully discuss the applicable laws and regulations, there is no plausible basis for its factual findings, which were predicated on less than the full application of 38 C.F.R. §3.401(b) thereby prejudicing his claim for an earlier effective date for additional compensation for his dependent spouse. (App. Br. 5) Stated differently, the Board's decision lacks an adequate statement of reasons or bases. "The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. 38 U.S.C. §7104(d). "Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determination or where the record is otherwise inadequate, a remand is the appropriate remedy." *Tucker v. West,* 11 Vet.App. 369, 374 (1998)

II. THE COURT OVERLOOKED APPELLANT'S ARGUMENTS AS TO WHY HIS RESPONSES ON THE VA FORM 686(c) IN OCTOBER 2003 WAS SUFFICIENT PROOF OF DEPENDENCY.

The Memorandum Decision further states that the Appellant "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)". (Mem. Decision at 6) This statement evidences that the Court appears to have overlooked Appellant's arguments on the topic.

In Appellant's initial brief, he detailed that he received a VA notification letter advising him that he was eligible for additional monthly allowance for dependents because his combined disability rating was greater than thirty-percent (30%). (App. Br. 1, R. 1755) "The letter further advised that if Appellant wished to receive additional compensation [for his dependents] he needed to complete and return the enclosed VA FORM 21-686c and if returned within one year from the date of this letter his dependents would be included from the effective date of this award." *Id.* "On the form, Appellant annotated in BLOCK 6A [and 6B] that he married Jessie Parker Taylor on March 1, 2003 in Raleigh, North Carolina." (App. Br. 1-2; R. 1751,1753) "It is undisputed that Appellant provided proof of his marriage within one year of the date requested because as discussed above, Appellant provided the month, day, year, city and state in BLOCK [6A and] 6B of his October 6, 2003 VA Form 21-686c." (App. Br. 10) Appellant's contention is simply that his entries on the VA Form 21-686c were sufficient evidence of his dependent and no additional evidence of the marriage was required because the VA only required him to complete and return

the form.

Appellant further expounded on this contention in his reply brief as he averred that "[a] material issue of fact in this case was omitted from the Board's decision [as to] whether or not Appellant's entries on the October 6, 2003 VA Form 21-686c were sufficient proof of his current marriage for the purposes of receiving additional compensation for his dependent spouse. (App. R. Br. 1-2) "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 [(i.e. an earlier effective date)] is frustrated." *Id.*

As argued in Appellant's reply brief, the "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(a)(1)" (App. R. Br. 2) "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 are inconsistencies in a claimant's statement…'" *Id. See also* App. R. Br. Appendix 1 at 11-12 Thus, all that was required as proof of dependency was for Appellant to complete the necessary sections on the VA Form 21-686c as Appellant contends is evidenced in BLOCKS 6A, 6B and 6C. (App. R. Br. 2; R. 1751) No further information or documentary proof was required.

Furthermore, Appellant contends the Court overlooked his explanation as to "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)". In his initial brief, Appellant pointed out that he had previously provided a VA Form 21-686c to the VA on November 22, 1989 indicating that he divorced Gloria on July 21, 1971. (App. Br. 2; App. R. Br. 3; R. 2209) Thus, the VA already had this information within Appellant's claim file making the October 16, 2003 request for the same unnecessarily redundant.

The October 2003 request for additional information contained what appears to be two typographical errors making the remainder of the request unintelligible. Specifically, the letter requested "[t]he most (sic) of Jessie's divorce from Leo" and "[t]he city and state of Jessie's divorce from Herman" (App. Br. 2; R. 1748-1749) While it is unclear what was being requested (i.e. "the most")

regarding Jessie's divorce from Leo there was no city and state *per se* to provide regarding Jessie's divorce from Herman because their marriage ended due to Herman's death as opposed to divorce based upon Appellant's annotations in BLOCKS 7A, 7B and 7D of the 21-686c (App. Br. 2; App. R. Br. 4; R. 1748-1749; 1751-1753)

Additionally, as Appellant further asserted in his reply brief, "[i]t 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." In this case, Appellant's entries on the VA Form 21-686c did not give rise to any substantial reason to seek additional information nor should the mere request for additional information be seen as rendering his proof of dependency in complete. As Appellant has stated "[t]he additional information requested from VA pertained to the *prior* marriages of Appellant and current spouse". (App. Br. 10) Thus with respect to the data provided regarding his current marriage it was complete and timely provided to the VA within one year of the notification letter.

III. IN THE ALTERNATIVE THAT THE COURT DENIES THE MOTION FOR RECONSIDERATION, A PANEL DECISION IS WARRANTED IN THIS CASE.

IV.

Pursuant to U.S. Vet. App. Rule 35(e)(2), Appellant asserts that resolution of this case would modify or clarify an existing rule of law; apply established law

to a novel fact situation; involve a legal issue of continuing public interest; and resolve a case in which the outcome is reasonably debatable. Specifically, the proper resolution of this case would clarify the conflict between §3.109 and §3.401(b) as well as the interplay between § 3.204(a)(1) and § 3.401(b) by applying these regulations to a novel fact situation, namely the applicability, or lack thereof of §3.109 to determining the effective date for additional compensation for dependents when a VA Form 21-686c is received within one year of notice of a qualifying rating decision but additional information is subsequently requested after the return of the VA Form 21-686c. Additionally, resolution of this case would further resolve determining when data recorded on a VA Form 21-686c is sufficiently complete for adjudication notwithstanding VA requests for additional information.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellant's initial and reply briefs, the Court should reconsider its Decision of April 27, 2020, and reverse and remand the Board's decision denying Appellant an earlier effective date for his additional compensation for dependents. Alternatively, for the same reasons, a panel of this Court should be convened and vacate the Decision and issue a decision reversing and remanding the Board's decision.

May 18, 2020

Respectfully submitted,

FOR THE APPELLANT

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