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

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| **CLEAMON D. BRYANT**, | ) | |
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| Appellant, | ) | |
| | ) | |
| v. | ) | Vet.App. No. 18-0092 |
| | ) | |
| **ROBERT L. WILKIE**, | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Appellee. | ) | |

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**SECRETARY'S SUPPLEMENTAL MEMORANDUM OF LAW**

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## I. QUESTIONS PRESENTED

1. What must the appellant show to succeed in a facial challenge to the validity of § 20.1304(a)?

2. Are there any sets of circumstances under which the regulation would be valid? If so, describe those circumstances.

3. What period should the Court consider when evaluating whether a claimant is afforded an opportunity to be heard "'at a meaningful time and in a meaningful manner'" and, what, if any, significance does the transfer of a claim from a RO to a decision-maker at the Board have on the answer to that question?

4. In this case, has the appellant met his burden of demonstrating that he did not have an opportunity to be heard in a meaningful time and in a meaningful manner?

5. What is the purpose of § 20.1304(a), and what authority supports your position?

## II. SUMMARY OF THE RESPONSE

The Secretary asserts that, to establish a facial challenge to the validity of 38 C.F.R. § 20.1304, Appellant would have to show that he is guaranteed under the Constitution or a statute a right to submit evidence to the Board of Veterans' Appeals (Board) within a certain timeframe. Since he cannot do that, he cannot succeed in his challenge. Nor can he demonstrate that the entirety of VA's legacy appeals system did not provide him with adequate notice and opportunity to be heard such that § 20.1304 violates his constitutional due process rights. Because Appellant cannot succeed in a facial challenge to the validity of 38 C.F.R. § 20.1304, this section is valid under all circumstances. Further, the Court must look at the entire process VA provided Appellant during his appeal. Because Appellant was guaranteed multiple opportunities to submit evidence and argument during the pendency of the claim, Appellant cannot demonstrate that the factors listed by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), weigh in his favor. Finally, the purpose of § 20.1304 was to create a "cutoff date" for the submission of additional evidence, to allow for orderly and prompt processing of appeals.

## III. RESPONSE

1. **To establish a facial challenge to the validity of 38 C.F.R. § 20.1304, Appellant would have to demonstrate that he is guaranteed under the Constitution or a statute a right to submit evidence to the Board within a certain timeframe. Since he cannot do that, he cannot succeed in his challenge.**

Appellant must demonstrate that the Constitution or a statute requires a guaranteed period of time for claimants to submit evidence to the Board following certification and transfer of the appeal to the Board before a Board decision is

promulgated to successfully challenge to the validity of 38 C.F.R. § 20.1304. But Appellant cannot demonstrate this because neither the Constitution nor any statute requires such. To then succeed in facially challenging § 20.1304, Appellant would have to demonstrate that he was provided insufficient notice and opportunity to be heard throughout the entirety of his appeal, as explained below. Yet, given that VA's legacy appeal system process provides claimants with multiple notices, including notice of what is needed to substantiate a claim and the reasons for VA's denial, and it provides claimants with multiple opportunities to submit evidence and argument, Appellant again cannot succeed in a facial challenge to the validity of § 20.1304.

A proper due process inquiry looks at the entirety of notice and opportunities to be heard VA provided during a claimant's pursuit of the award of the desired benefit. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985) (holding that "a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"). The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Cushman v. Shinseki*, 576 F.3d 1290 (2009) held, "A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution." *Id*. at 1298. The property interest for applicants of veterans' disability benefits is, therefore, the entitlement to the *benefit sought*. *Id*. The

Federal Circuit did not hold that there was a property interest in the adjudication of an appeal by the Board or a property interest in submitting evidence or argument before the Board that is protected by the Fifth Amendment's Due Process Clause. Rather, the property interest is in entitlement to veterans' disability benefits. *See Sapp v. Wilkie*, 32 Vet.App. 125, 139 (2019). As this Court has noted, "[a]n essential principle of procedural due process is that the deprivation of a protected interest must 'be preceded by notice and the opportunity for hearing appropriate to the nature of the case.'" *Id.*, quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Because the protected property interest is the benefit sought, the Court's due process inquiry must look at the entire process VA provided in pursuit of that benefit, and the multiple opportunities to be heard throughout a claim's adjudication.

Further, review of a Regional Office determination by the Board is a statutory right, not a constitutional right. *See* 38 U.S.C. § 7104; *United States v. MacCollom*, 426 U.S. 317, 323 (1976) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal" (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956))). Yet Congress has not mandated that a claimant be provided a finite, guaranteed number of days to submit evidence or argument before the Board following certification to the Board. Appellant, therefore, cannot demonstrate that the time period set out in § 20.1304 – 90 days or until the Board's decision is promulgated, whichever comes first – is contrary to VA's statutory authority and invalid under the statute.

Likewise, he cannot demonstrate that § 20.1304 violates the Due Process Clause of the Fifth Amendment. As discussed above, because there is no constitutional right to review by the Board, there cannot be a constitutional right to submit evidence and argument after the appeal has been certified to the Board. If Congress were to pass a statute eliminating the right to submit evidence before the Board, closing the record once the appeal is transferred from the Regional Office to the Board, there would be no constitutional issue given the multiple opportunities to be heard on a claim.[1] Likewise, if Congress were to eliminate the statutory right to review by the Board, requiring claimants to appeal Regional Office determinations directly to the Court, there would still not be any constitutional issue, so long as meaningful notice and a meaningful opportunity to be heard has been provided with regard to the benefit sought. In sum, neither review by the Board nor submission of evidence at the Board is required by the U.S. Constitution's Fifth Amendment Due Process Clause.

The Supreme Court has explained that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a

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[1] In fact, Congress *did* enact a statute which limited appellant's opportunities to submit evidence before the Board— the Veterans Appeals Improvement and Modernization Act of 2017 (AMA). Under 38 U.S.C. § 7113, claimants who elect a direct review before the Board cannot submit *any* additional evidence to the Board. Claimants who elect evidence submission review may *only* submit additional evidence with their notice of disagreement or within 90 days of the receipt of the notice of disagreement. *Id*. Finally, claimants who elect a hearing before the Board may *only* submit additional evidence for 90 days following the Board hearing. *Id*. Under the new statute, the Board is prohibited from considering evidence after a decision by the agency of original jurisdiction and before a notice of disagreement, before a Board hearing, or outside of the 90-day window that exists only in the evidence submission lane or hearing lane. *Id*.

meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Given that Appellant has a protected property interest in the award of potential disability benefits, VA is required to provide Appellant due process, meaning notice and a meaningful opportunity to be heard and participate in his claim for service-connected benefits. But, because Appellant has no protected property interest in Board adjudication or the submission of evidence to the Board, the relevant question is whether Appellant was not provided sufficient notice and meaningful opportunity to be heard during his pursuit of service-connected benefits.

VA provides claimants multiple opportunities to meaningfully participate in their claims and appeals. As provided by Congress and amplified by VA regulations, during the pendency of a case, claimants have multiple finite periods within which to submit additional evidence or argument. Claimants generally may submit evidence and argument following Veterans Claims Assistance Act (VCAA) notice, during the one-year period following notice of a rating decision, within 60 days following the issuance of a statement of the case, and within 30 days after the issuance of any supplemental statement of the case. *See* 38 U.S.C. §§ 5103(b)(1), 5104(a); 7105(b)(1),(d)(3); 38 C.F.R. §§ 3.156(b), 20.302(a),(b),(c) (2018). Further, claimants have the right to a hearing before a Board member, during which they can submit additional evidence and argument. 38 U.S.C. § 7107; 38 C.F.R. § 20.700 (2018). Finally, in the legacy appeals system, the record remains open, and, therefore, claimants have the ability to submit evidence at any point prior to certification of the appeal to the Board and within the

parameters of § 20.1304 following certification of the appeal to the Board. *See* 38 C.F.R. 19.37 (2018).

Therefore, because the proper inquiry is whether VA afforded Appellant notice and opportunity to be heard on his claim (not just at the Board), in order to successfully facially challenge the validity of § 20.1304, Appellant would have to demonstrate that all the protections and opportunities VA afforded him were not sufficient to prevent erroneous deprivation of his protected property interest. *See Mathews*, 424 U.S. 319. But, as discussed below, Appellant cannot meet the burden of demonstrating such.

**2. 38 C.F.R. § 20.1304 is valid.**

38 C.F.R. § 20.1304, as promulgated, is valid under all circumstances. It has already been found valid by the Federal Circuit, which held that the regulation is not contrary to 38 U.S.C. § 5103 and its notice and time requirements. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1353 (Fed. Cir. 2003). It was promulgated in the Federal Register; it is consistent with 38 U.S.C. § 501 authority and Chapter 71 of Title 38; and, as discussed above and below, it does not offend the Due Process Clause of the Fifth Amendment of the U.S. Constitution. The regulation, therefore, is valid. It is valid regardless of whether an appellant had 365 days between notice of docketing at the Board and the Board's decision, 90 days between the two, or, as in this case, 70 days between the two.

**3. The Court must look to whether claimants are provided notice and opportunity to be heard during the entire pursuit of the benefit.**

Where, as here, a claimant is challenging an existing procedure as being unconstitutional, the Court must look to the entire VA claims process to determine whether the claimant is afforded adequate notice and opportunity to be heard. *See Prickett v. Nicholson*, 20 Vet.App. 370, 382 (2006) (holding that the pertinent inquiry in a case raising a procedural due process issue is "whether the totality of the situation provides claimants with 'adequate notice of judicial disposition of their claim and an adequate opportunity to challenge an adverse ruling.'" (citing *E. Paralyzed Veterans Assoc., Inc. v. Secretary of Veterans Affairs*, 257 F.3d 1352, 1358-59 (Fed. Cir. 2001))).

As discussed above, under the Federal Circuit's holding in *Cushman*, Appellant's property interest protected by the Fifth Amendment and subject to the Due Process Clause is entitlement to veterans' benefits. *Cushman*, 576 F.3d at 1298. Therefore, the proper inquiry is whether VA provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner during Appellant's pursuit of the benefit sought. The certification and transfer of an appeal from the Regional Office to the Board has no significance on this inquiry because claimants do not have a constitutional right to review by the Board, nor do they have a constitutional right to submit evidence after an appeal has been certified to the Board. Further, the Supreme Court has assessed whether sufficient opportunity to be heard was provided at some appropriate point in the overall administrative process when addressing the type and timing of process provided

in administrative adjudications. *See, e.g., Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152-53 (1941) ("The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."); *see also Patlex Corp. v. Mossinghoff*, 771 F.2d 480, 485 (Fed. Cir. 1985).

**4. Appellant has not met his burden of demonstrating that he did not have an opportunity to be heard in a meaningful time and meaningful manner.**

Appellant has not met his burden of demonstrating that due process was violated. As discussed above, because the Due Process Clause of the Fifth Amendment of the U.S. Constitution does not require review by the Board and submission of evidence to the Board after an appeal has been certified, Appellant cannot demonstrate that the Constitution was violated on the basis that he was not guaranteed another finite amount of time to submit evidence to the Board once his case was certified to the Board. To succeed in a constitutional challenge, Appellant, therefore, must demonstrate that the entire process VA provided to him in pursuit of his claims for service connection did not afford him notice and an opportunity to be heard. *See Walters*, 473 U.S. at 330; *Prickett*, 20 Vet.App. at 382.

As noted above, during the pendency of his case, Appellant was afforded multiple periods of time within which to submit additional evidence or argument, including: the opportunity to submit evidence and argument when he filed his claim; the opportunity to submit evidence and argument following VCAA notice; a one-

year period to file a notice of disagreement; a 60 day period to file a substantive appeal with evidence and argument following the issuance of a statement of the case; and the opportunity to elect a hearing before the Board. *See* 38 U.S.C. §§ 5103(b)(1), 7105(b)(1),(d)(3); 38 C.F.R. §§ 3.156(b), 20.302(a),(b),(c) (2018). And, because Appellant's appeal was processed in the legacy system, there was never a closed record, meaning Appellant had the opportunity to submit evidence and argument at any point between filing his claim in October 2014 and the Board's decision in November 2017. *See* 38 C.F.R. § 19.37(a) (2018). Finally, Appellant has failed to demonstrate that his representative's statement on the VA Form 9 was a request for additional time under 38 C.F.R. § 20.1304(b) because it does not meet the requirements of demonstrating good cause for seeking additional time. *Compare* [R. at 168 (April 2017 VA Form 9)] *with* 38 C.F.R. § 20.1304(b).

In *Williams v. Wilkie*, the Court held that Mr. Williams failed to demonstrate his due process rights were violated by the Board because he "had been notified on multiple occasions the reasons for the denial of his claims and had had numerous opportunities throughout the course of his appeal to submit additional evidence and argument to challenge those denials." 32 Vet.App. 46, 59 (2019). Likewise, in the present case, Mr. Bryant was provided multiple notices of reasons for the denial of his claims, i.e. the December 2014 rating decision and April 2017 statement of the case. [R. at 249-94]; [R. at 634-41]. And he had multiple opportunities to submit additional evidence and argument to challenge those denials, including with the submission of his May 2015 notice of disagreement, his April 2017 substantive appeal, and the right to submit evidence and argument at a

Board hearing. Yet, like Mr. Williams, Mr. Bryant also declined to submit additional evidence during those periods.

Therefore, Appellant has not demonstrated that VA's actions in adjudicating the claim 70 days after he was sent notification pursuant to 38 C.F.R. § 20.1304 that his appeal had been certified violate his constitutional due process rights. Given the numerous opportunities VA provided Appellant to submit evidence and argument, Appellant cannot demonstrate that he was not afforded the opportunity to be heard in a meaningful time and meaningful manner in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

**5. The purpose of 38 C.F.R. § 20.1304 was to create a cutoff date of the submission of evidence to assist in orderly and prompt appeals processing.**

The purpose of adding the "cutoff date" in what is now 38 C.F.R. § 20.1304 was to assist in orderly and prompt appeal processing and to clarify the nature and extent of evidence considered by the Board when deciding an appeal. 55 Fed. Reg. 20,144 (May 15, 1990). Prior to its codification as 38 C.F.R. § 20.1304, VA in May 1990 amended 38 C.F.R. § 19.174 to provide that an appellant and his representative "will be granted a period of 90 days following the mailing to them of the notice described in paragraph (a), or until the date the appellate decision is promulgated by the Board of Veterans Appeals, whichever comes first, during which they may submit a request for a personal hearing or additional evidence, and during which the appellant may request a change in representation." *See* 38 C.F.R. § 19.174(b) (1991); 55 Fed. Reg. 20,144. This change additionally allowed for a subsequent request for a change in representation, a request for personal

hearing, or submission of additional evidence, provided that the appellant demonstrate good cause for the delay. 38 C.F.R. § 19.174(c) (1991); 55 Fed. Reg. 20,144.

VA specifically stated that this amendment was to add a "cutoff date" for the submission of additional evidence, a request for a personal hearing, or a request to change representation and to allow the submission of evidence and requests for hearings or change in representation at a later date only when good cause is shown. 55 Fed. Reg. 20,144 (May 1990). VA explained that, under the existing procedures, an appellant could continue to submit additional evidence or requests for personal hearing or change representation throughout the appellate process, and, as a result, "the appellate record can be [in] a constant state of change" and "[c]onfusion can sometimes result as to the exact nature of the record reviewed by the Board." *Id*. at 20,145. VA explained that "[i]t is essential that a point be reached at which the appellate record is fixed," and that "[t]he proposed changes would assist in orderly and prompt appeal processing and would help clarify the nature and extend of evidence considered by the Board in reaching a decision in any given appeal." *Id*. VA noted that "[t]ardy action by appellants and their representatives contributes to this extended processing time" because it not only delays their own individual cases, but also because delays "processing the appeals of the majority of appellants who are diligent in the prosecution of their appeals because of the time of Members of the Board and of the BVA's administrative staff which is wasted." *Id*.

VA additionally explained that the proposed amendment does not unlawfully or improperly impair appellant's statutory rights. VA noted that there "should be no reason for an appellant to first become aware of his or her rights at a late appellate stage." 55 Fed. Reg. at 20,146. It was noted that appellants are advised of their rights "at every stage of the claims process." *Id*. Finally, VA disagreed that the amendment would deprive appellants of the same due process rights that they have before the agency of original jurisdiction, noting that, while the amendments do create differences between procedures at the regional offices and before the Board, "there are many such differences – as could be expected," because the function of the regional offices and the Board are not the same. *Id*.

Further, this final rule differed from the proposed amendment. The proposed amendment to § 19.174, originally read, "[a]n appellant and his or her representative, if any, will be granted a period of 60 days following the mailing of notice to them an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation." 54 Fed. Reg. 28,445 (July 6, 1989). However, based on comments, in the final rule VA changed the proposed limit from a finite 60-day period to a 90-day outer limit for requests for a personal hearing or change in representation or to submit additional evidence. The final language enacted was that an appellant had 90 days "or until the date the appellate decision is promulgated by the [Board], whichever comes first." *Compare* 54 Fed. Reg. 28,445 *with* 55 Fed. Reg. 20,144.

In February 1992, VA amended part 19 and part 20 of title 38 of the Code of Federal Regulations, issuing 38 C.F.R. § 19.36 and 38 C.F.R. § 20.1304. *See* 57 Fed. Reg. 4,088 (Feb. 3, 1992). Section 20.1304 was noted to be "essentially a duplicate" of the final amendment of § 19.174(b) through (e) that was published in May 1990. VA noted that commenters on proposed § 20.1304 "incorporated prior comments" and "offered objections similar to those raised" concerning the amendment of 38 C.F.R. § 19.174. VA explained that, as the result of the comments to the proposed § 19.174, it made several changes, including extending the time limit from the originally proposed 60 days to 90 days or until the date the appellate decision is promulgated by the Board, whichever comes first. *See* 57 Fed. Reg. 4,088. VA enacted the final rule § 20.1304, continuing the cutoff date as being 90 days or until the date the Board promulgates a decision, whichever comes first. *Id*. Further, VA added 38 C.F.R. § 19.36, noting this amendment was a duplicate of the final version of § 19.174(a). However, VA additionally incorporated into the final rule § 19.36, the requirement that appellants and their representatives be notified of the various restrictions concerning the submission of additional evidence after an appeal has been certified to the Board. *See* 57 Fed. Reg. 4,088.

Nothing in the Federal Register supports the proposition that VA intended 38 C.F.R. § 20.1304 to create an invariable period of time for appellants to submit additional evidence. Rather, VA made clear that this regulation was intended to provide a cutoff time for the additional submission of evidence to allow for orderly and prompt processing of appeals. VA's comments explain that its intent was not

to create an absolute 90-day period at the Board for evidentiary submissions, but, rather, to restrict the previously unlimited open record system.

Finally, the plain language of the regulation permits the Board to decide a case before the 90-day period expires, and, therefore, it cannot intend to afford a claimant a fixed 90-day period to build his case. Instead, the plain language of the regulation describes what happens if a claimant submits evidence after the appeal has been certified to the Board, but the Board, for whatever reason, has not yet issued a decision, despite being legally permitted to do so. The plain language establishes an outer time limit (i.e. 90 days) to submit this additional evidence. And it is clear from the difference between the proposed amendment §19.174 and final rule § 19.174 that VA made a conscious decision to allow the Board to issue a decision without giving claimants a guaranteed 90-day period to submit additional evidence.

## IV. CONCLUSION

**WHEREFORE**, the Secretary responds to the Court's June 2, 2020 order.

Respectfully submitted,

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