

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0256

FLORENCE KENNEDY,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before ALLEN, TOTH, and FALVEY, *Judges*.

ORDER

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

Appellant Florence Kennedy appeals a November 1, 2018, decision of the Board of Veterans' Appeals that denied an earlier effective date for the award of dependency and indemnity compensation (DIC) benefits. This matter was sent to a panel for a precedential decision addressing whether VA Fast Letter 13-04 was a liberalizing law or VA issue pursuant to 38 C.F.R. § 3.114(a) such that an effective date one year earlier than the date assigned could potentially be warranted. On August 18, 2020, the Court held oral argument.

The Court has determined that it would be assisted by further briefing and directs the parties to submit supplemental briefing on the following questions:

- 1) Both the governing statute and regulation at issue in this case, 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a)(3), use the word "issue" to describe a provision that may be characterized as liberalizing. Section 5110(g) specifically refers to "any Act or administrative issue," while § 3.114(a) uses the phrase "liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction." What is the definition of an "issue," and does a VA Fast Letter qualify as an issue under that definition?
- 2) How, if at all, does 38 C.F.R. § 19.5,¹ which provides that "the Board is not bound by Department manuals, circulars, or similar administrative issues," affect the definition of "issue"?
- 3) Should the Court apply the Federal Circuit's test for determining whether a provision is a liberalizing law – "one which brought about a substantive change in the law creating a new

¹ This regulation is now found at 38 C.F.R. § 20.105 (2020).

and different entitlement to a benefit"² – to determine whether a provision is a liberalizing "issue"? If not, what test should the Court apply to determine whether an "issue" is liberalizing?

- 4) Finally, the language in § 3.114(a)(3) provides that "[i]f a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits *may* be authorized for a period of [one] year prior to the date of receipt of such request."³ Does VA have discretion to decline to award the one year earlier effective date if it finds a law or issue liberalizing? If so, what standard applies in making a determination whether an earlier effective date of one year is warranted?

Accordingly, it is

ORDERED that, within 45 days of the date of this order, the parties file with the Court and serve upon each other supplemental briefs not exceeding 20 pages addressing the issues set forth above.

DATED: August 19, 2020

PER CURIAM.

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

² See *Routen v. West*, 142 F.3d 1434, 1441 (Fed. Cir. 1998).

³ 38 C.F.R. § 3.114(a)(3) (2018) (emphasis added).