In the

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

No. 20-5411

STANELY L. DAVIS

Appellant

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

Appellee

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November 1, 2021

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CITATIONS TO RECORD BEFORE THE AGENCY:

Appellant's Reply Arguments

Mr. Davis stands by all arguments in the opening brief. This brief contains four replies to the Secretary's arguments.

I. The law differentiates between filed and received.

Mr. Davis argued in his opening brief that 38 U.S.C. § 7116(c) requires actual receipt, or possession by the Board before the time to submit evidence begins to run. Brief for the Appellant at 5-12. He specifically pointed out that Congress differentiated between "filing" an appeal and the Board's "receipt" of that appeal. In particular, 38 U.S.C. § 7266(b) specifically equates filing and receipt, which would be unnecessary if they were synonymous. Brief for the Appellant, at 9.

The Secretary argues that the date of filing and the date of receipt by the Board are the same. Brief for the Appellee, at 16. Specifically, he asks this Court to find that the Board's finding is "plausib[e]" because "[t]he document is marked as received on August 14, 2019, via 'BVA Fax.'" *Id*. However, the record does not show when the NOD was received by the Board. All the evidence demonstrates is that the NOD was received by the evidence intake center. R. at 88; *see also* Brief for the Appellant, at 11-12. There is no evidence, other than the Board's September 9, 2019, letter to Mr. Davis, that informs us when the Board received the NOD.

The Secretary argues that the postmark rule under 38 U.S.C. § 7105(b)(1)(B) requires this Court to find that the date of filing must be the date of receipt as a matter of law. Brief for the Appellee, at 18. However, this argument represents a

misunderstanding of the postmark rule, but more importantly ignores Congress' express use of different words in §§ 7105 and 7113. Instead, the postmark rule contained in § 7105(b)(1)(B) is a legal rule that informs us when a NOD is timely **filed**.

The Secretary further cites to *Savitz v. Peake*, 519 F.3d 1312 (Fed. Cir. 2008) for support of his argument that the filing of a NOD is the legal equivalent of the Board receiving the NOD. Brief for the Appellee, at 18-19. However, *Savitz* is distinguishable in a meaningful way. First, *Savitz* ruled on prior, now extinct statutes governing Board review of AOJ decision. Although the statute at issue in *Savitz* was also § 7105, there was no § 7113 in 2008. And this is an important distinction. As argued in our opening brief, § 7113 creates a distinction between filing and receipt. Brief for the Appellant, at 5-12. No such distinction existed in the 2008 version of statutes reviewed by the Court in *Savitz*.

Also, the ruling in *Savitz* had nothing to do with when an appeal was received. Instead, § 7105, then and now, simply requires the appeal be "filed." *Compare* § 7105 (2008) *with* § 7105 (2019) (both stating "[a] notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed"). The filing of an appeal under § 7105 triggers review by the Board, but has nothing to do with what evidence is reviewed by the Board.

To determine the record before the Board, one must look to § 7113. And this statute has very explicit instructions, requiring the evidence be "submitted … within 90 days following receipt of the notice of disagreement." If Congress meant "filed" it would

have said so. *See Bailey v. U.S.* 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").

The Secretary next cites to *Fithian v. Shinseki*, 24 Vet.App. 146 (2010) for the proposition that the courts "have 'consistently acknowledged VA as one entity for pleading purposes.'" Brief for the Appellee, at 18-19; quoting *Fithian*, at 152. However, once again *Fithian* dealt only with the filing of a pleading, and did not reach the question of "receipt" as articulated in § 7113. The law at issue in *Fithian* was 38 C.F.R. § 20.1001(b), which directed when and where a motion for reconsideration "must be filed." This regulation, and the ruling in *Fithian* do not touch on the issue in this case.

Finally, the Secretary asks this Court to find that the Board could have received the NOD before it was even in the record. Essentially the Secretary is asking the Court to rule that the Board has powers to see and possess something that is no there. The record clearly establishes that the NOD was not loaded into VBMS until September 2019. *See* Appendix to Brief for the Appellant. What this tells us is that the NOD was faxed to the Board; the NOD was then routed directly to the Evidence Intake Center;[1] and the NOD was held at the evidence intake center until finally put into VBMS on September 9, 2019. All we can tell from the record is that the NOD was timely filed because § 7105(b)(1) says so.

[1] Incidentally, the Evidence Intake Center is not the VA; rather it is a facility contracted by VA to process mail and upload it into the record (i.e. VBMS).

The Secretary offers nothing to inform this Court of how he interprets the term "receipt" in § 7113(c)(2). In fact, his regulation uses the same term as the statute and establishes that the record before the Board include evidence submitted "within 90 days following receipt of the Notice of Disagreement." 38 C.F.R. § 20.303(b)(1). The Secretary's interpretation of a statute is entitled to deference only when he actually interprets a statute. The parroting of a statute is not interpreting it. The Supreme Court in *Gonzales v. Oregon* characterized the regulation in that case as a parroting regulation because it "just repeats two statutory phrases and attempts to summarize the others." *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006). The Court added that the regulation "gives little or no instruction on a central issue." *Id*.

And when the Secretary does not provide his own interpretation, or his interpretation is not entitled to deference, the pro veteran canon of interpretation is for application. *See Kisor v. McDonough*, 995 F.3d 1316, 1325-1326 (Fed. Cir. 2021). Therefore, if this Court finds any ambiguity in § 7113, it should apply the pro veteran canon and find that receipt requires the Board to actually take possession of the NOD as opposed to the filing of the pleading under § 7105.

II. The ability of Mr. Davis to submit the evidence with a supplemental claim does not make the error harmless.

The Secretary cryptically argues that ignoring Congress' directive that the Board must consider the December 2019 evidence is harmless because "Appellant has one year following resolution of his appeal before the Court to file a supplemental claim, at

which time he could again submit the evidence submitted on December 5, 2019." Brief for the Appellee, at 20. However, the Secretary ignores that Mr. Davis filed his original motion to revise a prior RO decision in October 2013. R. at 417. It was not until after the Board ordered action on the request to revise the prior decision, no less than five written requests for a decision, and another letter from the Board, that the RO finally prepared a decision. R. at 381, 382, 384, 386, 387, & 389.

It took another two years for this rating decision to reach Mr. Davis' attorney. R. at 209-210. The Secretary asks this Court to subject Mr. Davis to additional, unnecessary delay. Importantly, under a direct review docket at the Board, which would be the quickest, Mr. Davis is looking at no less than 257 days for a decision from the date he would file a new NOD. *See* Board of Veterans Appeals, Appeals Matrix, https://www.bva.va.gov/Appeals_Metrics.asp (last visited November 1, 2021). This delay does not even contemplate how long a decision would take in response to the supplemental claim.

On the other hand, a remand from this Court, with an order to consider the evidence timely submitted, must be given expedited treatment. 38 U.S.C. § 7112. Finally, as argued extensively in our opening brief, the Board's error is prejudicial as a matter of law. Brief for the Appellant, at 12-20.

III. The evidence was constructively before the Board.

Mr. Davis argued that if the Court finds he did not timely submit the December 2019 evidence, then the Board was required to consider the 2017 GAO report as well

as the Davis letters because they were in the possession of the VA and could reasonably be expected to be a part of the record. Brief for the Appellant, at 21-26[2]. The Secretary responds that the Board has no legal obligation to "have searched the claims files of other Veterans and included records from those files as part of the administrative record in this case …." Brief for the Appellee, at 13.

However, the Secretary misreads the evidence. The two Davis letters were not sent to any particular veteran's file. Rather they were directed to the Director of Compensation and the Chairman[3] of the Board of Veterans Appeals generally. The first letter, addressed to the Director of Compensation, lists 39 instances where the RO failed to mail Mr. Davis' attorney copies of correspondence. R. at 21-22. This letter was not sent to individual veteran's files, rather it was notice to the Director of an ongoing problem with outgoing mail.

Likewise, the letter to the Board was not to any specific veteran's file. It was notice to the Chairman of an ongoing problem with outgoing mail from the Board. R. at 23-24. These letters were sent to the two people in charge of ensuring attorneys and other representatives receive timely notice of decisional documents so that they can properly advise and represent the interests of their veteran clients. These letters were sent to the two people also who have the ability to correct this ongoing problem.

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[2] In his opening brief, Mr. Davis asked this Court to consider whether the letter on page 20 of the RBA was constructively before the Board. However, on further review Mr. Davis no longer reads this evidence as meeting the criteria of *Euzebio*; and now asks the Court to only consider the two letters on pages 21-24 of the record.

[3] Here the letter is addresses to the BVA and to the director. But there is no director of the BVA only a chairman. 38 U.S.C. § 7101(a).

As such, the Chairman and the Director of Compensation were well aware of the mailing problems when Mr. Davis submitted his NOD to the Board in the instant case. These letters were not sent to individual claims files so the Secretary's concerns are unfounded[4]. Also, there is no doubt that the GAO report was in the possession of the VA as it was reviewed by the VA upon its drafting and release. R. at 33 & 53.

Furthermore, the Chisolm and Rauber affidavits, although they originated as part of Ms. Romero's claims file, became known to, and in the possession of, the VA at large when that appeal was presented to this Court. The Court's precedential decision in that case should do more than enough to make the Board aware of the information contained in those affidavits. This is not a case where Mr. Davis discovered an obscure letter in another veteran's file and asked the Board to consider it. Mr. Davis is simply asking the Board to consider evidence that it is well aware of either because the letters were sent directly to the leaders of the Board and the Department of Compensation; or because the affidavits were the key evidence in a precedential decision which is binding on the Board. 38 U.S.C. § 7104(a).

The Secretary next unconvincingly asserts that this evidence could not reasonably be expected to be a part of the record. The Secretary uses a lot of ink in his argument, but his argument boils down to a single reason – "documents submitted on behalf of a

[4] Although not at issue here, Mr. Davis submits that even if evidence were in an individual claimant's claims file, so long as the legal criteria for constructive possession exists, this evidence would be part of the record. However, as that is not the case here, we do not believe this issue is before the Court. If the Court deems otherwise, we welcome the opportunity to brief the matter, as necessary.

Veteran for inclusion in that Veteran's claims file are expected to be in the Veteran's claims file and therefore could not reasonably be expected to be in the claims file of another Veteran." Brief for the Appellee, at 11; *see also id*, at 12 ("these letters could not reasonably be expected to be part of Appellant's claims file because they reference other Veterans' cases and were submitted on behalf of other Veterans for inclusion in those Veterans' claims files"). Thus, the Secretary is asking this Court to find that evidence in one veteran's claims file can never be constructively before the Board in another veteran's appeal as a matter of law.

The Secretary futher exclaims that a ruling in Mr. Davis' favor will lead to "the absurd result of making all evidence ever submitted to VA on behalf of any and all Veterans potentially part of the administrative records of any and all Veterans." Brief for the Appellee, at 12-13. However, as articulated above, the Davis letters were sent to the Director of Compensation and the Charmian of the Board, not to individual claimant's files. Furthermore, the Chisholm and Rauber affidavits were known to the Secretary through his participation in that appeal; and was known to the Board because that ruling is precedent. *See supra*, 6-7.

However, the Secretary's argument does not hold water. The standard articulated in *Euzebio* is that evidence is constrictively before the Board when "the Board has constructive or actual knowledge of evidence that is 'relevant and reasonably connected' to the veteran's claim …." *Euzebio v. McDonough*, 989 F.3d 1305, 1321 (Fed. Cir. 2021). This sky-is-falling argument was considered and rejected by the Federal

Circuit. *See Euzebio*, at 1325. The Federal Circuit emphasized that VA is required to "evaluate and draw conclusions from record evidence to discern its impact on individual cases." *Id*.

Mr. Davis asks further, that this Court find the Secretary failed to respond in any meaningful way to his arguments. The Secretary asserts, **incorrectly**, that the evidence Mr. Davis seeks to have constructively before the Board was primarily evidence that was submitted to VA in other veterans' appeals.[5] His entire argument rests on this fallacy. He offers no other substantive reason why the constructive possession doctrine should not apply in this case. In *MacWhorter*, this Court held when the Secretary "default[s] in the obligation to brief the Secretary's position and thus provide the Court with the incidental benefit of his views on the facts and law, is deemed to concede the validity of appellant's legally plausible position." *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 134 (1992). the Court has essentially two avenues. One, is "for the Court is to proceed on its own to a complete and thorough examination of the record, the complex regulatory structure and the underlying statutory law." *Id*, at 135. The other is to find the Secretary has conceded Mr. Davis' assertions of error. *Id*, at 136. We ask that this Court reject the Secretary's invitation perform a "comprehensive record analysis and research for the government's side of a case." *Id*, at 135-136. That role belongs to the Appellee, not this Court.

[5] The GAO report is relevant on its own, because it documents oversight and management of outgoing mail; and also when read with the Davis letters and the Chisholm and Rauber affidavits.

IV. The provisions of 38 C.F.R. § 3.156(b) apply to this case.

Mr. Davis argued that because the Davis letters were submitted to VA on June 24, 2019, they are "considered as having been filed in connection with the claim that was pending at the beginning of the appeal period." Brief for the Appellant, at 24; citing 38 C.F.R. § 3.156(b). The Secretary responds that because Mr. Davis opted into the AMA review system in August 2019 (two months after the evidence was submitted by Mr. Davis) this regulation does not apply, and ceases to apply at any time prior to his opt in. Brief for the Appellee, at 14-15. ("After Appellant opted-in to the AMA in August 2019, 38 C.F.R. § 3.156(b) no longer applied to his case").

The Secretary's arguments make little sense. When the Davis letters were received § 3.156(b) was still in effect and had legal implications. *See Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011). Furthermore, the Secretary cites to no legal authority, and we are unable to find any, which allows the VA, through regulation, to retroactively remove a legal right conferred upon a claimant. To the contrary, the law does not allow a regulation to have retroactive effect where it destroys a right that previously existed. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("administrative rules will not be construed to have retroactive effect unless their language requires this result").

Nothing in the amended § 3.156(b) contemplates taking away the right to have new and material evidence "considered as having been filed in connection with the claim that was pending at the beginning of the appeal period." All this regulation says is that

for pending legacy appeal, this rule applies. In order to take away a statutory or regulatory right, the regulation must be explicit and clear.

Here, there is no clear and unequivocal indication § 3.156(b) would not apply in a situation like Mr. Davis'. When the new and material evidence was received by VA on June 24, 2019, Mr. Davis had not yet opted into the AMA. Under the Secretary's interpretation of the law, any time a claimant opts into the AMA, they lose the right to enforce § 3.156(b) even when the application of that regulation is mandatory. *See Bond, supra*. The Secretary cannot transform the law retroactively on a whim. Therefore, the Davis letters are "considered as having been filed in connection with the claim that was pending at the beginning of the appeal period." And as such VA had actual possession of them when the Board issued its decision in this case.

Conclusion

For the reasons set forth above, and in the opening brief, Mr. Davis respectfully requests that this Court provide relief by finding the date of receipt of the NOD was, September 9, 2019, the date the Board actually received the NOD, and not when it was submitted, filed, or otherwise received by a separate entity of the VA. This means Mr. Davis properly submitted the disputed evidence, and the Board has a legal obligation to consider it in its decision. For the reasons articulated above, this error was prejudicial as a matter of law.

In the alternative, should the Court find the NOD was received by the Board in August 2019, the Board had constructive possession of this evidence, as well as evidence

pursuant to *Euzebio*. Therefore, the Board had a legal obligation to consider it and its failure to do so was prejudicial as a matter of law.

Respectfully submitted,

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