IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIAM D. COWAN, Appellant, v. DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	))))))))))	Vet. App. No. 20-6227

SECRETARY'S RESPONSE TO THE COURT'S MARCH 2, 2022, ORDER

I. QUESTIONS PRESENTED

1. If the Court finds prejudicial error in regard to the January 2019 notice letter, how precisely should the Court frame its remand instructions to the Board concerning the appropriate remedy? With regard to this question, should the Court order the Board to fix the notice error itself and, if so, how would the Board do so? Or, depending in part on the response to question #2 below, does the Board remand to the RO to provide sufficient notice?

2. In light of the Veterans Appeals Improvement and Modernization Act (AMA), does the Board have authority to remand to the RO to remedy any notice errors? If not, what action should the Board take if it concludes on review in a given case that the RO's notice was inadequate?

3. If the Court instructs the Board to remand to the RO to provide sufficient notice of its November 2018 decision, do we vacate the part of the May 2020 Board decision concerning the knee disability? And if the Court vacates that part of the decision, what should VA do with the compensable knee extension ratings and the instability rating from February 20, 2018, that the Board assigned in the May 2020 decision?

4. Could Mr. Cowan have filed a supplemental claim after appealing to the Board or now file one while his appeal is pending before the Court? If he

was or is permitted to file a supplemental claim at either stage of adjudication, does this impact the Court's assessment of whether any notice error is prejudicial?

II. SUMMARY OF THE RESPONSE

A central theme of this appeal is Appellant's allegation that he was prejudiced from seeking the supplemental claim route after the November 2018 rating decision due to inadequacies in the January 2019 agency of original jurisdiction (AOJ) notice letter. *See generally* App. Br. 3, 8. However, as discussed below, Appellant still has the right to file a supplemental claim and preserve the effective date of his 2012 increased rating claim, even after the favorable May 2020 Board decision that granted additional staged ratings, a higher combined disability rating, and greater compensation for his right knee disability. Because the supplemental claim route that Appellant allegedly "was not able to take advantage of" is still available to him *today*, he has not demonstrated any prejudice or harm to his pursuit of benefits. *See* App. Br. 8. Moreover, the lengthy procedural history of this appeal and Appellant's identification of key favorable findings from the January 2019 AOJ notice letter and enclosures demonstrates that Appellant has maintained a keen understanding of the relevant law, favorable facts, and procedures applicable to his case throughout the course of his appeal and was sufficiently informed of the AOJ's findings such that he could have filed a supplemental claim, but instead chose to appeal to the Board of Veterans Appeals (Board). Therefore, the Court should not disturb the Board's finding that Appellant was not prejudiced by any alleged inadequacies in the January 2019 notice letter.

If, however, the Court finds that, despite the disability rating and compensation increases by the AOJ and the Board, the notice error(s) in the January 2019 AOJ letter so deprived Appellant of the essential fairness of the process and a meaningful opportunity to participate as to warrant action by this Court, then the Court must vacate the entirety of the May 2020 Board decision and return the case to the AOJ for issuance of a new letter. *See Simmons v. Wilkie*, 30 Vet.App. 267, 282-83 (2018) (citing *Shinseki v. Sanders*, 556 U.S. 396, 411 (2010)) (stating that "[w]hen an error abrogates the essential fairness of the adjudication or deprives a claimant of a meaningful opportunity to participate in the processing of their claim, the error has the 'natural effect' of being prejudicial"); *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) ("A procedural or substantive error is prejudicial when the error affects a substantial right that a statutory or regulatory provision was designed to protect."); *see also Arneson v. Shinseki*, 24 Vet.App. 379, 388-89 (2011) (finding the failure to afford an opportunity for a hearing before the Board deprived the claimant of an opportunity to meaningfully participate in the adjudicatory process). In that scenario where the Court finds prejudice, the Court must vacate the Board decision in its entirety because the fairness of agency proceedings was compromised after the prejudicial January 2019 AOJ letter, the Appellant was not able to meaningfully participate in proceedings thereafter, and the Board review process was tainted. Thus, if the Court finds prejudice, it must return Appellant's case to its status prior to the prejudicial error. Ironically, this means that the Court's finding of prejudice would

itself detriment the Appellant (more than any alleged notice error did in this case) because it would erase the higher rating and additional compensation that Appellant received. For all these reasons, the Court should find that any alleged inadequacies in the January 2019 notice letter were not prejudicial in light of Appellant's receipt of increased ratings and compensation stemming from his AMA notice of disagreement (NOD).

III. RESPONSE

1. **If the Court finds prejudicial error in regard to the January 2019 notice letter,[1] the Court should vacate the entire Board decision and direct the Board to remand the matter to the AOJ for issuance of corrected notice.**

If the Court finds prejudicial error in the January 2019 AOJ notice letter, then it must vacate the entire Board decision, *see infra* Sec'y Resp. Question #3, and remand the appeal to the Board with the precise instruction that, consistent with its remand authority provided by 38 C.F.R. § 20.802(a), the Board must remand the matter to the AOJ for issuance of corrected notice. The Board cannot fix the notice error itself because, if the Court finds prejudice despite the Board providing notice specifically mentioning the availability of the supplemental claim route, R. at 25, there is nothing more the Board itself can do to remedy that prejudice. The Board can certainly remedy a notice error (and we believe it did in this case), but,

[1] The response herein abides by the Court's instruction to the parties to assume that there is prejudicial error in the January 2019 AOJ notice letter. It remains the Secretary's position, however, that any notice error here was harmless. *See infra* Sec'y Resp. to Question #4.

if the Court finds that the notice error here was not remedied by the Board and was prejudicial, then the Board cannot itself issue a new AOJ notice letter. AOJ notice letters are, by their very nature, issued by the AOJ and provide a variety of rights of review, including the opportunity to seek higher level review or Board review, which are not available following a Board decision. *See* 38 U.S.C. §§ 5104B(a), 5104C(a)(1)-(2). Moreover, it would contravene Congress's express intent in amending section 5104: "to help better inform the veteran's decision regarding *whether to appeal VA's rating decision*." H.R. Rep. No. 115-135, at 3 (2017) (emphasis added). A contrary ruling "would be again making the Board a body that newly develops and adjudicates evidence rather than the appellate body that the AMA was meant to shore up," *Andrews v. McDonough*, 34 Vet.App. 151, 159 (2021), because notice letters or the absence thereof can constitute evidence. *See, e.g.*, *Cummings v. West*, 136 F.3d 1468 (Fed. Cir. 1998) (considering whether a Board decision notice letter constituted statutorily compliant notice under 38 U.S.C. § 5104 (1994)); *Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995); *Lozano v. Derwinski*, 1 Vet.App. 184, 186 (1991) (denying an equitable estoppel claim against the Secretary by a veteran who received a VA notification letter mistakenly listing hearing loss as a service-connected disability). Consequently, as discussed in the Secretary's response to question # 2 below, there is nothing more the Board can do, other than remand the matter, if the Court finds prejudice in the initial adjudication process related to the January 2019 notification letter.

2. Pursuant to 38 C.F.R. § 20.802(a), which governs the Board's remand authority in the AMA, the Board has discretion to remand any appeal in which it determines the AOJ erred in satisfying a regulatory or statutory duty.

The AMA made significant changes to VA's appeals process in order to "expedite VA's appeals process while protecting veterans' due process rights." H.R. Rep. No. 115-135, at 2. Those changes now "allow the [AOJ] to be the claim development entity within VA and the Board to be the appeals entity." *Andrews*, 34 Vet.App. at 156 (citing VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818, 39,818 (proposed Aug. 10, 2018) (codified at 38 C.F.R. pts. 3, 8, 14, 19, 20, 21)). Among those changes, Congress eliminated the Board's duty to assist, 38 U.S.C. § 5103A(e)(1)-(2), and amended 38 U.S.C. § 5104(b) to create a *statutory* requirement for notice of AOJ decisions that would "help veterans better understand VA's decisions on their claims" and "better inform the veteran's decision regarding whether to appeal *VA's rating decision*." H.R. Rep. No. 115-135, at 3 (emphasis added).

Consistent with this prohibition, the Secretary promulgated a regulation that requires the Board to remand for correction of pre-AOJ decision duty to assist errors, unless the claim can be granted in full, but also affords the Board discretion to remand for correction of "any other error by the [AOJ] in satisfying a regulatory or *statutory* duty, if correction of the error would have a reasonable possibility of aiding in substantiating the appellant's claim." 38 C.F.R. § 20.802(a) (emphasis added). Therefore, if the Board concludes in a given case that an AOJ notice was

inadequate such that the AOJ failed to satisfy a regulatory or statutory duty, then it must assess if correction of the error would have a reasonable possibility of aiding in substantiating the appellant's claim. *See* 38 C.F.R. § 20.802(a). If so, it should remand the matter back to the AOJ for compliant notice.

3. If the Court determines the January 2019 notice letter was inadequate and resulted in prejudice, it must vacate the entire May 2020 Board decision as it was tainted by the lack of adequate notice by the AOJ.

The Court must vacate the entirety of the May 2020 Board decision if it finds prejudicial error with the January 2019 AOJ notice letter. If the Court accepts Appellant's contentions that he was deprived of fair process and the right to be fully informed, then the fairness of agency proceedings was compromised after the prejudicial January 2019 AOJ letter, the Appellant was not able to meaningfully participate in proceedings thereafter, and the Board's review process was tainted. *See Simmons*, 30 Vet.App. at 282-83; *Overton*, 20 Vet.App. at 435; App. Reply Br. 2 ("[Appellant's] appeal concerns notice and not the opportunity to be heard but the opportunity to be informed"), 3 ("[Appellant] does not abandon any arguments regarding the merits of the Board Decision when he argues that he was deprived of his statutory right to be fully informed."), 6 ("[Appellant' did not receive from VA the information he needed to make an informed choice to request a higher level review or to file a supplemental claim"). In other words, the essential fairness of the appeal process was "fatally marred" by the AOJ's failure to inform Appellant of critical information necessary to understanding the outcome of the adjudicatory process, his rights, whether to appeal, and which review option to select. *See* App.

Br. 11. Indeed, Appellant argued that the January 2019 notice letter was noncompliant with virtually all components of 38 U.S.C. § 5104(b), *see* App. Br. 4-7, and "included no findings favorable to [Appellant] concerning the nature and extent of his right knee disability." App. Br. 6. If he is correct, then the Board review process is potentially flawed due to the possibility that the Board ignored or contradicted favorable findings by the AOJ without utilizing the appropriate legal standard. *Cf.* App. Reply Br. 1 (stating that he has not abandoned any arguments regarding the merits of the Board decision because the AOJ failed to fully inform him of its decision). As a result, the Board's decision was compromised by the prejudicial notice letter, and the Court must vacate the entire Board decision and direct the Board to remand the matter to the AOJ in order to remove the due process violation and ensure Appellant is fully informed and capable of exercising his rights. In other words, the Court and Board must return Appellant's case to its status prior to the prejudicial error.

If the Court accepts Appellant's contention that he was unable to present any arguments regarding the merits of the November 2018 AOJ decision or make an informed decision on which review lane to seek due to the inadequate notice contained in the January 2019 notice and attachments, then this Court's precedent illustrates that it must find prejudicial error and vacate the Board decision. *See Bryant v. Wilkie*, 33 Vet.App. 43, 49-50 (2020) (finding prejudice where the appellant asserted before the Court that he would have submitted argument and evidence to the Board if afforded the maximum time to do so); *Clark v. O'Rourke*,

30 Vet.App. 92, 99 (2018) (finding prejudice and remanding where appellant asserted in his brief that he "may have submitted evidence to the Board" had he been given the opportunity); *Procopio v. Shinseki*, 26 Vet.App. 76, 83 (2012) (vacating and remanding because the Board hearing officer failed to discharge her duty to fully explain the outstanding issues under 38 § 3.103(c)(2), resulting in appellant's lost opportunity to submit additional evidence before the claim was finally adjudicated); *Ingram v. Nicholson*, 21 Vet.App. 232, 241 (2007) (noting that a claim will remain pending where VA does not provide the claimant a copy of a decision or the decision omits notice of the claimant's appellate rights); *see also Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) (holding that "[w]here the effect of an error on the outcome of a proceeding is unquantifiable … we will not speculate as to what the outcome might have been had the error not occurred"). This Court's precedent concerning notice errors in the legacy system is also illustrative. According to that precedent, an appellant's claim remains pending "where VA has failed to procedurally comply with statutorily mandated requirements." *Tablazon*, 8 Vet.App. at 361; *see also Ingram v. Nicholson*, 21 Vet.App. 232, 241 (2007) (noting that a claim will remain pending where VA does not provide the claimant a copy of a decision or the decision omits notice of the claimant's appellate rights). Although the Board had jurisdiction to hear this appeal, its jurisdictional authority calls for decisions to be based on the "entire record in the proceeding and upon consideration of all evidence and material of record[,]" 38 U.S.C. § 7104(a), which includes favorable findings made by the AOJ,

38 C.F.R. § 3.104(c). Thus, to the extent the February 2012 claim remained pending due to prejudicial error in the January 2019 AOJ notice letter that affected the essential fairness of the adjudication, deprived Appellant of the right to be fully informed and/or deprived him of a meaningful opportunity to participate, the Board was required to address that error and ensure that it was corrected before adjudicating any portion of the claim on appeal.

Although the Court typically does not disturb favorable findings of fact by the Board, *see Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (citing 38 U.S.C. § 7261)), if the Court determines that the January 2019 notice letter was inadequate and resulted in prejudice, the entirety of the Board's decision would be tainted because the essential fairness of the adjudication would have been affected. There is no way of divvying up one portion of the Board decision as tainted by unfairness, and the other as not. Appellant apparently believes that he was prejudiced by his appeal proceeding through Board review, and, if he is correct, then his case must be restored to its status prior to Board review. Thus, if prejudice is found, the Court should order the Board, and VA, to vacate the separate compensable ratings for extension and instability, granted in the May 2020 decision.

However, as discussed next, the Court should not vacate the Board decision, which would *actually* detriment the Appellant, because there was no prejudice stemming from the January 2019 AOJ notice letter. To the contrary, Appellant's election to proceed with the Board review lane was undeniably

meaningful as he received additional staged disability ratings, a higher combined disability rating, and increased disability compensation for his right knee disability as a result. Furthermore, Appellant has maintained, and continues to maintain, the ability to file a supplemental claim throughout the appellate process, including while this action is pending before this Court. Therefore, even if the Court finds that January 2019 AOJ notice letter contained error, as discussed below, it should find that error harmless.

4. After appealing to the Board, Appellant could have filed, and may still file, a supplemental claim, and thus, any error in the January 2019 notice letter was harmless.

Appellant had and continues to have many options that (1) preserve the effective date of his increased rating claim[2] by filing a supplemental claim and (2) offer recourse at the AOJ level and preserve routes to the Board and the Court. After appealing to the Board, Appellant could have withdrawn his NOD and filed a supplemental claim within one year of the AOJ decision or for good cause shown, which would have preserved the effective date of a future award. 38 C.F.R. §§ 3.2500(e), 20.205(c). In addition, Appellant could have filed a supplemental claim within one year after the May 2020 Board decision and preserved the effective date of his increased rating claim. § 3.2500(c)(3). And Appellant can still

[2] This appeal stems from Appellant's increased rating claim for his right knee disability received by VA on February 28, 2012. R. at 6033. The Board also remanded the claim of entitlement to service connection for right ear hearing loss, which is not a final decision reviewable by this Court. R. at 5; *see* 38 U.S.C. §§ 7252(a), 7266(a); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

file a supplemental claim now with the effective date preserved through his notice of appeal with this Court. *See Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1144-45 (Fed. Cir. 2021) (invalidating the last sentence of section 3.2500(b) and holding that "[38 U.S.C.] § 5104C's statutory text unambiguously permits filing a supplemental claim during the pendency of an appeal before a federal court"). Lastly, Appellant can establish continuous pursuit by filing a supplemental claim within one year of the Court's decision in this appeal, regardless of the outcome. § 3.2500(c)(4).

These options affect a prejudice determination for several reasons. In assessing whether an error is harmless, the Court can consult the full agency record, including facts and determinations that could support a ground for affirming the Board decision. *Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021); *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) ("The [prejudicial error] statute does not limit the Veterans Court's inquiry to the facts as found by the Board, but rather requires the Veterans Court to 'review the record of the proceedings before the Secretary and the Board' in determining whether a VA error is prejudicial" (quoting 38 U.S.C. § 7261(b)(2))); *see* R. at 21-22 (1-26) (rejecting Appellant's contention that the January 2019 notice letter prejudiced him). Indeed, the Court has broad discretion to determine whether any error is harmless. *Shinseki v. Sanders*, 556 U.S. 396, 411-12 (2009); *Simmons v. Wilkie*, 30 Vet.App. 267, 284 (2018).

The fact that Appellant had, and still has, the option to file a supplemental claim presents several factors that weigh in favor of affirming the Board's finding that the January 2019 notice letter and accompanying attachments, contained no error, let alone error that was prejudicial. *See* R. at 21-22 (1-26). First, Appellant conceded that he was provided adequate notice of the November 2018 AOJ decision when he responded, "of course it's provided in the attached documents," to the Court's question as to whether adequate notice can be provided in the documents attached to the notice letter. Oral Argument Tr. at 10:27-10:40. This refutes his contention that he "was not able to take advantage" of the supplemental claim route due to the allegedly inadequate AOJ notice. Second, as discussed above, Appellant had numerous opportunities to file a supplemental claim at every stage of the adjudication process, and he may still file such a claim even before this Court issues a decision in this appeal. Thus, the supplemental claim route is still available to him, and an effective date associated with his increased rating claim remains available to him. In sum, he is not harmed in any way by his purported inability to "take advantage" of the supplemental claim avenue back in 2018 or 2019 because he can still take advantage of that route, with effective date preserved, *today*.

Moreover, the record does not support his contention that the alleged deficiencies in the January 2019 notice letter prevented him from meaningful participation in the adjudication of his claim. Appellant's continuous prosecution of his 2012 increased rating claim demonstrates that, despite VA's separate

attachment of the notice of appellate rights with corresponding decisions, he has not been hindered in his ability to meaningfully understand or participate in the appellate process thus far. *See Overton,* 20 Vet.App. at 435. Further, the options available to him in the AMA, to file a supplemental claim either while this appeal is pending with the Court or within one year of the Court's decision, ensure that he will continue to be able to meaningfully participate in the adjudication of his claim. In addition, Appellant's election to proceed with the Board review lane was undeniably meaningful as he received additional staged disability ratings, a higher combined disability rating, and increased disability compensation for his right knee disability as a result. Thus, his generalized contention of harm fails to establish more than a theoretical harm. *See Simmons*, 30 Vet.App. at 283 (finding that the Board's failure to ensure that an AOJ afforded the claimant the benefit of certain statutory presumptions which relieved him of providing evidence on one element out of several required for success did not have the natural effect of preventing meaningful participation in the VA decision-making process); *Vazquez-Flores v. Shinseki*, 24 Vet.App. 94, 105-07 (2010) (explaining that VA's lack of notice or defective notice to a veteran of evidence necessary to substantiate a claim would have a natural prejudicial effect, but would not prevent veterans from participating in the adjudication of their claims); *Bowen v. Shinseki*, 25 Vet.App 250, 253-54 (2012) (finding no prejudicial error where the veteran was not provided with a hearing at the AOJ level because the veteran was provided an opportunity for a hearing before the Board); *Cf. MVA*, 7 F.4th at 1122 (citing *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 566-67 (1992) (explaining that "pure speculation and fantasy" or an "ingenious academic exercise in the conceivable" is insufficient to establish injury for standing)); *Smith v. Phillips*, 455 U.S. 209, 217-21 (1982) (noting that due process does not require a new trial every time a juror is placed in a compromising situation if the facts demonstrated that the juror's conduct did not affect their impartiality).

Lastly, Appellant's AMA NOD shows that he was aware of the favorable findings contained in the January 2019 AOJ notice letter and enclosures,[3] including the AOJ's new assignment of a separate non-compensable rating for limitation of extension, despite the AOJ's recharacterization of the right knee disability. *Compare* R. at 57 (56-69) (seeking separate ratings for several conditions that did not already have separate ratings, except for limitation of extension, which was awarded by the AOJ in the January 2019 notice letter and enclosed November 2018 rating decision), *and* R. at 58-59 (56-69) ("[Appellant] disagrees with the Higher-level review decision which decided that Appellant was entitled to an evaluation [for] plica syndrome, right knee with instability, which is evaluated as … [zero] percent disabling from April 12, 2017[,] through February 19, 2018"), *with* R. at 835 (831-37) (November 2018 AOJ rating decision showing the AOJ assigned a non-compensable rating for limitation of flexion from April 12, 2017, through February 19, 2018). Appellant's AMA NOD also demonstrates that he reasonably

[3] This is consistent with his admission that he was provided adequate notice through the November 2018 AOJ decision. Oral Argument Tr. at 10:27-10:40.

understood that, beginning February 20, 2018, the AOJ combined all of his separately rated conditions into one single rating rather than continued to rate them separately. *Compare* R. at 66 (56-69) (asserting that the AOJ improperly combined his conditions and arguing that he was entitled to ***specific*** separate ratings for ankylosis, instability, recurrent pain, and limitation of flexion of the right knee to 45 degrees), *with* R. at 834-35 (831-37) (November 2018 rating decision showing the AOJ assigned a combined 50% rating due to a combination of symptoms, including ankylosis, moderate instability, painful motion of the knee, and limitation of flexion from 31 to 45 degrees). Lastly, Appellant's suggestions for how to rephrase the favorable findings listed in the November 2018 rating decision demonstrate that he reasonably understood the evidence those findings were based on and the diagnostic codes or criteria which they addressed. *Compare* R. at 63 (56-69) (stating that the AOJ's identification of findings favorable to claimant were not findings of fact, but rather descriptions of evidence relied upon by VA), *and* R. at 64-65 (56-69) (providing suggestions for how to break up the favorable findings in a manner which, unsurprisingly, would lead to increased compensation either through higher ratings or separate ratings for his right knee disability), *with* R. at 835 (831-37) (listing the favorable findings of the November 2018 rating decision). Altogether, the relevant procedural history shows that Appellant has maintained a keen understanding of the relevant law, facts, and procedures applicable to his case and was sufficiently informed of the AOJ's findings such that he could have filed a request for higher level review or a

supplemental claim, but instead chose to appeal to the Board. Because Appellant benefited from his AMA Board review election and still has the option to file a supplemental claim, he cannot show that any potential deficiency in the January 2019 notice letter affected the essential fairness of the adjudication.

WHEREFORE, the Secretary responds to the Court's March 2, 2022, order requesting responses to the foregoing questions.

Respectfully submitted,

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Amanda M. Haddock
AMANDA M. HADDOCK
Deputy Chief Counsel

/s/ Alex L. Kutrolli
ALEX L. KUTROLLI
Senior Appellate Attorney
Office of General Counsel (027N)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6863

Counsel for Appellee,
Secretary for Veterans Affairs