REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

21-3239

AARON N. ADAMS,
SON OF U.S. ARMY VETERAN JOHNNY R. ADAMS,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

1. **Aaron N. Adams' (ANA) notice under 38 U.S.C. § 3512(a)(3) is defective as it failed to inform him as to the proper dates of eligibility. The eligible dates for Dependents' Educational Assistance (DEA) are tied to the date of notification of the decision finding total disability for the Veteran. Johnny R. Adams' (JRA) notice of total disability was defective, making the eligible dates on ANA's DEA notification incorrect and notice defective.**

The Secretary has asserted that the facts in this case are "undisputed." Appellee's Brief at 8. Those undisputed facts are that on January 29, 2019, the Department of Veterans Affairs (VA) issued a notification for an August 23, 2018 Rating Decision (RD) that granted a total rating for JRA. [R. at 2230-2241 (January 29, 2019, VA Notification & August 23, 2018, Rating Decision)]. The January 29, 2019 notification contained the incorrect address for JRA's representative. [R. at 2232] ("3109 W Dr Martin Luther King Blvd"); [R. at 2735 (December 9, 2016, Change of Address of Notification)] (updating the representatives address to "5325 Primrose Lake Circle"). The January 29, 2019 notification was returned as undeliverable. [R. at 2190-2211 (Undeliverable Mail)]. The record does not contain any redelivery attempt to JRA's representative. In March 2019, the VA then informed ANA that his eligibility dates for DEA were between August 19, 2010, the effective date of the total rating, and January 29, 2019, the notification of the RD awarding a total rating. [R. at 41 (41-45, March 27, 2019, Certificate of Eligibility)].

Based on these undisputed facts, ANA argued that his March 2019 notification for DEA was defective as it failed to contain the proper eligibility dates as required by 38 U.S.C. § 3512(a)(3), which allows for eligibility from the effective date of the total award through the date of notification of the total rating award. *See* 38 U.S.C. § 3512(d). Under

v 1 the "VA must provide written notice to certain eligible children…. The written notice must identify the beginning dates the child may choose from…." Because the eligible beginning dates are linked to the notification of the total disability finding to the veteran, ANA argued that the defective notice to JRA has prejudiced him by making his notice defective as it failed to contain the correct beginning dates. More concisely, because the January 2019 notification finding a total rating was defective and the eligibility dates are predicated on the date of adequate notice of the total rating, ANA has not received adequate notice of the proper eligibility dates.

The Secretary does not dispute that the notice of the total disability rating was not adequately provided to JRA's agency representative. Instead, the Secretary takes issue with the cases cited by ANA. *See* Appellee's Brief at 12-14; see Appellant's Brief at 6-7 (citing *Romero v. Tran*, 33 Vet. App. 252 (2021), and *Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015)). Specifically, the Secretary asserts that "unlike here, those cases involved circumstances where statutory and regulatory provisions required that notice be sent to the claimant and his or her representative and any failure to cure such notice defects affected the provision of benefits to that claimant." Appellee's Brief at 12.

Due to the interplay of the multiple regulations and statutes involved, addressing every misunderstanding/misinterpretation of the Secretary's arguments would only muddy the issue. Thus, Appellant will focus on the Secretary's general argument. 38 U.S.C. § 5104 provides that "[i]n the case of a decision by the Secretary… affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision." 38 C.F.R. § 3.103(b)(1) similarly

entitles "[c]laimants and their representative are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief." The Secretary does not cite to, nor is the undersigned aware of, a decision by this Court that notice to the claimant alone is sufficient notice under the statutes or regulations. To the contrary, this Court and Federal Circuit have held that absent notice to the claimant's representative the notice to the claimant is deficient. *See Romero*, 33 Vet. App. 252, and *Carter*, 794 F.3d 1342.

Next, the Secretary poses the critical question whether ANA can raise the defective notice to JRA and, if so, whether the error is prejudicial as to ANA's claim. *See* Appellee's Brief at 14-15. The Secretary ignores that ANA is only raising JRA's notice defect tangentially as it relates to ANA's defective notice. ANA is asserting his right as to defective notice in his March 2019 letter that notified him that he could pick an eligibility date between August 19, 2010, and January 29, 2019. [R. at 41]. For the March 2019 letter to be adequate it must "includ[e] a statement of the deadline for the election imposed under this subparagraph … and … that beginning date." 38 U.S.C. § 3512(a)(3)(B)-(C). That beginning date is "the effective date of the rating or date of notification to the person from whom eligibility is derived establishing a service-connected total disability permanent in nature whichever is more advantageous to the eligible person." 38 U.S.C. § 3512(a)(3)(C)(i), (d). As the Secretary's brief concedes by omission, the January 2019 notification of the RD that found total disability was defective as it was not properly addressed to JRA's agency representative, and the record contains no cure of that defective notice. The eligibility dates required in the March 2019 notification is predicated on the "date of notification to the person from whom eligibility is derived establishing a service-

connected total disability." 38 U.S.C. § 3512(d). Thus, an adequate notice under 38 U.S.C. § 3512(a)(3)(C)(i) was required to contain the date of the cured/adequate "to the person from whom eligibility is derived." *See Carter*, 794 F.3d at 1346 ("[A] 'cure' of the notice defect must mean some source providing notification of the same opportunity a correct notice would have provided."). In sum, ANA's argument is, and has been, that his March 2019 letter is defective as it failed to contain the proper eligibility dates and, instead, contained an incorrect date derived from the January 2019 defective notification letter to JRA. Appellant's Brief at 6-7.

Lastly, the defective/uncured notice in the March 2019 letter is prejudicial to ANA as it goes directly to ANA's eligibility dates. That is, it affects his ability to choose an effective date as he was not properly informed as to the correct dates from which he could choose. *See Simmons v. Wilkie*, 30 Vet. App. 267, 279 (Vet. App. 2018) ("prejudice … can be shown by demonstrating that the error … affected or could have affected the outcome of the determination.") *affd*., 964 F.3d 1381 (Fed. Cir. 2020). Further, if the notice is defective and the clock did not start to run on the 60-days, then ANA would still be eligible to choose a date, in which case he would elect August 19, 2010. Thus, the error in this case has affected ANA's ability to participate in the adjudicatory process by misinforming him as to the eligible dates. *See Carter*, 794 F.3d at 1347 ("[W]e have no basis for finding harmlessness of the notice error.").

In sum, ANA's March 2019 letter was defective notice as it did not include the correct eligibility dates based on the "date of [adequate] notification to the person from whom eligibility is derived establishing a service-connected total disability permanent in

nature whichever is more advantageous to the eligible person." 38 U.S.C. § 3512(d). Accordingly, the case must be remanded for the VA to provide proper notice to ANA that identifying the correct eligibility dates.

2. The Board was required to consider whether ANA's August 27, 2019, correspondence was an amendment that related back to his initial submission.

In April 2019, ANA responded to the March 2019 letter indicating that he was choosing a date outside the range of eligible dates listed in the March 2019 letter. [R. at 47 (April 26, 2019, Response)]. On May 24, 2019, the VA informed ANA that he picked an ineligible date and that he had three days to submit an eligible date between August 19, 2010, and January 29, 2019. [R. at 30 (30-31, May 24, 2019, VA Letter)]. In August 2019, he attempted to correct the chosen date to August 19, 2010, the earliest possible election date. [R. at 102 (August 27, 2019, Report of Contact)].

In his brief, ANA argued that the Board was required to consider whether his August 2019 correction was a valid amendment under the Supreme Court's pro-amendment framework. *See* Appellant's Brief at 8-10. ANA noted that there is no regulation on amendments and that "even in situations where no particular procedural process is required by statute or regulation, the principle of fair process may nonetheless require additional process if it is implicitly required when 'viewed against [the] underlying concepts of procedural regularity and basic fair process.'" *Id.* at 8 (quoting *Smith v. Wilkie*, 32 Vet. App. 332, 337 (2020)). ANA largely relied on *Demery v. Wilkie*, which found that non-jurisdictional requirements may be subject to amendment:

> [W]e have more flexibility to forgive late filings through doctrines such as equitable tolling than we would if we had more significant jurisdictional constraints. The amendment and its relation back fit comfortably with the Supreme Court's understanding of the nature of jurisdiction.

30 Vet. App. 430, 443-44 (2019).

The Secretary has presented two arguments: (1) that amendments are not allowed because Congress has spoken directly on the 60-day time limit in 38 U.S.C. § 3512, and (2) that the May 24, 2019 letter was not an acknowledgment that the VA would accept an amendment. Appellee's Brief at 18.

The Secretary asserts that because Congress set the 60-day time limit for responding that this case differs from *Demery*. Appellees' Brief at 18 ("[H]ere Congress explicitly stated that… if he or she does not elect such a date within 60 days of VA's written notice, the period of eligibility beginning date will be the date of VA's decision that the veteran has a permanent and total disability."). This argument is truly perplexing. Is the Secretary asserting that the 120-day appeal deadline for this Court, which was the subject of *Demery*, was not prescribed by Congress in 38 U.S.C. § 7266? Giving the Secretary's argument the most liberal interpretation, the Secretary may be asserting that, as opposed to the non-jurisdictional time limit prescribed in 38 U.S.C. § 7266, that the time limit set in 38 U.S.C. § 3512(a)(3)(B) is jurisdictional. In that regard, "jurisdictional" has been recognized by this Court as prescriptions delineating personal jurisdiction and subject-matter jurisdiction. *See Percy v. Shinseki*, 23 Vet. App. 37, 46 (2009) ("[T]his Court holds that section 7105(d)(3) clearly does not delineate the Board's subject-matter or personal jurisdiction…."); *see also Hall v. McDonough*, 34 Vet. App. 329, 331-32 (2021). Thus, the

Secretary's argument turns on whether the time limit set in 38 U.S.C. § 3512(a)(3)(B), unlike § 7105(d)(3) (2009) and § 7266, is jurisdictional. Similar to § 7266 which indicates that the claimant "shall" file the appeal within 120 days, the 60 day requirement under § 3512 is not jurisdictional as it goes to neither subject-matter jurisdiction nor personal jurisdictional:

> Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claims-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 445 (2004).

The Secretary also asserts that the May 24, 2019, letter was not an indication that VA would allow an amendment. *See* Appellee's Brief at 18 (citing [R. at 30-31]). Fair process is viewed from the claimant's perspective. *See Smith v. Wilkie*, 32 Vet. App. 332, 339 (2020) (finding denial of fair process where the Board's prior decisions "reasonably lead MR. Smith to believe [the issue] was favorably settled"). In ANA's case, the VA issued a March 2019 letter indicating that he could not change his election once it was made. [R. at 48-49 (March 27, 2019, VA Letter)]. Through typographical error, ANA chose August 19, 2019, an invalid date. [R. at 47]. Despite initially telling ANA that he would not be able to amend his election, the VA then indicated in its May 24, 2019, letter that it would accept another election. [R. at 30]. This led ANA to reasonably believe that the VA would accept a new election despite initially indicating that he would not be able to change his election. Thus, the VA led ANA to believe that the VA was allowing an amendment in his case, and he relied on that to his detriment as he tried to correct his election. Even if the

May 24, 2019, letter was not an invitation to amend his initial election, it does little in the Board's duty to address whether his August 2019 amendment was a valid amendment under the Supreme Court's pro-amendment framework.

Thus, remand is necessary for the Board to address whether the August 2019 amendment was a valid amendment and, if so, whether it relates back to the April 2019 election.

CONCLUSION

WHEREFORE, for the reasons outlined in Appellant's Brief and this Reply Brief, Mr. Aaron N. Adams respectfully requests that this honorable Court vacate the Board's April 12, 2021, decision that denied an effective date prior to August 23, 2018, for DEA compensation, and to remand those claims for adjudication consistent with Appellant's Brief and Reply Brief.

Respectfully Submitted,

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