

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-5454

ROGER W. WIKER,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

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

ORDER

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

On August 17, 2021, Navy veteran Roger W. Wiker, through counsel, appealed a July 1, 2021, Board of Veterans' Appeals decision denying service connection before April 12, 2007, for left eye blindness. Mr. Wiker seeks an earlier effective date based on a December 1964 claim for bilateral cataracts, which was denied in a January 1965 regional office (RO) decision. He asserts that the January 1965 denial never became final because he was not adequately notified of the decision according to VA regulations then in effect.

On December 16, 2022, the case was submitted to a panel of the Court. Oral argument is scheduled for March 16, 2023.

In their briefs, both parties cite VA notice regulations that were effective in 1965, 38 C.F.R. § 3.103(a) and 38 C.F.R. § 19.109(a).¹ See 38 C.F.R. § 3.103(a) (1964); 29 Fed. Reg. 1464, 1465 (Jan. 29, 1964) (to be codified at 38 C.F.R. § 19.109(a)). Under § 3.103(a),

The claimant will be notified of any decision authorizing the payment of benefit or disallowance of a claim. Notice will include the reason for the decision, the claimant's right to initiate an appeal by filing a notice of disagreement and the time limits within which such notice may be filed.

38 C.F.R. § 3.103(a). Similarly, § 19.109(a) provides, "The claimant and his representative, if any, will be informed of the right to initiate an appeal by the filing of a notice of disagreement in writing, and the time limit within which such notice must be filed." 29 Fed. Reg. 1464, 1465 (Jan. 29, 1964) (to be codified at 38 C.F.R. § 19.109(a)).

¹ This regulatory provision became effective in January 1964 but was not included in the Code of Federal Regulations until after the RO denied Mr. Wiker's December 1964 claim. For simplicity, however, the Court will refer to the Code of Federal Regulations citation.

But neither party has addressed the potential applicability of 38 C.F.R. § 19.110,² which provides as follows:

While it is contemplated that the agency of original jurisdiction will give proper notice of the right to appeal and the time limit, failure to notify the claimant of his right to such appellate review or of the time limit applicable to a notice of disagreement or substantive appeal will not extend the applicable period for taking this action.

29 Fed. Reg. 1464, 1465 (Jan. 29, 1964) (to be codified at 38 C.F.R. § 19.110).

To aid the Court in its resolution of this matter, counsel for each party should be prepared to discuss the impact, if any, of § 19.110.

Upon consideration of the foregoing, it is

ORDERED that counsel be prepared to discuss the above issues at oral argument, in addition to all other issues presented by this appeal.

DATED: February 23, 2023

PER CURIAM.

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

² This provision was enacted at the same time as § 19.109(a). Again, for simplicity, the Court will refer to the Code of Federal Regulations citation.