THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEWIS BROWN, **Appellant,** **v.** **DENIS R. MCDONOUGH,** **Secretary of Veterans Affairs,** **Appellee.**	**VET. APP. NO. 21-3218**

SUPPLEMENTAL MEMORANDUM OF LAW

Pursuant to this Court's June 2, 2023, order, Mr. Brown submits the following memorandum of law. The Court presented four questions; and Mr. Brown responds in turn.

1. Is the August 19, 2019, rating decision a "pure" implementation of the Board's August 13, 2019, decision?

No, the August 2019 AOJ decision is not a "pure" implementation of the Board's decision because the "pure" implementation referenced in *Encarnacion* is an extinct product of the legacy system. The August 2019 AOJ decision provided Mr. Brown with 38 U.S.C. § 5104 notice and the AOJ's interpretation of the Secretary's 38 U.S.C. § 511 decision made by the Board member. This notice requires the VA to provide his appellate options, and the other specific information outlined in the statute. "Pure" implementation in the legacy makes sense because in the legacy § 5104 compliant notice was provided by the Board. But in the AMA, a purely implementing decision no longer

exists because otherwise the claimant would never receive the § 5104 notice Congress guaranteed him when the Board makes the § 511 decision of the Secretary.

In fact, Mr. Brown argues that an AOJ decision that interprets a Board decision is not an implementation at all. Rather it is a decision by the AOJ that interprets the Board's decision, and provides notice of the Secretary's decision under 38 U.S.C. § 5104(a) and (b). Because the AOJ's decision must interpret what the Board did, and supply the § 5104 compliant notice, it may contain errors that are fixable by the HLR. By reading the AMA to prohibit HLR review of this type of decision, the Court would also prohibit use of a powerful tool (the HLR) to ensure compliant notice so that he can adequately respond.

The Court has previously defined a "pure" implementation of a Board decision in *Encarnacion v. McDonough*, No. 21-1411 2023 WL 3553061 (Vet. App. May 18, 2023) as one that "does nothing more than implement a grant of benefits already determined by another agency department." *See Encarnacion*, at 3. The Court emphasized that such a decision "is ministerial rather than adjudicative in nature," and "the pure implementation of a Board adjudication cannot be regarded as a decision 'affect[ing] the provision of benefits' under section 511(a) and so cannot be appealed to the Board, which has already rendered the Secretary's final determination on the matter. *Id*, at 3-4.

However, *Encarnacion* dealt with a legacy Board decision and legacy AOJ decisions. *Id*, at 2. (Noting the Board decision in question was issued in May 2018; and the AOJ implementing decision was issued in June 2018 before the February 2019

effective date of the AMA); *see also* 38 C.F.R. § 3.2400. In this case, both the Board decision and the AOJ decision were issued in AMA. Mr. Brown opted into the AMA in September, 2018. R. at 1529. The Board's decision specifically noted it was issued under the AMA. R. at 1460. And of course, the AOJ decision was also in the AMA.

This is an important distinction because the AMA upended how VA processes and adjudicates claims. The notice requirements, in particular, underwent a dramatic change. Both prior to the AMA and within the AMA Congress directed that notice be provided "of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant." 38 U.S.C. § 5104(a). However, the content of that notice under § 5104(b) and the source of that notice changed with the AMA.

Legacy notice was only required to include, and only if the benefit sought was denied, "(1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary." 38 U.S.C. § 5104(b) (2018). However, in the AMA, the notice must now also include

> (1) Identification of the issues adjudicated.
> (2) A summary of the evidence considered by the Secretary.
> (3) A summary of the applicable laws and regulations.
> (4) Identification of findings favorable to the claimant.
> (5) In the case of a denial, identification of elements not satisfied leading to the denial.
> (6) An explanation of how to obtain or access evidence used in making the decision.
> (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

38 U.S.C. § 5104(b) (2019)[1]. We highlight that the new notice must include an identification of the precise issues adjudicated, a summary of the applicable laws and regulations, findings favorable to the claimant, and elements not satisfied in a denial.

Furthermore, as this Court recently reminds us, "under the system in place before the AMA, both this Court and the Federal Circuit understood section 5104(a)'s requirement that notice be provided upon issuance of 'a decision by the Secretary under section 511(a)' to apply to the Board." *See Greer v. McDonough*, No. 20-3047, 2023 WL 3946967, at 3 (Vet. App. June 12, 2023). Thus, prior to the AMA, the Board was required to provide notice of the Secretary's decision that complied with the limited information mandated in legacy § 5104(b).

However that all changed with the modernization and improvement of the claims adjudication system. Under the AMA, the new and improved system enhances the information required to be included in the notice. This modern and improved notice is intended to provide sufficient information so that claimants may choose from the many different options available to them in response to any § 511 decision by the Secretary – whether supplied by the AOJ or the Board. The overarching goal of the AMA is Congress' intent to do away with the legacy process, whose goal was to resolve appeals.

[1] Congress again amended § 5104 in 2022. *See* Honoring Our PACT Act of 2022, Pub. Law. 117-168 (Aug. 10, 2022). This amendment added subsections (c) and (d) that are not pertinent to this appeal. However, as discussed more below, this amendment included important information concerning the which part of VA is required to provide § 5104(b) notice.

The modernized and improved system, on the other hand, creates a process that shifts from appeal resolution to obtaining readjudication after each decision. This is best observed by 38 U.S.C. § 5110(a)(2)'s explanation of a continuously pursued claim. This statute, like 38 U.S.C. § 5104C, recognizes that a claimant "continuously pursue[s] [a claim] by filing any of the following, either alone or in succession." The statute then lists supplemental claim, higher level review, and NOD as capable of being filed in succession. 38 U.S.C. § 5110(a)(2).

More importantly, this Court explained the changes made by the AMA "w[ere] intended to 'help veterans better understand VA's decisions on their claims' and 'to help better inform the veteran's decision regarding whether to appeal VA's rating decision.'" *See Greer*, at 3; quoting H.R. Rep. No. 115-135, at 3 (2017). Congress intent with the AMA – to provide better notice to guide claimants – is thwarted if the § 5104 notice is not provided. Left unsaid in *Greer* is that § 5104 notice's primary purpose is to inform the claimant with respect to the elements already established and the elements missing from his claim so that he can appropriately respond. At some point a supplemental claim, with new and relevant evidence, will be necessary particularly after a decision by the Board or this Court.

But in order to obtain readjudication under 38 U.S.C. § 5108, a claimant must first receive § 5104 compliant notice. Otherwise, he is left in the dark, with his eyes closed, to guess what evidence is new or relevant. Or, to adequately appeal to the Board, Congress intended that the claimant should not have to challenge established

elements, namely the favorable findings of fact and law identified in the § 5104 notice. In fact, 38 U.S.C. § 5104A provides that these findings are binding, unless rebutted. But the only favorable findings that bind the VA are those contained in the § 5104(b) notice.

Per *Greer* the Board's decision does not include these favorable findings, and so even if the Board made any, the claimant will never be able to take advantage of the protections of § 5104A unless the AOJ's decision interpretating the Board decision tells the claimant what those favorable findings are. Mr. Brown submits that the intent of Congress, in modernizing and improving the claims processing system, could not have intended that favorable findings by the Board are not binding in the same way as AOJ findings are binding.

Importantly, Congress intends that for each and every decision by the Secretary, whether made by the AOJ, or the Board, this notice is mandatory. Now this Court, relying on a rule of construction found in the 2002 PACT Act, held the Board is not required to supply this notice. *See Greer*, at 5. (Holding "the rule of construction set forth in the PACT Act precludes the application of section 5104 to Board decisions in the modernized system"). However, the notice must still reach the claimant because Congress said so. Also without this notice, the purpose of the AMA, to "help veterans better understand VA's decisions on their claims" and "to help better inform the veteran's decision regarding whether to appeal VA's rating decision" is stymied, if not entirely impossible.

Congress has directed that every single § 511 decision **by the Secretary** must include certain information so that claimants can choose whether and how they what to continuously pursue these decisions. Furthermore, § 7104(a) is explicit that the Board's decision is the "[f]inal decision[…]" of the § 511 decision by the Secretary. 38 U.S.C. § 7104(a). What this means is that when the Board issues a decision, it is in fact issuing "a decision by the Secretary under a law that affects the provision of benefits by the Secretary …." 38 U.S.C. § 511(a). And because the Board's decision is a § 511 decision, that decision must include the specific notice outlined in § 5104(b).

Greer held § 5104 does not apply to the Board, so this notice must come from someone within the VA. The logical extension of this is that the AOJ's decision that implements the Board's decision is the only vehicle with which to provide the § 5104 notice. The AOJ does this by interpreting the Board's decision into § 5104 compliant notice. Mr. Brown submits that at the very minimum, a claimant can seek HLR to obtain § 5104 complaint notice that tells him, at a minimum, the favorable findings made by the Board in its § 511 decision, and the elements not met. Until he receives this notice, Congress' intent is not realized and no improvement has been provided. It is not an improvement to reduce the rights of a claimant with respect to a Board decision.

These elements in particular are vital to allow a claimant to submit his supplemental claim with new and relevant evidence. Section 5104A binds all future VA adjudicators[2] to these favorable findings, and allows both the VA and the claimant to

[2] The Board is likewise bound by these favorable findings. 38 C.F.R. § 20.801(a). However, this regulation also speaks about "favorable findings" but only binds the Board

focus their efforts on the "elements not satisfied." To reiterate, a claimant is not prohibited from responding, but the Congressional intent to modernize and improve the claims process should be understood to require this notice in all decisions from the Secretary. And when that decision is a Board decision, the AOJ is required to provide that notice in its interpretation of the decision. *See Greer, supra*.

This reading is also supported by the adjacent statues. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. U.S.*, 516 U.S. 137, 145 (1995); citing *Brown v. Gardner*, 513 U.S. 115 (1994). Section 5104 and § 20.801(a), as we pointed out, bind all future AOJ and Board adjudicators to favorable findings identified in the § 5104(b) notice. Section 5104B provides for the absolute right to higher level review of "the decision of the agency of original jurisdiction."

Next, and perhaps most importantly, § 5104C allows for a higher level review, the filing of a supplemental claim, or the filing of a NOD within one year after the AOJ decision. *See* 38 U.S.C. § 5104C(a)(1). This statute specifically says "[n]othing in this subsection shall prohibit a claimant from taking any of the actions set forth in paragraph (1) in succession with respect to a claim or an issue contained within the claim." 38 U.S.C. § 5104C(a)(2)(B). As mentioned above, § 5110(a)(2) also recognizes the right of

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to prior findings in Board decisions. It does not bind the AOJ to favorable findings in prior Board decision. At any rate, because § 5104 does not apply to Board decisions, one has no way of identifying a favorable finding. Thus our argument here that the AOJ decision is an interpretation of the Board's decision, and provides that statutory compliant notice.

the claimant to continuously pursue a claim by filing "either alone or in succession" the supplemental claim, HLR, or NOD.

Taking into account the statutory scheme, the plain meaning of the statutes, the Congressional intent of the AMA to "help veterans better understand VA's decisions on their claims" and "to help better inform the veteran's decision regarding whether to appeal VA's rating decision", and Congress' intent to modernize and improve the claims system in the Appeals Modernization and Improvement Act, it is clear that the AOJ no longer "purely" implements a § 511 decision of the Secretary issued by the Board.

Greer is binding, and makes clear that the Board does not provide § 5104 notice; but the law is equally clear that "a decision by the Secretary under section 511" shall include the specific notice outlined in § 5104, to include the specific elements in § 5104(b). This requires the AOJ to do more than simply perform a purely "ministerial" act of effectuating the Board's decision. Instead, the AOJ now owes a statutory obligation to provide § 5104 compliant notice. As *Greer* pointed out "[p]rior to the AMA, there was no requirement that AOJs provide with their decisions anything like the sort of detailed explanations required by that legislation. The new 5104(b) provisions sought to cure potential confusion caused by a barebones rating decision." *See Greer*, at 5. This new notice cannot "cure potential confusion" if it is not given.

August 2019 notice. The Court asked the parties to discuss the August 2019 notice actually provided. Mr. Brown begins by asserting the Court must look, not to the words used by the AOJ, but to what the law actually requires. But even those

words used by the AOJ are conflicting and so should not in any way sway the Court's review. The AOJ included a recitation of the Board decision and told Mr. Brown it was "implement[ing]" the Board's decision. R. at 84 (84-86). However, as discussed above, Mr. Brown was still owed § 5104 compliant notice of the Secretary's § 511 decision made by the Board member. In fact, the notification letter told Mr. Brown it was providing "information you should know … now that **VA has made a decision about your benefits**." R. at 76 (76-81). (Emphasis added). This is properly read to mean that the AOJ was providing notice of the decision. The AOJ provided § 5104 notice (R. at 76-81) and the Secretary's decision (R. at 84-86).

The notice goes on to tell Mr. Brown "What You Should Do If You Disagree **With This Decision**." *Id.* (Emphasis added). The notice then tells him that he can appeal the Board's decision to this Court "if you are not satisfied with the decision of the Board of Veterans' Appeals." *Id.* What the notice does not do is tell Mr. Brown how he can seek review of "This Decision" and so contains defective notice. The notice differentiates between "This Decision" by the AOJ and the Board's decision. But the notice does not provide any other appellate rights.

The AOJ's notice is at best, confusing, but at worst completely wrong. To reiterate, the AOJ interpreted the Board's decision and was required to provide § 5104 compliant notice of the Secretary's § 511 decision made by the Board. The AOJ notice told Mr. Brown he could appeal the Board's decision; and indicates that "This Decision" from the AOJ was something different. And it is. *See supra*, at 1-7.

M21-5 provision. With respect to the M21-5, this also supports Mr. Brown's reading of the pertinent statutory scheme. The M21 acknowledges that there are "two types of actions" forwarded to the AOJ. One, a full grant, requires that the AOJ "implements the Board decision[;] decides any associated downstream issues, such as effective date and evaluation[;] inputs the award data[;] **notifies the appellant**[;] and releases any payment." *See* M21-5, Ch. 4, Sec. 5.a. (Emphasis added). The specific subsection identified by the Court states "[e]ach decision, whether rating or non-rating, **must include the notice requirements under AMA**." *Id*, at Sec. 5.f. (Emphasis added).

The remainder of the M21 simply points out the obvious, which is that appellate rights for Board decisions and AOJ decision are different. If also further confirms the unremarkable statement that when no decision is made by the AOJ, then "VBA made no decisions." *Id*. However, in nearly all cases the AOJ interprets the Board's decision and provides § 5104 compliant notice to the claimant. To the extent this M21 provision can be read to create or prohibit a substantive right, it is invalid because it is in direct conflict with the plain meaning of the statutory scheme, and is contrary to the intent of Congress to modernize and improve the system, and to provide § 5104 notice of each and every § 511 decision by the Secretary, whether made by a Board member(s) or the AOJ raters.

2. Is the September 3, 2020, correspondence from VA a decision of the Secretary under 38 U.S.C. § 511, 38 U.S.C. § 5104B, or any other authority?

Yes, the September 2020 AOJ decision is a decision under § 511. Section 511 states "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." The Federal Circuit held that a law that affects the provisions of benefits under § 511 is the "single statutory enactment that bears a Public Law number in the Statutes at Large." *See Bates v. Nicholson*, 398 F.3d 1355, 1361 (Fed. Cir. 2005). Here, Chapter 51 is a law affecting the provision of benefits as it was first implemented well before the AMA, and includes laws that tell VA when to begin paying veterans (38 U.S.C. § 5110); what notice to provide claimants (38 U.S.C. § 5104); and review options available to a claimant after receiving notice of an AOJ decision (38 U.S.C. § 5104C). Thus, the entirety of Chapter 51, as well as many of the other Chapters in Title 38, are laws affecting the provision of benefits under § 511.

Section 5104B guarantees a right to higher level review when requested when Congress said "[t]he Secretary shall approve each request for [HLR] review." Thus, when the AOJ rejected Mr. Brown's HLR request, it violated § 5104B. Furthermore, the AOJ told Mr. Brown VA "cannot process your request" and that "your claim has been closed." R. at 59. Although the notice is once again defective, the practical effect of the September 2020 decision was to deny Mr. Brown of his statutory right to a higher level review of the AOJ's 2019 decision.

3. Did the Board err in interpreting VA's policy that a claimant may not request a HLR of a Board decision involving the same issue as prohibiting an HLR of an *AOJ decision implementing* a Board decision?

Question 3(a) seems to be directed to the Secretary, but Mr. Brown understands VA policy to prohibit higher level review of a Board decision. However, this case does not present this specific issue because, again, Mr. Brown is not seeking HLR of the Board's decision. he is seeking HLR review of the AOJ's decision that interpreted the Board's decision in to §5104 compliant notice.

With respect to question 3(b), yes, the Board erred in its interpretation because Mr. Brown did not seek HLR of the Board's decision, he sought HLR review of the AOJ's August 2019 decision, and, at a minimum, he is entitled to ask that the HLR ensure § 5104 compliant notice. It is this aspect of the AOJ decision (and any other determinations of law and fact made by the AOJ) that § 5104B permits review of by the HLR. To reiterate, because the Board does not provide § 5104 compliant notice, and Congress guarantees that a claimant shall receive that notice, the AOJ is required to provide that notice.

Also, as argued extensively above, the 2019 AOJ decision in this case was not an implementing decision, rather it was § 5104 notice of the Secretary's § 511 decision made by a Board member. Implementing decisions, as described in *Encarnacion*, are products of the legacy system. To the contrary, because the Board cannot provide § 5104 compliant notice in the AMA, the AOJ must provide that notice whenever the

Board member makes a § 511 decision by the Secretary. Thus, the purely implementing decisions of the legacy era are no more, and so a claimant is entitled to ensure the notice provided by the AOJ is compliant.

4. Given Mr. Brown's appeal of the Board's August 2019 decision to the court, was the Board required to construe appellant's August 2022 HLR request as motion for the Board Chairman to reconsider the August 2019 Board decision?

No, Mr. Brown did not, and does not seek reconsideration of the August 2019 Board decision. As explained above, Mr. Brown did not challenge the Board's determinations to the higher level reviewer. Rather, he challenged the Secretary's decision made when the AOJ interpreted the Board's § 511 decision, and provided § 5104 notice of that decision to Mr. Brown. The two decisions are distinct is so far as they do different things.

Mr. Brown appealed the Board's determinations with respect to the claim itself to this Court. He requested HLR review of the AOJ's decision that provided defective notice to him of the Secretary's § 511 decision made by the Board member. Thus, he could not have sought reconsideration with his HLR form because he did not challenge what the Board did. He challenged what the AOJ did with its August 2019 notice.

Respectfully submitted this the 20th day of July, 2023.

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