

Date: December 2, 1994

O.G.C. Precedent 20-94

From: General Counsel (022)

Subj: Authority of Board of Veterans' Appeals to Proceed On  
Remand Orders from Court of Veterans Appeals in Cases  
Appealed to the Court of Appeals for the Federal Circuit

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

When and under what conditions may the Board of Veterans' Appeals decide issues in a claim following an appeal to the United States Court of Appeals for the Federal Circuit from a decision of the United States Court of Veterans Appeals affirming, or reversing or vacating in whole or in part and remanding, a decision of the Board?

COMMENTS:

1. This request for opinion followed an appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit) from a decision of the United States Court of Veterans Appeals (CVA) in *Lineberger v. Brown*, 5 Vet. App. 367 (1993), *appeal dismissed*, 29 F.3d 645 (Fed. Cir. 1994). In *Lineberger*, the CVA affirmed in part and vacated and remanded in part a decision of the Board of Veterans' Appeals (BVA). 5 Vet. App. at 370-71. The appellant filed a timely notice of appeal to the Federal Circuit. Subsequently, the appellant, apparently dissatisfied at not having received a decision from the BVA on the remanded issues, filed a "motion to compel" in the Federal Circuit asking that court to order the BVA to issue its decision on the remanded issues. In response to the appellant's motion to compel, the Federal Circuit, citing *Travelstead v. Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992), held that the only part of the CVA decision which was final and appealable was the part that affirmed the BVA decision. See *Lineberger v. Brown*, No. 94-7029, slip op. at 2 (Fed. Cir. Mar. 24, 1994) (order denying "motion to compel"). The Federal Circuit further held that the part of the case which was remanded by the CVA became separate from the part on appeal and that the Federal Circuit was without jurisdiction

to compel the BVA to issue a decision on claims remanded by the CVA to the BVA. *Id.*<sup>1</sup>

2. A notice of appeal to the Federal Circuit must be filed within 60 days of the date of entry of a CVA judgment. See 38 U.S.C. § 7292(a); Fed. R. App. P. 4(a)(1). If a notice of appeal is not filed within the time allowed, the decision of the CVA becomes final. 38 U.S.C. § 7291(a). The CVA issues its mandate 60 days after the date of entry of judgment, unless the time is shortened or extended by order or unless a timely notice of appeal is filed. Vet. App. R. 41(a). In cases in which a timely notice of appeal is filed, the Federal Circuit clerk enters judgment after receipt of the opinion of that court. Fed. R. App. P. 36. The Federal Circuit issues its mandate 21 days after the entry of judgment, unless the time is shortened or enlarged by order. Fed. R. App. P. 41(a). If no petition for writ of certiorari is filed with the Supreme Court, the CVA decision becomes final and the CVA issues its mandate after expiration of the 90-day period allowed for filing such a petition. 38 U.S.C. § 7291(a)(1); 28 U.S.C. § 2101(c); Vet. App. R. 41(a). Thus, where a notice of appeal is timely filed from a decision of the CVA, the CVA does not issue its mandate until after the mandate of the Federal Circuit is issued following entry of the judgment of that court on the appeal. In our view, as explained below, the issuance of the mandate by the CVA determines when the BVA should proceed to resolve the issues before it in a case which has been remanded to it by the CVA.

3. The filing of a timely notice of appeal is an event of jurisdictional significance. As a general rule, a timely notice of appeal divests the lower court of jurisdiction with respect to all matters involved in the appeal and transfers jurisdiction to the appellate court. See *Griggs*

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<sup>1</sup> The Federal Circuit later held that it did not have jurisdiction under the provisions of 38 U.S.C. § 7292 to review the affirmed part of the CVA decision because the appeal challenged only factual determinations of the CVA. *Lineberger v. Brown*, No. 94-7029, 1994 WL 258906, at \*2-3 (Fed. Cir. June 13, 1994).

*v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam); 9 James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 203.11 (2d ed. 1993). In *Cerullo v. Derwinski*, 1 Vet. App. 195, 196-98 (1991), the CVA concluded that filing of a timely notice of appeal to the CVA immediately divests the BVA of plenary jurisdiction over a claim and renders the BVA without jurisdiction to take further action with regard to the matter. See also *Breslow v. Derwinski*, 1 Vet. App. 359, 363 (1991) (Steinberg, J., concurring) (once jurisdiction attaches in the CVA, it can be divested only by the action of a superior tribunal or the CVA itself and cannot be divested by the action of a subordinate body such as the BVA). Although the cases cited in *Cerullo* involved transfer of jurisdiction from a lower court to an appellate court, the court found the principle equally applicable to the transfer of jurisdiction from an administrative agency to the CVA. See *Cerullo*, 1 Vet. App. at 197; cf. *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980) (the position of any administrative tribunal subject to direct judicial review is much akin to that of a United States district court).

4. The CVA in *Cerullo* did not indicate when jurisdiction over a matter returns to the BVA. Further, the transfer-of-jurisdiction doctrine is not statutory; it is a judicially-created doctrine designed to avoid the confusion and inefficiency of two courts considering the same issues simultaneously. *Jankovich v. Bowen*, 868 F.2d 867, 871 (6th Cir. 1989); *In re Thorp*, 655 F.2d at 998; 9 James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 203.11 (2d ed. 1993); see also *Cerullo*, 1 Vet. App. at 197. Accordingly, the scope and terms of its application must be defined by the courts. Other than *Cerullo*, the decisions of the Federal Circuit and the CVA have not provided specific guidance as to the doctrine's application in appeals of BVA decisions. See generally *Wick v. Brown*, No. 94-7017, 1994 WL 606059, at \*4 (Fed. Cir. Nov. 7, 1994) (stating in general terms that the CVA's judicial power over a case terminated after that court remanded the case to the BVA); *Breslow v. Brown*, 5 Vet. App. 560, 561 (1993) (noting only that, the judgment and mandate having issued, the case was no longer pending in the CVA).

However, the authorities addressing the general subject of the transfer of jurisdiction upon the filing of a notice of appeal suggest that, once jurisdiction passes to an appellate body, jurisdiction does not return to a lower tribunal until the appellate court has issued its mandate. *E.g.*, *In re Thorpe*, 655 F.2d 997 (9th Cir. 1981); 9 James W. Moore, et al., MOORE'S FEDERAL PRACTICE ¶ 203.11 (2d ed. 1993).

5. Black's Law Dictionary 962 (6th ed. 1990) defines "mandate" as the official mode of communicating the judgment of an appellate court to a lower court, directing action to be taken or disposition to be made of the case by the lower court. Thus, a mandate is not a judgment but a notification of a judgment.<sup>2</sup> The mandate of a court terminates the court's power in a proceeding unless the court intends and acts to preserve its jurisdiction. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 287-88 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

6. Corpus Juris Secundum states: "The mandate of the appellate court is the order directing the action to be taken or disposition to be made of the cause by the lower court, returning the proceedings to the lower court, and reinvesting it with jurisdiction thereof." 5B C.J.S. *Appeal & Error* § 1958 (1958). In *Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 649 (11th Cir. 1990), the Eleventh Circuit indicated that an appellate court retains jurisdiction over an appeal until it has issued a mandate and a lower court is generally without jurisdiction to rule in the matter, despite a decision by the appellate court, until the mandate is issued. See also *In re Thorp*, 655 F.2d at 998 (lower tribunal generally divested of authority to proceed further until the mandate has been issued); *D.E.J. v. G.H.B.*, 631 S.W.2d 113, 117-18 (Mo. Ct. App. 1982) ("When the terms of mandate remand the cause to the subordinate tribunal, the effect is to revest jurisdiction in that court to take the acts directed."). Although the above-referenced cases involved the effect of mandates on lower courts, other

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<sup>2</sup> Vet. App. R. 41(a) requires the CVA to issue a mandate consisting of "[a] certified copy of the judgment and a copy of the opinion of the [CVA], if any."

authorities suggest that the same result would obtain in the case of an administrative agency. See *Cerullo*, 1 Vet. App. at 197-98; *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) (rule that inferior court has no power or authority to deviate from the mandate issued by an appellate court is equally applicable to the duty of an administrative agency to comply with the mandate issued by a reviewing court); cf. *Ithaca College*, 623 F.2d at 228 (analogizing administrative tribunal to district court).

7. There is no provision in the CVA rules which specifically addresses issuance of a mandate following a CVA decision like *Lineberger*, in which the court affirms in part and vacates and remands in part a BVA decision. We understand that the CVA does not bifurcate cases and does not issue a separate mandate for the parts of a CVA decision affirming a BVA decision and for the parts of the decision vacating and remanding the BVA decision. Thus, where an appellant files a timely notice of appeal from a CVA decision which affirmed in part and vacated and remanded in part a decision of the BVA, the CVA will not issue a mandate on any part of the case until after the Federal Circuit has issued its mandate on the portion of the case which was appealed to the Federal Circuit. Even though the Federal Circuit may find that it does not have jurisdiction over the remanded part of the case, the BVA, which was divested of jurisdiction when the case was appealed to the CVA, does not reacquire jurisdiction until the CVA issues its mandate. Accordingly, the BVA may not proceed to resolve any part of a case in which the CVA has affirmed in part and remanded in part until the CVA has issued its mandate in the case following resolution of the Federal Circuit appeal.

8. The request for opinion notes that it is not uncommon for a claimant to appeal to the Federal Circuit from a CVA decision in which the latter court has remanded a case to the BVA on all issues. The Federal Circuit has indicated that its jurisdiction under section 7292 to review "decision[s]" of the CVA pertains to final decisions of that court. See *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 1683 (1992). In *Travelstead*, the Federal Circuit recognized that, although

orders remanding to an administrative agency for further proceedings are not generally final and appealable, a remand order may be considered final where necessary to insure that the Federal Circuit will be able to review an important legal question which would otherwise be rendered effectively unreviewable by the remand. 978 F.2d at 1247-49 (citing *Sullivan v. Finkelstein*, 496 U.S. 617 (1990)). If the Federal Circuit determines that a remand order is not appealable, it will dismiss the appeal for lack of jurisdiction. See, e.g., *Hinrichs v. Brown*, No. 94-7003, 1994 WL 112791, at \*1 (Fed. Cir. Mar. 25, 1994). However, if the Federal Circuit determines that the CVA decision remanding a case is final and appealable under the *Travelstead* analysis, it will review the case on the merits. See, e.g., *Travelstead*, 978 F.2d at 1249-52 (affirming the CVA's decision to remand to the BVA). When the Federal Circuit dismisses a case for lack of jurisdiction or decides the case on its merits, it will issue a mandate in regular course pursuant to Fed. R. App. P. 41. After the Federal Circuit issues its mandate, the CVA will again have jurisdiction to issue its own mandate as required by Vet. App. R. 41(a). The issuance of the CVA mandate will vest the BVA with jurisdiction to proceed in accordance with the CVA remand order. Thus, as in other appealed cases, when a claimant files a timely appeal to the Federal Circuit from a CVA decision remanding a case to the BVA on all issues, the issuance of a mandate by the CVA, following the issuance of the Federal Circuit mandate, determines when the BVA has jurisdiction to decide the issues remanded to it.

HELD:

When an appellant files a timely appeal to the United States Court of Appeals for the Federal Circuit from a United States Court of Veterans Appeals decision to affirm or to reverse or vacate in whole or in part and remand a Board of

Veterans' Appeals decision, the Board's disposition of all aspects of the matter must await the issuance of the mandate of the Court of Veterans Appeals concluding the appeal.

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