

**Department of** **Memorandum**  
**Veterans Affairs**

Date: August 18, 1999

VAOPGCPREC 9-1999

From: General Counsel (022)

Subj: Authority of Board of Veterans' Appeals to Adjudicate Question of Timeliness of Substantive Appeal when Issue Not Previously Adjudicated by Agency of Original Jurisdiction

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

QUESTIONS PRESENTED:

- a. Does the Board of Veterans' Appeals (BVA) have the authority to adjudicate or address in the first instance the question of timeliness of a substantive appeal? If not, what is the appropriate course of action for the BVA to take when it raises the issue of timeliness of the substantive appeal for the first time on appeal?
- b. What is the appropriate course of action for the BVA to take when it discovers for the first time on appeal that no substantive appeal has been filed on an issue certified to the BVA for appellate review by the agency of original jurisdiction (AOJ)?

DISCUSSION:

1. These issues arise in the context of an order issued by the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims (CAVC)) in *Swan v. Brown*, 9 Vet. App. 450 (1996) (per curiam), in which the court directed the appellant and Secretary of Veterans Affairs to file memoranda addressing the question of whether the BVA has authority, in the absence of an administrative appeal, to adjudicate a question of timeliness of a substantive appeal if the AOJ has not made an adverse determination as to timeliness. The CAVC never issued a final decision in *Swan* as the parties agreed upon a settlement and the appeal was dismissed. See *Swan v. Brown*, No. 95-187 (U.S. Vet. App. Nov. 27, 1996) (nonprecedential order dismissing appeal).
2. We begin with the question of whether the BVA has the authority to adjudicate or address in the first instance the question of timeliness of a substantive appeal. The Supreme Court has declared that jurisdiction "is essen-

tially the authority conferred by Congress to decide a given type of case one way or the other." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). Stated differently, jurisdiction means the right or power of a tribunal to act. *Stokes v. Federal Aviation Admin.*, 761 F.2d 682, 685 (Fed. Cir. 1985); see also *Carroll Vocational Inst. v. United States*, 211 F.2d 539, 540 (5th Cir.), cert. denied, 348 U.S. 833 (1954). Regarding the Department of Veterans Affairs' (VA) appellate agency (BVA) and its agencies of original jurisdiction, Congress has delineated their respective jurisdictional responsibilities in 38 U.S.C. §§ 7104 and 7105. Section 7104(a) of title 38, United States Code, provides that all questions under laws that affect the provision of benefits by the Secretary of Veterans Affairs to veterans or their dependents or survivors shall be subject to one review on appeal to the Secretary and assigns the authority to make final decisions on behalf of the Secretary on such appeals to the BVA. See also 38 C.F.R. § 20.101. Section 7105 of title 38, United States Code, establishes the procedural steps that a claimant and an AOJ must follow with regard to appellate review by the BVA. Pursuant to 38 U.S.C. § 7105(a), "[a]ppellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished." See also 38 C.F.R. § 20.200. Furthermore, the time limits for filing a substantive or formal appeal are prescribed in 38 U.S.C. § 7105(d)(3) and 38 C.F.R. § 20.302(b). These provisions provide that a claimant will have 60 days from the date VA mails the statement of the case to file a formal appeal or one year from the date VA mails the notification of the determination being appealed, whichever period ends later. Section 7105(d)(3) further provides that the time period for filing a formal appeal may be extended for a reasonable period on request for good cause shown. See also 38 C.F.R. § 20.303. Finally, section 7105(d)(3) provides the AOJ "may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the [BVA]."

3. The Secretary has specifically delegated to the Under Secretary for Benefits and supervisory or adjudicative personnel within the Veterans Benefits Administration (VBA) authority to make findings and decisions on claims for monetary benefits. 38 C.F.R. § 3.100. Section 20.3(a) of

title 38, Code of Federal Regulations, defines an AOJ as the VA regional office, medical center, clinic, cemetery, or other VA facility which made the initial determination on a claim or, if records have been permanently transferred to another VA facility, its successor. Thus, the responsibility for making initial findings and decisions on claims for veterans' benefits lies with the AOJ. Further, the regulations contemplate that the AOJ has authority to make initial decisions concerning certain questions, i.e., the timeliness of notices of disagreement and substantive appeals. 38 C.F.R. § 19.34. It is also authorized to close an appeal for failure to respond to a statement of the case. 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 19.32. This office previously found that primary jurisdiction over appeals involving benefit matters rests with the AOJ until such time as the appeal is certified to the BVA and the record is transmitted. VAOPGCADV 5-89 (O.G.C. Adv. 5-89). In contrast, the BVA functions as an appellate body. Section 19.4 of title 38, Code of Federal Regulations, defines the principal functions of the BVA as making determinations of appellate jurisdiction, considering all applications on appeals properly before it, conducting hearings on appeals, evaluating the evidence of record, and entering decisions in writing on questions presented on appeal.

4. We have recognized that governing statutes and regulations generally do not contemplate that the BVA will make final determinations on claims or issues that have not been the subject of a decision by an AOJ. VAOPGCPREC 16-92 (O.G.C. Prec. 16-92). Section 7105(d)(1)(C) of title 38, United States Code, and 38 C.F.R. § 19.29(c) require that a statement of the case include the AOJ's decision on each issue involved in a claim. Sections 20.201 and 19.26 of title 38, Code of Federal Regulations, require that a claimant's notice of disagreement identify the specific determinations with which the claimant disagrees, and 38 C.F.R. § 20.202 requires that a substantive appeal completed by a claimant specifically identify the issues being appealed. Further, section 19.7(b) calls for the BVA to set forth in its decision the specific issue or issues under appellate consideration. This statutory and regulatory scheme treats the BVA as an appellate body which exercises jurisdiction only over issues properly brought before it under established appellate procedures.

Generally, an appellate body does not have the authority to make *initial* decisions. See, e.g., *Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 767 (Fed. Cir. 1988) (noting, with approval, "general rule that arguments not presented to the trial court (or initial adjudicatory forum) are deemed waived on appeal" (citing cases)), quoted in *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1075 n.16 (Fed. Cir.), cert. denied, 513 U.S. 961 (1994). Thus, these aspects of the statutory and regulatory scheme suggest that, if an issue is raised on the record for the first time before the BVA, the proper course, consistent with the governing statutes and regulations, is generally for the BVA to remand the issue to the AOJ for further development. (An exception to this scheme is 38 C.F.R. § 19.13, which provides that the BVA Chairman or Vice Chairman may approve the assumption of appellate jurisdiction of an adjudicative determination which has not become final in order to grant a benefit.)

5. Nonetheless, we note that section 7105(d)(3) of title 38, United States Code, specifically provides that, while the AOJ may close a case for failure to respond after receipt of the statement of the case, "questions as to timeliness or adequacy of response shall be determined by the [BVA]." This statute clearly places the authority to resolve a question of the timeliness of a substantive appeal with the BVA. While this statute recognizes the BVA's authority over the issue of the timeliness of a substantive appeal, it does not specifically address the situation where the BVA addresses the timeliness issue in the first instance. Thus, we cannot conclude that it clearly and unambiguously authorizes determination of the issue by the BVA in the absence of prior AOJ consideration. Turning again to the regulations, 38 C.F.R. § 19.33 provides that, if there is a question within the AOJ as to the timely filing of a notice of disagreement or substantive appeal, procedures for an administrative appeal must be followed. In addition, 38 C.F.R. § 19.34 refers to an adverse determination by an AOJ regarding the timeliness of a substantive appeal and states that whether a notice of disagreement or substantive appeal has been timely filed is an appealable issue suggesting that the AOJ has authority to decide the question in the first instance.

6. While 38 C.F.R. §§ 19.33 and 19.34 specify actions to be taken by the AOJ if the issue of timeliness arises at that level, there is no statutory or regulatory provision dealing with the situation where the BVA is the first to identify the possibility of an untimely substantive appeal. As a result, and notwithstanding the conclusion reached in this opinion, we believe that the issue of whether the BVA may adjudicate, in the first instance, a question of the timeliness of a substantive appeal should be addressed through rulemaking. Accordingly, we strongly recommend that the BVA consider promulgation of a regulation dealing with the issue, perhaps one similar to 38 C.F.R. § 20.203 which provides a claimant with certain procedural protections when the BVA raises the issue of the adequacy of a substantive appeal.

7. In any event, notwithstanding the nature of the BVA as an appellate body, it must be recognized that both this office and the CAVC have held that the BVA has the authority to decide questions presented on the record before it and that the BVA is not limited to the specific questions actually decided by the AOJ. In VAOPGCPREC 16-92, this office held that although the statutory and regulatory schemes establish BVA as an appellate body, nonetheless, when an appeal is certified to the BVA, "the [BVA] may consider arguments, subissues, statutes, regulations, or [CAVC] analyses which have not been considered by the [AOJ], if the claimant will not be prejudiced by its actions." (We used the term "subissues" to refer to the elements which make up the determination of the issue of a particular claim of entitlement.) We quoted in VAOPGCPREC 16-92 from the CAVC's decision in *Smith v. Derwinski*, 1 Vet. App. 267, 272 (1991), which stated, "[i]n reviewing a benefits decision, the [BVA] must consider the entire record, all of the evidence, and all of the applicable laws or regulations." We observed that the CAVC case law recognized a responsibility on the part of the BVA to apply relevant statutes and regulations without regard to whether they had been considered by the AOJ. We recognized that such application was appropriate even where it resulted in findings adverse to the claimant, so long as the claimant's rights were protected. Similarly, in *Bernard v. Brown*, 4 Vet. App. 384, 392 (1993), the CAVC found that the BVA has the authority to decide all questions presented on the record before it that are

necessary to its decision on a particular matter and that the BVA is not limited to the specific questions actually decided by the AOJ. These authorities strongly suggest that the BVA has the authority to deal with elements of a claim, such as the timeliness of a substantive appeal, which were not addressed by the AOJ and to apply statutes and regulations, such as those governing timeliness, which may have been overlooked by the AOJ, so long as prejudice to the claimant does not result from that action. See also 38 C.F.R. § 19.9 (remand not required to clarify procedural matters before the BVA, including choice of representative, issues on appeal, and requests for hearings).

8. Other decisions of the CAVC appear to recognize the BVA's authority to dismiss an appeal on the basis of an untimely substantive appeal. In *Bridges v. Brown*, 5 Vet. App. 496 (1993), the CAVC affirmed a BVA decision dismissing the veteran's claim because the veteran failed to file a timely substantive appeal. The veteran filed a claim for service connection for hearing loss which the AOJ denied in October 1989. The veteran filed a notice of disagreement in May 1990, and the AOJ issued a statement of the case on August 16, 1990. On November 19, 1990, the veteran filed a substantive appeal. In an October 1991 decision, the BVA dismissed the appeal as untimely due to the late filing of the substantive appeal. The AOJ apparently had not previously made a determination with respect to the issue of timeliness of the substantive appeal. The CAVC stated that, pursuant to its authority under 38 U.S.C. § 7105(d)(3) to determine questions as to the timeliness or adequacy of substantive appeals, the BVA properly dismissed the veteran's claim for failure to file a timely substantive appeal. *Bridges*, 5 Vet. App. at 498. See *Lapres v. Brown*, No. 93-786, 1994 WL 577719 (Vet. App. Oct. 14, 1994); and *Escritor v. West*, No. 98-319, 1998 WL 863945 (Vet. App. Dec. 11, 1998) (CAVC affirmed BVA decision dismissing appeal for lack of jurisdiction based on untimely substantive appeal in apparent absence of action by AOJ on the issue); *Fenderson v. West*, 12 Vet. App. 119 (1999) (BVA did not err when it decided that an issue as to which a veteran failed to perfect an appeal was not properly before the BVA).

9. Our review of the history of the statutes governing VA's appellate body has revealed nothing which indicates

that the BVA does not have authority to dismiss an appeal in the absence of a timely filed substantive appeal. Pub. L. No. 87-666, 76 Stat. 553 (1962), first introduced the statement of the case, and consequently the requirement of filing a timely formal appeal, into the veterans' appeal process to afford an added measure of due process in the adjudication of claims for veterans' benefits. The statute as originally enacted provided, as does the current statute, that "questions as to timeliness or adequacy of response shall be determined by the [BVA]." While the statute contemplated BVA consideration of the case on the basis of the entire record, including the statement of the case, see S. Rep. No. 1843, 87<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 2576, 2577, nothing in the legislative history suggests that the BVA may not dismiss an appeal in the absence of a timely filed substantive appeal. Rather, as noted earlier, Congress specifically provided that the BVA shall adjudicate questions as to timeliness.

10. Similarly, the regulatory history does not indicate that the BVA lacks the authority to dismiss an appeal in the absence of a timely filed substantive appeal. Prior to enactment of Pub. L. No. 87-666 and the introduction of the substantive appeal into the adjudication process, Veterans Administration Manual M1-1, para. 48 (Dec. 30, 1953) regarding disposition of appeals questioned as to timely filing, provided that, "[i]f there is a question as to whether an appeal was in fact timely filed, or if protest is received from a determination that an appeal was not timely filed, the appeal will be certified to the [BVA], where jurisdiction will be finally determined." The manual provision did not specifically require an AOJ to make a finding regarding the timeliness issue and did require that the BVA make a determination.

11. VA completely revised its procedures pertaining to appeals after the enactment of Pub. L. No. 87-666. The new regulation provided that, if a question arose as to the adequacy or timely filing of a substantive appeal, the AOJ would forward the case to the BVA for a final determination. 38 C.F.R. § 19.2(F) (January 1, 1963). Subsequently, the regulation was revised to state that the BVA would make a final determination of appellate jurisdiction: (A) when the AOJ has a question as to whether a substantive appeal is timely filed; and, (B) when a

claimant protests an adverse determination made by the AOJ with respect to that issue. 38 C.F.R. § 19.119 (March 16, 1967). Neither version of the regulation specifically addressed the situation where the BVA first recognizes, after the AOJ has forwarded an appeal to the BVA, that the appellant has not filed a timely substantive appeal. We note, however, that the regulation did not specifically require AOJ consideration or the issuance of a statement of the case on the issue of whether a substantive appeal is timely.

12. Section 19.119 was eliminated effective January 1, 1980, and replaced with several new sections, including new 38 C.F.R. §§ 19.133 and 19.135. New 38 C.F.R. § 19.133 required the initiation of an administrative appeal where a question arose within an AOJ as to the timeliness of a substantive appeal, and new 38 C.F.R. § 19.135 required the furnishing of a statement of the case on the issue when a claimant protested an AOJ's adverse determination on the timeliness of a substantive appeal. Transmittal Sheet 9, which accompanied these rule changes, explained that the new provisions expanded former section 19.119, "to clarify the procedures followed where adequacy or timeliness are questioned by the [AOJ] and where adverse determinations as to inadequacy or untimeliness are protested by the claimant." Again, there was no specific prohibition against the BVA making determinations sua sponte regarding the timeliness of substantive appeals. We can only conclude the regulation drafters simply did not contemplate the situation of the BVA raising the issue of timeliness of the substantive appeal for the first time on appeal and so did not provide express authority for the BVA to dismiss the appeal. However, there is no evidence of an intention to prohibit such action by the BVA.

13. In view of the foregoing, we conclude that the BVA has the authority to address in the first instance the question of the timeliness of a substantive appeal and may dismiss an appeal after the AOJ has certified it for appellate review, regardless of the AOJ's failure to adjudicate the timeliness issue. In view of this conclusion, your second question regarding the appropriate course of action for the BVA to take if the BVA does not have the authority to adjudicate the issue in the first instance is moot.



14. We note, however, that the BVA's dismissal of an appeal under the aforementioned circumstances raises the possibility that a claimant will be prejudiced by not having been afforded the benefit of all procedural safeguards, such as the right to notice, the right to a hearing, and the right to submit evidence in support of a claim. See 38 C.F.R. § 3.103; see generally *Thurber v. Brown*, 5 Vet. App. 119 (1993) (discussing importance of notice and opportunity to be heard). The *Bernard* court held:

[W]hen, as here, the [BVA] addresses in its decision a question that had not been addressed by the RO, it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby.

4 Vet. App. at 394. In *Marsh v. West*, 11 Vet. App. 468, 471 (1998), the CAVC found that the BVA

violated *Bernard* and *Sutton* by failing to address whether its sua sponte consideration of the question of the timeliness of the veteran's NOD—without first according the veteran an opportunity to submit evidence or argument on that question—was prejudicial. The [BVA's] obligation to assess its own jurisdiction cannot come at the expense of the procedural rights that belong to an applicant for VA benefits who has had no opportunity to present evidence or argument on that jurisdictional issue. . . . At the very least, the [BVA] was obliged to ask the veteran whether he objected to the [BVA's] adjudication of the NOD jurisdictional issue in the first instance and to include in the statement of reasons or bases for its decision an explanation as to why such adjudication in the first instance was not prejudicial to him.

Furthermore, in *Sutton v. Brown*, 9 Vet. App. 553, 569 (1996), the CAVC found that there was a need to coalesce the fair-process approaches and holdings of *Bernard*, *Thurber*, and *Austin v. Brown*, 6 Vet. App. 547 (1994), into a single, simplified, and generally applicable BVA-adjudication procedure. We note that when the BVA decides to dismiss an appeal because of a failure to allege specific error, the BVA must provide notice to the appellant and an opportunity to respond. See 38 C.F.R. § 20.203. Similarly, to ensure that VA affords all claimants adequate procedural protections, we believe that before the BVA dismisses an appeal because the appellant failed to file a timely substantive appeal, the BVA should consider whether the claimant has been given adequate notice and an opportunity to submit evidence and argument on that question, as well as an opportunity to address that question at a hearing. In addition, we note that, in *Sutton*, 9 Vet. App. at 569-70, the CAVC provided examples of procedures the BVA could follow to ensure that it affords fair process in all instances, consistent with the approaches and holdings in *Thurber*, *Austin*, and *Bernard*. These examples may prove useful with respect to the issuance of a regulation covering the issue of timeliness of a substantive appeal.

15. Turning to your last question as to the appropriate course of action for the BVA to take when it discovers for the first time on appeal that no substantive appeal has been filed on a certified issue, we find that, based on the above analysis, the BVA may dismiss the appeal as to that issue. See also 38 C.F.R. § 19.35 (certification does not serve to either confer or deprive the BVA of jurisdiction over an issue). If, however, the BVA intends to dismiss an appeal on this basis, it should afford the claimant adequate procedural protections regarding notice and the opportunity to be heard.

HELD:

a. The BVA has the authority to adjudicate or address in the first instance the question of timeliness of a substantive appeal and may dismiss an appeal in the absence of a timely-filed substantive appeal. It should, however, afford the claimant appropriate procedural protections to as

sure adequate notice and opportunity to be heard on the question of timeliness.

b. When the BVA discovers in the first instance that no substantive appeal has been filed in a case certified to the BVA for appellate review by the agency of original jurisdiction, it may dismiss the appeal. Again, it should afford the claimant appropriate procedural protections.

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