Department of Veterans Affairs

Memorandum

Date: May 21, 2003 VAOPGCPREC 1-2003

From: General Counsel (022)

Subj: Impact of *Disabled American Veterans v. Secretary of Veterans Affairs*, Case Nos. 02-7304, -7305, -7316 (Fed. Cir. May 1, 2003)

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

QUESTIONS PRESENTED:

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans v. Secretary of Veterans Affairs*, Case Nos. 02-7304, -7305, -7316 (Fed. Cir. May 1, 2003) (*DAV* decision), have on the authority of the Board of Veterans' Appeals (Board) to develop evidence with respect to cases pending before the Board on appeal?

B. May the Board adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA)?

C. What effect does the *DAV* decision have on the Board's authority to send claimants the notice required by 38 U.S.C. § 5103(a) in cases pending before the Board on appeal?

D. Is the Board required to identify and readjudicate any claims decided before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision?

COMMENTS:

1. On May 1, 2003, the Federal Circuit issued the *DAV* decision, which invalidated two regulatory provisions authorizing the Board to carry out certain responsibilities of the Department of Veterans Affairs (VA) under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. First, the Court invalidated 38 C.F.R. § 19.9(a)(2), which provides that, if further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Board Member or panel of Members may "[d]irect Board personnel to undertake the action

essential for a proper appellate decision." The Court concluded that this provision was contrary to 38 U.S.C. § 7104(a), which provides that "[a]ll questions" in a matter subject to decision by the Secretary shall be subject to "one review on appeal" to the Secretary, with the final decision on such appeals being made by the Board. The Court held that, if the Board obtained new evidence and rendered a decision on the basis of such evidence without obtaining a waiver from the claimant, such action would deprive the claimant of "one review" of the additional evidence.

2. The Court also invalidated 38 C.F.R. § 19.9(a)(2)(ii), which states:

> If the Board undertakes to provide the notice required by 38 U.S.C. 5103(a) and/or § 3.159(b)(1) of this chapter, the appellant shall have not less than 30 days to respond to the notice. If, following the notice, the Board denies a benefit sought in the pending appeal and the appellant submits relevant evidence after the Board's decision but before the expiration of one year following the notice, that evidence shall be referred to the agency of original jurisdiction. If any evidence so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the award's effective date will be the same as if the Board had granted the benefit in the appeal pending when the notice was provided.

The Court concluded that this provision is contrary to 38 U.S.C. § 5103(b), which provides that, when VA notifies a claimant of information or evidence the claimant must submit to substantiate the claim, "if such information or evidence is not received by the Secretary within one year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application." The Court concluded that the thirty-day period referenced in § 19.9(a)(2)(ii) "may lead unsuspecting claimants to believe that they must supply the requested evidence within thirty days," and that the regulation therefore fails to notify the claimant "that he or she has a full year to submit the evidence and still be within the statutory one-year time period." The Court also held that § 19.9(a)(2)(ii) was misleading as applied to circumstances where a claimant submits evidence after the Board has denied the claim but before expiration of the one-year period, because it does not specify whether the additional evidence must be "new and material" before it can be considered in such circumstances. The Court stated that, "[a]lthough § 19.9(a)(2)(ii) permits the appellant to submit evidence to the [agency of original jurisdiction] after the Board denies a benefit, it prejudices claimants by not providing the statutory one-year period to submit evidence before the Board denies the claim, because under 38 U.S.C. § 7104(b), the Secretary is authorized to reopen such claims only 'if new and material evidence is presented or secured.'"

3. The first question presented in the opinion request concerns the impact of the *DAV* decision on the Board's ability to develop evidence with respect to claims before it on appeal. Although the Federal Circuit invalidated the regulatory provision authorizing the Board to undertake evidentiary development, the Court's opinion cannot be read to hold that the Board is prohibited from seeking to obtain new evidence. The Court invalidated 38 C.F.R. § 19.9(a)(2) based on its conclusion that 38 U.S.C. § 7104(a) prohibits the Board from adjudicating a claim with new evidence in the absence of a waiver by the appellant. The Federal Circuit's holding invalidating section 19.9(a)(2) must be read in the context of the Court's decision. The decision clearly indicates the Court's conclusion that section 7104(a) prohibits the Board from considering additional evidence without remanding or obtaining a waiver. For example, the Court's stated conclusion was that section 19.9(a)(2) is invalid "because . . . it allows the Board to consider additional evidence without having to remand the case . . . and without having to obtain the appellant's waiver." (Emphasis added.) In its discussion of that issue, the Court stated that the regulation "is inconsistent with 38 U.S.C. § 7104(a), because § 19.9(a)(2) denies appellants 'one review on appeal to the Secretary' when the Board considers additional evidence without having to remand . . . and without having to obtain the appellant's waiver." (Emphasis added.) The Court's discussion and conclusion clearly reflect the view that it is the Board's consideration of new evidence, rather than the mere act of obtaining new evidence, that the Court found to be contrary to law. The Court did not purport to decide the distinct question of whether the Board generally has authority to obtain evidence, and its decision cannot be read as holding that the Board lacks authority to develop evidence. Because the decision rested on the narrow ground that the Board may not initially decide a claim based on new evidence, absent a waiver, we conclude that the decision does not preclude the Board from developing evidence with respect to an appealed claim, subject to the caveat that the Board may not adjudicate the claim based on new evidence unless it obtains the appellant's waiver.

4. The language of 38 C.F.R. § 19.9(a), as affected by the Court's decision, does not preclude the Board from obtaining evidence on appeal. Taking into account the Court's invalidation of section 19.9(a)(2), the surviving provisions of section 19.9(a) provide that, if further evidence is essential for a proper appellate decision, the Board "may . . . [r]emand the case to the agency of original jurisdiction." The permissive term "may" makes clear that the regulation was not intended to foreclose other actions consistent with the Board's statutory and regulatory authority. Although the regulation will have to be amended in light of the Court's decision, we conclude that the surviving language of the regulation does not prevent the Board from obtaining evidence to the extent permissible under current law.

5. Section 5103A of title 38, United States Code, directs the Secretary of Veterans Affairs to make reasonable efforts to assist claimants in obtaining the evidence necessary to substantiate their claims. The statute does not limit this

duty to VBA proceedings, nor does it specify or limit the VA personnel who may carry out the duty to assist on behalf of the Secretary. The United States Court of Appeals for Veterans Claims has held that the Board is bound by the duty to assist and is required to seek to obtain relevant evidence of which it has notice. *See Holland v. Brown*, 6 Vet. App. 443, 448 (1994); *Murincsak v. Derwinski*, 2 Vet. App. 363, 373 (1992). No statute prohibits the Board from directly providing the assistance required by 38 U.S.C. § 5103A before remanding a claim for a decision with respect to any additional evidence obtained through such assistance. As the Federal Circuit noted in the *DAV* decision, "the Board is an agent of the Secretary, as are the [agencies of original jurisdiction]." *See also Jackson v. Principi*, 265 F.3d 1366, 1370 (Fed. Cir. 2001). Accordingly, the Board may be authorized to carry out the Secretary's duty to assist under section 5103A.

6. The fact that the Board is an appellate body does not preclude it from carrying out the duty to assist with respect to evidentiary development. Unlike appellate courts, appellate administrative bodies ordinarily may obtain or accept additional evidence. *See* 2 Am. Jur. 2d *Administrative Law* §§ 372, 375 (2000). Several statutes and regulations authorize the Board to obtain various types of evidence. *See* 38 U.S.C. §§ 7107(b), 7109(a); 38 C.F.R. §§ 2.2, 2.3, 20.700, 20.901(a), (b), and (d). Congress has voiced approval of VA regulations authorizing the Board to obtain evidence in the form of medical opinions from Veterans Health Administration physicians and has indicated that such evidentiary matters are within VA's authority and discretion. *See* S. Rep. No. 87-1844 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2585, 2586 ("this is a matter within Agency discretion and ample authority for this practice now exists"); see also Explanatory Statement on Compromise Agreement on Division A, 134 Cong. Rec. S16650 (1988), reprinted in 1988 U.S.C.C.A.N. 5834, 5842 ("[t]he Committees also note with approval the current practice of obtaining [independent medical expert] opinions through the Department of Medicine and Surgery.").

7. We believe there is sufficient authority under existing statutes and regulations for the Board to request and obtain evidence with respect to cases on appeal, subject to the caveat that the Board may not decide the claim based on any new evidence so received unless the claimant waives VBA consideration. The provisions of 38 U.S.C. § 5103A directing "the Secretary" to assist claimants in obtaining evidence may reasonably be construed to vest the Board with authority to take such actions. As noted above, the Board is an agent of the Secretary and acts on behalf of the Secretary with respect to claims before the Board. Moreover, the CAVC's precedents establish that the Board is required to carry out the Secretary's duty to assist. *See Holland*, 6 Vet. App. at 448; *Murincsak*, 2 Vet. App. at 373. VA's regulations implementing the statutory duty to assist provide that "VA" will assist claimants, and the regulations make no distinction between VBA and the Board. 38 C.F.R. § 3.159. The CAVC has indicated that the regulations in 38 C.F.R. Part 3 generally apply to the Board unless they clearly indicate otherwise. *See Douglas v. Derwinski*, 2 Vet. App. 435, 441

(1992) (en banc). The Board's actions in requesting and obtaining evidence would be consistent with 38 U.S.C. § 5103A and 38 C.F.R. § 3.159 and would not contravene any other procedural requirements of statute or regulation. Moreover, the Board's actions would be beneficial to claimants in that they would implement the Secretary's duty to assist expeditiously without the delay that would otherwise result from employing a remand and transferring the claims folder before efforts to locate the necessary evidence could commence.

8. We note also that 38 C.F.R. §§ 2.2 and 2.3 delegate to several VA officials, including the Board Chairman, the authority to "aid claimants in the preparation and presentation of claims," and to "require the production of books, papers, documents, and other evidence," among other things. This authority derives from 38 U.S.C. § 5711, which is captioned "Authority to issue subpoenas" and is located in subchapter II of chapter 57 of title 38, United States Code, which pertains to "Investigations." Although the caption and location of this provision may suggest that it has no bearing on assistance in evidentiary development for benefit claims, we believe it is relevant to the Board's authority to develop evidence in benefit claims. The plain language of section 5711 and the implementing regulations makes clear that the authority provided by those provisions is not limited to issuing subpoenas, but includes the authority to "aid claimants in the preparation and presentation of claims." *See* 38 U.S.C. § 5711(a)(4), 38 C.F.R. § 2.3(a). The statutory provisions derive from legislation enacted in 1936, long predating VA's statutory duty to assist, and appear to have been designed to provide permissive authority to aid VA in determining the validity of claims for benefits. *See* Act of June 29, 1936, ch. 867, § 300, 49 Stat. 2031, 2033. The delegation of authority to the Board Chairman has been in effect since 1984. Although that delegation preceded the enactment of the duty to assist currently stated in 38 U.S.C. § 5103A, its plain terms provide delegated authority for the Board to take actions necessary to obtain evidence with respect to benefit claims.

9. In view of the issuance and subsequent invalidation of 38 C.F.R. § 19.9(a)(2), it may be advisable to clarify through rule making or other appropriate means that the Secretary's authority to develop evidence under section 5103A is delegated to the Board with respect to claims on appeal to the Board. Even if section 5103A were ambiguous as to whether the Board is authorized to obtain evidence, there is little doubt that the Secretary could delegate his authority under section 5103A to the Board as well as to VBA. *See* 38 U.S.C. § 512(a) (Secretary may assign functions and duties and delegate authority to act with respect to all laws administered by VA, to such officers and employees as the Secretary may find necessary); *Splane v. Secretary of Veterans Affairs*, 216 F.3d 1058, 1066 (Fed. Cir. 2000) (Secretary may delegate authority to Board). We believe, however, that the Board may develop claims in advance of publication of any such rules or delegations. As explained above, existing statutes and regulations provide authority for the Board to obtain evidence with respect to claims and the actions of the Federal Circuit in the *DAV* case did not restrict that

authority. Further, inasmuch as the suggested delegation would pertain merely to procedural matters and the internal assignment of responsibilities, it would not be subject to the notice-and-comment procedures or the effective-date provisions of the Administrative Procedures Act (APA). *See* 5 U.S.C. § 553(b)(3)(A) (exempting "rules of agency organization, procedure, or practice"). For similar reasons, the effectiveness of the delegation would not be conditioned on advance publication in the Federal Register under 5 U.S.C. § 552(a). *See Splane*, 216 F.3d at 1065 (the requirement for publication attaches only to matters that, if not published in the Federal Register, would adversely affect a member of the public); *United States v. Hoyland*, 960 F.2d 94, 96 (9th Cir. 1992) ("the APA does not require publication of delegation orders"); *Hogg v. United States,* 428 F.2d 274, 280 (6th Cir. 1970) (§ 552 "does not require that all internal delegations of authority . . . must be published in order to be effective").

10. Your opinion request raises the question of whether the Board may continue to develop evidence in claims in which development was initiated by the Board prior to May 1, 2003, when the *DAV* decision was issued, even if the *DAV* decision is construed to preclude the Board from initiating development action in any other cases after May 1, 2003. For the reasons explained above, we believe that the Board has authority to undertake evidentiary development with respect to claims before it irrespective of whether such development had been initiated prior to May 1, 2003. In view of this conclusion, it is unnecessary to analyze specifically whether the Board may continue development in the more limited class of cases in which the Board initiated development prior to May 1, 2003. We note that judicial decisions generally apply retroactively to all cases still open on direct review. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). Accordingly, if the *DAV* decision had foreclosed the Board from obtaining evidence, that holding would have applied to all pending appeals, including those in which the Board had previously begun gathering evidence. However, because we find that the *DAV* decision did not restrict the Board's authority to develop evidence, the Board is free to develop evidence in claims in which such development was initiated prior to May 1, 2003, just as it is free to do so in claims in which development is initiated after that date.

11. The second question raised in the opinion request concerns whether the Board may consider new evidence obtained on appeal if the appellant waives initial consideration by VBA. We conclude that the Board may do so. The Board's rules historically permitted the Board to consider in the first instance additional evidence submitted by a claimant on appeal if the appellant waived initial consideration of such evidence by the relevant first-tier adjudicator. *See* 38 C.F.R. § 20.1304(c) (2001). The provision relating to waivers was removed from section 20.1304(c) at the same time 38 C.F.R. § 19.9 was revised to provide for the Board's development and consideration of additional evidence. *See* 67 Fed. Reg. 3099, 3105 (2002). In the *DAV* decision, the Federal Circuit held that 38 C.F.R. § 19.9(a)(2) was invalid because "in conjunction with the amended rule codified at 38 C.F.R. § 20.1304, it allows the Board to consider

additional evidence without having to remand the case to the [agency of original jurisdiction] for initial consideration and without having to obtain the appellant's waiver." Because remand to VBA for initial consideration and obtaining a waiver are mutually exclusive events, clearly the Court contemplated that obtaining a waiver would be sufficient to permit the Board to consider new evidence without a remand. Thus, implicit in that holding is the conclusion that the Board may consider additional evidence when the claimant has waived remand to VBA for initial consideration.

12. The Federal Circuit's implicit conclusion with respect to waivers comports with the well-established principle that "[a] party may waive any provision either of a contract or of a statute, intended for his benefit." *Shutte v. Thompson*, 82 U.S. 151, 159 (1872); *see Janssen v. Principi*, 15 Vet. App. 370, 374 (2001). The fact that VA's regulations no longer contain an express reference to an appellant's ability to waive VBA consideration does not preclude the Board from recognizing such waivers. The Supreme Court has made clear that individuals always have the right to waive statutory provisions intended for their benefit, irrespective of whether a statute or regulation expressly provides for such waiver. *See United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995) ("Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. . . . [A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.").

13. In *Janssen*, the CAVC indicated that, for a waiver to be effective, the claimant "must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right." 15 Vet. App. at 374. Accordingly, in considering waivers, the Board must ensure that the appellant is fully aware of the right to initial VBA consideration and that he or she knowingly and voluntarily intends to relinquish that right. The CAVC indicated that waivers are permitted "where the appellant is represented by counsel," but did not address the issue of whether an appellant not represented by an attorney also may waive his or her rights. *Id.* We note, however, that the Supreme Court has repeatedly indicated that unrepresented parties, including pro se criminal defendants, may waive rights intended for their benefit. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 399-400 (1993) (waiver of right to counsel); *Adams v. United States*, 317 U.S. 269, 275-81 (1942) (waiver of right to jury trial). The Court has explained:

> The question in each case is whether the [person] was competent to exercise an intelligent, informed judgment -- and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems [a person] incompetent unless he does have the advice of counsel.

Adams, 317 U.S. at 277. The Court further stated that, "[w]hat were contrived as protections . . . should not be turned into fetters," and that a claimant's informed decision to forego certain procedural protections generally should be respected "even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer." *Id.* at 275, 279. An unrepresented claimant certainly may be competent to weigh the benefits and burdens associated with remand and to conclude, knowingly and intelligently, that he or she would prefer to forego remand. Consistent with the Supreme Court's precedents, we believe that unrepresented claimants may waive procedural rights, provided their decision is informed and voluntary.

14. The third question presented by the opinion request concerns the impact of the *DAV* decision on the Board's authority to provide claimants the notice required by 38 U.S.C. § 5103(a) in cases pending before the Board on appeal. For essentially the same reasons stated above with respect to the Board's development of evidence, we conclude that the *DAV* decision does not preclude the Board from sending the notice required by section 5103(a), although the decision will require changes in the content of any notice the Board sends to claimants. The Federal Circuit invalidated 38 C.F.R. § 19.9(a)(2)(ii) based on its conclusion that the reference in that regulation to a period of "not less than thirty days" to respond to a request for information or evidence was inconsistent with section 5103(b), which, the Court held, provides a period of one year for the submission of requested information or evidence. The Court further stated that the regulation improperly failed to specify whether evidence submitted after a final Board decision but before expiration of the statutory one-year period would have to be new and material to be considered by VA. The Court's decision does not preclude the Board from sending the notice required by section 5103(a), but only precludes the Board from requiring a response to the notice within less than one year or, at a minimum, clearly preserving the claimant's right to submit the requested information or evidence within one year.

15. The surviving provisions of 38 C.F.R. § 19.9(a)(2) state that the Board "may" remand a case when necessary to cure a procedural defect, but do not foreclose the Board from taking other permissible actions necessary to cure a defect in providing notice under section 5103(a). The plain language of 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159 directs "the Secretary" and "VA" to provide the required notice and, as explained above, would ordinarily be construed to apply to the Board as well as to VBA. Further, the Board's actions in providing notice required by section 5103(a) would be consistent with the authority delegated to the Board Chairman in 38 C.F.R. § 2.3(a) to "aid claimants in the preparation and presentation of claims." Accordingly, the existing statutes and regulations may reasonably be construed to authorize the Board to provide the notice required by 38 U.S.C. § 5103(a) on behalf of the Secretary. A specific delegation to the Board of the Secretary's authority to issue notice under section 5103(a) would, of course, clarify this matter and remove the need for interpretation of the statute and regulation to discern the Board's authority. We note that the question of

whether the section-5103(a) notice is sent by the Board or by VBA involves only matters of procedure and assignment of responsibility within VA and thus would not be subject to the notice-and-comment procedures or effective-date provisions of 5 U.S.C. § 553. For those reasons, and because claimants would not be adversely affected by receiving the notice from the Board rather than VBA, any such delegation could be given effect in advance of publication in the Federal Register. Of course, the content of any notice sent by the Board must conform to the requirements of the *DAV* decision.

16. The fourth question presented by the opinion request concerns whether the Board is required to identify and readjudicate any claims decided before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision. We conclude that the Board is not required to do so. In VAOPGCPREC 9-94, we held that judicial decisions invalidating VA regulations or statutory interpretations do not have retroactive effect with respect to claims that had been finally decided before the court's decision was rendered. That conclusion reflects the Supreme Court's consistent view on the effect of judicial precedents. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("[n]ew legal principles . . . do not apply to cases already closed"); *Harper*, 509 U.S. at 97 (judicial precedents apply retroactively to "cases still open on direct review"); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-23 (1988) (in invalidating agency regulations, it was improper to order agency to readjudicate prior decisions which had become final under governing statutes); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (judicial decision finding statute unconstitutional does not permit relitigation of cases previously and finally decided under that statute). We note, however, that under both the *DAV* decision and the invalidated provisions of 38 C.F.R. § 19.9(a)(2)(ii), even claimants who have received final Board decisions may submit requested information or evidence within one year after the date of the notice requesting such information or evidence. Although the Board is not required to seek out and review finally denied claims, VA would be required to review even a finally denied claim if the claimant submits requested information or evidence within the one-year period specified by 38 U.S.C. § 5103(b).

HELD:

A. The decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans v. Secretary of Veterans Affairs*, Case Nos. 02-7304, -7305, -7316 (Fed. Cir. May 1, 2003) (*DAV* decision), does not prohibit the Board of Veterans' Appeals (Board) from developing evidence in a case on appeal before the Board, provided that the Board does not adjudicate the claim based on any new evidence it obtains unless the claimant waives initial consideration of such evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA). Existing statutes and regulations may reasonably be construed to authorize the Board to develop evidence in such cases. If

considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to develop evidence in accordance with 38 U.S.C. § 5103A.

B. The Board may adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by VBA.

C. The *DAV* decision does not prohibit the Board from issuing the notice required by 38 U.S.C. § 5103(a) in a case on appeal before the Board. Existing statutes and regulations may reasonably be construed to authorize the Board to provide the required notice in such cases. If considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to issue notice required by 38 U.S.C. § 5103(a). The content of any notice issued by the Board must adhere to the requirements of 38 U.S.C. § 5103 as described by the Federal Circuit in the *DAV* decision.

D. The Board is not required to identify and readjudicate any claims decided by the Board before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision. However, if a claim was finally denied by the Board and the claimant subsequently submits requested information or evidence within one year after the date of the request, the Department of Veterans Affairs must review the claim.

Tim S. McClain