Department of Veterans Affairs

Memorandum

Date: December 22, 2003 VAOPGCPREC 8-2003

From: General Counsel (022)

Subj: Notice of Information and Evidence Necessary to Substantiate Claim – Issues Raised in Notice of Disagreement – 38 U.S.C. §§ 5103(a), 7105(d)

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Must the Department of Veterans Affairs (VA) notify a claimant of the information and evidence necessary to substantiate an issue first raised in a notice of disagreement (NOD) submitted in response to VA's notice of its decision on a claim for which VA has already notified the claimant of the information and evidence necessary to substantiate the claim?

COMMENTS:

1. VA's provision of notice of the information and evidence necessary to substantiate a claim for benefits available under the laws administered by VA is governed by 38 U.S.C. § 5103, as amended by section 3(a) of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, § 3(a), 114 Stat. 2096-97. Section 5103(a) provides:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provision of law, will attempt to obtain on behalf of the claimant.

By regulation, VA has defined the term *substantially complete application*.

> *Substantially complete application* means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed

> service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

38 C.F.R. § 3.159(a)(3). VA has also defined by regulation the term *application*. "*Claim—Application* means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p).

2. Under section 5103(a)'s plain language, VA's duty to give notice of the information and evidence necessary to substantiate a claim is triggered by VA's receipt of a complete or substantially complete application. *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1344 (Fed. Cir. 2003). From the statutory provision, it is apparent that normally VA is required to give the notice required by section 5103(a) at the beginning of the claim process. *See* S. Rep. No. 106-397, at 22 (2000) ("The Committee bill, in summary, modifies the pertinent statutes to reinstate VA's traditional practice of assisting veterans at the beginning of the claims process."). In fact, VA's receipt of a benefits application begins the claim process. *Hensley v. West*, 212 F.3d 1255, 1259 (Fed. Cir. 2000) (discussing claims process before VCAA's enactment). The VCAA's legislative history indicates that Congress intended the new law to improve the efficiency of the appeal process and the process by which subsequent claims for rating increases or service connection for additional conditions are handled, by ensuring proper development of the record the first time a claimant submits an application for benefits. 146 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). It appears that the drafters wanted claimants to know early in the claim process what was necessary to substantiate their claims. Therefore, the VCAA was drafted so as to impose on VA the duty to notify early in the claim process.

3. On its face, section 5103(a) does not require any VA action upon receipt of an NOD. NODs are not received at the beginning of the claim process. They are the means by which a claimant who is dissatisfied with VA's decision on a claim initiates an appeal to the Board of Veterans' Appeals (Board). 38 U.S.C. § 7105(a), (b)(1) ("Appellate review will be initiated by an [NOD]," and an "[NOD] shall be filed within one year from the date of mailing of notice of the result of initial review or determination."). However, an NOD can raise an issue that was not covered by the section 5103(a) notice VA gave when it received a substantially complete application but that relates to the claim evidenced by that application, viz., a "downstream element" of that claim. *See Grantham v. Brown*, 114 F.3d 1156 (Fed. Cir. 1997). For example, if a claimant claimed service connection for a disability and VA granted that claim, but the claimant filed an NOD with the effective date of the compensation award or the evaluation assigned to the service-connected disability, it is unlikely that VA's notice of the

information and evidence necessary to substantiate the service-connection claim will also have notified the claimant of the information and evidence necessary to substantiate a claim for compensation for an earlier period or for compensation paid at a higher rate. Nevertheless, we find nothing in section 5103's language or in the VCAA's legislative history indicating Congressional intent to require VA to give another section 5103(a) notice when VA receives such an NOD. Although it appears that an NOD that first raises an issue satisfies the section 3.1(p) definition of *application*, we do not interpret section 3.1(p) as requiring the provision of section 5103(a) notice upon receipt of an NOD raising a new issue. That definition of *application* existed long before the VCAA was enacted, *see* VA Regulations, Compensation and Pension, Transmittal Sheet 266 (Dec. 1, 1962), and therefore does not represent VA's implementation of section 5103 as amended by the VCAA. The Veterans Benefits Administration should consider whether section 3.1(p) should now be revised to ensure consistency with current law.

4. The action required of VA upon receipt of an NOD is governed by 38 U.S.C. § 7105. Section 7105(d)(1) provides:

> Where the claimant, or the claimant's representative, within the time specified in this chapter, files [an NOD] with the decision of the agency of original jurisdiction, such agency shall take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the [NOD], such agency shall prepare a statement of the case.

Under section 7105(d)(1)'s plain language, VA's receipt of a timely NOD triggers a duty to develop or review the claim, as deemed proper under regulations, and if such development or review does not resolve the disagreement, to prepare a statement of the case. *See Hamilton v. Brown*, 39 F.3d 1574, 1582 (Fed. Cir. 1994) ("Section 7105 is entirely devoted to the subject of an administrative appeal to the Board. [An NOD] is discussed solely in the context of initiating an appeal to the Board. No other function of a NOD is mentioned."). Thus, the question is whether regulations not inconsistent with title 38, United States Code, require VA to provide section 5103(a) notice when it receives an NOD raising an issue as to a downstream element of the claim.

5. VA has also issued regulations governing NODs and action required of VA upon receipt of an NOD. "A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with of an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement." 38 C.F.R. § 20.201; *Gallegos v. Principi*, 283 F.3d 1309, 1314 (Fed. Cir. 2002) (upholding section 20.201 as

reasonable and permissible construction of section 7105), *cert. denied*, 537 U.S. 1071 (2002).

> When [an NOD] is timely filed, the agency of original jurisdiction must reexamine the claim and determine if additional review or development is warranted. . . . If no preliminary action is required, or when it is completed, the agency of original jurisdiction must prepare a Statement of the Case . . ., unless the matter is resolved by granting the benefits sought on appeal or the [NOD] is withdrawn by the appellant or his or her representative.

38 C.F.R. § 19.26. However, VA regulations do not require that the development required upon receipt of an NOD include the provision of notice of the information and evidence necessary to substantiate an issue first raised in the NOD.

6. Furthermore, the action required by section 7105(d), preparation of a statement of the case if the disagreement is not resolved by development or review and submission of the statement to the claimant and any representative, would result in notice similar to that required by section 5103(a). A statement of the case must include a summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed; a citation to pertinent laws and regulations and a discussion of how they affect the decision; and a summary of the reasons for the decision on each issue. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29. A statement of the case notifies a claimant of the evidence already provided to VA and explains why that evidence is insufficient under applicable law and regulations to grant the benefits sought. A statement of the case will therefore inform a claimant of what is needed to substantiate an issue raised in the NOD. Section 7105(d)'s requirement to issue a statement of the case could be viewed as superfluous if section 5103(a) were interpreted to require VA to provide notice under that section upon receipt of an NOD. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." (footnotes omitted)); *see also Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Goudy*, 777 F.2d 1122, 1127 (6th Cir. 1985).

7. Moreover, interpreting section 5103(a) to require notice under that section upon receipt of an NOD raising an issue as to a downstream element of the claim could result in an absurdity: VA's claim decision could become final while the claimant still has time to submit the information and evidence necessary to substantiate the issue raised in the NOD. Under 38 U.S.C. § 5103(b), a claimant has one year to submit the information or evidence requested in VA's section 5103(a) notice. *Paralyzed Veterans of Am.*, 345 F.3d at 1345 (section 5103(b)(1) "is clearly intended to provide claimants with one year to

submit the requested evidence"); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1348 (Fed. Cir. 2003) ("law under 38 U.S.C. § 5103(a) [sic] provides the claimant one year to submit evidence").[1] However, an appellant also has sixty days from the date VA mails a statement of the case, or the remainder of the one-year period beginning on the date notification of the determination being appealed is mailed (the NOD-filing period), whichever period ends later, to file a formal or substantive appeal. 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.302(b). If the statement of the case is mailed soon enough, the one-year period for perfecting an appeal will end before the one-year period for submitting information or evidence requested in the section 5103(a) notice. Furthermore, if a formal or substantive appeal is not timely filed, the decision may become final. *Rowell v. Principi*, 4 Vet. App. 9, 17 (1993); *Cuevas v. Principi*, 3 Vet. App. 542, 546 (1992). Thus, if the claimant fails to timely file a substantive appeal, the decision could become final even though under section 5103(b) the claimant would still have time remaining to submit the information and evidence necessary to substantiate the claim. It would also be possible for the claimant to perfect his or her appeal to the Board and have the Board decide the appeal, thereby making VA's final decision on the claim, 38 U.S.C. § 7103(a), while there is still time remaining for the claimant to submit the information and evidence necessary to substantiate the claim. This situation leads precisely to what the United States Court of Appeals for the Federal Circuit (Federal Circuit) found troublesome when it invalidated VA regulations as inconsistent with the one-year period guaranteed by section 5103(b). *Disabled Am. Veterans*, 327 F.3d at 1349 (invalidating regulation accommodating claimant's submission, after Board decides appeal, of evidence requested in section 5103(a) notice). Congress could not have intended such a result. *See Pitsker v. Office of Pers. Mgmt.*, 234 F.3d 1378, 1383 (Fed. Cir. 2000).

8. With respect to whether an NOD raising a new issue should be treated as an application within the meaning of section 3.1(p), it is helpful to consider whether such an NOD is treated as a separate claim in other contexts. If VA receives an NOD that raises a new issue and subsequently awards the benefits sought, under the law, that award may be effective as early as the date VA received the application that preceded the NOD. Section 3.400 of title 38, Code of Federal Regulations, provides that the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase is the date of receipt of the claim or the date entitlement arose, whichever is later. *See also* 38 U.S.C. § 5110(a) (effective date of award based

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[1] We view this as unchanged by a recent amendment to section 5103(b)(1). *See* Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 701(b)(1), 117 Stat. 2651, 2670 (eliminating from section 5103(b)(1) prohibition on paying any benefit if VA does not receive the evidence requested in section 5103(a) notice within one year and replacing it with direct requirement that VA receive the evidence within one year).

on original claim, reopened claim, or claim for increase fixed in accordance with facts, but shall not be earlier than date of receipt of application). In *Grantham*, the appellant had filed an NOD with the rating assigned for a disability for which service connection had been granted. 114 F.3d at 1157. The Federal Circuit considered the issue of an increased rating for the service-connected condition a "down-stream question." *Id.* at 1158. The Federal Circuit explained that a regional office's first decision on a claim for benefits might not resolve, or even address, all necessary elements of the application for benefits. *Id.* Thus, the Court apparently considered the "down-stream question" of the rating to be assigned for a disability for which service connection was granted an element of the claim for compensation rather than a new claim. *See also Collaro v. West*, 136 F.3d 1304, 1308 (Fed. Cir. 1998) ("There are five common elements to a veteran's application for benefits: status as a veteran, the existence of disability, a connection between the veteran's service and the disability, the degree of the disability, and the effective date of the disability. Disagreement between the agency and the veteran about any of these may create an issue about which the agency reaches an adjudicative determination and which forms the substance of the veteran's NOD."); *Fenderson v. West*, 12 Vet. App. 119, 125 (1999) (distinguishing claims for increased rating, which court found to be new claims, from dissatisfaction with initial ratings, which court found to be, "as a matter of law, original claims that were placed in appellate status by NODs expressing disagreement with initial rating awards and never ultimately resolved until the Board decision on appeal"). In accordance with 38 U.S.C. § 5110(a) and relevant case law, described above, when determining the proper effective date for the payment of benefits, VA treats a new issue raised in an NOD as an element of the claim that has been placed in appellate status by the NOD. Accordingly, because section 5103(a) notice is required only upon receipt of a complete or substantially complete application, and, as in the situations described above, a new issue raised in an NOD is not generally considered an application for benefits, section 5103(a) notice is not required upon receipt of an NOD raising a new issue.

9. On July 11, 2003, the Court of Appeals for Veterans Claims (CAVC) remanded a case for compliance with section 5103(a)'s requirement that VA provide notice of the information and evidence necessary to substantiate a claim. *Huston v. Principi*, 17 Vet. App. 195, 202 (2003). In that case, the veteran had disagreed with the effective date assigned for the award of benefits for a grant of service connection for bilateral hearing loss. *Id.* at 198. The CAVC found that VA did not "advise the appellant of the information and evidence necessary to substantiate his direct-appeal [earlier effective date] claim." *Id.* at 202. Although the CAVC apparently read section 5103(a) to require notice upon receipt of an NOD that raises a new issue arising from a decision granting a claim, the CAVC provided no analysis in reaching this conclusion or even acknowledged that there might be some question as to whether such notice is required. Therefore, to view such conclusion as precedential would, in our view, be inappropriate. *See Leavitt v. Morrow*, 6 Ohio St. 71, 78 (1856) ("A legal principle, to be well settled,

must be founded on *sound reason*, and tend to the *purposes of justice*. . . . Otherwise, it could never be said, that law is the *perfection of reason*, and that it is the *reason* and *justice* of the law which give to it its *vitality."*); *see also Chalenor v. Univ. of North Dakota*, 291 F.3d 1042 (8th Cir. 2002) (striving to maintain uniformity in the law among the circuits, *wherever reasoned analysis* will allow) (emphasis added); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (decision not binding precedent on issue not raised in briefs or argument or discussed in court's opinion) (citing *Webster v. Fall*, 266 U.S. 507 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.")).

HELD:

Under 38 U.S.C. § 5103(a), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits. Under 38 U.S.C. § 7105(d), upon receipt of a notice of disagreement in response to a decision on a claim, the "agency of original jurisdiction" must take development or review action it deems proper under applicable regulations and issue a statement of the case if the action does not resolve the disagreement either by grant of the benefits sought or withdrawal of the notice of disagreement. If, in response to notice of its decision on a claim for which VA has already given the section 5103(a) notice, VA receives a notice of disagreement that raises a new issue, section 7105(d) requires VA to take proper action and issue a statement of the case if the disagreement is not resolved, but section 5103(a) does not require VA to provide notice of the information and evidence necessary to substantiate the newly raised issue.

Tim S. McClain