



BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

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On appeal from the
Department of Veterans Affairs Regional Office in Seattle, Washington

THE ISSUE

Entitlement to an effective date earlier than February 23, 2007, for the grant of service connection for hepatitis C.

ATTORNEY FOR THE BOARD

K. Fitch, Counsel

INTRODUCTION

The Veteran had active service from October 1969 to February 1973.

This matter comes before the Board on appeal from a June 2008 decision of the Department of Veterans Affairs (VA), Regional Office (RO), in Seattle, Washington, that awarded service connection for hepatitis C, effective as of February 23, 2007. The Veteran expressed disagreement with the assigned effective date and perfected a substantive appeal.

In April 2011, the Veteran and his spouse testified at a hearing over which the undersigned presided at the RO. A transcript of the hearing is associated with his claims file.

During the April 2011 hearing, the Veteran asserted that the issue of entitlement to an effective date earlier than February 23, 2007, for service connection for porphyria cutanea tarda with scarring, was also on appeal before the Board. However, while the Veteran timely filed a notice of disagreement as to the effective date of service connection assigned in a September 2008 RO decision (and he was provided with a statement of the case in March 2010), he did not, thereafter, timely file a substantive appeal, and the RO closed the appeal. Therefore, the issue is not before the Board.

In addition, the Board notes that the issues on appeal had previously included whether new and material evidence had been received to reopen the previously denied claims of service connection for a bilateral hip disorder and a low back disorder. However, in correspondence received in August 2011, the Veteran indicated that he wished to withdraw his appeal as to these issues only. As such, these issues are no longer before the Board.

In May 2012, the Board denied entitlement to an effective date earlier than February 23, 2007 for the grant of service connection for hepatitis C. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court), which in an April 2013, granted the parties' Joint Motion, vacating in part the Board's May 2012 decision and remanding the claim for compliance with the terms of the Joint Motion.

In the May 2012 decision, the Board noted that, in correspondence received by the Board in October 2011, the Veteran raised the issue of whether there was clear and unmistakable error (CUE) in a March 2010 Decision Review Officer's decision which addressed the issue of the assignment of a disability rating for the porphyria cutanea tarda. This issue was addressed in September 2013 rating decision.

IN THE APPEAL OF

The Veteran has submitted argument with regard to his entitlement to a greenhouse as part of VA's independent living program. The record does not show that the Veteran has been provided with a formal decision on this request. The matter is referred to the agency of original jurisdiction to insure that it is properly adjudicated.

In addition to the Veteran's claims file, the Veteran also has a Virtual VA paperless claims file, which is a highly secured electronic repository that is used to store and review documents involved in the claims process. The Board has reviewed the contents of the paperless file as well as the Veteran's claims file and will proceed with review of the claim based upon all relevant evidence.

FINDINGS OF FACT

1. The Veteran filed a claim of entitlement to service connection for hepatitis C on March 31, 1994, entitlement to service connection arose prior to that time.
2. A November 1994 rating decision denied service connection for hepatitis, and in December 1994, the Veteran submitted a timely notice of disagreement.
3. In January 1995, the Veteran was issued a statement of the case; however, the statement of the case did not comply with the provisions of 38 C.F.R. § 19.29 and, as such, by the terms of the Joint Motion for Remand, the 1994 rating decision did not become final.

CONCLUSION OF LAW

The criteria for an effective date of March 31, 1994, for service connection for hepatitis C have been met. 38 U.S.C.A. §§ 5103, 5107, 5110 (West 2002 & Supp. 2013); 38 C.F.R. § 3.400 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. VCAA.

The *Veterans Claims Assistance Act of 2000* (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002 & Supp. 2013)) redefined VA's duty to assist the Veteran in the development of a claim. VA regulations for the implementation of the VCAA were codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2013).

The appeal for an earlier effective date arises from the Veteran's disagreement with the effective date assigned after the grant of service connection. The courts have held, and VA's General Counsel has agreed, that where an underlying claim for service connection has been granted and there is disagreement as to "downstream" questions, the claim has been substantiated and there is no need to provide additional VCAA notice or address prejudice from absent VCAA notice. See *Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007); VAOPGCPREC 8-2003 (2003).

The VCAA also requires VA to make reasonable efforts to help a claimant obtain evidence necessary to substantiate his claim. 38 U.S.C.A. § 5103A ; 38 C.F.R. § 3.159(c), (d). This "duty to assist" contemplates that VA will help a claimant obtain records relevant to his claim, whether or not the records are in Federal custody, and that VA will provide a medical examination or obtain an opinion when necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4).

VA obtained the Veteran's service treatment records, post-service VA treatment records, and identified private medical records. Additional records dated since the award of service connection are not relevant to effective date issues because the effective dates turn on when the Veteran filed a claim for the subject benefits. There is no other reported relevant evidence that remains outstanding, nor is there any indication of the need for additional examinations or opinions. There is no

indication or allegation that additional VA treatment records could show that the Veteran filed an earlier claim for benefits with VA. Thus, VA has no duty to attempt to obtain additional records.

Concerning the hearing, in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the Court held that 38 C.F.R. § 3.103(c)(2) requires that the individual who chairs a hearing must fully explain the issues and to suggest the submission of evidence that may have been overlooked. In the present case, the undersigned fully identified the issues on appeal and asked specific questions directed at identifying any pertinent evidence not currently associated with the claims folder that might have been overlooked or was outstanding and might substantiate the claim currently on appeal. Additionally, neither the Veteran nor his representative have asserted that VA failed to comply with 38 C.F.R. § 3.103(c)(2), nor has he identified any prejudice in the conduct of the Board hearing. As such, the Board finds that, consistent with *Bryant*, there is compliance with the duties set forth in 38 C.F.R. § 3.103(c)(2).

II. Earlier effective date for hepatitis C.

Generally, 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 will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400.

A specific claim in the form prescribed by VA must be filed in order for benefits to be paid to any individual under the laws administered by VA. 38 C.F.R. § 3.151(a). The term "claim" or "application" means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief of entitlement, to a benefit. 38 C.F.R. § 3.1(p). "Date of receipt" generally means the date on which a claim, information or evidence was received by VA. 38 C.F.R. § 3.1(r).

The applicable statutory and regulatory provisions require that VA look to all communications from the appellant that may be interpreted as applications or

claims - formal and informal - for benefits. In particular, VA is required to identify and act on informal claims for benefits. 38 U.S.C.A. § 5110(b)(3); 38 C.F.R. §§ 3.1(p), 3.155(a); *see Servello v. Derwinski*, 3 Vet. App. 196, 198-200 (1992). An informal claim must identify the benefit sought. 38 C.F.R. § 3.155(a).

The RO denied the Veteran's initial claim for service connection for hepatitis in a November 1994 rating decision. He submitted a timely notice of disagreement in December 1994, and was issued a statement of the case in January 1995.

The statement of the case indicated that the Veteran's claim for hepatitis was denied because it was not shown in the service medical records. The letter accompanying the statement of the case notified the Veteran that if VA did not hear from him in 60 days, it would be assumed that he did not intend to complete his appeal, and VA would close the record. An Appeal to Board of Veterans' Appeals (VA Form 9) was enclosed for the Veteran's use.

Following the issuance of the statement of the case, there was no communication or correspondence from the Veteran which, even liberally, could be interpreted as an appeal of the November 1994 rating decision, or a claim, or application to reopen the previously denied claim of service connection for hepatitis until he submitted a claim to reopen in February 2007. In addition, no new and material evidence was submitted within one year of the November 1994 decision. The RO granted service connection for hepatitis C is February 23, 2007, the date the Veteran's petition to reopen the claim for service connection was received.

In correspondence to the Board and during his April 2011 hearing, the Veteran asserted that an earlier effective date was warranted as he had submitted additional evidence following the issuance of the January 1995 statement of the case, and that he had been waiting for a supplemental statement of the case in order to submit a VA Form 9. *See* 38 C.F.R. §§ 3.159(b), 19.31.

In May 2012, the Board denied the claim, finding that there was no additional evidence of record as to the issue of service connection for hepatitis which would have warranted the issuance of a supplemental statement of the case following the

January 1995 statement of the case. 38 C.F.R. § 19.31. In that decision, the Board found that, following the issuance of the January 1995 statement of the case, the Veteran was afforded a VA examination as to the separate issue of an increased disability rating for his service-connected tinnitus. The examination report, along with the results of diagnostic studies, appear to have been associated with the Veteran's claims file within one year of the issuance of the statement of the case. This additional evidence, however, did not pertain to the issue of service connection for hepatitis.

The Veteran appealed this decision and, in an April 2013 Order, the Court granted the parties' Joint Motion, vacating in part the Board's May 2012 decision and remanding the claim for compliance with the terms of the Joint Motion. Specifically, the parties to the Joint Motion found that the Board in May 2012 had failed to explain how the January 1995 statement of the case comported with that portion of 38 C.F.R. § 19.29 which provides that the statement of the case must be "complete enough to allow the appellant to present written and/or oral arguments before the [BVA]." In this regard, the parties to the Joint motion pointed to a portion of the January 1995 statement of the case that stated that VA was "reviewing the additional records you submitted with your appeal and we will notify you of our decision as soon as it is reached." The parties to the Joint Motion then noted that some of the records submitted by the Veteran with his December 1994 notice of disagreement (prior to issuance of the statement of the case) pertained to the hepatitis C claim. As such, the parties found that it was unclear how the statement of the case clearly conveyed that the denial of the claim was final and that the inherently contradictory information provided by the statement of the case did not render it complete enough to allow the Veteran to present an appropriate response. The parties to the Joint Motion found that it was unclear whether further adjudication was to take place with respect to all the claims.

As noted in the April 2013 Joint Motion, the January 1995 statement of the case does indicate that VA would be reviewing additional records submitted. The parties to the Joint Motion essentially agreed that if the statement of the case was insufficiently complete, it would have prevented the November 1994 decision from becoming final. Although the parties ostensibly left it to the Board to determine

whether the statement of the case was sufficiently complete, the parties agreed that the statement of the case was confusing and they could not see how the statement of the case would have permitted the Veteran to provide an appropriate response. The Board is bound by the stipulations and instructions contained in the Joint Motion. *See Forcier v. Nicholson*, 49 Vet. App. 414, 425 (2006).

As such, the Board is constrained to find that the January 1995 statement of the case, did not comport with 38 C.F.R. § 19.29, and therefore that the November 1994 rating decision did not become final. The appropriate effective date for the grant of service connection for hepatitis C is March 31, 1994, when the Veteran filed his initial claim and by which time entitlement had arisen. There has been no contention or evidence that he filed an earlier claim. Hence, an effective date prior to March 31, 1994 would not be warranted.

ORDER

Entitlement to an effective date of March 31, 1994, for the grant of service connection for hepatitis C is granted.



Mark D. Hindin
Veterans Law Judge, Board of Veterans' Appeals