DATE: 3-4-92

CITATION: VAOPGCPREC 05-92
Vet. Aff. Op. Gen. Couns. Prec. 05-92

TEXT:

Subj: De Novo Review of Sufficiency of Evidence to Reopen a Claim

QUESTION PRESENTED:

In appeals from decisions in which the agency of original jurisdiction reopened a claim for service connection after a finding of new and material evidence, but then proceeded to deny the reopened claim on its merits, does the Board of Veterans' Appeals (BVA or Board) have the authority to determine on a de novo basis whether the claim had been properly reopened?

COMMENTS:

1. This question arose as the result of an inquiry concerning an appeal to BVA in which the originating agency had found new and material evidence to reopen a claim for service connection it had previously denied, a decision later affirmed by BVA, and then denied the reopened claim because a new factual basis for a grant of benefits had not been presented. Claims for service connection that have previously been denied by the Board are subject to a two- step analysis prescribed by the United States Court of Veterans Appeals (COVA) in Manio v. Derwinski, 1 Vet. App. 140 (1991). First, the Board must determine whether additional evidence is "new and material" to reopen the claim. Second, if the Board finds the evidence to be new and material and the claim is thus reopened, the case is then to be evaluated based on all evidence of record.

2. In Thompson v. Derwinski, 1 Vet. App. 251 (1991), COVA affirmed a BVA denial of service connection but held that the BVA had erroneously reopened a claim based on a finding of new and material evidence. See also Perez v. Derwinski, U.S. Vet. App. No. 90-487, slip. op. at 4 (Jan. 15, 1992); Kehoskie v. Derwinski, U.S. Vet. App. No. 90-35, slip. op. at 1-2, 4-6 (Dec. 17, 1991). The ability of an appellate tribunal such as COVA to reverse the Board on an issue that had been decided in the claimant's favor suggests that BVA, with its powers of de novo review, should also be able to reverse a finding of new and material evidence by the agency of original jurisdiction.

3. First, we note that the provisions of 38 C.F.R. § 20.101(c) state that " s ubject to review by courts of competent jurisdiction, only the Board of Veterans' Appeals will make final decisions with respect to its jurisdiction." Cf. former 38 C.F.R. § 19.1(b). We also note that the provisions of 38 C.F.R. § 19.5 (formerly 38 C.F.R. § 19.103) do not include actions of the originating agency among the criteria under which BVA is bound. While it is arguable that the reopening of a claim based on a finding of new and material evidence by the originating agency may be construed as a "decision" which is "final and binding" under 38 C.F.R. § 3.104(a), we note that COVA apparently does not regard it as such. Even if the finding were final, however, BVA does have authority under 38 U.S.C. § 7103(c) (formerly 38 U.S.C. § 4003(c)) to correct obvious error. See also 38 C.F.R. § 3.105(a). Moreover, BVA should be able to invoke the provisions of 38 C.F.R. § 3.105 under 38 C.F.R. § 20.2, which permits the Chairman to "prescribe a procedure which is consistent with the provisions of title 38, United States Code, and the BVA rules of practice " in any instance governed by no applicable rule or procedure. Cf. former 38 C.F.R. § 19.101(b). Accordingly, we believe that the foregoing authority allows BVA to reverse a finding of new and material evidence.

4. A similar situation has arisen in the context of social security determinations rendered by the Social Security Appeals Council. Like BVA, the Appeals Council has substantial de novo review authority. See 20 C.F.R. §§ 404.956, 404.970(b), 404.976(b); see also 70A Am. Jur. 2d, Social Sec. & Medicare §§ 1360, 1373 (1987). Case law indicates that the Appeals Council, in reviewing the decision of an Administrative Law Judge (ALJ), has the authority to reconsider issues which the ALJ resolved in favor of the appellant even though the appellant did not appeal the ALJ's findings on those issues. See, e.g., Hale v. Sullivan, 934 F.2d 895 (7th Cir. 1991); Gronda v. Secretary of Health & Human Services, 856 F.2d 36 (6th Cir. 1988); DeLong v. Heckler, 771 F.2d 266 (7th Cir. 1985).

5. The Appeals Council's authority in this regard, however, may be limited. A review of social security case law reveals a split among the circuits as to whether the Appeals Council must provide advance notice of its intent to undertake expanded review of the ALJ decision and, if so, the nature and extent of the notice required. See, e.g., Hale, 934 F.2d at 898; Gronda, 856 F.2d at 38-39; Kennedy v. Bowen, 814 F.2d 1523, 1528 (11th Cir. 1987); Powell v. Heckler, 789 F.2d 176, 180 (3rd Cir. 1986); Everhart v. Bowen, 694 F.Supp. 1518, 1520-21 (D. Colo. 1987). Most jurisdictions that have addressed this issue appear to require notice of expanded review. See Clift v. Sullivan, 927 F.2d 367 (8th Cir. 1991); Bivines v. Bowen, 833 F.2d 293 (11th Cir. 1987); Chrupcala v. Heckler, 829 F.2d 1269 (3rd Cir. 1987); Kennedy v. Bowen, 814 F.2d at 1528-29; Powell, 789 F.2d at 179; Sorenson v. Bowen, 709 F.Supp. 1045 (D. Utah 1988), rev'd on other grounds, 888 F.2d 706 (10th Cir. 1989); Thomas v. Bowen, 693 F.Supp. 950 (W.D. Wash. 1988; Everhart,

694 F.Supp. at 1521. Contra Hale, 934 F.2d at 898; Gronda, 856 F.2d at 39; DeLong, 771 F.2d at 267-68. Cf. Houston v. Sullivan, 895 F.2d 1012, 1015 (5th Cir. 1989) (notice requirement not applicable where claimant made no attempt to limit issues). Most of the decisions rest on the provisions of 20 C.F.R. § 404.973 (see Bivines, 833 F.2d at 296-97; Kennedy, 814 F.2d 1527-28; Sorenson, 709 F.Supp. at 1048) or 20 C.F.R. § 404.969 (see Powell, 789 F.2d at 179; Everhart, 694 F.Supp. at 1520- 21) or both (see Thomas, 693 F.Supp. at 953). While the Bivines and Kennedy decisions from the Eleventh Circuit stress that the notice requirement must be based on social security regulations, it is questionable whether such regulations are necessary for a notice requirement. Most of the decisions generally invoke principles of "due process" and "fundamental fairness." See Bivines, 833 F.2d at 296; Chrupcala, 829 F.2d at 1273 n.5; Kennedy, 814 F.2d at 1526; Powell, 798 F.2d at 179; Sorenson, 709 F.Supp. at 1048; Everhart, 694 F.Supp. at 1522-23. The decisions emphasize that notice is necessary to alert the claimant that he or she may need to make certain arguments or present additional evidence on an unchallenged aspect of a decision. Bivines, 833 F.2d at 295; Kennedy, 814 F.2d at 1525-26; Thomas, 693 F.Supp. at 953. It has also been suggested that notice is necessary to advise claimants of the risks of filing an appeal. Everhart, 694 F.Supp. at 1523.

6. Similarities between the Social Security Appeals Council and the BVA suggest that the Board may be subject to a similar notice requirement. Unlike the BVA, however, the Appeals Council is not required to review every aspect of a case on appeal. See 20 C.F.R. § 404.976(a). " I f the council's role was to, in effect, re-try each case," observed one court, "then mere notice of the pendency of appeal would be sufficient because a claimant would prepare for an appeal as though it were a re-enactment of the entire ALJ proceeding." Kennedy, 814 F.2d at 1528 n.11. Since BVA does review all questions relating to a claim, it is arguable that notification of certification of appeal would provide an appellant with sufficient notice as to the issues.

7. On the other hand, although BVA's rules of practice do not provide for specific notification of the issues on appeal, the Board contemplates that appellants and their representatives are informed of the issues through the Statement and Supplemental Statements of the Case. See 57 Fed. Reg. 4091 (1992). By implication, when the Statement and Supplemental Statements of the Case do not define all of the issues being reviewed, additional notice is warranted. Furthermore, a notice requirement may be inferred from the regulations such as 38 C.F.R. § 20.903 (formerly 38 C.F.R. § 19.179), which requires BVA to notify appellants of opinions of the Chief Medical Director, the Armed Forces Institute of Pathology, the General Counsel, and independent medical experts.

8. If BVA is required to provide notice of the issues on appeal, the case law does

not clearly indicate how such notice should be provided. The provisions of 20 C.F.R. §§ 404.969 and 404.973 and the aforementioned cases do suggest that a letter mailed to the parties at their last known address stating the issues to be considered would provide adequate notice of expanded review. While some of the decisions reflect apparent judicial deference to agency regulations, see Bivines and Kennedy, an agency regulation or a form letter accompanying either the decision of the originating agency or the Statement of the Case designed to provide constructive notice of expanded review to all potential appellants might not fulfill the requirements of due process. At least one court has held that the notice requirement under 20 C.F.R. §§ 404.969 and 404.973 was not satisfied by a general warning on the cover sheet to an ALJ decision that all findings in the decision were subject to review on appeal. See Thomas, 693 F.Supp. at 952-53. In light of the due process concerns raised by the social security case law, we believe it would be prudent for the Board to write the appellant when it intends to reverse a finding of new and material evidence.

9. In summary, we conclude that VA regulations permit the Board, in reviewing denials of service connection, to reverse findings on sub-issues, such as whether new and material evidence exists to reopen a claim, which the originating agency had decided in a claimant's favor. Case law strongly suggests, however, that the claimant should be advised of the possibility of such a reversal.

HELD:

In appeals from decisions in which the originating agency denied a reopened claim for service connection after a finding of new and material evidence to reopen the claim, the Board of Veterans' Appeals has the authority to determine on a de novo basis whether the claim had been properly reopened.

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