Date: May 10, 1995 VAOPGCPREC 12-95

From: General Counsel (022)

Subj: Clear and Unmistakable Error -- Constructive Notice of VA Medical Records

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. Under the constructive-notice rule of Bell v. Derwinski, 2 Vet. App. 611 (1992), may the failure of an agency of original jurisdiction (AOJ) to consider pertinent Department of Veterans Affairs (VA) medical records in existence at the time of its prior final decision constitute clear and unmistakable error, even though such evidence was not actually in the record before the AOJ?

b. Would those circumstances constitute clear and unmistakable error only when the prior final decision of the agency of original jurisdiction was rendered after July 21, 1992, the date of the Bell decision?

c. If those circumstances would not constitute clear and unmistakable error as to prior final AOJ decisions rendered before July 21, 1992, would the effective date of an award of benefits in a later reopened claim after July 21, 1992, based on preexisting VA medical records be the date the reopened claim is filed?

COMMENTS:

1. In Russell v. Principi, 3 Vet. App. 310, 314 (1992), the United States Court of Veterans Appeals stated that "[a] determination that there was a 'clear and unmistakable error' must be based on the record and the law that existed at the time of the prior AOJ or [Board] decision." The court in Russell held that VA's failure to consider relevant evidence which was in the record before it at the time of the prior decision may constitute clear and unmistakable error, if the failure affected the outcome of the claim. Id. at 319-20. In Caffrey v. Brown, 6 Vet. App. 377, 383 (1994), the court held that "evidence that was not part of the record at the time of the prior determination may not form the basis of a finding that there was an act of clear and unmistakable error." Ac-

cordingly, under Russell and Caffrey, a claim that an AOJ committed clear and unmistakable error in failing to consider pertinent evidence must be based upon evidence which was in the record before the AOJ at the time of the prior decision.

2. In Bell, the Court of Veterans Appeals held that medical records concerning a claimant which are in VA's possession at the time VA adjudicators render a decision on a claim will be considered to be evidence which was in the record before the adjudicators at the time of the decision, regardless of whether such records were actually before the adjudicators at the time of the decision. The court's decision was based on the principle that VA adjudicators are deemed to have constructive notice of all medical records in VA's possession, whether or not they have actual notice of such records. The decision in Bell was made in the context of a determination as to whether records which were in VA's possession, but were not actually in the record before the AOJ or Board, could be considered part of the record on appeal to the Court of Veterans Appeals for purposes of 38 U.S.C. § 7252(b), which limits the court's review to "the record of proceedings before the Secretary and the Board."

3. In Damrel v. Brown, 6 Vet. App. 242 (1992), the court indicated that the constructive-notice rule of Bell may also be applicable in determining the content of the record before an AOJ in a prior final adjudication for purposes of clear-and-unmistakable-error determinations under 38 C.F.R. § 3.105(a). The claimant in Damrel had been evaluated by VA as totally disabled for insurance purposes since 1966, but evidence of that evaluation apparently was not considered by the AOJ in 1967 in evaluating his claim of total disability for compensation purposes. The claimant asserted that the AOJ committed clear and unmistakable error in 1967 by failing to award a total disability rating based upon the evidence of his VA evaluation for insurance purposes. The Court stated that, under the constructive-notice rule in Bell, the AOJ would ordinarily be deemed to have constructive knowledge of the

VA insurance records. However, the court held that the constructive-notice rule was first announced in Bell and was not applicable to decisions rendered prior to the issuance of the Bell opinion. Accordingly, the court held that the AOJ's failure in 1967 to consider evidence of the claimant's evaluation for VA insurance purposes could not constitute clear and unmistakable error, because such evidence was not actually before the AOJ in 1967 and could not be deemed to have been before the AOJ under the constructive-notice rule in Bell.

4. Under Bell and Damrel, evidence which was in VA's possession at the time of a prior final AOJ decision will be deemed to have been in the record before the AOJ at the time of that decision for purposes of 38 C.F.R. § 3.105(a). Under Russell, an AOJ's failure to consider pertinent evidence in the record before it may constitute clear and unmistakable error. Accordingly, a finding of clear and unmistakable error in a prior final decision may be based upon a prejudicial failure to consider evidence which was actually before the AOJ or which was deemed to have been before the AOJ under the constructive-notice rule of Bell. However, we believe that Damrel clearly establishes that the constructive-notice rule of Bell cannot be applied to establish clear and unmistakable error in a VA decision rendered prior to the July 21, 1992, issuance of the Bell opinion.

5. The court in Damrel noted that the rule of constructive notice in Bell "was not formulated until 1992." Damrel, 6 Vet. App. at 246. No statutes or regulations or other authorities imposed a constructive-notice rule on VA adjudications prior to the Bell decision. To the contrary, the applicable judicial precedents prior to Bell indicated that a particular component of VA does not have constructive knowledge of evidence in the possession of a separate VA component. See United States v. Willoughby, 250 F.2d 524, 528-30 (9th Cir. 1957); United States v. Nero, 248 F.2d 16, 19-20 (2d Cir. 1957); United States v. Kiefer, 228 F.2d 448, 450-51 (D.C. Cir. 1955), cert. denied, 350 U.S. 933 (1956); Clohesy v. United States, 199 F.2d 475, 477-78 (7th Cir. 1952); Jones v. United States, 106 F.2d 888, 891 (5th Cir. 1939). Accordingly, under the law in existence prior to the Court of Veterans Appeals' decision in Bell, the record before the AOJ would not generally be deemed to include VA records which were not actually before the AOJ when it rendered its decision on the claim. Any failure in such decisions to consider evidence which was in VA's possession but was not actually in the record before the AOJ could not constitute clear and unmistakable

error, because the alleged error would not be one based solely upon the record before the AOJ at the time of the prior decision.

6. The rule announced in Bell may not be applied retroactively to establish clear and unmistakable error in decisions which were correct based on the law and the record in existence at the time of those decisions. The clear-and-unmistakable-error regulation, 38 C.F.R. § 3.105, expressly states that it is not applicable when "there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue." Changes in statutes, regulations, or interpretations thereof occurring after a final AOJ decision do not affect the determination as to whether a decision was legally and factually correct at the time the decision was rendered. As the above-cited circuit-court decisions and the Court of Veterans Appeals' decision in Damrel indicate, the constructive-notice rule announced in Bell in 1992 represented a change in the controlling judicial interpretation of applicable law or VA issuances pertaining to the content of the administrative record. Accordingly, that change in interpretation may not be applied retroactively to form a basis for finding clear and unmistakable error. See also VAOGCPREC 9-94 (concluding, based on United States Supreme Court precedent, that precedential decisions of the Court of Veterans Appeals generally do not apply retroactively to cases which have been finally decided, but apply only as to cases still open on direct review). We conclude, therefore, that, as to prior final AOJ decisions rendered prior to July 21, 1992, the AOJ's failure to consider evidence which was in VA's possession but was not actually in the record before the AOJ may not form the basis for a finding of clear and unmistakable error.

7. In Tobler v. Derwinski, 2 Vet. App. 8, 14 (1991), the Court of Veterans Appeals held that "a decision of this Court, unless or until overturned . . ., is a decision of the Court on the date it is issued; any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued." Accordingly, the constructive-notice rule announced in Bell must be considered applicable to all AOJ decisions rendered on or after the date the Bell opinion was issued. The record in all AOJ decisions rendered on or after July 21, 1992, will thus be deemed to include all pertinent VA medical evidence in existence on the date of the AOJ decisions, regardless of whether such evidence was actually in the record before the AOJ. Un-

der Bell and Damrel, an AOJ's failure, in a decision rendered on or after July 21, 1992, to consider evidence which was actually or constructively in the record before it may constitute clear and unmistakable error if it affected the outcome of the prior decision.

8. When a claim was finally denied prior to July 21, 1992, and benefits are subsequently awarded in a reopened claim based on evidence which was previously in VA's possession but was not actually or constructively in the record before the AOJ at the time of the prior decision, the effective date of the award would generally be the date on which the reopened claim was filed. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(1)(ii) and (r). However, it should be borne in mind that such records may themselves constitute informal claims, which can have implications for the effective dates of resulting awards. 38 C.F.R. § 3.157. Although the constructive-notice rule announced in Bell constituted a liberalizing change in interpretation of law and regulation, we do not believe that such change in interpretation would justify a retroactive effective date under 38 U.S.C. § 5110(g) or 38 C.F.R. § 3.114. Section 5110(g) states that, where benefits are awarded or increased "pursuant to any Act or administrative issue," the effective date of such award or increase may be fixed retroactive to the effective date of the Act or administrative issue or for as much as one year prior to application for benefits under the liberalizing law or issue. In VAOGCPREC 10-94, however, we concluded that a judicial precedent does not constitute a liberalizing "law or administrative issuance" which would justify a retroactive effective date under the provisions of 38 U.S.C. § 5110(g).

9. Further, the Court of Veterans Appeals held in Spencer v. Brown, 4 Vet. App. 283, 288-90 (1993), aff'd 17 F.3d 368 (Fed. Cir.), cert. denied 115 S.Ct. 61 (1994), that the effective-date provisions of section 5110(g) apply only where a liberalizing law or VA issuance established a new substantive basis for entitlement to benefits, and do not apply when a law or agency issuance merely establishes new procedural or evidentiary requirements governing the adjudication of claims. The constructive-notice rule announced in Bell did not establish a new substantive basis of entitlement to benefits or alter the existing substantive standards for awarding benefits. Rather, Bell merely established an evidentiary rule for determining the contents of the record in VA adjudications. Accordingly, the Bell rule is not the sort of liberalizing law

or VA issuance which would justify a retroactive effective date under 38 U.S.C. § 5110(g).

HELD:

a. With respect to final agency of original jurisdiction (AOJ) decisions rendered on or after July 21, 1992, an AOJ's failure to consider records which were in VA's possession at the time of the decision, although not actually in the record before the AOJ, may constitute clear and unmistakable error, if such failure affected the outcome of the claim.

b. With respect to final AOJ decisions rendered prior to July 21, 1992, an AOJ's failure to consider evidence which was in VA's possession at the time of the decision, although not actually in the record before the AOJ, may not provide a basis for a finding of clear and unmistakable error.

c. When, subsequent to a final AOJ denial prior to July 21, 1992, a claim is reopened after July 21, 1992, and benefits are awarded on the basis of evidence in the VA's possession but not actually in the record at the time of the A0J denial, the effective date of that award will generally be the date on which the reopened claim was filed, as provided by 38 U.S.C. § 5110(a).

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