

DATE: 7-24-92

CITATION: VAOPGCPREC 16-92
Vet. Aff. Op. Gen. Couns. Prec. 16-92

TEXT:

Subj: Authority of the Board of Veterans' Appeals to Address Matters Not Considered by the Agency of Original Jurisdiction

QUESTIONS PRESENTED:

- a. Is it permissible for the Board of Veterans' Appeals (BVA) to consider evidence which has not been considered by the agency of original jurisdiction (AOJ)?
- b. Is it permissible for BVA to consider issues which have not been considered by the AOJ?
- c. Is it permissible for BVA to consider argument or subissues concerning a claim, or statutes, regulations, or Court of Veterans Appeals (COVA) analyses, which have not been considered by the AOJ?
- d. If BVA determines that the statement of the case furnished to an appellant does not meet the requirements of 38 U.S.C. § 7105(d) (formerly s 4005(d)), must BVA remand the appeal to the AOJ to cure the deficiency in the statement of the case?

COMMENTS:

1. To a substantial degree, the questions presented are governed by statutory and regulatory provisions relating to appellate practice and procedure. Further, General Counsel opinions issued shortly after your request for opinion was made shed considerable light on the issues raised.
2. Existing statutes and regulations prescribe the circumstances under which BVA may consider evidence which has not been considered by the AOJ. BVA regulations at 38 C.F.R. § 20.800 permit the submission of additional evidence by an appellant after initiation of an appeal. See also 38 C.F.R. § 20.709 (submission of additional evidence after a BVA hearing). Section 19.37(b) of title 38, Code of Federal Regulations, specifies that evidence received by the AOJ after the transfer of records to BVA for appellate consideration will be forwarded to BVA if it has a bearing on the appellate issue or issues. Under that regulation, BVA then determines what action is required with respect to the additional evidence. Section 20.1304(c) of title 38, Code of Federal Regulations, requires

BVA to refer pertinent evidence accepted by BVA following certification of an appeal or forwarded to BVA pursuant to 38 C.F.R. § 19.37(b) to the AOJ for review and preparation of a supplemental statement of the case unless review by the AOJ is waived by the appellant or BVA determines that the benefit to which the evidence relates may be allowed on appeal without referral of the evidence to the AOJ. This regulation further provides that any waiver must be in writing or, if made during the course of a hearing on appeal, formally entered on the record orally at the time of the hearing.

3. Pursuant to statutes and regulations, certain classes of evidence, i.e., independent medical opinions, 38 U.S.C. § 7109 (formerly § 4009) and 38 C.F.R. § 20.901(d), and opinions of the Chief Medical Director, the General Counsel, and the Armed Forces Institute of Pathology, 38 C.F.R. § 20.901(a), (b), and (c), may be considered by BVA without reference to the AOJ. However, pursuant to 38 U.S.C. § 7109(c) (with regard to independent medical opinions) and 38 C.F.R. § 20.903, BVA is required to notify an appellant and the appellant's representative when such an opinion is requested and, when the opinion is received, to provide a copy of the opinion to the appellant's representative, or to the appellant if there is no representative, and provide a period of 60 days for response.

4. Consideration of the question of whether remand is necessary to consider arguments, issues, subissues, statutes, regulations, or COVA analyses not considered by the AOJ requires a review of the statutory and regulatory scheme for processing claims for veterans' benefits by the Department of Veterans Affairs (VA). For purposes of this discussion, we use the term "issue" to refer to a particular claim of entitlement, e.g., service connection for a particular disability, and the term "subissue" to refer to the elements which make up the determination of that issue, e.g., whether service connection may be established on a particular basis.

5. The Chief Medical Director, the Chief Benefits Director, and Director of the National Cemetery System have generally been granted authority to act on all matters assigned to their respective offices. 38 U.S.C. § 512(a); 38 C.F.R. § 2.6(a)(1), (b)(1), and (f)(1). The Secretary has also specifically delegated to the Chief Benefits Director and supervisory or adjudicative personnel within the Veterans Benefits Administration authority to make findings and decisions on claims for monetary benefits. 38 C.F.R. § 3.100(a). Procedures for obtaining appellate review of adjudicative determinations made by AOJ's have been established. 38 U.S.C. § 7105(a); 38 C.F.R. §§ 20.200- 20.202. Section 20.3(a) of title 38, Code of Federal Regulations, defines the AOJ as the VA regional office, medical center, clinic, cemetery, or other VA facility which made the initial determination on a claim or, if records have been permanently transferred to another VA facility, its successor. Thus, the responsibility for making initial findings and decisions on claims for veterans' benefits lies with the AOJ.

6. In contrast, BVA functions as an appellate body. Section 7104(a) (formerly

section 4004(a)) of title 38, United States Code, provides that all questions under laws that affect the provision of benefits by the Secretary of Veterans Affairs to veterans or their dependents or survivors shall be subject to one review on appeal to the Secretary and assigns to BVA authority to make final decisions on behalf of the Secretary on such appeals. See also 38 U.S.C. § 511 (a) (formerly § 211(a)) and 38 C.F.R. § 20.101(a). Section 19.4 of title 38, Code of Federal Regulations, defines the principal functions of the Board as making determinations of appellate jurisdiction, considering all applications on appeals properly before it, conducting hearings on appeals, evaluating the evidence of record, and entering decisions in writing on questions presented on appeal.

7. Governing statutes and regulations do not contemplate that BVA will make final determinations on claims or issues which the AOJ has never had an opportunity to address. Section 7105(d)(1)(c) of title 38, United States Code, requires that a statement of the case include the AOJ's decision on each issue involved in a claim. See also 38 C.F.R. § 19.29(c). BVA regulations, at 38 C.F.R. § 19.35, state that a certification of appeal submitted to the Board by an AOJ cannot serve to deprive the Board of jurisdiction over an issue. However, a claimant's notice of disagreement must identify the specific determinations with which the claimant disagrees. 38 C.F.R. § 20.201; see also 38 C.F.R. § 19.26 (regarding clarification of the issues being appealed). Furthermore, a substantive appeal completed by a claimant must specifically identify the issues being appealed. 38 C.F.R. § 20.202. This statutory and regulatory scheme treats the Board as strictly an appellate body which exercises jurisdiction only over issues properly brought before it under established appellate procedures. The only exception to this scheme is 38 C.F.R. § 19.13, which provides that the BVA Chairman or Vice Chairman may approve the assumption of appellate jurisdiction of an adjudicative determination which has not become final in order to grant a benefit.

8. We note that 38 U.S.C. § 7104(d)(1) requires that a BVA decision include a written statement of findings and conclusions "on all material issues of fact and law presented on the record." However, this provision has been interpreted by the Department in implementing regulations at 38 C.F.R. § 19.7(b) as being subject to an exception for issues remanded to the AOJ for further development. Further, section 19.7(b) calls for the Board to set forth in its decision the specific issue or issues under appellate consideration. This suggests that, if an issue is raised on the record for the first time before the Board, the proper course, consistent with the governing statutes and regulations, is for the Board to remand the issue to the AOJ for further development.

9. The above conclusions are consistent with relevant COVA decisions. In Bentley v. Derwinski, 1 Vet.App. 28 (1990), appeal dismissed for failure to prosecute, No. 91-7020 (Fed. Cir. Feb. 22, 1991), the appellant sought review in COVA of, among other issues, his entitlement to service connection for coronary artery disease, as a result of a statement in BVA's decision that his

coronary artery disease had not been established as being service-connected. COVA observed that nothing in the record prior to the BVA statement indicated that the issue of service connection for this disability had ever been raised or considered or that the appellant had been given an opportunity to be heard on it. 1 Vet.App. at 31, COVA further stated that:

Under 38 U.S.C. § 4005(d)(1) (1988) now § 7105(d)(1) , a Statement of the Case (SOC) is required to discuss fully each issue. Here, however, the SOC, dated June 19, 1989, was totally silent on the issue of coronary artery disease. Thus, it appears from this record that the issue of any entitlement that the veteran might have for coronary artery disease was not properly before the BVA for decision. Therefore, the BVA decision does not constitute any binding resolution of this issue

Id. at 31-32. Thus, COVA recognized that BVA should not reach a decision on an issue not properly before it.

10. In Harris v. Derwinski, 1 Vet.App. 180 (1991), and Hoyer v. Derwinski, 1 Vet.App. 208 (1991), cited in the request for opinion, COVA dismissed as premature appeals from BVA decisions which addressed only those issues which had been considered by the AOJ. In each case, COVA held that BVA's decision on the claim which had been appealed was not a final order subject to appeal to COVA because that claim was "inextricably intertwined" with another claim which was undecided and pending before VA. Harris, 1 Vet.App. at 183. Hoyer, 1 Vet.App. at 210. We do not read either of these cases as requiring that BVA itself decide the pending claims. Instead, these cases state only that until such issues are ultimately decided, BVA's decision on the issue which was appealed is not final.

11. Finally, in Payne v. Derwinski, 1 Vet.App. 85, 87 (1990), COVA overturned a BVA decision on the basis that BVA had refused to acknowledge and act upon the appellant's assertion, included in his substantive appeal, that he had a right-knee disability which was caused by his service-connected left-knee disability, and that his overall disability had increased as a result. COVA vacated BVA's decision and remanded the case back to the BVA "for a determination by it (or the agency of original jurisdiction) which takes into account the condition of the right knee." Id. This case merely indicates that if an issue is adequately raised by a claimant in bringing a case before the Board, the Board must resolve that issue or, if necessary, remand it for further development.

12. Turning to the question of subissues, arguments, statutes, etc. not considered by the AOJ, although VA statutes and regulations establish BVA as an appellate body, nonetheless, when an appeal is certified to BVA, the Board is required to conduct a de novo review of the AOJ's decision. Boyer v. Derwinski, 1 Vet. App. 531, 534 (1991); O.G.C. Prec. 6-92 (interpreting 38 U.S.C. § 104(a)). In making its decisions, BVA is bound by VA regulations, instructions of the

Secretary, and precedent opinions of the General Counsel, per 38 U.S.C. § 7104 (c), and by final COVA decisions, see Tobler v. Derwinski, 2 Vet.App. 8, 14 (1991), appeal docketed, No. 92-7020 (Fed. Cir. March 13, 1992). O.G.C. Precs. 5-92 and 6-92, as well as pertinent COVA decisions, suggest that BVA may consider arguments, subissues, statutes, regulations, or COVA analyses which have not been considered by the AOJ, if the claimant will not be prejudiced by its actions.

13. In O.G.C. Prec. 6-92, we stated that in a case in which the appellant or the appellant's representative raises the applicability of a law which was not considered by the AOJ, the appellant is not prejudiced by the omission of such law from the statement of the case. In such situations, there is no need to remand the appeal to the AOJ to cure a deficiency in the statement of the case.

Since the appellant had argued the law, BVA may consider its applicability to the facts presented on appeal. The same reasoning would apply regardless of whether the argument asserted was of a legal or factual nature.

14. In Douglas v. Derwinski, 2 Vet.App. 103 (1992), vacated in part, (Vet. App.), an appeal was before BVA on the issue of a veteran's entitlement to service connection for basal-cell carcinoma. Although the only basis for service connection previously asserted by the veteran was exposure to ionizing radiation in service, the veteran's representative raised before the Board the possibility that the carcinoma resulted from exposure to sunlight while in service. The Board did not address that assertion in its decision. COVA vacated the Board's decision and remanded the case for consideration of the question of direct service connection for basal cell carcinoma resulting from sun exposure in service. In Smith v. Derwinski, 1 Vet. App. 267 (1991), an appeal from a loan-guaranty waiver decision, the Secretary argued that COVA lacked jurisdiction to review the threshold question of whether the appellant owed a debt to the Government because BVA only had authority to review the decision as to waiver of the debt. COVA rejected this argument stating that "in reviewing a benefits decision, the Board must consider the entire record, all of the evidence, and all of the applicable laws and regulations." Id. at 272. Similarly, in Schaper v. Derwinski, 1 Vet.App. 430, 431 (1991)), where a loan-guaranty debtor challenged the validity of the asserted debt in his notice of disagreement and in his substantive appeal but the issue was not developed for appellate review, COVA held, alternatively, "that the question of the validity of the asserted debt, when challenged, is an issue that must be determined by the BVA in deciding on a waiver-of-indebtedness application." In these decisions, COVA apparently treated the validity of the underlying debt as a subissue of the waiver decision and indicated that such subissues must be considered by BVA regardless of whether they were developed by the AOJ.

15. COVA has repeatedly cautioned that BVA may not ignore VA regulations. E.g., Smith v. Derwinski, 2 Vet.App. 137, 140 (1992); Payne, 1 Vet.App. at 87. For example, in Schafraath v. Derwinski, 1 Vet.App. 589 (1991), COVA held that a

BVA decision was void ab initio where the Board, in upholding a rating 0 reduction based on evidence of the range of motion of an injured elbow, failed to apply the provisions of 38 C.F.R. § 4.40 to determine whether the appellant's compensable rating should be continued based on functional loss of use due to pain. In Smith, 2 Vet.App. at 141, COVA held that BVA erred in failing to apply 38 U.S.C. § 1154 (formerly § 354) and 38 C.F.R. § 3.304(d) in the determination of the appeal. These cases found a responsibility on the part of BVA to apply relevant statutes and regulations without regard to whether they had been considered by the AOJ.

16. Before considering subissues and arguments, or applying statutes, regulations, or COVA analyses which have not been considered by the AOJ, BVA must first determine whether the claimant will be prejudiced by its actions. BVA may make findings favorable to an appellant on subissues or arguments relating to a claim without referring the matter to the AOJ, since such action is not barred by statutes or regulations and does not prejudice the interests of the appellant. Similarly, if a statute, regulation, or COVA analysis which was not considered by the AOJ provides a basis for allowance of the benefit sought on appeal, no statute or regulation bars BVA from granting the benefit sought, without referring the matter to the AOJ. Also, if the appellant has raised an argument or asserted the applicability of a law or COVA analysis, it is unlikely that the appellant could be prejudiced if the Board proceeds to decision on the matter raised. An exception would exist when additional factual development is required to assess the validity of the appellant's assertion.

17. Adverse BVA findings on matters not considered by the AOJ, or the denial of the benefit sought on appeal based on statutes, regulations, or COVA analyses which were not considered by the AOJ, raise an issue concerning whether the appellant's procedural rights to notice, 38 C.F.R. § 3.103(b), to a hearing, 38 C.F.R. § 3.103(c), and to submit evidence in support of a claim, 38 C.F.R. § 3.103(d), have been abridged. We note that in O.G.C. Prec. 5-92, after reviewing case law relating to the Social Security program concerning provision of advance notice to claimants of the Social Security Appeals Council's intent to undertake expanded review of an Administrative Law Judge's decision, we cautioned that BVA should advise appellants of the possibility of a reversal of a finding by the AOJ favorable to the appellant. We also noted that "by implication, when the Statement and Supplemental Statements of the Case do not define all of the issues being reviewed, additional notice is warranted." (While O.G.C. Prec. 5-92 used the term "issues," the matters under discussion in that opinion fall within the term "subissues" as used in this opinion.)

18. In O.G.C. Prec. 6-92, we stated that, in determining whether to consider matters which have not been addressed in the statement of the case, BVA should consider such factors as whether the appellant has been fully apprised of the applicable laws and regulations and whether the appellant or the appellant's representative has presented argument relative to such matters. We find the

reasoning of O.G.C. Precs. 5-92 and 6-92 regarding the necessity of providing notice to appellants and assuring that the appellant is apprised of the applicable laws equally applicable regardless of whether BVA intends to consider subissues, or to apply statutes, regulations, or COVA analysis, which were not considered by the AOJ.

19. Whether BVA must remand an appeal to the AOJ to cure a deficiency in the statement of the case relating to the summary of evidence, citation of statutes and regulations, or the summary of the reasons for the AOJ's decision will depend on the circumstances of the individual case. Section 7105(d) of title 38, United States Code, requires that, following the filing of a notice of disagreement, if further review or development does not resolve the matter, the claimant and the claimant's representative will be furnished with a statement of the case. The statement of the case must include a summary of the evidence which is pertinent to the issue(s) being appealed, citations to pertinent statutes and regulations, a discussion of how those statutes and regulations affect the agency's decision, a decision on each issue, and a summary of the reasons for such decision. Id.; 38 C.F.R. § 19.29. BVA's rules contemplate that appellants and their representatives will be informed of the issues and applicable statutes and regulations through the statement of the case and, where appropriate, a supplemental statement of the case. 38 C.F.R. §§ 19.29 and 19.31.

20. Again, we note that in O.G.C. Prec. 6-92 we stated that the AOJ's failure to consider applicable regulations or to cite a pertinent regulation in the statement of the case does not render the AOJ's decision void. We concluded that if BVA determines that the omission from the statement of the case did not prejudice the claimant or violate VA's statutory duty to assist the claimant, BVA could properly render a decision on the appeal. This view is consistent with 38 U.S.C. § 7261(b) (COVA "shall take due account of the rule of prejudicial error.") and COVA's decision in Thompson v. Derwinski, 1 Vet.App. 251 (1991) (BVA decision not disturbed where the ultimate outcome of the case was not prejudiced by an error). If BVA determines that the claimant has been prejudiced by a deficiency in the statement of the case, BVA should remand the case to the AOJ, pursuant to 38 C.F.R. § 19.9, specifying the action to be taken.

21. Finally, if BVA wishes to avoid remanding matters to the AOJ, it may wish to propose a regulation, similar to 38 C.F.R. § 20.903, which would require BVA to notify an appellant and the appellant's representative of its intention to consider a subissue, statute, regulation, or COVA analysis which was not considered by the AOJ. As in 38 C.F.R. § 20.903, such a regulation should afford the appellant and/or the appellant's representative, if any, a period for response before BVA enters a final decision on the appeal.

HELD:

a. Statutes and VA regulations prescribe the circumstances under which the

Board of Veterans' Appeals may consider evidence which has not been considered by the agency of original jurisdiction. Section 20.1304(c) of title 38, Code of Federal Regulations, generally requires that the Board refer to the agency of original jurisdiction for review evidence received by the Board following certification of an appeal unless such review is waived by the claimant or the benefit claimed may be allowed without referral. Under 38 U.S.C. § 7109 and 38 C.F.R. § 20.901, certain classes of evidence, i.e., independent medical opinions and opinions of the Chief Medical Director, the General Counsel, and the Armed Forces Institute of Pathology, need not be referred to the agency of original jurisdiction, but the appellant must be given an opportunity to review and respond to such evidence before a decision is rendered.

b. Generally, the Board of Veterans' Appeals, as an appellate body, is not authorized to make final determinations on issues which have not been considered by the agency of original jurisdiction.

c. Although statutes and regulations establish the Board of Veterans' Appeals as an appellate body, nonetheless, when an appeal is certified to the Board, the Board is required to conduct a de novo review of the agency of original jurisdiction's benefit decision. Hence, the Board may consider arguments, subissues, statutes, regulations, or Court of Veterans Appeals analyses which have not been considered by the agency of original jurisdiction, if the claimant will not be prejudiced by its actions.

d. The Board of Veterans' Appeals need not remand an appeal to the agency of original jurisdiction to cure a deficiency in the statement of the case if the Board determines the deficiency was not prejudicial to the interests of the appellant.

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