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REPLY BRIEF

WEST/CRS

2008-7058

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALLISON E. RANCHER,

Claimant-Appellant,

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
AUG 19 2008
JAN HORBALY
CLERK

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 02-1142
JUDGE ALAN G. LANCE, SR.

REPLY BRIEF OF APPELLANT ALLISON E. RANCHER

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STATEMENT OF THE ISSUES

1. Whether the Veterans Court misinterpreted the Secretary's regulations and therefore concluded that her pending, unadjudicated original January 31, 1985 claim was finally decided by four 1988 decisions.

2. Whether the Veterans Court misinterpreted the VA's duty to state reasons and bases for its conclusion that the appellant had withdrawn her TDIU claim and misinterpreted that VA's duty to liberally construe any document that purports to withdraw a claim.

I. INTRODUCTION

The Secretary initially suggests mistakenly that Ms. Rancher is appealing a remand decision by the Veterans Court (Sec's brief, pp. 2, 11). Ms. Rancher is not appealing the remand portion of the Veterans Court decision. She is appealing that Court's denial of her entitlement to a February 2, 1984 effective date for her granted 100% schedular rating and the Court's conclusion that the Board correctly concluded that she had withdrawn her TDIU claim. Under the Veterans Court's remand, Ms. Rancher may *potentially* be entitled to the earliest effective date of January 11, 1993 for her granted 100% rating (A. 10-11, 66-74).

The Veterans Court's denial of an effective date of February 2, 1984 denies her at least 107 months of retroactive VA benefits at the 100% rating. This is a substantial loss of benefits. To the extent that the Veterans Court's decision did not grant Ms. Rancher an effective of February 1984 and it affirmed the Board's conclusion that she had withdrawn her TDIU claim, "its decision is adverse to h[er]." *See Collaro v. West*, 139 F.3d 1304, 1307 (Fed. Cir. 1998).

The Secretary subsequently recognizes that Ms. Rancher's "theory [of her entitlement to an earlier effective date] is unrelated to the Veterans Court's remand to the [B]oard to reconsider the [B]oard's finding that Ms. Rancher is entitled to a

1996 effective date -- nothing in the remand proceeding will affect Ms. Rancher's claim to a 1984 effective date." (Sec's brief, p. 12).

The Secretary argues that the Veterans Court's decision does not violate the *Chenery* doctrine because that court "did not find new facts in reaching [its] conclusion." (Sec's brief, p. 22).

The Veterans Court concluded that Ms. Rancher's original claim was finally denied by one of the 1988 decisions, which the Board had not considered. This was certainly a new basis for affirming the Board's decision. This appears to be a legal conclusion, but it rests on factual findings. The Veterans Court decided that the Board's conclusion that her original claim was finally denied was correct, but the court's conclusion was based on an alternative theory not considered by the Board. The Board's conclusion that the original claim was finally denied based on its incorrect theory may have caused it to make an inadequate factual record. Since the ground given by the Board for its decision led it to an erroneous conclusion and consequently to an insufficient factual development of the record, its decision could not be affirmed. *See Hensley v. West,* 212 F.3d 1255, 1264 (Fed. Cir. 2000).

As the Secretary recognizes, the facts in "this appeal are complex and span VA claims and claims-related appeals over a period exceeding 23 years." (Sec's brief, p. 8). The Veterans Court was not the appropriate forum for initial fact-finding once that Court recognized that the Board had not applied the correct law.

Once the Veterans Court recognized that the Board had erred in failing to conclude that the original application was tolled by the submission of new and material evidence within the one-year appeal period (A. 9), that Court should have applied the correct law to the undisputed facts as found by the Board, *see Muehl v. West*, 13 Vet. App. 159, 161-62 (1999); *see also Groves v. Peake*, 524 F.3d 1306, 1310 (Fed. Cir. 2008), or should have remanded the case to the Board for the Board to decide the issues based on the correct understanding of the law. *See Hensley v. West, supra*, at 1263-64.

II. THE VETERANS COURT IMPROPERLY INTERPRETED THE SECRETARY'S REGULATIONS AND THEREFORE CONCLUDED THAT HER PENDING, UNADJUDICATED ORIGINAL JANUARY 31, 1985 CLAIM WAS FINALLY DECIDED BY FOUR 1988 DECISIONS ISSUED IN RESPONSE TO NEW CLAIMS FOR INCREASED RATINGS.

The Appellant had clearly argued that the Veterans Court improperly denied her entitlement to an earlier effective date of February 2, 1984, for her *pending, unadjudicated* original 1985 claim. Instead of addressing this argument directly, the Secretary confuses the Appellant's argument. In the Secretary's view, the Veterans Court concluded that "it lacked [subject matter] jurisdiction to consider Ms. Rancher's argument that the Board erred in not awarding her an" earlier

effective date of February 2, 1984 (Sec's brief, pp. 1, 2, 7, 8, 14-15, 21). The Secretary mistakenly states, "[t]he first issue is jurisdictional, and requires examination of whether the Veterans Court correctly determined that *it lacked jurisdiction to consider Mr. Rancher's argument* that her original 1985 VA benefit claim remains pending, and whether the Veterans Court erred in *not considering* whether Ms. Rancher is entitled to an effective date retroactive to when she separated from military service in 1984." (*Id.* at 8). The Secretary argues mistakenly that the Veterans Court did "not consider[]" Ms. Rancher's substantive arguments because it concluded that "it lacked jurisdiction to consider Ms. Rancher's claim seeking an effective date retroactive to 1984." (*Id.*).

On the contrary, the Court appears to have conceded its jurisdiction and decided the issue of whether Ms. Rancher was entitled to an earlier effective date of February 2, 1984, based on her original application (A. 9). Gratuitously, the Veterans Court also discussed the issue of whether she *might* be entitled to an earlier effective date based on a motion to revise the VA decisions based on clear and unmistakable error (CUE) in a prior decision, and then the Court stated that it did not have jurisdiction to consider this issue because a CUE motion had not been raised (A. 9-10). As that Court recognized, the Appellant had neither filed a CUE motion before the VA or Board nor raised this issue before the Court (A. 10). The Secretary subsequently recognizes that Ms. Rancher had never filed a CUE motion

or raised this issue before the Court. In its brief, the Secretary states that "Ms. Rancher remains free to file a claim seeking review of any or all of the rating decisions issued by the regional office in her case based upon an assertion of CUE." (Sec. brief, p. 17).

The Secretary further confuses Ms. Rancher's argument in stating that "[h]er argument is, in brief, that she submitted *additional evidence* in 1986 that *was not addressed* when the [R]egional [O]ffice rendered its 1988 decision and, because that claim has remained unadjudicated, the Veterans Court erred in not considering her argument in favor of a 1984 effective date." (emphasis supplied) (Sec's brief, p. 17).

Ms. Rancher's argument was that, contrary to the Veterans Court's decision, her original January 1985 *claim* was not finally decided or denied by one of the three 1988 Rating decisions, which purported to deny new claims for increased ratings (App's brief, pp. 18-27), and that she filed her April 1988 NOD to the April 1986 VA decision on her *original* claim, but the VA has not furnished her the required Statement of the Case (SOC) to pursue her administrative appeal to the Board of Veterans' Appeals (Board) (App's brief, pp. 18-20). Ms. Rancher's original January 1985 claim therefore remains pending and unadjudicated.

On January 31, 1985, Ms. Rancher filed her original claim to establish service connection for her schizophrenia (A. 26-29, 30). On August 1, 1985, the

VA granted her claim and found her schizophrenia to be service-connected (A. 30-32). The VARO granted a temporary 100% rating from January 29, 1985 until March 31, 1985, based on her hospitalization for paranoid schizophrenia at the Tuscaloosa, Alabama VA Medical Center (VAMC) from January 29, 1985 until March 20, 1985 (A. 22-25). This August 1985 Rating decision also granted a 30% rating effective April 1, 1985 for this disability (A. 30-31).

During the one-year appeal period after this August 1985 decision, Ms. Rancher submitted new and material evidence which tolled her appeal period for her original claim. The VARO received her July 1986 vocational rehabilitation report. In a February 24, 1986 VA Neuropsychiatric Examination report, Dr. G. G. Ochoa stated that her "degree of incapacity" was "[m]oderately severe, unable to pursue career in regular Army and in civilian job in Army Depot." (A. 33). The Veterans Court conceded that the Board erred in not concluding that this appeal period was tolled until the next VA decision was made on the claim in September 1988 (A. 9).

On April 15, 1986, the VA issued a second Rating decision to Ms. Rancher (A. 34-35). This April 1986 decision purported to deny an increased rating for her service-connected schizophrenia because "[t]his evidence does not warrant change in service-connected status or evaluation of any disability ...." (A. 34). This April 1986 Rating decision and the appeal period were also tolled by the submission of

new and material evidence in May and July 1986 (App's brief, pp. 18-19). In May 1986, the VA "discontinue[d] [her] course of vocational rehabilitation." (A. 36). In the VA's May 9, 1986 letter, the Vocational Rehabilitation Specialist stated, "I feel that without at least two years of inpatient and outpatient treatment that places your disability in a state of remission and maint[e]nance for at least six months[,] this program will not be of benefit to you." (A. 36). On July 17, 1986, she submitted vocational evidence which stated that she was "too psychotic to be able to train or maintain employment" (A. 37, 38). The Veterans Court held that where new and material evidence is submitted during the one-year appeal period after a Rating decision, pursuant to 38 C.F.R. § 3.156(b) and *Muehl v. West*, *supra*, at 161-62, the time period is tolled for filing an appeal until a new VA decision has been issued (A. 9). The next VA Rating decision was not issued until September 7, 1988 (A. 51-53). The Veterans Court erroneously did not conclude that the one-year appeal period after the April 1986 decision was tolled because the Court mistakenly believed this decision was an April *1988* decision (A. 9)

Ms. Rancher filed her Notices of Disagreement (NOD) in April 1988 (A. 39, 40-49) to the April 15, 1986 VA Rating decision (A. 9, 34-35) (App's Brief, p. 19-20). These NODs were filed with the VA *before* the next Rating decision in September 1988 (A. 51). In her April 18, 1988 letter to her Congressman, she stated that she believed she was entitled to "a higher percentage due to the nature

of her illness." (A. 39). In her April 19, 1988 letter to the VARO, she stated that she "would like to submit the following information on my behalf as new evidence in supporting the decision to have the service-connected disability claim Rating re-evaluated and *increased* to a *higher percentage of at least 80% and higher* ... because of the severe emotional distresses and wounds that were caused due to and for under conditions similar to war, which left me with a long-term illness as result of my military service." She further stated, "Even thou[gh] I am rated only thirty percent, but I have a major and severe disabling disability, along with other handicaps." (emphasis supplied) (A. 40, 42). In the July 19, 1988 VA examination report, she reported that "she ha[d] been unable to work since 1984." (A. 50). This report noting her claim of entitlement to total benefits from 1984 and one or both of Ms. Rancher's April 1988 letters filed with the VARO, which stated that she believed she was entitled to a "higher percentage of at least 80% and higher" for her disability, met the legal definition of an NOD. *See* 38 C.F.R. § 19.118 (1988); *see also Collaro v. West*, *supra*, at 1308 (explaining that a disagreement between the VA and the veteran about any element of a claim may create an issue about which the agency reaches an adjudicative determination and which forms the substance of the veteran's NOD).

The Veterans Court had mistakenly assumed that the April 1986 decision was an April 1988 decision (A. 9, 34-35). The Secretary does not dispute the

Veterans Court's error on the date of this decision (Sec's brief, pp. 3-4, 16-21). The Secretary does dispute that Ms. Rancher filed her April 1988 NOD. He states, "she does not identify these documents. App. Br. at 20. A review of the record reveals that the *first NOD Ms. Rancher filed* with regard to her psychiatric condition *was submitted in June of 1996.* S.A. 31." (emphasis supplied) (Sec's brief, p. 16). The Secretary does not refer to Ms. Rancher's discussion of her April 1988 NODs in her brief (App. Brief, pp. 18-20).

The record is undisputed that Ms. Rancher filed her two April 1988 letters with the VARO and that she claimed in a written document she had not been able to work since 1984. Whether one or all of these documents is an NOD is a question of law for this Court to determine *de novo*. *See Beyrle v. Brown*, 9 Vet. App. 24, 27 (1996).

In its September 7, 1988 Rating decision, the VA denied Ms. Rancher an increased rating for her service-connected schizophrenia based on the July 19, 1988 VA examination (A. 50-53).

On September 29, 1988, Ms. Rancher was again admitted to the Tuscaloosa VAMC where she was treated for her schizophrenia until her November 2, 1988 discharge (A. 55, 56-60). On her discharge, her physician stated, "The patient probably is unable to compete for gainful employment – however, she may benefit from continued efforts at vocational rehabilitation." (A. 58). In October 1988

(dated November 3, 1988), the VARO issued a new Rating decision which granted her a temporary total evaluation for this hospitalization (A. 54).

In December 1988, the VARO issued another Rating decision based solely on the same hospitalization and restored the 30% rating *after* her discharge from the hospital (A. 61-62). These three 1988 decisions were not prompted by any new claim filed by Ms. Rancher, but were instead based on her VA examinations and the VA hospitalizations. The *VA chose* to treat the claims as claims for increased ratings.

The Secretary concedes that "none of the 1988 rating decisions explicitly refer to the document she submitted from her rehabilitation counselor in 1986 ...." (Sec's brief, p. 17). The Secretary nonetheless argues that this evidence was in Ms. Rancher's claims file when the VA made the three 1988 Rating decisions (*Id.*). In citing *Gonzalez v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), the Secretary suggests that the 1988 Rating decisions considered all evidence in the claims file at the time of these decisions and therefore implicitly decided the original claim. The Secretary correctly recognized that these 1988 decisions addressed only her current condition and periods of hospitalization (Sec's brief, pp. 3-4). The 1988 decisions purported to adjudicate *only* her entitlement to current entitlement to a temporary total rating for hospitalization and for her entitlement to an increased rating (A. 51, 54, 61-62) (App's brief, pp. 23-26).

The Veterans Court erroneously concluded that Ms. Rancher had not filed an NOD based on its misinterpretation of 38 C.F.R. § 19.118 (1988) and its misinterpretation of law that the NOD was required to be filed within one year after the VA decision and because the Court failed to recognize that the new and material evidence submitted after the April 1986 decision "toll[ed] the time for filing an appeal until [the September 1988] decision has been issued" (A. 9). Whether one or both of Ms. Rancher's April 1988 letters to the VA was an NOD is a question of law which the Court reviews *de novo*. *See Beyrle v. Brown*, 9 Vet. App. 24, 27 (1996). The Veterans Court's error that one or both of these letters was not an NOD was an error of law that is within this Court's jurisdiction. *See Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003); 38 U.S.C. § 7292.

Once the VA received Ms. Rancher's April 1988 NODs, it was required to prepare and furnish a "statement of the case" to the veteran. *See* 38 U.S.C. § 7105(d)(1). In this case, the VA has not furnished the required SOC to Ms. Rancher (App's brief, p. 20). The Veterans Court has held that the time for appealing an RO decision does not run where the VA failed to provide the veteran with the required SOC. *See Tablazon v. Brown*, 8 Vet. App. 359, 361 (1995) (because the VA did not furnish the veteran with a statement of the case, he was unable to file a "formal appeal" with the Board and the RO rating decision did not become final); *Kuo v. Derwinski*, 2 Vet. App. 662, 666 (1992) (same).

Furthermore, in *Tablazon* and *Kuo*, the VA's failure to "furnish" the required SOC had the effect of extinguishing the claimant's right to appeal an adverse decision.

Ms. Rancher submits that the VA cannot consider a claim for an increased rating or a claim to reopen until *after* Ms. Rancher's *original* claim has become *final*. *See Jennings v. Mansfield*, 509 F.3d 1362, 1368 (Fed. Cir. 2007) ("we hold that a claim becomes final and subject to a motion to reopen only after the period for appeal has run. Any interim submissions before finality must be considered by the VA as part of the original claim."). As discussed above, Ms. Rancher submitted new and material evidence during the one-year appeal periods after the August 1, 1985 and April 15, 1986 decisions. All of this new evidence submitted during the appeal periods was required to be considered in connection with her *original* January 1985 claim. *See Jennings, supra*, at 1368. In April 1986, the VA issued a decision which denied her claim (A. 9). According to the Veterans Court, the submission of new and material evidence during the appeal period for this April 1986 decision would have "toll[ed] the time for filing an appeal until [the September 1988] decision has been issued," pursuant to 38 C.F.R. § 3.156(b) and *Muehl* (A. 9).

Once Ms. Rancher filed her April 1988 NODs with the VARO, the period for submitting evidence on her *original* claim for purposes of 38 C.F.R. § 3.156(b) would not expire until the Board makes its final decision on her *original* claim.

See Jackson v. Nicholson, 19 Vet. App. 207, 211 (2005) ("§ 3.156(b) provides that the issuance of a Board decision closes the period of time during which evidence submitted after the filing of a claim will be considered as having been filed along with that claim."), *aff'ed Jackson v. Nicholson*, 449 F.3d 1204, 1208 (Fed. Cir. 2006); *cf.* 38 CFR § 20.1105 ("When a claimant requests that a claim be reopened after an appellate decision has been promulgated and submits evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, as to whether it provides a basis for allowing the claim.").

The Secretary concedes that "original claims, claims to reopen, and claims for increase are construed by VA as different types of claims." (Sec's brief, p. 19). After recognizing that claims to reopen and claims for increase are different claims than original claims, the Secretary makes the unsupported argument that "it does not follow that the adjudication of these various claims must take place via a rating decision that individually addresses each and every claim and/or piece of evidence submitted." (*Id.*). The Secretary fails to explain how Ms. Rancher could have a pending claim for an increased rating of her service-connected schizophrenia in 1986 and 1988 when her original claim for service connection (and the elements of her rating and effective date) had not been finally decided.

Ms. Rancher filed her April 1988 NODs to the April 1986 denial of her *original* claim. Since Ms. Rancher's *original* claim was pending and

unadjudicated in April 1988 and in December 1988, "any interim submissions before finality must be considered by the VA as part of [her] original claim." *Jennings v. Mansfield, supra*, at 1368.

Ms. Rancher contends that the 1988 Rating decisions adjudicating claims for a temporary total evaluation and an increased rating did not finally adjudicate her pending original claim. Any VA Rating decisions issued after her April 1988 NODs would not have any legal effect on her pending, unadjudicated original claim because during the tolled appeal period she had timely appealed the VA's Rating decision on her original claim, which decision has never become final due to the VA's failure to furnish the required SOC to her. *See Tablazon; Kuo, all supra*; 38 U.S.C. § 7105(b). Since her original claim has never become final within the VA, all new evidence and filings submitted to the VA must be considered only in connection with her original claim. *See Jennings v. Mansfield, supra*, at 1368; *see also Jackson v. Nicholson*, 19 Vet. App. 207, 211 (2005), *aff'ed Jackson v. Nicholson*, 449 F.3d 1204, 1208 (Fed. Cir. 2006); *cf.* 38 CFR § 20.1105.

III. THE VETERANS COURT MISINTERPRETED THE VA'S DUTY TO STATE REASONS AND BASES FOR ITS CONCLUSION THAT THE APPELLANT HAD WITHDRAWN HER TDIU CLAIM AND MISINTERPRETED THE VA'S DUTY TO LIBERALLY CONSTRUE ANY DOCUMENT THAT PURPORTS TO WITHDRAW A CLAIM.

The Secretary does not dispute the merits of Ms. Rancher's arguments. Instead, the Secretary mistakenly argues that Ms. Rancher's "primary argument ... is that the June 2000 letter she submitted to the [VARO] concerning her TDIU claim was ambiguous" and that this Court "lacks jurisdiction" to consider Ms. Rancher's arguments because this issue "would require this court to independently consider and weigh facts, and then apply the law governing withdrawal of VA benefit claims to those facts." (Sec's brief, pp. 23-24).

Ms. Rancher is *not* asking this Court to decide the factual issue of whether her letter is ambiguous or whether she withdrew the TDIU claim. She recognizes that the interpretation of her letter is essentially a factual inquiry which is beyond this Court's jurisdiction. *See Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004).

Ms. Rancher's primary argument is that the Board did not make the required initial finding of fact that her letter was "ambiguous" or "unambiguous" and that the Veterans Court improperly made the initial finding that the letter was "unambiguous." (A. 13-14, 101) (App's brief, p. 28-29, 32, 34). Further, if the

Board had found her letter to be ambiguous, then it would have been required to state adequate reasons or bases to support its conclusion that her letter had withdrawn her TDIU claim. *See Verdon v. Brown*, 8 Vet. App. 529, 533 (1996); *see also* 38 U.S.C. § 7104(d)(1) (App's brief, p. 32).

The Veterans Court's initial finding of fact (instead of remanding to the Board) was prejudicial to her because it deprived her of the Board's initial finding on this issue, which finding would have to be made in the context of the nonadversarial setting of the VA adjudication process, and it deprived her of the Board's statement of adequate reasons or bases supporting its conclusion.

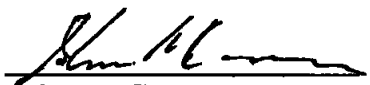
Ms. Rancher's discussion and argument that her letter was ambiguous was provided so that the Court can conclude that *if* the Board had made the initial finding of fact, it was at least reasonably possible the Board would have found the letter to be ambiguous, and therefore the Veterans Court's contrary initial finding on this issue was prejudicial to her. At the time the Veterans Court made its finding of fact, it was not a foreordained conclusion that the Board would have found the letter to be unambiguous.

CONCLUSION

The Appellant moves the Court to vacate and reverse the decision of the Veterans Court for readjudication consistent with the discussion above.

DATED: August 19, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have mailed two (2) copies of the foregoing Reply Brief of Claimant-Appellant, by U.S. mail, certified mail, return receipt requested, postage prepaid and properly addressed, on this the 19th day of August 2008, addressed to the following:

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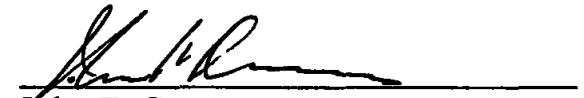

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I also hereby certify that I have mailed, by U.S. mail, certified mail, return receipt requested, postage prepaid, and properly addressed, an original and twelve (12) copies of the foregoing Reply Brief of Claimant-Appellant to the Clerk, U.S. Court of Appeals for the Federal Circuit at the following address, on this the 19th day of August 2008:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the type-volume limitation under Rule 32(a)(7)(B)(ii). The Reply Brief of Appellant Allison E. Rancher contains 4,003 words.

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