

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 07-2882

RICHARD HARRIS, JR.,

Appellant,

v.

JAMES B. PEAKE, M.D.,

Secretary of Veterans Affairs, Appellee.

BRIEF OF APPELLANT

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ISSUE PRESENTED

Whether VA must give effect to a January 2003 decision granting benefits.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

Mr. Harris seeks implementation of a January 2003 decision review officer (DRO) decision granting benefits.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW.

Mr. Harris served in the United States Air Force from August 1988 to March 1991. R. 71. He was paralyzed in a motor vehicle accident in 1990 while in service; alcohol was involved, but there was conflict over how to characterize the accident. The service initially recommended finding the accident in line of duty (LOD), R. 313, but later reviews determined it was not in line of duty. R. 310. Upon Mr. Harris's initial application in 1991, VA made its own "administrative decision," signed by Kathy Peters, finding that the accident was "due to his own willful and reckless disregard," so no VA benefits were awarded. R. 335-36, 338-39. In October 2002, Mr. Harris submitted evidence to attempt to reopen his claim. R. 469-90. He was denied in an October 2002 decision signed by P.C. Prieb, the Veterans Service Center Manager. R. 492-94. Mr. Harris then filed a notice of disagreement (NOD) and exercised his right to have his claim considered by a decision review officer. R. 496, 500; *see* 38 C.F.R. § 3.2600 (2002). In

January 2003, the DRO issued a favorable decision, overturning the VA's 1991 determination. The DRO found:

The veteran's injuries suffered in the automobile accident were not due to his own willful misconduct and reckless disregard. Therefore, based on new and material evidence being submitted in this case; [sic] Mr. Harris is now entitled to VA service connected disability benefits administered by the Department of Veterans Affairs. The veteran's injuries are considered to be in the line of duty in accordance with 38 CFR 3.301. The decision is based on a review by the Decision Review Officer and additional review of the entire claim file, including military LOD and [California Highway Patrol] reports cited. All doubt has been resolved in favor of Mr. Harris.

R. 507, 503-11. Mr. Harris was notified, thus making the DRO's determination a final decision under 38 C.F.R. § 3.104 (2002). R. 515-16. The notice letter, signed by P.C. Prieb, said, "This is a total grant of benefits sought on appeal. Your appeal is withdrawn at this time." R. 515.

In March 2003, without notice to Mr. Harris, the VA prepared a decision finding that the DRO decision reinstating the prior line of duty/willful misconduct determination was "clearly and unmistakably in error." R. 575-77. This decision was signed by Kathy Peters, who had participated in the original 1991 denial, and approved by P.C. Prieb, who had signed the award letter in January 2003.

Although Mr. Harris did not receive written notice of this decision, his national service officer (NSO) apparently heard about VA's action and asked that it be stopped. R. 579-80. Rather than respond to the veteran or his NSO, the RO's Mr. Prieb sought "difference of opinion" review from VA's central office in May

2003. R. 588-91. In July 2003, VA central office responded and supported the post-award denial. R. 593-94. VA provided no written notice of either its request for this review or the central office response to Mr. Harris.

Next in the record is a September 2003 “administrative decision,” approved by Kathy Peters. R. 596-97. Then there is a denial by rating decision dated October 7, 2003. R. 601-05. Despite all the activity in his case, it appears that the first written notice that Mr. Harris received that his service connection status was changed was by letter dated October 30, 2003. R. 599-610; *see also* R. 764-65 (VA chronology of claim, noting that written notice not provided until this date.) This notice letter described the October 7, 2003, denial.

In April 2004, Mr. Harris’s representative responded and sought review of VA’s actions through VA’s central office, asking that the January 2003 DRO decision be recognized as final and binding under 38 C.F.R. § 3.104. R. 640-55. VA then apparently lost Mr. Harris’s file, R. 617, so no response was made to Mr. Harris’s representative for more than a year. In June of 2005, VA’s central office finally responded and stated the DRO decision was clearly and unmistakably erroneous. R. 631-32.

Despite the huge gaps in time and the failure to notify Mr. Harris of significant events in his case, in July 2005, VA’s Kathy Peters asserted no notice of disagreement had been filed and the administrative decisions were unappealable,

so Mr. Harris had no further appeal. R. 677; *see also* R. 680-82. Ultimately, it appears the VA “reactivated” Mr. Harris’s earlier appeal, found that the January 2003 DRO decision did not have “legal validity,” and characterized the issue as whether new and material evidence was received. *See* R. 771; *but see* R. 803-35 (submission to BVA challenging the characterization of the issue, R. 803, and including VA’s “decision assessment document” regarding *Stallworth v. Nicholson*, 20 Vet.App. 482 (2006), to show the established law that a final decision may only be revised through CUE. R. 831-34.) Mr. Harris’s appeal was certified to the Board in January 2007. R. 797-98.

In its June 15, 2007, decision, the Board characterized the issue as “Whether new and material evidence has been received to reopen the May 1991 administrative line of duty determination.” R. 1. The Board found that “the January 2003 LOD determination is necessarily not a final decision, as the appeal of the LOD matter has been pending from October 2002 to this day,” R. 11. The BVA then determined that no new and material evidence had been received and denied the claim. R. 19. Nowhere did the Board address, 38 C.F.R. § 3.104, 38 U.S.C.A. § 5104 (West 2002), or the representative’s submissions, R. 803-35. This appeal followed.

SUMMARY OF ARGUMENT

The BVA decision is based on a false premise – that the January 2003 decision awarding service connection and benefits never became final. VA’s own regulations clearly show the premise to be wrong. Mr. Harris was provided written notice of the award, making it final under 38 C.F.R. § 3.104. As the agency never took any step required to sever service connection under 38 C.F.R. § 3.105(d), the Court must give effect to this final decision awarding benefits.

Over several years the agency has tried to distract attention from the unassailable fact that it granted Mr. Harris benefits, but the Court should not be diverted by these distractions. Every agency action taken on this claim since the January 2003 award letter has no legal effect. This is a highly unusual case, as it is rare that the agency shows such disregard for well-settled law. The Court has held since its inception that VA must follow its own regulations, and the Court should order that the agency immediately provide Mr. Harris his benefits.

ARGUMENT

I. JURISDICTION AND STANDARD OF REVIEW

Mr. Harris’s case is properly before the Court under 38 U.S.C.A. § 7266 (West 2002). The Court reviews de novo whether VA has followed its own regulations in reducing or terminating VA benefits. 38 U.S.C.A § 7261(a)(1), (3) (West 2002); *see Faust v. West*, 13 Vet.App. 342, 348 (2000); *Wilson (Merritte) v.*

West, 11 Vet.App. 383 (1998); *Brown (Kevin) v. Brown*, 5 Vet.App. 413, 416-21 (1993). The Court also reviews questions of statutory and regulatory interpretation de novo. See *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (*en banc*); see also *Hensley v. West*, 212 F.3d 1255, 1262-64 (Fed. Cir.2000) (discussing proper application of de novo review).

II. ONCE SERVICE CONNECTION IS ESTABLISHED, AS IT WAS HERE, IT CANNOT BE SEVERED EXCEPT AS PROVIDED UNDER 38 C.F.R. § 3.105(d).

The Board's analysis of this case is deeply flawed. In finding that the favorable January 2003 decision was not final, the BVA ignored or misinterpreted relevant law. R. 11. The plain language of the relevant statute and regulations demonstrate that Mr. Harris was granted service connection in a final and binding VA decision, and that grant can only be severed through application of the difficult and limited standards of 38 C.F.R. § 3.105(d) (2002). See *Stallworth*, 20 Vet.App. at 488; 38 U.S.C.A. § 5104(a); 38 C.F.R. § 3.104.

A. The VA granted service connection.

The agency granted service connection in January 2003. R. 503-11. The DRO was quite clear in his findings:

The veteran's injuries suffered in the automobile accident were not due to his own willful misconduct and reckless disregard. Therefore, based on new and material evidence being submitted in this case; [sic] Mr. Harris is now entitled to VA service connected disability benefits administered by the Department of Veterans Affairs. The veteran's injuries are considered to be in the line of duty in accordance with 38 CFR 3.301. The decision is based

on a review by the Decision Review Officer and additional review of the entire claim file, including military LOD and [California Highway Patrol] reports cited. All doubt has been resolved in favor of Mr. Harris.

R. 507. Even if he had not been so clear, the Federal Circuit has held that a favorable line of duty determination necessarily includes a finding of service connection. In *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004), the Federal Circuit, upon considering the question of “whether the statutory language ‘incurred in line of duty’ and ‘service-connected’ mean the same thing,” held that the terms share the same meaning: “[A] disability first manifested or aggravated during active duty is deemed to be service connected.” 381 F.3d at 1166. Thus, it is indisputable that the VA granted service connection. 38 C.F.R. § 3.2600(d) (DRO authority to grant benefit).

B. The VA notified Mr. Harris of the decision, making it final and binding.

The record demonstrates that Mr. Harris was notified of VA’s decision by letter in January 2003. The VA notice letter left no room for doubt as to the status of his case: “This is a total grant of benefits sought on appeal. Your appeal is withdrawn at this time.” R. 515-16.

VA is required to provide written notice of decisions to veterans under 38 U.S.C.A. § 5104. That statute states, “In the case of a decision by the Secretary . . . affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant’s representative) notice of such

decision.” 38 U.S.C.A. § 5104(a). Upon written notice, the provisions of 38 C.F.R. § 3.104 apply. That regulation provides:

§ 3.104 Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105 and § 3.2600 of this part.

38 C.F.R. § 3.104(a). Both the statute and regulation are plain, and, by operation of law, when VA provided written notice to Mr. Harris, the January 2003 grant of service connection became a final, binding decision of the agency under 38 U.S.C.A. § 5104 and 38 C.F.R. § 3.104.

C. Decisions granting service connection are only subject to revision under 38 C.F.R. § 3.105(d) .

As this Court has repeatedly noted, VA bears a heavy burden in severing service connection. *Wilson*, 11 Vet.App. at 386; *Stallworth*, 20 Vet.App. at 488; *Graves v. Brown*, 6 Vet.App. 166, 177 (1994). The agency may not simply change its mind. It has only one tool to sever a grant of service connection, clear and unmistakable error. 38 C.F.R. § 3.105(d); *see also* 38 C.F.R. § 3.104(b). The governing regulation, 38 C.F.R. § 3.105(d), provides:

§ 3.105 Revision of decisions.

(d) Severance of service connection. Subject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). (Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of § 3.114 are for application.) A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued, if in order, effective the last day of the month in which a 60- day period from the date of notice to the beneficiary of the final rating action expires.

38 C.F.R. § 3.105(d). The record makes clear that VA made no effort to comply with the regulation, and, as discussed more fully below, the Board decision should be reversed and the award of service connection given full legal effect.

III. THE VA DID NOT PROPERLY SEVER MR. HARRIS'S SERVICE CONNECTION UNDER ITS OWN RULES AND PROCEDURES, AND THE BENEFIT SHOULD BE GIVEN FULL LEGAL EFFECT IMMEDIATELY.

It is well established that VA must follow its own rules and procedures, and the Board "is not free to disregard VA regulations." *Cohen (Douglas) v. Brown*, 10 Vet.App. 128, 143 (1997) (citing *Sutton v. Brown*, 9 Vet.App. 553, 568-69 (1996) (citing *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), *Vitarelli v. Seaton*, 359 U.S. 535, 538, 539-40 (1959), and *Service v. Dulles*, 354 U.S. 363 (1957)); see also *Patton v. West*, 12 Vet.App. 272, 283 (1999); *Wilson*, 11 Vet.App. at 385; *Buzinski v. Brown*, 6 Vet.App. 360, 367 (1994); *Fugere v. Derwinski*, 1 Vet.App. 103 (1990), *aff'd*, 972 F.2d 331 (Fed.Cir.1992).

The process for severing service connection has clear steps, and VA followed none of them. For example, 38 C.F.R. § 3.105(d) requires advance written notice and an opportunity to respond. VA's actions with respect to Mr. Harris do not satisfy this requirement. Instead, it appears the agency tried to obscure its actions, sending no notice whatsoever until October 2003. R. 599-610.

Compounding the problems, BVA did not recognize, much less apply, the correct law. BVA found, contrary to controlling legal authority, that the January 2003 decision was not final. R. 11; 38 C.F.R. § 3.104; *see supra*. That is wrong because the award of service connection became final when VA sent written notice of its decision to Mr. Harris. 38 C.F.R. § 3.104. There simply is no other way to

view the record. In this situation, Court decisions support immediately giving Mr. Harris the benefit of his grant of service connection. Where there is only one possible result, the Court has held that reversal without remand to the Board is appropriate when “the only permissible view . . . is contrary to the Board’s decision.” *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)); *see also* 38 U.S.C.A. § 7261(a)(3)(A), (C), (D); *Hersey v. Derwinski*, 2 Vet.App. 91, 95 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (the Court may reverse the Board's determination when the Court possesses a “definite and firm conviction that a mistake has been committed”).

Fortunately, cases with such disregard for the law do not arise frequently, but the Court dealt with a similar situation in *Wilson v. West*, 11 Vet.App. 383 (1998). That decision is instructive here. In *Wilson*, VA notified the claimants that they would receive dependency and indemnity compensation (DIC) benefits, and these benefits were paid for five years. 11 Vet.App. at 384. Then, the regional office issued an administrative decision stating the payment of DIC was clear and unmistakable error because of administrative error, because a decision disallowing benefits had been made, placed in the claims folder, and never acted upon. *Id.* Even though the claimants had never received notice of the disallowance, VA proceeded to terminate benefits. *Id.* at 385. On appeal, the Board – rather than reviewing whether benefits had been properly terminated – characterized the case

as one for service connection for cause of death. The Board took similar action in Mr. Harris's case, improperly characterizing the issue in his case as whether new and material evidence had been presented. R. 1.

In *Wilson*, the Court found the BVA had erred and reversed, noting that the Board had failed to apply the CUE standards of § 3.105(d) and that service connection had not been severed in accordance with the procedures required by law. 11 Vet.App. at 386-87. The Court noted, "Once service connection has been granted, section 3.105(d) provides that it may be withdrawn **only** after VA has complied with specific procedures and the Secretary meets his high burden of proof." *Id.* at 386 (emphasis added). Since the procedures had not been followed, the Court reversed and ordered that VA pay the appellants the benefits due from the date they were terminated. *Id.* at 387. A similar result should follow here.¹

¹ The Court also noted, "Should the Secretary commence termination proceedings pursuant to 38 C.F.R. § 3.105, the appellants will have the opportunity, previously denied them, of being heard on their entitlement to derivative benefits." 11 Vet.App. at 387. While Mr. Harris disputes that VA could ever meet the CUE standard in this particular case, *see Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (*en banc*) (the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated"), if the VA were to attempt to sever his grant of service connection, that can only be a prospective action, so he would still be entitled to his benefits from the date of the grant until the benefits were properly terminated under 38 C.F.R. § 3.105(d).

IV. ASSUMING ARGUENDO THAT VA COULD SEVER MR. HARRIS'S GRANT OF SERVICE CONNECTION, ITS FAILURE TO PROTECT MR. HARRIS'S DUE PROCESS RIGHTS RENDERS ITS ACTIONS INVALID.

Once VA granted service connection and notified Mr. Harris, he had a protected property interest in the receipt of this benefit. *See Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 312, (1985) (acknowledging that VA benefits are similar to the Social Security benefits the Supreme Court addressed in *Mathews v. Eldridge*, 424 U.S. 319, 332-33, (1976), and determined that the continued receipt of such benefits is a property interest protected by the Fifth Amendment). Even if the agency's actions were not invalid as inconsistent with VA's governing rules, they would be void for VA's failure to comply with due process. In *Bryan v. West*, 13 Vet.App. 482 (2000), this Court said, "The due process clause of the Fifth Amendment 'requires that when an individual is to be deprived of a property interest as a result of federal government action, the aggrieved party must be provided with notice and an opportunity to be heard.'" *Thurber v. Brown*, 5 Vet.App. 119, 122-23 (1993) (citing *Mathews v. Eldridge*, 424 U.S. at 333, and *Fugere v. Derwinski*, 1 Vet.App. 103 (1990)). Mr. Harris received neither the notice nor the opportunity required by the due process clause, and the Court should find VA's actions violated his rights and should direct VA to give full legal effect to the January 2003 award of service connection.

CONCLUSION

For the foregoing reasons, the Court should set aside the BVA decision and order that VA give effect to the benefit granted to Mr. Harris in January 2003.

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