

Department of
Veterans Affairs

Memorandum

Date: May 1, 1991

O.G.C. Precedent 53-91

From: General Counsel (022)

Subj: Requirement of Supplemental Statement of the Case Following
Remand by the United States Court of Veterans Appeals

To: Chairman, Board of Veterans Appeals (01)

QUESTIONS PRESENTED:

A. When the Board of Veterans Appeals (BVA) pursuant to instructions from the United States Court of Veterans Appeals (COVA) enters a remand decision ordering additional development, must the agency of original jurisdiction, after completion of such development, furnish the appellant and his or her representative, if any, with a supplemental statement of the case (SSOC)?

B. If the agency of original jurisdiction is required to furnish the appellant and his or her representative, if any, with a SSOC, may either the appellant or the representative waive this requirement?

COMMENTS:

1. This is in response to your request for an opinion on the necessity of issuing a supplemental statement of the case when BVA, pursuant to instructions from COVA, remands an appeal to the agency of original jurisdiction for additional development.

2. We believe that, in absence of any instruction from COVA specifically addressing the issue in a particular case, the answer to your first question may be found in 38 C.F.R. § 19.122. This regulation governs when a SSOC is to be issued following development pursuant to a remand of the Board. The fact that the Board's remand was issued pursuant to instructions from COVA does not affect this regulatory requirement. Hence, if BVA, pursuant to COVA instructions, remands an appeal to the Secretary for an examination, after completion of such examination the appellant and representative, if any, shall be furnished with a SSOC because additional pertinent evidence has been received. If BVA, pursuant to COVA instructions, remands an appeal for a personal hearing before field personnel and no additional pertinent evidence is received, a SSOC is not necessary.

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3. Under the BVA's Proposed Appeals Regulations, BVA has considerable latitude in determining when or if a SSOC is required. BVA Proposed Appeals Regulation § 19.31 provides that a SSOC will be issued following development pursuant to a remand by BVA unless the only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction and properly discussed in a prior Statement of the Case or SSOC or the BVA specifies in the remand that a SSOC is not required. If BVA remands an appeal to cure a procedural defect, a SSOC will be required unless BVA directs otherwise. If BVA remands an appeal for a hearing before field personnel, a SSOC is required when new documentary evidence or evidence in the form of testimony concerning the relevant facts or expert opinion is presented.

4. As to whether the requirement of a SSOC may be waived, either the appellant or his or her representative, may waive this procedural due process right. The Supreme Court has recognized that waiver of constitutional rights, including procedural due process, is possible. Fuentes v. Shevin, 407 U.S. 67, 95 (1972); F. H. Overmyer Co. v. Frick, 405 U.S. 174, 185-86 (1972); Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971); National Equipment Rental, Ltd., v. Szukhert, 375 U.S. 311, 315-16 (1964). While a strict standard of waiver has been applied to those constitutional rights guaranteed to criminal defendants, the question of whether there has been an effective waiver of procedural due process rights is essentially a factual determination. See cases cited supra. For this reason, any waiver of the procedural right to be furnished with a SSOC should be in writing or, if during the course of a hearing conducted before field personnel, formally entered on the record orally at the time of the hearing.

5. An attorney generally has express authority to bind his or her client by all acts which are expressly authorized by the contract of employment or by the client's instructions. 7A C.J.S. Attorney and Client §191 (1980). In addition, an attorney has the general implied authority to do on behalf of his client all acts, in or out of court, necessary or incident to the prosecution or management of the suit or defense or the accomplishment of the purpose for which he was retained and any representation which an attorney makes within the scope of his or her authority may be binding on the client. Reed v. Ross, 468 U.S. 1 (1984); United States v. Weinstein, 511 F.2d 622 (2d Cir.), cert. denied, Austin v. United States, 422 U.S. 1042, rehrg denied, 423 U.S. 884 (1975); United States v. Dolleris, 408 F.2d 918 (6th Cir.), cert. denied, 395 U.S.

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943 (1969); United States v. Bender, 218 F.2d 869 (7th Cir.), cert. denied, 349 U.S. 920 (1955); Staatz v. Dupnik, 789 F.2d 806 (9th Cir. 1986); McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); Securities and Exchange Commission v. Naftalin, 460 F.2d 471 (8th Cir. 1972).

6. We believe that the broad grant of authority to attorneys also applies to non-attorney practitioners admitted to practice before COVA pursuant to COVA R. Prac. and P. 46. As the decision to waive the requirement that the claimant and representative be furnished of a SSOC following development pursuant to a BVA remand is incident to the prosecution or management of a claim for veterans' benefits, an attorney or other person authorized to represent persons before the COVA has the authority to waive this procedural safeguard.

HELD:

A. In cases in which the BVA, pursuant to instructions from COVA, remands a case to the agency of original jurisdiction, the necessity of furnishing the appellant and representative with a supplemental statement of the case, in the absence of specific instructions on this issue from COVA, is determined by application of 38 C.F.R. § 19.122.

B. If 38 C.F.R. § 19.122 requires that the agency of original jurisdiction furnish the appellant and representative with a supplemental statement of the case, either the appellant or representative may waive this procedural requirement. To be effective, such waiver should be in writing or formally entered on the record orally at the time of a hearing.


Raoul L. Carroll