

Date: April 7, 1995

VAOPGCPREC 11-95

From: General Counsel (022)

Subj: Duty to Assist -- Contemporaneous Examination Requirement

To: Under Secretary for Benefits (212B)

QUESTION PRESENTED:

Is the Board of Veterans' Appeals required, pursuant to the statutory duty to assist claimants in developing their disability-benefit claims, to remand a case solely because of the passage of time since an otherwise adequate examination report was prepared?

COMMENTS:

1. The United States Court of Veterans Appeals has repeatedly held that the Department of Veterans Affairs' (VA) duty under 38 U.S.C. § 5107(a) to assist claimants in developing the facts pertinent to their claims "may, under appropriate circumstances, include a duty to conduct a thorough and contemporaneous medical examination." Caffrey v. Brown, 6 Vet. App. 377, 381 (1994); see also Proscelle v. Derwinski, 2 Vet. App. 629, 632 (1992); Green v. Derwinski, 1 Vet. App. 121, 124 (1991). In several decisions concerning well-grounded claims for increased disability ratings, the court has held that a new VA examination was required because the most recent examination report of record was too old to provide an accurate assessment of the current level of the claimant's disability. See Caffrey v. Brown, 6 Vet. App. at 381; Weggenmann v. Brown, 5 Vet. App. 281, 284 (1993); Proscelle, 2 Vet. App. at 632.

2. In Caffrey, 6 Vet. App. at 381, the court stated that a November 1988 examination of the claimant's service-connected disability was "too remote" from the October 1990 Board of Veterans' Appeals (Board) decision on the claim to constitute a "contemporaneous examination" adequate for rating purposes and that VA was, therefore, obligated to obtain a new examination of the claimant's disability. However, we do not believe that Caffrey or any

other Court of Veterans Appeals precedent stands for the proposition that the mere passage of time will render inadequate an examination which was otherwise adequate for rating purposes when the claim was initially adjudicated. Rather, the court in Caffrey identified certain other factors which rendered the November 1988 examination inadequate for purposes of determining the claimant's current disability level.

3. In Caffrey, a VA regional office in October 1988 awarded service connection for the claimant's psychiatric disability, assigned a 10-percent rating for that condition, and ordered an examination to determine the then-current level of the claimant's disability. Caffrey, 6 Vet. App. at 380. Based upon the November 1988 report of the medical examination, the regional office in January 1989 assigned a 50-percent rating for that disability. Id. In August 1989, the claimant filed a notice of disagreement asserting that he was entitled to a higher disability rating. In support of his claim for a higher rating, the claimant submitted additional evidence, including a September 1989 rehabilitation counselor's letter discussing the claimant's disability and the report of a December 1989 psychiatric evaluation stating that the claimant was "substantially impaired for entrance into the competitive labor market." Id. The Board denied the claim in October 1990, without having obtained an additional examination of the claimant's condition.

4. In holding that the November 1988 VA examination was "too remote" from the October 1990 Board decision, the court quoted 38 C.F.R. § 3.327(a), which provides that "reexaminations will be required if . . . evidence indicates there has been a material change in a disability or that the current rating may be incorrect." Id. at 381. The court further stated:

In this case, the appellant presented the letter from the rehabilitation counselor . . . tending to suggest that the appellant's condition had become worse.

Further-more, the appellant presented [a] psycho-logical examination report, prepared in December 1989, which also tended to suggest that the appellant's condition was

more

severe than his rating indicated. Thus, the appellant had presented evidence both that there had been a material change in his condition, and that his 50% rating was insufficient.

Id. at 381. The court's references, in discussing the evidence submitted after the January 1989 rating decision, to evidence of a "material change" and to the insufficiency of the claimant's 50-percent rating suggest that the court construed the claimant's evidence as indicating that his disability may have worsened after the January 1989 rating decision. Under those circumstances, the most recent VA examination in November 1988 would clearly be inadequate for purposes of determining whether the claimant's condition had worsened subsequent to the January 1989 rating decision, and it would be necessary to obtain a more current examination to determine the level of the disability after the alleged worsening had occurred.

5. Other cases in which a new examination was required are factually similar. In Proscelle, the claimant asserted in 1989 that his service-connected disability had increased in severity since the prior final Board decision on his claim in 1987. Proscelle, 2 Vet. App. at 631-32. The court noted that the most current evidence of record regarding the severity of the claimant's condition was a 1985 examination report. Id. at 632. Accordingly, the court held that "[b]ecause the record before the BVA contained no evidence of the then-current level of the veteran's service-connected disability, fulfillment of the VA assistive duty in this case 'include[d] the conduct of a thorough and contemporaneous medical examination.'" Id. (quoting Green, 1 Vet. App. at 124). Similarly, in Weggenmann, the claimant asserted in 1990 that his service-connected disability had increased in severity since the prior rating in 1948. 5 Vet. App. at 282-84. The most recent examination of record was conducted in 1950. Id. at 284. The court, citing Proscelle, held that "[w]here an appellant claims that his condition is worse than when originally rated, and the available evidence is too old for an adequate evaluation of appellant's current condition, the VA's duty to assist includes providing a new examination." Id. at 284.

6. In Talbert v. Brown, No. 92-1275, slip op. at 8 (Vet. App. Dec. 1, 1994), withdrawn, 1995 WL 17696 (Vet. App. Jan. 19, 1995), the court held that an August 1987 examination was "too remote" from a July 1992 Board decision to constitute a contemporaneous examination for purposes of evaluating a claim for an increased rating. (The court, upon reconsideration, concluded that the appellant sought an increased rating on the basis of clear and unmistakable error in prior regional office and Board decisions, rather than on the basis that his disability had increased in severity. Talbert v. Brown, No. 92-1275, 1995 WL 17696, at * 3 (Vet. App. Jan. 19, 1995).) Although the court discussed the contemporaneity requirement in relation to the date of the Board's decision, rather than the date of the claim for an increase, it appears that the holding in the December 1, 1994, Talbert decision was based upon the absence of any examination contemporaneous with the claim for an increase, and not upon the mere passage of time since the prior examination. The Talbert opinions do not reveal when the claim for an increase was filed. However, the court noted that a prior final Board decision had been issued in June 1989. Talbert, slip op. at 5 (Dec. 1, 1994). Accordingly, it appears that the claim for an increased rating was filed after June 1989 and that, consequently, the most recent examination, conducted in August 1987, substantially predated the claim for an increase.

7. We believe that the cases discussed above establish that, when a claimant submits a well-grounded claim that his or her disability has worsened since a prior rating and since the most recent examination of record, the duty to assist requires VA to conduct a new examination. Where the most recent medical evidence of record substantially pre-dates the date of a claim for an increased rating, the evidence is inadequate for purposes of determining the level of disability at the time of the claim because VA would be unable to rule out the possibility that the claimed increase in disability occurred subsequent to the most recent examination but before the claim was filed. However, nothing in those cases indicates that an examination which is contemporaneous with the claim for an increase and is adequate for rating purposes at the agency of original jurisdiction

would be rendered inadequate for purposes of the Board's review solely by reason of the passage of time between the examination and the Board's review.

8. In a non-precedential decision, one judge of the Court of Veterans Appeals reached a similar conclusion as to the effect of that court's precedents with respect to examinations. In VanMeter v. Brown, 4 Vet. App. 477, 480 (1993) (mem.), the court discussed the contemporaneous examination requirements under the Court of Veterans Appeals' precedents and 38 C.F.R. § 3.327(a) and stated that "[i]t does not necessarily follow that the Board must remand for an examination whenever, during the course of the claims adjudication process, more than one year transpires from the date of the last examination and the claimant asserts that his or her condition has worsened." The court held that the Board did not err in that case in concluding that the evidence before it was adequate to rate the claimant's disability. Although VanMeter has no precedential value, the court's analysis in that case comports with our conclusion that the court's precedents concerning the duty to assist do not require a new examination based solely upon the passage of time during the processing of a claim.

9. VA's duty to assist a claimant arises once the claimant meets the burden of submitting a well-grounded claim. 38 U.S.C. § 5107(a); Murphy v. Derwinski, 1 Vet. App. 78, 81-82 (1990). A well-grounded claim for an increase requires a plausible claim that a service-connected disability has increased in severity since the prior rating. See Proscelle, 2 Vet. App. at 632. In order to be well-grounded when filed, a claim for an increased rating must necessarily assert that the disability increased in severity prior to the date on which the claim was filed. Since the claim for an increase relates to an event which occurred prior to the date of its filing, it follows that, in order to adjudicate fairly a claim for an increased rating, there must be evidence sufficient to demonstrate the severity of the disability proximate to or after the date on which it is asserted that an increase in disability took place. Although the court in Proscelle, in discussing the record before the Board, referred to the "then-current" level of disability,

2 Vet. App. at 632, and the Weggenmann decision, 5 Vet. App. at 284, contained reference to the appellant's "current" condition, we do not read these decisions as suggesting that the "current" level of disability necessarily refers to the level extant at the time the Board makes its decision. As noted above, a claim for an increased rating is generally based on the assertion that an increase in disability occurred prior to the date the claim was filed. Accordingly, an examination conducted proximate to the time the claim for increase was filed will generally be sufficiently "current" or "contemporaneous" for purposes of deciding that claim.

10. The Board is an appellate body. See 38 U.S.C. § 7104(a); VAOPGCPREC 16-92 at 3. Although the Board reviews decisions under essentially a de novo standard, the Board's functions are generally limited to reviewing claims already decided by the agency of original jurisdiction. See 38 C.F.R. § 19.4. Accordingly, a claim before the Board will ordinarily be the same claim that was before the agency of original jurisdiction. In the case of a claim for an increased rating, it is reasonable for the Board to assume, absent a contrary indication in the evidence and assertions in the record before it, that the claim on appeal is based upon the same assertions raised before the agency of original jurisdiction, i.e., that the claimed increase in disability occurred prior to the date on which the claim was filed. An examination report which was sufficient for purposes of the claim before the agency of original jurisdiction will thus generally be sufficient for purposes of the Board's review.

11. It is certainly possible that a claimant's disability may undergo a further increase in severity between the time the claim is filed and the time of a Board decision on the claim. As explained below, we believe that the Board is permitted, within certain limits, to consider evidence concerning the severity of a claimant's disability at any time prior to the Board's decision and to base its decision upon the most recent evidence of the level of disability. However, we do not believe that the Board is required under the duty to assist to obtain a new examination based on the mere possibility that an increase in the severity of a disability

may have occurred during that period between the filing of the claim and the Board's consideration of the appeal. Cf. Culver v. Derwinski, 3, Vet. App. 292, 297 (1992) (duty to assist may be triggered by notice from the claimant of the need to supplement the record, or by information in the evidence of record). Where a claimant affirmatively asserts to the Board that a further increase in disability has occurred subsequent to the prior examination and decision, an additional examination may be required. See 38 C.F.R. § 3.327(a) (reexaminations will be required where evidence indicates that there has been a material change in disability). However, we do not believe that the Board would be justified in inferring such a claim and remanding the matter for a new examination where the issue is not reasonably raised by the claimant or the evidence of record.

12. The above analysis is consistent with the Court of Veterans Appeals' opinion in Massey v. Brown, 7 Vet. App. 204 (1994). In Massey, the claimant submitted a claim for an increased rating in 1987, asserting that his service-connected disability had increased in severity since the prior rating in 1976. 7 Vet. App. at 205. The claim was denied by a regional office and the Board. Id. at 206. On appeal, the Court of Veterans Appeals remanded the case due to errors in the Board's analysis. In remanding the case, the court stated:

On remand, the Board may obtain a new psychiatric examination if the examination will aid the Board in making an informed decision. However, since the appellant's claim relates to an increase in his disability claimed originally in 1987, the Board must limit the examination to the symptoms present after 1987 and before August 6, 1990, the date of the [regional office] hearing. In conducting an examination, the examining physician must take into account the records dating prior to 1987 and compare them to the records and symptoms regarding the appellant's condition between 1987 and August 6, 1990.

Id. at 208. The basis for the court's selection of the hearing date as the cutoff date for determining the

severity of the claimant's condition is not clear. However, the quoted language strongly suggests that the Board's inquiry on a claim for an increased rating is essentially the same as the regional office's and that the pertinent period for determining the "current" disability level is the period proximate to the filing of the claim for an increase, and not a subsequent period when the claim is before the Board on appeal. Accordingly, an examination which is contemporaneous with the filing of the claim will generally be adequate for purposes of the Board's review.

13. Although our discussion focuses primarily on claims for increased service-connected disability ratings, the analysis in this opinion would also be applicable to a claim of permanent and total disability for pension purposes, as such a claim may raise the issue of whether the claimant's disability has increased in severity since the most recent examination. See Littke v. Derwinski, 1 Vet. App. 90 (1991) (pension claimant's substantive appeal made reference to recent private medical examinations). A well-grounded pension claim involves an assertion that the claimant became permanently and totally disabled prior to filing of the claim. Thus, the claimant's medical condition proximate to the time of filing the claim is the issue before the Board on an appeal arising from such a claim, unless the claimant asserts that his or her disability has subsequently increased in severity.

14. To the extent the evidence or the claimant's assertions in a case before the Board may suggest that a claimant's disability has undergone a further increase in severity subsequent to the most recent examination, the issue of whether such a further increase had occurred would generally involve factual issues not addressed by the regional office in the decision being appealed. The Board's ability to address any such issue in the first instance would be governed by the considerations discussed in Bernard v. Brown, 4 Vet. App. 384 (1993), and VAOPGCPREC 16-92. In Bernard, the Court of Veterans Appeals held that the Board may decide issues not previously decided by the agency of original jurisdiction if those issues are necessary to its decision

on the "matter" on appeal to the Board and if the claimant will not be prejudiced by the Board's action in deciding the issue in the first instance. 4 Vet. App. at 390-94.

15. With regard to the first consideration under Bernard, the court indicated that the term "matter," as used in 38 U.S.C. § 7104(a) in defining the Board's jurisdiction, refers generally to a particular claim for benefits "under a law that affects the provision of benefits by the Secretary." 4 Vet. App. at 392 (quoting 38 U.S.C. § 511(a)). The court in Bernard held that, on a claim for service-connected disability benefits for a particular disability, the issues of whether there was new and material evidence to reopen the previously-denied claim for such benefits and whether, upon reopening, the claimant was entitled to such benefits were issues pertaining to the single "matter" of the claimant's entitlement to compensation under 38 U.S.C. § 1110 for the disability. Id.

16. A claim that a disability has worsened during the pendency of an appeal is based upon a different factual basis than a claim that a disability worsened between the date of a prior rating decision and the date on which the claim for increase was filed. However, both issues may be viewed as pertaining generally to a single claim of entitlement to benefits, i.e., a claim for a rating higher than the rating currently assigned to a disability. Accordingly, under Bernard, we do not believe that the Board would be jurisdictionally barred from addressing the issue of whether an increase in disability occurred during the pendency of an appeal.

17. The second consideration identified in Bernard pertains to whether the claimant would be prejudiced if the Board decided an issue which the regional office had not addressed. As discussed in Bernard, 4 Vet. App. at 392-94, and VAOPGC- PREC 16-92 at 7-9, the issue of potential prejudice to the claimant will depend upon the facts of each case. In Curry v. Brown, 7 Vet. App. 59, 67 (1994), the court stated that, before the Board proceeds to consider an issue not decided by the agency of original jurisdiction, the Board should generally inform the claimant of the circumstances and determine whether the claimant objects to the Board deciding the issue in the first instance.

18. Where a claimant asserts to the Board that there has been a further increase in the severity of his or her disability subsequent to the regional office decision, the duty to assist may require that the Board remand the issue for additional evidentiary development, including a new examination, unless the claimant has submitted acceptable medical evidence of his or her current disability level proximate to the time of the appeal to the Board. See 38 C.F.R. § 3.326. If the evidence before the Board is adequate to adjudicate the issue of an increase in disability subsequent to the regional office decision, the Board should nevertheless consider whether the claimant would be prejudiced if the Board were to decide the issue in the first instance.

HELD:

The Board of Veterans' Appeals is not required, pursuant to the Department of Veterans Affairs' duty under 38 U.S.C. § 5107(a) to assist claimants in developing the facts pertinent to their claims, to remand an appealed disability-bene-fit claim solely because of the passage of time since an otherwise adequate examination report was prepared. Rath-er, an examination which was adequate for purposes of deter-mination of the claim by the agency of original jurisdiction will ordinarily be adequate for purposes of the Board's determination, except to the extent that the claimant asserts that the disability in question has undergone an increase in severity since the time of the examination.

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