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May 11, 2020

Mr. Peter R. Marksteiner
Clerk, U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N. W.
Washington, D.C. 20439

RE: Sellers v. DVA
No. 2019-1769
Citation to Supplemental Authority

Dear Mr. Marksteiner:

Pursuant to Fed. Cir. R. 28(j), the following significant authority has come to the attention of counsel for the appellee, Mr. Sellers's counsel after oral argument in this matter. During the course of argument numerous hypotheticals were posed by the panel addressing the question of the degree of specificity required for a claim. Counsel for Mr. Sellers does not believe that his responses to those hypotheticals were clear or accurately reflected the applicable law. In support of clarification those responses Mr. Sellers's counsel submits the following supplemental authority:

38 C.F.R. § 3.160(1996) provides the following pertinent definitions

Page 2

Sellers v. DVA

No. 2019-1769

Citations to Supplemental Authority

- (c) Pending claim. An application, formal or informal, which has not been finally adjudicated.
- (d) Finally adjudicated claim. An application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier. (See §§ 20.1103 and 20.1104 of this chapter.)

Mr. Sellers's counsel was attempting to express that once the Secretary received and accepted Mr. Seller's March 1996, formal application for service connected disability compensation using VA Form 21-526, Appx137-140, that claim remained pending until all reasonably raised claims from the evidence were finally adjudicated.

The current version of 38 C.F.R. § 3.155(b) provides:

- (2) An intent to file a claim must identify the general benefit (e.g., compensation, pension), but need not identify the specific benefit claimed or any medical condition(s) on which the claim is based.

Mr. Sellers's counsel was attempting, in response to the hypotheticals presented by the panel, to assert that Mr. Seller's March 1996 identified the general benefit of service connected compensation and that beyond what he provided in boxes 12 and 17 of VA Form 21-526, Appx137, nothing further was required to be identified for a claim.

38 C.F.R. § 3.103(e)(1996) provided:

The claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will entitle him to a

Page 3

Sellers v. DVA

No. 2019-1769

Citations to Supplemental Authority

Statement of the case for his assistance in perfecting his appeal. Further, the notice will advise him of the periods in which an appeal must be initiated and perfected.

Mr. Sellers's counsel was attempting, in response to the hypotheticals presented by the panel, to demonstrate that Mr. Sellers's 1996 formal application had not been finally adjudicated as demonstrated by the provisions of 38 C.F.R. § 3.103(e)(1996).

Both this Court in *Ruel*, and the Veterans Court in *Best* interpreted § 3.103(e) extant at the time of Mr. Sellers formal claim, Appx137-139, and VA's July 1996 decision, Appx132-136, to create a pending claim based upon non-compliant notice of a claim reasonably raised by the evidence of record.

Best v. Brown, 10 Vet.App. 322 (1997):

There is no evidence in the record to show that the RO ever acknowledged the error or finally adjudicated the claim. Based upon the requirements of 38 C.F.R. §§ 3.103(e), 3.104(a), the Court finds that VA committed a procedural error by failing to adequately notify the appellant that it was denying him service connection for all of the diagnosed disorders including generalized anxiety disorder. Therefore, the August 1981 decision is not final.

Best, 10 Vet.App. 325.

Ruel v. Wilkie, 918 F.3d 939, 942 (2019):

The Veterans Court and Board interpreted § 3.103(e) as satisfied by "explicit denials" that do not mention or in any other way identify the claim being denied. In defending this interpretation, the Government essentially argues that if the VA makes a fact finding with regard to one claim, that fact finding serves as notice to an applicant that all other claims for which that fact finding would be relevant are likewise explicitly decided, even without saying so.

Page 4

Sellers v. DVA

No. 2019-1769

Citations to Supplemental Authority

We disagree. Instead, we hold, as a matter of law, that to meet the notice requirements of § 3.103(e), an explicit denial must state, or clearly identify in some other manner, the claim(s) being denied. (footnote omitted). The decision must also meet the other requirements of § 3.103(e), including the reason for the decision, the date effectuated, and notice of appellate rights.

Ruel, 918 F.3d 942. In footnote 3 omitted from the above citation, this Court indicated that this holding was limited to explicit denials, since that is what the Veterans Court determined occurred here. *Id.*

Mr. Sellers's counsel apologizes to the Court and to the Secretary for his inability to clearly and precisely respond at oral argument to the hypotheticals presented by the panel. Mr. Sellers's counsel hopes that the supplemental authority he has submitted will clarify his intended responses.

Thank you for your attention to this matter.

Respectfully submitted,

/s/ Kenneth M. Carpenter

Kenneth M. Carpenter

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Page 5

Sellers v. DVA

No. 2019-1769

Citations to Supplemental Authority

CERTIFICATE OF SERVICE

I certify that on the 11th day of May, 2020, the foregoing submission of supplemental authority was electronically filed through CM/ECF system with the Clerk, United States Court of Appeals for the Federal Circuit. Copies of the document were served through the Court's CM/ECF system via the Notice of Docket Activity to:

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Respectfully submitted,

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