**APPENDIX A**

**United States Court of Appeals for the Federal Circuit**

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**FLORENCE JONES,**
Claimant-Appellant

v.

**ROBERT WILKIE,**
**SECRETARY OF VETERANS AFFAIRS,**
Respondent Appellee

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2018-2376

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Appeal from the United States Court of Appeals for Veterans Claims in No. 17-105, Senior Judge Mary J. Schoelen.

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Decided: July 15, 2020

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KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, for claimant-appellant.

BORISLAV KUSHNIR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by ETHAN P. DAVIS, ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM; JONATHAN KRISCH, Y. KEN

LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

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Before O'MALLEY, BRYSON, and HUGHES, *Circuit Judges.*

BRYSON, *Circuit Judge.*

Appellant Florence Jones, the widow of deceased veteran Thomas Jones, seeks to overturn a decision of the United States Court of Appeals for Veterans Claims ("the Veterans Court") regarding the effective date that the Department of Veterans Affairs ("DVA") assigned to benefits awarded to Mr. Jones. We affirm.

## I

Mr. Jones served on active duty with the U.S. Army between August 1967 and October 1974, and he served in the Army National Guard from March 1987 to October 1990. In 1994, he filed a claim for disability benefits for a nervous disorder and a right leg wound. A DVA regional office granted service connection for a right leg scar, but found that disability to be non-compensable. The regional office denied the claim for a nervous condition. The office found that there was no objective evidence in his service medical records of an in-service stressor, i.e., a traumatic event that caused his nervous disorder, although the service medical records were incomplete. Mr. Jones did not appeal that decision, which became final in 1995.

Several years later, on October 7, 2002, Mr. Jones filed a request to reopen his claim, which he characterized as a claim for post-traumatic stress disorder ("PTSD"). In the request, he asserted that he was assaulted by muggers while he was stationed in Germany, which resulted in his developing PTSD. The regional office denied his request for reopening on the ground that the evidence did not establish an in-service stressor and also that certain evidence that Mr. Jones presented was not new and material.

In a 2006 deferred rating decision, a DVA rating officer noted that the DVA had requested Mr. Jones's active duty service records in 1994, but that it was unclear whether all of those records had been obtained. The rating officer directed the regional office to attempt to obtain the records. The office received a copy of Mr. Jones's active duty medical records on March 2, 2006, and a copy of Mr. Jones's entire personnel file on June 22, 2006.

Subsequently, in an August 2008 decision, the Board of Veterans' Appeals granted Mr. Jones's request to reopen and remand his claim for further development. The Board directed the regional office to obtain additional information from two individuals with knowledge of the assault in Germany, to obtain and associate with the claims folder all available records relating to the development of the claim, and to "readjudicate the claim for service connection for PTSD on appeal in light of all pertinent evidence and legal authority."

In 2010, the regional office granted Mr. Jones service connection for PTSD and a schizoaffective disorder, bipolar type.[1] The regional office based its new rating decision in part on Mr. Jones's post-service DVA records, including a treatment record from October 2002. But it did not rely on Mr. Jones's active duty records from 1967 to 1974. After initially assigning a lower disability rating, the regional office later awarded Mr. Jones a 100% rating effective from October 7, 2002, the date that he sought to reopen his claim.

Not fully satisfied with that disposition, Mr. Jones sought to have the effective date of his award made retroactive to June 7, 1994, the date he first filed his claim. The Board of Veterans' Appeals denied that request in 2014. On review, however, the Veterans Court vacated the Board's decision and remanded the case to the Board for further explanation regarding certain factual findings. The Veterans Court directed the Board to determine whether a February 1971 service treatment record and a March 1987 report from a Kansas Army National Guard physician were associated with Mr. Jones's claims file at the time of the regional office's decision on his claim in 1994.

Mr. Jones died in November 2014. His wife, appellant Florence Jones, was substituted as claimant.

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[1] We note that the characterization of Mr. Jones's affliction evolved over course of the proceedings from "nervous disorder" to "PTSD" to "PTSD and a schizoaffective disorder, bipolar type." The parties do not contend that the differences in those characterizations matter for purposes of this appeal.

In a September 14, 2016, ruling, the Board determined that the March 1987 report was part of the record at the time of the regional office's 1994 decision. The Board could not determine if the February 1971 service treatment records were associated with the claims file at that time. But the Board determined that regardless of when the February 1971 records were associated with the file, neither the March 1987 report nor the February 1971 records "provide[d] the basis, in all or in part, for the later reopening of the Veteran's claim for service connection for PTSD."

The Board explained that the regional office already knew in 1994 that Mr. Jones had suffered a right leg laceration as the result of an incident in 1968. But Mr. Jones, according to the Board, had not reported that his PTSD was related to that laceration until October 2002.[2] Previously, according to the Board, Mr. Jones had stated only that he had been mugged, and he had not reported suffering from associated wounds. It was the October 2002 report, corroborated by records showing a laceration, "that served as a basis of the grant for the claim for service connection," the Board ruled. "Therefore, the additional service records documenting treatment for a laceration to his right leg did not serve as the basis for reopening and granting the claim in any respect." For that reason, the Board held

[2] The Veterans Court said that the Board incorrectly stated that the claim was reopened because of assertions made by Mr. Jones in 2002 regarding the assault against him. According to the Veterans Court, the reopening was based on assertions made by Mr. Jones in 2003 and a 2008 statement by a DVA physician.

that the effective date provision in the pertinent regulation, 38 C.F.R. § 3.156(c)(3),[3] was inapplicable in this case; the Board therefore rejected Ms. Jones's argument that the effective date for Mr. Jones's PTSD claim should be 1994 rather than 2002.

Ms. Jones appealed to the Veterans Court, which affirmed the Board's ruling. The court noted that, consistent with the requirements of 38 C.F.R. § 3.156(c)(3), the DVA had reconsidered Mr. Jones's claim when the Board remanded the claim in 2008 and the regional office granted him disability benefits in 2010. As to the role of the February 1971 and March 1987 service records, the court upheld the Board's determination that those records were not part of the basis for the award of benefits, and that the Board therefore properly found that the effective date for the award was October 7, 2002, the date on which the appellant sought to reopen his previously denied claim. The decision in Mr. Jones's favor, the court noted, was based on evidence created in 2003 and 2008, which did not exist in 1994 when Mr. Jones's claim was denied. Because section 3.156(c)(3) provides that newly associated records must have existed at the time of the initial decision in order to warrant an effective date relating back to the date on which the DVA received the previously decided claim, the court held that the Board properly rejected Ms. Jones's request to revise the effective date for the

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[3] The regulatory framework applicable to this case predates the Veterans Appeals Improvement Modernization Act, Pub. L. No. 115-55 (2017). The regulations implementing that Act became effective in February 2019, and do not apply to this case.

PTSD claim from 2002 to 1994.[4] Ms. Jones took this appeal challenging the effective date assigned to the award of benefits.

## II

This court has appellate jurisdiction to review a decision of the Veterans Court with respect to any interpretation of a statute or regulation relied on by that court in making its decision. 38 U.S.C. § 7292(a). We may not, however, review a challenge to a factual determination or a challenge "to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

Ms. Jones argues that the Veterans Court misinterpreted 38 C.F.R. § 3.156(c) and relied on an incorrect legal standard in applying that regulation. She characterizes the court as holding that section 3.156(c)(1) did not require reconsideration of Mr. Jones's original claim even though it was unclear whether an official service department file was in the DVA's possession at

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[4] The court said that the Board misstated the law when it stated that the subsequently associated records did not serve as the basis for reopening the previously denied claim for PTSD. As the government acknowledges, the relevant inquiry under 38 C.F.R. § 3.156(c)(3) is whether the newly received or associated records were a basis for the award, not for the reopening of the claim. The court ruled, however, that the error was harmless because the Board in its analysis fully considered the applicable provisions of section 3.156(c) and properly applied the law when it ruled that "the award of service connection was not based in all or in part on the association of [the] February 1971 service records with the file."

the time of the DVA's original decision. In addition, she argues that the court improperly held that section 3.156(c)(3) requires that the newly discovered service department records be the basis for both reopening the claim under section 3.156(a) and granting the reopened claim, when in fact section 3.156(c)(3) requires only that the award be based in part on the records identified by section 3.156(c)(1).

The regulation at issue in this case, 38 C.F.R. § 3.156(c), provides as follows, in pertinent part:

> (c) Service department records.
>
> (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section [which provides for reopening claims upon the receipt of new and material evidence].
>
> . . .
>
> (3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be

> authorized by the provisions of this part applicable to the previously decided claim.

A

The DVA is required to "reopen" a finally adjudicated claim under 38 C.F.R. § 3.156(a) if the claimant submits new and material evidence in support of the claim. "Reconsideration" of a claim is required by 38 C.F.R. § 3.156(c)(1) if the DVA receives official service department records that existed but had not been associated with the claims file when the DVA first decided the claim.

In the case of an award that results from reopening under section 3.156(a), the effective date of the award is the date the request for reopening was made or the date of entitlement, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(2); *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). If an award that results from reconsideration under section 3.156(c) was based in whole or in part on the newly obtained records, the award will be made effective on the date the original claim was received (or the date of entitlement if that is later than the date of receipt of the claim). 38 C.F.R. § 3.156(c)(3).

In this case, the DVA reopened Mr. Jones's claim in 2008 based on new and material evidence. The February 1971 service records, which were not part of the claims file when the DVA first denied Mr. Jones's claim, were associated with the claims file prior to the 2008 reopening decision. Thus, as found by the Veterans

Court, the DVA considered the February 1971 service records, together with all the other evidence of record, during the remand proceedings before the regional office.

Although it is undisputed that the DVA reopened Mr. Jones's 1994 claim, Ms. Jones contends that DVA failed to "reconsider" that claim. But she does not point to any evidence that the DVA failed to reconsider. Nor does she suggest what the DVA should have done differently in order to comply with the obligation to "reconsider" the claim.

As this court explained in *Blubaugh v. McDonald*, reconsideration under section 3.156(c) is meant to ensure "that a veteran is not denied benefits due to an administrative error." 773 F.3d at 1313. The regulation "serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Id.* The Veterans Court has similarly described reconsideration under section 3.156(c) as requiring the agency to reassess its original decision in light of the new service records, which may include the development of additional evidence. *George v. Shulkin*, 29 Vet. App. 199, 205 (2018), *vacated on other grounds sub nom. George v. Wilkie*, 782 F. App'x 997 (Fed. Cir. 2019); *see also Poole v. Wilkie*, No. 19-0041, 2020 WL 2108261, at *4 (Vet. App. May 4, 2020). Because the DVA considered Mr. Jones's claim in view of the records that Ms. Jones alleges should have been a part of the claimant's file from the outset, the DVA "reconsidered" the claim

per 38 C.F.R. § 3.156(c)(1), as held by the Veterans Court.[5]

The regional office subsequently awarded benefits. That award was exactly what Mr. Jones sought when he requested reopening of his initial claim. The only remaining question was what the effective date of that award should be.

As to that question, the Board properly applied the standard set forth in 38 C.F.R. § 3.156(c), as held by the Veterans Court. The Board examined whether the award was based in whole or in part on any of the service records that existed but were not available to the regional office at the time of the initial decision on Mr. Jones's claims. The Veterans Court found that the Board had correctly applied the law regarding the effective date for the award. We see no legal error in the Veterans Court's conclusion in that regard.

The outcome of that issue was not dictated by any distinction between reopening and reconsideration, both of which occurred here. Instead, the key issue was whether the award was attributable in whole or in part to the newly obtained service records, as directed by 38 C.F.R. § 3.156(c). To the extent Ms. Jones is suggesting that "reconsideration" mandates that the effective date of any award must necessarily be retroactive to the

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[5] Ms. Jones also contends the Veterans Court erred because the Board failed to determine whether the allegedly missing records were relevant as required by 38 C.F.R. § 3.156(c)(1). But the government has not disputed that the newly associated records were relevant and that reconsideration was required.

date of the initial claim, that argument is squarely contrary to section 3.156(c), which defines the particular circumstances in which such a retroactive effective date is required.

The regulations make clear that reconsideration of the initial claim is required if any relevant official service personnel records or service medical records were not associated with the claims file at the time of the DVA's initial decision on the claim. The DVA assumed that was true here and conducted reconsideration after the claim was ordered reopened. The DVA then granted an award of benefits. But that award was not predicated in any way on records that were not before the DVA at the time of the initial decision on the claim. Thus, as the Board held, the proper effective date was the date of the request for reopening, not the date of the initial claim. That is consistent with the procedure dictated by section 3.156 and does not reflect a misinterpretation of the regulations by the Veterans Court. *See Blubaugh*, 773 F.3d at 1314; *New and Material Evidence*, 70 Fed. Reg. 35388, 35389 (June 20, 2005).

B

Ms. Jones also contends that the Veterans Court relied on an incorrect legal standard because it erroneously required that newly discovered service department records be the basis both for reopening the claim and for awarding benefits on the reopened claim. That is not what either the Board or the Veterans Court did.

Although the Board noted that Mr. Jones's claim was reopened based on evidence obtained after the 1994 decision denying his claim, that fact was cited simply as contextual support for the Board's determination that the award of benefits was not attributable to the pre-1994 service records that were obtained after the denial of the claim. On the critical issue as to the evidence on which the Board based its award, the Veterans Court wrote: "The Board explained that the February 1971 service medical record and the March 1987 service record were not the basis for reopening, and *more significantly, the eventual grant of the appellant's claim*."

Thus, contrary to Ms. Jones's contention, the Veterans Court did not require that in order to trigger the effective date provision of 38 C.F.R. § 3.156(c)(3), the claimant had to show that both the reopening of the claim and the award were based in part or in whole on the records identified in section 3.156(c)(1). As the Veterans Court ruled, the Board focused its analysis on whether the award was based on those records, and not on whether the decision to reopen the claim was based on those records. There was therefore no legal error in the interpretation of section 3.156(c)(3).

Ms. Jones points to the purported error made by the Board in referring to the service records as not serving "as a basis for reopening the previously denied claim," rather than stating that those records did not serve as a basis for reconsidering the previous denial of Mr. Jones's claim and awarding benefits. Ms. Jones challenges the Veterans Court's conclusion that the

Board's error was harmless. Although the Board in its findings of fact stated that the subsequently associated records did not serve as the basis for reopening the previously denied claim, the Board applied the proper standard when it analyzed whether the subsequently associated records served, in whole or in part, as the basis for the award. The Veterans Court acknowledged the Board's purported error in referring to the basis for reopening rather than the basis for the award, but in light of the Board's application of the proper legal standard in the course of its analysis, the court held that error to be harmless.

Citing *Newhouse v. Nicholson*, 497 F.3d 1298 (Fed. Cir. 2007), and *Pitts v. Shinseki*, 700 F.3d 1279 (Fed. Cir. 2012), the government argues that this court lacks jurisdiction to decide whether the Veterans Court was correct in finding that the Board's remark about reopening was harmless error. To review that ruling by the Veterans Court, the government argues, would be to review an application of law to fact, contrary to the statutory limit on this court's jurisdiction in appeals from the Veterans Court under 38 U.S.C. § 7292(d)(2).

Ms. Jones responds that the Board's misstatement constituted an error of law. She contends that the Board and the Veterans Court relied on the misstatement and applied the wrong legal standard in making the effective date determination.

As explained above, we uphold the Veterans Court's determination that the Board applied the correct legal standard under 38 C.F.R. § 3.156(c) when it

analyzed the effective date issue. What remains is the Veterans Court's conclusion that, given that the Board applied the proper legal standard, the Board's purported mischaracterization of the test early in its opinion was harmless. On that narrow issue, the government is correct that we lack jurisdiction to review the Veterans Court's ruling in light of *Newhouse* and *Pitts*.

Because we find no error by the Veterans Court falling within our appellate jurisdiction, we affirm the Veterans Court's judgment.

No costs.

**AFFIRMED**

## APPENDIX B

*Designated for electronic publication only*

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0105

FLORENCE JONES, APPELLANT,

v.

ROBERT L. WILKIE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before SCHOELEN, *Judge.*

## MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet App. R. 30(a), this action may not be cited as precedent*

SCHOELEN, *Judge*: The appellant, Florence Jones, through counsel, appeals the September 14, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied entitlement to an effective date prior to October 7, 2002, for service correction for post-traumatic stress disorder (PTSD).[1] Record of Proceedings (R.) at 1-11. This appeal is timely, and the Court has jurisdiction to review the Board's decisions pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1

[1] The appellant's late husband, Thomas E. Jones, was a veteran and is the subject of the claim on appeal. Thomas E. Jones passed away on November 7, 2014, and the appellant was substituted as a party in December 2014. *See* R. at 38, 454, 458.

Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

## I. BACKGROUND

The appellant served in the U.S. Amy from August 1967 to October 1974. R. at 179, 180, 203. In February 1971, he reported pain in his right leg caused by an infected cut. R. at 4502. One week later, stitches were removed from his right leg. R. at 4513.

In March 1987, a Kansas Army National Guard physician noted a scar on the appellant's right leg. R. at 4417. On June 18, 1994, the appellant filed a claim for disability benefits for a nervous disorder and for a right leg wound. R. at 4656. VA denied the claim for a nervous condition on December 27, 1994, because the appellant's service medical records, which were incomplete, did not contain objective evidence of a stressor. R. at 4469. The appellant filed a Notice of Disagreement on March 17, 1995. R. at 4457. On March 22, 1995, VA granted the appellant's claim for disability benefits for a right leg scar, basing its decision on the March 1987 examination record. R. at 4455.

On October 7, 2002, the appellant filed a request to reopen his claim for PTSD and asserted that while he was stationed in Germany, he was assaulted by five attackers. R. at 4371. In August 2003, the regional office (RO) denied the appellant's claim because the evidence submitted was not new and material. R. at 4362. The appellant detailed the assault in an August 2003 statement. R. at 4356-57. In August 2004, the RO

confirmed its prior denial of the appellant's claim R. at 3016.

In a January 2006 deferred rating decision, a VA rating officer noted that the appellant's active duty service records were requested in 1994 and wrote that she could not determine whether a response had been received. R. at 2979. The officer ordered the RO to attempt to obtain records from the appellant's active duty service from August 1, 1967, to October 20, 1974. *Id.* In June 2006, the VA rating officer noted that the National Personnel Records Center sent certain pages from the appellant's personnel file and ordered the RO to send another request for the entire file. R. at 2917. In August 2008, the Board granted the appellant's request to reopen the claim and remanded the claim for further development. R. at 2687-96.

In May 2010, the RO granted the appellant's claim for PTSD and schizoaffective disorder, bipolar type. R. at 4730. The RO awarded ratings of 70%, effective October 7, 2002; 100%, effective December 2, 2004; and 70%, effective February 1, 2005. *Id.* In March 2011, the RO determined that a clear and unmistakable error was made in its prior evaluation of the appellant's PTSD and awarded a 100% rating from October 7, 2002. R. at 906. In March 2014, the Board denied the appellant's claim for an effective date prior to October 7, 2002. R. at 821. In January 2016, the Court vacated the Board's March 28, 2014, decision and remanded the matter for the Board to determine whether the February 1971 service medical record and the March 1987 report were associated with the appellant's

claims file at the time of the December 1994 rating decision. R. at 46-47.

On September 14, 2016, the Board issued the decision here on appeal. R. at 1-11. This appeal followed.

## II. ANALYSIS

A claimant may reopen a final decision by submitting new and material evidence. 38 C.F.R. § 3.156(a) (2017). The effective date for an award on a claim reopened on this basis is usually the date of receipt of the request to reopen or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(ii)(B)(2)(i), (r) (2017). If VA receives relevant official service department records that existed and were not associated with the claims file when VA first decided the claim, VA must reconsider the claim. 38 C.F.R. § 3.156(c)(1) (2017). If an award is granted that is based in whole or in part by such records, the award "is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(iii)(3). Whether the Board applied the correct legal standard as set forth in 38 C.F.R. § 3.156(c) is a question of law the Court reviews de novo. *See* 38 U.S.C. § 7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc).

The appellant argues that the Court must reverse the Board's effective-date finding because the appellant asserts that the Board relied on the incorrect legal standard in applying 38 C.F.R. § 3.156(c)(1) when it considered whether the subsequently associated

service records were the basis for reopening the previously denied claim, instead of considering whether VA acquired relevant official service department records that existed and were not associated with the file when VA first decided the claim. Appellant's Brief (Br.) at 6-7. The Secretary admits that the Board misstated the law, but contends that the error was harmless because the Board later accurately explained why the February 1971 record did not serve as the basis of the grant of benefits. Secretary's Br. at 8-10.

In its findings of fact, the Board found that the appellant's Army National Guard service records from March 1987 to October 1990 were of record at the time of the December 1994 rating decision denying his claim. R. at 3. The Board also found that records from the appellant's first period of active duty service (August 1967 to October 1974) were associated with the appellant's claims file after the December 1994 rating decision, but those records were not the basis for reopening his previously denied claim R. at 4.

VA must reconsider a claim where VA receives or associates relevant official service department records that existed and were not associated with the file when VA first decided the claim. 38 C.F.R. § 3.156(c)(1). VA reconsidered the appellant's claim when the Board remanded the appellant's claim in August 2008 for further development and the RO granted him disability benefits in May 2010. R. at 2688-96, 4730-33. Additionally, the Board found that the March 1987 service record was contained in the evidence of record at the time of the initial denial of the appellant's claim in

December 1994, so § 3.156(c) was not implicated as to that document.[2] R. at 7.

Where an award is granted and based partially or completely on records identified in § 3.156(c)(1), the effective date of the award is the date on which entitlement arose or the date on which VA received the previously denied claim, whichever is later. 38 C.F.R. § 3.156(c)(3). As to the February 1971 service record, the Board found that it was unclear whether that record was associated with the appellant's file at the time of the December 1994 decision, but the record was not the basis of the reopening of the appellant's claim in 2008. R. at 8. The Board's reopening of the appellant's claim in 2008 was based on lay statements submitted by the appellant in July 2003 and September 2003 and a June 2008 statement by a VA physician.[3] R. at 2687. The Board explained that the February 1971 service medical record and the March 1987 service record were

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[2] The appellant argued in his reply brief that the Board provided no evidence for its conclusions regarding the association of the February 1971 and March 1987 with his claims file. Appellant's Reply Br. at 6-8. This argument was not raised in the appellant's initial brief, and the Court declines to address the argument. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir.1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."), *aff'g sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief ); *Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (appellant "should have developed and presented all of his arguments in his initial pleading").

[3] The Board incorrectly stated in the instant appeal that the reopening was based on the appellant's October 7, 2002, statement that he sustained his right leg wound when he was mugged in service. R. at 8.

not the basis for reopening, and, more significantly, the eventual grant of the appellant's claim. R. at 8. Because the February 1971 and March 1987 records were not part of the basis for the award of benefits, the Board properly found that the effective date for the award was October 7, 2002, the date on which the appellant sought to reopen his previously denied claim. The Court finds no error in this determination because § 3.156(c)(3) is only for application where the newly associated records lead VA to award a benefit not granted in the original decision. *Blubaugh*, 773 F.3d at 1314 (citing *New and Material Evidence*, 70 Fed. Reg. 35,388, 35,388 (June 20, 2005)). The reopening of the appellant's claim was based on records created in 2003 and 2008, which therefore did not exist in 1994, when the appellant's claim was denied. *See* R. at 8. Under § 3.156(c)(3), newly associated records must have existed at the time of the initial decision to warrant an effective date relating back to the date on which entitlement arose or the date on which VA received the previously decided claim, whichever is later. 38 C.F.R. § 3.156(c)(3). The records on which the Board awarded benefits did not exist at the time of the 1994 decision, so § 3.156(c)(3) is not for application. Accordingly, the Board did not err in its application of § 3.156(c).

The Court agrees with the appellant that the Board misstated the law when it conflated the analysis required by 38 C.F.R. § 3.156(c)(1) and (3) in its findings of fact. R. at 3-4. However, this error was harmless, because the Board's analysis fully considered the applicable provisions of § 3.156(c) and

correctly applied the law and the appellant has not met his burden of showing prejudice from this error. 38 U.S.C. § 7261(b)(2) (requiring the Court to take due account of the rule of prejudicial error); *Sanders v. Shinseki*, 556 U.S. 396, 409 (2009) (holding that harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error). Accordingly, the Court finds no error in the Board's finding that the criteria for an effective date prior to October 7, 2002, were not met.

## III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 14, 2016, decision is AFFIRMED.

DATED: May 30, 2018

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

## APPENDIX C

[SEAL] **BOARD OF VETERANS' APPEALS**
**DEPARTMENT OF**
**VETERANS AFFAIRS**
**WASHINGTON, DC 20420**

IN THE APPEAL OF [redacted]
FLORENCE JONES

IN THE CASE OF
THOMAS E. JONES

DOCKET NO. 11-27 683 ) DATE SEP 14 2016
)
)

On appeal from the
Department of Veterans Affairs Medical and
Regional Office Center in Wichita, Kansas

### THE ISSUE

Entitlement to an effective date prior to October 7, 2002, for service connection for posttraumatic stress disorder (PTSD).

### REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney

### ATTORNEY FOR THE BOARD

R. Erdheim, Counsel

## INTRODUCTION

The Veteran served on active duty from August 1967 to October 1974, with service in the Army National Guard from March 1987 to October 1990.

This matter is before the Board of Veterans' Appeals (Board) on appeal of a May 2010 rating decision issued by a Department of Veterans Affairs (VA) Regional Office (RO). The Veteran disagreed with the effective date assigned by that rating decision for the award of service connection for PTSD.

In March 2014, the Board denied the claim. The Veteran died in November 2014. The appellant, the Veteran's spouse, was substituted in an appeal of the March 2014 Board decision to the Court of Appeals for Veterans Claims (the Court). By a February 2016 Order, the Court vacated the March 2014 Board decision and directed the Board to readjudicate the claim in accordance with a Memorandum Opinion.

## FINDINGS OF FACT

1. By a December 1994 rating decision, the Veteran's claim for service connection for PTSD was denied. The Veteran did not appeal the decision and it became final.

2. The next formal or informal claim for service connection for PTSD was dated October 7, 2002.

3. At the time of the December 1994 rating decision, the Veteran's service records from his period of Army

National Guard service, from March 1987 to October 1990, were of record.

4. Following the December 1994 rating decision, records from the Veteran's first period of active duty service, from August 1967 to October 1974, were associated with the claims file. These subsequently associated records did not serve as a basis for reopening the previously denied claim for service connection for PTSD.

## CONCLUSION OF LAW

The criteria for an effective date earlier than October 7, 2002, for the award of service connection for PTSD have not been met. 38 U.S.C.A. §§ 5107, 5110 (West 2014); 38 C.F.R. §§ 3.156(c), 3.400 (2015).

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

With respect to the Veteran's claim herein, VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326 (2015); *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015).

Generally, and except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation (DIC) based on an original claim, a claim reopened after final disallowance, or a claim for increase will be

the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400.

An exception to the above exists with regard to the later association of official service records with the record:

Under 38 C.F.R. § 3.156(c), if at any time after VA issues a decision on a claim, VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when

VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

The Board notes that changes were made to 38 C.F.R. § 3.156(c) in October 2006, namely the addition of 38 C.F.R. § 3.156(c)(2). However, that change does not affect the appellant's current claim and therefore the implication of such change need not be discussed.

The Board will focus its analysis on the two specific questions set forth by the January 2016 Memorandum Opinion. The Opinion requested the Board to determine whether a February 1971 service treatment record and a March 1987 service treatment record were

associated with the claims file at the time of the initial December 1994 denial of the Veteran's claim for service connection for PTSD.

In this case, the weight of the evidence supports a finding that the March 1987 service treatment record was associated with the record at the time of the December 1994 rating decision.

In that regard, in October 1994, the RO sent an initial request to the service department for all of the Veteran's service records, to include his period of active service from August 1967 to October 1974, and his Army National Guard service, from October 1974 "to the present." In October 1994, the RO received some, but not all, of the Veteran's service treatment records from the service records center. It is clear that the service center did send some records, as an October 19, 1994, RO date-stamp is present on a service treatment record folder and on the RO's initial request.

Then, in November 1994, following receipt of this package of service records, a Deferred Rating Decision was issued stating, in pertinent part, "we still have not received service medical records 8-1-67 to 10-2-74." Another request was sent to the service records center, this time just for records dated during the Veteran's active service, but not for records dated during his service in the Army National Guard.

In December 1994, the Veteran's claim for service connection for PTSD was denied. The December 1994 rating decision noted "service medical records," as evidence used. A March 1995 statement of the case on the

matter stated that the "reserve service treatment records fail to show any evidence of an acquired nervous condition." Significantly, also in March 1995, the Veteran was awarded service connection for a laceration of the right leg based upon the March 1987 record referenced by the Court. There is no indication in the record that further service records were requested or obtained in the interim time period between the issuance of the December 1994 rating decision and the March 1995 statement of the case and rating decision. Based upon the above, it is reasonable to conclude, and the Board does not doubt, that the March 1987 service record in question was of record at the time of the initial December 1994 denial.

Finally, and in further support of the above conclusion, as part of the development of the Veteran's later claim to reopen the previously denied claim for service connection for PTSD, a January 2006 Deferred Rating Decision noted that not all of the service records were of record, and specifically requested verification from the "National Personnel Records Center as to any records . . . for the period of active duty dated 08-01-67 to 10-20-74." Active duty was underlined by the rating officer. This evidence weighs heavily towards a finding that the records from the Veteran's other period of service, his reserve service after 1974, were already of record.

Thus, the Board concludes that the March 1987 record was of record at the time of the December 1994 initial denial of service connection for PTSD. Therefore, 38

C.F.R. § 3.156(c) is not implicated with regard to the March 1987 record.

With regard to the other record(s) that make reference to the Veteran's right leg laceration dated in February 1971, it is unclear whether those records were associated with the claims file at the time of the December 1994 initial denial. However, even if those records were not of record at the time, subsequent association of these records with the file does not meet the criteria set forth under 38 C.F.R. § 3.156(c).

Specifically, these additional records did not provide the basis, in all or in part, of the later reopening of the Veteran's claim for service connection for PTSD. *See* 38 C.F.R. § 3.156(c)(3).

For one, it was already known to the RO at the time of the 1994 rating decision that the Veteran suffered a laceration to the right leg "due to events that occurred in 1968," as documented in the March 1987 service record that was of record at the time of the initial denial.

But, most significantly, the Veteran did not report to the VA at any time prior to October 7, 2002, that his PTSD was related to that laceration. Prior to October 2002, the effective date of service connection, the Veteran had stated only that he had been mugged in Germany. He had not reported suffering from associated wounds. It was his later contention first reported on October 7, 2002, that he suffered from a laceration to the right leg due to a mugging that occurred in service, and the corroboration of the laceration to the right leg in the service treatment records, that served as a basis

of the grant for the claim for service connection. Therefore, the additional service records documenting treatment for a laceration to his right leg did not serve as the basis for reopening and granting the claim in any respect.

Thus 38 C.F.R. § 3.156(c)(3) does not apply in this instance, as the award of service connection was not based in all or in part on the association of these additional February 1971 service records with the file. Instead, the regulations under 38 C.F.R. § 3.400 are applicable. Under those regulations, the earliest effective date possible in this instance is October 7, 2002, the date of receipt of the claim to reopen the previously denied claim for service connection for PTSD.

ORDER

The claim for an effective date earlier than October 7, 2002, for service connection for PTSD, is denied.

/s/ M. E. Larkin
M. E. LARKIN
Veterans Law Judge,
Board of Veterans' Appeals

## APPENDIX D

NOTE: This order is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

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**FLORENCE JONES**,
*Claimant-Appellant*

v.

**ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS**,
*Respondent-Appellee*

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2018-2376

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Appeal from the United States Court of Appeals for Veterans Claims in No. 17-105, Senior Judge Mary J. Schoelen.

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**ON PETITION FOR PANEL REHEARING**

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Before O'MALLEY, BRYSON, and HUGHES, *Circuit Judges.*

PER CURIAM.

**ORDER**

Appellant Florence Jones filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on September 23, 2020.

FOR THE COURT

| | |
|---|---|
| September 16, 2020 | /s/ Peter R. Marksteiner |
| Date | Peter R. Markteiner<br>Clerk of Court |

## APPENDIX E

## RELEVANT FEDERAL REGULATIONS

### 38 C.F.R. § 3.156 New and material evidence.

(a) *General.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(f), 5108)

(b) *Pending claim.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of §20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 501)

(c) *Service department records.* (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

(Authority: 38 U.S.C. 501(a))

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**38 C.F.R. § 3.400**

* * *

(q) *New and material evidence (§3.156) other than service department records—(1) Received within appeal period or prior to appellate decision.* The effective date will be as though the former decision had not been rendered. See §§20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

(2) *Received after final disallowance.* Date of receipt of new claim or date entitlement arose, whichever is later.

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