NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,
Respondent-Appellee

2022-1587

Appeal from the United States Court of Appeals for Veterans Claims in No. 21-8002, Judge Joseph L. Toth.

Before DYK, REYNA, and CHEN, *Circuit Judges*.

PER CURIAM.

ORDER

Enrique M. Flores-Vazquez appeals from an order of the United States Court of Appeals for Veterans Claims ("the Veterans Court") dismissing his petition to the Supreme Court of the United States for a writ of certiorari that he filed at the Veterans Court. Having considered the Veterans Court's decision and Mr. Flores-Vazquez's informal opening brief, we summarily affirm.

In 2010, the Department of Veterans Affairs determined that Mr. Flores-Vazquez had service-connected bipolar disorder with depression and assigned a 30% disability rating effective January 24, 2005. Mr. Flores-Vazquez sought an earlier effective date of November 1998, which the Board of Veterans' Appeals denied. The Veterans Court affirmed the Board's decision in 2018. On appeal to this court, we upheld the Veterans Court's decision and denied rehearing on July 29, 2021. More than four months later, on December 6, 2021, Mr. Flores-Vazquez filed at the Veterans Court a petition for a writ of certiorari seeking the Supreme Court's review of our decision.* On February 18, 2022, the Veterans Court dismissed the petition, explaining that it lacked jurisdiction to review the decision. This appeal followed.

The court finds that summary disposition is appropriate because there is no substantial question regarding the outcome of this appeal. *See Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Here, the Veterans Court was clearly correct that only the Supreme Court could review this court's decision. Mr. Flores-Vazquez's informal brief raises no plausible challenge to the Veterans Court's dismissal ruling. Instead, his filings before this court largely consist of assertions going to the merits of his earlier-effective claim: that his case file is missing documents and includes false statements and that certain evidence from the record was never considered. ECF No. 4 at 2. Because there is no question as to the outcome here, we summarily affirm.

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* The court notes that the petition would have been untimely if filed at the Supreme Court. *See* S. Ct. R. 13.1 & 13.3 (stating that petition is timely when it is filed with the Clerk of the Supreme Court within 90 days after entry of the judgment that is the subject of the petition).

Accordingly,

IT IS ORDERED THAT:

(1) The Veterans Court's judgment is summarily affirmed.

(2) Each side shall bear its own costs.

FOR THE COURT

May 12, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

period of six years. He also denied to his VA medical care provider that he has used alcohol or any controlled substances. Subsequent VA records include the veteran's history of crack cocaine use and current Axis I diagnosis of bipolar disorder. Although these records note the veteran's "PTSD complaints," psychiatric evaluations include no substantive findings and no clinically correlated diagnosis of the claimed condition.

On VA examination May 11, 2005, the veteran told VA examiner he first experienced "excessive mental symptoms" on or about 1985 or 1986 after experiencing a fire and the subsequent death of a comrade coincident with launching a plane from the flight deck. He reported that symptoms continued from his discharge from active service until 1996, when he reported he started receiving treatment at Fort Myers VA medical clinic. It was among his contentions that he has a liver condition due to inhalation of toxic substances while on active duty, followed by a heart problem. He also reported that all of his employment has been short-term and sporadic, and that he would be fired because of his symptoms, the nature of which was not described.

VA examiner noted the veteran's diagnoses of bipolar disorder and recurrent major depression. His findings were consistent with Axis I diagnosis of bipolar disorder, depressed, with psychotic features. VA examiner stated that it is as likely as not that the veteran's bipolar disorder is due to inservice illness; his comment is based at least in part on the veteran's self-reported history of ongoing psychiatric symptoms from his treatment for a reactive depression in 1987 and to the present date; this history is not substantiated by medical evidence, including the veteran's self-reported medical history and complaints, prepared contemporary to the time frame in question. This examiner's comment was offered without benefit of records from Social Security Administration which show the veteran has been deemed disabled from gainful employment since 2002 due to schizophrenia. There is no secondary diagnosis by Social Security Administration.

While we cannot dispute that the veteran is competent to present testimony as to circumstances during his military service and injuries arising therefrom, we must weigh its credibility with other viable evidence in the record. (*Cartright v. Derwinski*, Vet.App. No. 90-28) We do not find the veteran's testimony as to incurrence of inservice condition and subsequent treatment therefor to be of sufficient probity to weigh in equipoise (balance) with medical evidence prepared contemporary to the time frame in question.

A medical opinion which is based on an inaccurate factual premise has no probative value in assessing the merits of a claim.

This veteran has described a set of circumstances he deems favorable to a positive outcome of this claim; however, the medical record and associated treatment reports do not coincide with circumstances described by the veteran. Any comment or conclusion derived from the veteran's statements is of little probative value in this case due to inconsistencies and inaccuracies contained therein. VA examiner's opinion regarding onset of the veteran's current psychiatric disability is of virtually no probative value in that the conclusion is based on unsubstantiated circumstances described by the veteran.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-2196

ENRIQUE M. FLORES-VAZQUEZ, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The pro se appellant, Enrique M. Flores-Vazquez, served in the U.S. Navy from April 1984 to April 1988. Record (R.) at 1872. He appeals a May 5, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than January 24, 2005, for the award of service connection for bipolar disorder with depression. R. at 1-17. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the May 5, 2015, decision and remand the matter for further proceedings consistent with this decision.

In the decision on appeal, the Board found that a September 1999 rating decision, which had initially denied the appellant's claim, was final and therefore could not serve as a basis for the grant of an earlier effective date. *See* R. at 4-5. The Board ultimately concluded that January 24, 2005, the date on which VA received the appellant's application to reopen his claim, was the earliest available effective date. *See* R. at 4-5 (Board decision); R. at 1936 (January 2005 application).

The appellant asserts that the proper effective date for his claim should be November 4, 1998, the date he filed his initial claim. Appellant's Informal (Inf.) Brief (Br.) at 3-4; *see* R. at 2099, 2106-09 (November 1998 claim). He argues that the September 1999 rating decision never became

final, as VA subsequently received relevant service department records and, thus, had a duty to readjudicate his claim pursuant to 38 C.F.R. § 3.156(c). Appellant's Inf. Br. at 3 (citing R. at 732-35 (September 2011 arguments submitted by a prior representative); *see* R. at 1988-89, 1991-94 (September 1999 rating decision), 1673-78 (unclassified command history of the U.S.S. *Kitty Hawk*). In the alternative, he contends that, as the September 1999 rating decision failed to acknowledge a July 1999 statement in support of claim, that statement should be considered new and material evidence sufficient to toll the finality of the rating decision pursuant to § 3.156(b). *Id.* (citing R. at 734-35). He asks the Court to reverse the Board's decision and assign an effective date of November 4, 1998. *Id.* at 3-4.

The Secretary concedes that remand is warranted, as the Board failed to provide an adequate statement of reasons or bases regarding the applicability of § 3.156(c) in light of the Court's decision in *Cline v. Shinseki*, 26 Vet.App. 18 (2012). Secretary's Br. at 5-10. Specifically, he asserts that, contrary to the Court's holding in *Cline*, the Board failed to consider and apply the version of § 3.156(c) in effect prior to its amendment in 2006, instead applying the current version of the regulation. *Id.* at 8. He argues, however, that remand, not reversal, is the appropriate remedy and that the appellant's argument regarding § 3.156(b) is without merit. Secretary's Br. at 5-10.

In *Cline*, the Court held that the Board erred by retroactively applying the amended version of § 3.156(c)(2) to a claim pending prior to the amendment. 26 Vet.App. at 25-26. Here, as the Secretary notes, Secretary's Br. at 8, the appellant submitted his application to reopen his claim prior to October 2006, when the amendments to § 3.156(c) took effect, but the Board, in the decision on appeal, applied the amended provision without any discussion of its applicability or the potential impact of *Cline*. *See* R. at 12-13; *Cline*, 26 Vet.App. at 25–27.

The Court agrees with the Secretary and holds that the Board's failure to address the applicability of *Cline* and pre-amendment § 3.156(c) frustrates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56–57 (1990). The Court will therefore vacate the Board's decision and remand the matter. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations . . . a remand is the appropriate remedy."); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Given this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's May 5, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: July 15, 2016

Copies to:
Enrique M. Flores-Vazquez
VA General Counsel (027)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

ROBERT D. SNYDER, ACTING SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2017-1061

Appeal from the United States Court of Appeals for Veterans Claims in No. 15-2196, Judge Alan G. Lance Sr.

Decided: February 13, 2017

ENRIQUE M. FLORES-VAZQUEZ, Naples, FL, pro se.

RETA EMMA BEZAK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., L. MISHA PREHEIM; BRIAN D. GRIFFIN, MEGHAN ALPHONSO, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before WALLACH, HUGHES, and STOLL, *Circuit Judges.*

PER CURIAM.

Appellant Enrique M. Flores-Vazquez appeals the decision of the U.S. Court of Appeals for Veterans Claims ("Veterans Court"). *See generally Flores-Vazquez v. McDonald*, No. 15-2196, 2016 WL 3865690 (Vet. App. July 15, 2016). The Veterans Court vacated and remanded the decision of the U.S. Department of Veterans Affairs's ("VA") Board of Veterans Appeals ("Board"), which denied Mr. Flores-Vazquez's request for an earlier effective date for his service-connected disability rating. *Id.* at *2. Because we do not have jurisdiction to adjudicate Mr. Flores-Vazquez's appeal, we dismiss.

BACKGROUND

Mr. Flores-Vazquez is a veteran of the U.S. Navy. Appellee's App. 20. In 1998, Mr. Flores-Vazquez submitted a claim for service-connected disability for depression that the VA later denied. *Id.* at 11–12. In 2005, Mr. Flores-Vazquez submitted a request to reopen his claim to the VA, *id.* at 21, and the VA ultimately awarded Mr. Flores-Vazquez a 30% disability rating for bipolar depression effective January 24, 2005, *id.* at 20. Mr. Flores-Vazquez appealed to the Board, requesting an earlier effective date, but the Board denied Mr. Flores-Vazquez's request. *Id.* at 19.

Mr. Flores-Vazquez appealed to the Veterans Court and argued that, inter alia, the VA's initial decision to deny his claim never became final because the VA had received additional service records that necessitated readjudication. *Flores-Vazquez*, 2016 WL 3865690, at *1. The VA conceded that remand was warranted because the Board failed to apply the appropriate version of 38 C.F.R.

§ 3.156(c)[1] in light of *Cline v. Shinseki*, *id.*, which "held that the Board erred by retroactively applying the amended version of § 3.156(c)(2) to a claim pending prior to the amendment" in 2006, *id.* at *2 (discussing 26 Vet. App. 18 (2012)). The Veterans Court determined that "the Board's failure to address the applicability of *Cline* and pre-amendment § 3.156(c) frustrate[d] judicial review" and, thus, vacated and remanded the Board's decision. *Id.* (citations omitted). In addition, the Veterans Court instructed that Mr. Flores-Vazquez was "free to submit additional evidence and argument" on remand and that "the Board must consider any such evidence or argument submitted." *Id.* (citations omitted).

DISCUSSION

This court has limited jurisdiction to review appeals from final decisions of the Veterans Court. *See* 38 U.S.C. § 7292(c) (2012). We "typically will not review remand orders by the [Veterans Court] because they are not final judgments." *Williams v. Principi*, 275 F.3d 1361, 1364 (Fed. Cir. 2002) (internal quotation marks and citation omitted). We will not depart from this finality requirement unless each of the following three conditions are satisfied:

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[1] Section 3.156(c) was amended in 2006. The amended version includes an exception allowing for consideration of service department records "that [the] VA could not have obtained when it decided the claim because the records did not exist when [the] VA decided the claim, or because the claimant failed to provide sufficient information for [the] VA to identify and obtain the records . . . ." 38 C.F.R. § 3.156(c)(2) (2006). This exception was not available prior to the amendment. *See* 38 C.F.R. § 3.156(c) (2005).

> (1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; *and*, (3) there must be a substantial risk that the decision would not survive a remand, *i.e.*, that the remand proceeding may moot the issue.

Id. (emphasis added) (footnotes omitted). Not all of the conditions are satisfied here. As to the second condition, the Veterans Court's decision did not adversely affect Mr. Flores-Vazquez because Mr. Flores-Vazquez prevailed, *i.e.*, he obtained the opportunity to present "additional evidence and argument" in support of his claim for an earlier effective date. *Flores-Vazquez*, 2016 WL 3865690, at *2. As to the third condition, remand proceedings will not moot the issue of whether Mr. Flores-Vazquez qualifies for an earlier effective date. Should the Board rule against Mr. Flores-Vazquez on remand, Mr. Flores-Vazquez will be permitted to appeal that decision to the Veterans Court. Because all of the conditions are not satisfied, we cannot "depart from the strict rule of finality" and, thus, do not have jurisdiction to adjudicate Mr. Flores-Vazquez's appeal. *Williams*, 275 F.3d at 1364.

CONCLUSION

Mr. Flores-Vazquez won a remand in the Veterans Court. He will be permitted to present to the Board additional evidence and arguments in support of his claim for an earlier effective date and, if he does not like what the Board does, he can appeal to the Veterans Court. Accordingly, we find that we lack jurisdiction and that this appeal is

DISMISSED

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
ENRIQUE M. FLORES-VAZQUEZ
A.K.A. ENRIQUE M. FLORES-VASQUEZ
A.K.A. ENRIQUE M. FLORES

[redacted]

DOCKET NO. 11-16 375) DATE *October 10, 2017*
) *PAT*
)

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in St. Petersburg, Florida

THE ISSUE

Entitlement to an effective date earlier than January 24, 2005 for the award of service connection for bipolar disorder with depression.

REPRESENTATION

Appellant represented by: Florida Department of Veterans Affairs

ATTORNEY FOR THE BOARD

C. D. Simpson, Counsel

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IN THE APPEAL OF [redacted]
ENRIQUE M. FLORES-VAZQUEZ
A.K.A. ENRIQUE M. FLORES-VASQUEZ
A.K.A. ENRIQUE M. FLORES

INTRODUCTION

The Veteran had active duty service from April 1984 to April 1988.

This appeal to the Board of Veterans' Appeals (Board) arose from a February 2010 Decision Review Officer decision in which the RO, *inter alia*, granted the Veteran's claim for service connection for bipolar disorder with depression, effective January 24, 2005. In April 2010, the Veteran filed a notice of disagreement (NOD). A statement of the case (SOC) was issued in May 2011 and the Veteran filed a substantive appeal (via a VA Form 9, Appeal to the Board of Veterans' Appeals) in June 2011.

In February 2015, the Veteran and his wife testified during a Board video-conference hearing before the undersigned Veterans Law Judge. A hearing transcript has been associated with the record.

As for the matter of representation, the Board observes that, in October 2009, the Veteran filed submitted a VA Form 21-22a (Appointment of Individual as Claimant's Representative) in which he designated Matthew Hill as his private attorney. In January 2014, the Veteran submitted a VA Form 21-22 (Appointment of Veteran Service Organization as Claimant's Representative) in which he designated The American Legion as his representative. The Veteran then submitted a new VA Form 21-22 appointing the Florida Department of Veterans Affairs as his representative in February 2015. The Board has recognized the change in representation./.

In May 2015, the Board denied entitlement to an effective date earlier than January 24, 2005 for the award of service connection for depression.

In June 2015, the Veteran filed a motion for reconsideration of the May 2015 Board decision. The same month, the Deputy Vice Chairman issued a ruling that denied the motion for reconsideration.

IN THE APPEAL OF [redacted]
ENRIQUE M. FLORES-VAZQUEZ
A.K.A. ENRIQUE M. FLORES-VASQUEZ
A.K.A. ENRIQUE M. FLORES

The Veteran appealed the May 2015 Board denial to the United States Court of Appeals for Veterans Claim (Court). In a July 2016 Memorandum Decision, the Court vacated the Board's decision, and remanded the claim to the Board for further proceedings consistent with the decision.

FINDINGS OF FACT

1. All notification and development actions needed to fairly adjudicate the claim decided herein have been accomplished.

2. The RO denied service connection for a depression reaction in a September 1999 rating decision, the Veteran was notified of this decision in a September 14, 1999 letter and there is no NOD objecting to this determination in the record.

3. No new and material evidence was received during the one-year appellate period following the September 14, 1999 notification of the September 1999 RO denial of service connection for depression reaction, and additional evidence associated with the claims file after the September 1999 denial does not include relevant official service department records that constitute new and material evidence to substantiate the underlying service connection claim so as to warrant reconsideration of the claim..

4. On January 24, 2005, the RO received a statement from the Veteran that was accepted as a request to reopen the previously-denied claim for service connection for depression.

5. In a February 2010 decision, the Board awarded service connection for bipolar disorder with depression and this decision was implemented by the RO in a February 2010 Decision Review Officer decision.

6. The basis for the February 2010 award of service connection for bipolar disorder with depression was the May 2005 VA psychiatric examination and service treatment records documenting psychiatric treatment.

7. Prior to January 24, 2005, there was no pending claim for service connection for depression pursuant to which the benefit ultimately awarded could have been granted.

CONCLUSION OF LAW

The claim for an effective date earlier than January 24, 2005 for the award of service connection for depression is without legal merit. 38 U.S.C.A. §§ 5101, 5110 (West 2014); 38 C.F.R. §§ 3.114, 3.151, 3.156, 3.157, 3.400 (2016); 38 C.F.R. § 3.156(c) (2005, 2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Due Process Considerations

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, and 5126 (West 2014) includes enhanced duties to notify and assist claimants for VA benefits. VA regulations implementing the VCAA were codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2016).

As regards to the Veteran's earlier effective date claim, the Veteran and his representative have been notified of the reasons for the denial of the claim, and have been afforded opportunity to present evidence and argument with respect to the claim. The Board finds that these actions are sufficient to satisfy any fundamental due process owed the Veteran. As will be explained below, this claim lacks legal merit. As the law, and not the facts, is dispositive of the claim, the duties to notify

and assist imposed by the VCAA are not applicable. *See Mason v. Principi*, 16 Vet. App. 129, 132 (2002).

As for the February 2015 Board hearing, it is noted that, in *Bryant v. Shinseki*, the United States Court of Appeals for Veterans Claims (Court) held that 38 C.F.R. § 3.103(c)(2) requires that the RO Decision Review Officer or Veterans Law Judge who chairs a hearing fulfill two duties: (1) to fully explain the issues and (2) to suggest the submission of evidence that may have been overlooked. *Bryant v. Shinseki*, 23 Vet. App. 488 (2010). In this case, the Board finds that there has been substantial compliance with the duties set forth in 38 C.F.R. 3.103(c)(2), and that the hearing was legally sufficient.

Here, during the February 2015 hearing, the undersigned Veterans Law Judge identified the issue on appeal as entitlement to an effective earlier than January 24, 2005 for the award of service connection for depression. The hearing transcript reflects appropriate exchanges between the Veteran, his wife and the undersigned Veterans Law Judge regarding the basis of the Veteran's claim and the evidence associated with the record. The Veteran's spouse testified regarding the Veteran's health. Although the undersigned did not *explicitly* suggest the submission of any specific, additional evidence, nothing gave rise to the possibility—at the of the hearing, or since—that there is any existing, outstanding evidence relevant to this matter to obtain or submit. Notably, neither the Veteran nor his representative has asserted that VA failed to comply with 38 C.F.R. § 3.103(c)(2), to include identification of any prejudice in the conduct of the hearing.

II. Earlier Effective Date

Generally, the effective date for an award based on, *inter alia*, an original claim or a claim reopened after a final adjudication shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore. 38 U.S.C.A. § 5110(a). If, however, a claim for service connection is received within a year following separation from service, the effective date will be the day following separation; otherwise, the effective date is the date of the claim. 38 U.S.C.A. §

5110 (b)(1); 38 C.F.R. § 3.400 (b)(2)(i). When an award is based on a claim to reopen a previously denied claim, the effective date will be the date of receipt of the new (i.e., reopen) claim or the date entitlement arose, whichever is later, unless new and material evidence was received within the relevant appeal period. 38 C.F.R. § 3.400(q).

A specific claim in the form prescribed by VA must be filed in order for benefits to be paid or furnished to any individual under the laws administered by VA. 38 U.S.C.A. § 5101(a); 38 C.F.R. § 3.151(a). A claim is defined by regulation as 'a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit.' 38 C.F.R. § 3.1(p). Any communication or action that demonstrates intent to apply for an identified benefit may be considered an informal claim. 38 C.F.R. § 3.155(a). Such an informal claim must identify the benefit sought. *Id.*

Under 38 C.F.R. § 3.157(a), a report of examination or hospitalization will be accepted as an informal claim for increase or to reopen, if the report relates to a disability that may establish entitlement. However, there must first be a prior allowance or disallowance of a claim. *See* 38 C.F.R. § 3.157(b).

VA is required to identify and act on informal claims for benefits. 38 U.S.C.A. § 5110(b)(3); 38 C.F.R. §§ 3.1(p), 3.155(a) (prior to March 24, 2015); *see also Servello v. Derwinski*, 3 Vet. App. 196, 198-200 (1992). Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

The basic facts in this case are not in dispute. The Veteran filed a claim for service connection for depression on November 13, 1998. The RO subsequently denied this claim in a September 1999 rating decision and notified the Veteran of its decision in a September 14, 1999 letter. A NOD objecting to this determination is not of record. On January 24, 2005, the Veteran filed a claim for service connection

which the RO accepted as a request to reopen the previously denied claim. On appeal of the RO's October 2006 denial of the claim, the Board, in a February 2010 decision, granted service connection for bipolar depression. The RO implemented the Board's decision in February 2010, awarding service connection for bipolar disorder with depression, effective January 24, 2005. This award was based on the date the petition to reopen a claim for service connection for depression was received by VA.

While the Veteran asserts his entitlement to an earlier effective date for the award of service connection for this disability, considering the record in light of the governing legal authority, the Board finds that no earlier effective date is assignable.

In support of his contention that an effective date of November 13, 1998-the date of his original claim for service connection for depression-is warranted, the Veteran has advanced several, alternative, sometimes conflicting, arguments. Specifically, during his February 2015 hearing testimony, he has asserted that he did file an NOD initiating an appeal of the September 1999 rating decision and that he was unable to file a timely NOD with the original denial due to illness and that he did not know that he had to file such a NOD. He has also argued that that the September 1999 was not final under the provisions of 38 U.S.C.A. § 3.156(b), as specific evidence was of record at the time of the decision but not listed as evidence, and that additional service records were received after the original denial in September 1999 and that reconsideration of the claim under 38 C.F.R. § 3.156(c) was warranted. Further, he has argued that that additional treatment records were received within one year of the September 1999 denial and that the claim was not readjudicated in accordance with 38 C.F.R. § 3.156(b).

As for the Veteran's suggestion that he was not informed of the September 1999 denial and that, if he had been informed, he would have filed a timely NOD, the Board points out that the record contains a September 1999 rating decision and a notification letter addressed to the Veteran and that such documents were not returned to VA as undeliverable. Moreover, there is a presumption of regularity

under which it presumed that government officials "have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Therefore, it must be presumed that VA properly discharged its official duties by properly handling claims submitted by the Veteran. The presumption of regularity is not absolute; it may be rebutted by the submission of "clear evidence to the contrary." Statements made by the Veteran or his representative are not the type of clear evidence to the contrary which would be sufficient to rebut the presumption of regularity. *Jones v. West*, 12 Vet. App. 98 (1999); *Mindenhall v. Brown*, 7 Vet. App. 271, 274 (1994); *Ashley v. Brown*, 2 Vet. App. 62, 64 (1992). Hence, in this case, the Veteran's unsupported contention that he never received a copy of the September 1999 notice letter and rating decision is insufficient to rebut the presumption that VA properly handled the Veteran's claim.

With regard to the Veteran's assertion that he was unable to file a timely request NOD due to his illness or poor health, such assertion appears to raise the question of whether the doctrine of equitable tolling should be considered. The Board notes that the Veteran, in his February 2015 hearing testimony, stated that he did not file a timely NOD to the original September 1999 rating decision because he had been concerned about his health at that time.

The Board notes that the doctrine of equitable tolling does not apply to jurisdictional requirements. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that 38 U.S.C.A. § 7266 (a) was a jurisdictional statute and therefore the Veterans Court did not have authority to equitably toll the time period for filing a notice of appeal). The United States Supreme Court, however, subsequently issued its decision in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), holding that the 120-day period for appealing a Board decision to the Court is not jurisdictional, but rather a claim processing rule that does not have jurisdictional consequences. *Id.* at 1205-6. Similarly, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has found equitable tolling may be proper in a case where because of mental illness a veteran filed with the Court an untimely Notice of Appeal of a Board decision. *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004).

Several cases provide further guidance in this regard. In *Brandenberg v. Principi*, 371 F.3d 1362 (Fed. Cir. 2004), the Federal Circuit explained that whether a time period to file should be equitably tolled depends on whether the Veteran had exercised due diligence in preserving his legal rights and whether his intention was clear and the appropriate entity had been put on notice of his intention to seek further review of his claim. *Id.* at 1364. In *Barrett*, 363 F.3d at 1321, the Court held equitable tolling may be proper in a case where because of mental illness a Veteran filed an untimely appeal. The Federal Circuit found that for equitable tolling to apply, the appellant must show that the failure to file was the direct result of a mental illness that rendered him incapable of 'rational thought or deliberate decision making,' or 'incapable of handling [his] own affairs or unable to function [in] society.' It was noted that a medical diagnosis alone or vague assertions of mental problems would not suffice. *Id.*

In this case, the Board finds these circumstances inapplicable and, therefore, equitable tolling is not warranted. Again, in *Brandenberg*, the Federal Circuit explained that whether a time period to file should be equitably tolled depends on whether the Veteran had exercised due diligence in preserving his legal rights and whether his intention was clear and the appropriate entity had been put on notice of his intention to seek further review of his claim. *Brandenberg*, 371 F.3d at 1364. The Board notes that *Brandenberg* involved the filing of a notice of appeal of a Board decision to the Court with the incorrect body, a situation totally inconsistent with the facts in the instant case. *Id.* Similarly, in *Henderson*, the appellant timely filed his appeal, but incorrectly filed his appeal with the Board instead of with the Court. *See Henderson*, 131 S. Ct. at 1197. In this case, the evidence does not show and the Veteran does not claim any intent or attempt to appeal the denial of service connection for depression prior to filing the petition to reopen the claim on January 24, 2005. Equitable tolling applies to a delay in filing a notice of disagreement, not the lack of filing of such a document. Thus, the Board concludes that, at the time of the September 1999 denial, he Veteran did not exercise due diligence in this case in preserving his legal rights or otherwise indicate an intention to appeal to filing to his petition to reopen a claim for service connection. *See Brandenberg, supra.*

The Board notes that it is undisputed that a NOD objecting to the September 1999 rating decision is not of record. Although the Veteran and his wife appeared to assert that such a NOD had been submitted during the February 2015 hearing, they have not presented a copy of such document. Moreover, this assertion is entirely inconsistent with the Veteran's testimony that he did not file a NOD due to his poor health and that he did not receive a copy of the September 1999 notification letter, and is without legal merit. Accordingly, unless an exception to finality applies, the September 1999 rating decision became final (and, hence, provides no basis for assignment of an earlier effective date for any subsequently granted benefit). *See* 38 U.S.C.A. § 7105(c); 38 C.F.R. §§ 3.104(a), 20.302, 20.1103.

On the question of whether an exception to finality of the September 1999 denial exists in this case, the Veteran and his former attorney have argued that, despite the fact that the denial of service connection was not appealed, new and material evidence was received within one year; thereby vitiating the finality of that decision. They have further argued that the reconsideration of the September 1999 rating decision was warranted based on additional service records received after that decision was rendered.

Applicable regulations provide that if new and material evidence was received during an applicable appellate period following a RO decision (1 year for a rating decision and 60 days for a SOC) or prior to an appellate (Board) decision (if an appeal was timely filed), the new and material evidence will be considered as having been filed in connection with the claim that was pending at the beginning of the appeal period. 38 C.F.R. § 3.156 (b); *Young v. Shinseki*, 22 Vet. App. 461, 466 (2009). Thus, under 38 C.F.R. § 3.156(b), "VA must evaluate submissions received during the relevant [appeal] period and determine whether they contain new evidence relevant to a pending claim, whether or not the relevant submission might otherwise support a new claim." *Bond v. Shinseki*, 659 F.3d 1362, 1367-68 (Fed. Cir. 2011). "[N]ew and material evidence" under 38 C.F.R. § 3.156(b) has the same meaning as "new and material evidence" as defined in 38 C.F.R. § 3.156(a). *See Young*, 22 Vet. App. at 46.

The Board notes that the purported missing evidence was identified as a statement from the Veteran dated on July 1, 1999. The statement purportedly indicated that he had been diagnosed with manic depression and PTSD and was not listed in the September 1999 rating decision. However, on review of the record, the Board has not located any such statement. Further, although the September 2011 submission indicated that a copy of the July 1999 letter was attached as an exhibit, no such letter was attached. Even assuming, *arguendo*, that there was a July 1999 statement in the record at the time of the September 1999 rating decision as alleged by the Veteran and his former attorney, such would not implicate the provisions of 38 C.F.R. § 3.156(b). This provision clearly applies to new and material evidence that was received during an applicable appellate period following a RO decision or prior to an appellate (Board) decision. As the purported letter was received by VA prior to the issuance of the September 1999 rating decision, the provisions of 38 C.F.R. § 3.156(b) cannot be applicable. This argument is therefore without merit.

The Board further notes the Veteran's argument that reconsideration of his claim for service connection for depression was required as VA received additional service records, namely the declassified *U.S.S. Kitty Hawk* Command History, after the September 1999 rating decision. Under the provisions of 38 C.F.R. § 3.156(c), 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 but were not associated with the claims file when VA first decided the claim, VA will reconsider the claim.

In the July 2016 Memorandum Decision, the Court cited *Cline v. Shinseki*, 26 Vet. App. 18, 27 (2012) as holding that the amended version of 38 C.F.R. § 3.156(c) has retroactive effects and does not apply to any claim filed prior to the October 6, 2006 effective date of the amendment. 71 Fed. Reg. 52,455 (September 6, 2006). The amended version of 38 C.F.R. § 3.156(c) (2016) provides that a claim is not reconsidered where VA could not have obtained the records when it initially decided the claim because the records did not exist at that time, 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 (JSRRC), or from any other official source. 38 C.F.R. § 3.156(c)(2) (2016).

Since the instant claim was received prior to October 6, 2006, the claim must be also considered under the pre-amended version of 38 C.F.R. § 3.156(c) without the limiting provisions under amended 38 C.F.R. § 3.156(c)(2). *See Cline*, 26 Vet. App. at 27 (providing that the October 6, 2006 limiting amendment of 38 C.F.R. § 3.156 (c)(2) does not apply to cases received before October 6, 2006).

For claims received prior to October 6, 2006, such as this one, the version of 38 C.F.R. § 3.156(c) (2005) as then in effect for newly received service department records provides, "[w]here the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This encompasses official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The 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."

Notably, under either the former or amended version of 38 C.F.R. § 3.156(c), a claimant whose claim is reconsidered based on newly discovered service department records may be entitled to an effective date as early as the date of the original claim. *Mayhue v. Shinseki*, 24 Vet. App. 273, 279 (2011).

In September 1999, the RO denied service connection for depression reaction and schizoaffective disorder. For the depression claim, the RO denied the claim due to lack of chronic disability shown from the isolated treatment for depression. The RO denied the service connection claim for schizoaffective disorder due to lack of treatment for the diagnosis in service.

As for the newly considered service department records, the Veteran initially reported that he witnessed several accidental deaths while serving on a destroyer in the Gulf of Oman, including one incident in which he witnessed a man being sucked inside the nose of an airplane in a March 1999 VA treatment note. The Veteran did not identify when this incident occurred. In September 2007, the Veteran submitted a Statement in Support of Claim for Service Connection for Posttraumatic Stress Disorder (PTSD) (VA Form 21-0781). The Veteran detailed the stressful episodes aboard the *U.S.S. Kitty Hawk* that occurred on the flight deck.

The AOJ subsequently attempted to verify the Veteran's purported stressors with the United States Armed Services Center for Unit Records Research (CURR) (now the JSRRC). A January 2008 Defense Personnel Records Information Retrieval System (DPRIS) response indicated that a review of the command history and deck logs submitted by the *U.S.S. Kitty Hawk* confirmed the Veteran's reported stressor. The Command History indicates that the *U.S.S. Kitty Hawk* was an operational aircraft carrier and that there was a loss of life during night flight operations on the flight deck; there was no indication that the carrier sailed in the Gulf of Oman.

Also, in October 2009, VA received the 1987 Command History for *U.S.S. Kitty Hawk*, which documents a March 31, 1987 fire that was successfully thwarted without any reported injuries.

In its February 2010 decision, the Board noted receipt of the command history for the *U.S.S. Kitty Hawk* from 1986 and 1987 that verified a September 1986 flight deck accident and March 1987 fire.

Notably, however, the Board's February 2010 service connection grant for bipolar disorder with depression was independent of the newly received service department records. The decision clearly identifies the previously available service treatment records documenting depression treatment and the May 2005 VA medical opinion as the bases for the award of service connection. The May 2005 VA examination shows the Veteran describing excessive mental symptoms in 1985 or 1986

following "a couple of very stressful episodes" aboard his assigned ship. One involved a fire and another involved recovering a body hit during a plane launch. In his positive opinion, the VA examiner identifies treatment for depression in service as the initial manifestations of the currently diagnosed bipolar disorder I, depressed, with psychotic features. He explained how continued mood swings following the initial depressive episode started developing into manic or mixed episodes later and that in many instances the initial presentation of depression caused clinicians to overlook the possibility of bipolar disorder. The favorable May 2005 VA medical opinion is not contingent on the verification of any particular stressor from service department records. Indeed, the verification of the stressors occurred after issuance of the VA medical opinion in question. In this case, the Board finds that, as the subsequent service connection grant by the Board in February 2010 was not based on the January 2008 DPRIS report and associated declassified command histories obtained after the final September 1999 rating decision denying service connection for a depression reaction and schizoaffective disorder, an earlier effective date pursuant to the former 38 C.F.R. § 3.156(c) is not warranted. *Cline, supra.*

As to the current version of 38 C.F.R. § 3.156(c), 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 but were not associated with the claims file when VA first decided the claim, VA will reconsider the claim, rather than require new and material evidence to reopen the previously denied claim. A claim is not reconsidered, however, where VA could not have obtained the records when it initially decided the claim because the records did not exist at that time, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the JSRRC, or from any other official source. 38 C.F.R. § 3.156(c)(2) (2016).

As noted above, it was only in the September 2007 statement in support of a claim for PTSD that the Veteran detailed stressful episodes aboard the *U.S.S. Kitty Hawk* that occurred on the flight deck that led to verification of a stressor. As such, the Board finds that the Veteran did not provide sufficient information for VA to identify and obtain the command history prior to September 2007. Moreover, in a

September 2011 submission, the Veteran's former attorney indicated that this Command History had been declassified in October 2000, suggesting that the record did not exist at the time of the September 1999 rating decision. Accordingly, reconsideration of the Veteran's claim under the amended 38 C.F.R. § 3.156(c) also was not warranted based upon these additional service records, as they were not sufficiently identified under 38 C.F.R. § 3.156(c)(2).

Finally, while, under the provisions of 38 C.F.R. § 3.157 (b)(1), the date of outpatient or hospital examination or the date of admission to a VA or uniformed services hospital may be accepted as the date of receipt of a claim, this regulation only applies to a defined group of claims. *See Sears v. Principi*, 16 Vet. App. 244, 249 (2002) (section 3.157 applies to a defined group of claims, i.e., as to disability compensation, those claims for which a report of a medical examination or hospitalization is accepted as an informal claim for an increase of a service-connected rating where service connection has already been established). VA medical records cannot be accepted as informal claims for disabilities where service connection has not been established. The mere presence of medical evidence does not establish intent on the part of the Veteran to seek service connection for a condition. *See Brannon v. West*, 12 Vet. App. 32, 35 (1998); *see also Lalonde v. West*, 12 Vet. App. 377, 382 (1999) (where appellant had not been granted service connection, mere receipt of medical records could not be construed as informal claim). Merely seeking treatment does not establish a claim, to include an informal claim, for service connection. Here, while the claims file contains VA treatment records from the Ft. Myers VA Outpatient Clinic and Collier County Community Based Outpatient Clinic dated prior to January 24, 2005, these records do not document any reference to a desire for service connection for bipolar disorder with depression. Hence, these records cannot constitute an earlier, pending claim for service connection.

The Board emphasizes that, while VA does have a duty to assist a claimant in developing facts pertinent to a claim, it is the claimant who must bear the responsibility for coming forth with the submission of a claim for benefits under the laws administered by VA. *See* 38 U.S.C.A. § 5101(a); 38 C.F.R. § 3.151(a). To the

extent practicable, VA does make every effort to identify and notify claimants of the potential entitlement to benefits. However, in this case, the claims file contains no communication from the Veteran or other document received between the 1999 final denial of the original claim for service connection but prior to January 24, 2005 that that could be interpreted as an informal claim for this benefit, or that otherwise put VA on notice that potential entitlement to service connection for bipolar disorder with depression had arisen.

For all the foregoing reasons, the Board finds that an effective date earlier than January 24, 2005, for the award of service connection for bipolar disorder with depression is not warranted. The pertinent legal authority governing effective dates is clear and specific, and the Board is bound by such authority. As, on these facts, no effective date for the award of service connection for bipolar disorder with depression, earlier than January 24, 2005, is assignable, the claim for an earlier effective date must be denied as without legal merit. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

ORDER

An effective date earlier than January 24, 2005, for the award of service connection for bipolar disorder with depression is denied.

JACQUELINE E. MONROE
Veterans Law Judge, Board of Veterans' Appeals

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3989

ENRIQUE M. FLORES-VAZQUEZ, APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Enrique M. Flores-Vazquez challenges an October 2017 Board decision that denied entitlement to an effective date earlier than January 24, 2005, for the award of service connection for bipolar disorder with depression. He alleges that the Board erred in denying an earlier effective date under 38 C.F.R. § 3.156(c), which, in certain instances, allows for an earlier effective date for a disability compensation award based upon submission of previously unobtained service department records. Because the Board committed no prejudicial error, the Court affirms.

I. BACKGROUND

Mr. Flores-Vazquez served on active duty in the Navy from April 1984 to April 1988. In 1998, he submitted a claim for service connection for depression, stating that it began during service and that he received treatment onboard the U.S.S. *Kitty Hawk*. During a March 1999 VA outpatient mental health visit, he stated that "he was on a destroyer in the Gulf of Oman" and observed several "accidental deaths," including "one occasion where he witnessed a man being sucked inside the nose of an airplane." R. at 875.

The VA regional office (RO) denied service connection for a psychiatric disorder in September 1999. After reviewing his service medical records and finding a single mention of treatment for depression in 1987 based on family issues, the RO concluded that "no permanent residual or chronic disability subject to service connection [was] shown by service medical records or demonstrated by evidence following service." R. at 2114. Mr. Flores-Vazquez did not appeal the decision and it became final.

In 2005, the veteran filed a request to reopen his previously denied claim for depression, attaching copies of service medical records mentioned in the 1999 RO decision. He underwent a VA examination, in which the examiner diagnosed bipolar disorder with depression and opined that—given the veteran's reports of continuous psychiatric symptoms since the late 1980s—this disorder was related to service. R. at 2028. In June 2005, the RO reopened the claim but denied service connection for a psychiatric disorder on the merits. Specifically, the RO found the VA opinion was of little probative value because it appeared to be based on the veteran's unsupported report of continued psychiatric symptoms following service. R. at 2020-21. In October 2006, in response to newly submitted (non-service-related) records, the RO continued its denial because the evidence submitted was not new and material. The veteran appealed to the Board.

Meanwhile, in August 2007, he filed a claim for service connection for PTSD, stating that he witnessed a shipmate being struck by an airplane while aboard the *Kitty Hawk* sometime around September 1987. R. at 1913. VA sent an inquiry to the Department of Defense, which reviewed the 1986 command history of the *Kitty Hawk* and confirmed that, in September 1986, a serviceman was killed on the flight deck during a night flight operations accident. Shortly, thereafter, Mr. Flores-Vazquez submitted the *Kitty Hawk* command history from 1987, which reported no deaths. Both command histories had been declassified in 2000.

In a February 2010 decision, the Board found that new and material evidence had been submitted sufficient to reopen a claim for an acquired psychiatric disorder and granted service connection for bipolar disorder with depression. Although it said the evidence was "not compelling," the Board nevertheless determined that

> service records do clearly show psychiatric symptoms and a VA medical examiner, with benefit of examination of the veteran and review of the record, has offered an opinion that it is at least as likely as not that the veteran's bipolar disorder with depression is causally related to service. Essentially, the examiner viewed the in-

> service symptoms as most likely being the initial presentation of the disability now diagnosed as bipolar disorder with depression. The examiner also seems to be of the opinion that it is often the case that the initial depressive episode causes the bipolar disorder to be overlooked. The examiner indicated that the veteran's continued symptoms of mood swings started initially with a depressive episode as such illness usually starts developing subsequent manic or mixed episodes later on.

R. at 1668 (some capitalization altered). In granting service connection for bipolar disorder, the Board specifically mentioned notations in the *Kitty Hawk* command histories of a serviceman's death and a fire. R. at 1668-69. But the Board discounted their relevance because the 2005 examiner—although acknowledging the veteran's reports of these accidents—diagnosed bipolar disorder, not PTSD, and these accidents were not the in-service events to which bipolar disorder was linked. *Id.*

The RO implemented the award by assigning a 30% rating from January 24, 2005, the date VA received the claim to reopen. Mr. Flores-Vazquez challenged the effective date. The Board in 2015 denied an earlier effective date under the current § 3.156(c) because, at the time of the earlier psychiatric claim, in 1999, Mr. Flores-Vazquez hadn't provided enough information to locate the *Kitty Hawk* command histories; and since those documents were classified, they were not in existence. R. at 157-58. The veteran appealed and the Court vacated and remanded. Specifically, the Court concluded that the Board failed to discuss the version of § 3.156(c) in effect before its amendment in 2006, as well as *Cline v. Shinseki*, 26 Vet.App. 18 (2012), which held that certain provisions of the revised regulation couldn't be applied to claims filed before the revision.

The Board issued the decision on appeal in October 2017, again denying an earlier effective date. This appeal followed.

II. ANALYSIS

A.

As noted above, § 3.156(c) was amended in 2006. *See* 71 Fed. Reg. 52,455 (Sept. 6, 2006). Because the veteran's claim to reopen was filed before that date and remained pending after it, the Board discussed whether either version of the regulation would warrant an earlier effective date. The pre-amendment text provided:

> Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the

former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The 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.

38 C.F.R. § 3.156(c) (2005). After the amendments, subsection (c) reads as follows:

(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.

38 C.F.R. § 3.156(c) (2018).

Here, the Board concluded that an earlier effective date wasn't warranted under the pre-amendment version because, although the 2010 Board decision granting service connection acknowledged receipt of command histories from the *Kitty Hawk*, the "service connection grant for bipolar disorder with depression was independent of the newly received service department records." R. at 14. That is, the Board's grant in 2010 was based primarily on the 2005 VA medical opinion, which relied on the veteran's statements and "the previously available service treatment records documenting depression treatment." *Id.* Indeed, the association of the declassified service records and the Department of Defense's response with the claims file occurred years after the 2005 opinion. R. at 15. Because those documents did not factor into the Board's grant of benefits, it determined that an earlier effective date was not prescribed by the old version of § 3.156(c). Turning to the current version of § 3.156(c), the Board again concluded that paragraph (2) prevented an earlier effective date because Mr. Flores-Vazquez hadn't provided at the time of the original claim enough information to verify the death on the flight deck; and, in any event, the newly associated service records were not declassified until 2000 and therefore could not have been considered at the time the original claim was decided in 1999. R. at 15-16.

B.

Mr. Flores-Vazquez's primary argument is that the Board failed, as required by either version of § 3.156(c), to "reconsider" the claim when he submitted new service records; i.e., the *Kitty Hawk* command histories. The Court disagrees.

As a preliminary matter, the veteran is correct that whether to reconsider a claim under § 3.156(c) is a distinct determination that precedes the question of whether an earlier effective date should be assigned under that provision. *See Emerson v. McDonald*, 28 Vet.App. 200, 207 (2016). But raising the contention that VA did not reconsider the claim is surprising at this stage of the appellate process. The 2015 Board decision addressed the new service records and why they did

not justify the assignment of an earlier effective date. Moreover, the premise of the Court's prior decision remanding for the Board to better explain some aspects of § 3.156(c) is that the Board had, in fact, reconsidered the psychiatric claim.

In any event, it is clear to the Court that—putting aside for the moment exceptions to reconsideration carved out by paragraph (c)(2) of the current version—Mr. Flores-Vazquez's service-connection claim was reconsidered in accordance with § 3.156(c). When the command histories were associated with the claims file in 2008, the claim for service connection for bipolar disorder was already in the process of being reconsidered as a result of the veteran's 2005 request to reopen. When the Board granted service connection in 2010, it expressly addressed the newly submitted command histories from the *Kitty Hawk* but concluded that they did not relate to the bipolar claim being adjudicated. As explained in the decision currently on appeal, the 2010 Board decision "clearly identifie[d] the previously available service treatment records documenting depression treatment and the May 2005 VA medical opinion as the bases for the award of service connection" and concluded that the new service records did not relate to a reconsideration of that claim. R. at 14-15. In other words, the 2010 Board decision adjudicated the merits of the service-connection claim, specifically acknowledged the new service records, and explained why they didn't affect its decision to grant service connection.

Under either version, this certainly looks like reconsideration of the claim. *See George v. Shulkin*, 29 Vet.App. 199, 204-06 (2018) (reviewing the record "as a whole" to determine whether the Board reconsidered a claim under § 3.156(c)). The veteran says it's not. But the basis for his belief that no reconsideration took place is never clearly articulated. At one point, he contends that, after new service department records were received, "VA should have made a determination as to whether the records were relevant such that reconsideration was triggered." Appellant's Br. at 15. To the extent Mr. Flores-Vazquez is arguing that the RO or the Board was obliged to state explicitly that it was (or wasn't) reconsidering the claim because of new service records and that error flowed solely from the absence of such an explicit statement, the Court is unpersuaded. It is apparent from the record that the Board reconsidered the veteran's psychiatric claim and that the *Kitty Hawk* command histories were duly taken into account as part of that analysis. Accordingly, any argument premised on the contention that VA did not obey the general duty in § 3.156(c) to reconsider the veteran's claim must fail.

C.

Moreover, even if the Board committed error in determining that exceptions set out in paragraph (c)(2) of the current version did not require reconsideration in this case, such error would not compel remand because it is harmless. Whatever their differences, both the former and the current versions of § 3.156(c) permit assignment of an earlier effective date only when a claim is granted *because of* newly associated service records. *Compare* § 3.156(c) (2005) ("The 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."), *with* § 3.156(c)(3) (2018) ("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."). As the Board decision on appeal and other documents of record make plain, the *Kitty Hawk* command histories submitted in 2008 played no role in the grant of service connection for bipolar disorder. The favorable resolution of the claim turned on a 2005 VA examination and opinion that, in turn, was based on the veteran's service medical records that had always been part of the claims file. The examiner diagnosed bipolar disorder with depression and linked it to a complaint of depression noted in a 1987 service treatment record. Although Mr. Flores-Vazquez sought service connection for PTSD, it was determined that he did not suffer from that condition, and observance of a fellow serviceman's death aboard the *Kitty Hawk* was not deemed relevant to the bipolar claim. *See* R. at 14-15, 1668-69, 2028. Thus, under either version of § 3.156(c), the grant of service connection for the psychiatric disorder at issue here was not based in any way on the new service records, and an earlier effective date for that claim is not authorized by this regulation. *See Emerson v. McDonald*, 28 Vet.App. 210, 216 (2016) ("newly associated official service department records must be at least partially decisive as to an award made under (c)(1)" before "the question of an earlier effective date under (c)(3) arises").

The Court is obliged to ascertain not simply whether there is error in a Board decision but also whether it is prejudicial. 38 U.S.C. § 7261(b)(2). Even assuming the Board committed errors in its § 3.156(c)(2) analysis, such errors were harmless because they neither affected a substantial right that disrupted the adjudication's fundamental fairness nor disturbed the Board's ultimate

determination on the claim for an earlier effective date. *See Simmons v. Wilkie*, 30 Vet.App. 267, 279-80 (2018). That is, assuming the Board wrongly concluded that reconsideration wasn't required because Mr. Flores-Vazquez failed to provide sufficient information to obtain previously classified *Kitty Hawk* command histories, such error had no effect here. The purpose of § 3.156(c) is "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." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). Since the command histories were not relevant to the veteran's bipolar disorder claim, their consideration in 1999 would not have led to a grant of service connection. And, similarly, any error in the Board's 2017 determination regarding the sufficiency of information or the histories' classified status did not prejudice the veteran.

III. CONCLUSION

Having fully considered the parties' briefs, governing law, and record, the Court discerns no prejudicial error in the October 10, 2017, Board decision, which is, accordingly, AFFIRMED.

DATED: December 28, 2018

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VA General Counsel (027)

Not published
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3989

ENRIQUE M. FLORES-VAZQUEZ, APPELLANT,

v.

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

Before SCHOELEN, TOTH and FALVEY, *Judges.*

ORDER

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

In a December 28, 2018, memorandum decision, the Court affirmed the Board of Veteran's Appeals (Board) decision dated October 10, 2017, that denied entitlement to an effective date earlier than January 24, 2005, for the award of service connection for bipolar disorder with depression. On January 18, 2019, the appellant filed a timely motion for reconsideration or, in the alternative, panel decision. The motion for decision by a panel will be granted.

Based on review of the pleadings and the record of proceedings, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge memorandum decision overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge decision remains the decision of the Court.

DATED: February 27, 2019 PER CURIAM.

Copies to:

Daniel G. Krasnegor, Esq.

VA General Counsel (027)

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1780

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-3989, Judge Joseph L. Toth.

Decided: April 30, 2021

EVAN TYLER SNIPES, Veterans Legal Advocacy Group, Arlington, VA, for claimant-appellant. Also represented by HAROLD HAMILTON HOFFMAN, III.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; BRIAN D. GRIFFIN, DEREK SCADDEN, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before NEWMAN, DYK, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

DYK, *Circuit Judge*.

Enrique Flores-Vazquez appeals a decision of the Court of Appeals for Veterans Claims ("Veterans Court") upholding a denial of an earlier effective date for a service-connected disability. We affirm.

BACKGROUND

This case presents a question of interpretation of 38 C.F.R. § 3.156(c), a regulation of the Department of Veterans Affairs ("VA"). The current version of § 3.156(c) allows the reconsideration of a previously denied claim and the availability of an earlier effective date when service-connected benefits have been allowed if VA receives "service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1) (2021). But an earlier effective date can only be granted if the award of benefits was "made based all or in part" on the newly obtained records. *Id.* § 3.156(c)(3). The question is whether the grant of benefits to Mr. Flores-Vazquez was based on such service department records.

I

Mr. Flores-Vazquez served on active duty in the Navy from April 1984 to April 1988. In November 1998, Mr. Flores-Vazquez submitted a claim for service connection for depression that he claimed began during service and for which he received treatment while onboard the U.S.S. *Kitty Hawk*. In March 1999, during an outpatient mental-health examination, Mr. Flores-Vazquez stated that he had witnessed several accidental deaths during active service, including "a man being sucked inside the nose of an

airplane." J.A. 102. At the time, Mr. Flores-Vazquez did not submit service department records supporting the existence of the incidents.

In September 1999, the regional office denied service connection for depression. The regional office noted that "[a]lthough there [was] a record of treatment in service for one episode of acute reactive depression, no permanent residual or chronic disability subject to service connection [was] shown by service medical records or demonstrated by evidence following service." *Id.* at 120. The regional office also treated his claim as asserting service connection for schizoaffective disorder but denied it as well, noting that "[t]his condition [was] not shown to have occurred in military service, nor was it shown to have been aggravated or caused by service, nor did it develop to a compensable degree within one year of military discharge." *Id.* at 121. Mr. Flores-Vazquez did not appeal this decision, and it became final.

II

In January 2005, there began a series of decisions that led to the decision under review. Some detailed description of those proceedings is necessary.[1] First, Mr. Flores-Vazquez filed a request to reopen his denied 1998 claim for service connection for depression. The regional office then ordered a medical examination, which Mr. Flores-Vazquez underwent in May 2005. The examiner diagnosed bipolar disorder with depression and determined that the condition was "due to or the result of in[-]service illness." *Id.* at 128. The examiner noted Mr. Flores-Vazquez's

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[1] In the interest of brevity, we have excluded the history of Mr. Flores-Vazquez's claim for post-traumatic stress disorder ("PTSD"), which was ultimately denied on the ground that Mr. Flores-Vazquez does not suffer from PTSD.

recollection of "very stressful episodes on the ship in which he served," including "a fire" and seeing another service member being "fragmented by [a] plane running into him." *Id.* at 125.

In June 2005, the regional office nonetheless denied service connection on the grounds that the VA medical opinion was "of little probative value because it appeared to be based on the veteran's unsupported report of continued psychiatric symptoms following service." *Flores-Vazquez v. Wilkie*, No. 17-3989, 2018 WL 6817851, at *1 (Vet. App. Dec. 28, 2018).

Mr. Flores-Vazquez then submitted additional, non-service-related records in 2006 to support his claim, but the regional office denied his claim. Mr. Flores-Vazquez appealed to the Board of Veterans' Appeals ("Board"). In 2008 and 2009, while Mr. Flores-Vazquez's appeal was pending, the VA received service department records in the form of the 1987 command history of the *Kitty Hawk* and a report from the Department of Defense regarding the 1986 command history of the *Kitty Hawk*.

On February 1, 2010, the Board decided Mr. Flores-Vazquez's appeal of his claim for service connection for bipolar disorder with depression, as well as his claim for PTSD. The Board found that "[t]he evidence in this case [was] certainly not compelling." J.A. 144. "Nevertheless," the Board found, referring to the May 2005 VA examination:

> [S]ervice records [did] clearly show psychiatric symptoms and a VA medical examiner, with benefit of examination of the Veteran and review of the record, ha[d] offered an opinion that it [was] at least as likely as not that the Veteran's bipolar disorder with depression [was] causally related to service. Essentially, the examiner viewed the in[-]service symptoms as most likely being the

> initial presentation of the disability now diagnosed as bipolar disorder with depression.

Id.

Despite finding the evidence in the case not compelling, the Board afforded "considerable weight" to the opinion of the May 2005 VA examiner, stating:

> The Board observes that the May 2005 VA examiner is identified as a medical doctor in psychiatry. The opinion is therefore entitled to considerable weight based on the education and training of the examiner. Based on the evidence, the Board finds that service connection is warranted for bipolar disorder with depression.

Id.

The Board also considered but did not rely on the command histories of the *Kitty Hawk*:

> The record also contains the command history of the U.S.S. Kitty Hawk for the years 1986 and 1987. The records show the death of a soldier by the same name as the Veteran reported in a night flight operations mishap on the flight deck in September 1986. The command history also shows that a fire occurred in March 1987 aboard the ship, but due to the efforts of the crew and fire-fighting teams, a major disaster was averted.

Id. at 143–44. But the Board "discounted" the "relevance" of the command histories. *Flores-Vazquez*, 2018 WL 6817851, at *2. The Board noted that, "[s]ignificantly, the May 2005 examiner acknowledged the Veteran's report of the fire and a death of an individual during service, but the examiner diagnosed bipolar disorder, not PTSD." J.A. 145.

The Board, having found entitlement for service connection for bipolar disorder, remanded. The regional office granted service connection for bipolar disorder with

depression with a rating of 30% and an effective date of January 24, 2005, the date the regional office had received Mr. Flores-Vazquez's request to reopen his claim denied in 1999.

III

Mr. Flores-Vazquez appealed the rating decision to the Board, seeking an earlier effective date of November 1998, the date he originally filed a claim for service connection for depression. Mr. Flores-Vazquez argued, in relevant part, that the regional office failed to reconsider his claim under 38 C.F.R. § 3.156(c). The Board, on May 5, 2015, denied an earlier effective date under 38 C.F.R. § 3.156(c)(2). On appeal, the Veterans Court vacated and remanded the Board's May 2015 decision on July 15, 2016, with instructions to "address the applicability" of the version of 38 C.F.R. § 3.156(c) that existed prior to amendment in 2006. J.A. 182.[2]

On October 10, 2017, on remand from the Veterans Court, the Board found that § 3.156(c) did not apply because the Board's award of benefits in 2010 "was not based on" the new service department records. *Id.* at 28. On further appeal to the Veterans Court, the Veterans Court also found that the award of benefits "was not based in any way on the new service records," and thus, an earlier effective date under § 3.156(c) was not available. *Flores-Vazquez*, 2018 WL 6817851, at *5.

Mr. Flores-Vazquez appeals.

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[2] Mr. Flores-Vazquez appealed the Veterans Court's July 2016 remand decision, and we dismissed for lack of finality. *Flores-Vazquez v. Snyder*, 676 F. App'x 1012 (Fed. Cir. 2017).

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited by statute. *See* 38 U.S.C. § 7292. We review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." *Id.* § 7292(a). We have jurisdiction to decide "all relevant questions of law" and to "set aside any regulation or any interpretation thereof (other than a determination as to a factual matter)" relied upon in the decision of the Veterans Court that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 7292(d)(1)(A). "Our review of these questions is de novo." *Manzanares v. Shulkin*, 863 F.3d 1374, 1376 (Fed. Cir. 2017). But absent a constitutional question, we "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

The VA "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." *Jones v. Wilkie*, 964 F.3d 1374, 1378 (Fed. Cir. 2020). "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." *Id.* at 1379 (citing 38 U.S.C. § 5110(a), 38 C.F.R. § 3.400(q)(2), and *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014)). However, under 38 C.F.R. § 3.156(c), an exception to the general effective date rule is available if VA receives new service department records and awards benefits based on those new service department records. *Jones*, 964 F.3d at 1379.

The versions of the regulation, before amendment in 2006 and after amendment, are set forth in an attachment

to this opinion. Mr. Flores-Vazquez argues that the "plain language" of the pre-amended version of § 3.156(c) "did not require that the service records contributed to service connection before determining whether an earlier effective date was warranted" and makes alternative arguments under both the pre-amended and amended versions of the regulation as applied to his case. Appellant's Br. 23. We need not decide which version of § 3.156(c), before amendment or as amended in 2006, applies here. Both versions of § 3.156(c) require that the award of benefits be based at least in part on the new service department records to qualify for an earlier effective date.

Mr. Flores-Vazquez's argument—that the pre-amended version does not require that the award be based on the service department records—is contrary to the plain language of § 3.156(c) before it was amended, which required that "[t]he 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." 38 C.F.R. § 3.156(c) (2005) (emphasis added).

The 2006 amendment was intended to "clarif[y]" that the award needs only to be "based all or in part on the records" to qualify for an earlier effective date. New and Material Evidence, 70 Fed. Reg. 35,388, 35,389 (June 20, 2005) (Proposed Rule) (emphasis added). The 2006 amendment "eliminate[d]" an "ambiguity" of the pre-amendment text of § 3.156(c), which "may be read as requiring an earlier effective date for the award of benefits upon reconsideration only when the basis for the award is newly discovered service department records." *Id.* (emphasis added). The 2006 amendment did not eliminate the requirement of § 3.156(c) that an earlier effective date is available only if the award is based at least in part on the newly discovered service department records.

In *Blubaugh*, we interpreted § 3.156(c) as amended in 2006 to "only appl[y] 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision.*'" 773 F.3d at 1314 (quoting New and Material Evidence, 70 Fed. Reg. at 35,388 (Proposed Rule)). In *Jones*, we similarly held that under the amended version of § 3.156(c), "the key issue [is] whether the award was attributable in whole or in part to the newly obtained service records." 964 F.3d at 1380. If the award of benefits is "not predicated in any way on records that were not before the [VA] at the time of the initial decision on the claim," then "the proper effective date [is] the date of the request for reopening, not the date of the initial claim." *Id.*[3]

Here, the Veterans Court found that "the grant of service connection for the psychiatric disorder at issue here was not based in any way on the new service records." *Flores-Vazquez*, 2018 WL 6817851, at *5.

In the 2017 decision, the Board found that "the subsequent service connection grant by the Board in February 2010 was not based on the January 2008 [Department of Defense] report and associated declassified command histories obtained after the final September 1999 rating decision." J.A. 28. The Board found that the Board's 2010 "decision clearly identifie[d] the previously available service treatment records documenting depression treatment and the May 2005 VA medical opinion as the bases for the award of service connection." *Id.* at 27. The Board further noted that "[t]he favorable May 2005 VA medical opinion [was] not contingent on the verification of any particular stressor from service department records" and that "the

[3] We express no opinion on other aspects of the amended version of § 3.156(c) or the pre-amended version.

verification of the stressors occurred after issuance of the VA medical opinion in question." *Id.* at 28.

Likewise, on December 28, 2018, in the decision on appeal here, the Veterans Court determined:

> As the Board decision on appeal and other documents of record make plain, the *Kitty Hawk* command histories submitted in 2008 played no role in the grant of service connection for bipolar disorder. The favorable resolution of the claim turned on a 2005 VA examination and opinion that, in turn, was based on the veteran's service medical records that had always been part of the claims file.

Flores-Vazquez, 2018 WL 6817851, at *5. Because of this finding, the Veterans Court concluded that neither version of § 3.156(c) authorized an earlier effective date for Mr. Vazquez's claim.

Mr. Flores-Vazquez argues that the "Veterans Court required the *Kitty Hawk* records alone to carry the 2010 Board's grant." Appellant's Br. 31. This is not what the Veterans Court said. The Veterans Court applied the correct standard under § 3.156(c), which requires that, if the award is "not predicated in any way on records that were not before the [VA] at the time of the initial decision on the claim," then "the proper effective date [is] the date of the request for reopening, not the date of the initial claim." *Jones*, 964 F.3d at 1380.

Mr. Flores-Vazquez also contends that the Veterans Court applied an impermissibly high standard of what the term "based in part" requires, as used in § 3.156(c) after the 2006 amendment. Appellant's Br. 28. Mr. Flores-Vazquez argues that "[b]ase" means "to lay a foundation" and that "[t]he *Kitty Hawk* records laid a foundation to the 2010 Board's grant" and "the *Kitty Hawk* records played a role in the 2010 Board's grant." *Id.* at 27–29. We see no error in the legal standard applied by the Veterans Court. To

the extent that Mr. Flores-Vazquez argues that the Veterans Court made a factual error in determining that the *Kitty Hawk* records "played no role in the grant of service connection for bipolar disorder," *Flores-Vazquez*, 2018 WL 6817851, at *5, we have no jurisdiction to review that factual challenge. *See* 38 U.S.C. § 7292(d)(2).

CONCLUSION

We have considered Mr. Flores-Vazquez's remaining arguments and find them unpersuasive. Because the Veterans Court did not err in its interpretation of 38 C.F.R. § 3.156(c), we affirm.

AFFIRMED

COSTS

No costs.

ATTACHMENT

Prior to amendment in 2006, § 3.156(c) provided:

> Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The 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.

38 C.F.R. § 3.156(c) (2005).

The current version of § 3.156(c), aside from the March 2021 amendment to subsection (c)(2), is the same as amended in 2006. *Compare* New Evidence, 86 Fed. Reg. 15,413, 15,414 (Mar. 23, 2021) (Final Rule); *with* New and Material Evidence, 71 Fed. Reg. 52,455, 52,457 (Sept. 6, 2006) (Final Rule). Section 3.156(c) currently provides:

> (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 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.

38 C.F.R. § 3.156(c) (2021).

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1780

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-3989, Judge Joseph L. Toth.

NEWMAN, *Circuit Judge*, dissenting.

This appeal concerns the interpretation of 38 U.S.C. § 7292(d) as implemented by 38 C.F.R. § 3.156(c), and specifically the effective date of disability payments to a veteran when service-connection is established on reconsideration of a previously denied claim.[1] Regulation 38 C.F.R. § 3.156(c) provides that when the veteran's

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[1] *Flores-Vazquez v. Wilkie*, No. 17-3989, 2018 WL 6817851 (Vet. App. Dec. 28, 2018) ("Vet. Ct. Op."); No. 08-15 411, 2010 WL 1475320 (Bd. Vet. App. Feb. 1, 2010) ("2010 BVA Op.").

previously-denied claim is refiled and granted on the basis of new and material evidence received from a military service department, the effective date of compensation is retroactive to the filing date of the original claim.

The Court of Appeals for Veterans Claims ("Veterans Court") adopted the government's position that this retroactive provision applies only when the new service department evidence is the sole basis for the finding of service connection. That is not required by the statute and regulation, and is inconsistent with the purpose of these enactments. Preserving the error, the panel majority now rules that the Federal Circuit does not have jurisdiction to review this statutory/regulatory interpretation. From my colleagues' erroneous rulings, I respectfully dissent.

I

JURISDICTION

38 U.S.C. § 7292(d)(1) authorizes Federal Circuit review of Veterans Court decisions on "all relevant questions of law, including interpreting constitutional and statutory provisions." Review is here sought for interpretation of the provisions governing the effective date of disability compensation when the veteran's claim was initially denied, but then was granted after receipt of new and material evidence from the military service department. The issue before us is the interpretation of this law, for the Veterans Court had accepted the government's argument that the Board of Veterans Appeals ("BVA") incorrectly interpreted the law. Review of this interpretation is squarely within our assigned jurisdiction.

The effective date of compensation for service-connected disability is a recurring issue, for a veteran's claim is often initially denied, and subsequently granted as additional evidence is provided. The practice is the subject of ongoing regulatory clarification; 38 C.F.R. § 3.156

implements 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400. Relevant provisions of 38 C.F.R. § 3.156 are:

> § 3.156(a). 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.
>
> * * *
>
> § 3.156(c). Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. . . . The 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.

38 C.F.R. § 3.156 (before 2006 amendment).

The Veterans Court interpreted § 3.156(c) as allowing benefit of the original claim filing date "only when a claim is granted *because of* newly associated service records." Vet. Ct. Op. at *5 (emphasis in original). The government states that this means that if the grant could have been supported without the new service records, then § 3.156(c)

does not permit retroactive credit for the original claim date. Govt Br. 28.

My colleagues hold that the determination of effective date is entirely a factual determination specific to Mr. Flores-Vazquez, and not an interpretation of law applicable to all veterans. That is inapt, for the majority interprets § 3.156(c) as a matter of legal construction and meaning, applicable to all veterans. It is our assignment under 38 U.S.C. § 7292(a) to assure that the law is correctly interpreted. *Jackson v. Wilkie*, 732 F. App'x 872, 875 (Fed. Cir. 2018) ("As prescribed by statute, our task is to review certain legal determinations relied upon by the Veterans Court in deciding a case."). My colleagues err in holding that we do not have jurisdiction of this appeal and the statutory/regulatory interpretation at issue.

On the correct interpretation of § 3.156(c), Mr. Flores-Vazquez is entitled to the benefit of the filing date of his original claim.

II

INTERPRETATION OF § 3.156(C)

A

As summarized in *Mayhew v. Shinseki*, 24 Vet. App. 273 (2011): "Read together, §§ 3.156(c) and 3.400(q)(2) provided that the effective date for an award of benefits based on newly discovered service department records that were previously unavailable may relate back to the date of the original claim or date entitlement arose even though the decision on that claim may be final." *Id.* at 277 (internal quotation marks and citations omitted). *See also Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014) (Section 3.156(c) views the former decision as reconsidered, whereby the later decision is retroactive to the filing date of the original claim).

Mr. Flores-Vazquez filed his original claim for service-connected psychiatric disorders in 1998; he received a psychiatric examination that recorded his asserted in-service stressors and treatment, but the claim was denied in 1999. In 2005 he filed a request for reconsideration, and a Veterans Administration ("VA") psychiatric examination in 2005 diagnosed Mr. Flores-Vazquez with various afflictions including "[b]ipolar disorder I, depress[ion], with psychotic features." J.A. 127. The VA examiner in 2005 concluded that the diagnosis "is at least as likely as not . . . due to or the result of in-service illness." J.A. 127–28. However, the claim was again denied in 2006, J.A. 131–34, the BVA finding the examiner's medical opinion to be "not new and material" evidence because it was based on stressors "not related [to] military service." Vet. Ct. Op. at *1 (summarizing BVA's 2006 rating decision); J.A. 132.

In 2008, the BVA obtained Command History records from the Department of Defense concerning events on the *U.S.S. Kitty Hawk* in 1986 and 1987, the BVA having requested such records in relation to a separate claim by Mr. Flores-Vazquez for PTSD. The Command History records had previously been "classified." J.A. 104.

In 2010, the BVA granted service connection for psychiatric disabilities as claimed by Mr. Flores-Vazquez, the BVA stating that the newly provided *Kitty Hawk* records were confirmation that was previously absent:

> The record also contains the command history of the U.S.S. Kitty Hawk for the years 1986 and 1987. The records show the death of a soldier by the same name as the Veteran reported in a night flight operations mishap on the flight deck in September 1986. The command history also shows that a fire occurred in March 1987 aboard the ship.

2010 BVA Op. at *4.

The BVA stated that these *Kitty Hawk* records corroborated the shipboard events reported by Mr. Flores-Vazquez, and were new and material evidence as contemplated by § 3.156(c). The BVA explained that the Command History records, together with other evidence starting with a March 1982 medical report, established service connection. 2010 BVA Op. at *2; *id.* at *4–5 (explaining that its determination was based on "all the evidence, including that pertinent to service," specifically including the Command History and numerous medical reports including the 2005 examination). The BVA concluded that: "Based on the evidence, the Board finds that service connection is warranted for bipolar disorder with depression". *Id.* at *5.

However, the BVA set the effective date for compensation as the date Mr. Flores-Vazquez refiled his claim in 2005, and the Veterans Court affirmed. The issue before us is whether § 3.156(c) was correctly interpreted to bar recourse to the original filing date, for the BVA explicitly included the newly provided Command History records, in combination with the other evidence, as establishing service connection.

B

The Veterans Court recognized that the issue of effective date turned on the interpretation of § 3.156(c). In 2017, the BVA told the Veterans Court that although the BVA's 2010 grant of service connection for Mr. Flores-Vazquez stated that the grant was based on a combination of the Command History evidence together with the May 2005 psychiatric examination, the 2010 decision only identified "the previously available service treatment records documenting depression treatment and the May 2005 VA medical opinion as the bases for the award of service connection." *Flores-Vazquez v. Wilkie*, No. 11-16 375, 2017 WL 6050350, at *8 (Bd. Vet. App. Oct. 10, 2017) ("2017 BVA Op.").

Thus the BVA in 2017 stated that in 2010 it did not rely on the Command History records, and the Veterans Court concluded that "they didn't affect its decision to grant service connection." Vet. Ct. Op. at *4. The Veterans Court acknowledged BVA's statements in 2010 that its decision was based on all evidence including the Command History records. *Id.* at *2 ("In granting service connection for bipolar disorder, the Board specifically mentioned notations in the *Kitty Hawk* command histories of a serviceman's death and a fire."); *id.* at *4 ("It is apparent from the record that the Board reconsidered the veteran's psychiatric claim and that the *Kitty Hawk* command histories were duly taken into account as part of that analysis."). However, the Veterans Court accepted the government's interpretation that "§ 3.156(c) permit[s] assignment of an earlier effective date only when a claim is granted *because of* newly associated service records." *Id.* at *5 (emphasis in original). The Veterans Court ruled that "the Board's grant in 2010 was based primarily on the 2005 VA medical opinion." *Id.* at *3.

The Veterans Court accepted the BVA's 2017 revision of 2005–2010 history, and ruled that Mr. Flores-Vazquez's 2005 medical examination sufficed to establish service connection. The court did not mention that the claim was denied based on the 2005 examination, and was not granted until after the Command History records were provided. Vet. Ct. Op. at *5. The Veterans Court concluded that because the 2005 medical examination, taken alone, supported the grant of service connection, this negated the applicability of § 3.156(c).

The court also ruled that if the BVA had indeed relied in 2010 on the Command History records, it did so in error, for "they neither affected a substantial right that disrupted the adjudication's fundamental fairness nor disturbed the Board's ultimate determination on the claim for an earlier effective date." Vet. Ct. Op. at *5. The court stated that "the command histories were not relevant to the veteran's

bipolar disorder claim." Vet. Ct. Op. at *5. The Veterans Court did not mention that service-connection was denied on the 2005 medical examination, and was not granted until the command histories were obtained.

On this appeal the government argues that unless the newly provided service records are themselves "the basis" for the grant of service connection, the retrospective benefit of § 3.156(c) is not available. Govt Br. 26–27 ("Because the command histories were not the basis of award, an earlier effective date would not have been warranted under either version of the regulation."). As construed by the government, § 3.156(c) requires that if other evidence could have supported the grant of service connection, the newly provided service department records cannot achieve retroactive benefit of the original claim date, although that benefit was denied until the service records were considered. My colleagues err in sustaining this flawed position.

C

It is not disputed that service-connection was denied to Mr. Flores-Vazquez until the *Kitty Hawk* records were provided in 2008. The government acknowledges that the BVA "[a]s part of its analysis" in 2010 "reviewed the command histories of the *Kitty Hawk*, and noted that the May 2005 examiner acknowledged Mr. Flores-Vazquez's report of his in-service stressors." Govt Br. 7 (citation omitted). The record is clear that the Command History evidence combined with the earlier medical evidence changed the BVA's decision, on reconsideration of its prior denial of service connection. 2010 BVA Op. at *5. There is no support for the government's position that a combination of old and new evidence cannot meet the conditions of § 3.156(c). Govt Br. 26–27.

On the correct interpretation of § 3.156(c) it appears undisputed that the conditions for retroactive benefit were met. From the court's incorrect statutory/regulatory

interpretation, and the ensuing flawed conclusion as applied to this veteran, I respectfully dissent.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1780

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-3989, Judge Joseph L. Toth.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, WALLACH[1], TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

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[1] Circuit Judge Evan J. Wallach only participated in the decision on the panel for rehearing.

ORDER

Enrique M. Flores-Vazquez filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on August 5, 2021.

FOR THE COURT

July 29, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
625 Indiana Avenue, NW Suite 900
Washington, DC 20004-2950

NOTICE OF DOCKETING (self-represented petitioner)

DOCKET NO: 21-8002 DATE: December 15, 2021

ENRIQUE M. FLORES-VAZQUEZ, PETITIONER, VA FILE NO: [redacted]

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

A petition for extraordinary relief, or correspondence that is being treated as a petition, was received on December 6, 2021. Under Rule 21, it has been docketed as shown above. This notice does **not** constitute an order that requires a response from the Secretary.

PETITIONER: Within 14 days after the date of this notice, you must take the action marked [X]:

[X] Pay the $50 filing fee through pay.gov (www.uscourts.cavc.gov/fee_filingfee.php) In the alternative you may pay by check or money order payable to the U.S. Court of Appeals for Veterans Claims **OR** file a Declaration of Financial Hardship (Rules 21(a) and 24). **DO NOT SUBMIT BOTH PAYMENT AND A DECLARATION OF FINANCIAL HARDSHIP.**

[ ] Furnish your daytime telephone number.

[ ] Other:

Note to Petitioner: Use the docket number shown above on all papers that you send to the Court. For information about the status of your petition, you may call (202) 501-5970. The Court staff cannot give you advice about your case.

Enclosed:
[X] Form 4 (Declaration of Financial Hardship)

See:
www.uscourts.cavc.gov/rules_of_practice.php for the Court's Rules
www.uscourts.cavc.gov/public_list.php for a list of practitioners

Gregory O. Block
Clerk of The Court

By: /s/ Trecia McKellar-Dixon
Deputy Clerk

Copies to:

Enrique M. Flores-Vazquez

VA General Counsel (027)

Form 10-PP (Rev 4/2021)

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Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-8002

ENRIQUE M. FLORES-VAZQUEZ, PETITIONER,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before TOTH, *Judge*.

ORDER

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

Petitioner Enrique M. Flores-Vazquez filed a document with the Court which, after review, appears to be a petition for a writ of certiorari requesting that the United States Supreme Court review an adverse decision issued by the U.S. Court of Appeals for the Federal Circuit. Certiorari can only be granted by the Supreme Court. *See* U.S. SUP. CT. R. 13. Therefore, even though Mr. Flores-Vazquez identified the relief he seeks, this Court cannot grant that relief. *See* VET. APP. R. 21(a).

Accordingly, Mr. Flores-Vazquez's petition is DISMISSED.

DATED: February 18, 2022

BY THE COURT:

JOSEPH L. TOTH
Judge

Copies to:

Enrique M. Flores-Vazquez

VA General Counsel (027)

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ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,
Respondent-Appellee

2022-1587

I, Enrique M. Flores -Vazquez Appellant respectfully request a review by a panel of judges from The United States Court of Appeals for the Federal Court to review Case #15-2196 from The Veterans Courts Of Appeals. #15-2196 Has not Been Adjudicated by The Board Of Veterans Affairs

I also respectfully request for a De Novo Review under 38 CFR 3.2600 This will finally show what all evidence on record and adjudicative actions.

Note The Appellant Enrique M. Flores-Vazquez reply on form 17 Informal Reply Brief was send on time but not consider at Court By dismissal with out answering Appellants Questions and Legal Request.

May 23, 2022
Date

Enrique M. Flores-Vazquez
Appellant

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ENRIQUE M. FLORES-VAZQUEZ,
Claimant-Appellant

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,
Respondent-Appellee

2022-1587

Appeal from the United States Court of Appeals for Veterans Claims in No. 21-8002, Judge Joseph L. Toth.

ON PETITION FOR PANEL REHEARING

Before DYK, REYNA, and CHEN, *Circuit Judges*.

PER CURIAM.

ORDER

The court construes Enrique M. Flores-Vazquez's submission received May 25, 2022, as his petition for panel rehearing from the court's May 12, 2022, order summarily affirming the judgment of the United States Court of Appeals for Veterans Claims.

Mr. Flores-Vazquez provides no cognizable basis for rehearing.

Accordingly,

IT IS ORDERED THAT:

ECF No. 15 is construed as a petition for panel rehearing. The petition is denied, and the mandate shall issue with this order.

FOR THE COURT

July 13, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

ISSUED AS A MANDATE: July 13, 2022