APPENDIX

APPENDIX A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JULIEN P. CHAMPAGNE,

Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

2023-1047

Appeal from the United States Court of Appeals for Veterans Claims in No. 21-1156, Judge Scott Laurer.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

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[1] Circuit Judge Newman did not participate.

O R D E R

Julien P. Champagne filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Douglas A. Collins. Military-Veterans Advocacy Inc. requested leave to file a brief as amicus curiae, which the court granted. The petition was referred to the panel that heard the appeal, and thereafter the petition 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.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

June 3, 2025
Date

APPENDIX B

United States Court of Appeals for the Federal Circuit

JULIEN P. CHAMPAGNE,

Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

2023-1047

Appeal from the United States Court of Appeals for Veterans Claims in No. 21-1156, Judge Scott Laurer.

Decided: December 6, 2024

FALEN M. LAPONZINA, ADVOCATE Nonprofit Organization, Washington, DC, argued for claimant-appellant. Also represented by KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS.

AMANDA TANTUM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM; CHRISTINA LYNN GREGG, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before CHEN, HUGHES, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

Julien P. Champagne appeals from the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the Board of Veterans' Appeals' ("Board") denial of an effective date earlier than July 14, 2003, for service connection for Mr. Champagne's cerebellar degenerative disorder ("CDD"). *Champagne v. McDonough*, 2022 WL 2663589 (Vet. App. Jul. 11, 2022). We affirm.

I

Mr. Champagne served honorably on active duty in the United States Marine Corps from December 1953 to December 1956. In September 1987, he filed a "Veteran's Application for Compensation or Pension," using VA Form 21-526, with the United States Department of Veterans Affairs ("VA") ("1987 Application"), seeking benefits relating to his CDD.

App'x 21-24.[1] A VA regional office ("RO") construed the 1987 Application as an "application for pension benefits," SApp'x 2, and awarded a "disability pension" in December 1987, App'x 29.

In August 1999, Mr. Champagne filed a "Statement in Support of Claim," requesting that the VA consider a claim for service connection disability compensation ("service connection compensation" or just simply "compensation") for a malaria condition, as well as any residual illnesses he "obtained while in military service." App'x 30. In a July 2002 rating decision, the RO granted Mr. Champagne service connection compensation for malaria at 0%, effective November 15, 2001, but did not grant compensation for any residual illnesses, including CDD. In July 2003, Mr. Champagne filed a notice of disagreement, contending that he had contracted malaria during service and that his CDD was caused by malaria. In April 2004, the RO confirmed its July 2002 rating decision.

In February 2005, upon finding that Mr. Champagne had failed to timely appeal its earlier decisions, the RO construed one of Mr. Champagne's filings as a new claim seeking a higher service connection compensation rating for malaria and also seeking a finding of compensation for CDD as a residual of or as secondary to malaria. After multiple proceedings between 2005 and 2013, Mr. Champagne was granted compensation for CDD at a 100% rating, effective February 3, 2005. He challenged this

[1] "App'x" refers to the appendix attached to Mr. Champagne's opening brief. "SApp'x" refers to the supplemental appendix attached to the government's response brief.

effective date and, in January 2018, the RO granted him an earlier effective date of July 14, 2003.

The January 2018 rating decision explained that Mr. Champagne's 1987 Application was "a claim for pension benefits" but added that "a claim for pension is also considered a claim for compensation benefits," even though "there was no evidence of record to suggest that [Mr. Champagne's] disability was incurred in or caused by service." App'x 41. Mr. Champagne appealed the July 14, 2003 effective date to the Board, arguing he "should be compensated from 1987 instead." App'x 44.

In October 2020, the Board issued a decision denying an effective date earlier than July 14, 2003. With respect to Mr. Champagne's 1987 Application, the Board found that his application contained "no suggestion of an intention . . . to make a claim for service connected disability benefits [i.e., compensation] in addition to the non-service connected pension benefits." App'x 61. "Under these circumstances," the Board concluded, "there was no requirement for [the] VA to consider the claim for pension as also one for compensation." *Id.*

Mr. Champagne appealed the Board's decision to the Veterans Court. On July 11, 2022, the Veterans Court affirmed the Board's October 2020 decision. Citing its precedent, namely *Stewart v. Brown*, 10 Vet. App. 15 (1997), the Veterans Court determined that under 38 C.F.R. § 3.151(a), the "VA *may* consider a claim for pension to include a claim for compensation, but it is not *required* to do so." App'x 5 (emphasis in original). According to the Veterans Court, then, the

Board permissibly construed Mr. Champagne's 1987 Application claim as *not* containing a claim for service connection compensation. The Veterans Court further concluded that it "need not determine" whether the RO had, in its January 2018 rating decision, "made . . . a factual finding" that the 1987 Application included a compensation claim because, even if the RO had done so, "the Board would not be bound by that finding." *Id.* at 7 & n.59.

Mr. Champagne timely appealed the Veterans Court's decision to us.

II

Our jurisdiction to review judgments of the Veterans Court is limited. We may review the validity of a Veterans Court decision "on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by" the Veterans Court. 38 U.S.C. § 7292(a). However, "[e]xcept to the extent that an appeal . . . presents a constitutional issue," we may not review "a challenge to a factual determination" or "to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

"We review questions of statutory and regulatory interpretation de novo." *Cavaciuti v. McDonough*, 75 F.4th 1363, 1366 (Fed. Cir. 2023). We "hold unlawful and set aside any regulation or any interpretation thereof" that we find to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation

of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1).

III

Mr. Champagne raises two issues on appeal. First, he contends that the Veterans Court misinterpreted 38 C.F.R. § 3.151(a) as not requiring the VA to treat his 1987 Application as both a claim for pension benefits ("pension") and also a claim for service connection disability compensation. Second, as an alternative argument, he contends that the Veterans Court engaged in impermissible factfinding. We address each issue in turn.

A

Before reaching the merits, we first consider the government's contention that we lack jurisdiction to review Mr. Champagne's appeal. The government argues that the Veterans Court did not interpret 38 C.F.R. § 3.151(a) but, instead, "simply applied section 3.151(a) to the facts, including the language of Mr. Champagne's September 1987 application." Appellee's Br. 15. We disagree.

In rejecting Mr. Champagne's contention that his 1987 Application must be treated as both a claim for pension and a claim for compensation, the Veterans Court, relying on its *Stewart* precedent, articulated its view that the language of § 3.151(a) "is permissive – not mandatory," meaning that "VA *may* consider a claim for pension to include a claim for compensation, but it is not *required* to do so." App'x 5 (emphasis in original). These statements show that the Veterans Court was elaborating on the meaning of, and thus

interpreting, the regulation, not merely applying it to a particular factual scenario. *See Forshey v. Principi*, 284 F.3d 1335, 1349 (Fed. Cir. 2002) (en banc) ("[A]n interpretation of a statute or regulation occurs when its meaning is elaborated by the court."). Thus, we do not dismiss this appeal for lack of jurisdiction.

B

Mr. Champagne contends that a proper reading of 38 C.F.R. § 3.151(a) requires the VA to construe an application, such as his 1987 Application, as both a claim for a pension and a claim for compensation. Section 3.151(a) provides:

> *(a) General.* A specific claim in the form[2] prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). *A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to*

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[2] The title of the form Mr. Champagne used, "Veteran's Application for Compensation or Pension," is arguably ambiguous and, unfortunately, might be misunderstood as constituting an application for *both* pension *and* compensation benefits, regardless of how the veteran completes the form. This appeal, however, does not call upon us to reach any conclusions about any particular form. Only the regulation is at issue, as Mr. Champagne's counsel made clear at oral argument. See Oral Arg. 10:15-12:28, *available at* https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-1047_04042024.mp3.

> *be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.*

38 C.F.R. § 3.151(a) (emphasis added).

In Mr. Champagne's view, the two emphasized sentences mean that "both pension and service connection [compensation] should have been adjudicated to determine the greater benefit, and only after specific election by Mr. Champagne, should the lesser benefit have been awarded." Appellant's Br. 9. The government responds that the Veterans Court's interpretation of the regulation is correct: the VA may exercise its discretion to consider a claim for a pension to also be a claim for compensation, and vice versa, but the VA is not required to do so. We agree with the government.

"When construing a regulation, we begin with the regulatory language itself to determine its plain meaning." *Frazier v. McDonough*, 66 F.4th 1353, 1357 (Fed. Cir. 2023) (internal quotation marks and citation omitted). We are also "required to carefully consider the text, structure, history, and purpose of a regulation when determining its meaning." *Id.* (internal quotation marks and citation omitted).

Starting with the language, § 3.151(a) states that "[a] claim by a veteran for compensation *may* be considered to be a claim for pension" (emphasis added). "May" is a permissive word, not a command. *See, e.g.*, *Ravin v. Wilkie*, 956 F.3d 1346, 1350 (Fed. Cir. 2020) ("The fact that [a statute] uses the term

'may' means the statute should not be read as mandatory."); *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992) ("The use of the permissive 'may' instead of the mandatory 'shall,' authorizes the board to employ its discretion . . . ."). Thus, we "use common sense and presume that the word conveys some degree of discretion." *McBryde v. United States*, 299 F.3d 1357, 1362 (Fed. Cir. 2002). The plain language of § 3.151(a), then, establishes that the VA is allowed, but not required, to consider a pension claim as a compensation claim, and vice versa.[3]

Mr. Champagne attempts to show that "inferences that we may rationally draw from the structure and purpose" of the regulation somehow rebut the plain meaning of "may." *See McBryde*, 299 F.3d at 1362. His effort fails. He relies primarily on the third sentence of the regulation: "[t]he greater benefit will be awarded, unless the claimant specifically elects the lesser benefit." 38 C.F.R. § 3.151(a). Mr. Champagne

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[3] The Veterans Court has held that under certain circumstances – specifically, where "the record was replete with evidence showing that the veteran qualified for disability compensation," giving the VA "notice that the [veteran] might be eligible for both" types of benefits – the VA's statutory duty to assist, as set out in 38 U.S.C. § 5103A, may *require* the VA to consider a pension claim as a claim for both pension and compensation benefits. *See Stewart*, 10 Vet. App. at 18-19. Mr. Champagne does not argue that such circumstances are present here (and we might lack jurisdiction over such an argument if it were made). Nonetheless, nothing we have said here should be read as weakening the VA's duty to assist or as precluding the possibility that the Veterans Court could find certain exercises of VA discretion under § 3.151(a) could constitute an abuse of that discretion.

argues that, in order to determine which benefit is greater, the VA must consider both pension and compensation claims; otherwise, it has no way of knowing which amount is greater. Hence, he continues, the VA must consider an application as seeking both types of benefits.

We are not persuaded. Instead, we read the third sentence of the regulation as providing the rule of decision for those instances *when* the VA considers both types of benefits. The sentence does not tell the VA anything about when it *must* do so. Mr. Champagne's contrary view would effectively have us rewrite the plain language of § 3.151(a) from "may be considered" to "will be considered." This we may not do. *See Langdon v. McDonough*, 1 F.4th 1008, 1013 (Fed. Cir. 2021) (refusing to "rewrite the plain regulatory language"); *see also Kisor v. Wilkie,* 588 U.S. 558, 575 (2019) ("[A] court cannot wave the ambiguity flag just because it [finds a] regulation impenetrable on first read.").

Mr. Champagne additionally points to the "specific[] elect[ion]" language of the third sentence of § 3.151(a), which he contends "removes any discretion[] from the VA" as to how it should "construe the application." Appellant's Br. 9. This argument, too, lacks merit. We do not see how the "specific[] elect[ion]" term limits the VA's discretion – as plainly set out in the second sentence of the regulation – to consider the veteran's claim as one solely for pension or compensation benefits. This language, instead, simply functions to provide the veteran with the ability to choose which benefit he wishes to elect *when* the VA evaluates his claim for both pension and compensation. Nothing

about the third sentence converts the discretionary "may" of the second sentence into a mandatory obligation of the VA.

The overall regulatory scheme further supports our conclusion. For example, an adjacent regulation, which addresses claims for death benefits, reads:

> A claim by a surviving spouse or child for compensation or dependency and indemnity compensation *will also be considered* to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension *will be considered* to be a claim for death compensation or dependency and indemnity compensation and accrued benefits.

38 C.F.R. § 3.152(b)(1) (emphasis added). The distinction between the use of "may" in § 3.151(a), with pension and compensation claims, and "will" in § 3.152(b), with death claims, shows that if the VA intends to impose a requirement on itself, it does so with compulsory language. *See generally Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted).

Finally, Mr. Champagne observes that "when interpreting veterans' benefits statutes, any doubt is

to be resolved in the veteran's favor." Appellant's Br. 14 (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). However, for the reasons discussed above, we find no "interpretive doubt" here. Although § 3.151(a) could have been written more clearly, its plain language and its context in the regulatory scheme as a whole unambiguously establish that the VA has discretion to determine that a veteran is solely seeking pension or compensation benefits. Thus, we have no basis to apply the pro-veteran canon of interpretation. *See, e.g.*, *Spicer v. Shinseki*, 752 F.3d 1367, 1371 (Fed. Cir. 2014) (stating that lack of ambiguity means there is no "interpretive doubt" that could give rise to application of pro-veteran canon of interpretation).

For the foregoing reasons, the Veterans Court's interpretation of § 3.151(a) is correct. The VA may, but is not required to, consider a claim for pension to also include a claim for compensation, and vice versa.

C

In the alternative, Mr. Champagne contends that the Veterans Court engaged in impermissible fact finding. It is not entirely clear what fact Mr. Champagne believes the Veterans Court found; he seems to principally take issue with a portion of the Veterans Court's decision he describes as a finding that the RO's January 2018 rating decision "made no factual findings" as to whether his 1987 Application for pension was also considered a claim for compensation. Appellant's Br. 17-18.

We do not see the Veterans Court as having engaged in fact finding, either in the portion of its opinion

emphasized by Mr. Champagne or anywhere else. To the contrary, the Veterans Court expressly stated that it "need not determine whether the [RO] made . . . a finding" about which type of benefits Mr. Champagne sought in 1987, App'x 7 n.59, because even if the RO had made such a finding, "the Board would not be bound by that finding," App'x 7. Thus, the Veterans Court merely decided that any findings in the RO's January 2018 rating decision would not have been dispositive because the Board determined for itself that Mr. Champagne's 1987 Application did not include a claim for compensation.[4] We have no basis to reverse.

IV

We have considered Mr. Champagne's remaining arguments and find them unpersuasive. Accordingly, we affirm the Veterans Court's decision.

AFFIRMED

COSTS

No costs.

[4] To the extent Mr. Champagne challenges the Board's finding that his 1987 Application did not include a claim for service connection compensation, we do not have jurisdiction to review that factual determination. *See* 38 U.S.C. § 7292(d)(2).

APPENDIX C

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-1156

JULIEN P. CHAMPAGNE, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LAURER, *Judge*.

MEMORANDUM DECISION

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

LAURER, *Judge*: United States Marine Corps veteran Julien P. Champagne appeals, through counsel, an October 27, 2020, Board of Veterans' Appeals (Board) decision denying an effective date before July 14, 2003, for service connection for

cerebral degeneration of all extremities secondary to service-connected malaria.[1]

Appellant first argues that the Board did not adequately support its finding that his September 1987 pension claim did not include an unadjudicated disability compensation claim.[2] Appellant also asserts that the Board did not adequately support its determination that a July 2002 rating decision was final.[3] Last, appellant contends that the Board violated a February 19, 2020, Court order granting a joint motion for remand (JMR).[4]

The Court finds that the Board's decision followed the relevant law on deciding effective dates, the Board's determinations are plausibly supported by the record, and the Board adequately explained those determinations. Thus, the Court will affirm the Board's decision.

I. BACKGROUND

Appellant's claim has a long and complex history. Since that history is relevant to the parties' arguments, the Court will summarize it before turning to the merits of the appeal. In March 1987, appellant filed a VA Form 10-7131, Exchange of Beneficiary Information and Request for Administrative and Adjudicative Action, checking the blocks for requesting information on "service connection" and "monetary benefits information" from

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[1] Record (R.) at 5-19; Appellant's Brief (Br.) at 9-30.
[2] Appellant's Br. at 10-17.
[3] *Id.* at 17-25.
[4] *Id.* at 25-28.

the VA regional office (RO).[5] Then, in September 1987, appellant filed an "application for compensation or pension" and included a July 1986 statement from a physician attesting that appellant "has a cerebellar degenerative disorder and has slurred speech [and] balance problems due to that."[6] How appellant completed his application is the subject of competing arguments on appeal, but in September 1987, the RO construed it as a pension application.[7] In December 1987, the RO issued a rating decision granting appellant's claim for pension benefits.[8] Appellant did not appeal that decision.

In September 1999, appellant sought service connection for malaria and any residuals caused by malaria.[9] The RO denied appellant's claim in May and September 2000 rating decisions.[10] But following implementation of the Veterans Claims Assistance Act of 2000 (VCAA), the RO sent a VCAA notification letter to appellant and informed him that the RO would review his claim again.[11] In June 2001, the RO issued a new rating decision denying appellant's claim.[12] Within a year of that decision, appellant

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[5] R. at 3338.

[6] R. at 3328, 3334-37.

[7] R. at 3322.

[8] R. at 3253-55, 3261.

[9] R. at 3193. The Board found that the RO received appellant's service connection claim "for malaria and any residual disability from malaria" in August 1999. R. at 5. Though appellant signed his claim on August 31, 1999, VA marked the document as received on September 1, 1999. R. at 3193. For clarity, the Court cites this evidence as a September 1999 service connection claim.

[10] R. at 3127-30, 3134-36.

[11] R. at 3119-23.

[12] R. at 3114-16.

wrote to the RO and argued that malaria caused "damage to [his] cerebellum."[13] In April 2002, the RO again denied appellant's service connection claim for malaria.[14]

Appellant timely disagreed with the April 2002 rating decision.[15] In July 2002, the RO granted service connection for malaria with a noncompensable rating, explaining that there was no evidence of malaria residuals.[16] Appellant timely disagreed with the noncompensable rating in July 2003, asserting that doctors told him that his malaria and high fever could have caused his speech and balance disorders.[17] The RO issued a Statement of the Case (SOC) in April 2004, confirming the rating because there was no evidence of residuals of malaria.[18]

Appellant's claim then took an unusual turn. In May 2004, VA claimant advocate Lloyd Frickey sent a letter to the RO on appellant's behalf.[19] Mr. Frickey asked the RO to construe the letter as a formal appeal of the April 2004 SOC.[20] The RO wrote to appellant on June 4, 2004, and explained that it could not accept Mr. Frickey's May 2004 correspondence as a formal appeal because appellant had appointed the American Legion as his representative.[21] The RO instructed the appellant that he would first need to formally revoke

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[13] R. at 3106-07.
[14] R. at 3060-64.
[15] R. at 3054.
[16] R. at 3045-47
[17] R. at 3029.
[18] R. at 3004-15.
[19] R. at 3003.
[20] *Id.*
[21] R. at 3002.

the American Legion as his representative or formally appoint Mr. Frickey as his representative before Mr. Frickey could file an appeal on appellant's behalf.[22] The RO also restated the date by which appellant needed to file a Substantive Appeal of the April 2004 SOC.[23] Appellant took no further action.

In February 2005, appellant appeared before the RO, represented by Mr. Frickey, for a pension benefits hearing.[24] Appellant testified about his pension benefits but was not prepared to testify about his compensation claim, so the RO held an informal conference on that issue instead.[25] That same month, the RO issued a deferred rating decision stating that appellant did not timely appeal the April 2004 SOC, so no appeal on that claim was pending.[26] The RO therefore construed claims for a higher rating for malaria and for service connection for cerebral degeneration, including as secondary to malaria, as "reopened claim[s]" dating from the February 2005 informal conference.[27] The RO then denied both claims in an April 2005 rating decision.[28]

Over the next several years, VA issued several decisions and conducted significant development until the Board granted service connection for cerebellar degeneration, including as secondary to malaria, in a September 12, 2013, decision. [29] The RO implemented

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[22] *Id.*
[23] *Id.*
[24] R. at 2941-47.
[25] R. at 2870.
[26] R. at 2865.
[27] R. at 2859-61, 2865.
[28] R. at 2826-33.
[29] R. at 1780-88.

the Board's decision in a November 2013 rating decision, assigning a 100% rating, effective February 3, 2005.[30] Appellant disagreed with the effective date, and in a January 2018 decision, the RO found clear and unmistakable error (CUE) in the November 2013 rating decision.[31] The RO determined that appellant's July 2003 Notice of Disagreement (NOD) encompassed a service connection claim for cerebral degeneration and that no earlier correspondence in appellant's claims file could be construed as a service connection claim for cerebral degeneration. Thus, the RO found that July 14, 2003, was the appropriate effective date for his claim.[32]

Appellant continued to pursue an earlier effective date, and in March 2019, the Board denied appellant's claim.[33] Appellant appealed to this Court, which granted a JMR in February 2020.[34] Appellant's claim then returned to the Board, which issued the decision now on appeal.[35]

II. ANALYSIS

The general rule for assessing the effective date for an award of benefits provides that "the effective date of an evaluation . . . will be the date of receipt of the claim or the date entitlement arose, whichever is later."[36] The Board's effective date determination is a

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[30] R. at 1755-59.
[31] R. at 1052-58.
[32] *Id.*
[33] R. at 205-15.
[34] R. at 167-73, 174.
[35] R. at 5-19.
[36] 38 C.F.R. § 3.400 (2022); *see* 38 U.S.C. § 5110(a)(1) (instructing that, generally, "the effective date of an award . . .

factual finding that the Court reviews for clear error.[37] The Court will not overturn the Board's factual finding unless there is no plausible basis in the record supporting the decision.[38] As with any material issue of fact or law, the Board must provide a written statement of the reasons or bases for its determination that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[39]

A. The 1987 Claim

The Board first found that appellant's original 1987 claim was only a claim for non-service-connected pension and not disability compensation benefits.[40] The Board reasoned that the way the appellant completed the claim indicated that he did not intend to seek disability benefits.[41] The Board explained that appellant completed the necessary sections to apply for pension benefits but that "in the sections of the application form that a claimant is instructed to complete if seeking compensation for a disability incurred in service, he wrote, 'N/A.'"[42] Appellant argues that the Board's determination is clearly

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shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application").

[37] *See Hanson v. Brown*, 9 Vet.App. 29, 32 (1996) (addressing the Court's standard for reviewing the Board's effective-date determinations).

[38] *Warren v. McDonald*, 28 Vet.App. 214, 218 (2016).

[39] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinksi*, 1 Vet.App. 49, 56-57 (1990).

[40] R. at 9.

[41] *Id.*

[42] *Id; see* R. at 3335-36.

erroneous and unsupported by an adequate statement of reasons or bases.[43]

Section 3.151(a) states that a "claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation."[44] In *Stewart v. Brown*,[45] the Court highlighted that the regulation's language is permissive—not mandatory.[46] That is, VA *may* consider a claim for pension to include a claim for compensation, but it is not *required* to do so. The *Stewart* Court emphasized that the Secretary must "exercise his discretion" in determining how to construe such claims and should do so "in accordance with the contents of the application and the evidence in support of it."[47] The Board did so here.

Appellant contends that the Board "mischaracterized" his September 1987 claim: he did not mark the disability compensation sections "N/A" because he was not seeking service connection; he marked those sections "N/A" because they asked him to list where he received medical treatment for a disability, and he had not received treatment for cerebral degeneration during service.[48] Appellant's argument offers another way to view his claim. But it does not prove that the Board's view of his claim was clearly erroneous. Instead, it highlights this Court's

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[43] Appellant's Br. at 10-13.
[44] 38 C.F.R. § 3.151(a) (2022).
[45] *Stewart v. Brown*, 10 Vet.App. 15 (1997).
[46] *Id.* at 18.
[47] *Id.*
[48] Appellant's Br. at 11-12.

oft-quoted axiom that a factfinder's conclusion is not clearly erroneous where the factfinder selects one of two permissible views of the evidence.[49] Indeed, individual sections of the claim form ask where the veteran received medical treatment for a disability—but the claim form also instructs that a claimant "need NOT complete[]" those sections "unless [they] are now claiming compensation for a disability incurred in service."[50] The Court finds that both views of the evidence are plausible, so the Board's conclusion cannot be clearly erroneous.

Appellant also asserts that the Board failed to consider relevant information in reaching its conclusion. He cites two types of evidence he believes the Board overlooked. First is the March 1987 VA Form 10-7131 that appellant used to request information on "service connection" and "monetary benefits information."[51] Second are appellant's lay statements about his intent in filing the 1987 claim.[52] But none of this evidence proves error. As the Court explained in *Stewart*, § 3.151(a) requires VA to consider "the *contents* of the application and the evidence *in support of it*."[53]

Appellant submitted the VA Form 10-7131 seeking benefits information a full 6 months before eventually filing a claim, and at no point in the September 1987

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[49] *See Gilbert*, 1 Vet.App. at 52; *see also Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

[50] R. at 3335.

[51] Appellant's Br. at 13; R. at 3338.

[52] *See* Appellant's Br. at 13-14.

[53] *Stewart*, 10 Vet.App. at 18 (emphasis added).

claim did he reference that form.[54] There is also no suggestion that appellant submitted the form in support of the eventual claim, so there was no requirement for the Board to consider it. Appellant's reference to his lay statements is similarly unpersuasive. Though it is unclear which lay statements appellant is referencing, he identifies no statements submitted as part of his claim or along with his claim so that they can logically be considered support for the claim. The only evidence appellant did submit in support of his September 1987 claim was a physician's statement that appellant suffered from cerebellar degeneration.[55] Yet that statement did not suggest that appellant's condition related to his active service.[56] Thus, the Court finds the Board's determination—that appellant's September 1987 claim did not show an intention to seek service-connected disability compensation benefits—to be plausibly supported by the record and explained its decision with an adequate statement of reasons or bases.

Appellant also argues that his 1987 claim contained a claim for disability benefits because of two VA agency of original jurisdiction (AOJ) decisions.[57] The specifics of appellant's argument are unclear, but he appears to contend that a January 15, 2018, rating decision and a January 17, 2018, Supplemental SOC (SSOC) conceded that his 1987 claim for pension "is

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[54] *See* R. at 3337, 3338.

[55] R. at 3328. Appellant also included a petition and judgment of divorce. R. at 3330-33. That evidence is irrelevant to whether a current disability relates to military service.

[56] R. at 3328.

[57] Appellant's Br. at 15-17.

also considered a claim for compensation benefits."[58] So, because the 2018 AOJ decisions acknowledged that there was a pending, unadjudicated claim, appellant maintains that the claim is currently on appeal and remains pending. This argument lacks merit. Even if the AOJ made a factual finding that appellant's September 1987 claim encompassed a claim for disability benefits,[59] the Board would not be bound by that finding. In a legacy claim[60] like appellant's, "the Board, as the final trier of fact, is not constrained by . . . determinations below."[61] Thus, appellant's argument cannot prove any clear error by the Board.[62]

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[58] *Id.* at 15 (citing R. at 1050, 1053).

[59] The Court need not determine whether the AOJ made such a finding.

[60] Claims decided before the Veterans Appeals Improvement and Modernization Act of 2017 went into effect are called "legacy appeals." 38 C.F.R. § 3.2400(b) (2022); *Godsey v. Wilkie*, 31 Vet.App. 207, 214 n.2 (2019).

[61] *McBurney v. Shinseki*, 23 Vet.App. 136, 139 (2009).

[62] Appellant also appears to argue that VA violated its "duty to notify and assist" him in developing his original 1987 claim. Appellant's Br. at 14-17. In support of his assertion, appellant only makes generic citations to the laws establishing VA's duties to notify and assist, and he quotes 38 U.S.C. § 7722 (2000)—a law requiring VA to establish broad outreach efforts to notify veterans of available benefits. *Id.*; *see also* 38 U.S.C. §§ 5103, 5103A; 38 C.F.R. § 3.159 (2022). Appellant does not apply any specific part of sections 5103 or 5103A, or § 3.159, to the facts of his claim. Nor does he explain how section 7222 applies to any individual claimant or claim for benefits. Thus, the Court finds that his argument is undeveloped, and the Court will not consider it further. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court need not consider undeveloped arguments).

B. The July 2002 Rating Decision

The Board found that the July 2002 rating decision became final because appellant did not timely perfect an appeal of the April 2004 SOC.[63] The Board explained that the May 2004 letter from Mr. Frickey to the RO was not an appeal because it was not sent by appellant's representative of record.[64]

Appellant discusses the procedural history of his claim at length and reiterates several times that he "already timely filed Notices of Disagreement" with the RO's rating decisions.[65] But appellant never addresses the critical fact underpinning the Board's finding of finality: that he never perfected an appeal. Under the law governing legacy claims, an appellant had a year "from the date of mailing of notice of the result of initial review or determination" to file an NOD.[66] Then, after any necessary development, the AOJ issued an SOC.[67] Finally, an appellant had 60 days from the date the AOJ mailed the SOC to "file the formal appeal."[68] Put simply, appellant had to file a Substantive Appeal to appeal his claim to the Board, and he does not even argue that he ever did so.[69]

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[63] R. at 6, 10-11.

[64] R. at 10-11.

[65] Appellant's Br. at 20.

[66] 38 U.S.C. § 7105(b)(1) (2018).

[67] 38 U.S.C. § 7105(d)(1) (2018).

[68] 38 U.S.C. § 7105(d)(3) (2018).

[69] Appellant does not contest the Board's finding that the May 2004 correspondence from Mr. Frickey could not be a formal appeal because appellant had a different representative of record at that time. *See* R. at 10. Regardless, the Board correctly noted that VA regulations defined which persons were authorized to

Even if the Court construed appellant's discussion of his claim's history as an argument that his Substantive Appeal deadline should have been equitably tolled, the argument is unavailing. The only problem the Court sees in any of the decisions or correspondence appellant cites is that the June 2004 letter the RO sent to appellant incorrectly specified that the April 2004 SOC related to an *April* 2002 rating decision instead of a *July* 2002 rating decision.[70] But the April 2004 SOC itself discussed the correct issue.[71] And while the June 2004 letter referred to the wrong rating decision, it provided the correct deadline for appellant to perfect a Substantive Appeal.[72] And in any event, appellant does not suggest that he filed an untimely Substantive Appeal because of VA's correspondence. As discussed above, appellant does not show that he ever filed a Substantive Appeal after the April 2004 SOC, so equitable tolling would not benefit him.

Appellant's argument that he did not respond to the RO's June 2004 letter because it referred to a decision that he "already timely" disagreed with similarly fails.[73] Appellant again appears to confuse an NOD, VA Form 21-0958, with a Substantive Appeal, VA Form 9. Appellant may have filed an NOD with the

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file appeals on a veteran's behalf, and the Board adequately explained why Mr. Frickey could not do so. *See* 38 C.F.R. § 20.301(a) (2018); *see also* R. at 10.

[70] *See* R. at 3002.

[71] *See* R. at 3006-15.

[72] *See* R. at 3002 (explaining that VA must receive a Substantive Appeal within 60 days of the date of the SOC and providing a deadline of June 20, 2004, for an SOC mailed on April 20, 2004).

[73] *See* Appellant's Br. at 19-20.

April and July 2002 rating decisions—but he did not file a Substantive Appeal after the April 2004 SOC, so he never perfected an appeal of either rating decision. The RO's June 2004 correspondence informed appellant that he needed to file a Substantive Appeal—something he had not done—and gave him the correct deadline to do so. So the Court cannot find any clear error in the Board's finding that the July 2002 rating decision became final.

Appellant next argues that he raised a service connection claim for cerebral degenerative disease secondary to malaria in his September 1999 claim and that the July 2002 rating decision never adjudicated that claim, so it remained pending.[74] The Court disagrees. A claim is considered denied when the RO discusses a claim "in terms sufficient to put the claimant on notice that it was being considered and rejected . . . even if the formal adjudicative language [does] not specifically deny that claim."[75] In *Adams v. Shinseki*,[76] the United States Court of Appeals for the Federal Circuit (Federal Circuit) found that an RO's decision that did not formally adjudicate a claim still implicitly denied the claim because it "alluded" to the claims "in a manner that put [appellant] on notice" that the claim was also denied.[77] And in *Deshotel v. Nicholson*,[78] the Federal Circuit found that an RO decision granting service connection for a head injury implicitly denied a claim for an acquired psychiatric

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[74] Appellant's Br. at 21-25.
[75] *Ingram v. Nicholson*, 21 Vet.App. 232, 255 (2007).
[76] *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009).
[77] *Id*. at 963.
[78] *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006).

condition because the RO found no evidence of psychiatric symptomatology.[79]

Appellant tries to distinguish his case by arguing that the RO considered only whether his "cerebral problems" were a symptom of malaria, not whether he was entitled to service connection for cerebral degenerative disease as a secondary condition.[80] But that distinction is irrelevant because it only speaks to which claim the RO formally adjudicated, and that is not the determinative factor in an implicit denial analysis.[81] The Board found that the RO implicitly denied appellant's claim for cerebral degeneration as secondary to malaria because both the July 2002 rating decision and April 2004 SOC considered and rejected the idea that appellant had cerebral symptoms resulting from malaria based on "unfavorable medical evidence."[82] And where appellant argues that the Board relied on an inadequate medical opinion, he cites no law that would allow a duty-to-assist error to abate the finality of an AOJ decision.[83] Because the July 2002 rating decision sufficiently discussed appellant's claim so as to give notice that it was denied and provide him a chance to appeal that denial, the Court sees no clear error in the Board's determination that the rating

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[79] *See id.* at 1261-62.

[80] Appellant's Br. at 23-24.

[81] *See, e.g.*, *Ingram*, 21 Vet.App. at 255.

[82] R. at 17, 3006-15, 3046-47.

[83] *See Nelson v. Principi*, 18 Vet.App. 407, 409-10 (2004) (reiterating that only two exceptions exist to the rule of finality: reopening a claim for new and material evidence and revising a decision based on CUE).

decision implicitly denied any claim for cerebral degeneration as secondary to malaria.[84]

C. Remand Compliance

Appellant contends that the Board violated the Court's February 2020 remand order.[85] "[A] remand by this Court to the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders."[86] That right extends to remands that result from the parties' JMR.[87] But VA must ensure only substantial, not absolute, compliance.[88]

Here, appellant argues that the remand "required that the Board apply *DeLisio*" and that the Board "refused to do so."[89] But appellant misconstrues the remand's terms. The parties agreed that the Board's March 22, 2019, decision was inadequate because "it did not address the *potential applicability* of the holding in *DeLisio v. Shinseki* . . . ."[90] The remand instructed the Board to "*address* the Court's holding in *DeLisio* and provide an adequate statement of reasons or bases for its determination of the effective date assigned for [a]ppellant's service connected cerebral degeneration."[91] And, despite appellant's contention, the remand does not suggest that the Secretary "agreed" that "the rationale in *DeLisio*"

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[84] *See Adams*, 568 F.3d at 963; *Ingram*, 21 Vet.App. at 255.
[85] Appellant's Br. at 25-28.
[86] *Stegall v. West*, 11 Vet.App. 268, 271 (1998).
[87] *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006).
[88] *Dyment v. West*, 13 Vet.App. 141, 146-47 (1999).
[89] Appellant's Br. at 26.
[90] R. at 167 (emphasis added).
[91] R. at 170 (emphasis added).

applied to this case.[92] The Board complied with the terms of the remand because it addressed *DeLisio* and explained why it did not apply to the effective date of appellant's cerebral degeneration.[93] In fact, the Board provided roughly seven pages of discussion on why *DeLisio* did not provide a way for appellant to obtain an earlier effective date.[94]

Appellant disagrees with the Board's application of *DeLisio*, but that does not prove that the Board violated the terms of the remand. If appellant separately argues that the Board erred in applying *DeLisio*, he again fails to carry his burden to prove prejudicial error.[95] As explained above, the Board provided an adequate statement of reasons or bases for finding that there was no pending service connection claim for cerebral degeneration stemming from either the 1987 or 1999 claims. And the Board also found that no new and material evidence "was received within one year of the July 2002 rating decision and not considered to prevent the decision from becoming final."[96] While appellant disagrees that no new and material evidence was added within a year of the July 2002 decision, he overlooks a relevant part of the Board's finding. All the evidence appellant cites was of record when the RO issued the

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[92] Appellant's Br. at 27.

[93] R. at 11-18.

[94] *Id.*

[95] *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table) ("An appellant bears the burden of persuasion on appeals to this Court ").

[96] R. at 14.

April 2004 SOC.[97] Appellant identifies no new and material evidence that the RO failed to consider. Thus, appellant proves no clear error in the Board's finding that this case is unlike *DeLisio* and that applying *DeLisio* cannot provide an earlier effective date.

D. Other Arguments

Finally, appellant argues that the Board failed to afford him the benefit of the doubt when deciding his claim.[98] But appellant does not argue that the Board improperly applied the law. Instead, he contends that the Board failed to explain why the preponderance of the evidence was against his claim. In support of that assertion, appellant merely cites back to his earlier arguments.[99] Because the Court has found that appellant's other arguments cannot prove that the Board clearly erred, his argument on the benefit of the doubt necessarily fails.

II. CONCLUSION

For these reasons, the Court AFFIRMS the October 27, 2020, Board decision.

DATED: July 11, 2022

Copies to:

Falen Marie LaPonzina, Esq.

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[97] *See* Appellant's Br. at 27.
[98] *Id.* at 28-29; *see also* 38 U.S.C. § 5107(b).
[99] *See* Appellant's Br. at 28-29.

VA General Counsel (027)

APPENDIX D

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

JULIEN P. CHAMPAGNE

Represented by

Falen M. LaPonzina, Attorney

C 20 579 772

Docket No. 16-50 939

Advanced on the Docket

DATE: October 27, 2020

ORDER

Entitlement to an earlier effective date prior to July 14, 2003 for the grant of service connection for cerebral degeneration of all extremities secondary to service-connected malaria is denied.

FINDINGS OF FACT

1. On August 31, 1999, the RO received an initial claim for service connection for malaria and any residual disability from malaria.

2. The August 1999 claim was denied in May and September 2000 rating decisions, and was then reconsidered in June 2001 due to a change in the law, which also resulted in a denial.

3. New and material evidence was received within a year of the June 2001 decision that was considered in an April 2002 rating decision that also denied service connection for malaria.

4. In June 2002, the Veteran filed a notice of disagreement.

5. A July 2002 rating decision granted service connection for malaria and assigned a noncompensable rating, effective November 15, 2001; the decision also implicitly denied service connection for cerebral degeneration as a disability related to malaria. The Veteran was notified of this decision in August 2002.

6. In a July 2003 notice of disagreement, the Veteran appealed the initial rating assigned for malaria and denial of cerebral degeneration, but he did not perfect his appeal by filing a timely substantive appeal after the April 2004 statement of the case was issued.

7. Service connection was granted for cerebral degeneration secondary to malaria in a November

2013 rating decision with an effective date of February 3, 2005; a January 2018 rating decision found clear and unmistakable error in the November 2013 rating decision and assigned an earlier effective date of July 14, 2003.

8. The January 2018 rating decision did not vitiate the finality of the July 2002 rating decision.

9. There was no pending claim stemming from the September 1987 pension claim or the August 1999 original claim for disability benefits.

CONCLUSIONS OF LAW

1. The Veteran's August 31,1999 claim for service connection for malaria and its residuals is no longer pending. 38 U.S.C. § 5108; 38 C.F.R. § 3.156(b).

2. The July 2002 rating decision that granted service connection for malaria and denied service connection for any residual disability and the previous rating decisions addressing service connection for malaria and its residuals, are final. 38 U.S.C. § 7105(c); 38 C.F.R. §§ 3.104, 20.302, 20.1103.

3. The criteria for entitlement to an effective date prior to July 14, 2003 for the award of service connection for cerebral degeneration have not been met. 38 U.S.C. §§ 5110; 38 C.F.R. §§ 3.155(a) (in effect prior to March 24, 2015); 3.156(b), 3.400.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from December 1953 to December 1956.

This matter is on appeal before the Board of Veterans Appeals (Board) from a November 2013 rating decision of a Department of Veterans Affairs (VA) Regional Office (RO).

In November 2018, a Board hearing was held before the undersigned; a transcript of the hearing is of record.

In March 2019, the Board denied an earlier effective date for the grant of service connection for cerebral degeneration. The Veteran appealed this decision to the Court of Appeals for Veterans Claims (Court). In February 2020, the Court granted a Joint Motion for Remand (JMR), vacated the Board decision, and remanded the matter. *See* February 2020 CAVC Decision.

Entitlement to an earlier effective date for the grant of service connection for cerebral degeneration of all extremities secondary to service-connected malaria.

Effective March 24, 2015, VA amended its regulations to require that all claims governed by VA's adjudication regulations be filed on a standard form. *See* 79 Fed. Reg. 57,660 (Sept. 25, 2014), codified as amended at 38 C.F.R. §§ 3.151, 3.155. The amended regulations apply only to claims filed on or after March 24, 2015. Because the claim in this case was

received by VA prior to that date, the former regulations apply, which are listed below.

Generally, the effective date of an award of disability compensation based on an original claim shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400. If a claim is filed within one year after separation from service, service connection will be effective as of the day after separation. 38 C.F.R. § 3.400(b)(2).

A claim is defined as a 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 (1) indicates an intent to apply for one or more VA benefits and (2) identifies the benefit sought may be considered an informal claim. 38 C.F.R. § 3.155(a). When determining the effective date of an award of compensation benefits, VA must review all the communications in the file that could be interpreted to be a formal or informal claim for benefits. *Servello v. Derwinski*, 3 Vet. App. 196, 198 (1992).

VA must look to all communications from a veteran which may be interpreted as applications or claims - formal and informal -for benefits. VA has a duty to fully and sympathetically develop the Veteran's claim to its optimum, which includes determining all potential claims raised by the evidence and applying all relevant laws and regulations. *Harris v. Shinseki*, 704 F.3d 946, 948-49 (Fed. Cir. 2013); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001).

A claim by a veteran for pension may be considered a claim for compensation and vice-versa. 38 C.F.R. § 3.151(a).

New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed, will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b). The Federal Circuit has held that if VA receives new evidence within the appeal period of an AOJ decision, it must be considered according to 38 C.F.R. § 3.156(b). If such consideration is not performed, the underlying claim does not become final but rather it remains pending. *See Beraud v. McDonald*, 766 F.3d 1402, 1406-07 (Fed. Cir. 2014).

Under Section 7(b) of the Veterans Claims Assistance Act (VCAA), claims that were denied as not well grounded and became final between July 14, 1999, and the date of the enactment (November 9, 2000), would be re-adjudicated as if the denial or dismissal had not been made, but only if a request was made by the claimant within two years of the date of enactment (or upon motion by the Secretary of VA). *See* Pub. L. No. 106-475, § 7, subpart (b), 114 Stat. 2096 (2000).

The Veteran has stated in his July 2014 notice of disagreement (NOD), September 2016 Form 9, and November 2018 video conference hearing that his symptoms started long before the current effective date and that he filed a claim for benefits for his cerebral degeneration in September 1987.

The record shows that the Veteran initially filed a VA Form 21-526, "Veteran's Application for Compensation or Pension," which was received by VA on September 3, 1987. On this application, the Veteran indicated that the only previous claim for VA benefits he had filed was a claim for VA educational benefits. The disability listed was cerebellar degeneration disorder. Based on the information included in this claim and accompanying medical evidence, non-service connected pension was granted in a December 1987 decision effective September 3, 1987, for cerebellar degeneration and hypertension.

The Board finds that the 1987 claim indicated that he was seeking non-service connected pension, as he completed all the requisite financial information, and did not include information that would lead one to believe he was seeking disability compensation benefits. Most notably, in the sections of the application form that a claimant is instructed to complete if seeking compensation for a disability incurred in service, he wrote, "N/A." In light of the sections he did complete and the ones in which he only entered "N/A" there is no suggestion of an intention on his part to make a claim for service connected disability benefits in addition to the non-service connected pension benefits. Under these circumstances there was no requirement for VA to consider the claim for pension as also one for compensation. 38 C.F.R. § 3.151(a).

The Veteran's initial claim for compensation benefits was received on August 31, 1999. He stated he was seeking service connection for malaria and any residual illnesses. *See* August 1999 Statement in

Support of Claim. This claim was denied in May 2000 and September 2000 as not well-grounded. After the VCAA was enacted the well-grounded standard was no longer used, so the RO reconsidered the Veteran's claim under the new law and again denied the claim in June 2001. *See* June 2001 Notification Letter.

In a November 2001 statement, the Veteran reported that he had malaria in service and believed that it caused cerebellum damage. He started having problems with his speech and balance in his late 20's. Thus, he believed the cerebellar disorder should be service connected. *See* November 2001 Correspondence. In January 2002, the RO considered this a "reopened claim," and noted that the September 2000 rating decision that denied service connection for malaria was final. *See* January 2002 VCAA/DTA Letter.

An August 2001 VA treatment record, received in January 2002, indicated that the Veteran's malaria in service was possibly but not very likely related to his current cerebellar problems. *See* January 2002 Medical Treatment Record – Government Facility.

In April 2002, the RO denied the claim for entitlement to service connection for malaria. The Veteran initiated an appeal by filing a NOD in June 2002 and the claim was granted in a July 2002 rating decision issued in August 2002. The RO assigned a noncompensable rating for malaria, effective November 15, 2001, based on findings that there was no evidence of recurrent malaria attacks and that the Veteran's cerebellar problem was not related to his

malaria. It was noted that the benefits sought "have been granted in full."

The Veteran filed a NOD with the initial rating and cerebral problems, which was received on July 14, 2003, and the RO issued a statement of the case (SOC) in April 2004. In May 2004, a VA claimant advocate, L.J.F., submitted a statement which requested "please consider this letter as a request for a formal appeal." It was noted that "a power of attorney to represent the [V]eteran will follow shortly." This statement was not accepted by the RO as a valid formal appeal, because it was submitted and signed by an individual who was not associated with the Veteran's recognized representative, the America Legion. 38 C.F.R. § 20.301(a). A June 7, 2004 RO correspondence informed the Veteran of this and that he had until June 20, 2004 to perfect his appeal; however, he did not submit a valid substantive appeal on his own or have his recognized representative (the American Legion) submit one on his behalf. Correspondence authorizing L.J.F. to act as the Veteran's representative in the requisite time period is not of record. Consequently, the Veteran took no action to properly perfect the appeal of the July 2002 rating decision within the prescribed period of time.

A February 3, 2005 correspondence again raised the issue concerning the residuals of his malaria, which was denied in an April 2005 rating decision. The appeal of this decision led to the September 2013 Board decision that granted service connection for cerebellar degeneration secondary to his malaria. The RO effectuated the Board decision in a November

2013 rating decision and assigned a 100 percent rating, effective February 3, 2005.

The Veteran perfected his appeal for an effective date earlier than February 2005 for the grant of service connection for cerebral degeneration. During the appeal, a January 2018 rating decision found clear and unmistakable error (CUE) in the November 2013 rating decision and established an earlier effective date of July 14, 2003 for cerebral degeneration. The RO concluded that the July 14, 2003 NOD was an informal claim for service connection for cerebral degeneration, secondary to malaria. As this was only a partial grant of the benefit sought, the Veteran continued his appeal for an earlier effective date.

The errors the JMR identified in the Board's March 2019 decision that denied an earlier effective date were that the Board did not discuss *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011) and did not clearly explain why the Veteran's claim for malaria was not considered pending. The JMR noted that the July 2003 correspondence, which discussed symptoms of speech and balance problems since the 1960's, was submitted within one year of the rating decision that granted service connection for malaria. *See* February 2020 CAVC Decision.

Although the JMR did not explain what the parties considered a pending "claim for malaria," the Veteran's attorney offered additional argument in April 2020 correspondence concerning deficiencies in the Board's March 2019 decision. He stated that the Board neglected to explain why the RO granted an effective date of July 14, 2003. He also asserts that

because service connection for malaria was established effective November 15, 2001 that, under *DeLisio*, the effective date for the secondary disability should also be no later than November 15, 2001. He added that because the Board decision conceded that the June 2001 rating decision was a reconsideration of denials of an August 31, 1999 claim then this is also a plausible effective date. *See* April 2020 Third Party Release of Information.

The attorney also noted that the Board found that the Veteran had not filed a timely appeal of the July 2002 rating decision; which rendered it final. He asserted that the Board was required to determine whether the January 2018 rating decision that established the July 14, 2003 effective date vitiated the finality of the July 2002 rating decision, which would warrant application of *DeLisio*. *See* April 2020 Third Party Release of Information.

Regarding this statement, the attorney appears to be unclear as to why the RO established an effective date of July 14, 2003 and concludes that it was based on error in the July or April 2002 rating decision; thus, substantiating at least a November 15, 2001 effective date for the secondary disability of cerebral degeneration. *See* April 2020 Third Party Release of Information. The attorney's understanding of the January 2018 rating decision is inconsistent with the explanation the RO provided in its decision. The codesheet associated with the January 2018 rating decision explicitly states:

> [T]he following clear and unmistakable error has been identified: The rating

> decision dated November 22, 2013, was clearly and unmistakably in error for failure to assign an earlier effective date than February 03, 2005, for entitlement to service connec[ti]on for cerebral degeneration affecting all extremities and speech (previously considered as cerebral degeneration with balance and speech problems). The effective date assigned was based on the date of an informal conference at which the [V]eteran reported that he believed this disability was caused by the malaria for which he was treated in service. However, during the course of his a[p]peal for entitlement to service connection for malaria, the [V]eteran submitted a statement on July 14, 2003, on which he reported that he believed this disability was caused by malaria. That informal claim was never addressed.

See January 2018 Rating Decision – Codesheet. Thus, it is obvious that the RO found CUE in the November 2013 rating decision based on the finding that there was an unadjudicated claim in July 2003; they did not find error in any earlier rating decision.

Concerning the assertion that the January 2018 rating decision vitiated the finality of the July 2002 rating decision, the Board must first address whether the July 2002 rating decision was final. To do so, it is important to understand the when a claim is pending and when a decision on a claim is final. By regulation,

a pending claim is defined as a claim which has not been finally adjudicated. *See* 38 C.F.R. § 3.160(c). A claim is finally adjudicated when the period in which to file a notice of disagreement has expired or there is a disposition on appellate review, whichever comes first. *See* 38 C.F.R. § 3.160(d). A decision on a claim by the agency or original jurisdiction is also final if an appeal is not perfected as prescribed in 38 C.F.R. § 20.302. *See* 38 C.F.R. § 20.1103.

As previously noted, the Veteran initiated an appeal by filing an NOD for the July 2002 rating decision but he did not complete the appeal process within the prescribed period of time after the SOC was issued. *See* 38 U.S.C. § 7105(c); 38 C.F.R. §§ 20.302, 20.1103. Consequently, the rating decision became final.

There are limited exceptions to the finality of a decision. The first is under 38 U.S.C. § 5108 and applies when VA reopens a claim after new and material evidence is obtained. This essentially does not disturb the finality of the prior decision; instead it allows the claim to be considered anew and if decided favorable, the effective date may be no earlier than the date the new claim was received. 38 C.F.R. § 3.400. The second is under § 5109A(a) and applies when a final decision is subject to revision due to CUE. Of these two options, only evidence of CUE in an earlier decision could result in an earlier effective date.

In establishing the July 2003 effective date for the secondary disability, the RO did not find CUE in the July 2002 rating decision, nor has the Veteran or his attorney specifically alleged there was CUE. As CUE in the July 2002 rating decision has not been raised,

it will not be addressed as a basis for vitiating its finality.

Closely associated with these exceptions is when a rating decision is not actually shown to be final. This can occur when new and material evidence is received within one year of the rating decision and the claim is not readjudicated. *See* 38 C.F.R. §§ 3.156(b). It can also occur when the record shows that there was an earlier unadjudicated claim. Thus, a claim remains open and pending when VA fails to adjudicate it. *See* 38 U.S.C. §§ 5104, 7105.

In the present case, the RO established the current July 2003 effective date based on what the RO believed was an earlier unadjudicated claim. As for new and material evidence, none was received within one year of the July 2002 rating decision and not considered to prevent the decision from becoming final. Even though the January 2018 rating decision established an effective date for the grant of secondary service connection for cerebral degeneration within a year of this decision, it does change the fact that the favorable evidence relied upon in granting the effective date was not received within one year of the July 2002 rating decision. Thus, 38 C.F.R. § 3.156(b) does not apply.

DeLisio addressed another method for establishing an earlier effective date involving unadjudicated claims. In that case, there was an unadjudicated claim for peripheral neuropathy that was still pending when the Veteran filed claims for service connection for diabetes mellitus and peripheral neuropathy many years later. Since diabetes mellitus was shown to be

related to service and peripheral neuropathy secondary to diabetes mellitus, the Court essentially found that the earlier unadjudicated service connection claim for peripheral neuropathy reasonably encompassed the later service connection claim for diabetes mellitus, since the evidence linking the two was of record when the earlier claim for the secondary disability was received. Consequently, the primary disability could have the same effective date as the secondary disability based on the earlier unadjudicated claim.

Specifically, the Court held that "when a claim is pending and information obtained reasonably indicates that the claimed condition is caused by a disease or other disability that may be associated with service, the Secretary generally must investigate the possibility of secondary service connection; and, if that causal disease or disability is, in fact, related to service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability, such that no separate filing is necessary to initiate a claim for benefits for the causal disease or disability, and such that the effective date of benefits for the causal disability can be as early as the date of the pending claim." *See DeLisio* at 55.

DeLisio is dissimilar to the current appeal because it addressed a situation in which there is an unadjudicated claim for a secondary disability when a later claim was filed for the primary disability; here, there was no prior unadjudicated claim for cerebral degeneration prior to the Veteran filing for service connection for malaria. The JMR must, therefore, be suggesting that *DeLisio* also applies when the reverse

is true because the parties have indicated that the pending claim was for malaria, which was the primary disability. Even if *DeLisio* did apply in this scenario, it does not apply in this case since there was no pending claim for malaria. Once service connection for malaria was granted in the July 2002 rating decision that decision was a full grant of the benefit sought, so the service connection claim was not pending in July 2003.

The Board finds it is more likely that the attorney and JMR are suggesting that *DeLisio* applies to the downstream issue involving the initial rating for malaria as this was pending in July 2003. Thus, the Board must address whether the service connection claim for cerebral degeneration reasonably encompassed the initial rating for malaria. If one were to consider the applicability of *DeLisio* in this context, the fact patterns of the two cases would still differ greatly, but what they are suggesting is no different from how claims involving disability ratings are typically adjudicated. For example, if service connection for a low back disability was granted, in rating the disability consideration would also be given to whether a separate rating was warranted if the evidence also showed that the Veteran had radiculopathy associated with the lumbar disability. Thus, the initial rating for the primary disability would encompass rating any secondary disabilities that were shown to be present. As will be discussed in more detail below, this was already addressed by the RO in the July 2002 rating decision.

Keeping the Court's holding in mind, the Board finds that to apply *DeLisio* in the present case, the

record must show that while one claim was pending there must also be information obtained to show that that the two disabilities are related and that one of them may be related to service. The dilemma in applying *DeLisio* to the current appeal goes back to determining when is a claim considered to be pending.

As previously discussed, a claim is pending if it has not been finally adjudicated. The Veteran's attorney appears to argue that the act of the RO establishing an effective date of July 14, 2003 for cerebral degeneration when the initial rating for malaria was still pending entitled the secondary disability to have the same effective date, if not earlier, as malaria, which is the primary disability.

Unlike *DeLisio*, no information was obtained in the current case that linked the Veteran's cerebral degeneration to his malaria while any claim associated with malaria was pending. Favorable nexus evidence was not obtained until July 2008, many years after the July 2002 rating decision became final. *See* July 2008 Medical Treatment Record – Non-Government Facility. In January 2018, the RO made a very favorable finding that there was CUE in the November 2013 rating decision on the basis that there was an informal claim in July 2003 for the secondary disability that was not addressed. The RO then granted an earlier effective date of July 15, 2003 for cerebral degeneration. While this action made the secondary disability effective while the initial rating for malaria was pending, the favorable evidence relied upon did not exist from a chronological standpoint when the downstream issue rating malaria was still pending. Furthermore, while the

Board accepts the effective date assigned, the reasoning behind it is faulty and inconsistent with the record, since the July 2002 rating decision included an implicit denial of service connection for cerebral degeneration. Therefore, to apply *DeLisio* as suggested by the Veteran's attorney would only compound the misapplication of the law.

Under the implicit denial rule, in certain circumstances, a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if VA did not expressly address that claim in its decision. *See Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009). The Federal Circuit held that "where the veteran files more than one claim with the RO at the same time, and the RO's decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run." *See Deshotel v. Nicholson*, F.3d 1258, 1261 (Fed. Cir. 2006).

The record shows that the July 2003 correspondence from the Veteran was an NOD and not a new unadjudicated claim. From the very beginning when the Veteran filed his first claim for disability benefits in August 1999, he has consistently included residual illnesses with his claim for entitlement to service connection for malaria. Significantly, his secondary disability was already considered when service connection for malaria was granted and rated in the July 2002 rating decision.

In rating the Veteran's malaria, the July 2002 rating decision not only considered whether there

were recurrent attacks of malaria, but it also considered and rejected inclusion of cerebral degeneration based on unfavorable medical evidence that found the two disorders to be unrelated. Even though cerebral degeneration was not listed as a secondary service connection issue in the July 2002 rating decision, the fact that it was discussed and found to be unrelated to the Veteran's malaria supports the Board's finding that the secondary disability was implicitly denied. Consequently, since the July 2003 NOD included a statement that addressed malaria and its residuals, including speech and balance problems, the appeal reasonably included the initial rating for the malaria but also the denial for any residual illnesses including his cerebral problems.

This was followed by the April 2004 SOC which also addressed both issues and considered the physician's unfavorable opinion as well as the Veteran's lay statements concerning symptoms associated with his cerebral degeneration. Of note, the SOC stated:

> A report by staff physician at New Orleans VAMC, Dr. Dejace, indicated that it is not very likely that your current cerebellar problem was cause[d] by Malaria because Cerebral Malaria is usually caused by Plasmodium falciparum, which does not recur. He indicates if you had another type of Plasmodium infection (vivax or malariae) there would be evidence of recurring disease in your past medical history and none is shown.

> You indicated in your notice of disagreement that you must have been disabled during active military service, because you were not shown to have the problems present following, your release. You provided statements from various correspondents to substantiate your claim.
>
> Statements from [redacted for privacy] received 07-14-03 report that they witnessed you with deteriorating speech pattern and difficulty ambulating following your release from active duty. The correspondents did not indicate that either were health care professionals.

Thus, the residuals of malaria involving cerebral degeneration was always considered part of the Veteran's claim for service connection for malaria, to include the downstream rating issue, and was contemplated in the July 2002 rating decision and the April 2004 SOC. When the Veteran did not perfect the appeal, the July 2002 decision that addressed both issues became final. As the original claim was filed in August 1999, the finality of the July 2002 rating decision meant that there was no longer a pending claim.

Therefore, to apply *DeLisio* in light of the entire record, the Board would have to ignore the fact that the July 2002 was a final denial concerning cerebral degeneration, that there was no new relevant evidence linking the cerebral degeneration to malaria when any claim associated with malaria was pending

to include within one year of the July 2002 rating decision, and that the effective date established for cerebral degeneration was not consistent with the record. As this would require misapplication of the law and stray far from what factually and procedurally occurred in *DeLisio,* the case is not applicable.

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In short, the Board finds that July 2002 rating decision is final, the January 2018 rating decision did not vitiate the finality of the decision, and there was no unadjudicated claim associated with malaria pending when information was received that linked cerebral degeneration to malaria. For the reasons stated, the Board finds that a preponderance of the evidence is against an effective date prior to July 14, 2003 for the grant of service connection for cerebral degeneration.

S. Heneks

S. HENEKS
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board D. Bredehorst

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

APPENDIX E

RELEVANT REGULATION

38 C.F.R. § 3.151 - CLAIMS FOR DISABILITY BENEFITS

(a) General. A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit. (See scope of claim, § 3.155(d)(2); complete claim, § 3.160(a); supplemental claims, § 3.2501(b)).

(b) Retroactive disability pension claims. Where disability pension entitlement is established based on a claim received by VA on or after October 1, 1984, the pension award may not be effective prior to the date of receipt of the pension claim unless the veteran specifically claims entitlement to retroactive benefits. The claim for retroactivity may be filed separately or included in the claim for disability pension, but it must be received by VA within one year from the date on which the veteran became permanently and totally disabled. Additional requirements for entitlement to a retroactive pension award are contained in § 3.400(b) of this part.

(c) Issues within a claim.

(1) To the extent that a complete claim application encompasses a request for more than one determination of entitlement, each specific entitlement will be adjudicated and is considered a separate issue for purposes of the review options prescribed in § 3.2500. A single decision by an agency of original jurisdiction may adjudicate multiple issues in this respect, whether expressly claimed or determined by VA to be reasonably within the scope of the application as prescribed in § 3.155(d)(2). VA will issue a decision that addresses each such identified issue within a claim. Upon receipt of notice of a decision, a claimant may elect any of the applicable review options prescribed in § 3.2500 for each issue adjudicated.

(2) With respect to service-connected disability compensation, an issue for purposes of paragraph (c)(1) of this section is defined as entitlement to compensation for a particular disability. For example, if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected. However, different review options may not be selected for specific components of the knee disability claim, such as ancillary benefits, whether a knee injury occurred in service, or whether a current knee condition resulted from a service-connected injury or condition.

(d) Evidentiary record. The evidentiary record before the agency of original jurisdiction for an initial or supplemental claim includes all evidence received by VA before VA issues notice of a decision on the claim. Once the agency of original jurisdiction issues notice of a decision on a claim, the evidentiary record closes as described in § 3.103(c)(2) and VA no longer has a duty to assist in gathering evidence under § 3.159. (See § 3.155(b), submission of evidence).