Nitsch v. Nicholson

United States Court of Appeals for Veterans Claims

May 14, 2007, Decided

NO. 05-3302

Reporter
2007 U.S. App. Vet. Claims LEXIS 740 *

CLAYTON D. NITSCH, APPELLANT, v. R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Notice: [*1] DESIGNATED FOR ELECTRONIC PUBLICATION ONLY

PURSUANT TO U.S. VET. APP. R. 30(a), THIS ACTION MAY NOT BE CITED AS PRECEDENT.

Case Summary

Procedural Posture
Appellant veteran, through counsel, appealed an October 24, 2005, decision of the Board of Veterans' Appeals affirming a reduction and denying an increase in his disability rating for degenerative disc disease of the lumbar spine. Appellee was the Secretary of Veterans Affairs.

Overview
The appeal raised three questions. (1) when was the veteran's increased rating claim filed? (2) what versions of 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5293 were in effect while this claim was pending? and (3), assuming more than one version was in effect, did the Board select and apply the right one? The veteran argued that his informal increased rating claim was filed and pending prior to September 23, 2002, that an earlier version was in effect at this time, and that the Board therefore erroneously evaluated his disability under the later version. The court held that a Department of Veterans Affairs (VA) medical report related to a service-connected disability was an informal claim, and that this claim remained pending unless and until it was adjudicated by VA or otherwise abandoned by the veteran. Next, the Board's failure to fully consider and apply 38 C.F.R. § 3.157(b) was arbitrary and capricious. Finally, the application of the revised version of the DC to the pending claim had a retroactive effect. The Board had to apply the older version if it determined on remand that the veteran filed an informal claim before September 23, 2002, the date the revision was effective.

Outcome
The Board's October 24, 2005, decision was vacated and the matter was remanded to the Board for further proceedings as to determining whether an informal claim had been filed.

Judges: Before LANCE, Judge.

Opinion by: LANCE

Opinion

MEMORANDUM DECISION

LANCE, *Judge*: The appellant, Clayton D. Nitsch, through counsel, appeals an October 24, 2005, Board of Veterans' Appeals (Board) decision affirming a reduction and denying an increase in his disability rating for degenerative disc disease of the lumbar spine. Record (R.) at 1-24. The appellant and the Secretary have filed briefs. 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 October 24, 2005, decision and remand the matter

for further proceedings consistent with this decision.

I. FACTS

The appellant served in the U.S. Army from March 1969 to December 1970. R. at 28. He was initially granted service connection for degenerative disc disease of the lumbar spine in November 1995. R. at 54. At that time, his [*2] condition was assigned a 10% disability rating. R. at 54.

The record indicates that the appellant has continuously received VA treatment for his condition since January 2001. R. at 107, 114. In particular, the appellant apparently received treatment for a variety of back ailments between January 2001 and April 2002, diagnosed as cervical spinal stenosis, bulging discs, herniated nucleus pulposus of the lumbosacral spine, cervical spondylosis, and degenerative changes of the lumbosacral spine. R. at 125, 133, 137, 148, 152.

On August 22, 2002, the Secretary issued a final rule revising the rating schedule for disabilities of the spine. 67 Fed. Reg. 54349 (Aug. 22, 2002); *see* 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5293 (2006). These revisions went into effect on September 23, 2002.

In October 2002, the appellant's attorney sent a letter to the Lincoln, Nebraska VA regional office (RO). This letter requested a new VA medical examination of the appellant because his condition had worsened. R. at 34. The RO later construed this letter as an informal claim for an increased disability rating. R. at 39, 52, 70. VA performed the requested VA examination [*3] in December 2002. R. at 43-46, 63-64.

In January 2003, the RO increased the appellant's disability rating to 20%, effective October 31, 2002, the date VA received his attorney's letter requesting a new medical examination. R. at 52-56. In February 2003, the appellant filed a Notice of Disagreement (NOD) with the RO's rating decision and requested further review by a decision review officer (DRO). R. at 58-60. Three days later, the DRO increased the appellant's disability rating to 60%, effective October 31, 2002. R. at 70. In so doing, the DRO applied the schedular rating as it existed prior to September 23, 2002, because his "spine was rated prior to the change in the law on this date." R. at 71. The DRO also issued a statement of the case (SOC) at that time. R. at 79-93. Thereafter, the appellant perfected his appeal to the Board. R. at 95-96.

In June 2003, the RO sent a letter to the appellant stating that there was clear and unmistakable error (CUE) in the DRO's rating decision. R. at 100-105. The RO explained that the DRO should have applied the revised version of DC 5293 when assigning his disability rating, because the appellant's claim was filed in October 2002, after the [*4] revised provision went into effect. R. at 101. The RO further explained that, under the new provision, the appellant was only entitled to a 20% rating for his disability, and that this reduction would take effect as of April 1, 2004. R. at 101.

In January 2004, the RO issued a formal rating decision authorizing the proposed reduction in the appellant's disability rating from 60% to 20%, effective April 1, 2004. R. at 205-210. In February 2004, the appellant filed an NOD with the RO's rating decision. R. at 212-213. The RO issued an SOC in May 2004, and the appellant perfected his appeal to the Board the following month. R. at 264-266.

In October 2004, the Board remanded the case to the RO for readjudication. R. at 268-275. In February 2005, the RO issued a supplemental SOC. R. at 297-320. The appellant perfected his appeal from this decision to the Board in April 2005.

On October 24, 2005, the Board issued the decision here on appeal. R. at 1-24. The Board found that the appellant filed his increased disability rating claim in October 2002. R. at 4. The Board also found that the DRO's February 2003 rating decision contained CUE, because the version of DC 5293 in effect as of September 23, 2002, had [*5] not been applied. R. at 13. The Board further found that the RO properly reduced the disability rating for the appellant's degenerative disc disease of the lumbar spine from 60% to 20%, effective April 1, 2004, (*id.*), and that the appellant was not entitled to a disability rating higher than 20% for his back condition R. at 18.

II. ANALYSIS

Three questions are raised in this appeal. First, when was the appellant's increased rating claim filed? Second, what versions of DC 5293 were in effect while this claim was pending? Third, assuming that more than one version was in effect, did the Board select and apply the right one? The appellant argues that his informal increased rating claim was filed and pending prior to September 23, 2002. He further argues that an earlier version of DC 5293 was in effect at this time, and that the Board therefore erroneously evaluated his back disability under the later version of DC 5293. Appellant's Brief (Br.) at 7-9. The Secretary argues that the appellant did not file his increased rating claim until October 2002, more than a month after the new version of DC 5293 became effective. The Secretary therefore argues that the Board correctly [*6] evaluated his back disability under the post-September 23, 2002, version of DC 5293. Br. at 7-10.

A. Informal Claim Based on a VA Medical Report

1. *Statutory and Regulatory Framework*

A VA medical report can qualify as an informal claim. *See* 38 C.F.R. § 3.157(b) (2006); *Servello v. Derwinski*, 3 Vet. App. 196, 200 (1992); *Norris v. West*, 12 Vet. App. 413 (1999). Specifically, "where . . . a claimant's formal claim for compensation has already been allowed, receipt of, inter alia, a VA report of examination will be accepted as an informal claim filed on the date of the examination." *Servello*, 3 Vet. App. at 198. Paragraph (a) of § 3.157 provides, in relevant part:

> A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or Department of Veterans Affairs issue, if the report relates to a disability which may establish entitlement.

38 C.F.R. § 3.157(a) (2006). Paragraph (b) of § 3.157 further provides, in relevant part:

> Once a formal [*7] claim for . . . compensation has been allowed . . ., receipt of one of the following will be accepted as an informal claim for increased benefits. . . . *Report of examination or hospitalization by Department of Veterans Affairs or uniformed services.* The date of outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of a claim. . . . The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within one year from the date of such examination, treatment or hospital admission.

38 C.F.R. § 3.157(b), (b)(1) (emphasis in original). The Board's determination of whether an informal claim has been filed is a mixed question of law and fact subject to review by this Court under the deferential "arbitrary" and "capricious" standard prescribed in 38 U.S.C. § 7261(a)(3)(A). *Westberry v. West*, 12 Vet. App. 510, 513 (1999); *see also Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) [*8] (remanding for a factual inquiry into "whether the [Board], as required by *Roberson*, sympathetically read [the veteran's] filings prior to [the assigned effective date] in determining whether [the veteran] made an informal claim"); *Beverly v. Nicholson*, 19 Vet. App. 394, 405 (2005) ("the question of whether a sympathetic reading of prior filings raises an informal claim for benefits is essentially a factual inquiry") (citing *Moody*, supra). However, the Board's determination of the actual date an informal claim was filed is a factual finding subject to review by this Court under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *Lalonde v. West*, 12 Vet. App. 377, 380 (1999) (citing *Stewart v. Brown*, 10 Vet. App. 15, 17 (1997); *KL v. Brown*, 5 Vet. App. 205, 207 (1993); *Quarles v. Derwinski*, 3 Vet. App. 129, 135 (1992)).

The Secretary has substantially changed 38 C.F.R. § 3.157 since its adoption. *See* 26 Fed. Reg. 1571 (Feb. 24, 1961). First and foremost, the circumstances under which a VA medical report [*9] will constitute an informal claim have been clarified. For instance, while the original version of the regulation provided that a VA medical report would be accepted as an informal claim, it did not specify whether such a report had to relate to a service-connected disability to acquire this status. *Id.* In December 1962, the Secretary sought to resolve this ambiguity by amending 38 C.F.R. § 3.157. *See* 27 Fed. Reg. 11887 (Dec. 1, 1962). This amendment provided that a VA medical "report . . . which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law[,] . . . liberalizing law[,] or Veterans Administration issue, if the report relates to a disability which may establish entitlement." 27 Fed. Reg. 11887 (Dec. 1, 1962); *see* 38 C.F.R. § 3.157(a). The Secretary went even further in his July 1987 amendment, making clear that a VA medical report only qualifies as an informal claim "when such reports relate to examination or treatment of a disability for which service-connection has previously been established[;]" otherwise, "a claim specifying the benefit sought [must [*10] be] received within one year from the date of such examination, treatment, or hospital admission." 52 Fed. Reg. 27340 (July 21, 1987) (amending Paragraph (b)(1) of the current version of 38 C.F.R. § 3.157). Second, the Secretary has recently brought claims based on VA medical reports within the general provision defining informal claims. In July 1987, the Secretary added paragraph (c) to 38 C.F.R. § 3.155. *Id.* In its amended and now current form, this provision provides that "[w]hen a claim has been filed which meets the requirements of § 3.151 or § 3.152 [(defining formal disability and death benefits claims)], an informal request for increase or reopening will be accepted as a claim." 38 C.F.R. § 3.155(c) (referencing 38 C.F.R. § 3.157). Finally, the Secretary has not significantly altered his original position regarding the effective date assigned to an informal claim based on a VA medical report. *Cf.* 26 Fed. Reg. 1571 (February 24, 1961) *with* 38 C.F.R. § 3.157(a).

2. *Relevant Cases*

There are several cases [*11] relevant to the disposition of the issues presented on appeal. The first is *Servello v. Derwinski*, where the Court held that a VA medical report of a service-connected disability qualified as an informal claim for total disability based on individual unemployability (TDIU). 3 Vet. App. at 197. The relevant facts of the case were as follows. *Id.* 197-198. In December 1983, the veteran was

initially granted service connection for a psychiatric disorder. *Id.* In May 1985, he received a VA psychiatric examination. *Id.* at 199. The report from this examination concluded that "the veteran suffered from [post traumatic stress disorder] which 'has resulted in profound interference with his social and economic [sic] adjustment.'" *Id.* Several months after this examination, the veteran filed a formal TDIU claim application with the RO. *Id.* at 198. On appeal, the Board granted the veteran TDIU, effective January 1987, the date he filed his formal claim. *Id.* This Court held on appeal that the May 1985 VA examination report was an informal claim for TDIU as a result the veteran's service-connected psychiatric disorder. [*12] *Id.* at 200 (citing 38 C.F.R. § 3.157(b)(1)). The Court therefore concluded that the Board clearly erred when it determined that January 1987 was the appropriate effective date for his claim. *Id.*

This appeal is distinguishable from *Servello* in at least two respects. First, *Servello* dealt only with the effective date assigned to an informal claim based on a VA medical report. *See* 38 C.F.R. § 3.157(a). It did not reach the issues presented here, i.e., whether a VA treatment report of a service-connected disability is an informal, pending claim on the date of its issuance; and, if so, what version of the law should apply in the adjudication of this increased rating claim when determining the proper degree of disability. Second, and as important, *Servello* involved a VA examination, not VA outpatient treatment reports and progress notes. For these reasons, it is not entirely clear to what extent the principles laid down in *Servello* control the outcome of this appeal.

However, the Court's decision in *Norris v. West*, 12 Vet. App. 413 (1999) answers most of these questions. In *Norris* [*13] , the veteran filed a formal claim for service connection for an anxiety disorder in September 1972. 12 Vet. App. at 421. One year later, he was granted service connection for this condition. 12 Vet. App. at 414. The veteran continuously sought an increased rating after his initial award of service connection, and a series of RO and Board decisions followed. *Id.* at 414-416. The veteran was also repeatedly hospitalized and treated in VA facilities for this condition throughout this period. *Id.* In September 1994, the Board granted the veteran TDIU, effective April 20, 1990. *Id.* at 416. In its decision, the Board found that the veteran had been unemployed since 1983, but that the effective date assigned was the first time he satisfied the requirements for a TDIU rating. *Id.* One month after this decision, the veteran filed a CUE claim challenging the prior RO decisions denying him TDIU. *Id.* In December 1996, the Board denied the veteran's CUE claims, finding that he had not filed a TDIU claim or requested a TDIU rating before the latest claim stream that resulted in its September 1994 decision. The veteran filed a timely [*14] appeal from the Board's decision with this Court.

On appeal, the Court held that the veteran had filed an informal claim for TDIU under 38 C.F.R. § 3.157(b) prior to the claim stream that resulted in the September 1994 Board decision. The Court reached this conclusion because the veteran had been repeatedly examined and treated by VA for his service-connected anxiety disorder throughout this period, and the latter had resulted in several VA medical reports. *Id.* at 414-416, 422. Moreover, the Court rejected the Secretary's argument that the veteran had to file a formal claim to make these VA medical reports ripe for adjudication. *Id.* at 421. As the Court explained:

> 38 C.F.R. § 3.155(c) . . . *mandates* that the Secretary accept an informal request for a rating increase "as a claim"; the Secretary *cannot* require the veteran to take any additional action action in order to perfect that "claim" - as contrasted with an informal claim under 38 C.F.R. § 3.155(a), which would be applicable in a situation where the veteran had *not* previously filed a claim that met [*15] "the requirements of § 3.151 or § 3.152." 38 C.F.R. § 3.155(c); *see also* 38 C.F.R. §§ 3.151 (regarding claims for disability benefits), 3.152 (regarding claims for death benefits) . . . . Thus, the only real benefit to a claimant that paragraph (c) provides is that the claimant need not file another formal application for benefits as called for in 38 C.F.R. § 3.155(a), i.e., need not start the process anew, in order to obtain an increase *if* he or she has already filed a formal claim pursuant to 38 C.F.R. § 3.151 or 3.152.

Id. (emphasis in original). The Court further held that the veteran's reasonably raised informal TDIU claims had not yet been adjudicated by the RO or the Board. *Id.* at 422. Therefore, those claims remained pending and could not be attacked for CUE, because no final decision had been rendered. *Id.* As important, the Court's decision analyzed the appellant's TDIU claim in the context of the schedular rating as it existed at the time these informal claims were filed. *Id.* at 417-19.

B. Rating Schedule Revisions

[*16] 1. *Statutory Framework*

The Secretary is required by law to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries." 38 U.S.C. § 1155. He is also authorized to make periodic readjustments thereto. *Id.* However, Congress has specifically provided that "in no event shall such a readjustment in the rating schedule cause a veteran's disability rating in effect on the date of the readjustment to be reduced unless an improvement in the veteran's disability is shown to have occurred." *See* 38 U.S.C.

§ 1155. This provision was originally enacted as part of the Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, § 103,105 Stat. 414 (codified as amended at 38 U.S.C. § 1155) [hereinafter VBPIA].

Shortly before the passage of the VBPIA, the House issued a report explaining the compromise agreement it reached with the Senate when adopting this particular provision. H.R. REP. NO. 101-857 at 2-3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 181, 182. The report noted that the VA General Counsel had recently issued an opinion [*17] stating "that when the schedule is adjusted, VA lacks the authority 'to protect ratings assigned under superseding criteria.'" *Id.* (citing VA Gen. Coun. Prec. 11-88 (Oct. 27, 1988)). In response to this opinion, the House passed an earlier version of the VBPIA with a provision "prohibit[ing] rating reductions based on a change in evaluation methods or standards of the VA disability rating schedule unless the veteran's disability had improved." *Id.* When the Senate later considered this bill, it adopted a provision "substantively identical to the House provision, except that it would have authorized, rather than required, prospective-only application of the changes in the disability rating schedule." *Id.* However, in the compromise agreement that resulted in the final version of the VBPIA, the House version of this provision was adopted and later enacted into law. *Id.* In light of this legislative history, the intent of Congress seems clear. First, adjustments to the rating schedule should only apply prospectively. Second, a veteran's disability rating can only be reduced under an adjusted rating schedule when his or her condition has improved.

2. *Relevant Cases*

[*18] The relevant cases on this issue are *Karnas v. Derwinski*, 1 Vet. App. 308 (1991) and *Rodriguez v. Nicholson*, 19 Vet. App. 275 (2005). In *Karnas*, the appellant had been assigned a 100% disability for a mental disorder in the late 1970s. 1 Vet. App. at 309. In October 1988, he received a VA examination. *Id.* The RO later reviewed the results of this examination and decided to reduce the appellant's disability rating to 70%, a decision he promptly appealed to the Board. *Id.* at 309-310. While his appeal was pending, the Secretary promulgated a new regulation authorizing a 100% disability rating where a mental disorder rated as at least 70% disabling prevents a veteran "from securing or following a substantially gainful occupation[.]" *Id.* at 311 (citing and quoting 38 C.F.R. § 4.16(c) (1990) (effective March 1, 1989)). However, when the Board issued its decision affirming the RO's reduction of the appellant's disability rating several months later, it did not apply this new regulation. *Id.* at 310.

On appeal, this Court analyzed the four leading Supreme Court [*19] cases on this issue, *id.* at 311-312 (discussing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969), *Bradley v. School Bd.*, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974), *Bennett v. New Jersey*, 470 U.S. 632, 105 S. Ct. 1555, 84 L. Ed. 2d 572 (1985), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988)), and held that "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to the appellant should and we so hold will apply unless Congress provided otherwise or permitted the Secretary . . . to do otherwise and . . . [he] did so." *Id.* at 313. The Court further held that:

> since 38 C.F.R. § 4.16(c) has no predecessor, became effective after the appellant filed his appeal with the B[oard] but before it rendered its decision, and does not specify an effective date to begin at a time subsequent to the conclusion of this appeal process, § 4.16 applies.

Id.; *but see Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003) [*20] (holding that the notice provisions of the Veterans Claims Assistance Act of 2000, Pub.L. 106-475, § 3(a), 114 Stat. 2096 (2000), do not apply retroactively and overruling *Karnas* to the extent that it conflicts with the binding authority of that Court and the Supreme Court).

In the other relevant case on this issue, *Rodgriguez*, the Court considered whether an amended version of 38 C.F.R. § 3.22 (2002) applied to a claim that was pending before it became effective. 19 Vet. App. at 286-290. Prior to its amendment, the Court's interpretation of this regulation allowed a claimant to establish entitlement to dependency and indemnity compensation (DIC) benefits on the basis of three different legal theories, one of which was known as "hypothetical entitlement." *Id.* at 283-284 (citing *Cole v. West*, 13 Vet. App. 268, 274 (1999)). After the appellant in *Rodriguez* had filed her claim, the Secretary amended 38 C.F.R. § 3.22 to proscribe any recovery under the latter legal theory. *Id.* at 284-286. In determining whether this new regulation applied to the appellant's pending [*21] claim, the Court on appeal first considered "whether there was a substantive right taken away or narrowed" by the amendment. *Id.* at 287 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). If so, then the amended regulation would have a retroactive effect, and its application would require explicit Congressional authorization and the exercise of that authority by the Secretary. *Id.* at 287-290. The Court held that the application of the amended version of the regulation would have a retroactive effect, because it "would . . . take away a substantive right [, i.e., the right to recover

DIC benefits under a previously recognized legal theory,] that existed at the time that the regulation was promulgated." *Id.* at 287. The Court further held that the general rulemaking authority relied upon by the Secretary in promulgating the amended regulation did not expressly authorize him to enact a retroactive regulation, *id.* at 289 (citing 38 U.S.C. § 501), and that, in any event, it was not "aware of any . . . express authority allowing VA to make its regulations retroactive." *Id.* at 290. [*22] Accordingly, the Court held that the appellant was entitled to pursue her claim for DIC benefits on the basis of the hypothetical entitlement theory. *Id.*

B. The Three Questions Before the Court

1. *Adjudicatory Status of a VA Medical Report of a Service-Connected Disability*

The Court holds that a VA medical examination or treatment report of a service-connected disability is a pending informal claim for an increased disability rating on the date of its completion. First, as noted *supra*, the regulatory history of 38 C.F.R. § 3.157 strongly suggests that the Secretary has deliberately chosen to treat such a medical report as a pending claim. The December 1962 amendment made clear that a VA medical report "*will be accepted as an informal claim for benefits under an existing law* . . ., if the report relates to a disability which may establish entitlement." 27 Fed. Reg. 11887 (December 1, 1962) (emphasis added). Similarly, the July 1987 amendment clarified that a VA medical report only qualifies as an informal claim "when such reports relate to examination or treatment of a disability for which service-connection has previously [*23] been established[.]" 52 Fed. Reg. 27340 (July 21, 1987) (amending Paragraph (b)(1) of the current version of 38 C.F.R. § 3.157). This amendment also drew a firm distinction between a VA medical report of a service-connected disability and those concerning a non-service-connected disability, providing that the latter does not enjoy the same adjudicatory status unless and until a claim is timely filed. *Id.* Moreover, the July 1987 amendment incorporated informal claims based on VA medical reports within 38 C.F.R. § 3.155, the general provision defining informal claims. *See* 52 Fed. Reg. 27340 (July 21, 1987). This indicates that the Secretary intended to give a completed VA medical report of a service-connected disability the same adjudicatory status as an informal claim, the latter of which is deemed pending on the date it is received. *See* 38 C.F.R. § 3.160 (2006). Indeed, the regulatory provision defining the status of claims simply references 38 C.F.R. § 3.155 in defining an "[i]nformal claim[,]" and clearly states that a "[p]ending claim [*24] . . . [is] [a]n application, formal or informal, which has not been finally adjudicated." *Id.* The Court is not aware of any authority removing an informal claim based on a VA medical report from the pending adjudicatory status provided to all other informal claims, and the Secretary did not so provide when the regulation defining the status of such claims was promulgated. These regulatory changes undermine any suggestion that the Secretary intends a veteran to take further action to pursue his or her claim once a VA medical report of a service-connected disability is completed. To the contrary, the only limitation imposed by the regulation is that the VA medical report must concern a service-connected disability. *See* Norris, supra.

Second, the text of the regulation repeatedly states that a VA medical report of a service-connected disability is an informal claim. For instance, paragraph (a) of 38 C.F.R. § 3.157 provides that "a report of examination . . . which meets the requirements of this section will be accepted as an informal claim . . . ." Similarly, paragraph (b) of 38 C.F.R. § 3.157 further provides [*25] that "[o]nce a formal claim for . . . compensation has been allowed[,] . . . receipt of . . . the following will be accepted as an informal claim for increased benefits[:] . . . Report of examination . . . by Department of Veterans Affairs . . .[,] only when such reports relate to examination or treatment of a disability for which service-connection has already been established[.]" As important, the remaining text of this provision runs counter to any suggestion that a veteran must take some further action to pursue such an informal claim. According to 38 C.F.R. § 3.157(b)(1), a veteran only needs to file claim when a VA medical report relates to a disability that has not yet been service-connected. This shows not only that the Secretary knew how to impose such a requirement when necessary, but that he consciously chose not to do so when a VA medical report relates to a service-connected disability.

Third, VA's interpretation of the 38 C.F.R. § 3.157 makes clear that a VA medical report of a service-connected disability is a pending, informal claim. The VA M21-1 *Adjudication Procedures Manual Rewrite*, Part III, subpart [*26] ii, P 2.D.15(a) (August 9, 2006), defines informal claim to include "evidence of examination or hospitalization in a VA or uniformed service health care facility", and P 2.D.15(d) notes that "[o]nce a formal claim for . . . service connection has been granted, receipt of evidence from [medical facilities operated by VA or the uniformed services] . . . is considered an informal claim . . ." *Id.* There is no mention of any need by the veteran to take further action to pursue his or her claim. More importantly, VA has not promulgated a formal claims application for an increased rating, another indication of VA's intent to consider its own medical report of a service-connected disability to be the actual claim. *See* MEG BARTLEY ET AL., *Forms Appendix* to VETERANS BENEFITS MANUAL (Ronald B. Abrams & Barton F. Stichman eds., 2006 ed.) (1999). This interpretation is entitled to substantial deference, *Smith v. Nicholson*, 451

F.3d 1344, 1349, 1351 (Fed. Cir. 2006), and is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945).

Fourth, [*27] this interpretation is consistent with the overall regulatory scheme, particularly those regulations concerning informal and pending claims. First, the relative simplicity of the issues involved in an increased rating claim suggests that a very informal process for handling such claims would be beneficial. Indeed, while "[a] claim for veteran's disability benefits [generally] has five elements[,]" *D'Amico v. West*, 209 F.3d 1322, 1326 (Fed. Cir. 2000) (citing *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000)), an increased rating claim only involves two of these elements: degree of disability and effective date. Veteran status, existence of a disability, and service connection are not at issue, because these elements have already been established in a prior adjudication. Moreover, the need for a more formal claims application is substantially reduced by the fact that the veteran has already demonstrated his intent to apply for the benefit sought when he or she filed the initial claim for service connection. The Secretary's actions in this regard are thus in accord with the unique, pro-claimant nature of the veterans' benefits system. *See* [*28] *also* 12 Vet. App. at 421, *supra*.

Finally, this interpretation is consistent with *Norris*. In that case, the Court held that "the Secretary *cannot* require the veteran to take any additional action in order to perfect . . . [a] 'claim'" based on a VA medical report of a service-connected disability because "38 C.F.R. § 3.155 (c) . . . *mandates* that the Secretary accept an informal request for a rating increase 'as a claim[.]'" 12 Vet. App. at 421. The Court further held that such an informal claim remains pending unless and until it is adjudicated by VA. *Id.* at 422. For these reasons, the Court holds that a VA medical report related to a service-connected disability is an informal claim, and that this claim remains pending unless and until it is adjudicated by VA or otherwise abandoned by the veteran.

2. *The Board's Analysis of* 38 C.F.R. § 3.157(b)

The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate [*29] to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court. *See* 38 U.S.C. 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert, supra*. In the decision here on appeal, the Board did not discuss 38 C.F.R. § 3.157(b). The Board also did not consider if any of the VA medical reports prior to September 23, 2002, qualified as an informal claim. As the Court explained in *Servello*, "[t]he applicable statutory and regulatory provisions, fairly construed, require that the B[oard] [*30] look to all communications in the file that may be interpreted as applications or claims - formal and informal - for increased benefits and, then, to all other evidence of record to determine 'the earliest date as of which', within the year prior to the claim, the increase in disability was ascertainable." 3 Vet. App. at 198 (citing 38 U.S.C. § 5110(b)(2)). The Court holds that Board's failure to fully consider and apply 38 C.F.R. § 3.157(b) was arbitrary and capricious. The Court further holds that the Board's failure to discuss the VA medical reports of record prior to September 23, 2002, frustrates meaningful judicial review of the appellant's claim.

3. Retroactivity of DC 5293

The only remaining issues in this case are whether the application of the revised version of DC 5293 to the appellant's pending claim would have a retroactive effect; if so, whether Congress has explicitly authorized the Secretary to adopt a schedular rating revision with this effect; and, if so, whether the Secretary exercised that authority here. The answer to these questions can be found in *Rodriguez v. Nicholson*, 19 Vet. App. 275 (2005). [*31] As we explained in that case, retroactivity depends on "whether there was a substantive right taken away or narrowed" in the amended version of the regulation. *Id.* at 287 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). In this case, the appellant was assigned a 60% disability rating by the DRO under the prior version of DC 5293. However, under the revised version of the regulation, the RO and the Board determined that he was only entitled to a 20% disability rating. Nothing in the record suggests that the appellant's condition had improved, or that the lower disability rating was assigned based on anything other than the application of the new version of the rating schedule. Thus, as in *Rodriguez*, the application of the amended version of the regulation "would . . . take away a substantive right that existed at the time that the regulation was promulgated[,]" *id.* at 287, i.e., the right to receive a 60% disability rating under the old version of the regulation. Accordingly, the application of the revised version of the regulation to the appellant's pending claim had a retroactive effect.

[*32] Moreover, it seems clear that Congress only intended readjustments in the rating schedule to apply prospectively, and that a veteran's disability rating can only be reduced on the basis of such a revision when his or her condition has improved. 38 U.S.C. § 1155; *see also* H.R. REP. NO. 101-857 at 2-3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 181, 182. The Court therefore holds that the Secretary lacks the clear Congressional authorization needed to apply the revised version of DC 5293 retroactively. *See* 19 Vet. App. at 288 (noting that "'[a]bsent clearly expressed intent to the contrary, statutes and regulations are presumed not to have retroactive effect'" (quoting *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005))). The Court further holds that, even if the Secretary had such authority, there is nothing in the preamble to the rule or the rule itself indicating that he intended the revised version of DC 5293 to apply in such a manner. *See* 67 Fed. Reg. 54349 (Aug. 22, 2002) (revising DC 5293, effective September 23, 2003); *see also Brown v. Gardner*, 513 U.S. 115, 117-118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994) [*33] (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n.9, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991), and noting that any interpretative doubt must be resolved in the veteran's favor). In the decision on appeal, the Board applied the revised version of DC 5293 because it believed the appellant had filed his claim after this provision became effective. However, for the reasons stated *supra*, the Board must apply the older version of DC 5293 if it determines on remand that the appellant filed an informal claim before September 23, 2002, the date this revision became effective.

C. Relief

Even though the Board erred in applying DC 5293 below, determining whether an informal claim has been filed and evaluating a disability are factual findings that the Board should make in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (court of appeals may remand if it determines that a lower tribunal failed to make findings of fact essential to a decision); *see also* 38 U.S.C. 7104(d)(1); *Fallo v. Derwinski*, 1 Vet. App. 175, 177 (1991) ("[T]he Board's finding[s] and conclusions in this case are [*34] so vague that it is impossible to review them."); *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991). Accordingly, the Court will vacate the October 24, 2005, Board decision and remand the matter for further proceedings.

On remand, the Board should consider all of the VA medical reports prior to September 23, 2002, and determine which of these reports, if any, qualify as an informal claim. If the Board finds that one of these reports qualifies as an informal claim, the version of DC 5293 in existence at the time the report was created should be applied. The appellant is free to submit additional evidence and argument on remand, 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). Given this disposition, the Court need not address the appellant's remaining arguments because he has not demonstrated that he would be prejudiced by a remand of this matter without consideration of his assertions of VA error because [*35] the asserted errors could likely be properly raised or eventually remedied on remand to the Board. *See Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991) (remand is meant to entail critical examination of justification for decision; Court expects that Board will reexamine evidence of record, seek any other necessary evidence, and issue timely, well-supported decision). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (West Supp. 2005) (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's October 24, 2005, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: May 14, 2007