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

IN THE APPEAL OF
CARMEN J. CARDONA

[redacted]

DOCKET NO. 11-01 921) DATE
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) AUG 30 2011
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On appeal from the
Department of Veterans Affairs Regional Office in Hartford, Connecticut

THE ISSUE

Entitlement to additional dependency compensation for a dependent spouse.

REPRESENTATION

Veteran represented by: Michael Wishnie, Attorney

ATTORNEY FOR THE BOARD

P. Sorisio, Counsel

INTRODUCTION

The Veteran had active service from July 1988 to May 2000.

This matter comes before the Board of Veterans' Appeals (BVA or Board) from a June 2010 determination of the Department of Veterans Affairs (VA) Regional Office (RO) in Hartford, Connecticut, which denied the Veteran's claim for additional dependency benefits.

The June 2010 determination reflects that the Veteran is receiving additional compensation for one dependent, her child. Thus, for clarity, the Board has characterized the issue on appeal as being for entitlement to additional dependency compensation for a dependent spouse.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c)(1) (2010) because this case "involves interpretation of law of general application affecting other claims." 38 U.S.C.A. § 7107(a)(2) (West 2007).

FINDINGS OF FACT

1. The Veteran's combined disability evaluation for VA compensation benefits is 80 percent.

2. As of October 28, 2008, the State of Connecticut legally recognizes same sex marriages.

3. The Veteran and R.H., who are both of the same sex, were legally married on May 14, 2010, in the State of Connecticut.

4. The Veteran and R.H. were both residents of the State of Connecticut at the time of their marriage and this is a valid marriage under VA laws and regulations.

5. R.H. is not a "spouse" for VA purposes.

CONCLUSION OF LAW

The criteria for entitlement to additional dependency compensation for a dependent spouse have not been met. 38 U.S.C.A. §§ 101, 103, 1115 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.1, 3.4, 3.50, 3.205 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran seeks to obtain additional VA dependency compensation benefits for her same-sex spouse, R.H. She contends that her marriage is considered valid by the State of Connecticut and that Connecticut recognizes her spouse as a dependent. *See* Notice of Disagreement, received June 11, 2010. The Veteran also contends, via her attorney representative, that the denial of spousal benefits to a service-connected Veteran in a same-sex marriage violates the Fifth and Tenth Amendments to the U.S. Constitution. *See* April 2011 Motion for Advancement on the Docket (Motion).

Veterans Claims Assistance Act of 2000 (VCAA)

As provided for by the VCAA, VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2010). Pursuant to 38 C.F.R. § 3.159(b)(3), however, no duty to provide 38 U.S.C.A. § 5103(a) notice arises when, as a matter of law, entitlement to the benefit claimed cannot be established. In this regard, the Board finds that the facts of this case are not in dispute, and the Veteran's representative has acknowledged the same. *See* April 2011 Motion, p. 6 ("[t]he facts of this case are undisputed and BVA has no fact-finding role to play."). Rather, the disposition of this appeal turns solely on the law. As the facts are not in dispute, and the case involves a matter of law, any deficiencies under the VCAA duty to notify are rendered moot.

In May 2011, the Veteran's attorney submitted additional, pertinent evidence to the Board, to include a license and certificate of marriage. In the letter accompanying

this evidence, it was noted that the Veteran "waives her right to referral of this evidence to the agency of original jurisdiction for review." As such, the Board accepts the evidence into the record and will consider it in making this decision. 38 C.F.R. § 20.1304(c) (2010). As noted, the facts of this case are uncontested and all evidence necessary for adjudication of this appeal is present in the claims file.

In sum, no further analysis of the RO's compliance with VA's duties to notify and assist is warranted in the present case, as the claim is being denied as a matter of law.

Legal Criteria and Analysis

The law provides that an additional amount of compensation may be payable for a spouse, child, and/or dependent parent, where a Veteran is entitled to compensation based on disability evaluated as 30 percent or more disabling. 38 U.S.C.A. § 1115 (West 2002 & Supp. 2011); 38 C.F.R. § 3.4(b)(2) (2010). VA law defines a "spouse" as a person of the opposite sex whose marriage to the Veteran meets the requirements of 38 C.F.R. § 3.1(j). 38 U.S.C.A. § 101(31)(West 2002); 38 C.F.R. § 3.50(a) (2010). "Marriage" means a marriage valid under the law of the place where the parties resided at the time of the marriage, or the law of the place where the parties resided when the right to benefits accrued. 38 U.S.C.A. § 103(c) (West 2002); 38 C.F.R. § 3.1(j) (2010).

Under the General Statutes of Connecticut, no persons may be joined in marriage until both have complied with the provisions of sections 46b-24 to 46b-27, inclusive, and 46b-29 to 46b-33, inclusive, and have been issued a license by the registrar for the town in which the marriage is to be celebrated, which bears the certification of the registrar that the persons named therein have complied with the provisions of said sections. CONN. GEN. STAT. § 46b-24(a) (2010). Further, such license, when certified by the registrar, is sufficient authority for any person authorized to perform a marriage ceremony in Connecticut to join such persons in marriage, provided the ceremony is performed within the town where the license was issued and within a period of not more than sixty-five days after the date of application. *Id.* § 46b-24(b). Connecticut law also states that each person who

joins any person in marriage shall certify upon the license certificate the fact, the time and place of the marriage, and return it to the registrar of the town where it was issued, before or during the first week of the month following the marriage. *Id.* § 46b-34.

In *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 482 (Conn. 2008), the Connecticut Supreme Court held that in accordance with state constitutional requirements, "same sex couples cannot be denied the freedom to marry."

The undisputed facts of this appeal are as follows. The Veteran is currently service-connected for carpal tunnel syndrome of the right hand, evaluated as 50 percent disabling, and carpal tunnel syndrome of the left hand, evaluated as 40 percent disabling, both effective November 4, 2005. According to the record, the Veteran's combined evaluation for disability compensation is 80 percent. In light of the criteria noted above, the Veteran is potentially eligible for additional dependency compensation for a spouse. *See* 38 C.F.R. § 3.4(b)(2)(2010).

On a VA Form 21-686c, received at the Hartford RO on May 24, 2010, the Veteran noted her marriage to R.H. on May 14, 2010, in Norwich, Connecticut. In the "Remarks" section of this document, the Veteran stated that she wanted to add her spouse to her service-connected disability allowance benefit. In response to this request, the Hartford RO sent the Veteran a letter dated June 4, 2010, that denied the claim for additional compensation for a dependent spouse. The letter stated that because the requirement of 38 C.F.R. § 3.50(a) (defining "spouse" for VA purposes) was not met, the claim was denied. It noted that the Veteran was being paid for one dependent, her child. In response to a timely Notice of Disagreement, the RO issued a Statement of the Case in November 2010 that denied the claim, again, because the requirement of 38 C.F.R. § 3.50(a) was not met. A timely Substantive Appeal was received on January 11, 2011. The Veteran did not request a Board hearing.

The record reflects that the Veteran's gender is female. *See* February 2000 Report of medical examination and corresponding report of medical history; March 2002 VA Form 21-526; Connecticut License and Certificate of Marriage. The record

also reflects that prior to May 14, 2010, the Veteran had never been married. *See* March 2002 VA Form 21-526; June 2008 VA Form 21-686c; and December 2008 VA Form 21-686c. A Connecticut License and Certificate of Marriage reflects that the Veteran married R.H. on May 14, 2010 in Norwich, Connecticut. *See* 38 C.F.R. § 3.205(a)(1)(2010). The License and Certificate of Marriage also indicates R.H.'s gender is female. Thus, the Veteran, a female, was legally married to R.H., a female, in Norwich, Connecticut, a state that, as noted, legally recognizes that "same sex couples cannot be denied the freedom to marry." *Kerrigan*, 957 A.2d at 482. Additionally, the License and Certificate of Marriage indicates that both the Veteran and R.H. were residents of Norwich, Connecticut at the time of the marriage. Based on the above facts and Connecticut laws, the Board finds that the Veteran and R.H. have complied with the General Statutes of Connecticut for a valid marriage in that state and were legally married on May 14, 2010. *See, e.g.*, Connecticut License and Certificate of Marriage; *Kerrigan*, 957 A.2d at 482. Therefore, this is a valid marriage under VA law. 38 U.S.C.A. § 103(c) (West 2002); 38 C.F.R. § 3.1(j)(2010).

However, VA law defines "spouse" as "*a person of the opposite sex*." 38 U.S.C.A. § 101(31)(West 2002); 38 C.F.R. § 3.50(a)(2010) (emphasis added). Under the facts and controlling law, the Board must deny this claim for additional dependency compensation for a spouse because the requirement of 38 C.F.R. § 3.50(a) that a spouse be a person of the opposite sex has not been met. In short, R.H. is not a "spouse" for VA purposes.

The Board acknowledges the Veteran's and her representative's arguments that Connecticut recognizes her spouse as a dependent, but VA law does not. In this regard, in addition to statutes enacated by Congress and controlling legal precedent, the Board's jurisdictional statute provides that the Board is bound by regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department. 38 U.S.C.A. § 7104(c) (West 2007). Thus, the Board is bound by the statutory and regulatory definitions of "spouse" previously noted, which does not support a finding of entitlement to additional dependency compensation for R.H. as a dependent spouse.

The Veteran, through her representative, has also raised constitutional arguments, to include violation of the Fifth and Tenth Amendments to the U.S. Constitution, which the Board fully acknowledges. *See Smith (Morgan) v. Derwinski*, 2 Vet. App. 137, 141 (1992)(the Board is not free to ignore assertions made by a claimant in support of their appeal.). Specifically, in an April 2011 Motion and a May 2011 letter, the Veteran set forth her contentions regarding the constitutionality of the definitions of marriage contained in 38 U.S.C.A. § 101(31), 1 U.S.C.A. § 7, and 38 C.F.R. § 3.50(a). The Veteran argues that these statutes and regulation have illegally classified individuals on the basis of sex and sexual orientation thereby denying them of valuable property by way of VA benefits. Her constitutional contentions also include denial of equal protection under the law, infringement on a fundamental right, and infringement by the Federal government upon the traditional governmental functions of the state in violation of the Tenth Amendment. *See* May 2011 letter.

Initially, the Board recognizes that the United States Court of Appeals for the Federal Circuit has held that there is a property interest in entitlement to VA benefits. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding that entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment). Notwithstanding the recognition of this property interest, the Board must deny the claim for additional dependency compensation for a dependent same-sex spouse as previously stated.

The Board is aware of Congress' decree that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C.A. § 511(a) (West 2002). There are, however, limitations to this Congressional mandate. In *Johnson v. Robison*, the United States Supreme Court noted the principle that adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. 415 U.S. 361, 368 (1974) (citations omitted). The United States Court of Appeals for Veterans Claims (Veterans Court) has also acknowledged this principle on a number of occasions. *See Saunders v. Brown*, 4 Vet. App. 320, 326 (1993) (citing *Johnson*) ("[i]t has generally been thought that

the adjudication of the constitutionality of congressional enactments is 'beyond the jurisdiction of administrative agencies,' including the BVA"); *see also Giantcaterino v. Brown*, 7 Vet. App. 555, 557 (1995) (stating that the Board may express an opinion on a constitutional claim but it is not required to do so). The Veterans Court has noted that administrative agencies are entitled to pass on constitutional claims, but are not required to do so. *Id.* (*citing Plaquemines Port v. Federal Maritime Comm'n*, 838 F.3d 536, 544 (D.C. Cir. 1988)). The critical role for the administrative agency is to ensure that the necessary factual development has been undertaken to help the court resolve the constitutional issue. *See id.*

In the instant case, as discussed, there are no factual matters in dispute. Rather, the sole issue is a legal issue, which, also as discussed, is not supported under applicable law. Regarding the remaining constitutional questions, in light of the above precedential case law, the Board declines to express an opinion as to the constitutional arguments regarding the statute and regulation at issue, as the Board has no jurisdiction to remedy the constitutional challenge. Neither 38 U.S.C.A. § 7104 (West 2002), which defines the jurisdiction of the Board, nor 38 U.S.C.A. § 511(a) (West 2002), which defines the authority of the Secretary of VA, confers upon the Board jurisdiction to consider constitutional challenges to statutes enacted by Congress or implementing regulations promulgated by the Secretary. Similarly, the Board does not have the jurisdiction or legal authority to ignore or rule unconstitutional a law, regulation or precedential decision of the General Counsel. *Hornick v. Shinseki*, 24 Vet. App. 50, 52 (2010) ("The Board is 'bound in its decisions by the . . . precedent opinions of the chief legal officer of the Department.'" (quoting 38 U.S.C. § 7104(c))). Notably, the jurisdiction of the Board is different than the jurisdiction of the Veterans Court, which is empowered by statute to make determinations regarding constitutional claims. *See* 38 U.S.C.A. § 7261(a)(1), (a)(3)(B) (West 2002); *see Raugust v. Shinseki*, 23 Vet. App. 475, 479 (2010) (noting that the Court has jurisdiction to consider constitutional challenges to statutes and regulations). The Board recognizes that such constitutional challenges must first be made at the agency level to build a factual record or to resolve the dispute on other grounds. *Ledford v. West*, 136 F.3d 776 (Fed. Cir. 1998). As set forth in this decision, the facts have been presented, and they are not in dispute.

The Veteran, through her representative, recognizes that the Board lacks jurisdiction to decide the constitutional challenge, as set forth in the April 2011 Motion and May 2011 letter. Those documents cite to a previously issued Board decision as support for the proposition that the Board does not have jurisdiction to decide constitutional questions. Notably, decisions of the Board are not precedential, and the decision cited by the Veteran is not controlling in this case. 38 C.F.R. § 20.1303 (2010). Nevertheless, as outlined by the caselaw cited above, although the Board has the ability to express an opinion on a constitutional claim, the Board has no jurisdiction to remedy a constitutional challenge of a law that is binding on the Board. Such challenge is more appropriate for the Veterans Court, which possesses the necessary jurisdiction for constitutional questions. *See* 38 U.S.C.A. § 7261(a)(1), (a)(3)(B) (West 2002).

In conclusion, for the reasons discussed, the Board finds no legal basis to support the Veteran's claim for additional dependency compensation benefits for her spouse, R.H., as R.H. is not a "spouse" as defined by VA law. The Board acknowledges and is sympathetic to the arguments advanced by the Veteran, especially in light of her honorable service. The Board also fully recognizes the sensitivity of the issue of same sex marriage, as well as the popular and political nature of this issue. However, VA law governing the definition of "spouse" is clear and specific, and the Board is bound by that law. As the disposition of this claim is based on the law, and not on the facts of the case, the benefit of the doubt doctrine does not apply and the claim must be denied based on a lack of legal merit under the law. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (stating that where the law and not the evidence is dispositive, the claim should be denied because of the absence of legal merit or the lack of entitlement under the law).

ORDER

Entitlement to additional dependency compensation for a dependent spouse is denied.

Laura H. Eskenazi

LAURA H. ESKENAZI
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.*

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court,** not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: http://www.uscourts.cavc.gov.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).