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

IN THE APPEAL OF
AARON M. SALMON HASSAY [redacted]

IN THE CASE OF
MICHAEL A. HASSAY

DOCKET NO. 14-24 748) DATE JUL 26 2016
)
)

On appeal from the
Department of Veterans Affairs Regional Office in Muskogee, Oklahoma

THE ISSUE

Entitlement to basic eligibility for 38 U.S.C.A. Chapter 35 Dependents' Educational Assistance (DEA) benefits.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

IN THE APPEAL OF
AARON M. SALMON HASSAY

[redacted]

IN THE CASE OF
MICHAEL A. HASSAY

ATTORNEY FOR THE BOARD

H. Papavizas, Associate Counsel

INTRODUCTION

The Veteran served on active duty from May 1966 to July 1968. The appellant is his son.

This matter comes before the Board of Veteran's Appeals (Board) on appeal from a January 2014 administrative decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Muskogee, Oklahoma, which denied the appellant's claim for DEA benefits under Chapter 35, Title 38, United States Code, on the basis that he had not established eligibility due to age.

In January 2016, the appellant testified at a videoconference hearing before the undersigned Veterans Law Judge (VLJ). A transcript of that proceeding has been associated with the Veteran's claims file.

The record before the Board includes the appellant's paper education file, as well as the electronic records, to include VBMS and Virtual VA records, of both the appellant and the Veteran.

FINDINGS OF FACT

1. The appellant was born in May 1976.

2. A July 2005 rating decision awarded the Veteran a 100 percent evaluation for schizoaffective disorder, effective June 25, 2004; having recognized the service-

connected disability as total and permanent in nature, the rating action also established basic eligibility for Dependent's Educational Assistance (DEA), effective June 25, 2004.

3. The appellant reached his 26th birthday prior to the effective date of the finding of permanent and total disability for the Veteran on June 25, 2004.

CONCLUSION OF LAW

The criteria for basic eligibility for Chapter 35 educational benefits have not been met. 38 U.S.C.A. §§ 3500, 3501, 3512 (West 2014); 38 C.F.R. §§ 21.3021, 21.3040, 21.3041 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

With regard to VA's duties to notify and assist, the pertinent facts in this case are not in dispute and the law is dispositive. Consequently, there is no additional evidence that could be obtained to substantiate the claim, and no further action is required to comply with VA's duties to notify and assist. *See Manning v. Principi*, 16 Vet. App. 534, 542 (2002); VAOPGCPREC 5-2004 (June 23, 2004).

Basic eligibility for Chapter 35 benefits is established in one of several ways, including as the child of a veteran who has a total and permanent disability rating from a service-connected disability. 38 U.S.C.A. § 3501(a)(1)(A); 38 C.F.R. § 21.3021.

Eligibility for Chapter 35 benefits further requires that the claimant must not reach his or her 26th birthday on or before the effective date of a finding of permanent and total service-connected disability. 38 C.F.R. § 21.3040(c). Under 38 C.F.R.

§ 21.3041, the basic beginning date of eligibility for educational assistance is normally the date the child reaches age 18, or the date of the child's completion of secondary schooling, whichever occurs first. 38 C.F.R. § 21.3041(a). The basic ending date for educational assistance is the date of the child's 26th birthday, or the date the veteran is no longer permanently and totally disabled. 38 C.F.R. § 21.3041(a).

If the effective date of the permanent and total rating is before the child's 18th birthday, and the date of notification to the veteran occurs after the child's 18th birthday, but before the child's 26th birthday, the child may elect the beginning date of his or her period of eligibility. If the child elects a beginning date that is before his or her 18th birthday, the period of eligibility ends the earlier of the date that the veteran is no longer rated permanently and totally disabled, or the date of the child's 26th birthday. If the child elects a beginning date after his or her 18th birthday, the period of eligibility ends the earlier of the date the veteran is no longer rated permanently and totally disabled or 8 years after the beginning date the child elects. 38 C.F.R. § 21.3041(a)(2)(i). If the effective date of the permanent and total rating occurs after the child's 18th birthday, but before the child's 26th birthday, the child may elect the beginning date of his or her period of eligibility. The period of eligibility ends the earlier of the date the veteran is no longer rated permanently and totally disabled, or 8 years after the beginning date the child elects. 38 C.F.R. § 21.3041(a)(2)(ii).

In this case, the RO did not make a specific finding as to whether the appellant meets the definition of a child. Neither the January 2014 administrative decision nor the April 2014 statement includes a finding concerning the relationship between the Veteran and the appellant. However, the matter of relationship is not on appeal and such a determination is not necessary to decide this appeal.

The appellant was born in May 1976, as shown by his claim for DEA benefits.

A July 2005 rating decision awarded the Veteran a 100 percent evaluation for his service-connected schizoaffective disorder, effective from June 25, 2004. The July 2005 rating decision also established basic eligibility as of that date for DEA benefits for eligible dependents, based on the finding that the Veteran's service-connected schizoaffective disorder is totally and permanently disabling in nature. There is no indication that the Veteran appealed the rating decision in regard to the effective date; thus, the rating decision of July 2005 has become final. 38 U.S.C.A. § 7105 (West 2014); 38 C.F.R. §§ 20.200, 20.1103 (2015).

In January 2014, the appellant filed a claim for DEA benefits. In a January decision, the RO denied eligibility for DEA benefits, because the appellant had reached age 26 before the June 25, 2004 effective date of the Veteran's total and permanent disability status.

In his March 2014 notice of disagreement, the appellant argued that he did not know of or talk to his father, the Veteran, until he was nearly 30 years old. The appellant also maintained that the Veteran could have qualified for benefits when the appellant was 26 years old but that the Veteran did not apply for benefits until the appellant was over 26 years of age. The Veteran also stated that he was living at or below the poverty line and wanted to go to school to improve his life.

At the January 2016 hearing, the appellant made essentially the same arguments. In addition, his representative maintained that 38 U.S.C.A § 3512(5) provided an exception that would allow an extension of the period of the appellant's eligibility for DEA benefits for 8 years after discharge from active duty. The record shows that the appellant had served on active duty from May 1994 to May 2002.

As noted above, there are some exceptions to the ending date requirement for DEA benefits; however, none of these exceptions apply to a dependent child who is 26 years old or older at the time that a veteran's total and permanent disability award becomes effective. This is also true of the provision cited by the appellant's

representative. Under 38 U.S.C.A § 3512(5), if a person serves on duty with the Armed Forces as an eligible person after the person's eighteenth birthday but before the person's twenty-sixth birthday, then such period shall end 8 years after the person's first discharge or release from such duty with the Armed Forces. *See also* 38 C.F.R §3041(c). However, 38 C.F.R §3040(c) bars eligibility for DEA benefits to any person who reached his or her 26th birthday on or before the effective date of a finding of permanent and total service-connected disability. Consequently, the exception cited by the appellant's representative is unavailing because the appellant was not an eligible person for DEA benefits at any time prior to his discharge from active service in May 2002 because the appellant's eligibility as a dependent is derived from the Veteran's total and permanent disability status and such status did not take effect until June 25, 2004.

Additionally, the appellant seems to contend that the Veteran, who failed to apply for benefits at an earlier date, could have qualified as permanently and totally disabled before June 25, 2004. However, the record clearly shows that the permanent and total rating went into effect on June 25, 2004. The July 2005 rating decision establishing the Veteran's permanent and total disability rating as of June 25, 2004, is final, and the effective date is not on appeal. Consequently, none of the aforementioned exceptions apply to the appellant, and he is not eligible for DEA benefits.

While the Board sympathizes with the appellant's contentions that he did not know his father until he was over 26 years old and his desire to pursue an education, to the extent that he is attempting to establish eligibility on a theory of equity, the Board is bound by the law and is without authority to grant benefits on an equitable basis. *See* 38 U.S.C.A. §§ 503, 7104 (West 2002); *Harvey v. Brown*, 6 Vet. App. 416, 425 (1994). Where the law and not the evidence is dispositive of the issue before the Board, the claim must be denied because of the absence of legal merit or the lack of entitlement under the law. *See Sabonis v. Brown*, 6 Vet. App. 426 (1994). Because the appellant has no legal entitlement to the benefit sought, it is the law in this case,

and not the evidence, that is dispositive of the appeal. As the law is dispositive of the instant case, the benefit of the doubt rule is not for application.

ORDER

Basic eligibility for Dependents' Educational Assistance benefits is denied.

MARJORIE A. AUER
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 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.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

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. *See* 38 C.F.R. 20.904. 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 the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

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 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 General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).