

United States Court of Appeals for the Federal Circuit

ORVILLE K. THOMAS,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-1504

Appeal from the United States Court of Appeals for
Veterans Claims in No. 20-4192, Judge Joseph L. Falvey,
Jr.

Decided: March 27, 2024

CHRIS ATTIG, Attig Curran Steel PLLC, Little Rock,
AR, argued for claimant-appellant. Also represented by
HALEY SMITH.

IGOR HELMAN, Commercial Litigation Branch, Civil Di-
vision, United States Department of Justice, Washington,
DC, argued for respondent-appellee. Also represented by
BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M.
MCCARTHY; JULIE HONAN, Y. KEN LEE, DEREK SCADDEN,
Office of General Counsel, United States Department of
Veterans Affairs, Washington, DC.

Before LOURIE, REYNA, and CUNNINGHAM, *Circuit Judges*.
REYNA, *Circuit Judge*.

Mr. Orville Thomas appeals a decision of the U.S. Court of Appeals for Veterans Claims. The Veterans Court affirmed the Board of Veterans' Appeals' denial of an earlier effective date for Mr. Thomas' claim of service connection for post-traumatic stress disorder. Because the Veterans Court applied an improper legal standard when reviewing the Board's decision, we vacate and remand.

BACKGROUND

Mr. Thomas served in the U.S. Navy from 1957 to 1964. J.A. 1–2. In January 1961, he was an airman on a plane that crashed on Midway Island, killing nine people. J.A. 2. Of the six passengers who were seated in the plane's mid-section, Mr. Thomas was the sole survivor. J.A. 2. Three years later in 1964, Mr. Thomas was honorably discharged as unsuitable for service after being diagnosed with an emotionally unstable personality. J.A. 211, 275.

In January 1971, he submitted a claim to the U.S. Department of Veterans Affairs ("VA") for service connection for his "depressive mania." J.A. 277. He expressed to the VA that, after surviving the plane crash, he was experiencing ongoing emotional distress and had attempted suicide. J.A. 277. The VA regional office obtained Mr. Thomas' medical records, which showed that he had been treated for emotional problems and was subsequently discharged. J.A. 204–75. Based on solely the medical records, the VA denied service connection and concluded that an emotionally unstable personality was not a disability under the law. J.A. 203. In reaching this decision, the VA did not consider Mr. Thomas' service department records. Mr. Thomas did not appeal this decision.

On June 16, 2014, Mr. Thomas filed a request to reopen his 1971 claim. J.A. 163–202, 116–50. This time, he submitted service department records that were not before the VA in 1971. J.A. 169–202, 116–50. These service department records include, *inter alia*, information about the 1961 plane crash, the changes in Mr. Thomas’ personality before and after the crash, and evaluations of Mr. Thomas’ performance in service. *E.g.*, J.A. 116–50, 169–91.

In November 2014, the VA granted Mr. Thomas service connection for post-traumatic stress disorder (“PTSD”), with an effective date of June 16, 2014. J.A. 106–12. The VA based its decision on a review of the evidence, which included (1) the service department records Mr. Thomas submitted in June 2014 and (2) the VA’s PTSD examination of Mr. Thomas, which diagnosed him with the disorder. J.A. 113–14.

Mr. Thomas filed a timely Notice of Disagreement, seeking an earlier effective date. J.A. 104–05. The VA issued a Statement of the Case which, while increasing the disability rating for his PTSD, continued to deny an effective date earlier than June 2014. J.A. 71–99. The VA acknowledged that Mr. Thomas had submitted his service department records, and that he had argued that under 38 C.F.R. § 3.156(c), those records showed entitlement to an earlier effective date.¹ J.A. 4, 99.

¹ Under 38 C.F.R. § 3.156(c)(1), if the “VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim.” Additionally, “[a]n award made based all or in part” on these service department records “is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later.”

The VA found that the service department records would not have changed the 1971 denial of service connection because they did not counter the determination that Mr. Thomas' in-service psychiatric problems were due to an "emotionally unstable personality," which was not considered a disability for VA compensation purposes. J.A. 99. The VA also concluded that the service department records "were not a factor in the grant of benefits at this time." J.A. 99.

Mr. Thomas appealed to the Board of Veterans' Appeals ("Board"). J.A. 68–69. The Board agreed with the VA's denial of an earlier effective date for the grant of service connection for PTSD. J.A. 54–67. The Board found no evidence of an unadjudicated claim for service connection for PTSD between the March 1971 rating decision and June 2014 that might justify an earlier effective date. J.A. 58–59. The Board decision did not address Section 3.156(c) or Mr. Thomas' newly added service department records. J.A. 54–67. Mr. Thomas appealed the Board's decision to the U.S. Court of Appeals for Veterans Claims ("Veterans Court").

Before the Veterans Court, Mr. Thomas argued that the Board violated its statutory duty under 38 U.S.C. § 7104(d)(1) to provide a written statement of its findings, and its reasons and bases for those findings, concerning "all material issues of fact and law presented on the record." J.A. 49 (citing 38 U.S.C. § 7104(d)(1)). According to Mr. Thomas, this statutory duty required the Board to consider

38 U.S.C. § 3.156(c)(3). "In other words, § 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

his arguments concerning Section 3.156(c), which applied to the facts of his case. Mr. Thomas also argued this statutory duty required the Board to consider his service department records, which had existed at the time of the VA's original denial in 1971 but had not yet been associated with his claims file. Mr. Thomas noted that these service department records served as a partial basis for his eventual grant of PTSD in November 2014. Finally, Mr. Thomas argued that the Board's errors prejudiced him. According to Mr. Thomas, had the Board properly considered that his service department records that were not associated with his claims file until 2014, the Board likely would not have concluded that "June 16, 2014, is the earliest possible effective date for the grant of service connection for PTSD." J.A. 52 (quoting J.A. 59).

The Veterans Court affirmed the Board's decision. The Veterans Court determined that the Board did not err in failing to discuss Section 3.156(c)(1) because this regulation only applies to "relevant" service records. The Veterans Court noted that Mr. Thomas "offer[ed] no argument that his service records were in any way relevant" to the VA's denial of his 1971 claim. For this reason, the VA concluded that Mr. Thomas had not shown that the Board committed prejudicial error in failing to discuss Section 3.156(c)(1).

The Veterans Court also determined that the Board did not err in failing to discuss Mr. Thomas' service department records. The Veterans Court explained that "Mr. Thomas has neither shown nor argued that the service department records . . . were 'favorable' evidence and that the Board was thus required to discuss them." J.A. 5.

Mr. Thomas appeals. We have jurisdiction under 38 U.S.C. § 7292(c).

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