UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 23-4114

WAYNE SELLERS, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Chief Judge*, and PIETSCH and BARTLEY, *Judges.*

O R D E R

Veteran Wayne Sellers, through counsel, filed a July 13, 2023, Notice of Appeal (NOA) from a June 5, 1996, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for (1) an acquired psychiatric disorder, including PTSD, and (2) a permanent and total disability rating for pension purposes.[1] Given the passage of time between the date of the Board's June 1996 decision and the filing of the NOA, it should be immediately apparent that this case presents an unusual situation.

On August 30, 2023, the Secretary filed a motion to dismiss the appeal as untimely. Appellant opposed the Secretary's motion to dismiss, asserting that he did not receive notice of the June 1996 Board decision until July 2023, (approximately 27 years later) after his current counsel reviewed the record.[2] The Court asked the parties to provide additional responses addressing appellant's assertion that VA had not satisfied its duty to notify because the Agency could have taken additional reasonable steps to notify him of the June 1996 Board decision, including searching for other possible and plausible addresses that may have been available through VA's healthcare arm, the Veterans Health Administration. The parties addressed the issue through the lens of the presumption of regularity of mailing and whether VA had satisfied its notice obligations under *Davis v. Principi*.[3]

On May 8, 2024, this matter was referred to a panel of the Court to address VA's notice obligations under *Davis*, including how long VA is required to search for additional possible and plausible addresses, as applied to the unique facts of this case. In particular, we are called on to decide whether VA satisfied its duty to notify appellant of the June 1996 Board decision when it had actual knowledge that the address that the Board used to provide notice to appellant was not, in fact, a current address, even though it was the address on file with the Agency at that time. We held oral argument in this matter on October 29, 2024.[4]

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[1] Preliminary record of proceedings (PROP) at 30.

[2] Appellant's Opposition (Opp.) at 1.

[3] 17 Vet.App. 29 (2003).

[4] Oral Argument (OA), *Sellers v. McDonough*, U.S. Vet. App. No. 23-4114 (Oct. 29, 2024), https://www.youtube.com/watch?v=BmCJt7lQBMg.

Our decision today is a narrow one. As we will explain in more detail below, we assume that *Davis* controls the situation we face and, that under *Davis*, VA only has an obligation to search for additional and plausible addresses that existed *at the time* of the Board's decision. So for the purposes of this decision, we assume–without deciding–that the Board satisfied its notice obligations under *Davis* at the time it mailed its June 1996 decision because there were no other plausible addresses in the file beyond the address the Board used to mail the decision to appellant. That does not end the matter, however, because we also conclude that under the unique facts of this case, the Board bound itself to greater notice obligations than *Davis* required. Specifically, the Board directed VA to continue to search for addresses that would afford appellant actual notice of the June 1996 decision. And because VA failed to satisfy those greater notice obligations, the presumption of regularity does not resolve the question about whether this appeal is timely. Instead, the relevant legal principle is that an agency may elect to provide a claimant more process than the law requires. The Board did so in 1996, and VA did not comply with those additional procedural protections. So on that narrow basis, we will deny the Secretary's motion to dismiss appellant's appeal. Accordingly, appellant's July 13, 2023, NOA of the June 5, 1996, Board decision will be treated as timely filed.

I. BACKGROUND

In January 1992 and January 1993, a VA regional office (RO) issued two rating decisions that denied service connection for PTSD "because the condition was not shown to exist, or to have occurred in, or be due to military service."[5] In February 1993, appellant was notified of these decisions, and he ultimately appealed to the Board.[6]

In May 1995, the Board remanded the matter to obtain a new VA examination. At this point in time, according to VA, appellant became unreachable.[7] In June 1995, the RO mailed appellant a letter seeking additional information about his PTSD claim, which was returned as undeliverable.[8] VA also attempted to schedule an examination, which was noted to be "undeliverable mail."[9] In February 1996, the RO sent another letter to appellant explaining that it was trying to obtain additional information to comply with the May 1995 Board remand order.[10] The RO explained that it had attempted to mail appellant correspondence to at least two different addresses and had contacted appellant's veterans service officer (VSO) as well. But all these actions were to no avail; the correspondence was returned as undeliverable. The RO remailed its February 1996 letter to both addresses it had obtained as appellant's possible current addresses and to his VSO. VA explained in its letter that if it received no response from appellant within 60 days,

[5] PROP at 16.

[6] *Id*.

[7] *Id*. at 33. (explaining that "notification to the veteran of the scheduled examination was returned to the VA as undeliverable, as was other correspondence, including the remand decision of May 1995.").

[8] *Id*. at 73, 69.

[9] *Id*. at 58.

[10] *Id.* at 55.

the matter would return to the Board for a decision to be based on the "evidence of record at that time."[11]

In May 1996, appellant's VSO, during an informal hearing presentation at the Board, acknowledged the RO's inability to contact appellant but informed the Board that appellant "has in the past received continuous treatment" from a nearby VA medical center.[12] The VSO requested that the RO contact the VA medical center and make additional attempts to locate appellant.[13]

On June 5, 1996, the Board issued the decision on appeal. In it, the Board found that "[t]he veteran's current address is not of record, and the VA was unable to locate such an address."[14] The Board also explained that "[t]he RO has been unable to locate [appellant] through alternative sources consisting of his accredited representative and the medical center from which he had been receiving his treatment."[15] The Board explained that because the Agency had been unable to establish contact with appellant, the necessary development could not be completed, and it concluded that the RO complied with its duty to assist. The Board also explained that "if the veteran contacts the VA, he is free to reopen his claim, at which point, additional development may be undertaken."[16] It is undisputed that the June 1996 Board decision was mailed on June 5, 1996, and was returned as undeliverable.[17]

Shortly thereafter, on June 24, 1996, the Board sent a "Referral of Correspondence" to the RO, attaching the June 1996 Board decision and informing VA that "[t]he enclosed communication initiated by the Board was returned undelivered."[18] Then the Board directed the RO to "[p]lease remail when the correct address is ascertained, with any necessary explanation."[19] Based on the Secretary's response and confirmation during oral argument, "[t]here is no evidence that the RO took any action after receiving the 'Referral of Correspondence.'"[20]

The preliminary record contains screenshots from the Compensation and Pension Record Interchange (CAPRI) system.[21] As evidenced by the CAPRI log entries, appellant was treated at

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[11] *Id*. at 57.

[12] PROP at 51.

[13] *Id*.

[14] *Id.* at 30.

[15] *Id*. at 33.

[16] *Id.*

[17] Secretary's Dec. 2023 Response (Resp.) to Nov. 2023 Court Order at 4; Appellant's April 2024 Resp. to Feb. 2024 Court Order at 3.

[18] Secretary's Motion (Mot.) to Dismiss, Exhibit (Ex.) A, Referral of Correspondence.

[19] *Id*.

[20] Secretary's April 2024 Resp. to Feb. 2024 Court Order at 7-8; OA at 13:00-14:06, 30:20- :56.

[21] CAPRI is the automated information system between the Veterans Benefits Administration (VBA) and the Veterans Benefits Health Administration. VA ADJUDICATION PROCEDURES MANUAL, M21-1, pt. X, subpt. iii, ch. 1, § A.1.

VA facilities throughout 1995 up until about January 1996.[22] After January 1996, the next entry is from September 1997, when annual treatment entries resumed.[23]

In October 2007, VA received a statement in support of claim from appellant that stated that he sought to reopen claims for various conditions, including PTSD.[24] Appellant specifically requested that he "would also like to reopen my claim for PTSD; I am seeking treatment [at] Jesse Brown VA [Medical Center]."[25]

In April 2008, a VA RO found that appellant's claim for service connection for PTSD "remains denied because the evidence submitted is not new and material."[26] The RO noted that its January 1992 and January 1993 decisions became final; the RO did not discuss the May 1995 or June 1996 Board decisions.[27]

In July 2022, appellant filed a supplemental claim under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) system.[28] And in November 2022, the RO reconsidered appellant's claim for service connection for PTSD. The RO noted the previous denials, including the June 1996 Board decision, stating that "[a]ll prior decisions were finally upheld" in that decision.[29] The RO reviewed evidence of record and denied appellant's claim for service connection for PTSD because there was no evidence of an in-service incident and no nexus evidence.[30] In November 2022, appellant, through a VSO, appealed the November 2022 RO decision to the Board, noting that the issue with which he disagreed was the finding that: "[t]he previous denial of service connection for [PTSD] is confirmed and continued."[31]

In February 2023, appellant appointed his current counsel.[32] According to appellant, his current counsel did not "physically access" his electronic VA records until July 2023.[33]

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[22] PROP at 19-23.

[23] *Id*. (Sept. 1997 CAPRI entry reflecting Aug. 1997 VA Discharge Summary).

[24] Secretary's Mot. to Dismiss, Ex. B., statement in support of claim.

[25] *Id*.

[26] PROP at 14.

[27] PROP 16-17.

[28] *Id*. at 9. A copy of the supplemental claim is not included in the PROP but is mentioned in the November 2022 RO decision.

[29] *Id.* at 10.

[30] *Id*. at 12.

[31] *Id.* at 7-8.

[32] *See* Appellant's Opp. at 1, note 1. Appellant asserts that he submitted a VA Form 21-22a, Appointment of Individual as Claimant's Representative, in February 2023. Although a copy of the VA Form 21-22a was not submitted as an attachment to appellant's opposition filing or contained in the PROP, we accept this fact as true, and the Secretary does not challenge it.

[33] *Id.*

On July 13, 2023, appellant filed an NOA of the June 5, 1996, Board decision that denied (1) entitlement to service connection for an acquired psychiatric disorder, including PTSD, and (2) a permanent and total disability rating for pension purposes.[34] As we noted above, pending before the Court today is the Secretary's August 2023 motion to dismiss this appeal.

II. PARTIES' ARGUMENTS

The Secretary concedes that appellant did not receive the June 1996 Board decision when it was mailed in 1996, because it was returned as undeliverable.[35] However, he argues that VA satisfied its obligation to provide appellant notice of the June 1996 decision because the Board, *at that time*, mailed its decision to appellant's last known address and VA provided a copy of the June 1996 Board decision to appellant's VSO.[36] Relying on our decision in *Davis*, the Secretary grounds his position on the presumption of regularity. He believes the presumption applies here "to show that the Board mailed its decision to [a]ppellant's last known address, which is its only duty under 38 U.S.C. § 7104(e)."[37] The Secretary concedes that there is no evidence that VA took any action after the Board's June 1996 Referral of Correspondence, but he maintains this is not a problem because VA was not required to do anything beyond mailing the June 1996 Board decision to the address the Agency had on file for appellant at that time.[38] The Secretary explains that there were no other known addresses of record for appellant at the time of the June 1996 Board decision, referencing a gap in treatment dates listed in CAPRI between January 1996 to December 1998.[39] The Secretary also notes that in October 2007, appellant sought to reopen his PTSD claim, which the Secretary asserts means that appellant knew his PTSD claim has been denied. During oral argument, the Secretary reiterated his position.

In opposition, appellant argues that his appeal should be accepted as timely because he never received a copy of the Board's June 1996 decision, and only learned of it after he obtained his current counsel, who accessed the records in July 2023.[40] Appellant asserts that once he was notified of the decision in July 2023, he diligently filed his NOA that same month. Additionally, appellant contends that he was admitted into VA treatment facilities for various periods of time between 1995 to 1998, providing VA notice of "other possible and plausible addresses" for VA to mail the June 1996 Board decision.[41] Moreover, appellant argues that when he reached out to VA in October 2007 seeking to reopen various claims, including PTSD, he notified VA of a viable address and yet VA did not provide him notice of the June 1996 Board decision. Initially, appellant argued that the presumption of regularity was rebutted in his case. During oral argument, however,

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[34] Board decision at 2.

[35] Secretary's Dec. 2023 Resp. to Nov. 2023 Court Order at 4.

[36] OA at 8:00- :15.

[37] Secretary's April 2024 Resp. to Feb. 2024 Court Order at 5.

[38] *Id.* at 7-8.

[39] PROP at 19-20. The CAPRI entries reflect treatment in August and September 1997, but the Secretary does not mention those dates.

[40] Appellant's Opp. at 1.

[41] *See id.* at Ex. 7-12.

appellant took the position that the presumption of regularity did not apply at all to his situation. Alternatively, appellant argues that equitable tolling should apply, such that the Court should deem his NOA as timely filed.

III. ANALYSIS

To be timely, an NOA generally must be filed with the Court within 120 days after the Board mails notice of its decision.[42] Until 2022, the Board was statutorily required to "promptly mail a copy of its written decision to the claimant at the last known address of the claimant."[43] "For the purposes of determining whether an NOA is timely filed under [§] 7266(a) . . . the Court applies to the Board's mailing of a decision copy under [§] 7104(e) a 'presumption of regularity.'"[44] The Supreme Court has held that, although "the deadline for filing [an NOA]" with this Court is "an important procedural rule," it "does not have jurisdictional attributes."[45]

In this matter, the crux of the parties' timeliness dispute is whether VA satisfied its statutory notice obligations, which includes its duty to mail appellant a copy of the Board's June 1996 decision. Therefore, the presumption of regularity is triggered.[46] So we will begin our analysis with an overview of the presumption of regularity and the role it plays in VA's duty to notify claimants of Agency decisions. We then will discuss VA's notice obligations and explain why strict compliance with our most relevant decision in this area, *Davis v. Principi*,[47] does not fully resolve the dispute before us. Then, we will discuss additional caselaw from not only our Court, but also the Supreme Court, that guides our consideration of the matters before us. And finally, we will explain why, under the unique facts of this case, VA was required to do more than what the law required and, therefore, why we will deny the Secretary's motion to dismiss the appeal as untimely.

A. Presumption of Regularity

Generally, "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[48] This Court has applied the presumption of regularity to processes and procedures throughout the VA administrative process, including the Board's mailing of a copy of its decision to a veteran.[49] As we already explained, the Board is required to "promptly mail a copy of its written decision" to the claimant, as well as to the claimant's authorized representative, if

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[42] 38 U.S.C. § 7266(a).

[43] 38 U.S.C. § 7104(e) (2021). This provision was amended in August 2022 and no longer contains this language.

[44] *Davis*, 17 Vet.App. at 36.

[45] *Henderson v. Shinseki*, 562 U.S. 428, 441-42 (2011).

[46] *See Romero v. Tran*, 33 Vet.App. 252, 255 (2021) (explaining that "the existence of VA's legal duty to mail [a decision] . . . [is] enough for the presumption [of regularity] to attach, and no further evidence was required to trigger the presumption.").

[47] 17 Vet.App. at 36-37.

[48] *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

[49] *Davis v. Brown*, 7 Vet.App. 298, 300-01 (1994); *see also Romero*, 33 Vet.App. at 262.

any, after reaching a decision in a case.[50] Absent clear evidence to the contrary, the Board is presumed to have properly mailed a copy of its decision to the claimant and his or her representative's last known address on the date that the decision was issued.[51] We have also held that where a mailing is undeliverable and a claimant's claims file discloses other "possible and plausible addresses, [VA] must attempt to locate the veteran at the alternative known addresses."[52]

However, "[t]he presumption of regularity is not absolute."[53] A claimant may rebut the presumption of regularity in mailing "by producing clear evidence that VA did not follow its regular mailing practices or that its practices were not regular."[54] Evidence of nonreceipt of a Board decision alone is not sufficient to rebut the presumption.[55] "Whether clear evidence exists to rebut the presumption is a question of law that the Court considers de novo."[56] In *Davis*, as most relevant to the situation we face, we held that an appellant can overcome the presumption by establishing that (1) the decision was mailed to an incorrect address or was returned as undeliverable *and* (2) "there were other possible and plausible addresses available to the Secretary *at the time* of the [Board] decision."[57]

Initially, we assume—without deciding—that *Davis* governs the situation before us, namely when the Board mails a decision to an address it knows is incorrect and will not result in the claimant receiving the decision. We confess that there is a certain oddity to considering the issue before us under the presumption of regularity. After all, we know for a fact that VA mailed the June 1996 Board decision to the last known address in appellant's file and that the decision was returned as undeliverable. So we really don't know what we are meant to "presume." But *Davis* frames the matter under the rubric of the presumption of regularity, so we use that framework here. Therefore, only the second rebuttal prong under *Davis* is at issue—whether there were other possible and plausible addresses of record available to VA at the time of the Board's decision. However, *Davis* does not fully address the matter before us today. As we say, here the Board was aware that the address to which it sent the June 1996 decision would not succeed in notifying appellant of its decision, and the Board instructed VA to continue searching for possible and plausible addresses for appellant even *after* it issued its decision. Thus, we must first consider how long VA's obligation to search for possible and plausible addresses remains open both under *Davis* and the facts of appellant's specific situation before we can conclude whether the second prong for rebutting the presumption can be met.

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[50] 38 U.S.C. § 7104(e)(1).

[51] *See Crumlich v. Wilkie*, 31 Vet.App. 194, 201 (2019); *Davis*, 17 Vet.App. at 36; *Ashley v. Derwinski*, 2 Vet.App. 307, 309 (1992).

[52] *Woods v. Gober*, 14 Vet.App. 214, 220 (2000).

[53] *Ashley*, 2 Vet.App. at 309.

[54] *Crumlich*, 31 Vet.App. at 205; *see also Romero,* 33 Vet.App. at 261 ("[C]lear evidence of irregularity is what robs the presumption of regularity of its power.").

[55] *Crain v. Principi*, 17 Vet.App 182, 186 (2003); *Davis*, 17 Vet.App. at 36-37.

[56] *Clarke v. Nicholson*, 21 Vet.App. 130, 133 (2007).

[57] 17 Vet.App. at 337 (emphasis added).

B. VA's Notice Obligations

In *Davis*, the Board mailed its June 9, 2000, decision to Mr. Davis on June 9, 2000, at the only address VA had in the claims file for Mr. Davis. That decision was returned as undeliverable. In assessing whether VA's presumption of regularity could be rebutted, we concluded that it could not be because "there was no additional possible and plausible address [for Mr. Davis] in the claims file *at the time of the* [*Board*] decision."[58] Thus, *Davis* makes clear that VA's obligation to search for additional addresses only applies "at the time of the Board decision," and it does not go further.[59]

Turning to the case before us, based on the parties' responses and arguments, we know that VA took a wide variety of actions to obtain a good address for appellant (that is, an address that would actually provide appellant with notice of the decision) *before* the Board issued its June 1996 decision. Although the Board was aware that appellant had not kept VA apprised of his whereabouts and could not be reached at any address that VA had on file for him, it contacted appellant's VSO and performed a search in the VA healthcare system in an attempt to find a good address for appellant.[60] Therefore, applying a strict reading of *Davis* means that VA was not required to do more than the laudable actions it already performed in searching for a viable address for appellant in this matter. And appellant has not demonstrated that the presumption of regularity can be rebutted.[61] And so, assuming again that *Davis* provides the appropriate rule of decision on the issue, there is no clear evidence that the VA did not mail the June 1996 Board decision in accordance with law. But our analysis does not stop here, given the specific factual context before us.

Although we conclude that VA satisfied its notice obligations under a strict *Davis* approach, and that should be enough to conclude that the presumption of regularity attaches, we cannot overlook the fact that the Board here specifically directed VA to do more than what the law requires. To reiterate, *after* the Board's June 1996 decision was returned as undeliverable, the Board instructed the RO to "[p]lease remail when the correct address is ascertained, with any necessary explanation."[62] We now turn to additional cases, post-*Davis*, to decide whether VA was required to do more in this instance, and if so, whether the *Davis* presumption of regularity decides this matter adverse to appellant.

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[58] *Id.* at 38 (reaffirming prior caselaw) (emphasis in original).

[59] *Id*.

[60] PROP at 33, 36.

[61] During oral argument, appellant argued that the presumption of regularity did not apply. OA at 40:40-42:35. However, in his opposition to the Secretary's motion to dismiss, he took the position that it could be rebutted. *See* Appellant's Opp. at 4-5.

[62] *Id*.

B. Post-*Davis* Caselaw

The Fifth Amendment to the U.S. Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."[63] "[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[64] An essential principle of due process is that deprivation of a protected interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case."[65] The Federal Circuit has held that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause.[66]

In *Jones v. Flowers*,[67] the Supreme Court addressed "whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice failed."[68] The Supreme Court explained that due process does not require actual notice before the government can take a property owner's property; instead, the government is required to provide "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[69] But the Supreme Court also held that, "when [a] mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling the property, if it is practicable to do so."[70]

The situation presented before us today is similar to that in *Jones*: The government (i.e. the Board) knew that appellant had not been notified of its decision before denying appellant a protected property interest (i.e. VA disability benefits). At first glance, we were concerned about a possible constitutional notice violation in this matter and sought additional responses from each party addressing *Jones* and whether *Davis*'s articulation of VA's duty to notify remains constitutional—particularly when the Board has actual knowledge that its notice procedures will not work. However, we decline to address this question here today. We can decide the issue on nonconstitutional grounds, which is always the preferable course of action.[71]

There is a longstanding practice of requiring an agency to follow its own internal guidance and policies, even when such policies impose obligations beyond those imposed by binding legal

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[63] U.S. CONST. amend. V.

[64] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

[65] *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950).

[66] *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009).

[67] 547 U.S. 220 (2006).

[68] *Id*. at 227.

[69] *Id*. at 226 (quoting *Mullane*, 339 U.S. at 314).

[70] *Id.* at 225.

[71] *See Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

authorities.[72] We have used this practice in our own caselaw, for example, in our decisions in *Overton v. Wilkie*,[73] *Healey v. McDonough*,[74] and *Stover v. McDonough*.[75]

In *Overton*, we held that the Board must "discuss any relevant provisions contained in the [*VA Adjudication Procedures Manual*, (*M21-1*)] as part of its duty to provide adequate reasons or bases, but because it is not bound by those provisions, it must make its own determination before it chooses to rely on an M21-1 provision as a factor to support its decision."[76] In the situation before the Court in *Overton,* that meant that while the Board was not required to follow *M21-1* provisions on which it relied as a matter of law, because it choose to rely on certain *M21-1* provisions to support its decision, the Board was required to discuss the particular provisions as part of its duty to provide adequate reasons or bases. So after *Overton*, the Board was required to discuss any *M21-1* provisions that it used in its decision, as part of its statutory duty to assist.

In *Healey*, the Court considered a situation that essentially was the converse of the one we considered in *Overton*. As an abstract matter, the question in *Healey* was whether the Board was required to discuss nonbinding Agency guidance that was potentially favorable to a claimant.[77] Unlike in *Overton*, the Board in *Healey* had not relied on such nonbinding guidance but rather had ignored it.[78] We made clear that the Board's obligations to provide an adequate statement of reasons or bases includes discussing relevant potentially favorable provisions of nonbinding Agency guidance documents.[79]

We returned to the general area *Overton* and *Healey* addressed in *Stover*. There, we considered whether there are instances in which the Board can be bound by provisions of the *M21-1*, which is normally only binding on the RO. In *Stover*, the Board incorporated the exact language from an *M21-1* provision into its decision and relied on that language as the controlling law of the case. We concluded that while "the M21-1 is not binding on the Board in every case, the Board adopted the M21-1. . . provision in *this* case when it repeatedly used the M21-1 standard as the rule of decision when adjudicating appellant's claim."[80] Therefore, the Board had bound itself to comply with the *M21-1* provision, even though it was not required to do so.

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[72] *See*, *e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[I]t is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."); *cf. Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) ("[G]overnment officials must follow their own regulations, even if they were not compelled to have them at all.").

[73] 30 Vet.App. 257, 264 (2018).

[74] 33 Vet.App. 312 (2021).

[75] 35 Vet.App. 394, 403 (2022).

[76] 30 Vet.App. at 264.

[77] *See* 33 Vet.App. at 315-16.

[78] *Id.* at 320-21. The nonbinding guidance document at issue in *Healey* was the *Purplebook*, a document that provided policies and procedures at the Board level, as opposed to the *M21-1* that was at issue in *Overton*, which deals with the VBA. *Id*. at 317.

[79] *Id*. at 322.

[80] 35 Vet.App. at 405 (emphasis in original).

In applying the logic in *Overton*, *Healey,* and *Stover* here, we conclude that when the Board directed VA to remail its decision in the June 1996 Referral of Correspondence, it changed VA's notice obligations as applied to this case. Despite being only required to search for possible and plausible addresses for appellant *at the time* of its June 1996 decision, the Board's Referral of Correspondence left VA's notice obligations open until "the correct address is ascertained."[81] We make clear that this result may not be true in every case in which VA uses a similar referral. But with respect to the particular factual circumstances before us today, we are convinced that the Board bound the Agency to comply with the "more rigorous" notice obligations it set for itself in the Referral of Correspondence.[82] In this regard, the laudable actions VA took *before* the Board's June 1996 decision to locate appellant provides context for the directions the Board gave in the Referral of Correspondence *after* its June 1996 decision. We won't assume that the Board was so proactive in finding an address that would actually provide appellant with notice only up until the point in time it knew that its efforts had failed. Instead, we think the best reading of the facts is that the Board continued its "above-and-beyond" notice efforts when it issued the Referral of Correspondence. And this makes resolving the issue before us straightforward. The Secretary concedes that there is no evidence that VA took any action in response to the Board's June 1996 Referral of Correspondence. Therefore, we conclude that VA failed to satisfy its duty to notify appellant of the June 1996 Board decision as the Board modified that duty through the Referral of Correspondence.

C. Summary

In sum, appellant filed his NOA roughly 27 years after the date of the Board decision that he wishes to appeal. The Secretary filed a motion to dismiss the appeal as untimely, relying on the presumption of regularity to demonstrate that VA performed its statutory notice obligations. We will deny the Secretary's motion to dismiss and conclude that appellant's NOA is timely filed. Although VA satisfied its notice obligations and the presumption of regularity cannot be rebutted under *Davis* (which we, again, assume—without deciding–provides the rule of decision under the facts before us), we conclude that the presumption of regularity does not decide this matter because VA did not comply with the heightened notice obligations the Board established in its June 1996 Referral of Correspondence. Appellant filed his NOA in July 2023, shortly after his counsel learned of the 1996 decision, which we conclude makes the NOA timely. Additionally, because we accept appellant's NOA as timely filed, we need not consider the remaining arguments that appellant raises, because they can lead to no greater remedy than the one that we provide in this order.

IV. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that the Secretary's August 31, 2023, motion to stay proceedings is denied as moot. It is further,

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[81] Secretary's Mot. to Dismiss, Ex. A.

[82] *Morton*, 415 U.S. at 235.

ORDERED that the Secretary's August 30, 2023, motion to dismiss is DENIED. It is further,

ORDERED that appellant's NOA is accepted as timely. And it is further,

ORDERED that the Appellant, within 14 days after the date of this order, file his response to the record before the agency (RBA). U.S. VET. APP. R. 10(b). The appeal shall thereafter proceed in accordance with the Court's Rules of Practice and Procedure.

DATED: December 20, 2024 PER CURIAM.

Copies to:

Kenneth H. Dojaquez, Esq.

VA General Counsel (027)