

**OVERRULED IN PART**

See Hamilton v. Brown, No. 90-470, Slip Op. at 16 (Apr. 15, 1993)

**UNITED STATES COURT OF VETERANS APPEALS**

No. 90-800

ALBINA M. MALGAPO,

Appellant,

v.

VA File No. XC 16 910 121

EDWARD J. DERWINSKI,

Secretary of Veterans Affairs,

Appellee.

Before NEBEKER, Chief Judge, and FARLEY and STEINBERG,  
Associate Judges.

**O R D E R**

Appellant's Notice of Appeal stated that her Notice of Disagreement (NOD) was filed at the Department of Veterans Affairs (VA) Regional Office (RO) on March 15, 1989. The Secretary of Veterans Affairs then moved to dismiss and attached a preliminary record indicating that appellant filed NODs on June 16, 1988, and September 22, 1988. The Court then ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. Appellant's response of November 28, 1990, does not address the NOD jurisdictional issue. In her response, appellant also moved for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651.

Because the Court required further documentation in order to determine jurisdiction under *Whitt v. Derwinski*, U.S. Vet. App. No. 89-16 (Oct. 12, 1990), *reh'g en banc denied* (Dec. 6, 1990), it ordered the Secretary to provide a supplemental preliminary record including (1) the filing dates of any correspondence which might be construed as an NOD filed by appellant, (2) copies of all adjudicative determinations made by the VARO and its hearing officers after September 22, 1988, and (3) copies of any correspondence from the VARO referring to such determinations.

In his response, the Secretary stated that appellant had filed after November 18, 1988, no document which might be construed as an NOD. The Secretary also argued that appellant's motion for extraordinary relief should be denied.

On March 8, 1991, this Court entered an order dismissing

appellant's appeal because "appellant filed her NOD prior to November 18, 1988, and because, under the provisions of Pub. L. No. 100-687, § 402, the Court does not have jurisdiction unless an appellant filed an NOD on or after November 18, 1988". Veterans' Judicial Review Act, Pub. L. 100-687, Div. A, § 402, 102 Stat. 4105, 4122 (1988) (VJRA). On April 22, 1991, appellant filed a pleading styled "Appellant's request for extraordinary relief under the All Writs Act", which the Court deems to be a motion for review by a panel of the Court of the March 8, 1991, order.

Upon consideration of that pleading and order and the supplemental preliminary record, it is

ORDERED that appellant's motion, as so deemed, is granted and that the Court's March 8, 1991, order is vacated, except for its last paragraph.

Upon further consideration of that pleading and record, the Court holds that appellant's April 7, 1989, VA Form 1-9, expressing disagreement with the decision, made by the Director, Compensation and Pension Service of VA's Veterans Benefits Administration, "that the evidence does not justify a change in the decision with which you have [previously] expressed disagreement" is a jurisdictionally valid NOD under 38 U.S.C. § 7105(b)(1) (formerly § 4005) which requires that an NOD "must be filed with the activity which entered the determination with which disagreement is expressed". See *Whitt*, slip op. at 5-6 (subsequent NOD as to same claim satisfies VJRA § 402 when it is "a written communication from the claimant expressing dissatisfaction [with] . . . the Hearing Officer's decision . . . to continue the denial of benefits [, which] was an adjudicative determination"); *Stokes v. Derwinski*, U.S. Vet. App. No. 90-122, slip op. at 4-5 (Apr. 4, 1991) (to the same effect: "any communication which 'can reasonably be construed' as expressing dissatisfaction with a VA adjudicative determination must be considered a valid NOD for this Court's jurisdictional purposes"). The more narrow language of 38 C.F.R. § 19.118 (1990), which provides that a "written communication . . . expressing . . . disagreement with an adjudicative determination of . . . the Department of Veterans Affairs [ ] regional office, medical center or clinic [ ] which notified the claimant of the action taken . . . will constitute [an NOD]", may not properly be construed as a limitation on the scope of the statutory language from which it derives, and that statute permits a valid NOD to be filed with **any** activity (not limited to those listed in the regulation) "which entered the determination with which disagreement is expressed". 38 U.S.C. § 7105(b)(1) (formerly § 4005) (1988). Accordingly, it is

ORDERED that the appeal proceed under the Court's Rules of Practice and Procedure and that appellant file a statement of issues under Rule 6 of those Rules not later than 60 days after the date of this order.

DATED: JULY 17, 1991

PER CURIAM.



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