

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 92-7425
Summary Calendar
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EMIL LEO NICK, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
(VETERANS ADMINISTRATION),

Defendant-Appellee.

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Appeal from the United States District Court for the
Northern District of Mississippi
(CA GC90 176 B 0)
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September 13, 1993

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

The facts are not disputed. Plaintiff-appellant Emil Nick, Jr. (Nick) holds a \$5,000 ordinary life insurance policy through National Service Life Insurance (NSLI). In 1960, Nick applied for and received a Total Disability Income Provision (TDIP) rider to his coverage. This rider provided benefits if Nick became totally

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

disabled before his sixtieth birthday. In 1965, another TDIP rider became available to policyholders. This rider, upon application, proof of health, acceptance, and payment of extra premiums, provided benefits if the applicant became disabled before his or her sixty-fifth birthday.

In a September 1965 letter, Nick requested the necessary forms to apply for this new TDIP. The government mailed a letter to Nick in October of that year which stated what the new premium would be and which included the application form. The government never received a completed application or payments including the new premium amount from Nick.

In March 1986, Nick, then at least sixty-two years of age, became totally disabled from a car accident. In November 1987, Nick asked the government for a waiver of premiums under his basic coverage and for disability payments. Nick was then sixty-four years old. The government waived his premiums but refused to authorize benefits because Nick's TDIP rider had expired upon his sixtieth birthday. On appeal to the Board of Veterans Appeals, the Board held that "[a] total disability income provision was not in effect when [Nick] became totally disabled in March 1986."

Nick brought this suit in the district court below. The government moved for dismissal or, in the alternative, summary judgment. The district court held that it had subject matter jurisdiction and granted summary judgment for the government. Nick filed timely notice of appeal. We affirm.

The government argues (alternatively to its first argument,

which is on the merits) that the district court did not have subject matter jurisdiction. "Subject to subsection (b), the decision of the Secretary [of Veterans Affairs] as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. § 511(a).

Subsection (b)(2) references section 1984. "In the event of disagreement as to claim . . . under contract of National Service Life Insurance, . . . an action on the claim may be brought against the United States . . . in the United States District Court . . . and jurisdiction is conferred upon such courts to hear and determine all such controversies." Section 1984(a).

The parties agree that Nick is a policyholder through National Service Life Insurance. This Court has found subject matter jurisdiction over disputed rider benefits by viewing the claim as arising under the NSLI policy itself. *Salyers v. United States*, 326 F.2d 623, 625 (5th Cir. 1964) ("Before the disability rider can be issued, there must be a policy in force. The policy is the foundation from which the right arises"). While the issue is a close one, we ultimately conclude that *Salyers* is controlling. Nick's claim was hence properly before the district court.¹

¹ The government argued below that 38 U.S.C. § 4052(a), added by P.L. No. 100-687, 102 Stat. 4105 (1988), precluded jurisdiction because it vests the Court of Veterans Appeals with "exclusive jurisdiction" to review decisions of the Board of Veterans Appeals. However, as the district court observed, Nick instituted his appeal to the Board of Veterans Appeals before the effective date of section 4052(a), so it is inapplicable. The government on appeal expresses its agreement with this holding, but correctly states that "the fact that the CVA lacks jurisdiction over this case does

The district court granted summary judgment for the government. "Summary judgment is appropriate if the record discloses 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c)." *Sims v. Monumental General Ins. Co.*, 960 F.2d 478, 479 (5th Cir. 1992). Nick does not argue that summary judgment, as such, was improper. He argues that the district court erred in applying the regulatory standard to the facts when it granted summary judgment for the government.

The governing standard for the agency's decision is reasonable doubt. "When, after careful consideration of all procurable and assembled data, a reasonable doubt arises . . . , such doubt will be resolved in favor of the claimant." 38 C.F.R. § 3.102. The same regulation also states, however, that "the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded." *Id.* Similarly, the statute provides that the claimant "shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." 38 U.S.C. § 5107(a) (formerly section 3007). Nick argues that there is reasonable doubt whether he received the application form that he requested and that the government mailed. He argues that if he had

not necessarily grant jurisdiction to the district courts." Nevertheless, we note that future such cases will go to the Court of Veterans Appeals (CVA). There is thus little occasion for this Court to reexamine *Salyers* or make fine distinctions respecting it, where the result in this case is the same in any event, namely that Nick not recover.

received the application, his past dealings with the government indicate he would have applied for the extended TDIP.

The controlling regulation over acquiring the extended TDIP rider is as follows:

"[T]he total disability income provision authorized by 38 U.S.C. 715, . . . effective January 1, 1965, shall not be added to a National Service life insurance policy containing the total disability income provision . . . in effect before January 1, 1965, except (1) upon complete surrender of such total disability income provision with all claims thereunder . . .; (2) written application signed by the applicant; (3) proof that the applicant is in good health . . .; and (4) payment of the premium" 38 C.F.R. § 8.96(a).

To receive the TDIP through the age of sixty-five, Nick had to meet all four requirements.

Assuming that Nick would have applied for the extended TDIP if he had received the application, thus fulfilling the second requirement, Nick still had to fulfill the other three requirements. The record lacks any proof as to the three remaining requirements. Assuming Nick did not receive the government's October 1965 letter sending the application form and he can only say he does not recall receiving it nevertheless there is no evidence that he thereafter did anything to pursue the matter until November 1987, when he was sixty-four, about a year and a half after the March 1986 accident (when he was at least sixty-two) that allegedly disabled him. By Nick's failing to submit evidence that he could or would have met all four requirements, Nick failed to carry his burden and there is no evidence sufficient to justify a belief by a fair and impartial individual that Nick acquired the extended TDIP coverage.

The judgment of the district court is

AFFIRMED.