



Pension Benefit Guaranty Corporation  
1200 K Street, N.W., Washington, D.C. 20005-4026

August 3, 2010



Re: Appeal  Case No. 214700, Compass Capital Partners, Ltd. Defined Benefit Retirement Plan (the "Plan")

Dear

This decision responds to your August  2009 appeal of PBGC's July  2009 determination that the Plan is not covered by PBGC's insurance program. The impact of PBGC's determination is that PBGC cannot pay you a benefit based on your participation in the Plan. For the reasons stated below, we have upheld PBGC's coverage determination, and, therefore, we are denying your appeal.<sup>1</sup>

### **PBGC's Determination**

PBGC issued its July  2009 determination to  of Compass Capital Partners, Ltd. ("Compass" or the "Company"). PBGC also provided a copy of this determination to you.<sup>2</sup> PBGC's determination stated that, pursuant to section 4021(b)(13) of the Employee Retirement Income Security Act, as amended ("ERISA"), the Plan is not covered by the insurance provisions of Title IV of ERISA.<sup>3</sup>

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<sup>1</sup> The Appeals Board has received identical appeal letters from you and two other individuals. The letters state: "This appeal is signed by Appellants in three counterparts, which taken together constitute a single appeal from the determination."

The Appeals Board has concluded that the three appeals arise out of the same or similar facts and they seek the same or similar relief. Exercising its discretion under section 4003.56 of PBGC's regulations, the Board has consolidated your appeal with the appeals filed by the other two individuals. See 29 Code of Federal Regulations 4003.56. The Board has decided all three appeals and is issuing separate decision letters to you and the other two appellants.

<sup>2</sup> You, as well as the other two appellants, are entitled to appeal PBGC's determination since you are an "aggrieved person" under section 4003.2 of PBGC's regulation.

<sup>3</sup> ERISA section 4021, which addresses PBGC's coverage of pension plans, is published at 29 United States Code section 1321.

PBGC's letter noted that ERISA section 4021(b)(13) excludes from Title IV coverage any plan that is "established and maintained by a professional service employer which does not at any time after the date of enactment of the Act have more than 25 active participants in the plan." PBGC also explained that section 4021(c)(2)(A) defines "professional service employer" as "an organization owned or controlled by professional individuals or by executors or administrators of professional individuals, the principal business of which is the performance of professional services."

PBGC found that Compass, the Plan's sponsor, is "an investment-banking firm that specializes in advising clients in the printing industry." Additionally, in finding that Compass "is owned and controlled by professional individuals" and "provides professional services," PBGC stated as follows:

Section 4021(c)(2)(B) provides a non-exclusive list of individuals who are considered to be "professional individuals." "Investment bankers" are not specifically listed in the statute. Consequently, a determination of whether investment bankers are "professional individuals" within the meaning of the statute depends on an analysis of the services performed and the expertise required to perform them. As stated in PBGC Opinion Letters 76-106 and 96-1, a professional individual generally is one who provides services which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine mental, manual or physical processes. Based on a review of the Compass website, all partners at Compass have a Master of Business Administration degree. This degree is indicative of knowledge of an advanced type. Moreover, the Compass partners have the knowledge to render investment banking services in the specialized printing industry.

Moreover, Compass provides professional services. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and usually would be predominantly intellectual in character. The Compass partners provide financial advice as their product. This type of financial advice requires the consistent exercise of discretion and judgment and is predominantly intellectual in character. Therefore, the partners of Compass provide professional services.

PBGC's determination letter further stated that there is no evidence that the Plan ever had more than 25 participants. PBGC thus concluded that the Plan met the condition in ERISA section 4021(b)(13) of not having more than 25 active participants since the time of ERISA's enactment. Based on the above-stated reasons, PBGC determined: (1) the Plan is established and maintained by a "professional service employer" as defined under ERISA section 4021(c)(2)(A), and (2) the Plan is excluded from Title IV coverage under ERISA section 4021(b)(13).

### Your Appeal

Your August [ ] 2009 appeal (the "Appeal") states that the Plan has five participants, who each was an employee of Compass when the Plan was established in 1999 as well as when the Plan was "frozen" in January 2003.<sup>4</sup> The Appeal therefore "concedes" that there never were more than 25 active participants in the Plan.

The Appeal, however, asserts that "Compass is not and was not a professional services employer, as defined in the Exclusionary Language."<sup>5</sup> The Appeal states that two findings are necessary to establish that Compass is a "professional services employer": (i) Compass's principal business must be the performance of professional services; and (ii) Compass must be owned or controlled by professional individuals, as defined in Section 4021(c)(2)(B). The Appeal then asserts that neither of these requirements is satisfied.

First, in contending that Compass was not in the business of performing professional services, the Appeal disputes PBGC's determination that Compass "was an investment banking firm that specializes in advising clients in the printing industry." Rather, the Appeal asserts:

In fact, Compass had two lines of business: it represented, as agent, buyers and sellers of printing companies; and it performed valuations of significant interests in businesses of all descriptions. Compass did not engage in many of the lines of business that are conducted by investment banking firms. It did not underwrite securities; it was not a stockbroker; it conducted no securities trading activities; it risked none of its capital in the transactions for which it was engaged. Its agency business can most accurately be described as business brokerage.

The Appeal also claims that investment bankers and their personnel are licensed by the Securities and Exchange Commission and various state regulatory authorities. Since Compass and its personnel were not required to be licensed for either its agency or its valuation businesses and since Compass did not carry professional liability insurance, the Appeal concludes that Compass should not be found to be in the business of performing professional services.<sup>6</sup>

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<sup>4</sup> Three of the participants identified in the Appeal are appellants.

<sup>5</sup> The Appeal asserts that the "applicable period" for determining the status of the Plan is the period between the Plan's establishment in 1999 and the freeze of benefit accruals as of January 1, 2003. We observe, however, that a freeze of benefit accruals generally does not affect the status of a pension plan for purposes of complying with ERISA's requirements.

Nevertheless, it is unnecessary for us to decide whether the "applicable period" ended in January 2003. There is no evidence that either Compass's ownership or the basic nature of its business has changed at any time after the Plan was established in 1999. Accordingly, our reasons for denying the Appeal, as stated in this decision, are not linked to a particular time period.

<sup>6</sup> The Appeal also states: (1) Compass was a member of various printing industry trade groups, but those groups imposed no requirements other than the payment of membership fees; (2) although Mr. [ ] was a member of the American Society of Appraisers, such membership was not a condition of his offering and performing valuation services; (3) all of Compass's business was done pursuant to engagement letters which indemnified Compass against

Second, the Appeal asserts that Compass was not owned or controlled by professional individuals. The Appeal points out that neither Compass's owner [redacted] nor any of its employees were performing services for Compass in a profession enumerated in section 4021(c)(2)(B).<sup>7</sup> The Appeal further claims that the "not limited to" language in section 4021(c)(2)(B) means that other occupations are included if they "are essentially identical to the enumerated occupations in relevant ways." In its view, a commonality among the majority of occupations listed in section 4021(c)(2)(B) is that they are licensed. Since Compass "engaged in no line of business that required any of its personnel to be licensed," the Appeal contends that Compass is not comparable to the listed occupations.

The Appeal further disagrees with PBGC's conclusion that, because all the partners at Compass have a Masters of Business Administration degree, this evinces knowledge of an advanced type used to render investment banking services in the specialized printing industry. First, the Appeal maintains that, while three of the Plan participants had an MBA during the relevant period, the two remaining participants did not. Furthermore, the Appeal claims that using an MBA as the criterion for determining whether an individual is a "professional individual" is an overly broad test that is inconsistent with the text of ERISA or with Congress's intent.

The Appeal requests that the Appeals Board reverse PBGC's initial determination and find that the Plan is covered under the insurance provisions of Title IV of ERISA.

#### Applicable Law

As is stated in PBGC's determination, ERISA section 4021 establishes the "professional service employer" exclusion from PBGC coverage of a pension plan. The relevant language for this exclusion is set forth below:

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any claim of liability for any actions or omissions other than gross negligence or willful misconduct; and (4) Compass's principal competitive edge derived from its contacts in the printing industry for its agency business and its contacts among the legal and accounting communities in the valuation business.

<sup>7</sup> The Appeal asserts that [redacted] had a [redacted] license but had not performed [redacted] services for a fee since 1982. It also states that [redacted] was a licensed [redacted] but never has performed [redacted] services.

**§ 4021. Coverage**

\* \* \*

**(b) Plans not covered.** —This section does not apply to any plan—

\* \* \*

(13) established and maintained by a professional service employer which does not at any time after September 2, 1974, have more than 25 active participants in the plan.

**(c) Definitions.** —

\* \* \*

(2) For purposes of this paragraph and for purposes of subsection (b)(13)—

(A) the term “professional service employer” means any proprietorship, partnership, corporation, or other association or organization (i) owned or controlled by professional individuals or by executors or administrators of professional individuals, (ii) the principal business of which is the performance of professional services, and

(B) the term “professional individuals” includes but is not limited to, physicians, dentists, chiropractors, osteopaths, optometrists, other licensed practitioners of the healing arts, attorneys at law, public accountants, public engineers, architects, draftsmen, actuaries, psychologists, social or physical scientists, and performing artists.

PBGC has issued several opinion letters that have interpreted the “professional service employer” exclusion.<sup>8</sup> In an early opinion letter issued by PBGC (Opinion Letter 76-106), PBGC stated that a professional service employer is “any entity owned or controlled by professional individuals, as defined in 4021(c)(2)(B) of [ERISA], where both the entity and the professional individuals owning and controlling it are engaged in the performance of the same professional service.” A copy of Opinion Letter 76-106 is provided as Enclosure 1. PBGC’s subsequent opinion letters have applied the same type of analysis as Opinion Letter 76-106. See further discussion below.

**Discussion**

PBGC provides pension insurance in accordance with ERISA. If a plan sponsor of a PBGC-covered, defined-benefit pension plan is unable to support the plan, PBGC becomes trustee of the plan and pays benefits, subject to the limitations and requirements set by Congress under ERISA. PBGC, however, is not authorized to pay guaranteed benefits in pension plans that are not covered by PBGC’s insurance program.

***The “Professional Service Employer” Issue***

The Appeal does not dispute that Compass at all relevant times had less than 25 active employees. Rather, the issue in the Appeal is whether the Plan is established and maintained by a professional service employer. As the Appeal states, the following two conditions must be

<sup>8</sup> PBGC’s Opinion Letters are published on PBGC’s website at [www.pbgc.gov](http://www.pbgc.gov).

satisfied for an organization to be a professional service employer: (1) the organization's principal business must be the performance of professional services; and (2) the organization must be owned or controlled by professional individuals. See Opinion Letter 76-106 (Enclosure 1).

1. Compass's Principal Business is the Performance of Professional Services

Although ERISA section 4021 does not define the term "professional services," it defines the term "professional individuals" through a nonexclusive list of occupations. See ERISA subsection 4021(c)(2)(B). This leads to the conclusion, which is supported by the holdings in PBGC's opinion letters, that "professional services" are the type of services that customarily are performed by individuals who are employed either in one of the occupations listed in subsection 4021(c)(2)(B) or in an occupation with similar characteristics.

PBGC Opinion Letter 76-106 further provides guidance as to the characteristics of a professional individual for occupations that are not listed in ERISA section 4021(c)(2)(B). The opinion letter states in pertinent part:

In our view, a professional individual generally is one who provides services which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship or from training in the performance of routine, mental, manual or physical processes. The rendering of professional services generally requires the consistent exercise of discretion and judgment in its performance and would be predominantly intellectual in character.

Later in this decision, we discuss whether the [redacted] of Compass, [redacted] meets the definition of a "professional individual." As stated in Opinion Letter 76-106, however, the "professional individual" determination "depends upon an analysis of the services performed and the expertise required to perform them." Accordingly, it is logical to analyze first the business services that Compass provides before determining whether [redacted] is a "professional individual."

According to Compass's website, Compass is "recognized nationally as a leader in investment banking, valuation services, financial advisory services and management consulting." See Enclosure 2, which is a copy of information we obtained from Compass's website. The website further lists seven identified services: Representing Selling Shareholders; Company Valuations; Acquisition Consulting; Capital Formation & Financing; Strategic Planning; Research; and Management & Organizational Development & Training.

The Appeal disputes PBGC's determination that Compass "was an investment banking firm that specializes in advising clients in the printing industry." The Appeal states that Compass "did not engage in many of the lines of business that are conducted by investment banking firms. It did not underwrite securities; it was not a stockbroker; it conducted no securities trading activities; it risked none of its capital in the transactions for which it was engaged. Its agency business can most accurately be described as business brokerage."

PBGC's conclusion that Compass was engaged in "investment banking" is consistent with Compass's website statement that it is "recognized nationally as a leader in investment banking." Additionally, the Plan's Form 5500 filing for 2003 (Enclosure 3) identifies Compass's business code as "523110," which is "Investment Banking & Securities Dealing" (see the list of business codes in Enclosure 4). Nonetheless, based on the information on Compass's website and the statements in the Appeal, it appears that "investment banking," at least in the traditional sense, is probably not the most accurate description of Compass's principal business activities. We further have accepted the Appeal's statement, for purpose of our analysis, that Compass had two major lines of business: it represented, as agent, buyers and sellers of printing companies; and it performed valuations of significant interests in businesses of all descriptions.

With respect to Compass's business of "representing, as agent, the buyers and sellers of printing companies," its website states the following with respect to "Representing Selling Shareholders":

We bring industry knowledge and financial expertise to the transaction, giving the selling shareholders a much better understanding and sense of control over the deal. Compass professionals guide you through the process, start to finish, step by step. We value your company and reach consensus with our client. We author a complete and detailed Descriptive Memorandum for prospective buyers. We identify the best strategic and/or financial buyers for your company. Then we negotiate the economics and structure the deal to meet your objectives. We supervise the Letter of Intent to Purchase and the Purchase Agreement and work with your accountants and lawyers to form your deal team. Finally, we work to insure a prompt and successful closing.

We concluded, based on this description, that Compass's services in representing the buyers and sellers of printing businesses "require knowledge of an advanced type in a field of science or learning" (which, in Compass's case, is financial expertise), involve "the consistent exercise of discretion and judgment in its performance," and are "predominantly intellectual in character." Thus, this line of Compass's businesses has the requisite characteristics for being a professional service.

With respect to Compass's valuation business, its website states: "Our professionals have valued businesses in a wide range of industries and of all sizes from \$500,000 to over \$500 million in revenues." The website further states:

Compass provides . . . timely, accurate, objective, and defensible valuation advice . . . We take pride in our reputation for producing carefully prepared, well-reasoned, defensible valuations and supporting materials which will, when necessary, stand the test of litigation. We are prepared to support our valuations when appropriate.

Thus, based on the apparent size and diversity of its customers as well as Compass's representations concerning the type of valuation services it provides, we concluded that

Compass's valuation business involves expertise of a complex nature in the areas of finance, accounting, and business, and therefore is a professional service.

The above-stated conclusions are consistent with a 1996 PBGC opinion letter that analyzed the professional services issue. In PBGC Opinion Letter 96-1, a copy of which is at Enclosure 5, PBGC determined that an "economic consulting firm" was a professional service employer. PBGC stated in pertinent part:

The Company's owners meet the PBGC criteria for professionals. They have advanced degrees in economics and accounting, have extensive work and teaching experience in those fields, and have published articles in those fields. They currently do analyses in the areas of macroeconomics, mathematical economics, econometrics and accounting. They provide intellectual services which require knowledge of an advanced type and which require the consistent exercise of discretion and judgment in its performance. They present their professional opinions in the form of reports to clients.

As is the case with the economic consulting firm, Compass: (1) performs analyses for its clients and customers that requires knowledge of an advanced type (which, in Compass's case, is financial expertise); (2) provides services which require the consistent exercise of discretion and judgment in its performance; and (3) in the course of its business presents professional opinions in the form of reports to clients and customers, as well as through the preparation of other types of documents.

Accordingly, based on the totality of the circumstances of the case, the Appeals Board decided that Compass's principal business is the performance of professional services.

## 2. Compass is Owned and Controlled by Professional Individuals

With respect to the requirement for ownership or control by professional individuals, the Appeal states:

During the Plan Period, 60% of Compass's voting stock, which represented control of Compass, was owned by [redacted] [redacted] was also Chief Executive Officer of Compass and Trustee of the Plan. [redacted] had a minority voting interest, and [redacted] and [redacted] had small non-voting interests. Accordingly, [redacted] controlled Compass. The ownership interests of [redacted] [redacted] were irrelevant to the issue of control.

The Appeal then contends that neither [redacted] nor any other Compass employee was a "professional individual." For reasons discussed below, we disagree with the position that Compass was not owned or controlled by professional individuals.

ERISA section 4021(c)(2)(A) provides that a "professional service employer" is an entity "owned or controlled by professional individuals . . . the principal business of which is the performance of professional services." In Opinion Letter 76-106, PBGC explained that, with



respect to this exclusion, both the entity and the professional individuals owning or controlling it must be "engaged in the performance of the same professional service."

In Opinion Letter 82-18 (Enclosure 6), PBGC further addressed the question of ownership and control by professional individuals. In that letter, PBGC considered the situation where 51% of the stock of a pharmaceutical entity is owned by a licensed pharmacist and the balance of the stock is held by a nonprofessional. PBGC concluded that, based on the 51% stock ownership by a licensed pharmacist, the business "is owned and controlled by a professional individual." PBGC further concluded that the pharmaceutical entity's principal business is the performance of professional services, and therefore the entity met the conditions for the professional service employer exclusion.

With respect to ownership or control by professional individuals, Compass is similar to the entity in Opinion Letter 82-18 in that a single individual owned more than 50% of the entity's stock.<sup>9</sup> Thus, based on the analysis in Opinion Letter 82-18, Compass would be owned or controlled by "professional individuals" if [redacted] (as the [redacted]) is a professional individual engaged in the same professional services as Compass. For the reasons discussed below, we concluded that [redacted] is such a professional individual.

ERISA section 4021(c)(2)(B) contains a non-exclusive list of individuals who are considered to be "professional individuals." The Appeals Board agrees with the Appeal that the services performed by [redacted] or by Compass's other employees, do not fall under any of the enumerated professions in section 4021(c)(2)(B).

As discussed above, however, PBGC Opinion Letter 76-106 describes the characteristics indicative of professional individuals for occupations that are not listed in ERISA section 4021(c)(2)(B). The opinion letter (among other things) states that "a professional individual is one who provides services which require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." Also, in determining whether an individual is a professional individual, PBGC has analyzed whether the services "generally require the consistent exercise of discretion and judgment in its performance and would be predominantly intellectual in character."

PBGC's July 28, 2009 determination states that the Compass partners have Masters of Business Administration ("MBA") degrees, which is "indicative of knowledge of an advanced type." This statement is accurate with respect to [redacted] since he holds a MBA degree from [redacted]. We agree with the Appeal, however, that [redacted] holding of a MBA is not enough by itself to establish that he is a "professional individual" for purposes of ERISA section 4021(c)(2)(B). As stated in Opinion Letter 76-106, a professional individual "provides services which require knowledge of an advanced type in a field of science or learning

<sup>9</sup> On June 29, 2010, the Appeals Board obtained a D&B Federal Information Report for Compass Capital Partners, LTD. This report shows that "100% of Capital Stock" is owned by [redacted] and [redacted] and their "present control" succeeded that of the prior owner in 1998. Thus, with respect to Compass's control, the D&B Federal Information Report is consistent with the statements in the Appeal. Since we found nothing that contradicts your statement that [redacted] ownership interest was 60%, we have accepted that stock ownership percentage for purposes of deciding the Appeal.

customarily acquired by a prolonged course of specialized intellectual instruction and study (emphasis added).” Thus, the opinion letter indicates that a connection must exist between the owner’s knowledge in a field of science or learning – which (for certain occupations) may be obtained through an educational program that provides an advanced degree – and the services performed by the business.

We concluded that such a connection exists in this case. In our view, based on Compass’s description of the services it provides, [redacted] occupation appropriately should be characterized as “financial analysis and business advice.” Such an occupation, as it relates to the services performed by Compass, involves expertise in finance, accounting, and business, and thus it resembles the occupation of the owners of the economic consulting firm in PBGC Opinion Letter 96-1. As is the case of the economic consulting firm, [redacted] occupation (as it relates to Compass) requires “knowledge of an advanced type in a field of learning that is customarily acquired by a prolonged course of specialized intellectual instruction.”<sup>10</sup> Based on the foregoing, the Appeals Board concludes that [redacted] is a professional individual.

In so concluding, we disagree with the contention that [redacted] is not a professional individual because he, as well as other Compass personnel, was not required to be licensed for either its agency or its valuation businesses. Although most of the occupations listed in ERISA section 4021(c)(2)(B) usually require licensing by governmental or private organizations, at least two of the listed categories – “social or physical scientists” and “performing artists” – typically are not licensed. Furthermore, PBGC’s opinion letters do not indicate that the term “professional individuals” generally should be limited to those that are in licensed occupations. There is no indication, for example, that the owners of the economic consulting firm in PBGC Opinion Letter 96-1 were licensed.

In summary, the Appeals Board concluded that Compass is a professional service employer because: (1) its principal business is the performance of professional services; and (2) it is owned or controlled by professional individuals. Additionally, since the Plan never had

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<sup>10</sup> We further observe that the knowledge needed for [redacted] occupation typically would be obtained through a MBA program (as occurred in his case) or through some other field of advanced study, such as finance or economics. Although, in [redacted] case, his educational knowledge was supplemented by his many years of practical work experience with the printing industry, this does not preclude our finding that he is a professional individual.

Indeed, it is common in many professions for educational knowledge to be supplemented with (or, in some instances, replaced by) practical work experience. For example, in Opinion Letter 97-2 (Enclosure 7), PBGC concluded that a surveying consulting firm was engaged in professional services. PBGC noted that surveyors licensed by the Commonwealth of Virginia normally must first complete a surveying curriculum of four or more years of study. PBGC further pointed out that if an applicant has not graduated from such a program, the applicant must have a specific record of 10 years of surveying experience before taking the licensing examination.

more than 25 active participants, the Appeals Board determined that the Plan is excluded from Title IV coverage based on ERISA section 4021(b)(13).<sup>11</sup>

***The Appeal's Allegations of Improper Transfer of Plan Funds***

The Appeal asserts that [redacted] improperly transferred funds from the Plan "for use in Compass's business and in another business in which [redacted] had an interest." The Appeal further indicates that, as a result of such improper transfers, the Plan is without the funds needed to pay pension benefits to its participants.

The Appeals Board is sympathetic to the hardship participants may experience if their pension plan is unable to make promised payments. Nevertheless, we cannot grant your appeal because ERISA does not provide PBGC with the authority to oversee the termination of plans that are not covered by PBGC's insurance program. Furthermore, ERISA does not give PBGC enforcement authority with respect to such plans. The issue the Appeal raises concerning the alleged improper transfer of Plan funds is within the jurisdiction of the Department of Labor's Employee Benefit Security Administration ("EBSA"). You may contact EBSA by telephone at 1-866-444-3272.

**Decision**

Having applied the provisions of ERISA to the facts of your case, the Appeals Board determined that the Appeal did not provide a sufficient basis to change PBGC's determination that the Plan is excluded from coverage under Title IV of ERISA. This is PBGC's final agency action with respect to the issues you raised.

You may, if you wish, seek court review of this decision. If you need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,

*Charles Vernon*

Charles Vernon  
Appeals Board Chair

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<sup>11</sup> The Appeal requests that [redacted] appear in person before the Appeals Board to clarify any points in the Appeal and to answer any questions the Appeals Board may have. PBGC's Rules for Administrative Review of Agency Decision [29 C.F.R. § 4003.55] provide that the opportunity to appear before the Appeals Board "will be permitted at the Board's discretion." In general, the Appeals Board will permit an opportunity for a hearing before the Board if the Board determines that there is a dispute as to a material fact. Because there is no dispute as to the material facts in this case, the Appeals Board denied the Appeal's request for an oral hearing.