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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-2879

REGINA WINTERS, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MOORMAN, *Senior Judge*.¹

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

MOORMAN, *Judge*: The appellant, Regina Winters, appeals through counsel a July 24, 2014, Board of Veterans' Appeals (Board) decision that denied her claim for entitlement to an earlier effective date for an award of special monthly compensation (SMC) for substitution purposes and denied her claim for accrued benefits. The Court has jurisdiction pursuant to 38 U.S.C. § 7252(a) to review the Board's decision. Both parties have filed briefs, and Ms. Winters has filed a reply brief. The appellant also filed a motion for oral argument. The Court finds that an oral argument will not materially assist in the resolution of this appeal. *See Mason v. Brown*, 8 Vet.App. 44, 59 (1995). This matter is of "relative simplicity" and "the outcome is not reasonably debatable." *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Accordingly, single-judge disposition is appropriate and the Court will deny the appellant's motion for oral argument. *Id.*; *see also* U.S. VET. APP. R. 34(b) (oral argument normally is not granted on matters being decided by a single judge). For the following reasons, the Court will vacate the Board's decision and remand the matters.

¹Judge Moorman is a senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 02-16 (Feb. 1, 2016).

I. BACKGROUND

The appellant is the surviving spouse of deceased veteran Arthur L. Winters. Mr. Winters served on active duty in the U.S. Army from November 1940 to September 1945. Record (R.) at 9724. He served in World War II and was a prisoner of war of the German Government for approximately 25 months. *Id.*; *see also* R. at 9761-64. Upon discharge, the veteran was awarded service-connected disability compensation for a gunshot wound scar on his right arm, rated as 10% disabling. R. at 9753. In 1967, the veteran's disability rating was increased to 30% for residuals of his gunshot wound with vascular damage and traumatic periostitis of the humerus. R. at 9687-90.

In August 1968, the veteran submitted a claim for disability compensation for a nervous disorder as secondary to his gunshot wound and his 25 months as a prisoner of war. R. at 9685. The regional office (RO) denied his claim in October 1968, finding that the veteran's diagnosed "passive dependent personality" was a constitutional or developmental abnormality and, therefore, not a disability under the law. R. at 9675-77. In September 1971, the veteran submitted a Notice of Disagreement (NOD) with an August 1971 rating decision.² R. at 9628. The veteran argued that the August 1971 decision did not properly consider his prisoner of war status. *Id.* The Board remanded the veteran's claim for the RO to secure treatment records from 1945 regarding the veteran's gunshot wound injury. R. at 9583-84. The RO issued a rating decision in March 1972 indicating that an examination from 1940 and three examinations from 1945 were reviewed and that none of the reports from those examinations contained any evidence of the disabilities at issue. R. at 9579. The veteran submitted a response in January 1973 arguing that the RO failed to comply with the Board's remand and that additional service medical records were still not obtained. R. at 9573. The Board issued a decision in March 1973 that expressly found that the veteran had been a prisoner of war of the German Government for approximately 25 months during World War II. R. at 1233-37. The Board denied the veteran's claims for service-connected disability benefits for a psychiatric disorder, a contracture of the bladder, adenocarcinoma of the prostate, arthritis of the spine, an abdominal disorder, frozen feet, malnutrition, and beriberi and denied a disability rating in excess of 30% for the veteran's service-connected residuals of a gunshot wound. *Id.*

² The August 1971 decision is not in the record before this Court.

The veteran pursued several claims and appeals from 1973 through 2002. By January 2002, the veteran's service-connected disabilities included a 30% disability rating for residuals of a gunshot wound of the right arm, effective September 6, 1967; a 20% disability rating for brachial aneurysm of the right arm, effective July 1, 1998; a 10% disability rating for residuals of frozen feet, effective from March 21, 1990, to January 12, 1998; separate 10% disability ratings each for residuals of frozen feet of the left and right lower extremities, effective January 12, 1998; and a noncompensable rating from August 9, 1971, for a laporatomy scar. *See* R. at 4442-43. In a January 24, 2002, rating decision, the RO, among other things, awarded the veteran a total disability rating based on individual unemployability (TDIU), effective July 1, 1998. R. at 4436-44.

In May 2006, the Board issued a decision that, among other things, remanded the veteran's claim for special monthly compensation based on the need for regular aid and attendance and ordered that the veteran be provided with a VA medical examination to determine whether he was entitled to SMC. R. at 1297-1316. In a July 2007, decision, the Board denied SMC based on the need for regular aid and attendance because the veteran, without good cause, failed to appear for a scheduled VA examination. R. at 1764-73.

In January, April, and June 2009, the RO received several letters from the veteran pursuing various compensation claims, including a claim for a kidney condition related to his section 1151 claim. R. at 1079-80, 1101-02, 1108-18; *see also* R. at 1058-65. The veteran submitted another letter in July 2009, arguing that he suffered from kidney and bladder conditions as a result of the negligent treatment he received at the VA hospital in 1971. R. at 1052-53. In August 2009, the RO issued a decision (1) denying the veteran's claims for increased disability ratings for his service-connected residuals of a gunshot wound, brachial aneurysm of the right arm, residuals of frozen feet of the left and right lower extremities, a skin rash secondary to his laporatomy scar, and a laporatomy scar and (2) denying service connection for a stomach condition; a nervous condition; hypertension; a kidney condition; residuals of malnutrition; ingrown toenails; shell fragment wounds to the spine, knees, and legs; residuals of beriberi; metabolic dysentery; new growth abdomen; postoperative resection of the prostate; organic disease of the gastrointestinal tract; arthritis of the spine and knees; a personality disorder; and hearing loss. R. at 1008-39.

The veteran submitted an NOD with that decision in August 2009. R. at 988-89. The veteran argued that the RO had failed to consider medical records from the American Red Cross that included hospital records from his time as a prisoner of war and documented "severe injuries and wounds in action [he] sustained." R. at 988. The veteran also argued that he should be awarded compensation for residuals of malnutrition based on his prisoner of war status, that he lost a kidney and suffered urinary tract problems as a result of negligent treatment at the VA hospital in 1971, and that he should have been awarded higher disability ratings for his aneurysm, right arm injury, and frozen feet. *Id.* He also argued that all of his disability compensation awards should be effective from 1945. *Id.* The veteran also mentioned a claim for benefits based upon exposure to mustard gas. R. at 998-99.

On October 26, 2009, the veteran submitted a letter to the RO stating: "I am enclosing proof that I am entitled to benefits based on a clear and unmistakable error." R. at 956-63. The veteran argued that the enclosed evidence demonstrated various wounds he incurred in combat and frozen feet he suffered as a prisoner of war. *Id.* The veteran stated: "I expect a rating on a clear and unmistakable error." *Id.*

On November 4, 2009, the veteran submitted a letter in response to an October 2009 letter from VA acknowledging his mustard gas claim and asking what disabilities he was claiming were a result of mustard gas exposure. R. at 964-65; *see also* R. at 985-87. The veteran suggested that VA failed to consider 38 C.F.R. § 4.26 (bilateral factor) and regulations regarding presumptive service connection for ex-prisoners of war and that he was entitled to an earlier effective date and higher disability rating for his aneurysm. R. at 964. The veteran enclosed copies of Red Cross records from 1944 and stated:

When you receive new evidence, you are supposed to check against your prior decisions, to see if the new evidence will change your prior decisions. I sent you new evidence of documentation received from the Red Cross showing my [prisoner of war] records from England, Germany, Italy[,] and France showing my severe gunshot wounds and [shrapnel] wounds, my aneurysm operation at a [prisoner of war] camp hospital, my fractured arm[,] and my being severely ill for several months.

You never rated me for my fractured arm received in battle in [World War II]. I am also entitled to benefits for being s[e]verely il[l] for several months in a German [prisoner of war] hospital.

R. at 964-65.

In January 2010, the RO issued a decision denying entitlement to service connection for a fracture of the left arm and a fracture of the right arm. R. at 755-65. The RO also continued the previous denials of entitlement to service connection for hypertension and denied an earlier effective date for brachial aneurysm of the right arm. *Id.* The veteran submitted a timely NOD with that decision in February 2010. R. at 752-54; *see also* R. at 735.

In December 2011, the appellant notified VA that the veteran died on December 14, 2011. R. at 718-20. In January 2012, the appellant submitted a letter to VA wherein she stated that her husband, the veteran, "had been requesting aid and attendance for me for several years" and that VA ignored the request. R. at 715-16. She noted that VA had recently awarded aid and attendance benefits and that she had appealed, seeking an earlier effective date for that award. *Id.*

In February 2012, VA issued a memorandum noting that the appellant had filed a VA Form 21-534, "Application for Dependency and Indemnity Compensation, Death Pension or Accrued Benefits by a Surviving Spouse or Child" and, pursuant to VA Fast Letter 10-30, directing the RO to reactivate the veteran's appeal regarding a fracture of the left and right arms, hypertension, aneurysm of the right arm, cold injury residuals, avitaminosis, and a bladder injury that was pending at the time of the veteran's death "for substitution" and to adjudicate both the appeal and the appellant's claim for accrued benefits. R. at 709-10.

In June 2012, the RO issued a Statement of the Case (SOC) regarding the issues of entitlement to service connection for right arm fracture residuals, left arm fracture residuals, hypertension, a kidney condition, and malnutrition residuals; an effective date prior to July 1, 1998, for the veteran's service-connected residuals of a right brachial artery aneurysm; a disability rating in excess of 20% for the veteran's service-connected residuals of a right brachial artery aneurysm; and disability ratings in excess of 10% each for the veteran's service-connected left and right lower extremity cold injury residuals. R. at 653-704. The RO issued a decision in June 2012 denying the appellant's claim for accrued benefits, finding no valid claims were pending at the time of the veteran's death. R. at 650-51. In July 2012, the appellant perfected her appeal of the issues listed in the June 2012 SOC. R. at 613-45. The appellant also submitted an NOD with the June 2012 RO

decision denying her claim for accrued benefits (*see* R. at 604) and perfected her appeal to the Board in August 2012 (R. at 329-30).

The RO issued a rating decision in November 2012 that awarded service connection for the cause of the veteran's death and eligibility for dependents' educational assistance. R. at 10,263-71. The RO also awarded service connection for congestive heart failure and arteriosclerotic heart disease and assigned a 100% disability rating, effective September 9, 2011, for accrued-benefits purposes. *Id.* In light of the veteran's 100% disability rating for congestive heart failure and arteriosclerotic heart disease, together with his additional service-connected disabilities independently ratable at 60% or more, the RO awarded SMC based upon housebound criteria, effective September 9, 2011, for accrued-benefits purposes. *Id.*

In a January 29, 2013, decision, the Board found issues of SMC based on the need for regular aid and attendance and for entitlement to compensation pursuant to 38 U.S.C. § 1151 "for substitution and accrued[-]benefits purposes" had been raised by the record but not adjudicated by the RO. R. at 227-33. Accordingly, the Board referred those matters to the RO. R. at 230. The Board also noted that the RO had adjudicated the appellant's claims for dependency and indemnity compensation (DIC) and death pension and was in the process of developing a claim for service connection for the cause of the veteran's death. R. at 230. The Board found that although the RO had properly construed the appellant's December 2011 VA Form 21-534 as an "inferred request to substitute," the RO failed to address the appellant as being substituted for the veteran but, instead, adjudicated the claims pending at the time of the veteran's death solely for accrued-benefits purposes. R. at 231. Accordingly, the Board remanded the claims for entitlement to service connection for right arm fracture residuals, left arm fracture residuals, hypertension, bladder neck contracture with distended bladder and transurethral resection of the prostate and bladder neck with possible carcinoma of the prostate and nephrectomy (kidney condition claim), and malnutrition residuals; entitlement to an earlier effective date for a separate 20% disability rating for residuals of a right brachial artery aneurysm and an increased disability rating for that condition; and entitlement to increased disability ratings for residuals of service-connected right and left lower extremity cold injury residuals. R. at 227-33. The Board directed the RO to "[c]onsider all of the claims on appeal

based on all of the evidence of record for both substitution and accrued[-]benefits purposes." R. at 233.

In a February 15, 2013, letter the RO notified the appellant that VA had "accepted [her] as the [s]ubstitution" for her husband's appeal (R. at 225-26) and a VA report of contact dated February 19, 2013, indicating that the appellant stated that she had no further evidence to submit and that she waived the 30-day waiting period (R. at 221). The RO issued an SOC on February 20, 2013, denying all the claims identified in the January 2013 remand "for substitution and accrued[-]benefits purposes." R. at 198-203. Regarding the referred claim for entitlement to SMC based on the need for aid and attendance and the section 1151 claim, the RO issued a deferred rating decision dated February 21, 2013, finding that there were no section 1151 or SMC claims pending at the time of the veteran's death. R. at 193-95. Accordingly, the RO denied accrued or substitution benefits for those claims. *Id.*

The appellant's claims were before the Board again in June 2013. R. at 155-88. In a June 3, 2013, decision, the Board granted the appellant's claims for service-connected benefits for residuals of a right arm fracture and hypertension. *Id.* The Board found that the service-connection awards were inextricably intertwined with the appellant's accrued-benefits claim. R. at 185-86. Accordingly, the Board found that consideration of the appellant's entitlement to accrued benefits must be deferred until the RO assigned ratings for the grant of service connection for right arm residuals and hypertension and remanded the claims for the RO to assign initial disability ratings for the service-connected conditions and to readjudicate the accrued-benefits claim. R. at 186. The Board denied the appellant's substituted claims for entitlement to service connection for the veteran's claimed left arm fracture, kidney condition, malnutrition residuals; entitlement to an earlier effective date for a 20% disability rating and for an increased disability rating for residuals of a right brachial artery aneurysm; and entitlement to ratings in excess of 10% for service-connected right and left lower extremity cold injury residuals. R. at 155-88.

On June 6, 2013, the RO issued a Supplemental SOC (SSOC) addressing only the issue of "[e]ntitlement to accrued benefits based on money owed the [v]eteran at the time of his death." R. at 120-31. The RO found that, because the veteran had been found to be 100% disabled as a result

of unemployability from July 1, 1998,³ until his death, "[a]ll claims for compensation were properly adjudicated." R. at 129. The RO also found that the evidence did not show that SMC was claimed or warranted during the appeal period. *Id.* A rating decision issued the same day awarded a 10% disability rating for the veteran's service-connected residuals of a right arm fracture, effective November 4, 2009, and a 10% disability rating for the veteran's service-connected hypertension, effective January 26, 2013. R. at 110-19. The RO explained that this award did not result in accrued benefits payable to the appellant because the decision did not result in an increase in the veteran's compensation benefit entitlement for the period from January 26, 2009, to December 1, 2011. R. at 110.

The appellant submitted a letter dated August 9, 2013, arguing that earlier effective dates should have been awarded for the veteran's service-connected cold injury residuals and aid and attendance award. R. at 57-58. The appellant argued "this is clear and unmistakable error." *Id.* In a September 10, 2013, letter, the RO acknowledged receipt of the appellant's August 2013 letter regarding the Board's decision and stated that the letter had been forwarded to the Board for its review. R. at 55-56; *see also* R. at 68-70 (internal VA memorandum forwarding the appellant's disagreement to the Board). An undated note in the record, apparently drafted by the Board, acknowledges the appellant's August 2013 correspondence raising issues of earlier effective dates for bilateral lower extremity cold injury residuals or a claim of clear and unmistakable error (CUE) in the assignment of an effective date for the award of increased ratings for the cold injuries. R. at 68. The note concludes that the letter does not constitute a motion for reconsideration of the Board's June 2013 decision based on clear and unmistakable error. R. at 68. The note further states: "[P]lease refer the earlier effective date/CUE in assignment of effective date to the RO." *Id.* There is no indication in the record that this information was communicated to the appellant.

On November 8, 2013, the appellant submitted a letter styled as "Request for Immediate Reconsideration of Pending Claim on Appeal By Decision Review Officer." R. at 53-54. The appellant argued there were clear and unmistakable errors made regarding the effective dates for the

³ The SSOC actually states that the veteran had been awarded a 100% disability rating in 1988. R. at 129. The record demonstrates that the appellant was awarded TDIU effective July 1, 1998. R. at 4443. The 1988 date in the SSOC is clearly a typographical error.

veteran's awards of service connection for frozen feet, aneurysm from gunshot wounds in combat, VA negligent treatment in 1971, and aid and attendance and that all these issues were pending at the time of the veteran's death. *Id.*

On November 27, 2013, the RO issued an SOC regarding the issue of entitlement to substitution and accrued benefits for aid and attendance pursuant to 38 U.S.C. § 1151. R. at 30-51. The RO again found that, although the Board had indicated in its January 2013 decision that there was an unadjudicated claim for substitution and accrued benefits for aid and attendance under section 1151, there was no claim or appeal pending regarding that issue at the time of the appellant's death. R. at 51. The appellant submitted a timely appeal to the Board in December 2013 wherein she stated that she was seeking "back benefits" for the veteran's award of SMC for aid and attendance. R. at 26. The appellant asserted that she had submitted an application for aid and attendance on December 13, 2011; however, she did not identify any evidence indicating that *the veteran* had sought an earlier effective date for his SMC award at any time prior to his death. R. at 26-27. Mrs. Winters stated that the veteran's need for aid and attendance stemmed from negligent medical treatment at a VA hospital in 1971 that resulted in the loss of his kidney. *Id.* The appellant argued that VA "refuse[d] to use clear and unmistakable errors in [their] decisions." *Id.* She also stated that VA had ignored the veteran's and her claims for an earlier effective date for the veteran's awards of service connection for residuals of a gunshot wound, aneurysm, and frozen feet. *Id.*

In the July 24, 2014, decision here on appeal, the Board denied the appellant's claim for an effective date prior to September 9, 2011, for the veteran's award of SMC, to include under 38 U.S.C. § 1114(s) and for being helpless so as to be in need of regular aid and attendance, for substitution purposes and denied entitlement to accrued benefits. R. at 3-17. The Board found that since the Board had denied the veteran's claim for SMC in July 2007 and prior to the September 9, 2011, effective date of the award of SMC at the level provided for under 38 U.S.C. 1114(s), "no communication or action indicating an intent to apply for SMC, including for being so helpless as to be in need of regular aid and attendance, was received by VA." R. at 5. In addressing the appellant's accrued-benefits claim, the Board noted that "the appellant has been substituted as the claimant for purposes of processing any pending claim of the [v]eteran[] at the time of his death to completion." R. at 13. The Board then stated that "the record does not reflect, and the appellant has

not contended, that any periodic VA monetary benefit to which the [v]eteran was entitled at death under existing ratings and decisions are due and unpaid." *Id.* The Board noted that instead, the appellant argued that the veteran was entitled to VA benefits at the time of his death based on evidence "demonstrating that a benefit not yet granted should be granted." *Id.* The Board found that because the Board denied an effective date prior to September 9, 2011, for the veteran's SMC award for substitution purposes, the accrued-benefits claim must also be denied. *Id.* This appeal followed.

II. ANALYSIS

The appellant filed pro se a Notice of Appeal (NOA) with this Court on August 26, 2014. The appellant did not identify the date of the Board decision from which she intended to appeal. On September 30, 2014, the Secretary filed with the Court a copy of the July 24, 2014, Board decision. Thereafter, the appellant sought a stay of proceedings to allow sufficient time to seek counsel. After successfully obtaining counsel, the appellant filed her initial brief wherein she stated that she is appealing "the final decision of the Board rendered on July 24, 2014, and abated Board decision rendered on June 3, 2013." Appellant's First Amended Brief (Appellant's Br.) at 14.

This Court's appellate jurisdiction derives exclusively from the statutory grant of authority provided by Congress, and the Court may not extend its jurisdiction beyond that permitted by law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). To be timely filed under Rule 4 of this Court's Rules of Practice and Procedure and precedents construing 38 U.S.C. § 7266(a), an NOA must be received by the Clerk of the Court within 120 days after notice of the Board decision is mailed to the appellant, or the appellant's representative, if any. However, "a motion for reconsideration filed with the Board within the 120-day judicial-appeal period will 'toll the time limit for filing a[n NOA] to the Court.'" *Smith (William) v. West*, 13 Vet.App. 525, 527 (2000) (quoting *Linville v. West*, 165 F.3d 1382, 1386 (Fed. Cir. 1999)); see also *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991).

Moreover, in *Ratliff v. Shinseki*, the Court acknowledged the Secretary's policy to treat "all written expressions of disagreement" with a Board decision filed at the RO as potential motions for Board reconsideration. 26 Vet.App. 356, 359 (2013). The Court held that, when a written expression of disagreement with a Board decision is filed at the RO during the 120-day period to file

a NOA, it abates finality of the Board decision for purposes of appealing to the Court until, as applicable here, "the Board chairman determines the status of the document, that is, whether it is considered a motion for Board reconsideration or not, and notifies the claimant of its determination." *Id.* at 360. Further, the Court explained that, if the Secretary returns the written disagreement to the claimant or the Board determines that the written disagreement does not constitute a motion for Board reconsideration, the Secretary must notify the claimant that the Board decision, as of the date of notification to the claimant, is now deemed final and that the claimant has a new 120-day appeal period beginning with the date of the mailing of the notification. *Id.* at 360-61.

The appellant argues that the Board erred in deciding the issue of entitlement to accrued benefits because the Board's June 3, 2013, decision—denying her substituted claims for entitlement to service connection for the veteran's claimed left arm fracture, kidney condition, malnutrition residuals; entitlement to an earlier effective date for a 20% disability rating and for an increased disability rating for residuals of a right brachial artery aneurysm; and entitlement to ratings in excess of 10% for service-connected right and left lower extremity cold injury residuals—is not final. Appellant's Brief at 16-17; *see also* R. at 155-88. The appellant asserts that she submitted a motion for reconsideration of the Board's June 3, 2013, Board decision on August 9, 2013, but that the Board never acted on her motion. Appellant's Br. at 17; *see also* R. at 57, 68-70. The Secretary argued in his brief that the Court should hold that the August 9, 2013, letter was not a valid motion for reconsideration. Secretary's Brief at 15. However, in response to the Court's order, the Secretary stated that the Board concedes that it did not provide notice to the appellant as to whether her August 9, 2013, letter constituted a motion for reconsideration. Secretary's Response to the Court's February 18, 2016, Order at 1.

Given the Secretary's concession that the Board did not comply with the procedures outlined in *Ratliff, supra*, the Court agrees that the Board's July 24, 2014, adjudication of the appellant's claims was premature. To the extent the appellant attempts to appeal the "abated Board decision rendered on June 3, 2013" (Appellant's Br. at 14), the Court does not have jurisdiction over that decision because it is not final. *See Ratliff, supra*. However, as VA has yet to address the appellant's potential disagreement with the June 3, 2013, decision regarding her substituted claims and those claims may affect her accrued-benefits claim as well as the date of the veteran's eligibility for SMC,

the Court finds that the resolution of the appellant's disagreement with the Board's June 3, 2013, decision is inextricably intertwined with the issues decided by the Board in the July 24, 2014, decision timely appealed to this Court. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998) (where a decision on one issue would have a significant impact upon another, and that impact could render any review by this Court of the decision on the other claim meaningless and a waste of judicial resources, the two claims are inextricably intertwined). Accordingly, the Court will vacate the Board's decision and remand the matters for reconsideration consistent with this decision.

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's July 24, 2014, is VACATED and the matter is REMANDED for readjudication consistent with this decision. The appeal of the Board's June 3, 2013, decision is DISMISSED for lack of jurisdiction.

DATED: March 31, 2016

Copies to:

Benjamin L. Krause, Esq.

VA General Counsel (027)