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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-0308

DANNY L. ELDRIDGE, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HOLDAWAY, *Judge*.

MEMORANDUM DECISION

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

HOLDAWAY, *Judge*: The appellant, Danny L. Eldridge, appeals an October 6, 2010, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for exogenous obesity. This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the October 2010 Board decision. The Board also remanded the issue of entitlement to service connection for type 2 diabetes mellitus to include as secondary to exogenous obesity due to exposure to Agent Orange. That issue is not before the Court because it was not the subject of a final Board decision. *See Breeden v. Principi*, 17 Vet.App. 478 (2004).

I. FACTS

The appellant served on active duty from March 1972 to December 1974. Record (R.) at 3963. His entrance examination showed that he weighed 232 pounds upon entry into service. R. at 4095. A September 1974 clinical record reveals that the appellant was diagnosed with exogenous obesity. R. at 4116. He was determined to be "not fit for sea or shore duty" that same month. R. at

4087. A November 1974 clinical record diagnosed the appellant with exogenous obesity with "no endocrinal abnormalities." R. at 4091. The appellant's December 1974 separation examination showed that he weighed 334 pounds upon separation. R. at 4097. His separation report of medical history indicated that his health was good "except for being overweight." R. at 4098.

In September 1977, the appellant filed a claim for service connection for "extreme obesity" and "possible diabetes and thyroid malfunction." R. at 4016. He was afforded VA examinations that revealed that he was obese but that he did not suffer from any endocrine dysfunction. R. at 3987-991, 4006-10. The VA regional office (RO) issued a rating decision in April 1978, denying service connection for a "gland condition." R. at 3980-82.

In August 1996, the appellant again filed a claim for service connection for obesity, and a claim for service connection for diabetes mellitus as secondary to his obesity. R. at 3748-52. The RO issued a decision in March 1997, declining to reopen the appellant's claims. R. at 3527-31. The appellant appealed that decision. R. at 3453-54. The Board subsequently remanded the appellant's claim for completion of additional development. R. at 3363-67.

The appellant was provided a VA examination in May 2000. R. at 3348-3350. The examiner diagnosed the appellant with exogenous obesity, "mean[ing] there is no known internal organic cause for his obesity." R. at 3348-50. The examiner also found that the appellant had no known endocrine condition related to his obesity. *Id.* The Board thereafter issued a decision denying the appellant's claim. R. at 2839-2846. In July 2006, the Court remanded the appellant's claims pursuant to the terms of a joint motion to remand filed by the parties. R. at 2470-2474.

Pursuant to that remand, VA obtained a medical opinion in August 2008. R. at 2435. The examiner opined that the cause of the appellant's obesity was unknown and that he did not see anything to suggest that military service contributed to his obesity. *Id.* The appellant was afforded another VA examination in December 2009. R. at 109-124. The examiner stated that the diagnosis of exogenous obesity was accurate, but the etiology was likely multifactorial, not to exclude depression. R. at 123.

On October 6, 2010, the Board issued the decision here on appeal. R. at 3-22. In that decision, the Board found that "[o]besity is not a disorder subject to service connection and the

evidence does not show that obesity is a manifestation of a separately diagnosed disability." R. at 6. This appeal followed.

II. ANALYSIS

The appellant contends that he is appealing both the issue of entitlement to service connection for exogenous obesity and service connection for type 2 diabetes mellitus to include as secondary to exogenous obesity or as due to exposure to Agent Orange. Appellant's Brief (Br.) at 1-2. As noted above, the Court is without jurisdiction to consider the issue of service connection for type 2 diabetes mellitus as that issue was remanded by the Board. *See Breeden, supra*. Regarding service connection for obesity, the appellant essentially expresses his disagreement with the Board's determination that obesity is not a condition for which service connection can be established. Appellant's Br. at 1-2 and Attachments. The Secretary counters that the Board's decision is supported by a plausible basis. Secretary's Br. at 16-27.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). A finding of service connection, or no service connection, is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

In rendering its decision the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it

finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza*, 7 Vet.App. at 506.

Here, the Board denied the appellant's claim for service connection because it determined that "[o]besity is not a disorder subject to service connection and the evidence does not show that obesity is a manifestation of a separately diagnosed disability." R. at 6. As the Secretary notes, this Court "may not review the schedule of ratings for disabilities" adopted by the Secretary. Secretary's Br. at 18; 38 U.S.C. § 7252(b). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that "the [rating] schedule consists of both the ratings and the injuries for which the ratings are provided[, and] [t]he Secretary's discretion over the schedule, including procedures followed and content selected, is insulated from judicial review with one recognized exception limited to constitutional challenges." *Wanner v. Principi*, 370 F.3d 1124, 1131 (Fed. Cir. 2004). The Federal Circuit further noted that "review of the content of the rating schedule is indistinguishable from review of what should be considered a disability." *Id.*; see also *Byrd v. Nicholson*, 19 Vet.App. 388, 392-94 (2005) (holding that the Court could not hear the appellant's challenge that periodontal disease should constitute a disease for VA compensation purposes because it would require the Court to review the content of the rating schedule). The Board did not dispute in this case that the appellant suffers from obesity; rather, the Board found that obesity is not recognized by VA as a disease or a disability for compensation purposes. R. at 14-16. The Court, therefore, does not have jurisdiction to entertain any argument that obesity should be considered a disability under the rating schedule. See 38 U.S.C. § 7252(b); *Wanner* and *Byrd*, both *supra*. The Court concludes that there is a plausible basis in the record, when viewed in its entirety, for the Board's denial of service connection for exogenous obesity. *Gilbert*, *supra*. Accordingly, the appellant's arguments are without merit and the Board's decision will be affirmed.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record on appeal, and the parties' pleadings, the October 6, 2010, Board decision is AFFIRMED. The Secretary's November 10, 2011, motion to strike the attachments to the appellant's brief is DISMISSED as moot.

DATED: April 13, 2012

Copies to:

Danny L. Eldridge

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