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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 13-0158

JACK SUCIC, APPELLANT,

v.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: The appellant, Jack Sucic, appeals through counsel the September 25, 2012, Board of Veterans' Appeals (Board) decision that denied him entitlement to an effective date earlier than January 2003 for benefits based on service connection for post-traumatic stress disorder (PTSD). Record (R.) at 3-15. The appellant argues that because the regional office (RO) took no action in response to a 1995 *referral* by Board of the matter of PTSD, the Board erred by not determining that a procedural error had been made and by denying an earlier effective date for the appellant's PTSD claim. Appellant's Reply Brief at 5. Review by a single judge is authorized by 38 U.S.C. § 7254(b) and is appropriate here. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Although the Court acknowledges "the justice of [veterans'] claims and the meritorious character of the claimants," *United States v. Yale Todd* (1794) (unreported decision discussed in the margin of the opinion in *United States v. Ferreira*, 54 U.S. 40 (1852)), the Court's scope of review is limited to that authorized by 38 U.S.C. § 7261. For the following reasons, the Court will affirm the September 2012 decision.

The appellant served on active duty in the U.S. Marine Corps as a rifleman (0311) and drill instructor (0369) from July 1973 to August 1979 and from December 1982 to October 1984. R. at

1361-63. In the years before filing the 1992 PTSD claim at issue here, the appellant made claims to the VA for other disabilities, and received service connection for a shrapnel wound. R. at 1393. In March 1992 VA denied claims based on several non-PTSD-related disabilities. R. at 1389.

In June 1992 the appellant filed a claim for compensation based on a nervous condition or PTSD. R. at 1375. In December 1992 the RO denied the appellant's June 1992 PTSD claim. R. at 1323-24. The appellant did not appeal that decision and it became final one year later. R. 9-10. Between the December 1992 RO decision and January 24, 2003, VA received no written communications from the appellant requesting service connection for PTSD. R. at 5.

On July 31, 1995, the Board issued a decision in the appellant's appeal of several non-PTSD claims. R. at 1273-77. Under the heading "Issues," the Board listed entitlement based on service connection or an increased disability rating for a half dozen disabilities, but not PTSD or related psychological disabilities. R. at 1273. In the decision's discussion section, however, the following paragraph appears:

The veteran has further contended that service connection is warranted for [post-traumatic] stress disorder (PTSD). Service connection for this disability was denied in a December 1992 rating action with notice in January 1993 and no disagreement received thereafter. Such issue was not developed for appellate review and no action by the Board is warranted. *It is referred to the [RO] for appropriate action.*

R. at 1274-75 (emphasis added).

This paragraph contains the Board's only reference to PTSD; the Board does not again mention PTSD. In the concluding portion of the decision, "[t]he Board note[d] that [additional medical evidence] would be helpful to adjudicate the current appeal," ordered certain specific development, ordered that "[w]hen the requested development has been completed the entire evidence should be reviewed by the RO," and stated that "[t]he purpose of this remand is to obtain clarifying medical data." R. at 1275-76. VA took no subsequent action on the matter of PTSD until after the appellant's 2003 claim. *See* R. at 4-5, 12.

In January 2003 the appellant filed a request to reopen his claim for disability compensation for his disability resulting from PTSD. R. at 1220. A May 2003 medical examination ruled out a diagnosis of PTSD. R. at 937. On May 29, 2003, VA denied his claim for lack of a current PTSD diagnosis. R. at 1188-91. On October 6, 2006, the Board found that "VA medical treatment records

subsequent to [May 2003] reflect findings of PTSD (R. at 937), reopened the appellant's claim for disability compensation for his disability resulting from PTSD, and remanded that matter to the RO to resolve the matter of conflicting of evidence about a current PTSD disability and identify stressors. R. at 930-41.

A March 2007 examination diagnosed the appellant with PTSD. R. at 911. A June 20, 2007, rating decision granted the appellant disability compensation for his disability resulting from PTSD effective January 2003 at an initial disability rating of 70%, and deferred a decision on the issue of his entitlement to a total rating based on unemployability (TDIU). R. at 893-98. On April 23, 2008, VA granted TDIU, effective January 2003. R. at 808-12. On June 25, 2008, the appellant appealed the matter of effective date. R. at 792-95.

On January 28, 2011, the Board denied his appeal of the effective date assigned for his PTSD disability. R. at 722-36. The appellant appealed to this Court, and on January 25, 2012, the Court approved a joint motion for remand (R. at 21-27), in which the parties concurred that remand of the appellant's claim of entitlement to an earlier effective date for service connection for PTSD was warranted because the Board had not provided an adequate statement of reasons or bases for its conclusion about the applicability of *Myers v. Principi*, 16 Vet.App. 228 (2002). R. at 21.

On September 5, 2012, the Board again denied the appellant an earlier effective date for PTSD. R. at 2-17. Referring to the paragraph about PTSD in the 1995 decision, the Board said that

[i]t is unclear why the Board *referred* this matter back to the RO, since the Board explained that the December 1992 RO decision was final, with no reference to another claim, either explicit or implied, which [sic] could be construed as a petition to reopen on the basis of new and material evidence or a claim alleging [clear and unmistakable error] in the December 1992 RO decision.

R. at 11-12 (emphasis added). The Board further "assume[d] that the RO reviewed the issue, determined that there was no claim and, therefore, had no action to take" and "note[d] that there is a presumption of regularity," which applies to this case. R. at 12. This appeal followed.

The appellant argues that (1) VA violated 38 C.F.R. § 19.9 by failing to take action on the matter of PTSD after the Board's *referral*; (2) because of this procedural error, under *Myers v. Principi*, 16 Vet.App. 228 (2002), a PTSD claim remained open from 1995; and (3) the Court should therefore reverse the Board's decision, instruct the Board to assign an effective date of July 1995 for

the appellant's PTSD claim, and direct the Board to determine the appropriate disability rating(s) for the period of July 1995 through January 2003.

The regulation that the appellant relies on¹ is titled "Remand for further development," and provides that

[w]hen, during the course of review, it is determined that further evidence or clarification of the evidence or correction of a *procedural defect* is essential for a proper appellate decision, a Section of the Board shall *remand* the case to the agency of original jurisdiction, specifying the action to be undertaken.

38 C.F.R. § 19.9 (1995) (emphasis added).

The Court disagrees with the appellant, specifically where he argues that

VA, as well as the Board in the decision on appeal, have apparently assumed that Mr. Sucic did not have new and material evidence and therefore the VA could lawfully ignore the Board's *referral*. However, such an assumption even if correct is not a defense to the VA's failure to act in response to the 1995 Board *referral*.

Appellant's Reply Brief at 5 (emphasis added).

On the contrary, 38 C.F.R. § 3.156 (2013) says that "[a] claimant may reopen a finally adjudicated claim by submitting new and material evidence." The appellant's reliance on § 19.9 is misplaced. That regulation governs Board *remands*, whereas the 1995 Board decision was a *referral*. The appellant has provided nothing to support his bare assertion that a *referral* for a lack of jurisdiction carries any of the same protections that § 19.9 provides for a remand. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Instead, the appellant mischaracterizes the Board's *referral* as an acknowledgment of a "procedural defect," and his reliance on *Myers* is therefore misplaced. The Board properly referred the matter of PTSD because it lacked jurisdiction to address the matter. 38 U.S.C. § 7104(a). Where a claim has been finally denied, and there is no suggestion that new evidence has been submitted, which even the appellant in his brief implicitly admits, the appropriate action for the RO was to do nothing. *See* 38 C.F.R. § 3.156 ("A *claimant* may *reopen* a finally adjudicated claim *by submitting* new and

¹ The Secretary asserts that the 1995 version of this regulation controls appellant's claim and argument here. Appellant's Br. at 11-12. The appellant concedes this point. Appellant's Reply Br. at 3-5.

material evidence." (emphasis added)). Nothing further was required of VA at that time, and accordingly the Court finds no procedural defect in VA's response to the 1995 Board decision.

The Court applauds the appellant's counsel's efforts to identify applications of our caselaw that favor veterans, and urges him to keep trying. The 1995 *referral* here, however, is simply not a vehicle for this worthy veteran to achieve an earlier effective date.

For the foregoing reasons, the September 25, 2012, Board decision is AFFIRMED.

DATED: June 30, 2014

Copies to:

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