

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-3642

KATHLEEN PERRY, APPELLANT,

v.

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

Before KASOLD, *Judge*.

MEMORANDUM DECISION

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

KASOLD, *Judge*: Mrs. Kathleen Perry, the surviving spouse of veteran Thomas R. Perry II and properly substituted as the appellant in the veteran's appeal, appeals through counsel a February 20, 2014, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an effective date prior to November 14, 2005, for service connection for coronary artery disease (CAD) with a history of myocardial infarction and coronary artery bypass graft. Mrs. Perry argues that Mr. Perry's entitlement to a 100% rating for CAD properly began either (1) in August 2000, when VA acknowledged Mr. Perry's letter to U.S. Representative Pat Danner as an attempt to reopen Mr. Perry's earlier claim for benefits, (2) in December 2002, when Dr. Elbie L. Loeb sent a letter on behalf of Mr. Perry to VA asserting that Mr. Perry's hypertension contributed to his CAD, or (3) in June 2004, when Mr. Perry sent a letter to VA detailing his high blood pressure and his various heart conditions. The Secretary disputes these arguments. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, the Board decision on appeal will be reversed and the matter remanded for assignment of an earlier effective date.

The record reflects that in 1992 Mr. Perry applied for disability compensation for various disabilities including hypertension, as well as heart attacks and coronary bypass as secondary to hypertension. His claim was denied in a 1992 regional office (RO) decision because Mr. Perry's

service treatment records did not reflect that he had hypertension while in service, which necessarily resulted in denial for conditions secondary thereto. That decision was not appealed. Later, Mr. Perry discussed his history of in-service hearing damage and in-service hypertension in a July 18, 2000, letter to U.S. Representative Pat Danner. Congresswoman Danner forwarded Mr. Perry's letter to the Secretary. The Secretary received the forwarded letter on August 7, 2000. The Secretary replied to the congresswoman in a letter dated August 11, 2000, that Mr. Perry's claim for hearing loss and "hypertensive heart disease" had been denied but that his forwarded letter would be considered an attempt to reopen his claim. Record (R.) at 1197.

The Secretary then notified Mr. Perry on September 1, 2000, that his claim for hearing loss remained denied, and that Mr. Perry would have to submit new and material evidence to have his claim reopened. R. at 1195. For unexplained reasons, the letter did not mention Mr. Perry's claim for benefits for hypertensive heart disease, as the Secretary essentially had informed Mr. Perry's congresswoman he would do. Thereafter, on September 13, 2002, Mr. Perry notified the Secretary that he wanted his claim amended to include hypertension, and, in January 2003, he submitted the medical opinion of Dr. Elbie L. Loeb stating that Mr. Perry's hypertension contributed to his CAD. A March 2003 forwarding letter and February 2003 rating decision notified Mr. Perry that his claim for "hypertension" had been denied. R. at 1120-25.

Mr. Perry timely filed his Notice of Disagreement (NOD) and his claim was denied in a May 2004 Statement of the Case (SOC). R. at 1098-1105. The SOC specifically recognized Mr. Perry's claim as one for service connection for "hypertension and related complications." R. at 1100. Mr. Perry perfected his appeal in May 2004. R. at 1097. In November 2005, Mr. Perry separately filed a claim for benefits for CAD. R. 1054-55. The stated issue on appeal at the Board was whether there was new and material evidence to warrant the reopening of Mr. Perry's claim for service connection for hypertension. R. at 1014. In its 2006 statement, the Board noted Mr. Perry's 2005 claim for benefits for CAD and further noted that, although the 2004 SOC noted the claim as one for service connection for hypertension and related complications, the 2002 rating decision adjudicated only hypertension. The Board referred to the RO the claim for secondary service connection for CAD.

Succinctly stated, Mr. Perry appealed the 2006 Board decision on various issues and ultimately was granted service connection for hypertension in a November 2008 Board decision. A 2009 rating decision assigned an effective date of August 7, 2000, for hypertension, the date the Secretary received Mr. Perry's letter forwarded from his congresswoman. The rating decision also granted secondary service connection for CAD, with an assigned effective date of November 14, 2005, the date Mr. Perry filed a specific CAD claim. The Board accepted jurisdiction over an appeal as to the effective date for benefits for CAD, and that is the decision now on appeal.

In the decision on appeal, the Board found that the July 18, 2000, letter to Mr. Perry's congresswoman did not constitute a claim to reopen his claim for benefits for CAD because the letter mentioned only hearing problems and hypertension. Based on the record of proceedings (ROP), the Court has a firm conviction that the Board's finding is clearly erroneous. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("A finding is "clearly erroneous" when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 (1948))). Mr. Perry's 1992 claim was for benefits for, inter alia, hypertension with heart attacks and coronary bypass as secondary thereto. It was denied because hypertension was not service connected. In his letter to his congresswoman, Mr. Perry naturally focused on the evidence that he had hypertension while in service; indeed, absent service connection for his hypertension, his conditions secondary thereto could not be service connected. Significantly, the Secretary notified the congresswoman that Mr. Perry's claim for "hypertensive heart disease" had been denied, and that Mr. Perry's forwarded letter would be deemed an attempt to reopen the claim.

For whatever reason, the Secretary's September 2000 letter to Mr. Perry mentioned only his claim for benefits for hearing loss, which prompted Mr. Perry to amend his claim to include hypertension and later submit medical evidence that his CAD was related to his hypertension. Although the 2002 rating decision denied hypertension, the SOC again recognized the claim more broadly as one for service connection for hypertension and related complications. Under such circumstances, even assuming that the 2005 Board correctly determined that it had jurisdiction only over the claim for service connection for hypertension, the proper course of action with regard to the conditions secondary thereto was a remand, not referral. *See Godfrey v. Brown*, 7 Vet. App. 398,

408-09 (1995) (referral appropriate when newly raised claim is not in administrative appellate status; remand appropriate where proper evidentiary development has not been completed). Remand is proper here because Mr. Perry's July 2000 letter to his congresswoman already had been recognized by the Secretary as a claim to reopen his earlier claim for "hypertensive heart disease" – i.e., the Secretary acknowledged that Mr. Perry's earlier claim included hypertension with heart attacks and coronary bypass as secondary thereto. Nothing thereafter served to limit Mr. Perry's claim to only hypertension.

Accordingly, the February 20, 2014, Board decision on appeal is REVERSED and the matter is REMANDED for the assignment of an effective date for service connection for CAD as of August 7, 2000.

DATED: March 15, 2016

Copies to:

Teresa M. Meagher, Esq.

VA General Counsel (027)