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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0975

MELBA J. SAUNDERS, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Melba J. Saunders, appeals through counsel a December 15, 2014, Board of Veterans' Appeals (Board) decision in which the Board (1) granted her request to reopen claims for entitlement to disability benefits for right and left knee disorders; (2) denied those claims; and (3) remanded her claim for entitlement to a compensable disability rating for the residual effects of a toe arthroplasty for additional development. Record (R.) at 2-15.

The Board's decision to reopen the appellant's knee disorder claims is favorable to her, and the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The matter remanded by the Board is not before the Court, and the Court may not review it at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are 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 Board's decision to deny the appellant entitlement to disability benefits for right and left knee disorders.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from November 1987 until October 1994. R. at 506. She experienced knee pain during her active service, and her care providers opined that she may have developed patellofemoral syndrome. R. at 529-30, 532-36, 538, 549. When she left active service, she filed a claim for entitlement to disability benefits for chronic knee pain. R. at 550-53. In January 1995, the VA regional office (RO) denied her claim. R. at 511. The RO's decision became final.

In January 2008, the appellant again sought entitlement to disability benefits for a knee disorder. R. at 487-98. In January 2009, the RO denied her claim. R. at 477-79.

In August 2011, a VA medical examiner diagnosed the appellant with "bilateral knee pain, subjective." R. at 322. The examiner then stated that the appellant "has a chronic bilateral knee condition that is at least as likely as not . . . caused by or a result of her military service." R. at 324. In March 2012, the examiner clarified that there is "no pathology to render a diagnosis" for a knee disability and that the link she established between the appellant's knee pain and her service was "based upon chronological order of events timeline veteran provided active service." R. at 281.

On December 15, 2014, the Board issued the decision here on appeal. R. at 2-15.

II. ANALYSIS

The Board found that "pain alone is not a disability for the purpose of VA disability compensation" and denied the appellant's claims on that basis. R. at 9. The Board's statement is a nearly verbatim recitation and straightforward application of the legal rule set forth in *Sanchez-Benitez v. West*, 13 Vet.App. 282, 285 (1999), *dismissed in part and remanded in part*, 259 F.3d 1356 (Fed. Cir. 2001).

The appellant does not dispute that the knee disorders for which she seeks compensation are manifested by pain that cannot be linked to any underlying pathology. She does not dispute that the Board correctly applied the rule stated in *Sanchez-Benitez* to the facts of her case. She instead wishes for the Court to deem the rule the Board relied upon either to be without precedential authority or to be irrelevant to her case. She makes a number of arguments in support of her position. For the reasons stated below, the Court concludes that they are not convincing.

The appellant asserts that the Board's reliance on *Sanchez-Benitez* is misplaced because the statement it cited "is dicta, rather than binding law." Appellant's Brief at 13. The arguments made by the appellant in *Sanchez-Benitez* mirror those made by the appellant here. In *Sanchez-Benitez*, the appellant "argue[d] that reversal is appropriate because the Board erroneously denied his claim despite an absence of evidence rebutting the medical documentation of an in-service complaint of neck pain, and his testimony that the pain continues to the present." 13 Vet.App. at 285. The Court's response reads as follows: "The Court *holds*, however, that pain alone, without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted." *Id.* (emphasis added).

The panel that decided *Sanchez-Benitez* plainly labeled the sentence that the appellant claims is dicta a holding, making it clear that it intended to establish precedent. Indeed, if the Court were to conclude that a sentence beginning with the phrase "[t]he Court holds" is dicta, then it's hard to imagine that the Court's reporters contain any precedent at all.[1] *Id.*

The appellant, perhaps recognizing the weakness of her facial attack on *Sanchez-Benitez*, essentially argues that it does not matter what the panel thought it was doing or intended to do because the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) implicitly converted the Court's precedential statement into dicta.[2] Appellant's Brief at 14-15.

When *Sanchez-Benitez* reached the Federal Circuit, the appellant in that case asked the panel to review this Court's conclusion that pain is not a compensable disability. 259 F.3d at 1361. The Federal Circuit determined that this Court's decision "rests on alternative grounds: the failure of proof of medical connection of current pain to the alleged in-service neck trauma incident, and the statement in the Veterans Court's opinion that 'pain alone' is not compensable." *Id.* at 1362. The Federal Circuit concluded that, because the Board's determination (affirmed by the Court) that the appellant had not established a connection between his neck pain and his service is a factual finding

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[1] In her briefs, the appellant quoted the entire sentence in question except for the phrase "[t]he Court holds."

[2] The Court is not clear on the mechanism that the appellant believes was at work. Apparently, she believes that if the Court reaches a precedential decision on alternative grounds and the Federal Circuit deems one of those alternative grounds to be the "ultimate basis" for the Court's decision, then the other loses its precedential value. Appellant's Brief at 14. As the Court will demonstrate momentarily, the appellant did not provide a sound legal basis for her proposed innovation and there was no "ultimate basis" in *Sanchez-Benitez*. *Id.*

that it is legally precluded from reviewing, it could not disturb the Court's decision. For that reason, it further concluded, "we cannot reach the question of whether Mr. Sanchez-Benitez's current pain is statutorily compensable. Our standard of review does not permit us to rearrange the facts so as to present a question of law for appellate review." *Id.*

The Federal Circuit acknowledged that this Court's decision "rests on alternative grounds" including a "question of law" about whether pain is compensable. *Id.* Its explicit recognition that this Court had decided an important legal issue establishes that the Court's conclusion was, on its face, not dicta.

The appellant asserts that the Federal Circuit did not reach the Court's pain determination because "that question was not properly presented for review" and the Court's "statement concerning pain as a disability was not necessary to deciding the case." Appellant's Brief at 14. That is not what the Federal Circuit said. Again, the Federal Circuit recognized that the Court's legal holding was one of two "alternative" bases for its decision. *Sanchez-Benitez*, 259 F.3d at 1362. The Court's pain holding, therefore, was not less necessary to its decision than its conclusion that the appellant had failed to establish the nexus prong of the test for service connection. *See Vazquez-Flores v. Peake*, 22 Vet.App. 37, 49 n.3 (2008) (stating that, when the Court "confront[s] an issue germane to resolution of this case, our ruling is not dicta"); *Hatch v. Principi*, 18 Vet.App. 527, 531 (2004) (stating that "'when an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound'") (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)). Furthermore, the pain question was properly presented to the Federal Circuit for review. The Federal Circuit did not reach it because of the vagaries of its jurisdiction, not because it wasn't ripe. *See* 38 U.S.C. § 7292.

The Court is aware of no rule stating that if the Federal Circuit affirms this Court under one of two alternative bases the Court gave for its decision, then the other basis for its decision is converted to dicta. Indeed, this Court routinely cites precedential statements in cases reviewed by the Federal Circuit, even when the Federal Circuit vacates those decisions on other grounds.

The appellant tries to coax the Court into creating the rule she wants by quoting Federal Circuit decisions that are from areas outside of veterans law. She places her quotations in

parenthetical notations behind her citations. They appear only to contain uncontroversial definitions of the word "dicta."

Even if they do contain substantive information, the appellant makes no attempt to ground them in the facts of the cases in which they appeared, show that they represent settled Federal Circuit law, or explain why they should be imported into veterans law. Most importantly, the appellant cites to no cases stating or even suggesting that when a court gives two equally viable alternative reasons for its decision and a reviewing court only addresses one of those reasons, the other becomes dicta. Because the appellant has made little attempt to support her assertions, the Court will not indulge her request for it to implement the legal theory she expounds. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (stating that an appellant must "plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments"), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Circ. 2008); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Finally, the appellant has not directed the Court to any decisions that it has issued that indicate that the meaning or validity of the key phrase in *Sanchez-Benitez* is in question. That is because she cannot. The Court has handled *Sanchez-Benitez* more than 100 times since its issuance.[3] The Court either itself relied upon or affirmed the Board's application of *Sanchez-Benitez* at least 83 times. It cited without comment or noted without question the Board's application of the case on at least 15 other occasions. It noted the Board's application of the case and either disagreed with how the Board applied it or decided the appeal on other grounds on at least 12 occasions.[4]

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[3] The Court will not encumber this decision with an enormous string citation. The cases it refers to are readily available on the commonly used electronic publishing platforms.

[4] The appellant argues that these statistics are meaningless because they "do[] not negate the Federal Circuit's ruling in *Sanchez-Ben[i]tez* that this Court's 'pain alone' statement in that case is dicta and not necessary to the outcome of the Court's decision." Reply Brief at 5 n. 3. The Federal Circuit never "rul[ed]" that the Court's *Sanchez-Benitez* holding "is dicta" nor did it "make[] plain" that it saw it as dicta. Reply Brief at 3, 5 n. 3. Furthermore, the case statistics demonstrate both that *Sanchez-Benitez* is settled law and that it is well understood. They also demonstrate that the appellant's "dicta" argument is a total anomaly.

The Court only appears to have seriously considered challenges to *Sanchez-Benitez* on two occasions. On the most recent occasion, the Court decided the case on other grounds and declined to respond. *Lampley v. Shinseki*, No. 12-2480, 2014 U.S. App. Vet. LEXIS 710 (April 29, 2014). On the other occasion, the Court easily rejected the appellant's attempts to undermine *Sanchez-Benitez*. *Kennedy v. Shinseki*, No. 10-448, 2012 U.S. App. Vet. LEXIS 544 (March 26, 2012).

That decision and all of the others noted above were single-judge decisions. They reveal that the Court has unfailingly and uncontroversially applied *Sanchez-Benitez* in the exact same manner for nearly two decades, has never seen fit to revisit it, has rarely been questioned about it by litigants, and has not drawn the Federal Circuit's attention.[5] The portion of *Sanchez-Benitez* that is dispositive in this case is about as settled as caselaw can be. Most importantly, no one, to the Court's knowledge, has ever suggested that the rule applied by the Board here is dicta. Throughout the nearly two decades since the rule stated in *Sanchez-Benitez* was written, the Court has unfailingly deemed it to be good precedential authority.

Even if, however, the appellant is correct and the statement the Board relied upon is dicta, she still cannot prevail. The Court accepted and relied upon the statement in question in *Sanchez-Benitez* in a later precedential decision, *Fountain v. McDonald*, 27 Vet.App. 258, 268 (2015). Citing *Sanchez-Benitez*, the Court wrote that "[i]f VA viewed tinnitus as merely a symptom of another condition and not a legitimate, independent illness, disease, or disability itself, tinnitus would not be subject to compensation in its own right as a service-connected disability." *Id.* at 268. Through *Fountain*, the principle behind *Sanchez-Benitez* was reaffirmed just months ago. Even if *Sanchez-Benitez* were dicta, *Fountain* renders the Board's reliance upon it harmless error.[6] 38 U.S.C.

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[5] It appears that only one *Sanchez-Benitez* case has reached the Federal Circuit. The Federal Circuit did not question the Court's precedent. Instead, it held that it was inapplicable because the statute at issue specifically ordered VA to take pain into account when determining whether to award compensation. *Joyner v. McDonald*, 766 F.3d 1393, 1395 (Fed. Cir. 2014).

In the penultimate paragraph of the appellant's reply brief, she suggests that the Court should "extend[] *Joyner*." Reply Brief at 7. The Court is not sure what that means. In any event, the appellant's argument is wholly undeveloped, and the Court will not consider it. *See Locklear*, 20 Vet.App. at 416; *Coker*, 19 Vet.App. at 442.

[6] The appellant argues that the panel in *Fountain* "did not endorse the Court's statement in *Sanchez-Benitez* as binding law." Reply Brief at 5 n. 3. The panel cited *Sanchez-Benitez* and quoted the applicable holding in full. It's hard to imagine how that is not an endorsement. The appellant further argues that the panel in *Fountain* buried *Sanchez-Benitez* in a "string citation that was not for the legal proposition argued by the Secretary here." *Id.* The other two items

§ 7261(b)(2); *see also Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (noting that the statute requiring this Court to "take due account of prejudicial error [] requires the Veterans Court to apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases").

Next, the appellant asserts that the panel in *Sanchez-Benitez* failed to interpret 38 U.S.C. § 1110 and determine whether it "reflects that pain alone qualifies as a disability for which service connection may be granted." Reply Brief at 5. The Court's analysis in *Sanchez-Benitez* makes it absolutely plain that it was considering the extent of section 1110 when it made the precedential statement in question. 13 Vet.App. at 285. The Federal Circuit recognized as much. 259 F.3d at 1360-61.

The appellant's assertion that the Court did not interpret section 1110 is a diversion.[7] Her real quibble is with the reasoning behind the rule stated in *Sanchez-Benitez*. *Sanchez-Benitez* (or, if you like, *Fountain*) is binding precedent that the Court must follow. It only may be overturned by the Court sitting en banc. *Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992). The appellant does not ask the Court to overturn *Sanchez-Benitez*. Engaging in a lengthy dispute about the validity of *Sanchez-Benitez* and the reasoning behind it serves no purpose at this juncture. The Court will therefore decline the appellant's invitation to do so and will faithfully apply *Sanchez-Benitez*.

Finally, the appellant asserts that *Sanchez-Benitez* is trumped by an earlier en banc decision that contains a rule that contradicts the rule at issue here. The appellant believes that the following quotation, taken from *Allen v. Brown*, 7 Vet.App. 439, 448 (1995), is dispositive in her case: "[T]he term 'disability' as used in . . . [38 U.S.C.] § 1110, should be construed to refer to impairment of earning capacity due to disease, injury, or defect, rather than to the disease, injury, or defect itself." This sentence, in the appellant's view, shows that "this Court has recognized that the measure of

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in that "string citation" are 38 U.S.C. § 1110 and the regulation implementing it. The *Fountain* panel's coupling of section 1110 and *Sanchez-Benitez* in the same citation indicates that it believed that *Sanchez-Benitez* explained the definition of the word "disability" as used in the statute, a point that will become important momentarily.

Moreover, if anything, it appears that the *Fountain* panel extended *Sanchez-Benitez*. After *Fountain*, the Board has the authority to reject a claim for entitlement to disability benefits for *any* symptom that is untethered to an underlying disorder, not just pain.

[7] Even though this case involves the very same issue that the Court decided in *Sanchez-Benitez*, the appellant often presents it as though it is a novel issue.

disability is the impairment, not the underlying disease or injury that caused it." Appellant's Brief at 10.

The appellant presented the holding in *Allen* in a manner that divorces it from its context. When read in the context of the case in which it appeared, it reveals itself to be inapplicable to her case. In *Allen*, the Court sought to determine whether secondary service connection is available when a non-service-connected condition is aggravated by a service-connected condition. The sentence that the appellant quotes supported its conclusion that it does.

Mr. Allen had a service-connected and a non-service-connected disorder, both of which the Court would easily recognize as a "disability" as that term is commonly understood in the colloquy of veterans law. The additional injury for which Mr. Allen sought compensation was therefore grounded in a "disease, injury, or defect." 7 Vet.App. at 448.

The appellant's pain is not. The appellant concedes that there is no physiological explanation for the pain she is experiencing. Her pain is detached from any "disease, injury, or defect" that would explain its cause. *Id.* In *Allen*, the Court decided whether aggravation of a diagnosed disorder could be compensable disability on a theory of secondary service connection. In *Sanchez-Benitez* and here, the Court is faced with a special question of whether untethered pain is a disability at all. Both in the area of law under review and the facts, the appellant's case (and *Sanchez-Benitez*) has far more dissimilarities than similarities to *Allen*. Those dissimilarities reveal that the Court should not allow *Allen* to override the clearly stated precedent in *Sanchez-Benitez*.

The appellant has done nothing to convince the Court that its analysis on this point is wrong. She spent no time explaining the context of *Allen*, nor did she expend much effort showing how two precedents with so many divergences are so aligned that one overcomes the other. The Court therefore cannot discern how she would respond to the points of distinguishment that the Court finds to be decisive. *See Locklear*, 20 Vet.App. at 416; *Coker*, 19 Vet.App. at 442.

Finally, the appellant supposes that the panel that decided *Sanchez-Benitez* either overturned *Allen* without admitting that it was doing so or failed to recognize that its decision did not comport with *Allen*. The Court is not prepared to cast the *Sanchez-Benitez* panel (and, it seems, the *Fountain* panel) as either rogue or incompetent. Also, *Sanchez-Benitez* and *Allen* have existed in the same legal universe and, occasionally, in the same decision for nearly 17 years without difficulty. The

arguments raised here have only been raised once before. They were quickly rejected in a single-judge memorandum decision. *See Kennedy*, No. 10-448, 2012 U.S. App. Vet. LEXIS 544.

It doesn't take much reading between the lines to realize that the appellant wishes to neutralize *Sanchez-Benitez* without going through the arduous steps necessary to convince this Court or the one above to overturn longstanding precedent. For the reasons stated above, however, her arguments cannot succeed. The Board correctly applied the legal authority implicated by the facts of this case. Even if it did not, its error was harmless. The appellant is not entitled to the benefits she seeks. *See Sabonis v. Brown*, 6 Vet.App. 426, 429-30 (1994) (holding that, where the law and not the evidence is dispositive, a claim should be denied or the appeal terminated because of a lack of legal merit or lack of entitlement under the law).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's December 15, 2014, decision explaining its conclusion that the appellant is not entitled to disability benefits for a disorder of the right knee and a disorder of the left knee is AFFIRMED.

DATED: May 25, 2016

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