

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0031

LAWRENCE J. ACREE, APPELLANT,

v.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Lawrence J. Acree, served in the U.S. Navy from June 1985 to June 1989 and from June 2007 to April 2008, including service in Iraq. *See* Record (R.) at 2785, 2793. He appeals, through counsel, a November 20, 2014, Board of Veterans' Appeals (Board) decision that dismissed his claims for entitlement to service connection for exposure to Gulf War hazards, an initial rating in excess of 10% for degenerative arthritis with tendonitis of the left shoulder, a total disability rating based on individual unemployability (TDIU), and effective dates earlier than April 24, 2008, for the award of service connection for degenerative arthritis with tendonitis of the left shoulder, lumbar strain, post-traumatic stress disorder (PTSD), and sinusitis. R. at 1-13¹. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the November 20, 2014, decision.

¹ The Court lacks jurisdiction over the claims for entitlement to increased initial ratings for lumbar strain and PTSD, an initial compensable rating for sinusitis, and service connection for sleep apnea, which were remanded, and they will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

In the decision on appeal, the Board dismissed the seven claims above, finding that the appellant withdrew them at a September 2014 Board hearing. R. at 4-5. Thus, the central issue in this case is whether the appellant's withdrawal was valid. The hearing transcript reflects that a representative from Disabled American Veterans represented the appellant during the hearing. R. at 978. At the start of the hearing, the Board member listed the seven matters now at issue and asked the appellant whether he was "withdrawing [his] appeal with respect to all of those issues." R. at 979. The appellant responded in the affirmative, *id.*, and the Board member proceeded to list the remaining issues on appeal, R. at 980.

The appellant presents three arguments in support of his assertion that the Board erred when it found that his withdrawal was valid. Appellant's Brief (Br.) at 4-5. First, he argues that it failed to address the requirements set forth in *DeLisio v. Shinseki* that withdrawal of a claim be "explicit, unambiguous, and done with a full understanding of the consequences of such action." 25 Vet.App. 45, 47 (2011); *see* Appellant's Br. at 6-11. Next, he contends that the Board member who presided over the hearing failed to fulfill his duty to explain the consequences of the withdrawal. *Id.* at 11-14. Lastly, the appellant argues that the Board member erred by failing to determine his state of mind at the time of the hearing, including whether he was competent to withdraw his claims at that time. *Id.* at 14-17. The Secretary disputes the appellant's contentions. Secretary's Br. at 7-22.

As an initial matter, the parties disagree as to which standard of review the Court should apply in this case. *See* Appellant's Br. at 6 ("The Court reviews the Board's dismissal of appellant's claims *de novo*" (citations omitted)); Secretary's Br. at 8 ("The question of whether a claim has been withdrawn is one of fact and reviewed under the 'clearly erroneous' standard . . ." (citations omitted)). This Court recently confirmed, however, that "[a] Board determination that a claimant withdrew his or her appeal is a finding of fact subject to the 'clearly erroneous' standard of review set forth in 38 U.S.C. § 7261(a)(4)." *Warren v. McDonald*, 28 Vet.App. 214, 217-18 (2016) (citing *Kalman v. Principi*, 18 Vet.App. 522, 524 (2004)). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Under this standard, the Court may not substitute its own judgment for a factual determination made by the

Board, even if the Court might not have reached the same factual conclusion in the first instance. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

Here, the Board found that the appellant's testimony at his September 2014 Board hearing satisfied the criteria under 38 C.F.R. § 20.204 for withdrawal. R. at 4-5. Namely, § 20.204(a) provides that "[o]nly an appellant, or an appellant's authorized representative, may withdraw an appeal," and § 20.204(b) states that, "[e]xcept for appeals withdrawn on the record at a hearing, appeal withdrawals must be in writing." 38 C.F.R. § 20.204 (2016). Thus, a withdrawal is only effective where it is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant. *DeLisio*, 25 Vet.App. at 57.

The Court is not persuaded that the Board failed to provide an adequate statement of reasons or bases to support its determination that his withdrawal was effective. *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). Although the appellant asserts that the Board erred by failing to explicitly address the factors set forth in *DeLisio*, as it did not make any finding as to whether his withdrawal was made with a full understanding of the consequences, Appellant's Br. at 6-7, he has not demonstrated that the Board was required to do so in this case.

The Board is required to address all issues raised by the appellant or reasonably raised by the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). In *DeLisio*, the Board member presiding over the veteran's hearing had listed 15 matters that required adjudication and asked Mr. DeLisio if he "got the issues straight," to which the veteran responded that he "thought" so. 25 Vet.App. at 58. The Board subsequently dismissed Mr. DeLisio's appeal as to the claims not included in the 15 listed matters. *Id.* On appeal, this Court held that the hearing transcript "reflects neither an explicit discussion of withdrawal nor any indication that Mr. DeLisio understood that he might be withdrawing claims," and it accordingly determined that the purported withdrawal did not comply with § 20.204. *Id.* In this case, by contrast, the Board hearing transcript reflects that the appellant's withdrawal of his claims was explicit and unambiguous, *see* R. at 979, and it is thus distinguishable from the situation in *DeLisio*. Accordingly, the Board was not required to delve into further analysis, and the

explanation that the Board provided in its statement of reasons or bases is adequate. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Court is likewise not persuaded that the Board member erred by failing to explain the consequences of withdrawal. *See* Appellant's Br. at 12 (citing *Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010)). In *Bryant*, the Court explained that 38 C.F.R. § 3.103(c)(2) imposes two duties on hearing officers: "to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 23 Vet.App. at 492 (citing § 3.103(c)(2)) (italic emphasis omitted). With respect to the first duty, the Court further clarified that "the hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to *substantiating* the claim." *Id.* at 496 (emphasis added). The appellant cites no authority requiring a Board member to explain the consequences of *withdrawing* an appeal, and the Court discerns no error in this regard, particularly in light of the explicit nature of the appellant's withdrawal in this case. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Hilkert*, 12 Vet.App. at 151.

Finally, the Court rejects the appellant's contention that the Board member erred by failing to determine whether he was competent at the time of the hearing. Appellant's Br. at 14-17. The appellant's argument is premised on an assertion that "[t]he safeguards called for in *DeLisio* . . . track the 'intelligent waiver' demanded before a court will accept a guilty plea" in a criminal case. Appellant's Br. at 14. He suggests that, when analyzing whether a veteran effectively withdrew a claim for disability benefits at a hearing, "Federal Rule of Criminal Procedure 11 is instructive." *Id.* at 15. The Court disagrees. This Court is not bound by the Federal Rules of Criminal Procedure, *cf. Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008) (holding that the Federal Rules of Evidence are not binding on the Court), and, as the Secretary notes, the withdrawal of a claim for disability benefits "does not lead to a forfeiture of rights on the scale of incarceration," Secretary's Br. at 21. Moreover, the appellant cites no evidence indicating that he may have been incompetent at the time of the withdrawal or otherwise raising the issue such that the Board was required to address it. *See Robinson*, 21 Vet.App. at 552. The Court thus discerns no error in this regard.

Therefore, after consideration of the parties' briefs and a review of the record, the Board's November 20, 2014, decision is AFFIRMED.

DATED: January 30, 2017

Copies to:

Natalie A. Bennett, Esq.

VA General Counsel (027)