Vet.App. No. 16-2149

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

FRANCISCO L. MARCELINO,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS
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FRANCISCO L. MARCELINO,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 16-2149
	)	
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
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I. ISSUE PRESENTED

Should the Court should affirm the April 5, 2016, Board of Veterans' Appeals (Board or BVA) decision that denied entitlement to service connection for obesity where the Board complied with the Agency's longstanding policy that it does not consider obesity to be a disease for purposes of disability compensation, and Appellant fails to show any clear error therein?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims (Court) exclusive jurisdiction to review Board decisions.

But the Court lacks jurisdiction over numerous issues that were withdrawn, remanded, and referred. Appellant withdrew his claim for an initial rating in excess of ten percent for hemorrhoids. *See Breeden v. Principi,* 17 Vet.App. 475, 477 (2004). The Board remanded the issues of: entitlement to service connection for diabetes mellitus, type 2, to include as secondary to service-connected bilateral knee disabilities; entitlement to an initial rating in excess of ten percent for osteoarthritis of the right knee; entitlement to an initial rating in excess of ten percent for osteoarthritis of the left knee; entitlement to an initial compensable rating for bilateral hearing loss; entitlement to an initial compensable rating for microcytic hypochromic anemia; and entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU). The Board referred the issues of entitlement to service connection for an ulcer, entitlement to service connection for erectile dysfunction,

and entitlement to an increased rating for hemorrhoids.[1] The Court lacks jurisdiction over these issues.

The Court also granted Appellant service connection for obstructive sleep apnea, but the Court is precluded from altering that favorable finding. *Hines v. Principi*, 18 Vet.App. 227, 239 (2004) ("This Court cannot controvert findings made by the Board that are not adverse to the appellant.").

B. Nature of the Case

Appellant, Francisco L. Marcelino, appeals the Board's decision denying entitlement to service connection for obesity. [Record Before the Agency (R.) at 2-27]. The Board also denied entitlement to service connection for high cholesterol, but Appellant does not challenge that determination.

C. Statement of Facts

Appellant served on active duty from December 1983 to December 2003. [R. at 65]. An April 1997 service treatment record shows that Appellant was overweight in service. [R. at 965]. Post-service treatment records show that he was morbidly obese. [R. at 1387-88].

In May 2004, Appellant filed a claim seeking service connection for obesity. [R. at 1766]. The Department of Veterans Affairs (VA) Regional Office

[1] The Board noted that Appellant withdrew his claim for a rating in excess of ten percent for hemorrhoids, but submitted a statement in November 2015 in which he indicated that he did wish to pursue such a claim. Thus, it construed the statement as a new claim for an increased rating for hemorrhoids. [R. at 5 (2-27)].

(RO) denied his claim six months later. [R. at 1696 (1689-1702)]. Appellant filed a Notice of Disagreement, and the RO furnished a Statement of the Case in August 2006 that continued the denial. [R. at 1629; 1612 (1587-1615)]. Appellant filed a substantive appeal later that month. [R. at 1582-86].

In August 2012, Appellant underwent a VA examination. [R. at 1267-77]. The examiner noted that Appellant had osteoarthritis in both of his knees, which impacted his ability to run or to walk for an appreciable length of time. [R. at 1274]. But the examiner also indicated that Appellant's osteoarthritis did not inhibit his ability to do low impact aerobic exercises, explaining that the main factor in losing or gaining weight is calorie intake and Appellant's bilateral knee condition did not cause him to eat more. [R. at 1274-75]. The examiner noted that Appellant's current body-mass index (BMI) was 39.68. [R. at 1274].

In April 2016, the Board issued the decision currently on appeal. [R. at 2-27]. It denied Appellant's claim because VA does not recognize obesity as a disease entity for purposes of compensation. [R. at 12]. It explained that being overweight or obese was not considered a disability for which the Agency granted service connection. [R. at 13]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should reject Appellant's arguments and affirm the Board's decision because the Board complied with the Agency's longstanding policy that it does not consider obesity to be a disease for purposes of disability compensation benefits. The General Counsel's recent precedential opinion discusses this established policy in detail, explaining that the Secretary made a policy choice not to provide compensation benefits for obesity, and noting that there was no widely accepted definition of "disease." The Court should reject Appellant's argument that VA, other agencies, and the medical community have recognized obesity as a disease because those situations are distinct from determining a claimant's impaired earning capacity, and they reflect a variety of purposes other than disability compensation. This is not a medical question, but a policy decision that the Secretary has made.

IV. ARGUMENT

A. Standard of Review.

Generally, the Court reviews questions of law *de novo*. *Ortiz v. Shinseki,* 23 Vet.App. 353, 356 (2010). But the Agency's policy interpretations are frequently owed deference. "VA's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Reizenstein v. Shinseki*, 583 F.3d 1331, 1336 (Fed. Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). This deference "is broader than deference to the agency's construction of a statute, because in the latter case the agency is

addressing Congress's intentions, while in the former it is addressing its own." *Id.* (quoting *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005)).

Additionally, VA, as an administrative agency, has the power to formulate policy and regulations to administer congressionally created programs. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Such legislative regulations that are explicit are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. When such legislative delegation is implicit rather than explicit, a court may not substitute its own construction of a statutory interpretation for a reasonable interpretation made by the agency. *Id.* Considerable weight should be accorded to an executive department's construction of a statutory scheme, and it should not be disturbed unless it appears to be one that Congress did not intend. *Id.* at 844-45. "[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation," construct policies to inform its judgments. *Id.* at 865.

The Court also reviews whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). Section 7104(d)(1) does not, however, require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the

Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("courts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. The Board properly denied entitlement to service connection for obesity because it complied with the Agency's longstanding policy that it does not consider obesity to be a disease that is eligible for VA compensation benefits

Despite Appellant's arguments to the contrary, the Board properly denied entitlement to service connection for obesity because it complied with the Agency's policy on the issue. It is VA's policy that it does not consider obesity to be a disease for compensation purposes, and the Board is bound by this position. And even though Appellant suggests otherwise, this is a policy choice,

and not a medical determination as he attempts to portray it. The Agency has the authority to decide whether to provide compensation benefits for obesity, and the Board is obligated to comply with that decision. Because the Board complied with that policy, and because Appellant fails to show any clear error in its decision, the Court should affirm that decision here.

The GC Precedential Opinion issued on January 6, 2017 (VAOPGCPREC 1-2017), and filed by Appellant under U.S. Vet. App. R. 30(b) on January 18, 2017, states that:

> The longstanding policy of the Department of Veterans Affairs (VA), that obesity per se is not a disease or injury for purposes of 38 U.S.C. §§ 1110 and 1131 and therefore may not be service connected on a direct basis, is consistent with title 38, United States Code.

VAOPGCPREC 1-2017. The General Counsel held that this policy is consistent with Title 38, United States Code. VAOPGCPREC 1-2017, Holdings, ¶ 1. The General Counsel also held that obesity "cannot be service connected on a secondary basis as a disability directly resulting from a veteran's service-connected disability," and it is not a "disease or injury" within the meaning of §§ 3.310(a), (b). VAOPGCPREC 1-2017, Discussion, ¶ 10. The General Counsel explained that there is not a single, widely-accepted definition of "disease," and the Agency has given meaning to the term through promulgation of the rating schedule. VAOPGCPREC 1-2017, Discussion, ¶ ¶ 3-7. The General Counsel noted that while some organizations and federal agencies have found that obesity is a disease, those findings do not compel the same result by VA

because those findings were made for a variety of purposes other than disability compensation (i.e., promoting understanding, prevention, treatment). VAOPGCPREC 1-2017, Discussion, ¶ ¶ 4-6. The General Counsel also emphasized the fact that the American Medical Association's Council on Science & Public Health concluded that without a single, widely-accepted definition of "disease," it is difficult to conclude whether obesity is a "medical disease state." VAOPGCPREC 1-2017, Discussion, ¶ 6. Thus, determining whether obesity should be considered a disease involves exercise of VA's gap-filling authority, which may include consideration of factual and policy considerations, such as whether there is a general consensus that obesity is a disease. *Id.*; *see also* 38 U.S.C. § 501 (authorizing the Secretary to prescribe all rules and regulations that are necessary to carry out the laws administered by VA).

The Board is bound by this longstanding policy as reflected in the VA rating schedule, and it complied with the Agency's position in this case here. It noted that VA does not recognize obesity as a disease entity for compensation purposes, and Appellant was consequently not entitled to service-connected benefits. [R. at 12]. The Board also explained the August 2012 VA examiner's opinion that Appellant's osteoarthritis in both knees did not inhibit his ability to do low impact aerobic exercises, and that there was no evidence that such osteoarthritis caused him to eat more, noting that the main factor in weight fluctuation is caloric intake. [R. at 12; 1274-75].

The Board identified the issue on appeal as being entitlement to service connection for obesity, and in its discussion, noted that Appellant was claiming service connection for obesity as secondary to his service-connected osteoarthritis of the knees. [R. at 11; 1701]. In his brief, Appellant argues that the Board should have recognized obesity as a disease under § 1110, so that a medical opinion could be provided to explore the link between Appellant's bilateral knee condition and his obesity, if the Board could not grant the claim under a theory of direct service connection. App. Br. at 9. This is unwarranted because VA does not recognize obesity as a disease under Title 38, precluding entitlement under theories of direct or secondary service connection. VAOPGCPREC 1-2017, Holdings, ¶ 1 (stating that obesity may not be service-connected on a direct basis because VA does not consider obesity to be a disease), Discussion, ¶ 10 (stating that "[o]besity also generally cannot be service connected on a secondary basis as a disability directly resulting from a veteran's service-connected disability"). Thus, the Board properly denied entitlement to service-connected benefits because it complied with VA's policy that it does not consider obesity to be a disease for compensation purposes.

Appellant fails to show any clear error in the Board's decision. His reference to the GC Opinion does not alter the Board's findings. In fact, the General Counsel found that the established policy that VA does not grant service connection (on a direct or secondary basis) for obesity–the only issue that is currently before the Court—is consistent with title 38, United States Code, and

General Counsel precedent opinions, and is supported by a number of scientific authorities. VAOPGCPREC 1-2017, Discussion, ¶ 9.

Appellant contends that the Board erred by relying on its own medical speculation and erred in this case because: (1) it violated Agency policy because VA itself has recognized obesity as a disease; (2) other federal agencies have defined obesity as a disease; and (3) the medical community recognizes obesity as a "disease." *See* Appellant's Brief (App. Br.) at 5-7. The Court should reject these arguments for three reasons. First, as discussed *supra*, VA's official, longstanding policy is that obesity per se is not a disease or injury for purposes of 38 U.S.C. §§ 1110 and 1131. Appellant cites to this Court's decision in *Fountain v. McDonald*, 27 Vet.App. 258, 269 (2015), to argue that VA has previously defined the term "disease." App. Br. at 4. In that case, the Court was referencing VAOPGCPREC 82-90 (July 18, 1990) (originally released as GC Opinion 1-85 on March 5, 1985). But VAOPGCPREC 1-2017 acknowledged VAOPGCPREC 82-90, and other GC opinions, which considered the meaning of the terms "disease" and "injury." VAOPGCPREC 1-2017, Discussion, ¶ 4.

In VAOPGCPREC 1-2017, the General Counsel explained, that although those earlier GC opinions cited definitions of "disease" from various authorities, they did not "interpret VA statutes or regulations as establishing a single specific definition of that term." *Id.* The General Counsel also explained that if those opinions described a significant standard for distinguishing "disease" from congenital defects or injuries, they did not describe a standard for distinguishing

disease from things like obesity, that have not traditionally fallen into one of those categories. *Id.* Thus, VA's consideration of "disease" in the GC Opinion referenced in *Fountain* does not establish that VA has adopted an authoritative definition of the term, or that it considers obesity to be classified as such a disability. The other definitions that Appellant cites in his brief are from VA medical centers using the International Classification of Diseases codes (and other VA programs) that classify the term in a medical sense, and not from the perspective of providing compensation for "specific injuries or combination of injuries" based on average impairment of earning capacity. 38 U.S.C. § 1155. The General Counsel acknowledged in its opinion that obesity has been considered by some to be a disease, but explained that these were for purposes other than compensation benefits. VAOPGCPREC 1-2017, Discussion, ¶ ¶ 4-6. Likewise, any recognition by the VA medical centers or other VA programs that obesity is a disease was not for purposes of providing compensation. *See* App. Br. at 5-6. Thus, the Board complied with VA policy on the issue because Appellant's argument refers to instances that fall outside of the compensation benefits scheme.

Second, VA is not bound by the findings made by other federal agencies. *See* App. Br. at 6; *see also* 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"); 38 C.F.R. § 19.5 ("In the consideration of appeals, the Board is bound by applicable

statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs"); *Beaty v. Brown*, 6 Vet.App. 532, 538 (1994) (noting that there is no authority for the determinative application of Social Security regulations to VA claims); *Murincsak v. Derwinski*, 2 Vet.App. 363, 370 (1992) (noting that decisions by the Social Security Administration are not controlling for VA determinations). As noted in the GC Opinion, the findings made by other federal agencies recognizing obesity as a disease do not compel the same result by VA because those findings were made for a variety of reasons other than VA disability compensation. VAOPGCPREC 1-2017, Discussion, ¶ ¶ 5-6. The Secretary is authorized to prescribe regulations that will best implement the laws enacted by the Agency and Congress, and he is not bound by other federal agencies in that regard. *See* 38 U.S.C. § 1155. And in this case, he has chosen not to provide disability compensation benefits for obesity because it is not a "disease" for purposes of 38 U.S.C. §§ 1110 and 1131. *Id.*; VAOPGCPREC 1-2017, Discussion, ¶ ¶ 5-7, 9. The findings made by other federal agencies do not warrant a contrary result.

Third, Appellant's argument that the medical community recognizes obesity as a "disease" is unpersuasive because as discussed *supra*, the Secretary is aware that some members of the medical community consider obesity to be a disease, but he has made the policy choice not to consider the condition a disease for purposes of providing compensation benefits. VAOPGCPREC 1-2017, Discussion, ¶ ¶ 4-7, 9. Again, this is not a medical

question, but one about the Agency's policy on administering compensation benefits. The Secretary is authorized to administer that policy, based on the fact that there is not a widely accepted definition of what constitutes a "disease." Indeed, the General Counsel emphasized that obesity is not conclusively considered to be a disease because there is no widely accepted definition of the term "disease." VAOPGCPREC 1-2017, Discussion, ¶ ¶ 6, 9. The fact that there is some medical acknowledgement of obesity as a disease does not contravene the Secretary's longstanding policy.

Appellant accuses the Board of relying on its own medical speculation but that is what he does here in relying on medical definitions. *See* App. Br. at 7-8. VA is already aware of definitions that identify obesity as a disease but has chosen not to recognize it is a "disease" for purposes of Title 38, United States Code. This is a policy choice, not a medical determination as Appellant portrays it to be. He contends that the Board cannot rely on the fact that the rating schedule does not specifically contemplate obesity because the Board could just rate by analogy. App. Br. at 8. This is unpersuasive because in this case, the omission of obesity from the rating schedule reflects the Agency's considered judgment that obesity is not a disease or injury for purposes of compensation benefits. VAOPGCPREC 1-2017, Discussion, ¶ 8.

The General Counsel has explained that the Secretary has the authority to promulgate the schedule of ratings, and because obesity is a well-known and widespread condition, VA would "almost certainly have included provisions in its

rating schedule related to obesity" if it had considered it to be a disease for such purposes. *Id.* This is supported by the fact that when obesity is referenced in the rating schedule, it is listed as a possible sign of another condition, and not a disease in and of itself for compensation purposes. *See* VAOPGCPREC 1-2017, Discussion, ¶ 7; *see also* 38 C.F.R. § 4.119, Diagnostic Code 7907 (listing obesity as a symptom of Cushing's syndrome). The General Counsel cited to the Federal Register to show that hyperlipidemia, elevated triglycerides, and elevated cholesterol, are similar in that they are conditions that the Secretary deemed not to be appropriate for the rating schedule. VAOPGCPREC 1-2017, Discussion, ¶ 8; *see* 61 Fed. Reg. 20,440, 20445 (May 7, 1996); *see also Cook v. Principi*, 318 F.3d 1334, 1339 n.6 (Fed. Cir. 2002) (citation omitted) (noting that under the *expressio unius est exclusio alterius* canon of construction "the expression of one thing is the exclusion of another"). The Secretary has therefore chosen not to include obesity in the rating schedule because VA does not consider obesity to be a disease for compensation purposes, precluding the applicability of analogous ratings for obesity. Thus, disputing the omission of obesity from the rating schedule amounts to an impermissible challenge to the rating schedule. *See Wanner v. Principi*, 370 F.3d 1124, 1131 (Fed. Cir. 2004) (holding that "[t]he Secretary's discretion over the schedule, including procedures followed and content selected, is insulated from judicial review . . ." and that a direct review of the content of the rating schedule "is indistinguishable from the

review of 'what should be considered a disability.'"). Appellant is barred from doing so.

Lastly, the Court should reject Appellant's argument that he was prejudiced by the Board's error because there was no error here. *See* App. Br. at 8-9. The Board complied with the Agency's policy of not providing compensation benefits for obesity. If Appellant believes that he was prejudiced, his remedy does not lie in this Court because the Secretary's decision not to include obesity in the rating schedule is insulated from judicial review.

Accordingly, the Secretary respectfully submits that the Court should affirm the Board's decision that denied entitlement to service connection for obesity. The Board followed VA's longstanding policy and provided an adequate statement of its reasons and bases for its conclusion. Furthermore, as discussed *supra*, the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino*, 168 F.3d at 34 (holding that the failure of an appellant to include an argument in the opening brief will generally be deemed a waiver of that argument).

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

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