Vet. App. No. 16-2993

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT M. SELLERS,
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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ON APPEAL FROM

THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm those parts of the April 29, 2016, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to an effective date earlier than September 18, 2009, for the award of service connection for major depressive disorder (MDD); entitlement to an evaluation in excess of 70% for his service-connected MDD; and did not consider whether to refer a purported claim for tinnitus.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

Robert M. Sellers (Appellant), appeals, through counsel, that part of the April 29, 2016, Board decision that denied an effective date earlier than

September 18, 2009, for the award of service connection for MDD; denied an initial evaluation in excess of 70% for MDD; and did not consider whether to refer an purported claim of entitlement to service connection for tinnitus to the VA Regional Office (RO). Insofar as the Board granted the claim of entitlement to service connection for post-traumatic stress disorder (PTSD), granted an effective date of September 18, 2009, for the award of service connection for MDD, and granted entitlement to a total disability rating based upon individual unemployability (TDIU), the Court should not disturb those favorable findings. *See Roberson v. Principi*, 17 Vet.App. 135, 139 (2003). Because the Board remanded the claims of entitlement to a compensable evaluation for laceration and tendon injury of the index and middle fingers of the right (major) hand, entitlement to an evaluation in excess of 10% for a left knee disability, and entitlement to service connection for a bilateral ankle disability, to include vascular insufficiency of the lower extremity, those issues are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

Appellant makes no argument as to the Board's denial of an effective date earlier than September 18, 2009, for the award of a 40% evaluation for a lumbosacral spine disability, *see generally* Appellant's Brief (App. Br.), the Court should consider that issue abandoned. *See Disabled Am. Veterans (DAV) v. Gober,* 234 F.3d 682, 688 n.3 (Fed. Cir. 2000).

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty from April 1964 to February 1969 and from January 1981 to February 1996. *See* Record Before the Agency (R.) at 1137, 1136 (DD Forms 214).

In March 1996, Appellant submitted an Application for Compensation or Pension. R. at 2684-87. Appellant listed the disabilities he was claiming as: right leg numbness and tingling, left knee injury, back injury, right middle and index finger injury, and "hearing loss." *Id*. at 2684 (boxes 12 and 17); *see also id*. at 2685 (box 19). He later made a statement, "Request s/c for disabilities occurring during active duty service." *Id*. at 2687 (box 40). Although that box, labeled "Remarks", requested that Appellant identify his statement by its applicable item number, Appellant did not do so. *See id*. In July 1996, the VA Regional Office (RO) issued a rating decision that, in pertinent part, continued Appellant's 0% evaluation for service-connected high frequency bilateral hearing loss.[1] *See* R. at 2668 (2666-70). Appellant did not appeal that decision.

On September 18, 2009, a VA Form 119, Report of General Information, showed that Appellant called to request an informal claim for his right index and middle finger and "[posttraumatic stress disorder] PTSD." R. at 2647. In March 2011, the RO issued a rating decision that denied entitlement to service connection for PTSD (R. at 3019-30), but in August 2011 it issued another rating

[1] Appellant was initially granted entitlement to service connection for hearing loss in a rating decision dated June 1, 1971, between his two periods of active service. *See* R. at 2751-52.

decision that granted entitlement to service connection for MDD, and assigned a 70% evaluation, effective May 13, 2011. R. at 3004-18. Appellant submitted a Notice of Disagreement (NOD) relating to that decision in October 2011. R. at 2351-60. The RO issued a rating decision that granted an effective date of September 3, 2010, for service connection for MDD in March 2014. R. at 2983-94. VA issued Statements of the Case (SOCs) that same month. R. at 2175-96; 2146-74. Appellant perfected his appeal to the Board as to the denial of an evaluation in excess of 70% for his MDD in April 2014. R. at 2121-28. That same month, Appellant submitted an NOD relating to the March 2014 rating decision that denied an effective date prior to September 3, 2010, for service connection for MDD. R. at 2118-20. VA issued a SOC relating to that issue in September 2015. R. at 134-53. Appellant perfected his appeal to the Board as to that issue in October 2015. R. at 129-32.

Appellant submitted a Vocational Assessment performed by Mr. Christopher A. Young MA; C.R.C. (Mr. Young) in March 2016. R. at 85-97. Mr. Young stated that Appellant's "psychological disability alone precludes all competitive employment in the national economy for a number of reasons." *Id*. at 89. His first reason is: "VA granted Appellant a [70%] disability rating for his [MDD] from September 3, 2010. A [70%] rating includes such vocationally significant symptoms as: deficiencies in work, school; impaired impulse control; difficulty in adapting to a work like setting, including work; deficiencies in judgment, thinking or mood; diminished ability to function independently." *Id*.

III. SUMMARY OF ARGUMENT

Appellant makes four general allegations of error on appeal. *See* App. Br. at 9-28. Specifically, he alleges that the Board improperly denied an effective date earlier than September 18, 2009, for the grant of entitlement to service connection for MDD, alleging that he filed a claim in March 1996 for that disability (*Id.* at 9-18); that the Board's erred when it denied an evaluation higher than 70% for that disability for the same reason (*Id*. at 18-20); that the Board improperly gave less weight to Mr. Young's March 2016 Vocational Assessment (App. Br. at 20-26); and that the Board erred when it did not refer an alleged claim of tinnitus to the RO for adjudication. *Id*. at 26-28. However, Appellant has not carried his burden of demonstrating prejudicial error, and the Court should therefore reject Appellant's arguments.

IV. ARGUMENT

A. The Court should reject Appellant's arguments because he has not carried his burden of demonstrating prejudicial error.

The Court should reject Appellant's arguments because "the Court of Appeals for Veterans Claims' proceedings *are not non-adversarial*," *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc) (emphasis added), and Appellant has failed to carry his burden of demonstrating the existence of any prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 406-10 (2009); *Barrett v. Shinseki*, 22 Vet.App. 457, 461 (2009).

1. The March 1996 Application for Compensation or Pension did not include a claim of entitlement to service connection for a mental disability.

Appellant's first two arguments are entirely predicated upon the mistaken belief that his March 1996 Application for Compensation or Pension included a claim of entitlement to service connection for a mental disability, to include MDD. *See* App. Br. at 9-20. It did not, and the Board correctly found as much. *See* R. 20 (2-27); 2684-87 (March 1996 Application for Compensation or Pension).

A "claim" is "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement." 38 C.F.R. § 3.1(p) (2016); *see Hillyard v. Shinseki*, 24 Vet.App. 343, 355 (2011). "Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by [VA] . . . may be considered an informal claim. Such informal claim must identify the benefit sought." 38 C.F.R. § 3.155(a). "The essential requirements of any claim, whether formal or informal . . . [are] (1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing." *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009). Evidence of a condition alone is not sufficient to raise a claim; there must be some intent by a claimant to seek benefits. *See Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006) ("The mere existence of medical records generally cannot be construed as an informal claim; rather, there must be some intent by the claimant to apply for a benefit."); *Brannon v. West*, 12 Vet.App. 32, 35 (1998)

(holding that the "mere presence" of medical evidence is insufficient to establish the intent necessary for an informal claim for VA benefits).

Appellant requested service connection for several individually-listed disabilities in his March 1996 Application for Compensation or Pension, but a mental disability was not one of them. *See* R. at 2684-87. Appellant attempts to hang his hat upon the statement, “request s/c for disabilities occurring during active service.” *See* App. Br. at 12; R. at 2687 (2684-87). This Court has already rejected the idea of allowing such a broad construction to constitute a claim for a specific benefit. *See Brokowski*, 23 Vet.App. at 89 (concluding that a writing that requested service connection for "all disabilities of record" was too broad to satisfy 38 C.F.R. § 3.155(a)'s requirement that an informal claim "identify the benefit sought" because accepting such language as adequately identifying the benefit sought would nullify that specificity requirement). Appellant’s March 1996 statement does not “identify the benefit sought,” as was the case in *Brokowski*, and the Court should reject his argument for the same reason. The Court should likewise reject all of Appellant’s arguments that are predicated upon the erroneous belief that the March 1996 Application for Compensation or Pension included a claim of entitlement to service connection for a mental disability.

2. VA treatment records from 2009 are not informal claims of entitlement to service connection for a mental disability.

Insofar as Appellant alleges that VA treatment records dating from January and April 2009 constituted informal claims of entitlement to service connection for

a psychiatric disability (*see* App. Br. at 15-18 citing R. at 1842-46, 1859, 1861-63), this argument is also without merit because none of those records evidence an intent to apply for a benefit. It is well settled that "[t]he mere existence of medical records generally cannot be construed as an informal claim; rather, there must be some intent by the claimant to apply for a benefit." *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006) (citing *Brannon v. West*, 12 Vet.App. 32, 35 (1998)); *see also MacPhee v. Nicholson*, 459 F.3d 1323, 1326-28 (Fed. Cir. 2006) (affirming determination that "medical evidence reflecting treatment for and diagnoses of an alcohol-related problem is not sufficient to indicate an intent to apply for secondary service connection for alcohol dependence or to identify the benefit sought"). None of the January or April 2009 VA treatment records cited by Appellant demonstrate an intent to apply for service connected disability benefits, *see* R. at 1842-46, 1859, 1861-63, and the Court should therefore reject his argument.

3. Appellant is not entitled to an evaluation in excess of 70% for MDD because his March 1996 Application for Compensation or Pension did not include a claim for that disability.

Appellant's second general argument is that the Board should have awarded him an evaluation in excess of 70% for his service-connected MDD based upon a regulation from 1996, specifically 38 C.F.R. § 4.132 Diagnostic Code (DC) 9411 (1996), which he asserts was "in effect in March 1996" and should have applied to his "1996 claim." *See* App. Br. at 18-19. This argument

must fail because it completely depends upon his first erroneous argument, that the March 1996 Application for Compensation or Pension included a claim of entitlement to service connection for a psychiatric disability. *See* App. Br. at 18-20. Because the Secretary has already demonstrated that Appellant's first argument must fail, this argument must fail as well, especially because Appellant provides no further support for the allegation that the Board erred in denying him an evaluation in excess of 70% for his service connected MDD. *See* App. Br. at 18-20; *see also 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 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. Cir. 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). The Court should reject Appellant's underdeveloped argument.

4. The Board did not err when it gave less probative weight to Mr. Young's Vocational Assessment

Appellant's third general argument, that the Board "improperly discredited" Mr. Young's March 2016 Vocational Assessment (App. Br. at 10-11), is without merit. It is well-settled that it is the purview of the Board, and not Appellant or this Court, to assign weight to the *evidence* of record. *See Owens v. Brown*, 7

Vet.App. 429, 433 (1995); *see also Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992) (finding that the Board is permitted to favor one opinion over another provided that it gives an adequate statement of its reasons and bases for doing so). This is not limited to medical evidence; the Board is permitted to weigh non-medical evidence as well, and it did so here. *See* R. at 16 (2-27). The Board correctly found that Mr. Young did not acknowledge any level of social impairment, R. at 16 (2-27), which is necessary for the next higher rating, 100%, under 38 C.F.R. § 4.130, DC 9434. *See* DC 9434 (a 100% evaluation requires total occupational *and social* impairment). The Board's determination that Mr. Young's finding of "total disability is incongruous with his acknowledgment that the symptoms cause diminished ability to function independently without any discussion thereof" (R. at 16 (2-27)) is also correct. Mr. Young stated that Appellant's "psychological disability alone precludes all competitive employment in the national economy for a number of reasons." R. at 89 (85-97). His first reason is: "VA granted Appellant a [70%] disability rating for his [MDD] from September 3, 2010. A [70%] rating includes such vocationally significant symptoms as: deficiencies in work, school; impaired impulse control; difficulty in adapting to a work like setting, including work; deficiencies in judgment, thinking or mood; diminished ability to function independently." *Id*. In other words, Mr. Young came to the incongruous conclusion that Appellant's MDD precluded all employment[2] *because VA found his disability did not rise to the level of total*

[2] Interestingly, Mr. Young later states, "He is totally disabled from all competitive

occupational and social impairment. *Compare* R. at 89, 90 (85-97) *with* 38 C.F.R. § 4.130 DC 9434; *cf. also* 38 U.S.C. § 7252(b) (review of the Schedule of Rating Disabilities is prohibited); *Wingard v. McDonald*, 779 F.3d 1354, 1356 (Fed. Cir. 2015) (same); *see also Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) (role of rating specialist is to "interpret[ ] medical reports in order to match the rating with the disability"), *rev'd on other grounds by Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). Mr. Young's finding is incongruous, as the Board correctly found, and adequately explained. *See* R. at 16 (2-27); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). No error exists as alleged, and the Court should therefore reject Appellant's argument.

5. The Board did not err when it did not refer an alleged claim of entitlement to service connection for tinnitus

Contrary to Appellant's argument, *see* App. Br. at 26-28, the Board did not err when it did not refer an alleged claim of entitlement to service connection for tinnitus to the RO for initial consideration. The Board did not have jurisdiction to consider a claim for tinnitus, because nothing Appellant points to would be considered a claim of entitlement to service connection for that disability.

It is well established that the Board has jurisdiction to determine its own jurisdiction, *Marsh v. Nicholson*, 19 Vet.App. 381, 384 (2005), and that the Court has jurisdiction to review such a Board determination. *Young v. Shinseki*, 25

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gainful employment on the basis of his *physical* service connected disabilities and resulting permanent physical restrictions alone without even taking into account his decreased ability to concentrate. His reduced ability to concentrate also supports my conclusion that he is not able to work." R. at 91 (85-97).

Vet.App. 201, 203 (2012) (en banc) (per curiam order) (holding that the Court "has jurisdiction over an appeal of a decision of the Board that denies a part of a claim for benefits and decides to refer, rather than remand, for adjudication another part (or condition) or theory in support of that same claim, and our jurisdiction extends not only to the denied part of the claim but also to the referral decision"); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 3 (2009) (noting that the Court has "jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, with regard to a claim properly before the Court, but failed to do so").

Moreover, a “claim” is a "formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p). A "pending claim" is "[a]n application, formal or informal, which has not been finally adjudicated." 38 C.F.R. § 3.160(c). A Board determination of whether a document is a claim is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Brokowski*, 23 Vet.App. at 85*; Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Although this Court "has jurisdiction to hear arguments presented to it in the first instance, provided it otherwise has jurisdiction over the veteran's claim," the determination of whether to entertain an argument raised for the first time at the Court is "a matter of discretion." *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2002). One boundary on the Court's discretion is its role as an appellate tribunal, which precludes it from finding facts in the first instance. *See*

Hensley v. West, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate for a for initial fact finding"); *see also* 38 U.S.C. § 7261(c).

If the Court were to address Appellant's arguments that his March 1996 Application for Compensation or Pension included a claim of entitlement to service connection for tinnitus, the Court would be required to make factual determinations in the first instance, which it may not do. *See Hensley.* Appellant has not shown, or argued, he raised the issue of entitlement to service connection for tinnitus anywhere on appeal. *See generally* App. Br. Appellant did not seek benefits for symptoms that he thought were caused by hearing loss that turned out to be caused by tinnitus; he requested benefits for hearing loss. And, the Court has unambiguously stated that "tinnitus and hearing loss are recognized by the Secretary as separate and distinct disabilities." *Monzingo v. Shinseki*, 26 Vet.App. 97, 104-05 (2012). Furthermore, the mere existence in the medical records of a diagnosis for a condition is not sufficient to raise a new claim for benefits for that condition. *Criswell*, 20 Vet.App. at 504 (finding that a claim for benefits for trenchfoot did not contain an informal claim for cold weather residuals of the hands, despite a VA medical examination provided in connection with the claim for benefits for trenchfoot that demonstrated such residuals).

Moreover, because Appellant was initially granted entitlement to service connection for hearing loss in June 1971, between his two periods of active service (*see* R. at 2751-52), the March 1996 Application for Compensation would have, at the most, constituted a request for an increased rating for service-connected hearing loss, and not a separate claim of entitlement to service connection for tinnitus. The Court should not find that the Board erred when it did not refer a purported claim of entitlement to service connection for tinnitus to the RO, and instead should affirm the Board's decision.

V. CONCLUSION

Upon review of all of the evidence and Appellant's arguments, he has not demonstrated that the Board committed error, much less prejudicial error, in its findings of fact or conclusions of law. Because Appellant has not carried his burden of showing prejudicial error, the Court should affirm the remainder of the Board's decision. The Secretary further urges the Court to find that Appellant has abandoned any other arguments, therefore rendering it unnecessary to consider any other error not specifically raised. *See DAV,* 234 F.3d at 688 n.3; *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd* 104 F.3d 1328 (Fed. Cir. 1997).

Respectfully submitted,

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