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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2407

SAMANTHA J. UNELL, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Samantha J. Unell, through counsel, appeals an April 8, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied an earlier effective date for coronary artery disease status post myocardial infarction, for accrued benefits purposes under *Nehmer v. U.S. Veterans' Admin.*¹ Record of Proceedings (R.) at 1-16. Additionally, the Board dismissed a claim for an earlier effective date for the cause of the veteran's death. R. at 11. Further, the Board remanded an increased-compensation claim for coronary artery disease status post myocardial infarction, for accrued-benefits purposes. R. at 11-14. The remanded claim is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

¹ 712 F. Supp. 1404 (N.D. Cal. 1989); *see also Nehmer v. U.S. Veterans' Admin.*, 284 F.3d 1158 (9th Cir. 2002); *Nehmer v. U.S. Veterans' Admin.*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999). *Nehmer* was a class action in which Vietnam veterans and their survivors sued VA alleging that, in promulgating regulations governing compensation for diseases attributed to Agent Orange, VA failed to comply with the Dioxin and Radiation Exposure Compensation Standards Act.

I. BACKGROUND

The appellant is the surviving daughter of veteran William L. Chandler, who served in the U.S. Army from October 1966 to October 1969 (including service in the Republic of Vietnam) and died in May 2000. R. at 85, 431. In April 1990, the veteran was diagnosed with coronary artery disease. R. at 211-13. In May 1994, the veteran submitted a statement in support of claim, which VA broadly construed as including a disability compensation claim for heart disease. R. at 1042-43.

After the veteran died, the appellant filed a statement in support of claim asking the VA regional office (RO) to award service connection for the veteran's heart disease beginning in 1990. R. at 370-71. In December 2012, the RO awarded retroactive benefits under *Nehmer*, with a 30% disability rating effective May 5, 1994, and a 100% disability rating for the period beginning September 29, 1999. R. at 188-92, 194-201. The appellant filed a Notice of Disagreement in May 2013 and perfected her appeal in August 2013. R. at 187, 1384.

In April 2016, the Board issued the decision on appeal, finding that the appellant was not entitled to receive an earlier effective date for retroactive-benefits purposes under *Nehmer* because May 1994 was the earliest date of the disability compensation claim received by VA. R. at 1-16. This appeal followed.

II. ANALYSIS

Generally, the effective date of an award "shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a). In accordance with *Nehmer*, VA codified an exception to the general rule so that the effective date of a veteran's claim for a "covered herbicide disease" depends on whether (1) VA denied the claim for the covered herbicide disease between September 25, 1985, and May 3, 1989, or (2) the claim was pending before VA on May 3, 1989, or received by VA between that date and the effective date of the law establishing a presumption of service connection for the condition. 38 C.F.R. § 3.816(c)(1)-(2) (2017). If a claimant's circumstances fall within those exceptions, then the effective date of an award for a covered herbicide disease will be the later of the date such claim was received by VA or the date the disability arose. *Id.* If neither of those circumstances apply, the normal effective-date provisions of 38 U.S.C. § 5110(a) apply.

Nehmer class members include Vietnam veterans who have a covered herbicide disease and surviving spouses of Vietnam veterans who died from a covered herbicide disease. 38 C.F.R. § 3.816(b)(1).² *Nehmer* class members are eligible to receive retroactive benefits. 38 C.F.R. § 3.816(f). If a class member is entitled to retroactive benefits under 38 C.F.R. § 3.816(c)(1)-(3) and dies prior to receiving payment of any such benefits, VA must pay the owed benefits to certain survivors (including surviving children) or the class member's estate. *Id.*

A Board determination of the proper effective date is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *See Evans v. West*, 12 Vet.App. 396, 401 (1999). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). The Court reviews VA's interpretation of statutes and regulations de novo. *See Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003) ("[I]nterpretation of a statute or regulation is a question of law . . ."); *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (stating that the Court reviews "questions of law de novo without any deference to the [Board's] conclusions of law"). The Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

Here, it is undisputed that the veteran is a qualifying *Nehmer* class member and that if retroactive benefits are due, they should be paid to the appellant; therefore, the only issue to be addressed is whether the Board erred in deciding the appellant is not entitled to an earlier effective date for the purposes of retroactive benefits. *See* R. at 5. The appellant argues that she is entitled to retroactive benefits dating back to April 1990 because that is the "date the [veteran's heart] disability arose," and asks the Court to reverse the Board's decision. Appellant's Brief (Br.) at 6-7. Broadly construed, the appellant argues that 38 C.F.R. § 3.186(c) and VA Fast Letter 10-04 require the Board to grant an earlier effective date for retroactive benefits under *Nehmer* "if there was medical evidence of record sufficient to code a condition." *Id.* at 9. The Secretary argues that the

² "Ischemic heart disease" is listed as a covered herbicide disease under 38 C.F.R. § 3.816(e). In August 2010, the Secretary expanded the list of presumptive diseases to include "Ischemic heart disease." 38 C.F.R. § 3.309(e) (2010).

Court should affirm the Board decision because the appellant "has not shown that the Board failed to recognize the [v]eteran as a *Nehmer* class member or to appropriately apply the effective date rules of 38 C.F.R. § 3.816(c) that are applicable to the [v]eteran's claim." Secretary's Br. at 7.

In the decision on appeal, the Board stated that the veteran submitted a disability compensation claim in May 1994, which the RO liberally construed as a claim including heart disease. R. at 7-8. The Board then noted that "[t]here are no earlier records showing a formal or informal claim of service connection for any claim, including heart disease." R. at 8. After reiterating the appellant's contention that the veteran's treatment in April 1990 for a myocardial infarction should be construed as the earliest date for which service connection is warranted, the Board correctly restated the applicable law:

[Because] the [v]eteran's claim was deemed to have been received between May 3, 1989 and August 31, 2010, his claim for an earlier effective date is covered under *Nehmer* per 38 C.F.R. § 3.816(c)(2). In these situations, by law, the effective date of the award will be the later of the date of claim or the date the disability arose.

R. at 9 (citing 38 C.F.R. § 3.816(c)(2)).

The Court cannot identify any clear error in the Board's decision. In her principal brief, the appellant cites VA Training Letter 10-04, which states:

If VA receive[s] medical records documenting a diagnosis of the now-covered disease, *then the first rating decision issued after receipt of those records* is deemed to have denied [service connection] for that condition, and the claim denied by that decision is deemed to have included a claim for the now-covered disease.

Appellant's Br. at 9 (emphasis added) (quoting VA Training Letter 10-04 at 20 (Feb. 10, 2011)). The Secretary correctly notes that, despite this accurate recitation of VA's *Nehmer* Training Letter and its requirements, the appellant does not allege that the Board's characterization of the facts is erroneous – most notably, the appellant does not contest the Board's finding that there was no rating decision before May 1994. *See* Secretary's Br. at 5; Appellant's Br. at 8-11; R. at 8. Here, the appellant provides no specific or coherent legal theory as to why the date of the veteran's medical treatment should be treated as the date of the claim for purposes of *Nehmer*; therefore, the appellant has not met her burden of persuasion on appeal, and the Court will affirm the Board's decision.³ *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden

³ To the extent that the appellant raises new arguments in her reply brief, the Court notes that "courts have consistently concluded that the failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument." *Carbino v. West*, 168 F.3d 32 (Fed. Cir. 1999); *see Amoco Oil Co. v. United States*, 234 F.3d 1374 (Fed. Cir. 2000) (holding that a party must raise in their opening brief all issues it wishes

of persuasion on appeals to this Court to show that such reliance was in error."), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000); *Moore v. Nicholson*, 21 Vet.App. 211, 214 (2007) (stating that "the appellant bears the burden of persuading the Court that the Board decision below is tainted by a[n] error that warrants reversing or remanding the matter for the investment of the additional time and effort that would be required by VA to produce a new decision in [the] case"); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (stating that "the appellant . . . always bears the burden of persuasion on appeals to this Court"); *see also* U.S. VET. APP. R. 28(a) (requiring an appellant to plead specific contentions of error in law or fact).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's April 8, 2016, decision is AFFIRMED.

DATED: December 20, 2017

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to challenge); *Henderson v. West*, 12 Vet.App. 11, 18-19 (1998) (stating that where an argument is raised for the first time in the appellant's reply brief, the claim is considered abandoned); *Costantino v. West*, 12 Vet.App. 517, 521 (declining to address arguments raised for the first time in the reply brief); *Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (stating appellant "should have developed and presented all of his arguments in his initial pleadings"); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992); *see also* U.S. VET. APP. R. 28(a)(3) (stating that the appellant's brief must contain a statement of the issues).