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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2259

BENITO R. CHAVEZ, 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, Benito R. Chavez, through counsel, appeals a May 17, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for bilateral hearing loss, tinnitus, and a right knee disorder. Record of Proceedings (R.) at 2-28. 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 reasons that follow, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from January 1963 to July 1963, and then again from August 1964 to August 1967. R. at 1705-06. On his entry examination in November 1962, bilateral defective hearing was noted. R. at 1357. On his July 1963 separation examination, no defects were noted, but no audiometer data for hearing were recorded. R. at 1361. On his August 1964 entrance examination, no defects were noted. R. at 1364. Similarly, on his July 1967 separation examination, no defects were noted. R. at 1365-69.

In September 2005, the appellant filed a claim for service connection for post-traumatic stress disorder (PTSD). R. at 1249, 1255. In a November 3, 2006, rating decision, the regional office (RO) granted the appellant's PTSD claim and assigned a 100% rating, effective September 2005. R. at 1253-62.

In a September 2008 rating decision, the RO reduced the appellant's PTSD rating to 50%, effective December 1, 2008. R. at 1121-25; *see also* R. at 1181-83 (Feb. 2008 proposed reduction). In October 2008,[1] the appellant filed a Notice of Disagreement (NOD), stating:

> I wish to file a notice of disagreement with VA letter dated 9-22-08. I feel my service connected PTSD should be rated greater than 50%. I would like to have a decision review officer [(DRO)] review my case.

R. at 1117. In a June 2, 2010, DRO decision, VA increased the appellant's PTSD rating to 70%, effective December 1, 2008. R. at 1090-97.

Later in June 2010,[2] the appellant filed a formal claim for "Increased Compensation Based on Unemployability," noting that he became too disabled to work in June 2002. R. at 1082. To the question of "[w]hat service-connected disability prevents you from securing or following any substantially gainful occupation," the appellant answered, "PTSD, prostate cancer." *Id.*

In a June 24, 2011, RO decision "on [the appellant's] claim for service connected compensation received on June 23, 2010," VA "continued" the appellant's 70% PTSD rating, and denied entitlement to a total disability rating based on individual unemployability (TDIU). R. at 859-70. In August 2011, the appellant submitted a "Statement in Support of Claim" to VA, in which he requested: "Please withdraw my claim for increased compensation for PTSD, effective immediately." R. at 872.

In November 2012, the appellant sought to reopen his claims for service connection for bilateral hearing loss, tinnitus, and a right knee disorder. R. at 804-10. In February 2013, the appellant underwent VA audio, knee, and lower legs examinations. R. at 730-40. During the audio examination, the examiner diagnosed the appellant with bilateral hearing loss and tinnitus, but opined that neither disability was due to service. R. at 736-37. The examiner's rationale for his opinion was as follows:

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[1] On August 14, 2009, VA recorded having received the NOD. R. at 1117.

[2] It is unclear when this claim was received. The signature line is dated June 17, 2010, and there is a handwritten date of June 24, 2010, on the claim, which may be the date of receipt. *See* R. at 1082-83.

> Electronic hearing testing conducted at enlistment and at discharge shows the veteran did not have hearing loss/hearing injury while in service (no significant threshold shift beyond normal variability while in service). Based on electronic hearing testing conducted at enlistment and at discharge it is my opinion the veterans hearing loss and reported tinnitus are less likely as not caused by or a result of noise exposure while in service.

Id.

During the knee examination, the examiner diagnosed the appellant with arthritis of the right knee. R. at 754. The examiner opined that, based on the lack of service records documenting right knee complaints, symptoms or diagnoses, it was less likely that his arthritis was incurred in or caused by his military service. R. at 757. Rather, the examiner opined that his arthritis was "more likely due to his 50 [pound] weight gain since discharge and his work as a physical education teacher for 27 years." *Id.*

In February 2013, the RO determined that there was new and material evidence to reopen the appellant's claims for bilateral hearing loss, bilateral tinnitus and a right knee disorder, but then denied service connection for these disabilities. R. at 3, 722-29. The appellant timely appealed this decision to the Board. R. at 646-69, 604-06, 134-38. In March 2016, the appellant testified that he had experienced bilateral hearing loss in service, that he had constant ringing in his ears since service, and that he had injured his right knee in a parachute injury while in service. R. at 74-77.

In the Board decision here on appeal, the Board confirmed that there was new and material evidence to reopen the appellant's claims for bilateral hearing loss, bilateral tinnitus and a right knee disorder, but then declined to grant service connection for any of these claims. R. at 2-30. In its decision, the Board found that VA had satisfied its duty to assist, and to this end, the February 2013 medical examinations and opinions were adequate. R. at 7.

Concerning the appellant's hearing loss and tinnitus claims, the Board reviewed the medical evidence of record, and acknowledged that the appellant was exposed to acoustic trauma in combat. R. at 22. However, the Board found that such exposure "does not automatically mean there were chronic residuals, including a sensorineural hearing loss and tinnitus, which were caused thereby." *Id*. Ultimately, the Board determined that

> the combination of the lack of treatment for hearing loss and tinnitus during service; audiometric testing at service discharge from his second period of service which found no elevated threshold levels at any relevant frequency in either ear; his not

> having complained of hearing loss or tinnitus at service discharge; his not having sought treatment or disability compensation for hearing loss or tinnitus immediately after service; the fact that his post-service clinical records are negative for any findings of a hearing loss, including sensorineural hearing loss or tinnitus for many years after his service discharge, to be persuasive evidence against his claims.

R. at 24. In its analysis, the Board acknowledged that the appellant's November 1962 audiometric testing upon enlistment in the Army Reserve revealed bilateral defective hearing. R. at 20. However, it noted that these testing results were never confirmed by subsequent audiometric testing during either period of active service. *Id*. The Board also acknowledged the appellant's lay evidence, relating his hearing loss and tinnitus to acoustic trauma during service and continual hearing loss and tinnitus thereafter, but found it vague, and inconsistent with contemporaneous and other medical records. R. at 17-18, 23-25.

Regarding the appellant's knee condition, the Board found that it first manifested several decades after active service, and was not related to military service; accordingly the Board denied his service-connection claim. R. at 27-28. In its analysis, the Board relied on the opinion of the 2013 examiner, who related the appellant's knee condition to his significant exertion as a physical education teacher, and to his weight gain since service. R. at 27. Although the Board recognized appellant's lay evidence attesting to continual pain since he injured his knee in in-service parachute jumps, it found this evidence inconsistent with his prior statements, and discounted it accordingly. R. at 26-27.

II. ANALYSIS

A. Adequacy of the February 2013 VA Medical Examinations

The Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). "[O]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's '"evaluation of the claimed disability will be a fully informed one."' *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)).

Additionally, the opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id*. at 124-25; *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two").

The appellant argues that the February 2013 VA hearing loss, tinnitus, knee and lower leg medical examinations were inadequate, and the Board erred in relying on them to deny his claims for service connection for these conditions. Appellant's Brief (Br.) at 10-15. Specifically, he contends that the examinations were based on an inaccurate factual predicate, and lacked adequate rationale. Appellant's Br. at 10-15. Concerning the hearing and tinnitus examinations, the appellant asserts that the examiner failed to recognize that he was diagnosed with bilateral hearing loss during his November 1962 entrance examination. Appellant's Br. at 12. Regarding the knee examination, the appellant suggests that the examiner should have acknowledged that, "consistent with his duties as a paratrooper," he could have suffered a knee injury during service, and that he had symptoms of a right knee disability before 2008. Appellant's Br. at 14.

In response, the Secretary first contends that, even if the hearing examiner failed to consider the November 1962 audiometric results, any error in failing to do so is harmless, because, as the Board found, the results were never confirmed by subsequent audiometric testing, and moreover, consideration of that evidence would show that this condition improved rather than worsened during his service. Secretary's Brief at 14-15. Regarding the knee and lower leg examination, the Secretary contends that the examiner reviewed the record, his opinion was "well-reasoned and fully explained," and the appellant fails to cite any evidence of an in-service injury to his right knee, nor does he cite any treatment or complaints made in service, that the examiner failed to consider. Secretary's Br. at 17.

The Court agrees with the Secretary. There is no clear error in the Board's determination that the February 2013 medical examinations were adequate. Accordingly, for the reasons that follow, the Court will affirm the Board's decision regarding VA's duty to assist.

1. *2013 Hearing Loss and Tinnitus Examinations*

As an initial matter, it is not clear to the Court that the hearing loss and tinnitus examiner misread or overlooked the November 1962 audiometric results. First, the fact that the examiner did not specifically reference the November 1962 audiometric results does not categorically render his opinion inadequate. Indeed, there is no requirement that a medical examiner comment on "every favorable piece of evidence in a claims file." *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012); *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994) (noting that the Board, not medical examiners, has the duty to discuss favorable evidence in a statement of reasons or bases). Second, the examiner noted that he had reviewed the appellant's claims file. *See* R. at 736. In the absence of evidence to the contrary, he is presumed to have considered all the evidence in the file, including the November 1962 audiometric results. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) ("There is a presumption that VA considered all of the evidence of record.").

Similarly, as the Board correctly noted, the examiner's observations regarding the appellant's electronic hearing testing relate to his *second* period of service. R. at 21, 23. In other words, the examiner did not misstate the results of the electronic hearing testing performed during the appellant's *first* period of service. Accordingly, the Court is not convinced that the examiner's opinion was based on an inaccurate factual premise.

Moreover, even assuming, arguendo, that the examiner failed to consider the November 1962 audiometric results, the appellant fails to persuade the Court that this evidence is sufficiently medically pertinent to render his medical opinion inadequate. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam) ("An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail . . . . "). As the Secretary has persuasively contended, consideration of the November 1962 audiometric results would show that the appellant's hearing condition improved, rather than worsened, during his service. Further, because the Board essentially deemed the November 1962 audiometric results to lack probative value, as they were never confirmed by subsequent audiometric testing during either period of active service, any failure by the examiner to consider them was harmless. R. at 20. *See* 38 U.S.C. § 7261(b) (the Court shall take account of the rule of prejudicial error); *Conway v. Principi*, 353 F.3d 1369, 1375 (Fed. Cir. 2004) (Court is required to "take due account of the rule of prejudicial error"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that appellant bears burden of demonstrating error on appeal), *aff'd*, 232 F.3d 908 (Fed.

Cir. 2000); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (stating that "the appellant . . . always bears the burden of persuasion on appeals to this Court"). Therefore, remand is not necessary. *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (holding that, "[i]n the absence of demonstrated prejudice," remand is unnecessary).

2. *2013 Knee and Lower Leg Examination*

Similarly, the Court does not agree that the knee and lower leg examination was inadequate. Rather, the examiner properly conducted an in-person examination and reviewed the appellant's medical history, R. at 742-43, and the resulting opinion rests on "correct facts and reasoned medical judgment," *Acevedo*, 25 Vet.App. at 293; *D'Aries*, 22 Vet.App. at 104. The examiner specifically acknowledged that the appellant was a parachutist during his military service, but that his enlistment and separation physical were silent for a knee condition, and that outpatient records begin addressing his knee condition in 2008. R. at 743, 757. These facts, which the examiner premised his opinion on, are consistent with the Board's findings that the appellant's pain symptoms began many years after military service, and that his lay statements attesting otherwise were inconsistent with his prior statements regarding onset. R. at 26-27. The appellant does not dispute these facts, and offers only speculation as to his potential knee injuries during service, in an attempt to discount the examiner's findings. Such speculation does not meet his burden of persuasion before this Court. *Fagan v. Shinseki*, 573 F.3d 1282, 1286 (Fed. Cir. 2009) (stating that the claimant has the burden to "present and support a claim for benefits" and noting that the benefit of the doubt standard in section 5107(b) is not applicable based on pure speculation or remote possibility); *see also Hilkert*, 12 Vet.App. at 151.

Ultimately, the examiner opined that the appellant's knee condition was not likely due to service, but more likely due to his 50-pound weight gain since discharge, as well as his work as a physical education teacher for 27 years. R. at 757. In short, the opinion contains clear conclusions with supporting data and a reasoned medical explanation connecting the two. *Nieves-Rodriguez*, 22 Vet.App. at 301; *Stefl*, 21 Vet.App. at 123. Therefore, the appellant fails to demonstrate that the Board's reliance upon this opinion was clearly erroneous. *See D'Aries*, 22 Vet.App. at 103; *Ardison*, 6 Vet.App. at 407; *Gilbert*, 1 Vet.App. at 52.

B. PTSD Claim

The appellant also argues that the Board erred by failing to remand his PTSD claim, which he alleges is currently pending, for issuance of a Statement of the Case (SOC). Appellant's Br. at

8-10; Reply Br. at 1-5. According to the appellant, he filed a timely NOD with the September 2008 rating decision to reduce his disability rating for PTSD from 100% to 50% disabling, and VA has yet to act on it. Appellant's Br. at 8-9; Reply Br. at 3 (citing R. at 872). The Secretary counters that the Board had "no obligation" to remand the claim because the appellant explicitly and unambiguously withdrew his PTSD appeal in an August 2011 written statement, and therefore, the Board lacked jurisdiction over it. Secretary's Br. at 7, 10 (citing R. at 872). Further, the Secretary argues that, "absent a determination on PTSD from the Board, the Court lacks jurisdiction to consider the matter." Secretary's Br. at 10. In response, the appellant contends that his August 2011 statement only withdrew his June 2010 claim for increased compensation for PTSD due to TDIU, and that his NOD with the September 2008 rating decision is still pending. Reply Br. at 2-4 (citing R. at 872).

The Court's appellate jurisdiction derives exclusively from the statutory grant of authority provided by Congress and governed by 38 U.S.C. §§ 7252(a) and 7266(a) and is limited to review of final decisions of the Board. 38 U.S.C. § 7252(a) (the Court "shall have exclusive jurisdiction to review decisions of the [Board]"); 38 U.S.C. § 7266(a) ("In order to obtain review by the Court of Appeals for Veterans Claims," a claimant must appeal "a final decision of the Board"). The Court may not extend its jurisdiction beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

In this case, the Board's May 2016 decision that is currently on appeal does not include a final decision as to the appellant's claim for an increased rating for PTSD or the propriety of VA's PTSD rating reduction. R. at 2-28. Accordingly, the Court has no jurisdiction to address the appellant's PTSD arguments in the context of his appeal from this particular Board decision. To the extent that the appellant believes that his claim remains pending because VA has not issued an SOC in response to a timely filed NOD, the appropriate procedure is for him to pursue resolution of the issue with the RO. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006); *Roberson v. Principi*, 17 Vet.App. 135, 138 (2003) ("[W]here the Court discovers on appeal that VA has failed to comply with its adjudication procedures and a claim therefore remains pending, the Court lacks jurisdiction to act on that claim, other than to note its existence and the Secretary's obligation to act."); *see also* 38 C.F.R. § 19.34 (2017) (whether an NOD has been timely filed is an appealable issue). If the Secretary fails to process the claim, then the appellant may file a petition with this

Court challenging the Secretary's refusal to act. *See DiCarlo*, 20 Vet.App. at 56–57 (citing *Costanza v. West*, 12 Vet.App. 133, 134 (1999)).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's May 17, 2016, decision is AFFIRMED.

DATED: January 11, 2018

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)