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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0304

RICHARD C. BURGESS, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Richard C. Burgess, through counsel, appeals a January 11, 2017, Board of Veterans' Appeals (Board) decision that denied his claims for entitlement to service connection for coronary artery disease, hypertension, an acquired psychiatric disorder, and a thyroid condition, each claimed as due to exposure to ionizing radiation. Record (R.) at 1-12. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266. Both parties submitted briefs and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the Board's January 11, 2017, decision.

I. BACKGROUND

The appellant served in the U.S. Navy from May 1957 to June 1960. R. at 109. He was exposed to ionizing radiation in October 1958. R. at 7, 177.

In November 2013, the appellant applied for entitlement to service connection for, inter alia, coronary artery disease, hypertension, an acquired psychiatric disorder, and a thyroid condition under VA's fully developed claim (FDC) program, one of VA's program to expedite claims. R. at 248-49 (VA Form 21-526EZ, "Application for Disability Compensation and Related

Compensation Benefits"). The signed application stated: "I certify I have received the notice attached to this application titled, *Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits*." R. at 249 (emphasis in original). In February 2014, the VA regional office (RO) sent him a letter indicating that it had received his claims and request to participate in the FDC program. R. at 241-44. In a section of that letter, titled "What Do We Still Need From You," the RO informed the appellant that he "should provide a medical report of the first diagnosis of the disease. If you cannot, tell us the date that the disease was first diagnosed or treated." R. at 241-42. He responded that he did not "have any other medical evidence to submit." R. at 240.

The RO denied the claims in May 2014. R. at 84-95. For each claim, the RO stated that "[a] review of the service records fails to show exposure to ionizing radiation during service." R. at 89, 91, 93, 94. The appellant submitted a Notice of Disagreement, R. at 79-81, the RO issued a Statement of the Case (SOC), R. at 41-68, and he perfected his appeal, R. at 37. In a November 2016 brief submitted to the Board, the appellant's former representative argued that the appellant maintains his entitlement to service connection for the disabilities on appeal. R. at 13-17. The representative acknowledged that to establish service connection, the evidence must show: (1) in-service incurrence or aggravation of a disease or injury; (2) a current physical or mental disability; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. R. at 14.

The Board denied the appellant's claims, as it found that there was no competent or credible evidence of a current diagnosis of any of the disabilities on appeal. R. at 7. In doing so, it determined that VA had satisfied the duty to notify, as the notice that accompanied his FDC application satisfied that duty. R. at 5.

II. ANALYSIS

Initially, the Court is compelled to address the quality of the work product submitted by counsel for the appellant. To start, counsel fails to acknowledge that the appellant chose to submit his claims as fully developed claims, which operate under a VA program that required him to submit claims that were ready for adjudication or nearly ready for adjudication after VA obtained federal records or conducted VA examinations. *See* VA Fast Letter 10-22, (June 15, 2010). Next, in the appellant's opening brief, counsel attempts to provide the general principles of VA notice

and due process. Appellant's Brief (Br). at 3-4, 6-7. However, aside from this listing of boilerplate, his argument does not contain any citations to controlling statutes, regulations, or cases. *See* U.S. VET. APP. R. 28(A)(5) (requiring the appellant's brief to contain "an argument . . . containing the appellant's contentions . . . and the reasons for those contentions, with citations to the authorities"). More troubling, though, is that in his attempt to state the controlling law, he relies on the U.S. Court of Appeals for the Federal Circuit's holding in *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), to assert that all notice errors should be presumed prejudicial unless VA can show that the error did not affect the essential fairness of the adjudication. Appellant's Br. at 4-5. He fails to appreciate that the U.S. Supreme Court overruled that holding two years later in *Shinseki v. Sanders*, 556 U.S. 396 (2009).

Following the Supreme Court's decision in *Sanders*, it is well established that, generally, the burden is on the appellant to demonstrate that any VA error prejudiced the appellant.[1] *Id.* at 409 (holding that harmless error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). It is unclear how counsel, an experienced practitioner of veterans law,[2] overlooked the Supreme Court's ruling. Moreover, it has not escaped the Court's attention that his apology, found in a footnote in the reply brief, for his erroneous reliance on the Federal Circuit's holding came only after the Secretary "correctly indicate[d] that the Supreme Court requires veterans to prove that notice failures were prejudicial to their claim." Reply Br. at 1. Counsel's reliance on *Sanders v. Nicholson* demonstrates a fundamental misunderstanding of the law, and the Court cautions him to exercise the level of competence and diligence expected and required by this Court when drafting future briefs. *See* MODEL RULES OF PROF'L CONDUCT 1.1 (Competence), 1.3 (Diligence); U.S. VET. APP. R. ADM. & PRAC. 4(a) (adopting the Model Rules of Professional Conduct as the disciplinary standard of the Court).

Turning to the merits of the appellant's argument, he asserts that VA failed to provide adequate notice advising him that his claims could be denied due to a lack of evidence of a current disability. Reply Brief (Br.) at 1. He contends that, as the May 2014 rating decision and March

[1] *Sanders* was binding precedent for over four years at the time the appellant submitted his November 2013 VA Form 21-526EZ and for over eight years by the time the appellant, through current counsel, submitted his opening brief to the Court.

[2] Counsel was admitted to the Court's bar in December 2011 and has since represented veterans in approximately 250 cases before the Court.

2015 SOC denied his claims due to a lack of in-service radiation exposure, he "rightfully believed" "that VA took him at this [(sic)] word that he was currently diagnosed with these disabilities" and his "claim was limited to whether he had in-service radiation exposure," and states that he "was never informed[,] in any prior decision[,] that the issue was lack of a current disability." *Id.*; Appellant's Br. at 6. The Secretary responds that the Board's determinations that service connection was not warranted for any disability on appeal and VA satisfied its duty to notify were not clearly erroneous and, even assuming any notice error, the appellant has not carried his burden of demonstrating prejudicial error. Secretary's Br. at 4. The Court emphatically agrees with the Secretary.

The Board explained that FDC application forms, like the VA Form 21-526EZ that appellant used, "generally include[] notice to the Veteran of what evidence is required to substantiate a claim for service connection and of the Veteran's and VA's respective duties for obtaining evidence." R. at 5; *see* R. at 248-49. The Board further explained that "the notice that is part of the [FDC] claim form submitted by the Veteran satisfies the duty to notify." R. at 5. The appellant neither disputes receipt of this notice nor addresses the fact that he certified that he "received the notice attached to this application titled, *Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits*." R. at 249 (emphasis in original). He does not challenge the Board's determination that the notice that accompanied his VA Form 21-526EZ satisfied VA's duty to notify. *See Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005) ("[I]ssues not raised on appeal are considered abandoned."), *aff'd*, 445 F.3d 1346 (Fed. Cir. 2006).

The Board further explained that, in February 2014, "VA informed [the appellant] that he had requested to participate in the FDC program and requested a medical report of the first diagnosis of the claimed disease and information regarding his medical treatment" and that, in reply, "he indicated that he did not have any other medical evidence to submit." R. at 5; *see* R. at 240-42. The appellant does not address this evidence or challenge the Board's reliance on his response. *See Cromer*, 19 Vet.App. at 217.

The appellant also argues that he "was never informed by [] VA that his claim was being denied due a lack of evidence of a current disability," and appears to suggest that VA was required to provide a pre-decisional notice of adverse findings of fact and provide him an opportunity to respond. Appellant's Br. at 2. He does not, however, cite any authority for his position. *See*

Locklear v. Nicholson, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *see also Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1276-77 (Fed. Cir. 2009) (noting that the VCAA requires generic notice rather than veteran-specific notice).

Moreover, even assuming arguendo that VA provided deficient notice, the Court can discern no prejudicial error, as the appellant had actual knowledge that evidence of a current disability was required to substantiate a claim of entitlement to service connection. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Sanders*, 556 U.S. at 406. In his November 2016 brief to the Board, the appellant's former representative stated that "service-connection requires evidence that shows . . . a current physical or mental disability." R. at 14; *see Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (stating that notice errors are not prejudicial when the claimant has actual knowledge of the evidence needed to substantiate a claim); *Dalton v. Nicholson*, 21 Vet.App. 23, 30-31 (2007) (noting, in the context of the notice requirement, that actual knowledge can be established by statements or actions by the claimant or the claimant's representative that demonstrate an awareness of what is necessary to substantiate the claim). The appellant, again, does not address this evidence or dispute the Secretary's reliance on it in his reply brief. *See Cromer*, 19 Vet.App. at 217.

Finally, the appellant asserts that VA violated his due process and fair process rights. Appellant's Br. at 2, 7. Once more, he provides no citations or argument beyond a bald assertion that VA's actions in adjudicating his claims violate those rights. *Id.* at 7. Absent any supporting argument, "[t]o the extent that he has simply put a 'due process' label on his contention that he should have prevailed on his . . . claim, his claim is constitutional in name only." *Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999); *see Brewer v. West*, 11 Vet.App. 228, 236 (1998) (explaining that the Court need not consider "mere assertions of constitutional impropriety for which [the appellant] has not provided any legal support" (citing *Gov't & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364, 366, (1957) ("Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete form."))).

In sum, the Court holds that the Board's determinations that the appellant was not entitled to service connection for the disabilities on appeal and that VA satisfied its duty to notify are not clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Davis v. West*, 13 Vet.App. 178, 184 (1999). The Court will affirm the Board's decision.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's January 11, 2017, decision is AFFIRMED.

DATED: March 5, 2018

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)