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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0264

GUADALUPE LOPEZ, JR., APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Self-represented appellant Guadalupe Lopez, Jr., served the Nation honorably in the United States Marine Corps from February 1967 to March 1970, earning a Purple Heart.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a November 6, 2018, decision of the Board of Veterans' Appeals that denied (1) service connection for dizziness, blurred vision, fatigue, and a bilateral hip disorder;³ (2) a disability rating greater than 30% for headaches, including on an extraschedular basis; (3) a 30% disability rating for coronary artery disease since January 29, 2015, based on unemployability; (4) disability ratings greater than 10% for a left wrist strain, left thumb strain, and left arm scar;⁴ (5) effective dates earlier than January 8, 2008, for service connection for left arm carpal tunnel, left wrist strain, and

¹ Record (R.) at 2512-13.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ The Board's decisions to reopen appellant's claims for service connection for dizziness, blurred vision, and fatigue, based on the receipt of new and material evidence, are favorable findings that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

⁴ The Board's assignment of 10% disability ratings for these conditions are also favorable findings we may not disturb. *See id.* at 170.

left thumb strain; and (6) an effective date earlier than January 4, 2001, for service connection for coronary artery disease.

Based on a change in the Court's caselaw since the Board decision as it pertains to extraschedular analysis, because the Board failed to comply with a prior Court remand as to appellant's coronary artery disease rating, and because the Board failed to provide an adequate statement of its reasons or bases for denying an effective date earlier than January 4, 2001, for service connection for coronary artery disease, the Court will set aside the Board decision with respect to appellant's increased-rating claims for headaches and coronary artery disease and his effective-date claim for coronary artery disease, and the Court will remand these matters. We will affirm the remainder of the decision because the Board's statement of reasons or bases is adequate, its factual determinations are not clearly erroneous, and it applied the correct law.

I. ANALYSIS

Because appellant is proceeding pro se, he is entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments.⁵ But he still carries the burden of demonstrating error on appeal in the Board's determination that he was not entitled to the benefits at issue.⁶ Here, appellant makes no specific arguments about how the Board erred. Instead, he lists medical evidence of record but fails to explain how such evidence supports an argument that the Board erred. Despite his lack of specific arguments, in recognition of his service, we will generally review the Board's decision to determine whether it contains legal or factual error.

A. Service-Connection Claims

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.⁷ The Court reviews the Board's findings regarding service connection for clear error.⁸ The Court will overturn the Board's finding only if the record offers no plausible basis for the Board's decision and the Court is left with a definite

⁵ See *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

⁶ *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

⁷ See *Hickson v. West*, 12 Vet.App. 247, 253 (1999); see also *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

⁸ *Dymment v. West*, 13 Vet.App. 141, 144 (1999).

conviction that the Board's decision was in error.⁹ And finally, for all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.¹⁰

The Board denied service connection for dizziness, blurred vision, and fatigue, finding appellant did not have current disabilities associated with these symptoms.¹¹ The Board also found that appellant's blurred vision and dizziness were associated with his service-connected headaches, for which he was awarded a 30% disability rating.¹² Additionally, the Board denied service connection for bilateral hip disabilities, also finding that appellant had no current disability.¹³ The Board found that to the extent appellant reported pain in his hips, he "has not provided any medical evidence describing any symptoms or functional impairment."¹⁴ Thus, the Board concluded that "the evidence of record does not show that [appellant's] pain results in functional impairment of earning capacity."¹⁵

The Court sees no error in the Board's findings concerning service connection for these claims, and the Board's determinations are understandable and facilitate meaningful judicial review, making its statement of reasons or bases for denying service connection for dizziness, blurred vision, fatigue, and a bilateral hip disability adequate.¹⁶ We have carefully reviewed the record and can find no error, leading us to conclude that appellant has failed to meet his burden of demonstrating that the Board erred in this portion of its decision.¹⁷ We will, therefore, affirm the denial of service connection for dizziness, blurred vision, fatigue, and bilateral hip disabilities.

⁹ See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹⁰ 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

¹¹ R. at 14-15.

¹² R. at 15.

¹³ *Id.*

¹⁴ R. at 16.

¹⁵ *Id.* (discussing *Saunders v. Wilkie*, 886 F.3d 1356, 1361 (Fed. Cir. 2018)).

¹⁶ See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

¹⁷ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

B. Effective-Date Claims

Generally, the effective date of an award based on an initial claim is assigned based on the facts found, but shall not be earlier than the date an application for compensation is received.¹⁸ An effective date cannot be awarded earlier than the date a claim is filed.¹⁹ Thus, in determining the appropriate effective date, identification of the earliest nonfinal claim for benefits is critical. The Board's determination of the proper effective date for an award of service connection is a finding of fact the Court also reviews for clear error.²⁰ And again, the Board must support all its determinations with an adequate statement of its reasons or bases.²¹

As to the appropriate effective date for appellant's left carpal tunnel syndrome, left wrist strain, and left thumb strain, the Board discussed a prior final October 1972 Board decision that denied service connection.²² The Board acknowledged postservice medical evidence related to appellant's left arm, but found "the mere presence of medical evidence does not establish an intent to seek service connection."²³ The Board also noted "no additional evidence on record that makes any reference to [appellant's] left [carpal tunnel syndrome], wrist, or thumb until January 8, 2008, and February 2008."²⁴ Thus, the Board concluded there was "no basis under the law to award an effective date earlier than January 8, 2008."²⁵

On appeal, appellant presents evidence that he has had symptoms of carpal tunnel, left wrist strain, and left thumb strain since service. The Board addressed this argument, and the Court sees no clear error in its analysis. Furthermore, the Board supported its finding with an adequate statement of its reasons or bases for denying an earlier effective date, sufficient to facilitate judicial review. The Court affirms the Board's denial of an effective date prior to January 8, 2008, for left carpal tunnel, left wrist strain, and left thumb strain.

¹⁸ 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2) (2019).

¹⁹ 38 C.F.R. § 3.400(b).

²⁰ 38 U.S.C. § 7261(a)(4); *see Evans v. West*, 12 Vet.App. 396, 401 (1999).

²¹ *Allday*, 7 Vet.App. at 527; *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

²² R. at 28.

²³ R. at 29.

²⁴ R. at 28.

²⁵ *Id.*

With respect to appellant's coronary artery disease claim, following *Nehmer v. U.S. Veterans' Administration*, VA codified an exception to the general rule about effective dates.²⁶ Under VA regulations, the effective date for service connection for a "covered herbicide disease" depends on whether the claim was (1) denied between September 25, 1985, and May 3, 1989, (2) pending on May 3, 1989, or (3) received by VA between May 3, 1989, and July 9, 2001.²⁷ Coronary artery disease, or ischemic heart disease, is one such "covered herbicide disease."²⁸ The effective date for a *Nehmer* veteran is either the date VA received the claim or the date the disability arose, whichever is later.²⁹

Here, the Board discussed the *Nehmer* provisions and found that appellant was first denied service connection for his heart condition in January 1985, outside the period for which *Nehmer* applies.³⁰ However, the Board construed a January 1997 claim that included shortness of breath and fatigue as constituting a claim for symptoms associated with coronary artery disease.³¹ In light of this claim and the *Nehmer* provisions, the Board granted an earlier effective date of January 4, 2001, which the Board found to be the date of the condition's onset.³²

The Board's statement of reasons or bases for finding January 4, 2001, the earliest effective date that could be assigned for coronary artery disease is deficient. The Board acknowledges that appellant had symptoms of coronary artery disease as early as 1997, when he filed a claim for such symptoms. Thus, it is unclear why the Board required a diagnosis of coronary artery disease to determine "the date the disability arose."³³ The regulation does not require a diagnosis, and when it conceded evidence of earlier symptoms, the Board did not explain why it relied on the need for a diagnosis. Thus, remand is warranted for the Board to determine the actual date appellant's coronary artery disease arose and, based on that finding, to assign an appropriate effective date.³⁴

²⁶ 712 F. Supp. 1404 (N.D. Cal. 1989); *see also Nehmer v. Veterans' Admin.*, 284 F.3d 1158 (9th Cir. 2002); *Nehmer v. U.S. Veterans' Admin.*, 32 F.Supp.2d 1175 (N.D. Cal. 1999).

²⁷ 38 C.F.R. § 3.186(c)(1)-(2) (2019).

²⁸ 75 Fed. Reg. 53,202, 53,216 (Aug. 31, 2010).

²⁹ 38 C.F.R. § 3.186(c)(1)-(2).

³⁰ R. at 30.

³¹ *Id.*

³² R. at 31.

³³ 38 C.F.R. § 3.816(c)(2).

³⁴ *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

C. Increased-Rating Claims

The Board's decision regarding the degree of disability under the rating schedule is a finding of fact that is reviewed for clear error.³⁵ And, the Board must support all its determinations with an adequate statement of its reasons or bases.³⁶

Appellant's left wrist strain and left thumb strain are rated under diagnostic codes (DCs) found in 38 C.F.R. § 4.71a, which addresses musculoskeletal disabilities. Both conditions are rated based on the limitation of motion the disability causes. The Board found that neither disability caused limitation of motion sufficient to establish a compensable rating.³⁷ However, the Board found that both disabilities resulted in painful motion, warranting a minimum compensable rating of 10% for each joint.³⁸

Additionally, his left arm and wrist scar is rated under DC 7804, which provides for unstable or painful scars.³⁹ A 10% rating is warranted for one or two unstable or painful scars, and a higher rating requires three or more scars.⁴⁰ The Board found that "the evidence does not show a disability picture more nearly approximating three or four scars that are unstable or painful."⁴¹ Instead, the Board found that appellant had one painful scar. The Board concluded that appellant had other disabling effects such as limitation of motion, but noted that he was assigned separate ratings based on those effects.⁴²

The Court sees no error in the Board's decision, and appellant has not met his burden of showing error in this part of the Board's decision.⁴³ The Board's discussion is understandable and facilitates review, and thus its statement of reasons or bases for denying ratings greater than 10% for left wrist strain, left thumb strain, and left arm and wrist scar is adequate.⁴⁴

³⁵ *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997).

³⁶ *Allday*, 7 Vet.App. at 527; see 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

³⁷ R. at 22, 24.

³⁸ R. at 22, 24; see 38 C.F.R. § 4.59 (2019).

³⁹ 38 C.F.R. § 4.118 (2019).

⁴⁰ *Id.*

⁴¹ R. at 26.

⁴² *Id.*

⁴³ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

⁴⁴ See 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

With respect to appellant's claim for an increased rating for headaches, the Board concluded that extraschedular referral was not warranted based on appellant's short-term memory loss. However, since the Board's decision, the Court has held that the Board's duty to maximize benefits requires it to use the rating schedule to "better adjudicate claims that include symptoms and effects not contemplated by an applicable diagnostic code."⁴⁵ Here, the Board conceded that appellant's short-term memory loss was not contemplated by his headaches rating.⁴⁶ Thus, pursuant to *Morgan*, remand is required for the Board to provide a fully reasoned explanation about why appellant's short-term memory loss is not ratable under the rating schedule.

As to appellant's claim for an increased rating for coronary artery disease, this Court remanded the matter to the Board in a September 2017 memorandum decision for the Board to address evidence of appellant's coronary artery disease impacting his ability to work.⁴⁷ In the decision on appeal, the Board acknowledged this evidence but found that the issue of a total disability rating based on individual unemployability (TDIU) was moot because appellant was already rated 100% for a psychiatric disability and was awarded special monthly compensation based on additional disabilities rated at 60% or more.⁴⁸

A claimant has the right to compliance with a remand from either the Board or this Court.⁴⁹ The Secretary has an affirmative duty "to ensure compliance with the terms of the remand."⁵⁰ Additionally, when a veteran files an increased-rating claim, he or she is generally presumed to be seeking the maximum benefit allowed by law.⁵¹ The Secretary has an obligation to "render a decision which grants every benefit that can be supported in law."⁵²

The Board failed to comply with the Court's September 2017 remand directing it to discuss the evidence of record that appellant's coronary artery disease impacted his ability to work. Furthermore, the Board erred in finding that the matter of TDIU was moot, because the Board did

⁴⁵ *Morgan v. Wilkie*, 31 Vet.App. 162, 164 (2019).

⁴⁶ R. at 19.

⁴⁷ See *Lopez v. Shulkin*, No. 16-3419, 2017 WL 3897675, at *3 (Vet. App. Sept. 7, 2017).

⁴⁸ R. at 21.

⁴⁹ *Stegall v. West*, 11 Vet.App. 268, 271 (1998).

⁵⁰ *Id.*

⁵¹ See *AB v. Brown*, 6 Vet.App. 35, 38 (1993); see also *Bradley v. Peake*, 22 Vet.App. 280, 294 (2008).

⁵² 38 C.F.R. § 3.103(a) (2019).

not fulfill its duty to render a decision to grant a potential benefit supported in the law, as required by § 3.103(a). Therefore, remand of this issue is warranted.⁵³

D. Other Matters

Appellant cites 38 C.F.R. § 3.156(c) and seems to argue that his claims are entitled to reconsideration because service records were added to his claims file. However, he does not identify the records allegedly added. Furthermore, a review of the records does not reveal that any service records have been added requiring reconsideration. Therefore, appellant has not fully developed this argument, and the Court will not consider it further.⁵⁴

Finally, appellant refers to a potential motion for revision of a prior decision based on clear and unmistakable error (CUE). However, the Court addressed this argument in a September 2017 memorandum decision, finding that CUE was not pled with sufficient specificity to warrant Board review.⁵⁵ Therefore, appellant is precluded from relitigating the CUE matter.⁵⁶

E. Appellant's Rights on Remand

As to the headaches and coronary artery rating claims and the coronary artery disease earlier-effective-date matter the Court is remanding, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.⁵⁷ The Board must consider any such additional evidence or argument submitted.⁵⁸ The Board must proceed expeditiously.⁵⁹

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the portions of the November 6, 2018, Board decision that denied increased disability ratings for headaches and coronary artery disease and denied an effective date earlier than January

⁵³ *Tucker*, 11 Vet.App. at 374.

⁵⁴ *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006).

⁵⁵ *See Lopez*, No. 16-3419, 2017 WL at *3.

⁵⁶ *See Young v. Shinseki*, 25 Vet.App. 201, 204 (2012).

⁵⁷ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

⁵⁸ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

⁵⁹ 38 U.S.C. §§ 5109B, 7112.

4, 2001, for coronary artery disease, and the Court REMANDS those matters for further proceedings consistent with this decision. The remainder of the Board's decision is AFFIRMED.

DATED: October 25, 2019

Copies to:

Guadalupe Lopez, Jr.

VA General Counsel (027)