

No. 19-2012

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEON C. KREBS
Appellant,

v.

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

**APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS’
APPEALS**

**OPENING BRIEF OF APPELLANT,
LEON C. KREBS**

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I. ISSUES PRESENTED FOR REVIEW

Issue #1:

When a claimant withdraws an issue on appeal to the Board in writing and there are multiple issues on appeal, 38 C.F.R. § 20.204(b) (2018) requires that the withdrawal must specify that the appeal is withdrawn in its entirety or must list the issue(s) to be withdrawn. The Board determined that a statement indicating “I wish to withdraw my appeal and request for video conference” constituted clear intent to withdraw, such that withdrawal of service connection for sleep apnea, an increased rating above 40 percent for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment was proper. Was the Board’s finding that the withdrawal was proper clearly erroneous?

Issue #2:

The Board must properly apply the law and must base its factual findings on all relevant evidence contained in the record. Here, the Board failed to address that when there are multiple issues on appeal, 38 C.F.R. § 20.204(b) (2018) requires a statement that the appeal is withdrawn in its entirety or identification of which issue(s) are to be withdrawn. It also failed to adequately consider that within months of the alleged withdrawal, Mr. Krebs submitted written argument as to those same issues, rendering the withdrawal ambiguous. Did the Board provide adequate reasons and bases for its finding that there was clear intent to withdraw and that the withdrawal was proper?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has exclusive jurisdiction to review Board decisions.¹

¹ 38 U.S.C. § 7252

B. Statement of the Case and Relevant Facts

Leon Krebs served honorably in the United States Army from February 1974 to March 1977.² He sought service connection and compensation for compound fracture of the left femur in November 2011.³ The regional office (RO) granted service connection for left femur arthroscopic rush rod placement and removal post open fracture, limitation of flexion, limitation of extension, impairment of the thigh and various related scars in a March 2013 rating decision.⁴ Mr. Krebs filed a timely notice of disagreement the following month, explaining that he believed a rating of at least 50 percent was warranted.⁵ That July, he sought service connection for sleep apnea and explained that his service-connected leg disability prevented physical activity and exercise, causing an inability to lose weight that was directly contributing to his sleep apnea.⁶

In June 2014, the RO denied his claim for sleep apnea and increased his service-connected left femur rating to 10 percent.⁷ The following month, Mr. Krebs submitted a notice of disagreement.⁸ The RO issued a Statement of the

² R. at 819

³ R. at 1539-56

⁴ R. at 1340-57

⁵ R. at 1331-32

⁶ R. at 1154

⁷ R. at 1008-28

⁸ R. at 992

Case in October 2015.⁹ He perfected his appeal for service connection for sleep apnea and increased ratings for his left femur open fracture with various muscle group involvement through the timely filing of a VA Form 9.¹⁰

The RO issued a decision in January 2017, in which it granted service connection for residuals of left femur open fracture and removal with muscle group XIV symptoms and left hip impairment with an assigned rating of 40 percent.¹¹ It noted that, in pertinent part, service connection for sleep apnea remained pending on appeal.¹² The RO also issued a Supplemental Statement of the Case with respect to residuals of the left femur fracture with muscle group XIV and XVII symptoms and left hip impairment.¹³

On April 9, 2018, Mr. Krebs submitted a typed statement indicating “I wish to withdraw my appeal and request for a video conference. I understand that this in no way is connected to the recent reconsideration that has been submitted.”¹⁴ Several months later, Mr. Krebs’ representative submitted an informal written brief to the Board on his behalf.¹⁵ In this brief, he presented

⁹ R. at 839-71

¹⁰ R. at 810-12

¹¹ R. at 534-40; R. at 580-93

¹² R. at 535

¹³ R. at 594-36

¹⁴ R. at 284

¹⁵ R. at 65-71

arguments as to the claims for service connection for sleep apnea and increased ratings for his left femur and left hip impairment.¹⁶

The Board issued a decision on November 27, 2018.¹⁷ It noted a signed statement dated April 16, 2018, that stated “I wish to withdraw my appeal and request for a video conference. I understand that this is in no way connected to the recent reconsideration that has been submitted.”¹⁸ It found that this was a clear intent to withdraw his appeal, and dismissed the claims for service connection for sleep apnea, and increased ratings for residuals of left femur open fracture with Muscle Group XIV and XVII symptoms and left hip impairment, and dismissed the appeal of the three claims.¹⁹ This appeal followed.

III. SUMMARY OF THE ARGUMENT

When a claimant withdraws an issue on appeal to the Board in writing, the withdrawal must be explicit and unambiguous. Here, the Board determined that the April 2018 letter indicating “I wish to withdraw my appeal and request for a video conference” was a clear intent to withdraw, and dismissed the issues of service connection for sleep apnea, an increased rating above 40 percent for residuals of left femur open fracture with Muscle Group

¹⁶ *See id.*

¹⁷ R. at 1-8

¹⁸ R. at 5

¹⁹ R. at 6

XIV symptoms and left hip impairment, an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment.

However, in so finding, the Board failed to address that 38 C.F.R. § 20.204(b) clearly requires that when there are multiple issues on appeal, the withdrawal must specify that the appeal is withdrawn in its entirety or list the issue(s) withdrawn from the appeal. Mr. Krebs had three separate issues on appeal, and the April 2018 statement did not specify that the appeal was withdrawn in its entirety, nor did it identify the particular issue(s) to be withdrawn. The Board's failure to adhere to 38 C.F.R. § 20.204(b) and finding that the withdrawal was proper is clearly erroneous and warrants reversal. In the alternative, its failure to consider the requirements of section 20.204(b) or to adequately support its finding that the statement was clear intent to withdraw requires remand.

IV. STANDARD OF REVIEW

The Court reviews material questions of fact under the “clearly erroneous” standard of review.²⁰ “A finding is ‘clearly erroneous’ where “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been

²⁰ 38 U.S.C. § 7261(a)(4)

committed.”²¹ The Court may not “substitute its judgment for that of the BVA on issues of material fact[,]” and may not overturn factual determinations of the Board if there is a plausible basis in the record.²²

The Court reviews claims of legal error by the Board under the *de novo* standard of review.²³ The Board’s interpretation of statutes and regulations is also a legal ruling to be reviewed without deference by the Court.²⁴ A conclusion of law shall be set aside when that conclusion is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, or unsupported by adequate reasons or bases.”²⁵

V. ARGUMENT

- 1. The Board misapplied 38 C.F.R. § 20.204 and clearly erred when it found that Mr. Krebs withdrew his claims for service connection for sleep apnea, an increased rating for above 40 percent for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment.**

The Board found that an April 16, 2018, statement that “I wish to withdraw my appeal and request for a video conference” was a “clear intent to withdraw his appeal” of the issues of an increased rating above 40 percent for

²¹ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)

²² *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990)

²³ *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (en banc)

²⁴ *See Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003)

²⁵ *King v. Shinseki*, 26 Vet. App. 433, 437 (2014)

residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment, and service connection for sleep apnea.²⁶ However, in making this determination, the Board misapplied 38 C.F.R. § 20.204 and, consequently, its finding is clearly wrong.

The Court recently held that “when an appellant seeks to withdraw an appeal in writing, 38 C.F.R. § 20.204(b) governs whether that withdrawal is effective.”²⁷ To be effective under the regulation, “the withdrawal must be explicit and unambiguous” - that is, it must include a statement that the appeal is withdrawn.²⁸ The law is clear that if an appeal involves multiple issues, as is the case here, the withdrawal must specify that the appeal is withdrawn in its entirety or list the issue(s) withdrawn from the appeal.²⁹

Here, the Board noted that in a signed statement received on April 16, 2018, Mr. Krebs stated, “I wish to withdraw my appeal and request for a video conference. I understand this is in no way connected to the recent

²⁶ R. at 5-6; R. at 284

²⁷ *Hembree v. Wilkie*, No. 18-3856, 2020 U.S. App. Vet. Claims LEXIS 1677, at *10-11 (August 31, 2020); *see Acree v. O'Rourke*, 891 F.3d 1009, 1012 (Fed. Cir. 2018) (“Section 20.204(b)(1) sets out with particularity the requirements for making a written request to withdraw a claim.”)

²⁸ *Id.* at *10-11; *see also* 38 C.F.R. § 20.204(b)(1)

²⁹ 38 C.F.R. § 20.204(b)

reconsideration that has been submitted.”³⁰ The Board determined that this was a “clear intent to withdraw his appeal in the matter,” despite noting that Mr. Krebs’ representative filed an informal hearing presentation with written argument regarding those same issues just a few months after the alleged withdrawal.³¹

Recently, the Court found a written withdrawal unambiguous and therefore valid when the veteran specified that he wanted to withdraw “*all pending claims and appeals*.”³² This case is distinguishable, as Mr. Krebs did not state that he wished to withdraw the appeal in its entirety, nor did he identify any of the issues to be withdrawn with any specificity.³³ Rather, his was a vague and general statement that he wished to “withdraw my appeal and request for a video conference.”³⁴ Because there were multiple issues on appeal and the statement did not specify whether the appeal was being withdrawn in its entirety or identify the specific issues to be withdrawn, the written withdrawal did not satisfy the requirements of 38 C.F.R. § 20.204(b)

³⁰ R. at 5; *see* R. at 284-85

³¹ R. at 6; *see* R. at 65-71

³² *Hembree*, No. 18-3856, 2020 U.S. App. Vet. Claims LEXIS 1677, at *10-11 (emphasis added)

³³ R. at 284

³⁴ *Id.*

and the Board's finding that it demonstrated "clear intent to withdraw" is clear error.

As further support for its ambiguity, Mr. Krebs, through his representative, submitted written argument to the Board regarding the issues of service connection for sleep apnea and increased ratings for his left femur and hip impairment disabilities within months of the alleged withdrawal.³⁵ In this August 2018 written argument, Mr. Krebs argued that service connection for sleep apnea was warranted, as were increased ratings for his Muscle Group XVII and XIV disabilities.³⁶ The Board's only consideration of this written argument was to note that "the Veteran's appeal was already withdrawn in April 2018."³⁷ It made no attempt to consider whether the submission of written argument regarding issues allegedly withdrawn rendered the withdrawal ambiguous.³⁸

Mr. Krebs was prejudiced by the Board's determination that his general statement of intent to "withdraw my appeal" constituted a proper withdrawal, as this statement did not contain the requisite information pursuant to 38 C.F.R. § 20.204(b). Contrary to the Board's finding, it is unclear from the April 2018 statement which of the three issues on appeal Mr. Krebs intended to

³⁵ R. at 65-71

³⁶ *See id.*

³⁷ R. at 6

³⁸ *See id.*

withdraw, or whether he intended to withdraw all of them when he vaguely referred to “my appeal.”³⁹ Furthermore, the submission of written argument related to those very same issues after the alleged withdrawal renders the withdrawal ambiguous.

Had the Board correctly applied the law, Mr. Krebs’ claims for an increased rating above 40 percent for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment, and service connection for sleep apnea would remain pending or would have been adjudicated in the decision on appeal. Therefore, the Board’s finding that the withdrawal was proper is clearly erroneous under 38 C.F.R. § 20.204(b) and should be reversed.⁴⁰

2. In the alternative, remand is required because the Board failed to properly apply the law and failed to adequately address all relevant evidence when it found that the withdrawal was proper.

Alternatively, remand is warranted for the Board to properly apply 38 C.F.R. § 20.204 and to determine whether the three claims were properly withdrawn in light of the April 2018’s statement’s lack of required specificity, and to provide adequate reasons and bases for its decision. In every decision,

³⁹ See R. at 284

⁴⁰ See *Warren v. McDonald*, 28 Vet. App. 214, 216 (2016); see *Gutierrez v. Principi*, 19 Vet. App. 1, 10 (2004)

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.⁴¹ When reviewing the question of a claimant's withdrawal of an appeal to the Board, the Court must take into consideration "the non-adversarial setting of the [VA] claims adjudication process,"⁴² during which VA is required to construe liberally all submissions by a claimant.⁴³

Significantly, the Board failed to even discuss the requirements for written withdrawal in its decision.⁴⁴ It merely provided a citation to section 20.204 after reciting Mr. Krebs' April 2018 statement.⁴⁵ Unlike the written withdrawal in *Hembree*, Mr. Krebs' statement did not specify whether he intended to withdraw all pending claims and appeals or whether he only wished to withdraw certain issues.⁴⁶ The Board failed to explain how a general reference to "my appeal" necessarily indicated a desire to withdraw all issues on appeal. Because there were multiple issues on appeal and the statement failed to specify that the appeal was withdrawn in its entirety or which

⁴¹ 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Bowling v. Principi*, 15 Vet. App. 1, 6-7 (2001); *Gilbert*, 1 Vet. App. at 56-57

⁴² *Isenbart v. Brown*, 7 Vet. App. 537, 541 (1995)

⁴³ *See EF v. Derwinski*, 1 Vet. App. 324, 326 (1991)

⁴⁴ *See R.* at 5-6

⁴⁵ *R.* at 5

⁴⁶ *R.* at 284; *Hembree*, No. 18-3856, 2020 U.S. App. Vet. Claims LEXIS 1677, at *10-11

particular issues should be withdrawn, the April 2018 statement did not satisfy the requirements for written withdrawal under 38 C.F.R. § 20.204(b) and the Board's finding that it demonstrated "clear intent to withdraw" is not supported with adequate reasons and bases.

As discussed, *supra*, Mr. Krebs also submitted written argument to the Board regarding the issues of service connection for sleep apnea and increased ratings for his left femur and hip impairment disabilities within months of the alleged withdrawal.⁴⁷ In this August 2018 written argument, Mr. Krebs argued that service connection for sleep apnea was warranted, as were increased ratings for his Muscle Group XVII and XIV disabilities.⁴⁸ While the Board noted this subsequent written argument, it simply concluded that "the Veteran's appeal was already withdrawn in April 2018."⁴⁹ It made no attempt to consider whether the submission of written argument regarding issues allegedly withdrawn rendered the withdrawal ambiguous.⁵⁰

Mr. Krebs was prejudiced by the Board's failure to correctly apply the law, failure to adequately consider relevant evidence and failure to support its decision with adequate reasons and bases because these errors resulted in his

⁴⁷ R. at 65-71

⁴⁸ *See id.*

⁴⁹ R. at 6

⁵⁰ *See id.*; *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000)

claims being dismissed. The errors further prevent him from understanding the precise basis for the dismissal and preclude effective judicial review.

Therefore, if the Court does not agree that reversal of the Board's finding that the withdrawal was proper is appropriate, remand is nevertheless warranted for the Board to properly apply the law, consider all relevant evidence and provide an adequate statement of reasons and bases for its dismissal of the issues.⁵¹

VI. RELIEF REQUESTED

The Board's decision that found clear intent to withdraw the issues of service connection for sleep apnea, an increased rating above 40 percent for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and an increased rating above 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment was clearly erroneous. The law requires specificity as to which issue(s) are to be withdrawn when there are multiple issues on appeal, and Mr. Krebs' statement did not contain that required information. The Board also failed to adequately address whether the August 2018 informal brief regarding the same issues allegedly withdrawn renders that withdrawal ambiguous.

⁵¹ See *Tucker v. West*, 11 Vet. App. 369, 374 (1998)

In the alternative, the Board failed to properly apply the law and provided inadequate reasons and bases for its decision. The Board's decision should therefore be vacated, and the appeal remanded for readjudication.

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