

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

LEON C. KREBS,

Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans' Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

RICHARD J. HIPOLIT
Deputy General Counsel
Veterans' Programs

MARY ANN FLYNN
Chief Counsel

JOAN E. MORIARTY
Deputy Chief Counsel

DEBRA L. BERNAL
Appellate Attorney
U.S. Department of Veterans' Affairs
Office of the General Counsel (027C)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6905

Attorneys for Appellee

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

LEON C. KREBS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-2012
)	
DENIS McDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (BVA or Board) decision, which dismissed Appellant's claims based on his written request to withdraw his appeal.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Leon C. Krebs (Veteran or Appellant), appeals a November 27, 2018, Board decision, which dismissed his claims for: (1) service connection for

sleep apnea, (2) a rating in excess of 40 percent, for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and (3) a rating in excess of 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment. The claims were dismissed in accordance with an April 2018 written statement Appellant submitted requesting that his pending appeal be withdrawn.

C. Statement of Pertinent Facts

Appellant had active service in the United States Army from February 1974 to March 1977. [R. at 819].

In November 2011, Appellant submitted a claim for compensation for residuals a compound fracture of the left femur. [R. at 1546 (1539-56)]. His claim was granted in a March 2013 rating decision. [R. at 1340-52]. Appellant submitted a notice of disagreement with this determination in April 2013, expressing dissatisfaction with the rating assigned and seeking an increased rating due to functional loss. [R. at 1331].

In July 2013, Appellant submitted an informal claim for service connection for sleep apnea. [R. at 1154]. A July 2014 rating decision increased the disability rating associated with Appellant's service-connected left femur condition; it also denied entitlement to service connection for sleep apnea. [R. at 1008-28].

In July 2014, Appellant submitted a notice of disagreement continuing to express dissatisfaction with the disability evaluation and effective dates associated with his service-connected left femur condition. [R. at 992]. He also expressed

disagreement with the denial of his claim of entitlement to service connection for sleep apnea. *Id.* A Statement of the Case was issued in October 2015. [R. at 839-71]. Appellant perfected an appeal to the Board in December 2015. [R. at 810]. On his appeal form, Appellant indicated that he wanted to appeal all the issues listed on the Statement of the Case; he also requested a live videoconference hearing at his local VA office. [R. at 810].

In a January 2017 Decision Review Officer decision, the VA Regional Office granted an increased rating and assigned an earlier effective date for Appellant's left femur condition. [R. at 534-40, 580-93]. A Supplemental Statement of the Case was issued simultaneously with the Decision Review Officer decision. [R. at 594-636]. Appellant's appeal was certified to the Board in April 2017. [R. at 486-91].

In April 2018, Appellant submitted a statement in support of his claims stating the following: "I wish to withdraw my appeal and request for a video conference." [R. at 284]. On this submission, Appellant also noted that he understood that this request was not connected to a "recent reconsideration" he had submitted pertaining to an unrelated claim for major depression. *Id.*

In August 2018, Appellant accredited representative submitted a brief to the Board in support of Appellant's claims for service connection for sleep apnea and increased ratings for residuals of his left femur fracture. [R. at 65-71].

On November 27, 2018, the Board issued the decision on appeal, dismissing Appellant's claims for: (1) service connection for sleep apnea, (2) a rating in

excess of 40 percent, for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and (3) a rating in excess of 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment, in accordance with the April 2018 written statement from Appellant requesting that his pending appeal be withdrawn. [R. at 3-6]. The instant appeal ensued.

SUMMARY OF ARGUMENT

The Court should affirm the Board decision on appeal dismissing Appellant's claims for: (1) service connection for sleep apnea, (2) a rating in excess of 40 percent, for residuals of left femur open fracture with Muscle Group XIV symptoms and left hip impairment, and (3) a rating in excess of 50 percent for residuals of left femur open fracture with Muscle Group XVII symptoms and left hip impairment. The claims were properly dismissed in accordance with an April 2018 written statement Appellant submitted requesting that his pending appeal be withdrawn.

ARGUMENT

THE COURT SHOULD AFFIRM THE BOARD'S DECISION, WHICH DISMISSED APPELLANT'S CLAIMS BASED ON HIS WRITTEN REQUEST TO WITHDRAW HIS APPEAL

Pursuant to 38 C.F.R. § 20.204 (2018) (re-designated as section 20.205 on February 19, 2019), an appeal may be withdrawn verbally at a hearing; otherwise, it must be withdrawn in writing. The withdraw must include "a statement that the

appeal is withdrawn.” 38 C.F.R. § 20.204 (2018). If the appeal involves multiple issues, the withdraw must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal. *Id.*

In *Acree v. O’Rourke*, 891 F.3d 1009, 1012-14 (Fed.Cir. 2018), the United States Court of Appeals for the Federal Circuit addressed “verbal claim withdrawal” at a hearing, referencing this Court’s decision in *DeLisio v. Shinseki*, 25 Vet.App. 45 (2011) in which this Court “determined that a statement made by a [V]eteran at a board hearing qualifies as an effective claim withdrawal in accordance with the regulation only when it is: (1) explicit; (2) unambiguous; and (3) done with a full understanding of the consequences of such action on the part of the veteran.” *Acree*, 891 F.3d at 1012 (*citing DeLisio*, 25 Vet.App. at 57) (internal quotations omitted). The Federal Circuit referred to this as “The *DeLisio* standard for verbal claim withdrawal.” *Id.* at 1013.

In *Hembree v. Wilkie*, 33 Vet.App. 1 (2020), this Court considered whether the factors laid out in *DeLisio* regarding the standard for orally withdrawing an appeal, apply to a written request to withdraw an appeal. The Court examined VA’s regulation governing written withdrawals, 38 C.F.R. § 20.204 (2018) and observed that the regulation embodies the first two *DeLisio* factors – the withdrawal must be explicit and unambiguous, but held that it does not require an affirmative inquiry into whether the withdrawal is done with full understanding. *Id.* at 5-6. The Court found that while conducting an inquiry makes sense and is not unduly burdensome when dealing with oral withdrawals at hearings, it is not required for

written withdrawals. *Id.* at 6. The Court held that when an appellant seeks to withdraw an appeal in writing, 38 C.F.R. § 20.204(b) (2018) governs whether that withdrawal is effective. *Id.* at 7.

In the decision on appeal, the Board concluded that Appellant withdrew his pending appeal in its entirety in the statement he submitted in April 2018. See [R. at 3-6, 284]. In reaching this conclusion, the Board cited the relevant regulation, 38 C.F.R. § 20.204 (2018), which pertains to written claim withdrawal and determined that Appellant's April 2018 statement met the criteria to withdraw his appeal upon receipt pursuant to that regulation. The Board dismissed the appeal in accordance with that determination. [R. at 3-6]. The Secretary submits that this determination is consistent with 38 C.F.R. § 20.204 (2018) and this Court's decision in *Hembree* and should be affirmed.

In his brief, Appellant argues that reversal of the Board's decision is required because the Board misapplied 38 C.F.R. § 20.204(b). Specifically, he contends that the Board clearly erred by dismissing his appeal because section 20.204(b) states that to be effective, a withdrawal must specify either that the appeal is either withdrawn "in its entirety" or list the issue(s) withdrawn from the appeal. (Appellant's Brief (App.Br.) at 6-10). He submits that, because his April 2018 statement does neither, it is not consistent with section 20.204(b) and therefore does not constitute an effective withdrawal. Alternatively, Appellant argues that the Board's statement of reasons or bases is inadequate for not sufficiently explaining the bases for dismissing his appeal. (App.Br. at 10-13). The

Secretary disagrees as discussed below; neither remand, nor reversal are warranted in this case.

The pre-February 19, 2019, version of 38 C.F.R. § 20.204(b) states that appeal withdrawals must be in writing and include “a statement that the appeal is withdrawn.” The regulation also states: “[i]f the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.” 38 C.F.R. § 20.204(b) (2018).

Appellant asserts that, because his appeal involves multiple issues and his withdraw did not specify which issue(s) he intended to withdraw, or indicate that he was withdrawing the appeal “in its entirety,” the withdraw is ineffective. The Secretary recognizes that Appellant did not use the verbiage “in its entirety” in his April 2018 request to withdraw his appeal. [R. at 284]. Nevertheless, the Secretary submits that Appellant’s statement is explicit and unambiguous and clearly reflected his intent to fully withdraw his entire appeal consistent with 38 C.F.R. § 20.204(b) (2018).

Appellant characterizes his April 2018 statement as “a vague and general statement” that is ineffective because it did not specify the individual issue(s) he wished to withdraw. (App.Br. at 8). He further states that his accredited representative’s August 2018 written brief, which was submitted several months after his own statement withdrawing his appeal, renders his request to withdrawal ambiguous. (App.Br. at 9). He submits that it is unclear from his April 2018

statement whether his use of the phrase “my appeal” was intended to encompass all of the issues on appeal. (App.Br. at 10). The Secretary disagrees.

Appellant’s April 2018 statement, despite not using the words “in its entirety,” was explicit and unambiguous and clearly evidenced his intent to fully withdraw his appeal. This intent is supported by the other evidence of record. For example, in his April 2018 withdrawal, Appellant evidenced an understanding that his appeal was limited to the issues listed on the October 2015 Statement of the Case [R. at 841 (839-71)], because he specified that he understood that his withdrawal did not pertain to an unrelated issue for which he recently sought “reconsideration.” [R. at 284]. That unrelated issue was a claim for an increased rating for major depressive disorder, which was subsequently granted in a June 2018 rating decision. [R. at 213-16, 226-31].

Following his April 2018 request to withdrawal his appeal, Appellant continued to correspond with VA regarding his unrelated claim for an increased rating for major depressive disorder [R. at 203 (199-203)], and a separately submitted formal application for increased compensation based on unemployability. [R. at 177-81, 204-05]; *see also* [R. at 62-63, 83, 96]. Indeed, in a September 2018 Statement in Support of Claim, Appellant only addressed his claim for unemployability without mention of any of the issues he withdrew in his April 2018 request to withdraw his appeal. *See* [R. at 62-63]; *compare with* [R. at 284]. Entitlement to individual unemployability was subsequently granted in a September 2018 rating decision. [R. at 37-43].

Appellant did not mention the claims associated with his withdrawn appeal in any of his post-withdrawal correspondence with VA. There is no documentation following his April 2018 request to withdrawal that contradicts his explicit and unambiguous request to withdrawal his appeal in its entirety. [R. at 284]. The only submission related to the claims addressed in the Board decision on appeal is the August 2018 submission from Appellant's accredited representative. [R. at 65-71]. However, as the Court acknowledged in *Hembree*, a written withdraw is effective upon receipt. See *Hembree*, 22 Vet.App. at 6. Therefore, Appellant's appeal had already been withdrawn several months prior to the August 2018 submission from his accredited representative; the accredited representative's submission does not change that or reanimate Appellant's previously withdrawn appeal.

Moreover, the record in this case reflects that Appellant was employed with VA as a Veterans Service Representative prior to seeking an increased rating based on individual unemployability. [R. at 116-28]. Indeed, Appellant's application for an increased rating based on individual employability, which was granted in a September 2018 rating decision [R. at 37-43], reflects that he was employed by VA as a Fiduciary Service Representative from September 2011 until May 2018. [R. at 178 (177-81), 204 (204-05)]. This shows that Appellant was well versed and knowledgeable with regard to VA regulations and procedures and supports the Board's determination that his April 2018 withdrawal was explicit and unambiguous and effectively withdrew his appeal in its entirety upon receipt. See

[R. at 3-6, 284]; *see also* 38 C.F.R. § 20.204 (2018); *Hembree supra*. Appellant's argument otherwise should be rejected.

In his brief, Appellant alternatively argues that remand is required because the Board did not provide an adequate statement of reasons or bases to support its determination that he effectively withdrew his appeal in its entirety consistent with 38 C.F.R. § 20.204(b). The Secretary disagrees.

For the reasons discussed previously, the Secretary submits that Appellant's April 2018 request to withdraw his appeal is explicit and unambiguous and effectively withdrew his appeal in its entirety upon receipt in accordance with 38 C.F.R. § 20.204(b) (2018) and this Court's decision in *Hembree*. The Board's decision on appeal clearly explained as much in the decision on appeal. [R. at 5-6 (3-6)]. Appellant's argument otherwise is without merit and the Board decision on appeal dismissing Appellant's claims should be affirmed.

The Court should consider Appellant to have abandoned any issues not directly addressed in his brief. *See Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."); *Smith v. West*, 11 Vet.App. 56, 57 (1998); *see also Ford v. Gober*, 10 Vet.App 531, 535 (1997); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993) (appellant found to have abandoned an issue on appeal where he listed multiple issues in his Notice of Appeal and statement of issues, but in his pleadings and at oral argument, his request for relief was limited to only one of those claims).

CONCLUSION

For the foregoing reasons, Appellee, Secretary of Veteran Affairs, respectfully requests the Court to affirm the June 17, 2020, decision on appeal.

Respectfully submitted,

RICHARD J. HIPOLIT
Deputy General Counsel
Veterans' Programs

MARY ANN FLYNN
Chief Counsel

/s/ Joan E. Moriarty
JOAN E. MORIARTY
Deputy Chief Counsel

/s/ Debra L. Bernal
DEBRA L. BERNAL
Appellate Attorney
Office of the General Counsel (027C)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6905
Attorneys for Appellee Secretary
of Veterans Affairs