

No. 19-2012

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEON C. KREBS
Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

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

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

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I. REPLY ARGUMENT

1. **The Board misapplied 38 C.F.R. § 20.204 in connection with its finding that Mr. Krebs withdrew his 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.**

Mr. Krebs argued in his opening brief that the Board misapplied 38 C.F.R. § 20.204 and clearly erred in finding that his request “to withdraw my appeal” was a “clear intent to withdraw his appeal” 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, warranting reversal.¹ In the alternative, he argued that the Board failed to provide adequate reasons and bases for its decision that his April 2018 statement was a sufficient withdrawal of a claim that involved numerous issues.² He argued that pursuant to 38 C.F.R. § 20.204(b) and *Hembree*, the law is clear that if an appeal involves multiple issues, as it does here, “the withdrawal must specify that the appeal is withdrawn in its entirety or list the issue(s) withdrawn from

¹ Appellant’s Opening Brief at 6-10; *see Hembree v. Wilkie*, 33 Vet. App. 1 (2020); R. at 284-85; R. at 6

² Appellant’s Opening Brief at 10-13

the appeal.” In this case, although there were multiple issues on appeal, Mr. Krebs did not state that the appeal was withdrawn in its entirety, nor did he list the specific issue(s) to be withdrawn; instead, he merely stated “I wish to withdraw my appeal and request for a video conference. I understand this is in no way connected to the recent reconsideration that has been submitted.”³

Despite acknowledging that his April 2018 written statement did not contain the requisite language for a written withdrawal under section 20.204, the Secretary argues that Mr. Krebs’ withdrawal was not ambiguous and that other evidence reflects his understanding that the appeal was withdrawn.⁴ However, the Secretary’s argument ignores *Hembree* and 38 C.F.R. § 20.204, which provide that in a written withdrawal of a claim that involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety or list the issue(s) withdrawn from the appeal.”⁵ Because the written withdrawal did not specify that the appeal was withdrawn in its entirety or list the issue(s) withdrawn from the appeal, the Board clearly erred in finding the withdrawal proper and in dismissing the appeals. The Board’s finding in this regard should be reversed.

³ R. at 5; *see* R. at 284-85

⁴ Secretary’s Brief at 8-9

⁵ *See* 38 C.F.R. § 20.204; *Hembree*, 33 Vet. App. at 5

The Secretary further argues that Mr. Krebs was employed with the VA prior to seeking an increased rating and consequently was “well versed and knowledgeable with regard to VA regulations and procedures...”⁶ The Secretary’s reliance on other evidence outside of the April 2018 written submission is misplaced and should be rejected as post hoc rationalization. Although there are times the Board may need to consider other evidence outside of the written submission in deciding whether a withdrawal is valid, the Board did not conduct such an inquiry here.⁷ The Board did not discuss Mr. Krebs’ employment or make any finding of fact as to how that would or would not impact the effectiveness of his withdrawal, and the Secretary may not now use his employment background as a justification for the Board’s decision in the first instance.⁸ In determining that there was a “clear intent to withdraw,” the Board only discussed the procedural history from October 2015 through April 2017 and the contents of his April 2018 statement.⁹ Therefore, the Secretary’s argument should be rejected as *post-hoc* rationalization that is

⁶ Sec. Brief at 9

⁷ *Hembree*, 33 Vet. App. at 6

⁸ R. at 5-6; see *Frost v. Shulkin*, 29 Vet. App. 131, 140 (2017) (“[T]he Court cannot accept the Secretary’s post-hoc rationalizations in lieu of reasons or bases from the Board.”)

⁹ R. at 5-6

not based on any explanation or reasoning provided by the Board in its decision.¹⁰

Mr. Krebs was prejudiced by the Board's failure to address that 38 C.F.R. § 20.204 requires certain language in written withdrawals when there are multiple issues on appeal because if the Board had done so, it may have determined that the withdrawal was ambiguous and not in compliance with section 20.204. Had the Board properly applied the law, Mr. Krebs' claims for various increased ratings and service connection would remain pending or would have been adjudicated in the decision on appeal. Further, the Board's failure to conduct the proper analysis regarding the express language of the regulation or to make any findings of fact as to its effect on the alleged withdrawal's ambiguity prevents him from understanding the basis for the denial and frustrates effective judicial review.¹¹

The Board's finding of a clear intent to withdraw should be reversed, and the appeal should be remanded for the Board to apply 38 C.F.R. § 20.204 and determine whether the claims for an increased rating above 40 percent for residuals of left femur open fracture with Muscle Group XIV symptoms and

¹⁰ Sec. Brief at 9; see *SEC v. Chenery*, 332 U.S. 194, 196 (1947); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991); *Wanless v. Principi*, 18 Vet. App. 337, 343 (2004)

¹¹ See R. at 5-6

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 were properly withdrawn in his vague statement to “withdraw my appeal,” considering that the regulation requires explicit language that the claims were withdrawn in their entirety or a list of issue(s) to be withdrawn.¹² Alternatively, the appeal should be remanded for the Board to conduct the proper analysis as to the written withdrawal of multiple appeals pursuant to section 20.204 and *Hembree*, and provide adequate reasons and bases for its decision.

II. RELIEF REQUESTED

For the foregoing reasons, as well as those raised in the opening brief, the Board’s decision that dismissed the issues of 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 was in error. The Board clearly erred in finding a “clear intent to withdraw his appeal” when it did not address the express requirements for a valid written withdrawal or acknowledge that his written submission did not state that the appeal was

¹² See *Tucker v. West*, 11 Vet. App. 369, 374 (1998); *Bowling v. Principi*, 15 Vet. App. 1, 6-7 (2001); *Hembree*, 33 Vet. App. 1

withdrawn in its entirety or list the specific issue(s) to be withdrawn. The Court should reverse the Board's finding that there was a clear intent to withdraw and subsequent dismissal of his appeals.

Alternatively, the Board failed to support its decision with adequate reasons and bases, requiring remand. The Board's decision should be vacated, and the appeal remanded for further adjudication.

Date: May 13, 2021

Respectfully submitted,
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