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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2012

LEON C. KREBS, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Veteran Leon C. Krebs served in the Army from 1974 to 1977. He challenges the Board's determination that he withdrew his appeal with respect to VA's denials of service connection for sleep apnea and of higher ratings for left femur fracture residuals affecting two separate muscle groups. VA regulations provide in relevant part: "If the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal." 38 C.F.R. § 20.205(b)(1) (2021). The Court agrees with the veteran that, because his statement to VA did not specify the issues withdrawn or indicate that his appeal was being withdrawn "in its entirety," it did not qualify as a valid withdrawal. Accordingly, the Court reverses, vacates, and remands.

In June 2014, the regional office (RO) denied service connection for sleep apnea and ratings higher than 10% for left femur fracture residuals and related issues. Mr. Krebs filed a Notice of Disagreement. R. at 992. The RO continued those denials in an October 2015 Statement of the Case. That same month, VA granted service connection for impairment to muscle groups of the left thigh. Then, in December 2015, the veteran filed a Substantive Appeal seeking Board review of the sleep apnea and femur fracture residual claims and indicating that he wanted a hearing before the Board via videoconference at his local RO office. R. at 810. All of these matters came together

in January 2017 in a Supplemental Statement of the Case and a rating decision, which together denied service connection for sleep apnea; a rating higher than 40% for left femur open fracture residuals with arthroscopic rush rod placement and removal with Muscle Group XIV symptoms and left hip impairment; and a rating higher than 50% for left femur open fracture residuals with arthroscopic rush rod placement and removal with Muscle Group XVII symptoms and left hip impairment. R. at 625. VA certified the appeal of these matters to the Board. R. at 487-88. An April 2017 letter notified the veteran that VA had "certified your appeal," but it did not mention any specific issues. R. at 486.

Then, on April 9, 2018, Mr. Krebs submitted the following statement: "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." R. at 284. (Both parties seem to agree that the "reconsideration" request referred to the issue of a higher mental disorder rating then pending before the RO. On June 28, 2018, the RO reconsidered its earlier decision and increased the veteran's 50% rating for major depressive disorder to 70%. R. at 226-31.) VA did not respond to this submission.

Some four months later, Mr. Krebs's veterans service organization representative submitted an informal hearing presentation to the Board arguing that he should receive service connection for sleep apnea and higher ratings for his separate left thigh conditions. The brief did not mention the April 2018 submission.

In the decision on appeal, the Board concluded that Mr. Krebs articulated a "clear intent to withdraw his appeal" as to the sleep apnea and two left thigh claims. R. at 6. Although noting that the veteran's representative submitted an informal hearing presentation after the veteran stated he wanted to withdraw his appeal, the Board concluded that this was of no moment. It reasoned that the veteran's appeal withdrawal was effective as soon as it was received; that the regulations permit renewal of an appeal only through timely resubmission of a Notice of Disagreement, which Mr. Krebs didn't do; and that no provision permits reanimation of an appeal via submission of an informal hearing presentation.

"Only an appellant, or an appellant’s authorized representative, may withdraw an appeal. An appeal may be withdrawn as to any or all issues involved in the appeal." 38 C.F.R. § 20.205(a). "An appeal withdrawal is effective when received by the Board" and "will be deemed a withdrawal

of the Notice of Disagreement as to all issues to which the withdrawal applies." *Id.* § 20.205(b)(3), (c).[*]

At issue here is the content of Mr. Krebs's April 2018 submission. Section 20.205(b)(1) "sets out with particularity the requirements for making a written request to withdraw a claim." *Acree v. O'Rourke*, 891 F.3d 1009, 1012 (Fed. Cir. 2018). The regulation requires that a veteran's withdrawal "include the name of the veteran, . . . the applicable Department of Veterans Affairs file number, and a statement that the appeal is withdrawn." 38 C.F.R. § 20.205(b)(1). "If 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." *Id.* This language forms the crux of the veteran's appeal. The meaning of a regulation is a question of law that the Court reviews de novo. *Bailey v. Wilkie*, 33 Vet.App. 188, 194 (2021).

Mr. Krebs's argument is straightforward. Section 20.205(b)(1) requires that withdrawal of an appeal involving multiple issues either specify that the entire appeal is being withdrawn or that only certain issues are being withdrawn. Because the April 2018 submission did not do either, it was ambiguous and, therefore, did not constitute a valid written withdrawal of his appeal to the Board. The subsequent submission of an informal hearing presentation as to the same three sleep apnea and left thigh claims only reinforces this ambiguity. Accordingly, he seeks reversal of the Board's withdrawal determination or, failing that, a remand for the Board to reconsider its decision in light of the specific withdrawal content requirements set out in § 20.205(b)(1), which it did not examine. For his part, the Secretary contends that the April 2018 submission was effective because, even though not using the words "in its entirety," it explicitly and unambiguously withdrew the whole of the pending appeal.

In *Hembree v. Wilkie*, 33 Vet.App. 1 (2020), the Court considered whether the inquiry the Board had to undertake when an appeal withdrawal occurred orally at a hearing—a situation in which VA rules provided no guidance—applied when a withdrawal was submitted in writing. Noting that "the regulation comprehensively lays out the requirements for making a written

[*] The regulation addressing appeal withdrawals was modified slightly and moved to § 20.205 as part of VA's implementation of the Veterans Appeals Improvement and Modernization Act of 2017. VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 138, 155 (Jan. 18, 2019) (final rule). But the language at the heart of this appeal was unchanged, *see, e.g.*, 38 C.F.R. § 20.204(b)(1) (2018), so the intervening regulatory amendments are irrelevant to the Court's analysis.

Given the very recent recodification, caselaw refers to § 20.204. For the sake of consistency, however, citations to § 20.204 have been changed to § 20.205.

withdrawal," we declined to engraft extratextual requirements on to it. *Id.* at 5. But we found that § 20.205(b)(1)'s requirements embodied two factors for assessing the validity of a withdrawal: "the withdrawal must be explicit and unambiguous." *Id.* These factors were evident from the requirement that, "if the appeal involves multiple issues, the regulation also requires specificity about whether the entire appeal or only specific issues are withdrawn" *Id.*

Further, since the regulation makes a withdrawal effective from the moment it is received, *Hembree* reasoned that "an adjudicator cannot reasonably be required to wait to give it effect depending on what happens after it is submitted." *Id.* at 6. Thus, "the Board should ordinarily confine itself to deciding whether the withdrawal is valid based on examining the written submission to determine whether it complies with the requirements laid out in" § 20.205(b). *Id.* Yet, the Court continued, "if the written withdrawal is itself ambiguous—for example, if it fails to adequately specify which claim is being withdrawn—the Board may need to consider other evidence," guided by "the pro-claimant nature of the VA system." *Id.* At all events, the analysis in the context of written withdrawals does not turn on a "subjective inquiry" into a veteran's intent but on whether the withdrawal satisfies § 20.205(b)'s requirements. *Id.* at 6-7.

But the Court found no reason to consider additional evidence of record because Mr. Hembree's written submissions in that case—requesting "to withdraw all pending claims and appeals," *id.* at 3—was explicit and unambiguous and met the requirements for a valid withdrawal under § 20.205(b), *id.* at 7.

Hembree is instructive here. By its terms, § 20.205(b) indicates that "the withdrawal must be explicit and unambiguous." *Id.* at 5. To that end, when more than one issue is on appeal, the regulation requires a written withdrawal to do one of two things: (1) "specify that the appeal is withdrawn in its entirety" or (2) "list the issue(s) withdrawn from the appeal." 38 C.F.R. § 20.205(b)(1). Mr. Krebs's submission stating, "I wish to withdraw my appeal and request for a video conference," clearly didn't list any individual issues. Nor did it "specify" that the entire appeal was being withdrawn. That is, it did not "state a fact or requirement clearly and precisely." NEW OXFORD AMERICAN DICTIONARY 1676 (3d ed. 2010). Writing "I wish to withdraw my appeal" might suffice when a veteran is only appealing one issue. But when multiple issues are on appeal, VA's regulation requires specificity and simply referring to "my appeal" does not convey the scope of the withdrawal in the specific—i.e., clear and precise—manner mandated by § 20.205(b)(1).

The Secretary's arguments to the contrary are unavailing. He admits that the purported withdrawal didn't use clear and unambiguous words like "all" or "entirety." But he suggests that the veteran clearly indicated that he was withdrawing the sleep apnea and left thigh claims because he distinguished them from the pending request for reconsideration of his major depressive disorder claim. But that is not really a distinction, since the latter issue was not even on appeal before the Board; it was still before the RO. The point of the regulatory requirements is to avoid this sort of parsing and permit a finding of withdrawal only where the scope of the veteran's submission is explicit and unambiguous.

Next, the Secretary contends that a clear and unambiguous intent in the veteran's written submission to withdraw the sleep apnea and left thigh claims can be inferred from the veteran's post-April 2018 correspondence with the Agency, which does not mention these issues. But even if it were appropriate to look to extrinsic evidence, the Secretary offers no advice on how to factor into this assessment the informal hearing presentation filed by Mr. Krebs's representative, a circumstance that weighs heavily against the interpretation of the record advanced by the Secretary.

Third, the Secretary points out that Mr. Krebs was employed by VA as a Fiduciary Service representative. This, the Secretary contends, "shows that [he] was well versed and knowledgeable with regard to VA regulations and procedures." Secretary's Br. at 10. The Court is dubious that a strong knowledge of VA regulations and procedures can be imputed to a veteran simply because he works at the Agency. Putting that aside, however, this argument comes close to reintroducing a consideration that *Hembree* said was not applicable in the written withdrawal context: "an affirmative inquiry into whether the withdrawal is done with full understanding." 33 Vet.App. at 5. True, *Hembree* said the regulation's wording meant that this Court couldn't require the Board to explicitly determine whether a veteran had the requisite knowledge and understanding of what it meant to withdraw his appeal. But the Court's broader point was that a "subjective inquiry into the veteran's understanding" is not compatible with § 20.205(b), which focuses on the objective language of a purported withdrawal. *Id.* at 6.

Finally, it should be noted that none of the circumstances cited by the Secretary were considered by the Board in its analysis.

Thus, under the terms of the regulation, Mr. Krebs's intent to withdraw his appeal in its entirety, was not, as the Board concluded, "clear." R. at 6. To the extent the Board thought that a

vague statement of withdrawal met the regulatory requirements in this case, it erred as a matter of law. From the four corners of the April 2018 submission, the scope of the veteran's purported withdrawal of his appeal was not "explicit and unambiguous," *Hembree*, 33 Vet.App. at 5, as it did not specify that the appeal was being withdrawn in its entirety or only as to a subset of issues. And since the Board did not rely on anything outside of the four corners of the April 2018 submission itself, there is no dispute of material fact to be resolved on remand. Mr. Krebs's purported withdrawal did not meet the regulatory requirements to be effective. Reversal of the Board's dismissal is appropriate. *See Sullivan v. McDonald*, 815 F.3d 786, 792 (Fed. Cir. 2016) (noting that this Court "may reverse incorrect judgments of law based on proper factual findings").

The Board's conclusion that Mr. Krebs withdrew his appeal as to the matters listed on the first page of its decision is REVERSED. The November 27, 2018, Board decision is VACATED, and this case is REMANDED for the Board to adjudicate the merits of the veteran's appeal.

DATED: June 30, 2021

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