No. 21-4029

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLES E. ELLINGTON,
Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

OPENING BRIEF OF APPELLANT, CHARLES E. ELLINGTON

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I. ISSUES PRESENTED FOR REVIEW

Issue #1:

38 C.F.R. § 3.156(c) provides that an award based all or in part on newly submitted service department records is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later. After Mr. Ellington's claim for service connection for a bilateral foot disability was denied in May 1983, service medical records were associated with his file. The Board misapplied the law and provided inadequate reasons and bases when it found that an earlier effective date was not warranted because the May 1983 decision referenced foot complaints of flat feet during service. Did the Board commit prejudicial legal error when it misapplied 38 C.F.R. § 3.156(c)?

Issue #2:

The Board is required to address all issues that are either explicitly raised by the veteran or reasonably raised by the evidence, to analyze the probative value of the evidence, and explain the basis of its rejection of evidence materially favorable to the claimant. Mr. Ellington argued to the Board that he received two separate FOIA responses in 2010 and 2012 but the records in each package were not identical; that his feet were never examined in the original March 1983 VA examination; and that his December 2010 correspondence to the VA should have been considered a notice of disagreement with the September 2010 rating decision. Did the Board commit prejudicial legal error when it failed to address these arguments and issues that were explicitly raised by Mr. Ellington?

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

Charles Ellington, a Purple Heart recipient, served in the United States Army from June 1968 to March 1970.[2] He first sought service connection for, in relevant part, his bilateral foot disability in January 1983.[3]

He underwent an examination in March 1983.[4] The report notes that physical examinations were done for his hands, knees, ankles and back, and x-rays were performed for his chest, knees, hands, and left leg.[5] There is no mention of his foot pain in service or during the examination, or of his prior pes planus diagnosis.[6] That May, the RO denied his claim.[7] It noted repeated complaints of foot pain in service with a diagnosis of flat feet in October 1968, yet it found that "injuries to both feet, ankles and hands are seen as acute and transitory conditions which are not found on last exam."[8]

Mr. Ellington again sought service connection for his foot disability in November 1996 and requested a complete copy of his service medical records.[9] The RO denied his request to reopen in February 1997.[10]

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[2] R. at 1790; R. at 1662-63; R. at 2605
[3] R. at 2562-67
[4] R. at 2538-43
[5] R. at 2540
[6] R. at 2540-41
[7] R. at 2462; R. at 2471-72
[8] R. at 2471-72
[9] R. at 2448
[10] R. at 2441-43

In April 2010, Mr. Ellington once again requested a copy of his service records and sought to reopen his claim for his bilateral foot disability.[11] That July, he underwent a VA examination.[12] The VA deferred a decision in August, finding the July 2010 examination inadequate and noting that the examiner stated "no actual medical record documents this patient reported feet condition [in service]," but the "STR[s] note he was seen on at least 14 occasions between June 1968 and November 1969 with complaints of the following: pain in feet over heels, painful left os calcis with diagnosis of fracture left as calcis, bilateral stress fractures, feet; general foot stress; pes planus; tender plantar aspect; pain in ankle joints and flat feet."[13] The VA requested that the examiner "review STR[s], again and review IMO."[14] The request specifically stated that the physician was to given an opinion based on review of the claim folder.[15] Mr. Ellington was incorrectly marked as a "complete no show" for an examination the following month, and his denial of service connection for bilateral plantar fasciitis was confirmed and continued.[16]

Mr. Ellington called the VA regarding the September 2010 rating decision he received, indicating that his claim was denied because he was a no

[11] R. at 2338; R. at 2328
[12] R. at 2160-64
[13] R. at 2132
[14] *Id*.
[15] R. at 2125-26; *see* R. at 2129-30
[16] R. at 2089-95; R. at 2059-78

show for an examination, and VA noted "it appears there was some confusion on the part of QTC with the dates of the exam for his feet. [. . .] Please review and contact the Veteran."[17] The VA's communication was a letter stating that a rating decision was mailed on September 29, 2010 notifying him that his foot condition was denied.[18]

Pursuant to his Privacy Act request, Mr. Ellington's service records were associated with his file in September 2012.[19] The Accounting of Records form notes two different numbers: 11,421 and 11,335.[20]

The VA acknowledged that he submitted an intent to file on November 12, 2015.[21] The following month, he submitted documents in support of a fully developed claim, to include service medical records[22], treatment records[23], an argument letter with highlighted summaries of the evidence[24], and sworn statements[25] from Mr. Ellington and his family.[26] He explained that his foot symptoms first appeared within three weeks of basic training, due to prolonged running, jumping, lifting, marching and standing for long periods of time, as

[17] R. at 2055-56
[18] R. at 2053-54
[19] R. at 1905-07; R. at 1793-900
[20] R. at 1907
[21] R. at 1784
[22] R. at 1606-63
[23] R. at 1576-605
[24] R. at 1684-94
[25] R. at 1574-75; R. at 1669-71; R. at 1681
[26] R. at 1768-70; R. at 1574-767

well as being issued ill-fitting boots.[27] His service medical records reflect ongoing, chronic painful foot symptoms and his separation examination documented foot trouble.[28] Mr. Ellington also explained that he requested his service medical records in 2010, and received two separate packages, with the package received in 2012 containing additional service medical records.[29] He argued that, pursuant to 38 C.F.R. § 3.156(c), his effective date should be May 13, 1983.[30]

Mr. Ellington appeared for a VA foot examination in March 2016.[31] The examiner noted that he was diagnosed with pes planus in 1968 after suffering severe foot pain and lost arch height in both feet with a ruptured Achilles tendon in both ankles and stress fractures in his feet.[32] He continued to have "severe foot problems throughout his military career" and began seeing a general practitioner and eventually a podiatrist upon discharge from service.[33] She opined that his foot disability was related to service:

> Almost immediately after beginning basic training, he began having foot pain. He was gradually losing arch height in both feet and was referred to Podiatry. This began a long series of treatments via both Podiatry Clinic and Orthopedic Clinic including profiles to restrict weight-bearing activity, prescription

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[27] R. at 1686
[28] R. at 1687
[29] R. at 1689
[30] *Id.*
[31] R. at 1266-77
[32] R. at 1266-67
[33] R. at 1267

> heel pads, various shoe inserts, casts, and arch supports – none of which were effective in relieving his foot pain. By Sept-Oct of 1968 he had developed and was diagnosed with symptomatic flat feet. His foot problems continued throughout military service and on his 3/20/70 separation physical he endorsed foot trouble along with infected calluses of both feet.
>
> [. . .]
>
> His bilateral plantar pes planus with plantar fasciitis is certainly a continuation of the foot conditions he suffered with during military service. Once developed, pes planus does not resolve then reoccur – it is a chronic condition that in turn can lead to further foot problems.[34]

The RO granted service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs in April 2016.[35] That August, Mr. Ellington submitted a timely notice of disagreement, seeking an earlier effective date of January 1983 for his bilateral foot disability.[36] He wrote that there was "[t]otal confusion about this date of exam. . . He rescheduled an **audio** exam for September. He did "show" for this foot exam. The exam was returned insufficient. . . Dr. failed to correct. No one followed up. Denied based on missed appointment. Considered a NOD??"[37]

The RO denied his claim for an earlier effective date for bilateral pes planus with bilateral plantar fasciitis and heel spurs in August 2018.[38]

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[34] R. at 1276
[35] R. at 131-70
[36] R. at 124-28
[37] R. at 2055 (emphasis in original)
[38] R. at 70-82

Mr. Ellington appealed to the Board the following August, selecting Direct Review by the Board.[39] The Board issued a decision in February 2021, denying an effective date earlier than November 12, 2015, for the grant of service connection for his bilateral foot disability.[40] This appeal followed.

III. SUMMARY OF THE ARGUMENT

38 C.F.R. § 3.156(c) provides that an award based all or in part on newly submitted service department records is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later. After Mr. Ellington's claim for service connection for a bilateral foot disability was denied in May 1983, service medical records were associated with his file. The Board misapplied the law and provided inadequate reasons and bases when it found that an earlier effective date was not warranted because the May 1983 decision referenced foot complaints of flat feet during service. The Board committed prejudicial legal error when it misapplied 38 C.F.R. § 3.156(c).

The Board is required to address all issues that are either explicitly raised by the veteran or reasonably raised by the evidence, to analyze the probative value of the evidence, and explain the basis of its rejection of evidence materially favorable to the claimant. Mr. Ellington argued to the

[39] R. at 25-27
[40] R. at 1-16

Board that he received two separate FOIA responses in 2010 and 2012 but the records in each package were not identical; that his feet were never examined in the original March 1983 VA examination; and that his December 2010 correspondence to the VA should have been considered a notice of disagreement with the September 2010 rating decision. The Board failed to address these arguments and issues that were explicitly raised by Mr. Ellington, requiring remand.

IV. STANDARD OF REVIEW

The Court reviews material questions of fact under the "clearly erroneous" standard of review.[41] "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 committed."[42] 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.[43]

The Court reviews claims of legal error by the Board under the *de novo* standard of review.[44] The Board's interpretation of statutes and regulations is

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[41] 38 U.S.C. § 7261(a)(4)
[42] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)
[43] *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990)
[44] *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (*en banc*)

also a legal ruling to be reviewed without deference by the Court.[45] 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."[46]

V. ARGUMENT

1. The Board misapplied the law and provided inadequate reasons and bases when it found there was no basis for an earlier effective date prior to November 12, 2015, for service connection for bilateral pes planus with plantar fasciitis and heel spurs.

The Board misapplied 38 C.F.R. § 3.156(c) and failed to provide an inadequate statement of reasons and bases for its denial of an effective date prior to November 2015. Pursuant to 38 U.S.C. § 7104(d)(1), a decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.[47] The Board's statement of reasons or bases must explain the Board's reasons for discounting favorable evidence[48], discuss all issues raised by the claimant or

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[45] *See Lennox v. Principi,* 353 F.3d 941, 945 (Fed. Cir. 2003)
[46] *King v. Shinseki*, 26 Vet. App. 433, 437 (2014)
[47] *Gilbert*, 1 Vet. App. at 56; *see Allday v. Brown*, 7 Vet. App. 517, 527 (1995)
[48] *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000)

the evidence of record[49], and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."[50]

If VA receives or associates with the claims file relevant official service department records at any time after VA issues a decision on a claim, VA will reconsider the claim.[51] Specifically, 38 C.F.R. § 3.156(c)(1) provides that "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim," the new and material evidence standards notwithstanding. An award based all or in part on such service department records "is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later."[52]

Here, the Board found that the May 1983 decision referenced his service medical records, but that the basis for the denial was the lack of a current

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[49] *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008)
[50] *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991)
[51] *See* 38 C.F.R. § 3.156(c); *see also Mayhue v. Shinseki,* 24 Vet. App. 273, 239 (2011) ("[U]nder either pre-amendment or amended § 3.156(c), a claimant whose claim is reconsidered based on newly discovered service department records may be entitled to an effective date as early as the date of the original claim.")
[52] 38 C.F.R. § 3.156(c)(1)

documented disability.[53] The Board failed to address that additional service records were associated with his claims file after this denial, and these records served as part of the basis for the later grant of service connection in 2015.[54] Mr. Ellington's service records, aside from a March 1970 award of the Purple Heart, do not appear in his file until 2012.[55] In late 2015, Mr. Ellington submitted an extensive evidence package in support of his claim, including his service medical records and lay statements.[56] The RO then ordered an examination, which resulted in a positive nexus opinion based largely in part on his service records, and the grant of his claim for service connection.[57]

Significantly, the 2016 VA examiner discussed his service medical records and the foot problems he suffered during service, with diagnosis of pes planus in 1968. She discussed her review of the evidence from his January 1968 pre-induction physical through his March 1970 separation examination and opined that "[h]is bilateral plantar pes planus with plantar fasciitis is certainly a continuation of the foot conditions he suffered with during military service. Once developed, pes planus does not resolve then reoccur – it is a chronic condition that in turn can lead to further foot problems."[58]

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[53] R. at 11
[54] 38 C.F.R. § 3.156(c)
[55] R. at 1907; R. at 1793-899; R. at 2605
[56] R. at 1574-764
[57] R. at 1567-70; R. at 1266-77
[58] R. at 1276

The law is clear that an award based all ***or in part*** on such service department records "is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later."[59] Had the Board properly considered that additional service records were not associated with his claims file until 2012 and served in part as the basis for the award of service connection in 2015, it likely would not have concluded that November 12, 2015, was the earliest possible effective date for the grant of service connection.[60]

Mr. Ellington was prejudiced by the Board's misapplication of 38 C.F.R. § 3.156(c), as it resulted in the denial of an effective date prior to November 12, 2015, for his service-connected bilateral pes planus with fasciitis and heel spurs. Accordingly, remand is warranted for the Board to properly apply 38 C.F.R. § 3.156(c) as it relates to his claim for an earlier effective date.

2. The Board ignored Mr. Ellington's arguments, failed to address whether there remains an open and pending claim, and provided inadequate reasons and bases for its decision.

The Board is required to address all issues that are either explicitly raised by the veteran or reasonably raised by the evidence.[61] This generally

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[59] 38 C.F.R. § 3.156(c) (emphasis added)
[60] R. at 9; *see* 38 U.S.C. § 7104
[61] *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Robinson*, 21 Vet. App. at 553, *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009)

requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant.[62] Mr. Ellington made three arguments to the Board: 1) that he received two separate FOIA responses approximately two years apart but the records in each package were not identical; 2) that his feet were never examined in the March 1983 VA examination; and 3) that his December 2010 correspondence should have been considered a notice of disagreement with the September 2010 rating decision.[63]

The Board merely repeated his argument regarding the discrepancy in the amount of responsive records he received in his two FOIA requests.[64] The Board noted that the May 1983 rating decision "specifically referenced the Veteran's SMRs regarding foot complaints of flat feet during active duty," but that the basis of the denial was the lack of a current documented disability at the time of the decision.[65] However, it failed to provide any substantive response to his argument.[66] The Board did not even mention the Accounting of Records form that notes two different numbers, what these numbers might

[62] 38 U.S.C. § 7104; *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995)
[63] R. at 1689; R. at 1907; R. at 2540-41; R. at 2055
[64] R. at 9
[65] R. at 11
[66] R. at 9-11

mean, or whether this form supports his argument that his complete service records were not associated with his file as of the 1983 denial.[67]

The Board further erred in failing to address that there is no documentation of a foot examination or imaging in conjunction with the 1983 claim.[68] The March 1983 examination report notes that physical examinations were done for his hands, knees, ankles and back, and x-rays were performed for his chest, knees, hands, and left leg.[69] There is no mention of his foot pain in service or during the examination, or of his prior pes planus diagnosis.[70] The Board failed to address that the basis for the denial in 1983 was lack of a current disability, but that a current diagnosis could not have been rendered without a physical examination.[71]

Finally, the Board failed to consider that Mr. Ellington argued that his December 2010 correspondence with the VA constituted a notice of disagreement with the September 2010 rating decision. In April 2010, Mr. Ellington sought to reopen his claim for his bilateral foot disability.[72] He underwent a VA examination that July.[73] The VA deferred a decision,

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[67] *See* R. at 1907; R. at 9-11
[68] *See* R. at 9-11
[69] R. at 2540
[70] R. at 2540-41
[71] R. at 9-11
[72] R. at 2338; R. at 2328
[73] R. at 2160-64

specifically finding the July 2010 examination inadequate and noting that the examiner stated "no actual medical record documents this patient reported feet condition [in service]," but the "STR[s] note he was seen on at least 14 occasions between June 1968 and November 1969 with complaints of the following: pain in feet over heels, painful left os calcis with diagnosis of fracture left as calcis, bilateral stress fractures, feet; general foot stress; pes planus; tender plantar aspect; pain in ankle joints and flat feet."[74] The VA requested that the examiner "review STR[s], again and review IMO."[75] The request specifically stated that the physician was to given an opinion based on review of the claim folder.[76] Inexplicably, Mr. Ellington was incorrectly marked as a "complete no show" for an examination the following month, and his denial of service connection for bilateral plantar fasciitis was confirmed and continued.[77]

Mr. Ellington called the VA regarding the September 2010 rating decision he received, which indicated he was a no show for his foot examination, and VA noted "it appears there was some confusion on the part of QTC with the dates of the exam for his feet. [. . .] Please review and contact the Veteran."[78] The VA's communication was nothing more than a letter

[74] R. at 2132
[75] *Id.*; *see* R. at 2125-26
[76] R. at 2129-30
[77] R. at 2089-95; R. at 2059-78
[78] R. at 2055-56

stating that a rating decision was mailed on September 29, 2010, notifying him that his foot condition was denied.[79] In August 2016, Mr. Ellington submitted a copy of this Report of General Information and wrote that there was "[t]otal confusion about this date of exam. . . He rescheduled an **audio** exam for September. He did "show" for this foot exam. The exam was returned insufficient. . . Dr. failed to correct. No one followed up. Denied based on missed appointment. Considered a NOD??"[80] Despite this Report of General Information in which Mr. Ellington expressed disagreement with the September 2010 rating decision, the Board never considered his argument that it should have been considered a notice of disagreement.

The Board's failure to address the arguments and issues explicitly raised by Mr. Ellington render its statement of reasons and bases inadequate and require remand.[81]

3. The Board committed prejudicial legal error.

The Court must take due account of the rule of prejudicial error.[82] In doing so, the Court may "review[ ] 'the record of proceedings before the

[79] R. at 2053-54
[80] R. at 2055 (emphasis in original)
[81] *See Robinson*, 21 Vet. App. 553; *Caluza*, 7 Vet. App. at 506; *Tucker v. West*, 11 Vet. App. 369, 374 (1998)
[82] 38 U.S.C. § 7261(b)(2)

Secretary and the [BVA]'" in order to determine whether a BVA error is prejudicial.[83] The Court may only disregard ". . . errors or defects which do not affect the substantial rights of the parties."[84] An error is prejudicial when there is "reason to believe that the 'procedure used or the substance of the decision reached' by the Board might have been different" but for the error.[85] Where an error's effect on a proceeding is not quantifiable, a court should not speculate as to what the outcome might have been but for the error.[86] To determine whether an error is prejudicial, the "Court [may] go outside the facts as found by the Board."[87] In doing so, the Court may not make findings of fact in violation of its jurisdictional charge.[88] The Federal Circuit has held that "§ 7261(b)'s command that the Veterans Court 'give due account of the rule of prejudicial error' does not give it the right to make de novo findings of fact or otherwise resolve matters that are open to debate."[89]

Mr. Ellington was prejudiced by the Board's misapplication of section 3.156(c), failure to address arguments raised in the record, and inadequate

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[83] *Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007)
[84] 28 U.S.C. § 2111
[85] *See In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004)
[86] *Southall-Norman v. McDonald*, 28 Vet. App. 346, 352 (2016); *quoting Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004)
[87] *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007)
[88] 38 U.S.C. § 7261(c); *Conway v. Principi*, 353 F.3d 1369, 1375 n. 4 (Fed. Cir. 2004); *Wood v. Peake*, 520 F.3d 1345, 1351 (Fed. Cir. 2008); *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1363 (Fed. Cir. 2001)
[89] *Tadlock v. McDonough*, 5 F.4th 1327, 1337 (Fed. Cir. 2021)

reasons and bases. If the Board had properly applied the law, it likely would have granted an effective date earlier than November 12, 2015, for his bilateral pes planus with fasciitis and heel spurs. If it had considered whether his correspondence to the VA regarding the September 2010 rating decision constituted a notice of disagreement, then it may have determined that his April 2010 claim remained open and pending. The Board's errors also frustrate effective judicial review, requiring remand.

VI. RELIEF REQUESTED

Based upon the foregoing, the Board's decision that denied an earlier effective date prior to November 12, 2015, for bilateral pes planus with fasciitis and heel spurs was in error. The Board misapplied the law, failed to address evidence and argument raised in the record, and failed to provide adequate reasons and bases for its decision. Accordingly, the Board's decision should be vacated, and the appeal remanded for further adjudication.

DATE: January 31, 2022

Respectfully submitted,
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