Vet.App. No. 21-4029

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLES E. ELLINGTON
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

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TABLE OF CONTENTS

Table of Authorities

Statutes **Page(s)**

Regulations **Page(s)**

Record Citations:

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CHARLES E. ELLINGTON,	)	
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ON APPEAL FROM THE
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BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

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I. ISSUES PRESENTED

Whether the Court should affirm the February 16, 2021, decision of the Board which denied entitlement to an effective date earlier than November 12, 2015, for the grant of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant appeals the February 16, 2021, decision of the Board which denied entitlement to an effective date earlier than November 12, 2015, for the grant of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs. (Record Before the Agency (R.) at 4-16). In his brief, Appellant

asks this Court to remand the Board's decision with respect to his claim for an earlier effective date for bilateral pes planus. (Appellant Brief (App. Br.) at 18). Appellant does not contest the Board's denial of an effective date earlier than November 12, 2015, for the grant of a 70 percent rating for service-connected posttraumatic stress disorder with persistent depressive disorder (PTSD) (also claimed as mood, emotion, and sleep disturbance). (App. Br. at 1-18). Thus, the Secretary asserts that any argument with respect to this claim has been abandoned. *See, e.g., Becton Dickinson & Co. v. C.R. Bard, Inc.* 922 F.2d 792, 800 (Fed. Cir. 1990). As discussed below, this Court should affirm the Board's decision.

B. Statement of Relevant Facts

Appellant served on active duty in the U.S. Army from June 1968 to March 1970. (R. at 1900). In January 1983, Appellant sought service connection for his feet (R. at 2562-65), and in March 1983, the Regional Office (RO) requested "all service medical records." (R. at 2544). In March 1983, Appellant attended a VA examination where he complained of "constant pain in [his] feet" and the examiner in turn, did not note a foot condition diagnosis. (R. at 2521, 2524 (2521-24)). In May 1983, the RO denied service connection for his feet. (R. at 2462). In November 1996, Appellant requested service connection for his feet (R. at 2448), in December 1996, the RO noted Appellant's need to submit new and material evidence for the claim to be reopened (R. at 2447), and in February 1997, the RO found that no new and material evidence was received to reopen his feet claim.

(R. at 2441-43). He again filed a claim in September 2003 (R. at 2438) which was denied in May 2004. (R. at 2410-12).

In April 2010, Appellant sought to reopen his claim for his feet (R. at 2335), in July 2010 he attended a VA feet examination (R. at 2160-63), and on September 29, 2010, the RO continued the previous denial of service connection for Appellant's feet condition. (R. at 2064-68, 2077-84). On December 10, 2010, Appellant called the RO regarding its September 29, 2010 letter. (R. at 2056). On February 10, 2011, the RO notified Appellant of its continued denial of his feet claim. (R. at 2053-54). In December 2015, Appellant filed a request for service connection for his feet (R. at 188-90), he then attended a feet examination in March 2016 (R. at 1266-77), the RO granted service connection with a 50 percent rating effective November 12, 2015 (R. at 171-79), and in August 2016 he filed an NOD. (R. at 124-25). On May 3, 2018, Appellant elected to participate in RAMP – Higher Level Review. (R. at 94). In August 2018, the RO denied an earlier effective date for his feet condition (R. at 80-82) and in August 2019, Appellant appealed to the Board. (R. at 26-27).

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's decision. The Board provided an adequate statement of reasons or bases.

IV. ARGUMENT

Appellant argues that the Board misapplied 38 C.F.R. § 3.156(c), failed to adequately address his argument regarding the alleged discrepancy in the amount

of responsive records he received in his two FOIA requests, failed to address that there is purportedly no documentation of a foot examination or imaging in conjunction with the 1983 claim, and failed to consider his argument that his December 2010 phone call correspondence with VA constituted a notice of disagreement with the September 2010 rating decision. (App. Br. at 11, 13, 14). The Secretary addresses these issues in the proceeding section.

A. As to Appellant's request for an earlier effective date for his feet condition, the Board provided an adequate statement of reasons or bases

As to Appellant's earlier effective date claim for his feet condition, Appellant avers that the Board provided inadequate reasons or bases for its decision. (App. Br. at 9-18). Contrary to that argument, the Board provided an adequate statement of reasons or bases for its decision.

The Board's decision must be based on all the evidence of record, and the Board must provide a "written statement of [its] 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." 38 U.S.C. § 7104(d). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, provide the reasons for its rejection of any material evidence favorable to the claimant, and consider and discuss all "potentially applicable" provisions of law and

regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), ***aff'd per curiam***, 78 F.3d 604 (Fed. Cir. 1996) (table). "A finding is 'clearly erroneous' when 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." *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)).

As it relates to Appellant's earlier effective date claim for his feet condition, the Board provided adequate reasons or bases for denying this claim. In this regard, the Board noted Appellant's contention that all of his service medical records (SMR's) were not used to adjudicate his initial feet claim in a May 1983 rating decision and his request for redress under 38 C.F.R. § 3.156 (c). (R. at 9). In response, the Board noted that in connection with his original January 1983 claim, Appellant's SMR's were requested and in March 1983, a rating decision [which considered his SMR's] was issued, which became final. (R. at 9, 2462, 2544). Second, it noted that although he filed another claim in November 1996, and an informal claim in September 2003, both rating decisions became final. (R. at 9-10, 2410-12, 2441-43). Third, it noted that although Appellant submitted an informal claim in April 2010, the RO denied this claim in September 2010, with "full notice of his appeal rights." (R. at 10). It then stated that although on December 10, 2010, Appellant called regarding the RO September 2010 rating decision, the RO responded to this correspondence, and Appellant "[d]id not respond to the

February 2011 correspondence or appeal the September 2010 rating decision by submitting a written notice of disagreement." (R. at 10-11). Finally, the Board noted that "the May 1983 rating decision specifically referenced the Veteran's SMRs regarding foot complaints of flat feet during active duty. However, the basis for the initial denial of the Veteran's feet claim was not the lack of an in–service incurrence, but rather the lack of a current documented disability at the time of decision. The subsequent rating decisions similarly referenced the Veteran's SMRs." (R. at 11). The Board supported its decision with adequate reasons or bases.

First, Appellant argues that the Board misapplied 38 C.F.R. § 3.156(c) as it "[f]ailed to address that additional service records were associated with his claims file after this [1983] denial, and these records served as part of the basis for the later grant of service connection in 2015." (App. Br. at 11). He argues that his service records do not appear in his file until 2012. (App. Br. at 11). The Secretary disagrees.

The Board explicitly noted that the May 1983 rating decision detailed a review of Appellant's service records (R. at 9-11, 2462) and that subsequent rating decisions *too* referenced Appellant's SMR's. *See* (R. at 11, 2080 – September 2010 rating decision noting a review of "service treatment records for the period January 22, 1968 to March 20 1970"; 2443 – February 1997 rating decision noting a review of "service medical records for the period 1-22-68 to 3-20-70."). The Board clearly found that there were no additional service records added to the file

since the 1983 rating decision. Nevertheless, Appellant assumes that additional service records were added to the file since the 1983 RO decision, but he fails to articulate what specific service records [he believes] were added since the 1983 decision and what specific service records were added that resulted in the favorable March 2016 nexus opinion. (App. Br. at 1-18). 38 CFR § 3.156 (c)(3) notes that an earlier effective date under this regulation is warranted when the "award made [is] based [on] all or in part on the records identified . . ." Appellant fails to cite to what specific record(s) the 2016 nexus opinion relied on that was not of record prior to the 1983 RO decision. *See* (App. Br. at 1-18). It is his burden to demonstrate error in the Board decision, to which he has not done. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error).

Second, Appellant argues that the Board failed to adequately address his "[a]rgument regarding the discrepancy in the amount of responsive records he received in his two FOIA requests." (App. Br. at 13). The Board clearly addressed this argument as it stated that the 1983 rating decision and subsequent rating decisions noted a review of his service records and the basis of the RO's original denial in 1983 was based on no current disability at the time of the decision. *See* (R. at 9). He also cites a December 2012 Accounting of Records with two different numbers with the proposition that these numbers help demonstrate that he received non-identical FOIA requests. (App. Br. at 13, R. at 1689, 1907). However, the document does not state what these numbers mean nor is the Board

obligated to comment on every piece of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Third, Appellant argues that the Board erred in purportedly "failing to address that there is no documentation of a foot examination or imaging in conjunction with the 1983 claim." (App. Br. at 14). The Board addressed this argument as it noted that he was afforded a VA examination in March 1983 and the examiner did not "diagnose [a condition] [d]uring his March 1983 VA examination." (R. at 9). Appellant has not demonstrated that there was not a foot examination in conjunction with the 1983 claim. The March 1983 examiner noted Appellant's feet complaints but did not render a foot diagnosis. (R. at 2521-24). Simply because a diagnosis was not rendered does not mean that an examination of his feet did not occur. Second, Appellant is engaging in lay hypothesizing with this argument, which the Court does not allow. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991). He states that there is "[n]o mention of his foot pain in service or during the examination, or of his pes planus diagnosis" (App. Br. at 14), but fails to take into account that there is no reasons or bases requirement for examiner. *Monzingo v. Shinseki,* 26 Vet.App. 97, 105, 105-06 (2012) *and see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Further, VA examiners are presumed competent to perform their duties, *Schertz v. Shinseki*, 26 Vet.App. 362, 369 (2013), and to have reviewed the claimant's medical history. *D'Aires v. Peake*, 22 Vet.App. 97, 106 (2008).

Finally, he argues that 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." (App. Br. at 14). The Board considered this argument as it noted that Appellant did not "[a]ppeal the September 2010 rating decision by submitting a written notice of disagreement." (R. at 10-11). Additionally, the Secretary notes that Appellant's phone call cannot be considered an NOD. In this regard, at the time of the 2010 correspondence, a NOD was a defined by regulation as a "written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result with constitute a Notice of Disagreement." 38 C.F.R. § 20.201. A phone call is not a written form of communication. *See* (R. at 2056). Further, although the text of the call was written on the 2010 VA correspondence, the written communication was not from the claimant or his representative, rather it was from a VA employee. *See* (R. at 2056). As such, Appellant's phone call cannot be construed as a possible NOD. This is why the Board noted that even after the 2010 phone call correspondence, Appellant "[d]id not respond to the February 2011 [VA] correspondence or appeal the September 2010 rating decision by submitting a written notice of disagreement." (R. at 10-11). In sum, Appellant's 2010 phone call does not constitute an NOD, and the Board noted that after this phone call, Appellant did not respond to the VA's February 2011 correspondence or submit an NOD to the September 2010 rating decision.

V. CONCLUSION

In offering this response to Appellant's arguments, the Secretary has limited his response to only those arguments raised by Appellant in his brief and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant to have adequately raised and properly preserved, but which the Secretary did not address herein, and the Secretary requests the opportunity to address the same if the Court deems it to be necessary.

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, asks the Court to affirm the Board's decision.

Respectfully submitted,

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