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

REPLY BRIEF OF APPELLANT, CHARLES E. ELLINGTON

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I. REPLY 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.

Mr. Ellington argued in his opening brief that the Board misapplied 38 C.F.R. § 3.156(c) and failed to provide an adequate statement of reasons and bases for its denial of an effective date prior to November 2015, including failing to address explicitly raised arguments and issues.[1] The Secretary argues that the Board provided adequate reasons and bases because the Board found that there were no additional service records added to the file after the May 1983 rating decision, and because the Board noted that he was afforded an examination in March 1983 and the examiner did not render a foot diagnosis.[2] For the following reasons, the Court should reject the Secretary's argument and remand Mr. Ellington's appeal.

The Board found that Mr. Ellington's service records were requested in March 1983 and that he underwent an examination the same month, but that the May 1983 rating decision denied the claim, finding that injuries to his feet were acute and transitory, because they were not diagnosed during his March

[1] Appellant's Opening Brief at 9-15.
[2] Secretary's Brief at 5-7.

1983 VA examination.[3]

The Secretary argues that "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."[4]

Contrary to the Secretary's argument, Mr. Ellington did articulate what service records were added since the 1983 decision. He argued in his opening brief that his service records did not appear in his file until 2012, with the exception of his March 1970 award of the Purple Heart.[5] As the Board noted, his service medical records were requested in March 1983, and he underwent an examination the same month.[6] The examination report discusses his headaches, shell fragment wounds, and pain in knees and ankles, and notes "Exam Knees – Ankles – and Back negative."[7] The accompanying x-ray report relates to his chest, left knee, right knee, both hands, and left femur.[8] The examination report does not reference any of his service records and neither the examination report nor the x-ray report address his feet.

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[3] R. at 9; R. at 11.
[4] Sec. Brief at 7 (emphasis in original).
[5] R. at 1907; R. at 1793-899; R. at 2605; *see* Appellant's Opening Brief at 11.
[6] R. at 2521-26; R. at 2544; R. at 2550.
[7] R. at 2522-24.
[8] R. at 2525.

He also argued that in late 2015, he submitted his service medical records as part of an extensive evidence package in support of his claim.[9] 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.[10]

Mr. Ellington argued that the positive nexus opinion was based largely in part on his service medical records, as the 2016 VA examiner specifically discussed his service medical records, the foot problems he suffered during service, and diagnosis of pes planus in 1968.[11] 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."[12]

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

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[9] R. at 1574-764; *see* Appellant's Opening Brief at 11.
[10] R. at 1567-70; R. at 1266-77.
[11] R. at 1276; *see* Appellant's Opening Brief at 11-12.
[12] R. at 1266-67; R. at 1276 (emphasis added).

received the previously decided claim, whichever is later."[13] The claim was initially denied in May 1983 because the VA stated that "injuries to both feet, ankles and hands are seen as acute and transitory conditions which are not found on last exam."[14] However, the March 1983 examination report does not mention his feet or reflect that an examination was performed, and his feet were not included in the x-ray report.[15] It is not the case that the March 1983 VA examiner clearly considered his service records, examined and x-rayed his feet, and found there was no diagnosis; rather, the examination and x-ray reports are silent as to his service medical records and his foot complaints. In 2016, following the submission of his service medical records, an examination was ordered, and the VA examiner reviewed his service medical records, noted that he suffered foot problems in service and was diagnosed with pes planus in 1968, and explained that pes planus is a chronic condition that does not resolve and then reoccur. This speaks to the basis for the prior denial – Mr. Ellington had pes planus in service and because it is a chronic condition that does not resolve and reoccur, he still had pes planus at the time of the prior denial.

The Secretary asserts that, "the Board clearly found that there were no additional service records added to the file since the 1983 rating decision."[16]

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[13] 38 C.F.R. § 3.156(c) (emphasis added).
[14] R. at 2472.
[15] R. at 2522-24.
[16] Secretary's Brief at 6.

This is an incorrect statement. The Board made no factual findings about additional service records being added to the file in 2012 and 2015. The Board does not even address these records. All it stated is that, "the May 1983 rating decision specifically referenced the Veteran's SMRs regarding foot complaints of flat feet during active duty."[17] The critical error here, which the Secretary does not address, is the Board's failure to determine, in the first instance, whether service treatment and medical records associated with the file in 2012 and 2015 were records not previously associated with the claims file when VA first decided the claim and whether those records warrant reconsideration of the claim.[18] The Board does not "clearly address" these service records associated with the file in 2012 or in 2015, despite the Secretary's after the fact rationalization.[19]

Had the Board properly considered that additional service records were not associated with his claims file until at least 2012 and served in part as the basis for the later award of service connection, it likely would have granted an earlier effective date prior to November 12, 2015.[20] Accordingly, remand is warranted for the Board to properly apply 38 C.F.R. § 3.156(c).

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[17] R. at 11.
[18] 38 C.F.R. § 3.156(c).
[19] *See* Secretary's Brief at 6.
[20] R. at 9; *see* 38 U.S.C. § 7104.

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.

Mr. Ellington also argued in his opening brief that the Board failed to address explicitly raised arguments, warranting remand.[21] The Secretary argues that the Board "clearly addressed" the arguments.[22] The Court should reject this argument.

Mr. Ellington explicitly raised 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.[23]

The Board only addressed argument one, that he received two separate FOIA responses two years apart, but it merely repeated his argument regarding the discrepancy in the amount of responsive records he received in his two FOIA requests, without more.[24] 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

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[21] Appellant's Opening Brief at 12-16.
[22] Sec. Brief at 7-9.
[23] R. at 1689; R. at 1907; R. at 2540-41; R. at 2055.
[24] R. at 9.

the lack of a current documented disability at the time of the decision.[25] The Secretary merely parrots this statement in his defense of the Board's decision, and notes that the Accounting of Records "document does not state what these numbers mean, nor is the Board obligated to comment on every piece of evidence."[26]

While the Board may not be obligated to comment on every piece of evidence, it *is* obligated to address issues either explicitly raised by the veteran or reasonably raised by the record.[27] It is also obligated to analyze the probative value of evidence, account for that which it finds persuasive or unpersuasive, and explain the basis for its rejection of evidence.[28] Mr. Ellington's lay statement in support of his claim for an earlier effective date is relevant evidence, and the Board failed to provide a substantive response to Mr. Ellington's explicitly raised argument.[29] The Board did not even mention the Accounting of Records form that notes two different numbers, what these numbers might mean, or whether this form supports his argument that his

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[25] R. at 11.
[26] Sec. Brief at 7-8.
[27] *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000).
[28] *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995); *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000); 38 U.S.C. § 7104.
[29] R. at 9-11.

complete service records were not associated with his file as of the 1983 denial.[30]

With respect to his second argument, that his feet were never examined during the March 1983 VA examination, the Board failed to address that there is no documentation of a foot examination or imaging in conjunction with the 1983 claim.[31] The Secretary accuses Mr. Ellington of lay hypothesizing and relies on the fact that examiners are not bound by a reasons and bases requirement.[32] This argument misses the point. Mr. Ellington, the veteran who personally appeared for and participated in the March 1983 examination, has asserted that his feet were not examined when he wrote "no documentation of foot examination" on the 1983 report and submitted it to the VA as an exhibit.[33] He is competent to report things that he has experienced or observed through his senses, such as the fact that his feet were not examined during his 1983 examination.[34] The March 1983 examination report supports his assertion, as it only documents physical examinations for his hands, knees, ankles and back, and x-rays of his chest, knees, hands, and left leg.[35] There is no mention of current foot pain during the examination or his foot pain in

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[30] *See* R. at 1907; R. at 9-11.
[31] *See* R. at 9-11.
[32] Sec. Brief at 8.
[33] *See* R. at 2540.
[34] *See Layno v. Brown*, 6 Vet. App. 465, 469-70 (1994).
[35] R. at 2540.

service, or of his previously diagnosed pes planus.[36] Once Mr. Ellington raised this argument, the Board was obligated to address it, and it has yet to do so.

As to argument three, that his December 2010 correspondence with the VA constituted a notice of disagreement with the September 2010 rating decision, the Board ignored this argument altogether. Following a July 2010 examination, the VA deferred a decision, finding the examination inadequate and requesting that the examiner "review STR[s], again and review IMO."[37] 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.[38] In the September 2010 rating decision, the RO discussed findings from a July 2010 foot examination, but noted that it did not appear the examiner had reviewed his entire service records, and another examination was requested with complete review of all evidence and reconsideration of the medical opinion.[39] It explained that it was notified he failed to report for a September 2010 examination, and stated, "[i]f you are able and willing to report for this examination, please notify us."[40]

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[36] R. at 2540-41.
[37] *Id.*; *see* R. at 2125-26.
[38] R. at 2089-95; R. at 2059-78.
[39] R. at 2075.
[40] *Id.*

Following receipt of this decision, Mr. Ellington called the VA. The 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."[41] The VA's communication in response was simply a letter stating that a rating decision was mailed on September 29, 2010, notifying him that his foot condition was denied.[42]

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??"[43]

The Secretary's explanation that 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'" and that "the 2010 phone call does not constitute an NOD" is nothing more than post hoc rationalization and does not cure the Board of its failure to address his argument.[44] First, that the Board stated that he did not appeal the September 2010 rating decision by filing a written notice of disagreement does not mean that the Board addressed

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[41] R. at 2055-56.
[42] R. at 2053-54.
[43] R. at 2055 (emphasis in original).
[44] *Martin v. OSHRC*, 499 U.S. 144 (1991); *see* R. at 10-11.

his argument. Mr. Ellington agrees that the Board made that statement in its decision; nevertheless, the Board did not address his December 2010 correspondence with the VA. The Board did not consider his argument that this communication with the VA could be construed as a notice of disagreement. The Board also did not consider whether his phone call to the VA, in response to the RO telling him that he allegedly missed an examination for his feet and to notify them if he was willing and able to report to an examination, prevented the decision from becoming final, thus rendering his claim open and pending.[45]

Second, contrary to the Secretary's assertion, the Board did not address Mr. Ellington's arguments regarding the 2010 correspondence and find that it did not constitute a valid notice of disagreement, and the Secretary may not provide this reasoning for the Board in a response brief. [46] This is a factual finding the Board was required to make in the first instance. Its failure to do so necessitates remand.

[45] *See* R. at 2055-56; R. at 2075.
[46] *See Robinson*, 21 Vet. App. 553; *Caluza*, 7 Vet. App. at 506; *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

II. RELIEF REQUESTED

Based upon the foregoing and the arguments contained in his opening brief, 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: July 14, 2022

Respectfully submitted,
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