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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-4029

CHARLES E. ELLINGTON, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Charles E. Ellington, through counsel appeals a February 16, 2021, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than November 12, 2015, for (1) the award of benefits for bilateral pes planus with bilateral plantar fasciitis and heel spurs and (2) the award of a 70% disability rating for post-traumatic stress disorder (PTSD) with persistent depressive disorder. Record (R.) at 4-16. The appellant does not challenge that part of the Board's decision that denied an earlier effective date for a 70% rating for PTSD, and the Court will therefore dismiss the appeal as to that matter. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision denying an effective date earlier than November 12, 2015, for award of benefits for bilateral pes planus with bilateral plantar fasciitis and heel spurs and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from June 1968 to March 1970. R. at 1900. In January 1983, he sought benefits for "[r]esiduals of injury resulting from basic training to both feet." R. at 2563. Two months later, a VA regional office (RO) requested the appellant's service medical records. R. at 2544. At a March 1983 VA medical examination, the appellant complained of "constant pain" in his feet, R. at 2521; the examination report does not reflect a diagnosis relating to the feet, *see* R. at 2521-24. The RO denied the appellant's claim in May 1983, finding that the "injuries [in service] to both feet . . . [we]re seen as acute and transitory conditions" that were not shown during the VA examination. R. at 2462. In that regard, the RO reviewed the appellant's service medical records and noted that, in service, he had been "followed frequently for complaints of foot pain without any actual pathology being noted"; there were "several diagnoses such as stress fracture of the foot," but none that were supported by x-ray evidence; and he was diagnosed with flat feet in October 1968. R. at 2471.

The appellant's subsequent request to reopen his claim was denied in February 1997. R. at 2442-43. In May 2004, the RO "confirmed and continued" the previous denial, R. at 2410, finding that, "[a]lthough [a December 2003] VA exam[iner] diagnosed . . . bilateral plantar fasciitis, there was no objective evidence showing that this was related to . . . military service," R. at 2411.

In a September 2010 rating decision, the RO indicated that the evidence of record included July 9 and September 20, 2010, VA examination reports. R. at 2072. At that time, the RO reopened the previously denied claim for benefits for bilateral plantar fasciitis but denied the claim on the merits, finding no evidence that the condition was related to service. R. at 2074. The RO stated that the Agency was notified on September 24, 2010, that the appellant had failed to appear for a scheduled September 14, 2010, VA examination and therefore "any evidence expected from this examination, which might have been material to the outcome of this claim, could not be considered." R. at 2075. The RO confirmed and continued the prior denial because there was "no evidence of a chronic disability of [the appellant's] feet based on the VA examiner's opinion that was incurred in or caused by [his] military service." *Id.*

On December 10, 2010, the appellant called VA regarding the September 2010 denial and explained that he had canceled a July 10, 2010, VA examination and rescheduled for September 10, 2010. R. at 2056. The VA employee who spoke to the appellant noted that VA's database showed that the appellant had attended the July 10 examination, and the employee stated

that "it appears there was some confusion on the part of [the contract examiner] with the dates of the exam[ination] for [the appellant's] feet." *Id.* In a February 2011 letter to the appellant, VA wrote:

> In response to your VA Form 21-0820[,] Report of General Information[,] received on December 10, 2010[,] regarding the examination of your feet. After review of your claims file[,] we have found that a rating decision dated September 28, 2010[,] was completed and you were notified by correspondence mailed on September 29, 2010[,] that your bilateral plantar fasciitis condition was denied.

R. at 2053.

In December 2015, the appellant filed a new claim for benefits for flatfoot and sought to reopen the previously denied claim for benefits for bilateral plantar fasciitis. R. at 188-90, 1684-90. At that time, he explained that he had requested his service medical records from VA in 2010 under the Freedom of Information Act (FOIA) and that he had received two responses from the Agency, in April 2010 and September 2012. R. at 1689. He stated that the 2012 response contained additional medical records and argued that, pursuant to 38 C.F.R. § 3.156(c), his effective date should be May 13, 1983, the date of his original claim. *Id.*

After a March 2016 VA examiner opined that the appellant's foot conditions were at least as likely as not related to service, R. at 1276, the RO granted benefits for bilateral pes planus with bilateral plantar fasciitis and heel spurs the following month and assigned a 50% disability rating, effective November 12, 2015.[1] R. at 159-70. The appellant filed a Notice of Disagreement (NOD) with the effective date, R. at 124-25, and later opted to participate in the Rapid Appeals Modernization Program, selecting higher level review (HLR), R. at 94. In an August 2018 HLR decision, the RO denied an earlier effective date for the award of benefits for a bilateral foot disability, R. at 76-82, and the appellant, through former counsel, sought direct review by the Board, R. at 26-27.

In the February 2021 decision on appeal, the Board rejected the appellant's argument that his service medical records "were not used to adjudicate" his initial January 1983 claim for benefits for a bilateral foot disability, R. at 9, finding that "the May 1983 rating decision specifically referenced [his] [service medical records] regarding foot complaints of flat feet during active duty," R. at 11. Further, the Board noted that the appellant's claim was denied in May 1983 for

[1] The RO stated that November 12, 2015, is the date VA received the appellant's intent to file. R. at 162.

lack of a current disability, rather than lack of an in-service injury. *Id.* The Board then found "no formal or informal communication prior to November 12, 2015[,] without subsequent adjudication expressing an intent to reopen his claim for service connection for a bilateral foot disability," and therefore denied entitlement to an earlier effective date. *Id.* This appeal followed.

II. ANALYSIS

A. Parties' Arguments

The appellant argues first that "[t]he 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." Appellant's Brief (Br.) at 7. In that regard, he contends that the Board "failed to address that additional service records were associated with his claims file after th[e May 1983] denial, and these records served as part of the basis for the later grant of service connection in 201[6]." *Id.* at 11. The appellant also asserts that the Board failed to address his expressly raised arguments regarding the discrepancy between the two FOIA responses, his assertion that his feet were not examined during the March 1983 examination, and his contention that his contact with VA regarding the September 2010 rating decision should have been construed as an NOD with that decision. *Id.* at 7-8; *see id.* at 12-16. The appellant asks the Court to vacate the Board's decision and remand this matter. *Id.* at 18. The Secretary counters generally that the Board provided adequate reasons or bases for its decision, and he therefore urges the Court to affirm the Board decision. Secretary's Br. at 4-9.

B. Law

At the time of the initial grant of benefits in this case, 38 U.S.C. § 5110, which governs the assignment of an effective date for an award of benefits, provided:

> [T]he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a) (2012 & Supp. III 2016).[2] The implementing regulation similarly provided that the effective date generally "will be the date of receipt of the claim or the date entitlement

[2] For claims to reopen for which VA provided notice of a decision prior to February 19, 2019, *see* 38 C.F.R. §§ 3.2400(b), 19.2(a), "[i]f new and material evidence is presented or secured with respect to a claim which has been

arose, whichever is the later." 38 C.F.R. § 3.400 (2015). However, the version of § 3.156(c) in effect at the time of the April 2016 decision provided an exception to this rule.[3] Paragraph (c)(1) provides, in pertinent part, 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." 38 C.F.R. § 3.156(c)(1) (2015). Paragraph (c)(3) further provides that "[a]n award made based all or in part on the records identified by paragraph (c)(1) . . . is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3) (2015). Finally, paragraph (c)(4) permits a retroactive evaluation of disability in certain circumstances. 38 C.F.R. § 3.156(c)(4) (2015).

In *Blubaugh v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) underscored that § 3.156(c) "serves to place a veteran in the position he [or she] would have been had . . . VA considered the relevant service department record before the disposition of [the] earlier claim." 773 F.3d 1310, 1313 (Fed. Cir. 2014). The Federal Circuit noted that paragraph (c)(1) "is a separate and distinct provision from [paragraphs] (c)(3) and (c)(4)," that "[t]he language and overall structure of § 3.156(c) strongly suggest that § 3.156(c)(1) requires . . . VA to reconsider only the merits of a veteran's claim" whenever newly acquired relevant service records are associated with the claims file, and that "[o]nly if . . . VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1) must it consider an earlier effective date under subsections (c)(3) and (c)(4)." *Id.* at 1314.

This Court further emphasized the distinction between paragraph (c)(1) and paragraphs (c)(3) and (c)(4) in *Emerson v. McDonald*, stating that the operative clause in § 3.156(c)(1) "mandates that 'VA will reconsider the claim'" at any time after it issues a decision on a claim, if it receives relevant service department records not previously associated with the claims file. 28 Vet.App. 200, 208 (2016) (quoting 38 C.F.R. § 3.156(c)(1)). More recently, in *George v. Shulkin*, the Court explained that "reconsideration" under paragraph (c)(1) requires VA to reassess its original decision "in light of the new service records" and noted that this may also include the

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disallowed, the Secretary shall reopen the claim and review the former disposition of the claim," 38 U.S.C. § 5108 (2012 & Supp. IV 2017); *see* 38 C.F.R. § 3.156(a) (2022).

[3] Section 3.156(c) remains unchanged in its current version, save a deleted reference to the Joint Services Records Research Center. *Compare* 38 C.F.R. § 3.156(c) (2015), *with* 38 C.F.R. § 3.156(c) (2022).

development of additional evidence. 29 Vet.App. 199, 205 (2018), *vacated on other grounds sub nom. George v. Wilkie*, 782 F. App'x 997 (Fed. Cir. 2019). The Court further explained that, had the Board "skipped past § 3.156(c)(1), which demands reconsideration of the original claim, and [gone] straight to § 3.156(c)(3), which deals with the effective date of a claim granted via reconsideration," that would "indicate that [the Board] did not understand the relevant legal framework." *Id.*

A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *Evans v. West*, 12 Vet.App. 396, 401 (1999). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of reasons or bases that is "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); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

C. Board Decision

Here, the Board initially acknowledged that the appellant "seeks relief pursuant to 38 C.F.R. § 3.156(c)" on the grounds that the RO in 1983 did not use his service medical records in adjudicating his claim for pes planus and that, as support, he asserted that the two separate packages of service medical records he subsequently received did not contain identical records. R. at 9. The Board also noted that, after requesting the appellant's service medical records, the RO denied the appellant's initial claim in 1983 because his in-service foot injuries were acute and transitory. *Id.* As noted above, the Board then rejected the appellant's § 3.156(c) argument because "the May 1983 rating decision specifically referenced [his] [service medical records] regarding foot complaints of flat feet during active duty," and his claim was denied in May 1983 for lack of a current disability, rather than lack of an in-service injury. R. at 11.

Additionally, the Board recounted the appellant's subsequent attempts to reopen his claim, noted the April 2016 grant of service connection, and concluded that the appellant was not entitled to an effective date earlier than his November 2015 notice of intent to file a claim. R. at 9-11. In that regard, the Board found "no formal or informal communication prior to November 12, 2015[,] without subsequent adjudication expressing an intent to reopen his claim for service connection

for a bilateral foot disability," and therefore denied entitlement to an earlier effective date. R. at 11.

D. Discussion

The Court concludes that the Board failed to adequately address the appellant's expressly raised argument that he is entitled to an effective date earlier than November 12, 2015, for the award of benefits for a bilateral foot disability because service medical records were added to the record after the May 1983 denial. Appellant's Br. at 9-12; Reply Br. at 1-5; *see* R. at 1689. The Board stated only that the RO in May 1983 referred to the appellant's service medical records regarding foot complaints and that his claim was not denied based on lack of an in-service event. R. at 11. The threshold question under § 3.156(c), however, is whether "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim" were added to the record after the initial denial of a claim. 38 C.F.R. § 3.156(c)(1) (2015). Because the Board did not make a determination as to whether any additional service records were added after the May 1983 denial, and if so, whether any such records were relevant, 38 C.F.R. § 3.156(c)(3), and because those are matters that the Court may not address in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."), remand is warranted, *see* 38 U.S.C. § 7104(d)(1); *Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

In so concluding, the Court acknowledges the Secretary's assertions that the appellant did not identify the specific service records that he contends were not before VA in May 1983 or the specific records that were added "that resulted in the favorable March 2016 nexus opinion," which in turn led to the April 2016 rating decision. Secretary's Br. at 7. However, the appellant alleged in his opening brief that his "service records, aside from a March 1970 award of the Purple Heart, do not appear in his file until 2012." Appellant's Br. at 11 (citing R. at 1907, 1793-899, 2605). More importantly, the appellant specifically raised the question whether relevant service records were added after the May 1983 decision when he advised VA, at the time of his December 2015 claim, that the copy of his records that he received in September 2012 had "additional service medical records" that did not appear in the April 2010 copy. R. at 1689. At that time, the appellant made the following argument:

> Based on the reasons I was denied (no medical evidence of treatment in service) and the additional service medical records found (later sent to me in 2012) and the fact of not being notified that my records were lost or destroyed, it is my understanding that my initial claim date of May 13, 1983, would be the correct effective date and retroactive evaluation would be made under 38 C.F.R. [§] 3.156(c).

Id.; *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Moreover, to the extent that the Secretary suggests that the appellant must point to service records that led to the 2016 *grant* of benefits, the caselaw outlined above makes clear that the inquiry is whether records relevant to the prior *denial* have been added to the record. *George*, 29 Vet.App. at 205 (explaining that "reconsideration" under paragraph (c)(1) requires VA to reassess its original decision "in light of the new service records" and noting that this may also include the development of additional evidence); *see also Kisor v. McDonough*, 995 F.3d 1316, 1323 (Fed. Cir. 2021) ("[T]he context of § 3.156(c) makes clear that, in order to be 'relevant' for purposes of reconsideration, additional records must speak to the basis for the VA's prior decision.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) ("[T]he Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of that part of the Board's February 16, 2021, decision denying an effective date prior to November 12, 2015, for the award of a 70% disability rating for PTSD with persistent depressive disorder is DISMISSED. After consideration of the parties' pleadings and a review of the record, that part of the Board's decision denying an effective date earlier than November 12, 2015, for the award of benefits for bilateral pes planus with bilateral plantar fasciitis and heel spurs

is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: September 2, 2022

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