Vet.App. No. 15-1867

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

VICTOR K. WILSON,

Appellant,

v.

ROBERT A. MCDONALD,
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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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

VICTOR K. WILSON,	)	
	)	
Appellant,	)	
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v.	)	Vet.App. No. 15-1867
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (BVA or Board) February 24, 2015, decision, which denied entitlement to an effective date prior to September 8, 2011, for the grant of entitlement to service connection for a lumbar strain.

II. STATEMENT OF CASE

Appellant appeals the Board's February 24, 2015, decision denying entitlement to an effective date prior to September 8, 2011, for the grant of entitlement to service connection for a lumbar strain. [R. at 3-12]. Because

Appellant has not demonstrated that the Board's decision is clearly erroneous or the product of prejudicial error, the Court should affirm it.

Appellant served on active duty from November 1993 to June 1996. [R. at 292]. Appellant filed an application for compensation in July 1996, reporting that he injured his lower back, the back of his neck and upper right shoulder in an August 1995 automobile accident. [R. at 538-541]. The Department of Veterans Affairs (VA) Regional Office (RO) denied service connection for, *inter alia*, a lower back injury due to a motor vehicle accident in a December 1996 rating decision. [R. 522-524]. Appellant did not appeal this decision and it became final.

Appellant sought to reopen the claim for service connection for a back injury in February 2006, which the RO denied in an August 10, 2006 rating decision. [R. at 476-478, 513]. In an October 2008 Board decision, the Board found that evidence received since the unappealed December 1996 rating decision was not new and material and declined to reopen the claim for entitlement to service connection for residuals of a low back injury. [R. at 366 (359-369)].

Appellant filed a Motion for Reconsideration in December 2008. [R. at 303-308]. In September 2009, the Board chairman found no obvious error of fact or law under 38 C.F.R. § 20.1000(a) and denied the Veteran's motion for reconsideration of the October 2008 Board decision. [R. at 298 (297-300)]. The Board chairman found the Board properly construed the February 2006 claim for a back injury as a claim to reopen the disallowed 1996 claim. [R. at 298 (297-

300)]. The Board chairman found that medical evidence Appellant submitted from Correctional Medical Care from December 2008 and March 2009 was not in existence at the time of the prior Board decision and that the lack of consideration of these records was not obvious error. [R. at 298 (297-300)]. The Board chairman also found that the October 2008 Board decision had a plausible basis in the record and contained clearly stated reasons and bases. [R. at 298 (297-300)].

In August 2011, the United States Court of Appeals for Veterans Claims (Court) affirmed the October 2008 Board decision. [R. at 13-15]. The Court found the Board provided an adequate statement of reasons or bases for its conclusion that the evidence received since the December 1996 rating decision did not show a current low back disability related to Appellant's in-service injury. [R. at 14 (13-15)]. The Court also found that there was no failure in the duty to assist as VA had obtained all records requested by Appellant. [R. at 14 (13-15)]. In September 2011, the Court denied the Appellant's motion for reconsideration of its August 2011 decision, finding that Appellant had simply restated arguments contained in his initial brief. [R. at 16].

Appellant submitted another request to reopen the claim on September 8, 2011. [R. at 150 (149-150)]. Appellant submitted medical records from the University of Texas Medical Branch covering the period from January 2009 to October 2010, to include treatment notes, an October 2010 imaging report and a January 2009 radiology report. [R. at -151-160]. In a May 2012 rating decision,

the RO granted entitlement to service connection for a lumbar strain, with a 10 percent evaluation, effective September 8, 2011. [R. at 129-132].

Appellant filed his Notice of Disagreement (NOD) in June 2012 asserting that the effective date should be October 1, 2007, or December 12, 2008. [R. at 121-122]. When Appellant perfected his appeal, he asserted that the effective date should be February 28, 2006. [R. at 94-95].

In the February 24, 2015, decision on appeal, the Board denied entitlement to an effective date prior to September 8, 2011, for the grant of entitlement to service connection for a lumbar strain. [R. at 3-12].

III. ARGUMENT

The Court should affirm the Board's February 24, 2015, decision that denied entitlement to an effective date prior to September 8, 2011, for the grant of entitlement to service connection for a lumbar strain, because the Board's decision is plausibly based upon the evidence of record and Appellant has not shown it to be clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

Appellant has not demonstrated that the Board erred in finding that the requirements for an effective date prior to September 8, 2011, for the grant of

service connection for a lumbar strain have not been met, and has not presented any basis for the Court to overturn the Board's February 24, 2015, decision. [R. at 3-12]. The Board's effective date determination is reviewed under the deferential clearly erroneous standard of review. *Brown v. Nicholson*, 21 Vet.App. 290 (2007). Under 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. *Dent v. McDonald*, 27 Vet. App. 362, 381 (2015).

Appellant seeks an earlier effective date of February 28, 2006, which corresponds to the date of his first claim to reopen. [R. at 513], Appellant's Brief (AB) at 3. The February 28, 2006, claim resulted in the October 2008 Board decision that the Court affirmed in prior litigation. *See Wilson V. Shinseki*, No. 09-4646, 2011 WL 3629216 (Vet.App. Aug. 19, 2011). In the decision on appeal, the Board found that the Appellant's claim to reopen the low back claim was denied in a final October 2008 Board decision, which was affirmed by this Court in 2011. BVA explained that the earliest possible effective date corresponds to the September 8, 2011, date when Appellant filed a second claim to reopen the claim. [R. at 7 (3-12), 150]. The effective date for a reopened claim based on new and material evidence other than service department records is the date of receipt of the new claim or the date entitlement arose, whichever is later. 38 C.F.R. §§ 3.400(q)(2), 3.156(a),(c); *see Pacheco v. Gibson*, 27 Vet.App. 21, 30 (2014). Appellant appears to attempt to litigate the Deputy Vice Chairman's 2009

denial of his motion for reconsideration in the guise of appealing the Board's February 24, 2015 decision. In his informal brief, Appellant cites to his 2008 motion for reconsideration [R. at 303-308], and the Deputy Vice Chairman's 2009 letter [R. at 297-301]. AB at 1-2. However, Appellant fails to demonstrate that the Court has jurisdiction over the 2009 denial of the motion for reconsideration. *See, e.g., Henderson v. Peake*, 22 Vet.App. 217 (2008) (appellant has the ultimate burden of establishing jurisdiction). The Federal Circuit has pointed out that this Court's jurisdiction is limited by statute to review of decisions of the Board and that "[a]n action by the Chairman is not a decision of the [B]oard." *Mayer v. Brown,* 37 F.3d 618, 619–20 (Fed.Cir.1994), *overruled in part on other grounds by Bailey v. West,* 160 F.3d 1360 (Fed.Cir.1998) (en banc). The Federal Circuit stated that, although 38 U.S.C. § 7261 "may allow the [Veterans Court] to review actions of the Chairman [of the Board] in cases where it already has jurisdiction by virtue of a timely appeal from a final [B]oard decision, it does not independently grant jurisdiction over such actions." *Mayer*, 37 F.3d at 620. The only exception is in those cases in which the appellant has filed a motion for Board reconsideration within 120 days after the mailing date of the Board decision (and filed any subsequent motions for Board reconsideration within 120 days after the Board's denial of reconsideration); and then filed an NOA within 120 days after the Board Chairman has denied the reconsideration motion. *Rosler v. Derwinski,* 1 Vet.App. 241, 249 (1991). Those exceptions are not applicable here. *See Sanders, supra.*

The Court should not reconsider the same issues it affirmed in its August 19, 2011, decision. [R. at 13-15]. Collateral estoppel precludes relitigation of an issue in a suit on a different cause of action where the identical issue was already litigated between identical parties and finally resolved. *See Bissonnette v. Principi,* 18 Vet.App. 105, 110 (2004). Whether collateral estoppel applies turns on whether the issues previously adjudicated were identical to those before the current tribunal; whether the issues were "actually litigated" in the prior proceeding; whether the prior tribunal's resolution of those issues was necessary to the resulting judgment; and whether the litigant was fully represented in the prior proceeding. *See Young v. Shinseki,* 25 Vet.App. 201, 204 (2012) (en banc). The Court in 2011 considered the same arguments Appellant now makes and affirmed the Board's October 2008 decision. [R. at 15 (13-15)]. The August 19, 2011, Court decision turned on whether Appellant could demonstrate error in the Board's determination that the evidence received was not new and material and whether VA fulfilled its duty to assist in obtaining medical records. [R. at 14 (13-15)]. In its August 19, 2011,decision, the Court found the Board did not err in its conclusion that the evidence received since the December 1996 rating decision did not show a current low back disability related to Appellant's in-service injury. [R. at 14 (13-15)]. The Court also found that there was no failure in the duty to assist as VA had obtained all records requested by Appellant. [R. at 14 (13-15)]. As to the final collateral estoppel factor, Appellant was represented by counsel below who submitted an initial brief and reply brief on behalf of Appellant. [R. at

17-33, 61-82]. In September 2011, the Court denied Appellant's motion for reconsideration of the August 2011 Court decision, finding that Appellant had simply restated arguments contained in his initial brief. [R. at 16]. Appellant did not seek review of the Court's 2011 decision or the denial of his motion for reconsideration by the United States Court of Appeals for the Federal Circuit pursuant to 38 U.S.C. §§ 7252(c), 7292. The Court's decision became final under 38 U.S.C § 7291(a). *See DiCarlo v. Nicholson,* 20 Vet.App. 52, 55 (2006) ("Except as provided by law, when a case or issue has been decided and an appeal has not been taken within the time prescribed by law, the case is closed, the matter is ended, and no further review is afforded.").

Appellant argues that the VA failed to obtain records from his private chiropractor. AB at 2. Unfortunately, Appellant fails to establish that the Secretary had a duty to make reasonable efforts to obtain records that the claimant adequately identified and authorized the Secretary to obtain. 38 U.S.C. § 5103A(b)(1); *see Loving v. Nicholson,* 19 Vet.App. 96, 102 (2005). The Court reviews the Board's determination that VA satisfied its duty to assist under the deferential clearly erroneous standard of review. *See Nolen v. Gober,* 14 Vet.App. 183, 184 (2000).

Appellant cites to a brief submitted by his prior attorney in *Wilson V. Shinseki*, No. 09-4646, 2011 WL 3629216 (Vet.App. Aug. 19, 2011) in which she refers to a chiropractor. AB at 2. Appellant also cites to a July 2007 Deferred Rating Decision in which it is noted that Appellant was sent an authorization for

release of information after he referenced chiropractic treatment in an NOD. [R. at 452, *see* mailing of Authorization for Release of Information R. at 457 (456-58)]. AB at 2. Appellant does not state that he authorized the Secretary to obtain those records and the Record Before the Agency is silent for any such authorization. *See Sanders, supra.* The Court, in its August 2011 decision, did not find that the Board erred in its duty to assist in obtaining records. [R. at 15 (13-15)]. Appellant's argument is simply another attempt to the relitigate the 2008 Board decision. *See DiCarlo, supra.*

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

IV. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully urges the Court to affirm the Board's February 24, 2015, decision that denied entitlement to an effective date prior to September 8, 2011, for the grant of entitlement to service connection for a lumbar strain.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 7, 2016, I mailed a copy of Appellee's Brief postage prepaid to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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