

Vet.App. No. 16-0048

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

OTHA STEWART, JR.,
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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**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the November 24, 2015, decision of the Board of Veterans' Appeals (Board) denying entitlement to an annual clothing allowance for year 2014 should be affirmed.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Appellant, Otha Stewart, Jr., appeals the November 24, 2015, Board decision denying him entitlement to an annual clothing allowance for year 2014. Record Before the Agency [R. at 2-10].

B. Statement of Facts

Appellant served on active duty in the United States Army from July 1980 through June 1998. [R. at 1502]. Pursuant to a December 17, 2008, rating decision, Appellant is currently rated 40 percent disabled for low back pain due to back injury, and 10 percent each for patellofemoral syndrome of the left and right knees. [R. at 985 (983-88)]. Appellant requires a brace for all three of his service-connected disabilities. [R. at 1642 (1642-44)]. He received a clothing allowance for year 2010 for the use of a lumbar corset (rigid with panels) and Koolflex knee braces (elastic with joints). [R. at 1683-84]. The Board's decision also notes Appellant received a clothing allowance in August 2011 and August 2012. [R. at 7 (2-10)].

Appellant submitted a claim for a year 2014 clothing allowance on January 2, 2014, [R. at 1681 (1679-82)], that was denied in February 2014 by the Acting Chief of Prosthetic Treatment Center ("Acting Chief") of the VA North Texas Health Care System (VAMC). [R. at 1678]. That same month, Appellant filed a Notice of Disagreement (NOD) with the VAMC's decision. [R. at 1685]. On March 5, 2014, the VAMC issued a Statement of the Case (SOC) continuing to deny Appellant's claim. [R. at 1679-82]. On November 15, 2015, the Board issued its decision denying Appellant's claim for a clothing allowance. This appeal follows from the Board's decision.

III. SUMMARY OF THE ARGUMENT

The determination as to whether the braces used by Appellant for his low back and knee disabilities tend to wear out or tear clothing belongs solely to VA under 38 U.S.C. § 1162; therefore, the Board's reasons and bases for denying Appellant's claim are sufficient and its decision should be affirmed.

IV. ARGUMENT

A Board decision must be supported by a statement of reasons or bases, which adequately explains the basis of the Board's material findings of fact and conclusions of law. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). This standard generally 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). The Board, however, need not comment upon every piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (clarifying that the appellant bears the burden of demonstrating error). Moreover, to warrant judicial interference with the Board decision, the appellant must show that such demonstrated error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding

that the appellant bears the burden of demonstrating prejudicial error). If the appellant cannot demonstrate that the outcome of his claim could have been different had the alleged error not been committed, the error is necessarily non-prejudicial. See *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (stating error is nonprejudicial “where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision”).

A. The Board gave due consideration to the lay statements of Appellant and its determination that the opinion of the VAMC that the braces worn by Appellant did not tend to wear out and tear his clothing was more probative is supported by an adequate statement of reasons or bases.

The clothing allowance statute, 38 U.S.C. § 1162, provides for payment of an annual clothing allowance to a Veteran who meets either of the two following criteria: (1) because of service connection disability wears or uses a prosthetic or orthopedic appliance which VA determines tends to wear out or tear his clothing, or (2) uses medication prescribed for a skin condition due to a service-connected disability that VA determines causes irreparable damage to his outer garments. Only the first criterion of the statute is at issue in this appeal, and Federal regulations require that the Under Secretary for Health (or his or her designee) must certify that the Veteran applicant wears or uses certain prosthetic or orthopedic appliances that tend to wear or tear clothing because of such disability. 38 C.F.R. § 3.810(a)(1)(ii)(A). More than one clothing allowance may be allowed if multiple garments are affected. 38 C.F.R. § 3.810(a)(2).

The February 3, 2014, correspondence from the Acting Chief to Appellant stated that the, “Prosthetic Sensory Aids Service at the VA Central Office in Washington, D.C. has determined that only braces with exposed metal hinges, exposed plastic inserts, or exposed metal stays can be considered for clothing allowance. [R. at 1678]. A brace with Velcro fasteners and fabric covered plastic/metal inserts does not cause irreparable damage to clothing and does not qualify for a clothing allowance.” Relying upon those guidelines, the VAMC, through the Acting Chief, denied Appellant’s clothing allowance because his bilateral knee braces did not have exposed metal hinges, his back brace did not have exposed rigid panels, and neither would cause irreparable damage to clothing. *Id.*

Appellant’s February 25, 2014, NOD responded to the VAMC’s denial of his disability claim stating that he had to wear the knee and back braces daily because of the pain he suffers, but quickly found that they irritated his skin after prolonged wear. To prevent the irritation, he began wearing the braces on top of his clothing. Wearing the braces in that manner caused more wear and tear on his clothing and the hard plastic in the back brace eventually wore a large hole in the seat of his vehicle. [R. at 1685]. The March 5, 2014, SOC from the VAMC prepared by a prosthetics representative and approved by the Acting Chief repeated its denial of Appellant’s claim without commenting on his statements from the NOD, and without setting forth any additional reasoning for its denial not

already contained within the February 3, 2014, correspondence initially denying Appellant's claim. [R. at 1679-82].

Contrary to Appellant's assertions (App. Br. at 7), the Board did consider Appellant's lay statements in its decision, acknowledging Appellant's reasons why he wore the braces on the outside of his clothing. [R. at 6 (2-10)]. The Board found the opinions of the VA prosthetics representative and the Acting Chief outweighed the unsubstantiated lay assertions of Appellant, because of their knowledge and familiarity with the specific back and knee braces used by Appellant. The Board also noted Appellant produced no other lay evidence to corroborate his statements, such as photographs showing wear and tear to his clothing, or statements from his spouse, friends or relatives describing any wear and tear of his clothing that they had observed. [R. at 7 (2-10)].

38 U.S.C. § 1162 requires that the prosthetic or orthopedic appliance tends to wear out or tear clothing, not that it actually must do so. The Cambridge Dictionary (<http://dictionary.cambridge.org/us/dictionary/english/tend>) defines "tend" as an intransitive verb meaning "to be likely to happen or to have a particular characteristic or effect." Therefore, as applied to the case, a prosthetic or orthopedic appliance that tends to wear out or tear clothing must be one that has a demonstrated history of wearing out or tearing clothing or one that has design features that would achieve the same effect.

While the Appellant was competent to provide lay statements concerning the particulars of his own experiences with the braces, including his admitted

non-intended use of the braces on the outside rather than the inside of his clothing, there is no allegation that he is competent to opine whether the design of or historical use of the specific braces he uses tends to wear out or tear clothing. Furthermore, the language of the statute places the determination whether a prosthetic or orthopedic appliance tends to wear out or tear clothing solely within the discretion of the VA.

Notwithstanding VA's discretion to determine whether the prosthetic or orthopedic appliance in question tends to wear out or tear clothing, the Board's decision suggests that had Appellant provided additional evidence beyond his general and unsubstantiated lay statements to support his claim, the Board might well have weighted such evidence more favorably against the VAMC's findings. In determining the preponderance of the evidence was against Appellant's claim, the Board explained that it considered Appellant's lay statements and evidence, and noted the lack of additional lay evidence that could have been useful to Appellant. Accordingly, the Board provided an adequate statement of reasons and bases in support of its denial of Appellant's claim.

B. The Board complied with its duty to assist Appellant and no remand to the VAMC for a new opinion considering his lay statements was required.

Appellant claims that the VAMC impermissibly ignored his lay statements explaining why he claimed it necessary to wear the braces on the outside of his clothing, or to consider the damage to it he claimed was as the result of doing so. *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007). *Dalton*, however, dealt with a

particular statute (38 U.S.C. § 1154(b)) specifically intended to ease combat veterans' evidentiary burdens by permitting them to introduce lay evidence in support of a claim to establish in-service incurrence or aggravation of an injury or disease notwithstanding the fact there was no official record of such incurrence or aggravation in service. *Dalton* at 36. The examiner in *Dalton* impermissibly ignored the appellant's lay statements that he had sustained a back injury in service, rendering the examination inadequate. Further, the Board failed to consider the credibility of the appellant's lay statements in determining whether he had suffered an in-service incurrence or aggravation of his back injury. *Id.* at 38-39. Therefore, in *Dalton*, the appellant's lay statements were of particular importance in establishing an in-service incurrence or aggravation of his disability under the statute and case law. See 38 U.S.C. § 1154(b); *Collette v. Brown*, 83 F.3d 389, 392 (Fed Cir. 1996); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); and *Dalton, supra*.

Unlike the statute at issue in *Dalton* which gives special credence to veterans' lay evidence for the specific purpose of easing evidentiary burdens necessary to establish a service connection for a claimed disability, 38 U.S.C. § 1162 places the discretion to determine whether the prosthetic or orthopedic appliance in question tends to wear out or tear clothing with VA alone. The reasons set forth in both the February 3, 2014, correspondence from VAMC and the SOC, sufficiently explain why Appellant's braces do not tend to wear out or tear clothing. However, it is the Board's responsibility, not the VAMC's, to assess

the credibility and weight to be given to the evidence. *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). To the extent the VAMC failed to address Appellant's lay statements, the Board, in fact, did consider them. [R. at 6 (2-10)]. Where the Board, independent of the VAMC, fully evaluated Appellant's lay statements, but found them to be less probative than the VAMC's determinations, the Board fully complied with its duty to assist Appellant.

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the November 24, 2015, Board decision denying entitlement to a clothing allowance for year 2014.

Respectfully submitted,

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