

*Designated for electronic publication only*

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

NO. 15-1867

VICTOR K. WILSON, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

**MEMORANDUM DECISION**

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

DAVIS, *Chief Judge*: U.S. Army veteran Victor K. Wilson appeals pro se from a February 24, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than September 8, 2011, for the grant of disability benefits for a lumbar strain. On appeal, Mr. Wilson argues that the Board erred in failing to award him disability benefits effective February 28, 2006. For the following reasons, the Court will affirm the Board's February 2015 decision.

**I. BACKGROUND**

Mr. Wilson served on active duty from November 1993 to June 1996. Shortly after service, he sought disability benefits for a back injury, asserting that he was injured during an in-service automobile accident. The VA regional office (RO) denied service connection in December 1996, and that decision became final.

Mr. Wilson unsuccessfully sought to reopen his claim. He filed a request to reopen on February 28, 2006, but the RO declined to reopen the matter. The Board upheld that determination in October 2008, Mr. Wilson sought reconsideration, but the Board Chairman found no error in the Board decision. Mr. Wilson appealed the October 2008 Board decision to this Court. In August

2011, the Court found that the Board provided adequate reasons or bases for declining to reopen his claim, and that the Board did not err in finding that the duty to assist had been satisfied. One month later, the Court denied Mr. Wilson's motion for reconsideration.

Following the Court's affirmance, on September 8, 2011, Mr. Wilson submitted additional evidence to the RO that included medical records from 2009 to 2010. *See* Record (R.) at 150-60; *see also* R. at 214-23 (2008 and 2009 medical records stamped "received" December 2011). After listing the evidence, including the newly submitted records, the RO granted service connection on May 14, 2012, granting an effective date of September 8, 2011.

The Board decision here on appeal affirmed the RO's choice of effective date, given that September 8, 2011, was the date of Mr. Wilson's claim to reopen. The Board also found that although Mr. Wilson's representative referenced clear and unmistakable error (CUE), the allegation of CUE was not made with the requisite specificity. This appeal ensued.

## II. ANALYSIS

On appeal, Mr. Wilson contends that after the Board Chairman received additional evidence that he had submitted, he should have remanded the case for review based on new and material evidence.<sup>1</sup> He asserts that, had the Chairman remanded the matter, he would have been entitled to an earlier effective date.<sup>2</sup>

Mr. Wilson's arguments fail for several reasons. First, under the terms of our enabling statute, we have no jurisdiction to consider a Board Chairman's denial of reconsideration of a final Board decision unless a timely Notice of Appeal as to the Board decision has already been filed with the Court. *See Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994) (holding that the Court's jurisdictional statute, 38 U.S.C. § 7252, does not provide independent jurisdiction over a decision by the Board Chairman, such as a denial of reconsideration, that is not a decision of the Board itself);

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<sup>1</sup> Although it is not entirely clear what Mr. Wilson refers to, Mr. Wilson appears to be referring to evidence submitted in 2011; the Board Chairman denied reconsideration in 2008. It does not appear that in 2008 the Board Chairman possessed any new evidence that was not before the Board.

<sup>2</sup> In his informal brief, Mr. Wilson correctly notes that newly discovered service records may warrant the assignment of an earlier effective date in some circumstances. *See* 38 C.F.R. § 3.156 (2016). Here, however, Mr. Wilson does not identify any service records before the Board that had not been previously associated with his claims file.

*Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991). Mr. Wilson did not previously take issue with the Board Chairman's denial during his prior appeal to this Court, and that matter is now foreclosed from consideration. *See Mayer, supra*. In addition, this Court affirmed the October 2008 Board decision with regard to both new and material evidence and the duty to assist, and the Court's decision became final. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006).

Because the Court's decision (and, consequently, the Board's 2008 decision) had become final, VA did not err in treating Mr. Wilson's next submission of evidence on September 8, 2011, as a request to reopen his finally denied claim. Because disability benefits generally may not be awarded for a date earlier than an application to reopen a claim, the Board decision on appeal did not clearly err in affirming an effective date of September 8, 2011. *See* 38 U.S.C. § 5110(a) ("[T]he effective date of an award based on . . . a claim reopened after final adjudication . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." (emphasis added)); *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005) ("[A]bsent a showing of [clear and unmistakable error, the appellant] cannot receive disability payments for a time frame earlier than the application date of his claim to reopen, even with new evidence supporting an earlier disability date."); 38 C.F.R. § 3.400 (2016) ("[T]he effective date of an evaluation and award of . . . a claim reopened after final disallowance . . . will be the date of receipt of the claim or the date entitlement arose, whichever is later."); *see also* 38 U.S.C. § 7261(a)(4) (Board determination of the proper effective date is a finding of fact that the Court reviews under the "clearly erroneous" standard of review); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996).

Mr. Wilson also argues that although VA was informed of treatment from his private chiropractor, VA did not seek to obtain those records, and the Board in 2008 did not remand the case to VA to obtain them. He contends that he ultimately had to obtain the records on his own, which caused his claim to be reopened. Once a decision has become final, as it did here, a CUE motion is the only avenue that would allow the grant of an earlier effective date; however, a CUE motion alleging a failure in the duty to assist cannot serve as the basis for an earlier effective date. *See Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) ("[A] breach of the duty to assist necessarily implicates evidence that was not before the RO at the time of the original decision. . . . Evidence that

should have been part of the record, but was not (because of a breach of the duty to assist), may not be considered [during a CUE analysis]."). Thus, Mr. Wilson's argument has no merit.

In sum, although it is clear that Mr. Wilson firmly believes he is entitled to an earlier effective date for his back disability and that he is entitled to the benefit of the doubt and a sympathetic reading of his pleadings (Appellant's Informal Brief at 2-3), the Court is constrained to apply the law as set forth by Congress, based on the facts in the record. The Court wants to assure Mr. Wilson that it has carefully considered the arguments presented and the evidence of record; unfortunately, however, the facts of this case do not support an earlier effective date.

### **III. CONCLUSION**

On consideration of the foregoing, the Court AFFIRMS the Board's February 24, 2015, decision.

DATED: November 30, 2016

Copies to:

Victor K. Wilson

VA General Counsel (027)