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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1638

FRANCIS J. SAMPSON, JR., APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Francis J. Sampson, Jr., served the Nation honorably in the United States Army from August 1967 to June 1969, including service in the Republic of Vietnam.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he challenges a February 22, 2019, decision of the Board of Veterans' Appeals that granted an effective date of March 31, 2013, but no earlier, for service-connected sleep apnea. To the extent that the Board granted an effective date of March 31, 2013, this is a favorable finding that the Court will not review.³ Rather, this appeal concerns only the denial of a date earlier than March 31, 2013. Because the Board's decision is not clearly erroneous, is based on a correct understanding of the governing law, and is supported by an adequate statement of reasons or bases, we will affirm.

I. ANALYSIS

Appellant argues that the Board erred in failing to consider his sleep apnea claim as part of his PTSD claim filed in August 2000. He contends that, at that time, he had a diagnosis of sleep

¹ Record (R.) at 873, 2930.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

apnea and a psychiatric VA examination from March 2001 documented trouble sleeping and staying asleep, symptoms of sleep apnea. He argues that this was sufficient to raise a claim for sleep apnea, and the Board erred in finding otherwise. The Secretary defends the Board's decision in full and urges affirmance.

Generally, the effective date of an award based on an initial claim is assigned based on the facts found, but shall not be earlier than the date of receipt of an application for compensation.⁴ Unless there is some exception (and there is none here), an effective date cannot be awarded prior to the date of the filing of a claim.⁵ Thus, identification of the earliest nonfinal claim for benefits is critical in determining the appropriate effective date. The law requires the Secretary to read the veteran's filings sympathetically by determining all potential claims raised by the evidence, applying all relevant laws and regulations.⁶

The elements of any claim, formal or informal,⁷ are "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing[.]"⁸ Although "a claimant's identification of the benefits sought does not require any technical precision,"⁹ the Board is not required to "conjure up issues that were not raised by the claimant."¹⁰ The Board is required to review all communications in the record that may be interpreted as formal or informal claims and consider whether such communications, in the context of the entire record, reasonably raise a claim for benefits.¹¹ Moreover, "a claimant is not required in filing a claim for benefits to identify a precise medical diagnosis or the medical cause of his condition; rather, he [or she]

⁴ 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2) (2019).

⁵ 38 C.F.R. § 3.400.

⁶ *See, e.g., Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).

⁷ As of September 25, 2015, VA no longer recognizes informal claims. *See* 79 Fed. Reg. 57,660-01 (2015). In their place VA recognizes an "intent to file a claim," which may be submitted electronically, on a prescribed intent-to-file-a-claim form, or through an oral communication to certain VA employees that is later recorded in writing. 38 C.F.R. § 3.155(b)(1)(i), (iii) (2019). At the time appellant filed his claim, prior to 2015, however, VA recognized informal claims.

⁸ *See Shea v. Wilkie*, 926 F.3d 1362, 1367 (Fed. Cir. 2019); *MacPhee v. Nicholson*, 459 F.3d 1323, 1326-27 (Fed. Cir. 2006); *see also Sellers v. Wilkie*, 30 Vet.App. 157, 162 (2018); *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009).

⁹ *Brokowski*, 23 Vet.App. at 88 (citing *Ingram v. Nicholson*, 21 Vet.App. 2332, 2567-57 (2007)).

¹⁰ *Id.* (quoting *Brannon v. West*, 12 Vet.App. 32, 35 (1998)).

¹¹ *See Sellers*, 30 Vet.App. at 162-63; *Brannon*, 12 Vet.App. at 35.

sufficiently files a claim for benefits 'by referring to a body part or system that is disabled or by describing symptoms of the disability.'"¹²

Whether a claim (formal or informal) has been filed is a substantially factual determination the Court reviews for clear error.¹³ The same is true of the more general question concerning the assignment of an effective date.¹⁴ The Court will reverse a factual finding of the Board when, after reviewing the evidence of record, we are left with "a definite and firm conviction that a mistake has been committed."¹⁵ And, for all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.¹⁶

Here, the Board determined that appellant was not entitled to an effective date for service connection for his sleep apnea earlier than March 31, 2013, because there was no evidence that he filed a claim for sleep apnea before then.¹⁷ The Board considered appellant's argument that he is entitled to an effective date in August 2000, based on his PTSD claim, but found no evidence of an informal claim in the record. The Board noted appellant's diagnosis of sleep apnea dating back to 2000 but found that "the mere presence of medical evidence of a disability does not show an intent on the [v]eteran's part to seek service connection and therefore does not constitute a claim."¹⁸

We find no error in the Board's discussion. The Board properly explained its findings and conclusions in denying an earlier effective date for sleep apnea. The Board was correct in noting that medical records alone are insufficient to constitute an informal claim because such "evidence

¹² *DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011) (quoting *Brokowski*, 23 Vet.App. at 86); see also *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (stating that, when determining the scope of a claim, VA must consider "several factors including: . . . the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of that claim").

¹³ See *Sellers*, 30 Vet.App. at 163; *Brokowski*, 23 Vet.App. at 85; see also *Beverly v. Nicholson*, 19 Vet.App. 394, 405 (2005).

¹⁴ *Canady v. Nicholson*, 20 Vet.App. 393, 398 (2006); see also 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹⁵ *Gilbert*, 1 Vet.App. at 52 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¹⁶ 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

¹⁷ R. at 6-7. The Court notes that the date of appellant's claim was actually March 31, 2014. However, the Board found that appellant was entitled to an effective date one year prior based on an amendment to 38 U.S.C. § 5100 in 2012 based on fully developed original claims received from August 6, 2013, through August 5, 2015.

¹⁸ R. at 7.

does not establish an intent on the part of the veteran to seek . . . service connection."¹⁹ That does not mean that such records are irrelevant to whether an informal claim has been filed. As both the Federal Circuit and this Court have recently made clear, VA must look broadly at the record, including medical records, to determine whether a veteran intends to seek benefits for a certain condition.²⁰ Here, there simply are no documents contemporaneous with the medical records showing a diagnosis of sleep apnea that evidence any intent on appellant's part to seek benefits. In his August 2000 claim, he specifically requested that VA "consider this an application for service connected disability for PTSD."²¹ His subsequent claims for an increased disability rating for PTSD also make no mention of sleep apnea. Thus, the Board's finding of no informal claim is not clearly erroneous.

Appellant also argues that the evidence of record related to his PTSD claim included a claim for sleep apnea because that condition was later found to be secondarily service-connected to PTSD and his PTSD examinations included symptoms such as trouble sleeping. However, neither he nor his counsel has demonstrated the medical knowledge necessary to attribute symptoms noted in a psychiatric examination to sleep apnea, and he presents no evidence to support this position.²² The first evidence in the record relating sleep apnea to PTSD is the May 2014 private physician's letter, which VA relied on in granting service connection for sleep apnea.²³ This evidence followed the March 2014 claim, which the Board found to be the first showing of an intent to seek benefits for sleep apnea. Thus, the lack of evidence of sleep apnea is not at issue. In fact, the Board found it "indisputable" that he had sleep apnea as far back as August 2000.²⁴ But, as noted above, the Board found no evidence of an intent to file a claim for sleep apnea, a finding that bars an earlier effective date.

In sum, we have carefully reviewed the Board's decision. The Board applied the correct law, fully explained its conclusions, and did not commit clear error as to its factual determinations.

¹⁹ *Brannon*, 12 Vet.App. at 35.

²⁰ *See Shea*, 926 F.3d at 1368-69; *Sellers*, 30 Vet.App. at 164.

²¹ R. at 2679.

²² *See Kern v. Brown*, 4 Vet.App. 350, 352 (1993); *see also Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing . . . serves no constructive purpose and cannot be considered by the Court.").

²³ R. at 1275.

²⁴ R. at 6.

Appellant has not met his burden of demonstrating error in the Board's decision.²⁵ Thus, we will affirm.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the February 22, 2019, Board decision.

DATED: May 8, 2020

Copies to:

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²⁵ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).