

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RANDOLPH WILSON,)
Appellant,)
)
v.)
)
DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
Appellee.)

Vet.App. No. 19-3791

APPELLANT’S RESPONSE TO COURT’S ORDER OF JUNE 8, 2021

Appellant Randolph Wilson submits this memorandum to respond to the United States Court of Appeals for Veterans Claims’ (CAVC or Court) Order of June 8, 2021. That Order requests that Mr. Wilson (Appellant or Veteran) inform the Court whether he believes his arguments on appeal are still viable in light of the CAVC’s holding in *Bailey v. Wilkie*, 33 Vet.App. 188 (2021).

Appellant appeals a November 27, 2018, Board of Veterans' Appeals (Board) decision that denied an increased rating for hearing loss. He alleges, among other things, that the Board failed to address his peripheral vestibular disorders (PVD) with dizziness and staggering. The Secretary acknowledges that, in his Form 9 appeal, the Veteran "indicated an informal intent to seek benefits for PVD, dizziness, or staggering, either as related to his service-connected hearing loss or tinnitus, or as due to service." Secretary's Brief (Sec. Br.) at 8. Secretary argues, however, that the Board was not obligated to discuss these issues because the veteran did not file a formal claim. *Id.*

On January 6, 2021, after the principal briefing in this case, the CAVC decided *Bailey*

v. Wilkie, 33 Vet.App. 188 (2021), holding that a separate formal claim is not necessary for VA to be required to recognize, develop, and adjudicate a claim for secondary service connection that is reasonably raised by the record during the course of adjudicating a formally initiated claim for a service connected disability. A question is therefore raised, of whether, in similar procedural circumstances, *Bailey's* holding extends to claims for secondary service connection expressly raised to the Board.

As explained in more detail below, Mr. Wilson believes that the arguments presented in his appeal are currently viable and meritorious, and the Court's decision in *Bailey* does not compel that these arguments be rejected. Indeed, much of the CAVC's legal analysis in *Bailey* supports the proposition that Appellant's arguments are correct. It is therefore the position of Appellant that the claim encompasses the peripheral vestibular disorders, dizziness and staggering. To any extent that it does not, the record is clear that Appellant expressly related his condition to his hearing disability and did so while the matter was in appellate status. As *Bailey* makes clear, there is no need to file a separate formal claim when the matter is reasonably raised during the course of adjudicating a claim for service-connected disability; so, without any doubt, there is no need to file a formal claim when the matter is expressly raised and the Board does not address or refer the matter (including in order for the Court to have jurisdiction over it).

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS'
DECISION IN *BAILEY*

In considering the Appellant's argument that the record reasonably raised the issue of entitlement to benefits for peripheral vestibular disorders (PVD), dizziness, and staggering,

the Court should be guided by its recent decision in *Bailey*. In line with that decision, the Court must first satisfy itself “that th[is] issue[] w[as] reasonably raised by the record as the [appellant] asserts.” *Bailey*, 33 Vet.App. at 197. In this regard, the Secretary acknowledges that in February 2017, Appellant did report that he had PVD which caused dizziness or staggering. Sec. Br. at 7. Based on the Secretary’s acknowledgement, the Court should therefore conclude that the record reasonably raised the possibility of entitlement to benefits for a compensable rating for hearing loss encompassed secondary service connection for PVD, dizziness, or staggering,

After finding that the claims at issue were reasonably raised by the record, the Court in *Bailey* addressed the Secretary’s assertion that, because secondary service connection for diarrhea and lymphedema were not part of the appellant’s appeal of the proper disability rating for his already service-connected prostate cancer residuals, and because he did not file a formal claim for secondary service connection for either condition “within the context of th[at] appeal stream,” the Board was not required to address the possibility of entitlement to secondary service connection. *Bailey*, 33 Vet.App. at 198. The Secretary in this case raises a similar argument. *See* Secretary’s Br. at 8 -10. Here, as in *Bailey*, the Secretary’s argument is based on the 2015 amendments to 38 C.F.R. § 3.155. As the Court in *Bailey* explained, “[p]rior to March 24, 2015, the effective date of those amendments, VA accepted both formal and informal claims for benefits,” but VA amended the regulation “to, among other things, ‘eliminate the concept of an “informal” claim, and replace it with a process that would incentivize the submission of claims in a format more amenable to efficient processing, while

still allowing veterans to receive favorable effective date treatment similar to that available under the current “informal” claim rule.’ ” 33 Vet.App. at 199 (quoting Standard Claims and Appeals Forms, 78 Fed. Reg. 65,490, 65,490 (Oct. 31, 2013) (proposed rule)).

Appellant’s report that he had PVD which caused dizziness or staggering reasonably raised the issue of secondary service connection for hearing loss in February 2017, i.e., after the amendments to § 3.155 took effect. Accordingly, whether the appellant was required to file a separate claim for benefits for that condition turns on the question of whether PVD, dizziness or staggering is an alleged “complication” of hearing loss within the meaning of § 3.155(d). *See id.* at 199-200. Section 3.155(d) provides, in part, that, once VA receives a complete claim, “VA will ... consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for *complications* of the claimed condition, including those identified by the rating criteria for that condition” in the rating schedule. 38 C.F.R. § 3.155(d)(2) (2020) (emphasis added). In *Bailey*, the Court consulted several dictionaries and concluded that the definitions of “complications” “connote a causal or aggravative relationship between the primary disease or condition and the resulting disease or condition,” which the Court stated “is the same relationship that exists between primary and secondarily service-connected disabilities.” *Bailey*, 33 Vet.App. at 200. The Court therefore concluded that, pursuant to § 3.155(d)(2), “VA is required to develop and adjudicate related claims for secondary service connection for disabilities that are reasonably raised during the adjudication of a formally initiated claim for the proper evaluation level for the primary service-connected disability.”

Id. 33 Vet.App. at 202.

The facts of this case fall squarely within the control of *Bailey*. Here, as there, because the Board did not address the reasonably raised issue, it erred. *Id.* (citing *Robinson*, 21 Vet.App. at 552).

CONCLUSION

The Court therefore should conclude that, pursuant to § 3.155(d)(2), “VA is required to develop and adjudicate related claims for secondary service connection for disabilities that are reasonably raised during the adjudication of a formally initiated claim for the proper evaluation level for the primary service-connected disability.” *See id.* at 203. Thus remand is warranted.

July 8, 2021
Date

Respectfully submitted,

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