IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MARK J. STILES, Appellant,	)	
v.	)	Docket No. 20-3523
DENIS MCDONOUGH, Acting Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO THE COURT'S JUNE 8, 2021 ORDER

The Secretary asseverates that dismissal of Appellant Mark J. Stiles's (Stiles) case is appropriate because he is unable to overcome jurisdictional barriers to have his appeal heard by this Court. Stiles responds that the Board of Veterans' Appeals' (Board) failure to refer reasonably raised claims to the Regional Office (RO) is a legal error reviewable by this Court. Thus, he respectfully requests reinstatement of his appeal.

The Secretary argues that because the Board did not have jurisdiction over Stiles's claims for service connection for obstructive sleep apnea and vertigo, the Court is congruously jurisdictionally barred from addressing those issues. *See* Secretary's Response to the Court's June 8, 2021 Order (Sec. Resp.) at 5. The Secretary further urges that Stiles's appeal should fail because the Board's decision included a remand order with respect to his sinusitis and allergic rhinitis disabilities; thus, the Board's decision is nonfinal and "not within the jurisdiction of the Court." Sec. Resp. at 2-4.

A. The Secretary's view of the Board's jurisdiction is overly narrow.

Stiles avers his case is properly before this Court as an appeal of the Board's violation of 38 C.F.R. § 20.904(b), which states that "The Board shall refer to the [RO] for appropriate consideration and handling in the first instance all claims reasonably raised by the record that have not been initially adjudicated by the agency of original jurisdiction…" In his Motion for Reconsideration, Stiles asserted that the regulation's employment of mandatory language imposes a requirement on the Board to refer reasonably raised claims to the RO for initial adjudication. *See* Appellant's Motion for Reconsideration (App. Mtn. for Recon.) at 3. Given that his claims for service connection for obstructive sleep apnea and vertigo were reasonably raised by his original disability claim, the Board's failure to refer these items to the RO constitutes a violation of 38 C.F.R. § 20.904(b)'s mandate.

The Secretary "disputes any such mandatory requirement" and alleges that when claims have not been adjudicated by the RO, the Board does not have jurisdiction over them; thus, its inaction is legitimate. Sec. Resp. at 4-5. This position is at odds with a plain reading of 38 C.F.R. § 20.904(b) and renders the regulation meaningless. The meaning of a regulation is assessed by first reviewing its text. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). If no uncertainty exists, the "regulation then just means what it means—and the court must give it effect." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

The drafters of 38 C.F.R. § 20.904(b) deliberately elected to use the "mandatory 'shall,'" which "normally creates an obligation impervious to…discretion." *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)(citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Thus, the regulation *requires* that the Board refer

reasonably raised claims to the RO for *initial adjudication*. *See* 38 C.F.R. § 20.904(b)(emphasis added). A plain reading of the regulation shows that some jurisdiction is necessarily conferred upon the Board with respect to reasonably raised claims, even though the RO has not yet adjudicated them. *See id*. While it is a narrow type of jurisdiction—the jurisdiction to refer rather than adjudicate—it is jurisdiction created by section 20.904(b) nonetheless.

The creation of a narrow jurisdiction to refer claims is not unique to 38 C.F.R. § 20.904(b). It is also seen in the context of extraschedular ratings for service-connected disabilities. *See* 38 C.F.R. § 3.321(b)(1). That regulation establishes a three-part inquiry to award an extraschedular disability rating in exceptional cases where the schedular rating is inadequate. *See Benford v. Wilkie*, 2021 U.S. App. Vet. Claims LEXIS 37, *4 (citing *Thun v. Peake*, 22 Vet. App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009)). If the first two elements are met, the final element "mandates that the Board refer the claim to the Director of Compensation Service for a determination about whether an extraschedular rating is warranted." *Id*. Importantly, the Board's failure to refer a veteran's entitlement to an extraschedular rating is reviewable by this Court. *See id*.

The narrow jurisdiction to refer claims is also seen in 38 C.F.R. § 4.16(b), when a veteran seeks total disability due to individual unemployability (TDIU) benefits but does not meet the schedular criteria for entitlement. 38 C.F.R. § 4.16(b) tasks the Board with referring the claim to the Director, Compensation Service, for extraschedular consideration. *See* 38 C.F.R. § 4.16(b)(stating that "rating boards should submit" claims for extraschedular consideration). Like in 38 C.F.R. § 20.904(b), the regulation usurps the

Board's capacity to adjudicate the claim in the first instance and instead creates a narrower type of jurisdiction to refer the claim. Importantly, the Board's failure to refer a veteran's TDIU claim for extraschedular consideration is reviewable by this Court. *See Fisher v. Principi*, 4 Vet. App. 57, 60 (1993).

The foregoing examples show that 38 C.F.R. 20.904(b) creates a narrow jurisdiction for the Board to refer a pending claim to the RO. It is well settled that the Court has the jurisdiction to review the Board's jurisdictional determinations. *King v. Nicholson*, 19 Vet. App. 406, 409 (2006) ("Of course, this Court always has jurisdiction to assess its own jurisdiction."). This includes the narrow regulatory jurisdiction to refer a pending claim as required by 38 C.F.R. § 20.904(b). Because the Board's action or inaction with respect to referral under 38 C.F.R. § 20.904(b) is reviewable by this Court, Stiles's appeal should be reinstated.

B. The Board's decision was final because Stiles was denied a benefit.

The Secretary further challenges the Court's ability to preside over Stiles's case based on the remand directives included in the Board's November 2019 decision. Sec. Resp. at 3-4. According to the Secretary, because the decision remanded Stiles's disability ratings for sinusitis and allergic rhinitis, his appeal with respect to the Board's refusal to refer his reasonably raised claims must fail. *See id.* As set out above, Stiles responds that the Board's refusal was violative of the narrow jurisdiction created by 38 C.F.R. § 20.904(b), therefore it was a legal error over which the Court can assume jurisdiction. However, to the extent that the Secretary is determined to bar his appeal from progressing because "none of [his] arguments change the fact that he seeks to appeal a non-final Board

remand to this Court," Stiles asserts that his appeal is nevertheless properly before this Court because the Board's decision was not simply a remand order; rather, it was a mixed decision that remanded two claims and denied a benefit. *See* Sec. Resp. at 2.

38 U.S.C. §§ 7252(a) and 7266 form the foundation of the Court's jurisdiction. The Veterans Court and the Federal Circuit Court of Appeals (Federal Circuit) have interpreted these statutes to convey jurisdiction to the Veterans Court when a Board decision either grants or denies benefits. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (2005); *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000). The Court's jurisdiction extends to "mixed" decisions such as when the Board remands a claim or fails to refer a claim and denies a benefit. *See Elkins v. Gober*, 229 F.3d 1369, 1373 (Fed. Cir. 2000); *Barringer v. Peake*, 22 Vet. App. 242 (2008); *Ashmore v. Derwinski*, 1 Vet. App. 580 (1991). The question for the Court in the present case is whether a Board decision that remands a claim(s) and denies a veteran's repeated request to refer pending claims constitutes a "mixed" decision over which the Court has jurisdiction. Stiles asserts that it does.

Stiles acknowledges that a remand by the Board is not a final decision subject to the Court's review because it neither grants nor denies a benefit. Therefore, the inquiry turns to whether the Board's denial of a regulatory right to have a pending reasonably raised claim referred constitutes a denial of a benefit. In this context Stiles notes that implied findings and determinations are just as valid and actionable as findings expressly made. The Federal Circuit noted as much when it adopted the implicit denial rule in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006) and *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009). In *Deshotel* and *Adams*, the Federal Circuit affirmed that where a veteran files more

than one claim with the Regional Office and the Regional Office's decision acts (favorably or unfavorably) on one claim but fails to specifically address the other claim, the second claim is implicitly denied. *Adams,* 568 F.3d at 961; *Deshotel* 457 F.3d at 1258. The Federal Circuit noted in *Adams,* "the key question in the implicit denial inquiry is whether it would be clear to a reasonable person that the DVA's action that expressly refers to one claim is intended to dispose of others as well." *Adams,* 568 F.3d at 964 (discussing *Ingram v. Nicholson*, 21 Vet. App. 232, 248 (2007)).

Stiles avers that the Board's failure to refer his reasonably raised claims to the RO cannot be read as anything other than a denial. He argued in two separate pleadings to the Board that claims for service connection for his obstructive sleep apnea and vertigo were reasonably raised and remain pending. R. 8-17; Appellant's Response to Motion to Dismiss (App. Resp. to Mot. to Dismiss) at Attachment 10. He explicitly requested relief from the Board in the form of referral to the RO for adjudication of these claims. R. at 17 ("Stiles further contends that his claim for service connection for vertigo and sleep apnea remain pending. Referral to the RO for adjudication on these issues would…satisfy this appeal")(8-17). However, the Board did not refer his claims as he requested. Nor did the Board indicate that any further action would be taken. Stiles asserts that the Board's inaction implicitly denied his claim and put him on notice that no further action would be taken on the claims despite his express requests.

The Board's refusal to act was in direct violation of 38 C.F.R. § 20.904(b) which places an affirmative duty upon it to refer claims that have not yet been adjudicated to the RO. It does not allow the Board to ignore expressly raised requests to refer pending claims.

See 38 C.F.R. § 20.904(b); *see also McCray v. Wilkie*, 31 Vet. App. 243, 257 (2019)(holding that where a veteran "explicitly raised" an issue prior to the Board's decision, "the Board must respond and not ignore the veteran's argument"). Nor does section 20.904(b) require further action by the veteran. 38 C.F.R. § 20.904(b). By placing the Board on notice of his reasonably raised claims, Stiles invoked its affirmative duty to refer his claims. *See id.* The referral action is a benefit provided by section 20.904(b) that was denied by the Board.

This understanding is consistent with the pro veteran nature of the VA disability benefits landscape. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013); *Evans v. Shinseki*, 25 Vet. App. 7, 14 (2011) (stating that the VA system is "veteran-friendly" and "non-adversarial"); *Kouvaris v. Shinseki*, 22 Vet. App. 377, 381 (2009) (noting that the veterans' benefits system is a "veteran-friendly" system); *see also Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) ("Congress has expressed special solicitude for the veterans' cause…..the adjudicatory process is not truly adversarial"). Stiles asserts that 38 C.F.R. 20.904(b) was created to benefit veterans by requiring the Board to refer pending claims to the RO without necessitating additional action from the veteran. Because Stiles was denied this benefit, his appeal meets the binary "granted or denied" threshold to convey jurisdiction to the Court. *Maggitt*, 202 F.3d at 1375. Additionally, because the present appeal does not disturb the Board's remand directives (thereby disrupting "the orderly process of adjudication"), it should be allowed judicial review. *See Elkins*, 229 F.3d at 1373.

C. The Court is the proper forum to address whether claims were reasonably raised by the record and this appeal is the proper remedy for Stiles.

The Secretary states that if Stiles believes that his claims for service connection for obstructive sleep apnea and vertigo were reasonably raised and remain pending, then he should "seek issuance of a final RO decision" or "file a petition for extraordinary relief with this Court challenging the Secretary's refusal to act." Sec. Resp. at 4. However, these assertions ignore the mandatory language of 38 C.F.R. 20.904(b). As stated above, section 20.904(b) places the affirmative duty on the Board to refer a reasonably raised claim to the RO. It does not require additional action by the claimant to seek a final RO decision. Because section 20.904(b) places the duty on the Board, not the claimant, to refer the pending claims, requiring additional action by the claimant is contrary to the regulation's plain language and renders it meaningless.

The Secretary alternatively recommends that Stiles "file a petition for extraordinary relief," citing to *Constanza v. West*, 12 Vet. App. 133. Sec. Resp. at 4. In *Constanza*, the Court denied a veteran's motion for extraordinary relief in the nature of mandamus. 12 Vet. App. at 134. There, the petitioner was frustrated by the RO taking more than 90 days to certify his appeal to the Board. *Id*. The Court dismissed, impressing upon the petitioner that the remedy he sought was "a drastic one, to be invoked only in extraordinary situations" when it is shown that the petitioner lacks "adequate alternative means to obtain the relief they seek" *Id*. Given this threshold established by the Court, a writ would not be suitable because the Court has already addressed instances where the Board fails to refer or even identify a reasonably raised claim. In *Barringer*, like in the present case, the Board

was completely silent on whether Mr. Barringer's case reasonably raised the issue of entitlement to an extraschedular rating. 1 Vet. App. at 244. The Court assumed jurisdiction, stating that it "has jurisdiction to review whether the Board erred in failing to consider whether Mr. Barringer's case reasonably raised the issue of extraschedular evaluation such that the Board erred by not discussing it." *Id.* The Court cited to *Travelstead v. Derwinski*, in which it stated that "A failure by the Board to address a relevant issue in a final decision is, in itself, subject to review under 38 U.S.C. § 7252(a) . . . since such failure falls within the Court's scope of review . . ." *Id*. (citing 1 Vet. App. 344, 348 (1991)).

Given that the Court is capable of reviewing the Board's failure to refer reasonably raised claims, Stiles's case is not an extraordinary situation that can only be remedied through drastic relief. *See Constanza*, 12 Vet. App. at 134. Stiles asserts that because the Board's decision on appeal is a mixed decision, the Court has jurisdiction to review it, which is adequate for him to obtain the relieve he seeks. *See id.* Therefore, a petition for extraordinary relief would not be proper. *See id*.

For these reasons and those set out above, Stiles's appeal should be reinstated by this Court and permitted to proceed.

Respectfully submitted on this 17th day of August, 2021 by:

/s/ Adam R. Luck
Attorney for Appellant
TX Bar #24073567
GloverLuck, L.L.P.
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com

CERTIFICATE OF SERVICE

On August 17, 2021, a copy of the foregoing Reply to Appellee's Response to the Court's June 8, 2021 Order was filed and served via electronic filing for the United States Court of Appeals for Veterans Claims on: Attorney Katerina M. Georgiv, counsel for Respondent, Secretary of Veterans Affairs at Katerina.georgiev@va.gov. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Adam R. Luck
Attorney for Appellant
TX bar #24073567
GloverLuck, L.L.P.
1910 Pacific Ave.
Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com