

*Designated for electronic publication only*

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

No. 22-3042

GARY DEAN JACKSON, APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

**MEMORANDUM DECISION**

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

FALVEY, *Judge*: Marine Corp veteran Gary Dean Jackson, through counsel, appeals those parts of the February 7, 2022, Board of Veterans' Appeals decision that denied ratings above 20% for type II diabetes and bilateral lower extremity diabetic peripheral neuropathy. His appeal is timely and within our jurisdiction. 38 U.S.C. §§ 7252(a), 7266(a). In a separate decision, a panel of this Court addressed Mr. Jackson's diabetes rating;<sup>1</sup> this decision addresses Mr. Jackson's bilateral lower extremity peripheral neuropathy ratings.<sup>2</sup> As we explain, we will remand this claim to the Board so that the Board can address it with the benefit of new precedent.

Mr. Jackson offers several arguments for how the Board erred when it assigned him his neuropathy ratings. In simple terms, Mr. Jackson argues that he has symptoms the Board failed to compensate and that the Board should have assigned separate ratings under other diagnostic codes. But, as the Secretary points out, despite having an attorney before VA, Mr. Jackson never made

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<sup>1</sup> As that precedential decision explains in more detail, the parties' options for how to proceed after this decision remain mostly the same as in any other decision issued by this Court.

<sup>2</sup> The Board also granted an effective date of April 29, 2019, for the bilateral extremity peripheral neuropathy and for the 20% diabetes rating. These are favorable findings that we do not disrupt *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also denied effective dates before April 29, 2019, for these neuropathy and diabetes claims. Mr. Jackson hasn't challenged this part of the Board decision. Thus, we dismiss the appeal with respect to the denial of earlier effective dates. *See Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc).

these arguments to VA. In fact, he didn't make any arguments about his neuropathy. Thus, we agree with the Secretary that invoking issue exhaustion is appropriate.

When faced with a new argument raised for the first time before this Court, we have discretion to hear the new argument. Exercising that discretion calls for us to weigh the claimant's interests in having the arguments heard against the interest of protecting agency administrative authority and promoting judicial efficiency. *Morris v. McDonough*, 40 F.4th 1359, 1362 (Fed. Cir. 2022) (citing *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000)).

Here, weighing Mr. Jackson's interests against the interest of protecting agency administrative authority and promoting judicial efficiency counsels against resolving his newly raised arguments. *Id.* Mr. Jackson had representation and could have argued to VA that there were symptoms left uncompensated or rated under the wrong diagnostic code. He didn't take advantage of the opportunity.

To be sure, the Board is not absolved of addressing issues that are not raised by a claimant; the Board needs to address all issues reasonably raised by the claimant *or the record*. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009). But Mr. Jackson doesn't raise a compelling case for how all his issues were raised by the record. In the end, however, we don't need to decide that issue; this case is still returning to the Board.

While this matter was pending, the Federal Circuit decided *Webb v. McDonough*, 71 F.4th 1377 (2023). That case clears up the proper analysis VA must undertake when rating a disability under an analogous diagnostic code (DC). *Id.* at 1380-81. "In circumstances where there has been a new legal development between the issuance of a Board decision and the submission of a case to the Court, we have the discretion not to address the effect of that development and instead remand for the Board to consider it in the first instance." *Davis v. McDonough*, 34 Vet.App. 131, 140 (2021), *appeal dismissed*, No. 2022-1247, 2023 WL 1987940 (Fed. Cir. Feb. 14, 2023). We think that is the best course to take here.

The sort of analysis highlighted in *Webb* should produce answers to Mr. Jackson's newly raised arguments. Even if that does not lead to additional benefits, we will at least have a better record to review should Mr. Jackson remain dissatisfied with his neuropathy ratings. In any case, we encourage him and his counsel to raise disagreements with his assigned rating to VA.

Based on the above, that part of the Board's February 7, 2022, decision that denied ratings above 20% for bilateral lower extremity diabetic peripheral neuropathy is SET ASIDE and the matter is REMANDED for further proceedings consistent with this decision.

DATED: December 27, 2023

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