

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

Vet. App. No. 19-530

VERNON L. WINGERT,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

**John S. Berry,
Attorney for Appellant**

**Jerusha L. Hancock,
Attorney for Appellant**

**Stephani M. Bennett,
Attorney for Appellant**

**BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444**

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I. STATEMENT OF THE ISSUES

- A. Whether The Board Of Veterans' Appeals Commits Remandable Error When It Improperly Characterized The Claim For A Lung Condition As A Claim To Reopen And For Failing To Provide An Adequate Statement Of Reasons Or Bases For Its Finding.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Vernon L. Wingert (Wingert) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2018).

B. Nature of the Case / Result Below

Wingert appeals the Board's September 26, 2018 decision that denied his claim to reopen a claim for a lung condition and an earlier effective date for his coronary artery disease (CAD). [R 4-24 (2018 BVA decision)]

C. Relevant Facts

Wingert is a veteran with honorable service in the U.S. Army from September 16, 1969, to August 29, 1971. [R 909 (DD214)] He is seeking to reopen his claim for a lung condition, as well as an earlier effective date for his service-connected CAD.

III. ARGUMENTS & AUTHORITIES

LUNG CONDITION (CTR)

- A. The Appellant's claim for a lung condition was improperly characterized as a claim to reopen.**
- B. The Board failed to provide an adequate statement of reasons and bases for finding that the claim was of one to reopen.**

The Board denied Wingert's claim for a lung condition because he had not presented new and material evidence. The Board also found that Wingert did not have a lung condition, and that whatever lung condition he might have is attributable to his smoking. However, his post-operative examination in 2009 found "[e]mphysematous, scattered old inflammatory and fibrotic changes in both lungs indicating bronchitis most likely chronic and COPD." [R 166 (Chest X-Ray Report)] Pleural thickening over the right upper lobe was also present.

Wingert submitted a statement dated March 28, 2015, in which he complained of pain and breathing issues. [R 963-965 (VA Form 21-4138)] The 2013 examiner determined that Wingert had a pleural effusion at the time of his cardiac surgery, but that it resolved. [R 1032-1041 (2013 Respiratory DBQ)] Then, the later examiner found COPD, restrictive lung disease (likely due to prior pleurodesis for pleural effusion), and pleural effusion (resolved). [582-585 (2014 Respiratory DBQ)] The examiner attributed his breathing difficulties to his COPD, rather than the pleurodesis. That explanation does not account for Wingert's complaint of pain in his chest, however.

We note that the diagnostic codes and rating criteria for the Appellant's diagnosed conditions use FEV-1, FEV-1/FVC, or DLCO scores to rate lung diseases such as COPD and pleural effusion. 38 C.F.R. § 4.97 (2019), the schedule of ratings for the respiratory system, addresses COPD and restrictive

lung disease. DC 6604 (COPD) and DC 6845 (Chronic pleural effusion) make no mention of pain in the chest. The VA should have properly characterized Wingert's claim to be one for pain, which would be a new claim for benefits, rather than a reopened claim. The Board failed to provide an adequate statement of reasons or bases for the finding that Appellant's claim for chest pain is not a new, freestanding claim. Absent an adequate statement of reasons or bases, judicial review is frustrated. 38 U.S.C. § 7104(d) (2019).

CORONARY ARTERY DISEASE

- A. The Board failed to properly apply 38 C.F.R. § 3.157.**
- B. The Board failed to provide an adequate statement of reasons and bases for its failure to find an earlier informal claim for an increased evaluation for a service-connected condition.**

Wingert was afforded a compensation and pension examination in conjunction with his claim for an increased evaluation for CAD. [R 572-576 (Heart Condition DBQ)] The examiner stated that there were no recent cardiac records to review, and that his CAD did not impact Wingert's ability to work. However, we note that Wingert was also afforded an examination for his respiratory condition in 2014. During that examination, Wingert complained of being easily fatigued and dyspneic with exertion. [R 582-585 (Respiratory Conditions DBQ)] He stated that he had to stop with minimal exertion when carrying something. Wingert reported that he avoided carrying things because of his CAD. [R 572-576 (Heart Condition DBQ)]

Prior to the regulation change that took effect on March 24, 2015, some reports of a medical examination or hospitalization qualified as claims for increase for a service-connected disability. See 38 C.F.R. § 3.157 (2018). With regard to claims for increase, a document qualifies as a claim for increase if the document indicated that the disability had worsened a treatment or examination report that identified at least one specific examination by date and that concerned the disability in question from an outpatient or hospital facility operated by the VA or a military service. See *Massie v. Shinseki*, 724 F.3d 1325, 1328 (Fed. Cir. 2013).

In this case, the compensation and pension examination for Wingert's claimed respiratory condition qualifies. Wingert was service-connected for CAD at the time of the examination, the examination had a date, it was conducted by the VA, and Wingert complained of worsening symptoms. The Board failed to provide an adequate statement of reasons or bases for why the respiratory examination would not constitute an informal claim for an increased evaluation for CAD. Without an adequate statement of reasons or bases, judicial review is frustrated. 38 U.S.C. § 7104(d) (2019).

CONCLUSION

The Board committed remandable error when it improperly treated Wingert's claim for a lung condition as a claim to reopen, rather than as a freestanding claim for chest pain. The Board also failed to provide an adequate statement of reasons or bases for why his claim for chest pain could not be considered a freestanding

claim, since pain is not contemplated by the diagnostic codes for a lung condition. The Board also failed in its application of 38 C.F.R. § 3.157, and provided an inadequate statement of reasons and bases for why his respiratory examination would not be considered an informal claim for an increased evaluation for his CAD. Accordingly, the claims must be remanded.

Respectfully submitted,

VERNON L. WINGERT, Appellant

By: /s/ Jerusha L. Hancock
Jerusha L. Hancock, Esq.
BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
402-466-8444
402-466-1793 Fax
jerusha@jsberrylaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

Shannon E. Leahy, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on July 31, 2019.

By: /s/ Jerusha L. Hancock
Jerusha L. Hancock, Esq.