Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6798

MARVIN H. JOHNSON, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Marvin H. Johnson, through counsel appeals a September 6, 2018, Board of Veterans' Appeals (Board) decision that dismissed his appeal regarding entitlement to disability compensation for a left shoulder disability and denied entitlement to disability compensation for hypertension. Record (R.) at 3-16. The Board remanded the matters of entitlement to disability compensation for an acquired psychiatric disorder, including post-traumatic stress disorder; disability compensation for right ear hearing loss; and a total disability rating based on individual unemployability. The remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). Additionally, the Board awarded disability compensation for an ear condition, including tinnitus. This is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part and dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). The appellant does not raise any argument concerning the

Board's dismissal of his appeal regarding entitlement to disability compensation for a left shoulder disability. Therefore, the Court finds that he has abandoned his appeal of this issue and will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision denying disability compensation for hypertension.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from September 1968 to September 1970, including service in Vietnam. R. at 109. In October 2009, he submitted a claim for disability compensation for high blood pressure and checked a box reflecting that he was claiming in-service exposure to herbicides; he also submitted a private treatment record from March 2006 reflecting a history of hypertension. R. at 628-42, 662. The following month, VA advised him that it was working on his claim and requested information "showing that [his] claimed condition is medically associated with dioxin exposure." R. at 588. The appellant responded that his claimed condition is "not associated with exposure to dioxin." R. at 553.

A VA regional office subsequently denied entitlement to disability compensation for hypertension on the basis that there was no evidence that it "occurred in or was caused by" military service or developed within 1 year of discharge, R. at 472-82; the appellant appealed, R. at 460; *see* R. at 259-61, 421-47. In April 2018, he testified before the Board that he was diagnosed with hypertension approximately 2 years after separation from service and he has "had that problem ever since." R. at 43-44; *see* R. at 27-51.

In September 2018, the Board denied disability compensation for hypertension. R. at 3-16. This appeal followed.

II. ANALYSIS

The appellant argues that the Board failed to satisfy the duty to assist because it did not obtain a medical opinion addressing the possible relationship between his hypertension and in-service exposure to herbicides. Appellant's Brief (Br.) at 6-18. Specifically, he contends that the

National Academies of Sciences, Engineering & Medicine's (NAS) *Veterans and Agent Orange: Update 2006* (7th Biennial Update 2006), and subsequent NAS reports, provide the indication of a link between hypertension and herbicide exposure necessary to trigger VA's duty to provide an examination and that VA had actual or constructive knowledge of the NAS reports. *Id.* He further asserts that, because he is presumed to have been exposed to herbicides and the NAS reports suggest an association between hypertension and herbicide exposure, the Board was required to consider that theory of entitlement. *Id.* at 17.

The Secretary counters that the Court does not have jurisdiction to consider the NAS reports because they were not actually or constructively before the Board and that, because there is no evidence of record suggesting a link between hypertension and herbicide exposure, the theory of entitlement to disability compensation based on herbicide exposure was not reasonably raised. Secretary's Br. at 5-26. Alternatively, he contends that, if the Court finds that theory of entitlement reasonably raised, remand is required for the Board to address that theory in the first instance. *Id.* at 26-29.

A. Relevant Law

The Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record, *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), and the Court has jurisdiction to review whether the Board erred in failing to consider such theories, *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008). Whether an issue is reasonably raised by the record is essentially a question of fact, subject to the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Robinson*, 21 Vet.App. at 553.

The Court is precluded by statute from considering any material that was not contained in "the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b); *see Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990) (holding that review in this Court shall be on the record of proceedings before the Secretary and the Board); *see also Kyhn v. Shinseki*, 716 F.3d 572, 576-78 (Fed. Cir. 2013) (holding that the Court contravenes the jurisdictional requirements of section 7252(b) by considering extrarecord evidence). In that regard, the Court's authority "is limited to reviewing the correctness of the Agency's factual and legal conclusions based on the record before the agency at the time of its decision." *Bonhomme v. Nicholson*, 21 Vet.App. 40, 43 (2007) (per curiam order).

In certain circumstances, evidence will be deemed constructively part of the record before the Secretary and the Board. *See Bell v. Derwinski*, 2 Vet.App. 611, 612 (1992) (per curiam order). Generally, "VA is considered aware of VA-generated evidence when put 'on notice as to its possible existence and relevance' and when such records 'could reasonably be expected to be a part of the record.'" *Turner v. Shulkin*, 29 Vet.App. 207, 217 (2018) (quoting *Bell*, 2 Vet.App. at 612-13). The Court's constructive possession doctrine has evolved since *Bell*, however, and, "today, an appellant must show that there is a *direct relationship* between the document and his or her claim to demonstrate that the document was constructively before the Board, even if the document was generated for and received by VA under a statutory mandate," and "[t]he document must bear a closer relationship to the appellant beyond providing general information related to the type of disability on appeal, . . . or merely being referenced in other evidence of record or relied upon by appellants in similar cases." *Euzebio v. Wilkie*, __ Vet.App. __, No. 17-2879, 2019 WL 3955208, at *5 (Aug. 22, 2019) (citing *Monzingo v. Shinseki*, 26 Vet.App. 97, 101-03 (2012) (per curiam); *Goodwin v. West*, 11 Vet.App. 494, 496 (1998) (per curiam order); *Bowey v. West*, 11 Vet.App. 106, 108-09 (1998)).

B. Reasonably Raised

Here, the Board found that the appellant has a current hypertension disability but that there is no evidence of complaints, diagnoses, or treatment for hypertension during service or within 1 year after service. R. at 7-8. The Board thus concluded that there was no evidence that hypertension had its onset in service or within the presumptive period for chronic conditions and denied the claim. R. at 8. The Board did not address whether VA had satisfied its duty to assist or entitlement to service connection based on exposure to herbicides. *See* R. at 3-16.

The appellant concedes that he "did not explicitly raise the theory of entitlement to service connection based on herbicide exposure." Appellant's Br. at 17. Rather, he asserts that, because he is presumed to have been exposed to herbicides and the NAS reports—which he asserts were constructively before the Board—suggest an association between hypertension and herbicide exposure, the Board was required to consider that theory of entitlement. *Id.*

The appellant's argument is not persuasive. Initially, he does not point to any evidence that was "in the record" of proceedings before the Board that may have raised that theory of entitlement. *See* Appellant's Br. at 17-18; *see also Robinson*, 557 F.3d at 1361 ("claims which have no support *in the record* need not be considered by the Board" (emphasis added)). Further, even assuming

that evidence not actually in the record could reasonably raise a theory of entitlement and that the NAS reports could be deemed constructively before the Board,[1] the appellant fails to demonstrate that any error on the part of the Board in not discussing the NAS reports was prejudicial error. *See* 38 U.S.C. § 7261(b)(2); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error).

As the Secretary noted in his brief and the appellant does not dispute, the appellant informed VA, in response to a request that he submit information regarding dioxin exposure, that his hypertension is "not associated with exposure to dioxin." R. at 553; *see* Secretary's Br. at 3; *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (concluding that the theory of continuity of symptomatology was not reasonably raised by the record because the appellant had asserted that her symptoms did not begin until 8 years after discharge from service). In other words, VA attempted to develop the appellant's claim as one based on exposure to dioxin, but he *affirmatively disclaimed entitlement* to benefits based on that theory. He has not acknowledged this evidence or explained why VA had a duty to address or develop a theory of entitlement that he expressly disavowed.

Although the Board is obligated "to analyze claims . . . beyond the arguments explicitly made," its duty is not unlimited. *Robinson*, 21 Vet.App. at 553. Here, the record reflects that VA acted pursuant to its statutory duty to assist a claimant, 38 U.S.C. § 5103A, by requesting information to help develop his claim based on dioxin exposure and the appellant unambiguously responded that his condition "is not associated with exposure to dioxin." R. at 553, 588; *see Mlechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (holding that this Court's statutory duty to take due account of the rule of prejudicial error permits the Court "to go outside of the facts as found by the Board to determine whether an error was prejudicial by reviewing 'the record of the proceedings before the Secretary and the Board'" (quoting *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007))); *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) ("[I]n assessing the prejudicial effect of any error of law or fact, the Court is not confined to the findings of the Board but may examine the entire record before the Agency, which includes the record of

[1] In *Euzebio*, the Court held that an NAS report was not constructively part of the record before the Board because there was no direct relationship to the claim on appeal. __ Vet.App. at __, 2019 WL 3955208, at *5. Because the Court concludes that the appellant has not demonstrated that a theory of entitlement based on herbicide exposure was reasonably raised, it need not address his contentions that this case is distinguishable from *Euzebio*.

proceedings."). The appellant has not pointed to any authority demonstrating that the Secretary was required to override his decision, nor does he explain how the NAS reports could reasonably raise a theory of entitlement that he informed VA he was not pursuing. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006) (concluding that the Court was unable to find error where the appellant made "no effort to explain how the evidence . . . amounts to a claim for service connection or why the Board should have considered it as such"). Further, to the extent that he is arguing that the NAS reports, by themselves, sufficiently raise the issue, he does not argue that or explain how the reports could be relevant to a claim that was not otherwise based on herbicide exposure. *See Turner*, 29 Vet.App. at 217 ("VA is considered aware of VA-generated evidence when put 'on notice as to its possible existence *and relevance*' and when such records 'could reasonably be expected to be a part of the record.'" (emphasis added)).

In sum, the appellant has not carried his burden of demonstrating that the theory of entitlement based on herbicide exposure was reasonably raised by the evidence of record. *See Bankhead v. Shulkin*, 29 Vet.App. 10, 24 (2017) (concluding that the appellant failed to carry his burden of demonstrating that an issue was reasonably raised by the evidence of record). Accordingly, because he has not shown that the Board erred by not adjudicating that theory of entitlement, he cannot demonstrate prejudice in any errors by the Board in ensuring that the duty to assist was satisfied as to that theory. *See Simmons v. Wilkie*, 30 Vet.App. 267, 280 (2018) (noting that, "[i]n circumstances where the prejudicial effect of an error is not obvious, the aggrieved party 'normally must explain why the erroneous ruling caused harm[]'" (quoting *Sanders*, 556 U.S. at 410)). Finally, because he does not challenge the Board's conclusion that hypertension did not have its onset in service or during a presumptive period, the Court will affirm the Board's decision.

III. CONCLUSION

The appeal of the Board's September 6, 2018, decision dismissing his appeal as to the denial of entitlement to disability compensation for a left shoulder disability is DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision denying entitlement to disability compensation for hypertension is AFFIRMED.

DATED: November 7, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)