Vet.App. No. 19-1547

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MARLENE STERN
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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Appellant,	)	
v.	)	Vet. App. No. 19-1547
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ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board) November 9, 2018, decision, which denied entitlement to service connection for obesity, an acquired psychiatric disability, to include depression and anxiety, a respiratory disability, and a heart disability, as well as entitlement to compensation under 38 U.S.C. § 1151 for gallbladder surgery residuals, to include fistula and sutures in the stomach, and entitlement to a temporary 100% rating based on hospitalization for treatment of a service connected disability.

II. STATEMENT OF THE CASE

Appellant appeals the November 9, 2018, Board denial of entitlement to service connection for obesity, an acquired psychiatric disability, to include depression and anxiety, a respiratory disability, and a heart disability, as well as entitlement to compensation under 38 U.S.C. § 1151 for gallbladder surgery residuals, to include fistula and sutures in the stomach, and entitlement to a

temporary 100% rating based on hospitalization for treatment of a service connected disability. [Record Before the Agency [R.] at 1-28].[1] The decision on appeal should be affirmed because Appellant does not present any arguments or reference any evidence relevant to the claims on appeal, and thus has failed to demonstrate any error in the Board's decision.

III. STATEMENT OF THE FACTS

Appellant's husband, Howard S. Stern (the Veteran), served on active duty from April 2, 1968, to October 4, 1968. [R. at 221]. At the Veteran's separation examination, his lung, chest, heart, and psychiatric condition were all clinically evaluated as normal. [R. at 4178-79]. Although the Veteran was originally discharged under other than honorable conditions, *id.,* the character of his discharge was later changed to under honorable conditions in December 1968. [R. at 4321].

In February 1974, October 1978, and July 2000, the Regional Office (RO) issued a rating decision in which it denied the Veteran's claims for entitlement to service connection for a psychiatric condition and obesity. [R. at 4287]; [R. at 4228-31]; [R. at 4192-93].

In 1977, the Veteran was in a traffic accident, at which time he injured his spine. [R. at 4248-49]; *see* [R. at 4259]. In August 1978, the Veteran related to a

[1] The Board reopened Appellant's previously denied and final claims for entitlement to service connection for a psychiatric disability, to include anxiety and depression, and for obesity. [R. at 4]. These are favorable findings that the Court cannot disturb. *See Medrano v. Nicholson,* 21 Vet.App. 165, 170 (2007).

VA examiner he had been depressed since his traffic accident the previous year. [R. at 4241-42]. An x-ray taken in conjunction with the Veteran's examination showed that his lungs were clear and his heart was normal. [R. at 4240]; [R. at 4233-34 (4232-35)]. In a 2007 medical record, it was noted that the Veteran started smoking in 1970 and had a smoking history of 4 packs a day. [R. at 3976 (3976-77)].

In March 2010, the Veteran filed (1) an application to reopen his previously denied claims for entitlement to service connection for a psychiatric disorder, and for obesity, and (2) claims for entitlement to service connection for a heart condition and a respiratory condition. [R. at 4123-24].

In September 2011, the Veteran filed a claim for entitlement to benefits pursuant to 38 U.S.C. §1151. [R. at 1750-51]. The Veteran asserted that he had gallbladder surgery in the spring of 1977 at the Brooklyn VA Medical Center, and that he had complications that resulted in an "ultra[-]long stay [and] . . . [a] fistula at the surgical site." [R. at 1750].

In September 2012, in response to a VA medical records request, the New York RO provided in a letter that it had conducted a search of the Brooklyn VA facility, St. Albans facility, and the Ryerson/Chapel Street outpatient care facility, and that no records relating to the Veteran were found. [R. at 599]. In October 2012, the New York RO issued a formal finding of unavailability of medical records. [R. at 500].

The RO thereafter issued a rating decision in which it denied the Veteran's claim to entitlement to compensation under 38 U.S.C. § 1151. [R. at 490-99]. In October 2013, the Veteran filed a Notice of Disagreement (NOD) in which he appealed "the rejection of [his] disability claims." [R. at 477].

In January 2013, Appellant informed VA of the Veteran's death, and filed an application for accrued benefits. [R. at 459-70]. Following an additional attempt to obtain medical records pertaining to the Veteran's asserted gallbladder surgery at a VA medical facility, the RO received another response in February 2014 explaining that there was no indication that the Veteran was ever even registered at a VA medical center, and that his name did not appear in the facilities system. [R. at 274].

In June 2016, the RO sent Appellant a letter in which it concluded that she was considered a substitute for the Veteran's appeal. [R. at 139-40]. Later that month, the RO issued a Statement of the Case (SOC), after which Appellant perfected her appeal to the Board. [R. at 98-137]; [R. at 47-48].

In November 2018, the Board issued the decision on appeal. [R. at 1-28]. Appellant appealed that decision.

IV. ARGUMENT

In her *pro se* brief, Appellant has provided no argument, reference to any evidence, or any other indication as to why she believes that the Board wrongly decided the claims on appeal. *See* Appellant's Brief [App. Br.] at 1-4. Appellant merely indicated that she was appealing the claims denied by the Board, [App.Br.

at 1], provided page numbers in the Board decision in response to the question of whether she believed the Board "incorrectly decided," issues, *id.*, recounted that VA had issued multiple prior denials of benefits to the Veteran, and asserted that no notice of those decisions were received, and requested "[a]pproval of VA benefits." [App. Br. at 2]. Also, attached to Appellant's informal brief is a letter labeled as a "Notice of Disagreement," which appears to be another veteran's informal brief to the Court. *See* [App. Br. at 3-4]. In that attachment, it was argued that the other veteran should be granted a total disability rating based on individual unemployability (TDIU) due to that veteran's service-connected hearing loss. [App. Br. at 3-4].

Insofar as Appellant asserts that VA closed the Veteran's case twice without a notice of denial, the Secretary initially notes that the Appellant does not specify how the issue of notice of any prior denial is relevant to the issue of whether an award of service connection was warranted for the claims on appeal. *See* [App. Br. at 2]; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (Appellant bears the burden of persuasion on appeal), *aff'd per curiam* 232 F. 3d 908 (Fed. Cir. 2000). The Secretary notes that notice of a prior denial of benefits has no bearing on the essential elements of service connection. *See Hickson v. West*, 12 Vet.App. 247, 253 (1999) (establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability).

Moreover, even assuming *arguendo* that the issue of notice of the prior final denials is somehow relevant to the issue of entitlement to service connection of the claims on appeal, Appellant provides no indication of which two of the three prior denials of service connection of obesity and a psychiatric condition were lacking notice. *See* [App. Br. at 3]. She also provides no argument to rebut the presumption of regularity to show that any of those three denials were improperly delivered, and indeed, the record reflects that notice of these decisions were mailed to the Veteran. *Id.; see* [R. at 4287]; [R. at 4228-31]; [R. at 4192-93]; *Crumlich v. Wilkie*, 31 Vet. App. 194, 205-06 (2019) (the presumption of regularity may be rebutted by producing clear evidence that VA did not follow its regular mailing practices or that its practices were not regular); *Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (applying the presumption of regularity to the RO's mailing of its decision to a Veteran). To the extent Appellant believes that the Veteran should have been notified that the decisions became final, there is no basis or requirement in law that VA provide such notice of the finality of a decision. Rather, finality of a decision occurs when a veteran fails to appeal the rating decision within one year. 38 U.S.C. § 7105 (a notice of disagreement shall be filed within one year from the date of the mailing of notice of the decision of the agency of original jurisdiction); *DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006) ("when a case or issue has been decided and an appeal has not been taken within the time prescribed by law, the case is closed, the matter is ended, and no further review is afforded"). Thus, because the issue of notice of a prior rating is not

relevant to show entitlement to service connection, and Appellant has not met her burden to show relevancy here, let alone provide any argument to rebut the presumption of regularity or show that notice of the finality of the decisions was required, the Court should reject Appellant's argument.

The Secretary is cognizant of the duty to give a liberal and sympathetic reading to the informal briefs of *pro se* Appellants, and has done so in this case. *See Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with respect to all *pro se* pleadings, VA must give a sympathetic reading by "determining all potential claims raised by the evidence, applying all relevant laws and regulations") (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *Calma v. Brown*, 9 Vet.App. 11, 15 (1996); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *see also* U.S. VET.APP. R. 28(e) (providing that a *pro se* appellant need not conform to the strictures regarding the content of his brief). Nonetheless, even a liberal and sympathetic reading of Appellant's informal brief reveals that she failed to provide any argument or reference to evidence that may support the claims denied by the Board, let alone a theory of prejudicial error that would require remand based thereon. *See* [App. Br. at 1-4].

It is not the duty of this Court, or the Secretary, to search the record to uncover any errors not identified by Appellant. *See Breeden v. West*, 13 Vet.App. 250, 250 (2000) (per curiam order). Thus, insofar as Appellant bears the burden of demonstrating error on appeal, and has not done so in her brief, the Secretary asserts that Appellant has not established that the Board committed error

warranting remand. *See* 38 U.S.C. § 7261(b)(2) (Court is required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders,* 556 U.S. 396, 406 (2009); *Hilkert*, 12 Vet.App. at 151; *Marciniak v. Brown,* 10 Vet.App. 198, 201 (1997) (holding that the appellant bears the burden of demonstrating prejudice on appeal and that remand is unnecessary "[i]n the absence of demonstrated prejudice").

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's November 9, 2018, decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that on November 12, 2019, a copy of the foregoing was mailed, postage prepaid, to:

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