
United States Court of Appeals for Veterans Claims

Vet.App. No. 18-4499

JERRIAN O. LOCKETT,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

In his opening brief, Appellant established that the Court should vacate and remand the Board's April 24, 2018, decision because it provided an inadequate statement of reasons or bases to support its decision. First, it failed to meaningfully address why Mr. Lockett's headaches did not result in "functional impairment of earning capacity" that would qualify his condition as a disability for the purposes of 38 U.S.C. § 1110 under the binding legal principles set forth in *Saunders v. Wilkie*, 886 F3.d 1356, 1363 (Fed. Cir. 2018). Appellant's Brief (Br.) at 6-9. Second, despite the issues having been raised by the record and Mr. Lockett, the Board wrongly failed to address whether Mr. Lockett is entitled to service connection for dry eye syndrome or Hepatitis. *Id.* at 9-10.

In his responsive brief, the Secretary concedes that remand for the Board to address entitlement to service connection for dry eye syndrome is required. Secretary's Br. at 11. However, the Secretary maintains that the Board's findings that Mr. Lockett did not have a headache disability or sleep disorder were supported by an adequate statement of reasons or bases. Secretary's Br. at 7-10, 11-16. Because the Secretary's arguments would wrongly require the Court to adopt factual findings not made by the Board, the Court should reject the Secretary's arguments and remand both the headache and sleep disorder claims.

ARGUMENT

I. THE BOARD DID NOT MAKE A FINDING THAT MR. LOCKETT DOES NOT SUFFER FROM HEADACHES THAT CAUSE FUNCTIONAL IMPAIRMENT IN EARNING CAPACITY.

In his brief, the Secretary essentially concedes that the Board erred by relying on the lack of a headache diagnosis for its finding that Mr. Lockett did not have a headache disability, in violation of *Saunders v. Wilkie*. Secretary's Br. at 7-8. However, the Secretary also maintains that this error was not prejudicial because "the Board also correctly noted that the record as a whole did not demonstrate a recurrent headache disability even absent a diagnosis, and, thus, Appellant has not demonstrated that the Board's error was prejudicial because he still has not demonstrated that the outcome of the Board's decision would be different without this error." *Id.* at 8. In support of this argument, the Secretary does not cite any language where the Board found that Mr. Lockett does not suffer from headaches or that his headaches do not cause a functional impairment in earning capacity. Instead, the Secretary relies solely on the Board's listing of the medical and lay evidence and asks the Court, in the first instance, to conclude that the result of this claim would have been the same if *Saunders* had been applied by the Board. Secretary's Br. at 9-10.

The Court must reject the Secretary's argument because it nothing more than a thinly veiled effort to get the Court to adopt his lawyers' interpretation of the evidence. As a matter of law, a disability exists under 38 U.S.C. § 1110 where the veteran's symptoms cause "functional impairment of earning capacity." *Saunders*, 886 F.3d at 1365-66. "Functional impairment," the Federal Circuit ruled, is defined as the inability of the body or a constituent part of it "to function under the ordinary conditions of daily life including employment." *Saunders*, 886 F.3d at 1363 (quoting 38 C.F.R. § 4.10). In other words,

pain alone can qualify as a disability where it diminishes the body's ability to function, even where it is not diagnosed or connected to a current underlying condition. *Id.*

The Secretary does not and cannot point to a single portion of the Board's decision where a finding was made concerning whether Mr. Lockett's headaches cause functional impairment in earning capacity. Nor can the Secretary point to a portion of the Board's decision where it found that Mr. Lockett does not suffer from headaches. Instead, his attorneys rely on the Board's listing of evidence and asks the Court itself to find in the first instance that the standard under *Saunders* cannot be met by the evidence of record. Secretary's Br. at 10. The Court, however, cannot sustain the Board's decision on a basis other than that provided by the Board. *See Mayfield v. Nicholson*, 444 F.3d 1328, 1337 (Fed. Cir. 2006) (court cannot affirm a Board decision on bases other than those advanced by the Board); *see also Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005), *rev'd in part on other grounds*, 451 F.3d 1344 (Fed. Cir. 2006) (rejecting the Secretary's defense of decision because "the Board did not set forth any such rationale; it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court."). As a result, the Secretary's argument is without merit.

Finally, the Secretary's suggestion that the Board's failure to follow *Saunders* was harmless is also without merit. Specifically, the Secretary's assertion that "further discussion of the Federal Circuit's decision in *Saunders* would not affect the outcome of the Board's decision" is based on nothing more than his attorneys' preferred interpretation of the evidence. Secretary's Br. at 10. As demonstrated in Appellant's opening brief, Mr. Lockett while under oath described in detail how his headaches adversely impact his daily

life and employment. During his February 2018 Board hearing, Mr. Locket was asked about prostrating attacks of his headache condition and this exchange occurred:

MISS SIMPSON: How often do you have prostrating attacks? Like how often does your head hurt so badly that you can't do anything, can't go anywhere, you don't work, you're at home or you're just still and quiet until it goes away? How often?

VETERAN: I'd say weekly.

MISS SIMPSON: How many times a week?

VETERAN: Two or three times a week.

MISS SIMPSON: Is it to the point where you can't work? Are you employed?

VETERAN: Yes, I am.

MISS SIMPSON: Is it to the point where you're missing work?

VETERAN: Yes.

MISS SIMPSON: You are missing work, okay.

(R. at 62 (49-65)) (emphasis added). Accordingly, while under oath Mr. Lockett testified that his headache episodes prevented him from doing anything and caused him to miss work on a weekly basis.

The above testimony is prima facie evidence of a “functional impairment of earning capacity” as required by *Saunders*. As a result, had the Board applied the correct legal standard it likely would have found that Mr. Lockett had a current disability, which in turn could have led to service-connection for his headache disorder. Moreover, in the context of veterans’ benefits cases, this Court has held that when determining whether or not

prejudice exists, the Court does not focus on what the evidence currently supports. *Washington v. Nicholson*, 21 Vet.App. 191, 195 (2007); *Overton v. Nicholson*, 20 Vet. App. 427, 435 (2006). Instead, the proper analysis focuses on whether the appellant lost an opportunity to submit evidence or advance his claim as a result of VA error. *Id.* Here, the Board's failure to find that Appellant had a current disability due its application of the wrong law, clearly denied Mr. Lockett the ability to advance his claim further. As a result, remand is required.

II. THE BOARD NEEDED TO ADDRESS HEPATITIS BECAUSE IT WAS EXPRESSLY RAISED BY A PRO SE VETERAN.

It is well settled law that the Board is obligated to address all issues of fact and law that are reasonably raised by Appellant or the evidence of record. *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). In this case, during his February 2018 hearing, Mr. Lockett expressly raised the issue of his sleeping difficulties being caused by a Hepatitis infection related to service. (R. at 58 (49-65)). As a result, the issue of whether or not Mr. Lockett has sleeping issues due to a potentially service-connected Hepatitis infection was not only reasonably raised, it was expressly raised by Mr. Lockett. Thus, the law required the Board to address this theory of the case, and it simply did not do so.

In his responsive brief, the Secretary does not counter the controlling law, or dispute that Hepatitis was raised in the sworn testimony of record. Instead, he attempts to argue that the medical evidence does not support a Hepatitis infection and that Mr. Lockett "only addressed hepatitis in the context of asserting that this event in service was related to an acquired psychiatric disorder." Secretary's Brief at 13. The Secretary's argument is

completely without merit. First, although the medical evidence of record is not definitive on the diagnosis of a Hepatitis infection, the evidence is clear that hepatitis has been at issue. (R. at 860) (discussing Hepatitis); (R. at 1158) (indicating positive screening for Hepatitis B). Furthermore, the question of whether or not Mr. Lockett has Hepatitis is one of fact that must be address by the Board in the first instance. As stated earlier, the Court cannot affirm the Board's decision based on factual findings not advanced by the Board. *See Mayfield*, 444 F.3d at 1337; *see also Smith*, 19 Vet. App. At 73 (2005).

Second, the record does not support the Secretary's contention that Hepatitis was only raised in relation to a psychiatric condition. During his hearing, Mr. Lockett stated:

VETERAN: Well, when I was stationed in Germany, my whole unit came down with Hepatitis C when we were in the field. So, that was the only time that I've been in my life, and I'm 56 years old, that I've been hospitalized. I was hospitalized for a whole month and my unit. We were quarantined, and I can't find that paperwork anywhere. But my whole unit contracted, from eating from dirty utensils, Hepatitis C. So that's still on my mind. Every time I urinate, I look at my urine and make sure my urine is clear.

JUDGE: Let me jump in. Are you saying that you believe the Hepatitis C you contracted in service lead to a sleep disability?

VETERAN: Yes sir.

(R. at 58 (49-65)) (emphasis added). There was no equivocation on the part of Mr. Lockett. When asked if he was asserting that Hepatitis caused his sleeping disability, he said yes. *Id.* There is no equivocation in this testimony, and the Secretary fails to explain why a theory of the case expressly raised by Mr. Lockett can validly go unaddressed by the Board. As a result, the Secretary's argument should be rejected.

Perhaps realizing the infirmity of his argument about the record, the Secretary next asserts that the case law requiring the Board to sympathetically address Mr. Lockett's pleadings and testimony is inapplicable because "Appellant retained an attorney prior to filing NOD in the appeal of his sleep disorder claim, and the attorney also assisted him in filing his VA Form 9." Secretary's Br. at 14. In essence, the Secretary suggests that the Court should deem the Hepatitis theory waived because Mr. Lockett had an attorney at the time his appeal was filed.

The Court should reject the Secretary's argument because at the time of his February 2018 hearing, and at the time the Board issued this decision, Mr. Lockett was no longer represented by an attorney. Specifically, his attorney withdrew as counsel on October 5, 2015. (R. at 664-666). As a result, Mr. Lockett did not have an attorney when he raised his Hepatitis theory and all of the cases cited by him in his opening brief are applicable. Furthermore, the Secretary fails to cite to any law that would prohibit a pro se veteran from raising a new theory of the case on appeal to the Board due merely to the prior presence of an attorney. This is due to the fact that no such authority exists. Accordingly, because the Secretary's arguments are baseless, the Board's decision to not address Mr. Lockett's Hepatitis theory denied him an opportunity to advance his claim and remand is required. *See Washington, supra*.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's opening brief, the Court should vacate the Board's April 24, 2018, decision that denied Mr. Lockett service connection for a headache disorder, an eye disorder, and a sleep disorder, and remand this

case with an Order that the Board adequately address whether a current disability exists as to each claim.

Respectfully submitted,

November 12, 2019

/s/ Patrick A. Berkshire

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