Vet. App. No. 19-1457

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT HUDSON, JR.,
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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IN THE UNITED STATES COURT OF APPEALS
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	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 19-1457
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the November 2, 2018, decision of the Board of Veterans' Appeals (Board) that determined new and material evidence was not received to reopen the claim of entitlement to service connection for a seizure disorder; denied entitlement to an initial compensable rating left ear hearing loss; and entitlement to a rating in excess of 20% for diabetes mellitus (DM), where the Board's findings are plausibly based on the evidence of record and supported by Department of Veterans Affairs (VA) statutes and regulations and current case law, as well as an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

Nature of the Case

Robert Hudson, Jr., (Appellant), appeals the November 2, 2018, Board decision to the extent that it determined new and material evidence was not received to reopen the claim of entitlement to service connection for a seizure disorder; denied entitlement to an initial compensable rating left ear hearing loss; and entitlement to a rating in excess of 20% for DM.

The Board reopened the claim of entitlement to service connection for hypertension, to include as secondary to PTSD, depressive disorder, diabetes mellitus, or medications taken for those conditions. This is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (the decision to reopen a claim is a favorable finding over which the Court lacks jurisdiction.).

The Board remanded claims of entitlement to an effective date prior to May 20, 2014, for the grant of entitlement to service connection for left ear hearing loss; whether new and material evidence was received to reopen a claim of entitlement to service connection for a skin rash of the right lower extremity; entitlement to service connection for tinnitus, to include as secondary to service-connected left ear hearing loss; entitlement to service connection for posttraumatic stress disorder (PTSD); entitlement to service connection for depressive disorder; entitlement to service connection for a sleep disorder, to include as secondary to PTSD and depressive disorder; entitlement to service connection for coronary artery disease, to include as

secondary to PTSD, depressive disorder, or diabetes mellitus; entitlement to service connection for hypertension, to include as secondary to PTSD, depressive disorder, diabetes mellitus, or medications taken for those conditions; entitlement to service connection for acid reflux, to include as secondary to PTSD, depressive disorder, or diabetes mellitus; and entitlement to service connection for erectile dysfunction, to include as secondary to PTSD, depressive disorder, or diabetes mellitus. The Court lacks jurisdiction over these remanded matters. *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").

Statement of Relevant Facts

Appellant served on active military duty from January 1968 to December 1971. [Record (R.) at 3306]. In June 2008, Appellant filed a claim for entitlement to service connection for seizures, among other claims. [R. at 3108-3122]. A February 2009 rating decision denied Appellant's claim of entitlement to service connection for a seizure disorder. [R. at 2838-2845]. The rating decision noted there was no evidence of a seizure disorder during Appellant's active military duty service and the first medical diagnosis of a seizure disorder was not until 1997, 26 years after Appellant was discharged from active military service. [R. at 2841]. In July 2009, Appellant filed a Notice of Disagreement (NOD). [R. at 2834]. A Statement of the Case (SOC) was issued in October 2009. [R. at 2778-2798]. Appellant did not perfect the appeal and it became final.

In January 2013, Appellant sought to reopen his seizure claim. [R. at 2679-2682]. An August 2013 VA duty to assist letter advised Appellant that in order to reopen his previously denied seizure disorder claim, he needed to provide new and material evidence. [R. at 2669, (2668-2676)]. Although Appellant did not provide any additional evidence relating to his seizure disorder, a September 2013 rating decision reopened Appellant's seizure claim but denied entitlement to service connection. [R. at 2585-2593].

Appellant was provided a VA hearing examination in May 2014. [R. at 2274-2278]. Audiological testing revealed Appellant had change in his hearing threshold in service, but it did not meet the criteria for a disability for VA purposes. [R. at 2276, (2274-2278)]. Nevertheless, a June 2014 rating decision granted entitlement to service connection for left ear hearing loss, noncompensable. [R. at 2258, (2249-2260)].

An April 2015 rating decision granted entitlement to service connection for DM, 20% disabling. [R. at 2096-2116]. In June 2015, the RO issued Statements of the Case (SOCs) regarding Appellant's hearing loss and seizure claims. [R. at 2039-2060; 2061-2079]. Appellant perfected his appeal as to his left ear hearing loss claim in July 2015. [R. at 2020, 2023; *see also* R. at 2033].

In September 2015, Appellant was provided a VA DM examination. [R. at 1839-1841]. The examiner noted Appellant's DM was managed by restricted diet and oral hypoglycemic agents. [R. at 1839]. A November 2015 rating decision continued the 20% disability rating for DM. [R. at 1781-1799].

In January 2016, Appellant was provided another VA hearing examination. [R. at 1494-1497]. After audiological testing, the examiner again noted Appellant had a change in his hearing threshold in service, but it did not meet the criteria for a disability for VA purposes. [1496].

Appellant was provided another VA DM examination in May 2017. [R. at 1144-1146]. The examiner noted Appellant's DM was managed by restricted diet, oral hypoglycemic agents, and home monitoring of blood glucose. [R. at 1144]. In May 2017, an SOC was issued regarding Appellant's DM claim. [R. at 1115-1135]. Appellant perfected his appeal as to his DM claim in June 2017. [R. at 41-42].

In the decision on appeal, the Board determined new and material evidence was not submitted to warrant reopening the claim of entitlement to service connection for seizures. [R. at 9, (1-19)]. The Board determined that the evidence did not warrant a higher disability rating for Appellant's service-connected left ear hearing loss and DM disabilities. [R. at 10, 12]. This appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the November 2, 2018, Board decision that determined new and material evidence was not received to reopen the claim of entitlement to service connection for a seizure disorder; denied entitlement to an initial compensable rating left ear hearing loss; and entitlement to a rating in excess of 20% for DM because the Board provided adequate reasons or bases for its

determinations and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error.

IV. ARGUMENT

The Board Provided an Adequate Statement of Reasons or Bases for Denying Appellant's Claims.

The Court should affirm the Board's decision that denied Appellant's claims because there is a plausible basis for the Board's determinations and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error. *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (noting that the appellant bears the burden of persuasion on appeals to this Court); *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); 129 S.Ct. 1696, 173 L.ED. 2d 532 (2009) (Appellant bears the burden of demonstrating prejudicial error).

The Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To accomplish this, the Board is required to assess the credibility, probative value, and persuasiveness of the evidence and to provide reasons for rejecting material evidence that is favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F. 3d 604 (Fed. Cir. 1996) (table). Contrary to Appellant's assertions, the Board did so in this case. Thus, the Court should affirm the Board's decision.

A. Seizure Disorder

"New evidence" means existing evidence not previously submitted to agency decisionmakers. 38 C.F.R. § 3.156(a). "Material evidence" means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. *Id.* New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened and must raise a reasonable possibility of substantiating the claim. *Id.* Whether evidence is material "depends on the basis on which the prior claim was denied." *Kent v. Nicholson*, 10 Vet.App. 1, 10 (2006).

Appellant argues the Board provided inadequate reasons or bases for explaining why it discounted favorable evidence that he argues is new and material because it raises a new theory of entitlement. [Appellant's Brief (App. Br.) at 2]. 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). But the Board is "not required sua sponte to raise and reject 'all possible' theories of entitlement in order to render a valid opinion" and only errs when it fails to address issues either expressly raised by the appellant or reasonably raised by the record. *Id.*; *Robinson*, 557 F.3d at 1361 ("Where a fully developed record is presented to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to address or consider such a theory").

Essentially, Appellant contends he presented evidence that his seizure disorder and mental health condition are intertwined. [App. Br. at 3]. Appellant asserts his January 2013 claim to reopen his seizure claim intermixed his seizure and mental health symptoms. [*Id.*; *see* R. at 2679]. Looking at the evidence, Appellant's letter reported symptoms of depression and PTSD; he specifically stated, "I don't like it when they call me wired or crazy because I take medication or sometimes have seizures." *Id.* This is the only instance to which Appellant refers to seizures in this letter and he does not intertwine his symptoms. [R. at 2769-2682]. While new as this letter was not previously considered, it is not material. Appellant merely stated he disliked it when others called him names because he took medication or had seizures. [R. at 2679]. This is does not raise a new theory of recovery. *Robinson,* 21 Vet.App. at 553. Moreover, he does not cite to any evidence to support his assertion that his mental health disorders and his seizures are related in any way.

The only evidence Appellant highlights to support his assertion that his seizure and mental health symptoms are intermingled is a December 2005 VA mental health treatment record where he reported that on one occasion, he experienced visual hallucinations prior to a grand mal seizure. [App. Br. at 4; *see* R. at 667, (667-670)]. However, as the Board correctly noted, *see* [R. at 9-10], this evidence could not be new because it was not added to the record following the February 2009 Rating Decision. *See* 38 C.F.R. § 3.156(a) (noting that new evidence "means existing evidence not previously submitted to agency

decisionmakers"). Indeed, the December 2005 record was of record at the time of the February 2009 Rating Decision. Because the evidence is not new, the Board was not required to reopen the claim. *Shade v. Shinseki*, 24 Vet.App. 110, 120 (2010); *see also Untalan v. Nicholson,* 20 Vet.App. 467, 470 (2006) ("The presentation of new arguments based on evidence already of record at the time of the previous decision does not constitute the presentation of new evidence"). Therefore, Appellant's argument is not persuasive.

To the extent Appellant attempts to allude that VA combined his seizure and mental health symptoms in its August 2013 duty to assist letter, this assertion is based on a misreading and attempted misinterpretation of the record as VA did not intertwine these issues. Rather, the notice letter simply said that VA would consider whether seizures and depression/sleep disorder is associated with dioxin exposure if evidence is received demonstrating they are medically associated with dioxin exposure. [R. at 2669]. The argument that by simply listing multiple disabilities in one letter indicates they are associated with one another is an absurd interpretation of the evidence, and one that is not supported by the record or by any law. Indeed, the subsequent rating decision made clear the scope of each claim. [*See* R. at 2588].

Similarly, the June 2015 SOC listed the issue as, "service connection for seizures," and then separately "service connection for depression," "service connection for sleep disorder," and "service connection for post-traumatic stress disorder." [R. at 2063]. An August 2018 letter from the Board to Appellant's

attorney also clearly listed the issues as, “whether new and material evidence has been received to reopen a claim of entitlement to service connection for a seizure disorder,” and “entitlement to service connection for PTSD,” and “entitlement to service connection for depression.” [R. at 22]. Thus, there is no indication in the August 2013 letter or in VA’s subsequent adjudication of the various disabilities that VA was ever treating them as related in any way. As such, Appellant’s argument is wholly meritless.

Furthermore, at no point in time prior to appeal to this Court did Appellant’s attorney raise any objection to how the issue on appeal was framed or indicate that Appellant’s seizure claim was intertwined with his depression or PTSD claims or should also include entitlement on a secondary basis to either of these claims. Appellant’s attorney has been representing him since September 2013. [R. at 2568]; *see Burton v. Principi*, 15 Vet.App. 276, 277 (2001) (per curiam order) ("We should not encourage the kind of piecemeal litigation in which the appellant here has engaged."); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ((“Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation”). Thus, because the Board is not required "to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision," *Robinson,* 21 Vet.App. at 553, and the record does not reasonably raise this theory of entitlement, or demonstrate new and material

evidence that the Board failed to consider, the Board's determination that new and material evidence had not been received to reopen Appellant's seizure claim is not clearly erroneous. *Suaviso v. Nicholson,* 19 Vet.App. 532, 533 (2006) (holding that the Court reviews whether appellant has submitted new and material evidence to reopen a previously denied claim under the "clearly erroneous" standard of review); [R. at 10].

B. Left Ear Hearing Loss

Disability ratings for hearing loss are derived from the mechanical process of applying the rating schedule to the specific numeric scores assigned by audiology testing. *See Lendenmann v. Principi,* 3 Vet.App. 345, 349 (1992). Appellant's service-connected hearing loss was evaluated as non-compensable, pursuant to 38 C.F.R. §§ 4.85, 4.86. [R. at 2257].

Appellant simply asserts that his hearing loss worsened between examinations in May 2014 and January 2016, and therefore it likely continued to worsen such that he is probably eligible for a compensable evaluation. [App. Br. at 6-7]. However, neither examination showed compensable hearing loss. [*See* [R. at 1496; 2276]. Without evidence of compensable hearing loss, there is no basis for a compensable disability rating. *Lendenmann,* 3 Vet.App. at 349*; see Palczewski v. Nicholson,* 21 Vet.App. 174, 181 (2007). Appellant presents no evidence other than his mere speculation that his condition may have now worsened to a compensable level. There is no evidence that Appellant has the requisite training or credentials to render an opinion as to whether his hearing

loss was of a compensable level as he is not competent as a lay individual to make such a determination. *Jandreau v. Nicholson,* 492 F.3d 1372, 1377 (Fed. Cir. 2007).

Moreover, to the extent Appellant alleges that the January 2016 VA examination is inadequate because it is now 3 ½ years old, and that "it is most likely stale," citing to case law from 1992, [App. Br. at 8], he conveniently ignores more recent precedent clearly laying out that the mere passage of time does render an examination inadequate. *Palczewski,* 21 Vet.App. at 182. An adequate examination is "based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." 38 U.S.C. § 5103A; *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). The adequacy of medical reports must be based upon a reading of the report as a whole. *Monzingo v. Shinseki,* 26 Vet.App. 97, 105-106 (2012) (per curiam order); *Acevedo v. Shinseki,* 25 Vet.App. 286, 293 (2012). The January 2016 VA examiner provided an in-person examination and described Appellant's left ear hearing loss by providing puretone thresholds and speech discrimination scores. [R. at 1494-1495]. Appellant presents no other argument to allege the examination is inadequate due to the passage of time, which is insufficient to demonstrate error. Thus, his argument is unpersuasive.

C. DM

Appellant's service-connected DM is rated as 20% disabling pursuant to 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913. [R. at 1802]. That code provides a 20 percent rating for diabetes requiring insulin and a restricted diet, or, oral hypoglycemic agent and restricted diet. 38 C.F.R. § 4.119, DC 7913. A 40 percent evaluation requires insulin, restricted diet, and regulation of activities. *Id*.

Appellant asserts that his DM worsened between examinations in September 2015 and May 2017, and therefore it likely continued to worsen such that he is probably eligible for a 40 percent evaluation. [App. Br. at 9-11]. He argues the Board decision provided inadequate reasons or bases for rejecting favorable evidence and relied upon an inadequate examination. [App. Br. at 8]. However, Appellant did not explain what favorable evidence he contends the Board did not consider. [App. Br. at 9-11].

Regarding his assertion that the VA examinations are inadequate, he is mistaken. Appellant notes that neither the September 2015 nor the May 2017 VA examiners provided blood testing and that neither examiner provided primary care or treatment. [App. Br. at 9-10]. But both examiners reviewed Appellant's pertinent medical records, [R. at 1144; 1839], and described his disability in sufficient detail so that the Board was able to provide a fully informed evaluation. [R. at 1133-1146; 1839-1841]. 38 U.S.C. § 5103A; *Stefl*, 21 Vet.App. at 123. Appellant also seeks to argue that his fasting glucose level increased, thus representing a significant shift in the severity of his disability. [App. Br. at 10].

Even if that is true, Appellant's argument demonstrates a misunderstanding of 38 C.F.R. § 4.119, DC 7913. As the Board acknowledged, neither examination showed Appellant required insulin or regulation of activities as part of medical management of diabetes. [R. at 12-13; *see* R. at 1144-1146; 1839-1841]. Therefore, without evidence of insulin or regulation of activities as part of medical management of diabetes, even if his fasting glucose level had increased, there was no basis for an increased disability rating. *See* 38 C.F.R. § 4.119, DC 7913; *Camacho v. Nicholson*, 21 Vet.App. 360, 363-64 (2007) (holding that DC 7913 requires medical evidence to support a rating based on "regulation of activities").

To the extent Appellant asserts his condition *may* have worsened, [App. Br. at 10], and again suggests the record is "stale," he again presents no evidence other than his mere speculation that his condition may have worsened to a higher level. He is not competent as a lay individual to make such a determination. *Jandreau,* 492 F.3d at 1377. As such, the Board did not err where it denied entitlement to an increased evaluation for diabetes. *See* 38 C.F.R. § 4.119, DC 7913*; see also Palczewski,* 21 Vet.App. at 181.

To the extent Appellant asserts that "unexplainably, there are no treatment records [for diabetes] since [his] November 2016 blood tests[,]" there is no indication or allegation that additional treatment records are outstanding. [App. Br. at 10]. The Court should not entertain this undeveloped argument, particularly as stated above, Appellant has been represented by the same counsel since 2013 who has never asserted that there are outstanding records.

Locklear v. Nicholson, 20 Vet.App. 410, 416 (2006); (the Court will not entertain undeveloped arguments); *Coker v. Nicholson,* 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) ("Having initially failed to raise the procedural issue, the veteran should not be able to resurrect it months or even years later when, based on new circumstances, the veteran decides that raising the issue is now advantageous."); *see also Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (affirming the Court's decision not to review a duty-to-assist argument that was not raised before the Board); *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2000) (noting the institutional interests of protecting agency administrative authority and promoting judicial efficiency).

V. CONCLUSION

The Board provided adequate reasons or bases for its determinations. 38 U.S.C. § 7104(d)(1); *Buczynski v. Shinseki,* 24 Vet.App. 221, 223 (2011). In sum, Appellant has failed to carry his burden of persuasion on appeal. *Hilkert,* 12 Vet.App. at 151; *Sanders*, 556 U.S. at 409. This Court should reject Appellant's arguments and affirm the decision on appeal.

Respectfully submitted,

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