Vet.App. No. 18-6537

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOSEPH A. SCHULLER, 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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I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board) September 20, 2018, decision which denied entitlement to an effective date before December 18, 2013, for posttraumatic stress disorder (PTSD), where the Board's findings are plausibly based on a correct application of Department of Veterans Affairs (VA) statutes, current regulations, and case law, as well as an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

On September 20, 2018, the Board issued the decision on appeal, denying Mr. Joseph A. Schuller, Jr. (Appellant) entitlement to an effective date before December 18, 2013, for service connection for PTSD. [Record Before the Agency (R.) at 1-9].

C. Statement of Facts and Procedural History

Appellant served in the United States Marines from August 8, 1966, to August 9, 1968. [R. at 6926]. Appellant's entrance examination and separation examination indicated normal psychiatric evaluations. [R. at 6776-77; 6755-56]. Service treatment records (STRs) do not show a diagnosis, treatment, or any symptoms of any psychiatric condition. [R. at 6754-6817].

On January 28, 1994, Appellant applied for service connection for PTSD, among other conditions. [R. at 6947-50]. On April 19, 1994, the regional office (RO) denied service connection for PTSD because "[t]he evidence of record does not show a diagnosis of post-traumatic stress disorder. The veteran also failed to provide a history of stressful events in service, and there is no evidence which indicates such events were experienced." [R. at 6912-19]. On November 21, 1994, Appellant provided his notice of disagreement (NOD). [R. at 6908-09]. The RO provided the statement of the case (SOC) on December 28, 1994, denying service connection for PTSD finding that there "is no evidence that the veteran has ever been diagnosed with or treated for post-traumatic stress disorder." [R. at

6904 (6899-6904)]. Appellant did not appeal and the April 1994 rating decision became final.

On May 26, 1999, Appellant sought to reopen his claim for service connection for PTSD. [R. at 6893-6909]. He also submitted correspondence detailing several traumatic instances he experienced while in service. [R. at 6855-92 (May 28, 1999, Correspondence)]. On November 20, 1999, the RO again denied Appellant's claim for PTSD finding that the claim was "previously denied by VA…as the evidence did not show any diagnosis of post traumatic stress disorder. Treatment records…do not show any diagnosis or treatment for post traumatic stress disorder." [R. at 6839 (6837-39)]. Appellant did not appeal that rating decision and it became final.

Between February and March 2007, Appellant sought mental health treatment from the Youngstown, Ohio VA Medical Center. [R. at 6463-72]. Appellant was diagnosed with "Posttraumatic Stress Disorder, Provisional" in February 2007. [R. at 6465].

Appellant sought to reopen his claim for PTSD again on December 18, 2013. [R. at 6829-34]. On May 17, 2014, Appellant attended a VA examination and was diagnosed with PTSD. [R. at 6624-31]. The examiner opined that it was more likely than not that Appellant's diagnosed PTSD was related to his military service. [R. at 6630]. Subsequently, the RO granted service connection for PTSD at a 70% evaluation, effective December 18, 2013. [R. at 6605-17].

On June 25, 2014, Appellant submitted a NOD, stating that he disagreed with the effective date. He reported that he was diagnosed with PTSD in 2007 at the Youngstown VA Medical Clinic. [R. at 6601-04]. The RO provided the SOC on January 22, 2016, [R. at 6388-6419], and Appellant submitted his substantive appeal on March 7, 2016. [R. at 6358]. Appellant attended a Board hearing on May 14, 2018, where he reported he was originally diagnosed with PTSD in 2007. [R. at 6139 (6122-6166)]. The Board issued the decision on appeal on September 20, 2018. [R. at 1-9]. Appellant timely appealed the Board's decision on November 21, 2018.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's September 20, 2018, decision because Appellant does not demonstrate prejudicial error with the Board's decision. As Appellant's claim was previously denied because the evidence did not show a diagnosis of PTSD, those previous decisions became final, and none of his cited evidence would be relevant to whether or not a diagnosis of PTSD would have been present, he fails to demonstrate error in the Board's decision. As the Board provided sufficient reasons and bases, the Court should affirm the Board's decision.

IV. ARGUMENT

Personnel Records and Unit Histories Are Not Relevant to Appellant's Claim for An Earlier Effective Date, and Could Not Substantiate An Earlier Diagnosis for PTSD

Appellant argues that VA failed to ensure that the duty to assist had been fulfilled because it did not obtain his complete service personnel records or his unit histories. Appellant's Brief (App. Br.) at 12-17. Appellant's personnel records and unit histories are not associated with his claims file because his personnel records and unit histories are not relevant to his earlier effective date claim as they would not demonstrate a diagnosis of PTSD. VA had no duty to obtain these records and, even if those records were obtained, they would not be relevant to the previous denials in this case. *See* 38 U.S.C. § 5103A; 38 C.F.R. §§ 3.156(c); 3.159(d).

Appellant's legal theory for remand sets up a careful string of dominos that all must consecutively fall for his appeal to be successful. App. Br. at 12-17. First, he argues that the duty to assist required VA to obtain personnel records and unit histories because those records were relevant to his claim for an earlier effective date for the grant of entitlement to service connection for PTSD. App. Br. at 14. Second, he argues that those missing personnel records would possibly substantiate his claim because they would show an in-service stressor, albeit not a diagnosis for PTSD, triggering reconsideration under 38 C.F.R. § 3.156(c). App. Br. at 16. Third, he vaguely implies VA would have been under an obligation to obtain a retrospective opinion. App. Br. at 9. At the end of it all, he argues remand

is necessary for the Board to clean up this hypothetical mess he's crafted after the Board's initial decision. As the Secretary will explain, none of his dominos fall and all his arguments are unpersuasive.

Appellant's arguments conveniently omit crucial facts from which the Court should view this case. First, the January 1994 and November 1999 rating decisions denied entitlement to service connection for PTSD because of *a lack of diagnosis*. [R. at 6904, 6839]; *see* 38 C.F.R. § 3.304(f) (noting that service connection for PTSD requires medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125a). Second, Appellant did not appeal the January 1994 or the November 1999 rating decisions, and those both became final. Appellant does not challenge these two facts nor the fact that the first diagnosis of PTSD was in 2007, [R. at 6465], when he did not have a pending claim. Third, there has been no motion for revision based on clear and unmistakable error (CUE), and even so, Appellant's arguments now regarding duty to assist obtain service personnel records cannot serve as a basis for CUE. *See Sondel v. Brown,* 6 Vet.App. 218, 219-20 (1994) (holding that there is an unassailable principle that the Court does not have jurisdiction to review a CUE theory unless previously adjudicated by the Board); *see also Cook v. Principi,* 318 F.3d 1334, 1346 (Fed. Cir. 2002) (en banc) (a breach of the duty to assist cannot form the basis for a claim of CUE). Thus, to the extent Appellant argues a duty to assist violation in the January 1994 and November 1999 final rating decisions, that

is meritless. These are vital facts that the Court should keep in mind in viewing the remainder of Appellant's § 3.156(c) arguments.

Turning now to the duty to assist arguments Appellant makes under § 3.156(c), VA was not required to obtain Appellant's service personnel records or unit histories because they are not relevant to the earlier effective date claim on appeal because they would not show a diagnosis for PTSD. Generally, the Secretary is required to assist a claimant in obtaining evidence necessary to substantiate his claim for benefits. 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159. This requires that the Secretary make reasonable efforts to obtain all adequately identified, federal records relevant to his claim. *See Golz v. Shinseki,* 590 F.3d 1317, 1322 (Fed. Cir. 2010) (clarifying that the duty to assist in obtaining records extends only to relevant records).

Records are potentially relevant if they "may be related to the claim" or if "there is a possibility that the records could substantiate the claim." *Raugust v. Shinseki*, 23 Vet.App. 475, 478 (2010). Under § 5103A(c), the Secretary has a duty to obtain service records, including personnel records, only "if [they are] relevant to the claim." 38 U.S.C. § 5103A(c)(1)(A) (noting that the Secretary should obtain other relevant records pertaining to the claimant's active military service that are held or maintained by a governmental entity if furnished sufficient information to locate such records). Moreover, an appellant who claims that the Board erred in not obtaining certain records must do more than merely assert the possibility that those records could be relevant. *Raugust*, 23 Vet.App. at 478.

(assertion that it was "conceivable" that certain records would have aided claim insufficient to establish error in failure to obtain those records). There "must be specific reason to believe these records may give rise to pertinent information" such as "specific allegations" by the claimant that the records are relevant. *Golz,* 590 F.3d at 1323. This is because the duty to assist is not boundless in scope. *Id. at* 1320-21; *see Gobber v. Derwinski*, 2 Vet.App. 470, 472 (1992) (holding that the statutory duty to assist "is not a license for a 'fishing expedition' to determine if there *might* be some unspecified information which could possibly support a claim"); *see also Walch v. Shinseki*, 563 F.3d 1374, 1378 (Fed. Cir. 2009) (recognizing that the "duty to assist is not an unbounded obligation").

Here, Appellant's personnel records and unit histories are not relevant to the issue on appeal because they would not demonstrate or discuss any medical diagnoses, including a diagnosis for PTSD. As stated above, the RO previously denied Appellant's claim for PTSD because there was *no evidence of a diagnosis* of PTSD. [R. at 6912-19 (July 18, 1994, Rating Decision); 6904 (6899-6904) (December 28, 1994, SOC); 6837-39 (November 20, 1999, Rating Decision)]. Personnel records are primarily administrative records, containing information about the subject's service history such as date and type of enlistment and appointment; duty stations and assignments, training, qualifications, performance; awards and decorations received; disciplinary actions; and date and type of separation or discharge. *See* The U.S. National Archives and Records Administration, *What is an Official Military Personnel File (OMPF)* (November 22,

2019), https://www.archives.gov/personnel-records-center/ompf-background. Detailed information about the veteran's participation in battles or other military engagements are not contained in the personnel record. *Id*. Similarly, Appellant's personnel records and unit history would not detail medical conditions, and thus, would not be relevant to the issue on appeal.

The relevant service records that would have shown evidence of a diagnosis of PTSD are his STRs, which were associated with the claims file since the initial final rating decision in 1994. [R. at 6916 (6912-19) (July 18, 1994, Rating Decision)]. There is no evidence in the STRs that Appellant was ever diagnosed with or treated for a psychiatric condition while in service. [R. at 6754-6817]. Importantly, these records were considered when VA first decided the claim in an unappealed, final rating decision, [R. at 6916], and so do not trigger reconsideration under 38 C.F.R. § 3.156(c). Appellant does not challenge this fact or allege that any records are missing. *See Pederson v. McDonald,* 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief.").

Additionally, Appellant accepts and acknowledges that he was originally diagnosed with PTSD for the first time in 2007. [R. at 6139 (6122-6166)]. If he was initially diagnosed with PTSD in 2007, personnel records or unit histories would not contain a diagnosis for PTSD, by his own account. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (2007) (noting that lay statements are competent

evidence as to observable features or symptoms of an injury or illness but are not competent as to complex medical questions). Thus, the Board's upholding of the effective date of December 18, 2013, the date of claim, is accurate as a matter of law. [R. at 6-7]; 38 U.S.C. § 5110(a) (the effective date of an award based on a claim reopened after final adjudication shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor).

Appellant fails to present *any* argument that his personnel records or unit histories were relevant to the lack of PTSD diagnosis finding that underscored the previous final denials. App. Br. at 12-17. In fact, it appears that Appellant mistakes the fundamental facts of this case, arguing primarily that the in-service stressor was the only reason his claim was initially denied. App. Br. at 17. As stated, Appellant's claim was denied initially because there was no evidence of a diagnosis *and* no evidence of in-service stressor. [R. at 6912-19 (July 18, 1994, Rating Decision)]. Appellant's claim was denied in November 1999 because there was no diagnosis of PTSD. [R. at 6837-39]. Appellant's omission of these facts is fatal to his claim.

Appellant also seeks to skirt his legal burden by repeating that "these service records are pertinent," but gives no explanation why. App. Br. at 17. Appellant simply states, "service personnel records would definitely identify Mr. Schuller's dates of service and unit assignment in Vietnam and could potentially corroborate reported stressor involving combat." App. Br. at 14. The Secretary agrees that personnel records could corroborate what is already known by VA. The record

shows that Appellant experienced traumatic events while in combat in service and personnel records could provide more details regarding his in-service assignments. [R. at 6855-92 (May 28, 1999, Correspondence)]. But personnel records would not show any medical diagnosis, would not substantiate his claim, and are not relevant to the issue on appeal. The Court should find that Appellant's silence as to the relevancy of these records regarding a diagnosis shows that he has failed to demonstrate error in the Board's decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error); *see Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant must demonstrate prejudicial error).

Appellant's case citations do little to advance his relevancy argument, as they highlight cases where the appellant's claim was initially denied because of a lack of stressor, but not because of a lack of a diagnosis. *See Mayhue v. Shinseki*, 24 Vet.App. 273, 280 (2011) (where appellant's claim was initially denied because there was no verification of an *in-service stressor*, but "information contained in the claims file…was ultimately sufficient to verify Mr. Mayhue's stressor." (emphasis added)); *Cohen v. Brown*, 10 Vet.App. 128, 148-49 (holding that VA was required to provide the veteran a specific opportunity to provide additional information to corroborate an *in-service stressor* (emphasis added)).

For instance, Appellant cites *Gagne* to argue that VA was required to "submit as many requests as necessary" to obtain his service personnel records, but fails to note that the Court emphasized that those service records must be "relevant to

the claim" under the definition of the codified statute, 38 U.S.C. § 5103A. *Gagne v. McDonald*, 27 Vet.App. 397, 402. The Court and parties agreed in that case that reports of a military vehicle accident may be elicited from the Joint Services Records Research Center (JSRRC) after multiple requests and would be material to determining whether an *in-service event* occurred. *Id*. at 403 (emphasis added).

Appellant also cites *Emerson* where the Court held that personnel records were relevant to the claim on appeal because those records could substantiate whether *a stressor event* occurred in service. *Emerson v. McDonald*, 28 Vet.App. 200, 203 (2016) (emphasis added). In *Emerson*, Appellant's claim was initially denied "based on the lack of a verified stressor." *Id*. The Court held that, notwithstanding the fact that Appellant's claim for PTSD had been granted after an initial denial, VA was required to "reconsider the claim" upon receiving service department records that were relevant to whether Appellant had a stressor event in service. *Id*. at 210. In the present case, Appellant's identified records would not elicit any indication of a whether Appellant had a medical diagnosis of PTSD.

Reiterating the importance of the relevancy of service records in light of 38 C.F.R. § 3.156, the United States Court of Appeals for the Federal Circuit held in *Blubaugh*, that "[t]he language and overall structure of § 3.156(c) strongly suggest that § 3.156(c)(1) requires the VA to reconsider only the *merits* of a veteran's claim whenever it associates a relevant service department record with his claims file." *Blubaugh v. McDonald*, 773 F.3d 1310, 1312 (Fed. Cir. 2014) (emphasis in original). Thus, Appellant has to demonstrate some relevance of his cited records

to the primary issue for his original denial. As Appellant fails to argue how these personnel records would be relevant to the issue of whether a diagnosis of PTSD was present at the time of his initial, final denial in 1994, he has failed to demonstrate error in the Board's decision. *Hilkert*, 12 Vet.App. at 151; *see Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (concluding that where evidence is overwhelmingly against a claim, remand for reasons or bases deficiency would result in unnecessary additional burdens on the Board and VA with no benefit to the veteran); *Mayfield v. Nicholson*, 19 Vet.App. 121, 129 (2005) (recognizing that where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

Assuming, *arguendo*, that personnel records were obtained, notwithstanding their relevancy, those records would not substantiate his theory for entitlement because they would not show a diagnosis of PTSD and would not allow for an earlier effective date. 38 C.F.R. § 3.156(c) requires VA to reconsider a claim if VA receives or associates with the claims file relevant service department records that existed and had not been associated with the claims file when VA first decided the claim. 38 C.F.R. § 3.156(c)(1). An award based on reconsideration of these relevant service records may provide for an earlier effective date if an award is made based all or in part on the service records obtained. 38 C.F.R. § 3.156(c)(3). In this case, an award could not be made based on personnel records or unit histories because they would not show a diagnosis for PTSD. As stated

above, personnel records and unit histories would not contain information regarding diagnoses and Appellant acknowledged that his original diagnosis of PTSD was in 2007. *See Supra* p. 7-8. Moreover, in granting entitlement to service connection for PTSD, the RO relied only on preexisting service medical records and post-service medical records, including ones providing the critical missing component – a diagnosis of PTSD. [R. at 6612-14]. Thus, it is unclear how Appellant could view § 3.156(c) as triggered in any form in this case.

Finally, to the extent that Appellant suggests a retrospective opinion was required for the Board to adjudicate the case, his suggestion is misplaced and vague, at best. App. Br. at 9; *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006) (terse or undeveloped arguments do not warrant detailed analysis by the Court and are considered waived); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (Appellant is required to plead the allegation of error with some particularity), *rev'd on other grounds sub nom Coker v. Peake*, 310 F.App'x 371 (Fed. Cir. 2008). While a retrospective medical examination may, in some circumstances, be necessary, the Board is not obligated to provide one unless a disability rating "cannot be awarded based on the available evidence" and a retrospective evaluation or opinion is deemed necessary. *See Chotta v. Peake,* 22 Vet.App. 80, 85 (2008). As Appellant's only assertion is that the Board should discuss a retrospective opinion because he should succeed on his duty to assist argument, his argument is not persuasive because remand is not warranted for his duty to assist argument. More importantly, he has not shown that the disability

award could not "be awarded based on the available evidence," *see Chotta,* 22 Vet.App. at 85, especially when, as here, the disability award was granted in 2014 based on the available evidence demonstrating a PTSD diagnosis. Therefore, the Court should not entertain this underdeveloped argument.

Overall, Appellant's argument fails to recognize that he was originally denied service connection in 1994, and again in 1999, because he did not have a diagnosis of PTSD. App. Br. at 12-17. He fails to mention that those decisions became final. He fails to appreciate that § 3.156(c) only applies to *relevant* official service department records. Finally, he fails to present argument for how personnel records or unit histories would (1) be relevant to his claim, (2) substantiate his claim, or (3) require a retrospective opinion. Therefore, he fails to present persuasive argument warranting remand.

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the September 20, 2018, Board decision.

Respectfully submitted,

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