IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DONALD F. CALDWELL,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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Appellant,	)	
	)	
v.	)	Vet.App. No. 19-0416
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the November 8, 2018, Board of Veterans' Appeals (Board or BVA) decision denying the application to reopen the previously denied claim of entitlement to service connection for osteoarthritis of the left knee (claimed as bilateral knee condition) as new and material evidence has not been received.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252, which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Donald F. Caldwell, appeals a November 8, 2018, Board decision denying his application to reopen the previously denied claim of service connection for osteoarthritis of the left knee (claimed as bilateral knee condition) as new and material evidence had not been received.

C. Statement of Relevant Facts

Appellant had active duty service from December 1974 to August 1977. [Record Before the Agency [R.] at 1267].

Appellant initially filed a claim for benefits seeking service connection for a bilateral knee condition in October 2008. [R. at 1161]. He further advised VA that he relocated from California to West Virginia and requested that his claims file be transferred to the regional office (RO) in Huntington, West Virginia. *Id*. In January 2009, following a VA examination, the RO granted service connection for osteoarthritis of the right knee with a disability rating of 10% effective October 14, 2008, but denied service connection for osteoarthritis of the left knee. [R. at 1013 (1013-16) (January 29, 2009, Rating Decision)], [R. at 1026-35 (January 15, 2009, VA Medical Exam)]. Appellant did not file a timely appeal.

In June 2014, Appellant filed a claim seeking an increase in disability rating for his service-connected right knee condition and requested that his claim for service connection for his left knee condition be reopened. [R. at 804 (804-06)]. He alleged that he experienced "[s]evere [p]ain and lost strength in [his] left knee" secondary to his service-connected right knee condition. *Id*.

VA provided another examination in April 2014. [R. at 236-45]. Subsequently, the RO denied the reopening finding that no new and material evidence had been received. [R. at 233-35]. Appellant filed a timely notice of disagreement (NOD) and the RO issued a statement of the case (SOC) in February 2015. [R. at 167-84 (February 2015 SOC)], [R. at 210-211 (NOD)].

In March 2015, Appellant filed a VA Form 9 and requested a Board hearing by live videoconference.[1] [R. at 158 (158-59)]. In March 2018, VA scheduled Appellant's live videoconference hearing for May 29, 2018, at the Huntington RO in Huntington, West Virginia.[2] [R. at 49 (49-52)]. The notice letter outlined the process for rescheduling hearings and requesting a new hearing when a claimant fails to report for a hearing. [R. at 49-50]. In April 2018, VA sent a notice reminding him of the scheduled May 29, 2018, live videoconference hearing at the Huntington RO. [R. at 36 (36-39)].

On May 8, 2018, Appellant requested to reschedule the May 29, 2018, videoconference hearing advising that he only had availability on Mondays due to his work schedule and claiming that the Huntington RO was "very far" from his home. *Id*. In June 2018, VA rescheduled the videoconference for Monday,

[1] VA Form 9 provides claimants with four options to choose from: (A) I do not want a BVA hearing; (B) I want a BVA hearing by live videoconference; (C) I want a BVA hearing in Washington, DC; and (D) I want a BVA hearing at a local office. [R. at 158].

[2] A videoconference hearing takes place at a claimant's local VA regional office. Department of Veterans Affairs, Considering a BVA Hearing? Choose a Video Hearing!, https://www.bva.va.gov/docs/BVA-VideoHearing-508version.pdf.

September 17, 2018, at the Huntington RO. [R. at 28 (28-31)]. On September 5, 2018, VA again notified Appellant of the scheduled September 17, 2018, hearing. [R. at 24 (24-27)]. Appellant did not report to the September 17, 2018, hearing. [R. at 5 (3-12)]. He also did not submit a motion for a new hearing date within 15 days of the missed September 17, 2018, hearing. *Id*.

In November 2018, the Board declined to reopen the claim of entitlement to service connection for osteoarthritis of the left knee. [R. at 4 (3-12)]. This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the Board's decision because its determination that no new and material evidence had been submitted sufficient to reopen his previously denied claim of entitlement to service connection for a left knee disability has plausible basis in the record as the new evidence does not raise the possibility of substantiating the claim. Further, the Court should find no clear error in the Board's decision to decide the case without a hearing as the record clearly shows that Appellant failed to attend his prescheduled Board hearing and did not submit a timely motion for a new hearing date.

IV. ARGUMENT

A. The Board's Determination That No New And Material Had Been Submitted Sufficient To Reopen The Previously Denied Claim Of Entitlement To Service Connection For A Left Knee Disability Has Plausible Basis In The Record And Is Supported By An Adequate Statement Of Reasons Or Bases.

Appellant contends that the Board clearly erred in finding that no material evidence had been received sufficient to reopen the claim of entitlement to service connection for osteoarthritis of the left knee. [Appellant's Brief [AB] at 7-10]. Although he asserts that reversal is required as his April 2014 lay statement constituted material evidence sufficient to trigger VA's duty to assist to provide a medical examination or opinion and to reopen the claim, the Board's determination that none of the evidence submitted since the last rating decision constituted new and material evidence has plausible basis in the record and should be affirmed. [AB at 9-10], [R. at 6-10].

Generally, once a claim has been finally decided and disallowed, it may not be reopened unless "new and material evidence" is presented or secured with respect to the claim. 38 U.S.C. § 5108. "New" evidence means existing evidence not previously submitted, while "material" evidence means evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. 18 C.F.R. § 3.156(a). 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*. A determination that new

and material evidence has not been submitted is reviewed under the clearly erroneous standard. *Sauviso v. Nicholson*, 19 Vet.App. 532, 533 (2006); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

A new etiological theory cannot constitute a new claim, and this Court has held that "a final denial of one theory is a final denial on all theories." *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (citing *Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005)). But while a new theory of entitlement cannot be the basis to reopen a claim under 38 U.S.C. § 7104(b), if the evidence supporting a new theory of entitlement constitutes new and material evidence, then VA must reopen the claim under 38 U.S.C. § 5108. *Boggs v. Peake*, 520 F.3d 1330, 1336-37 (Fed. Cir. 2008).

Appellant argues that he "alleged that his service-connected right knee disability has aggravated his current left knee disability." [AB at 7]. He alleges that his August 2014[3] report that his "right knee gave away while only partial weight bearing on the left knee . . . with increased pain and weakness[,]" is evidence that his service-connected right knee condition aggravated his left knee disability. [AB at 7-10]; *see also* [R. at 238 (236-45) (August 2014 VA examination report)]. It appears from Appellant's argument that he merely disagrees with the Board's

[3] In Appellant's brief to the Court, he identifies an April 2014 VA examination, however, it appears that he is referring to the August 2014 VA examination. *See* [AB at 7], *but see* [R. at 236-45 (August 2014 VA knee and lower leg conditions examination)].

interpretation of the evidence, which is not a valid basis for remand. *See* 38 U.S.C. § 7261(a)(4) (The Board has wide latitude when it comes to deciding matters of fact, and how it interprets the evidence of record, the probative weight it assigns to that evidence, and what, if any, inferences it draws from that evidence, are subject to review only for clear error).

In its decision, the Board considered the August 2014 examination report and found that although it consisted of new evidence, it contained no material evidence sufficient to reopen the claim for service connection for a left knee disability. [R. at 7-8]. Indeed, the Board found as conclusory Appellant's repeated assertions that his left knee disability is secondary to his service-connected right knee disability. [R. at 8]. The Board further found that Appellant had not provided any evidence to support his assertions beyond his conclusory statements. *Id*. Indeed, in his brief to this Court, Appellant admits that his statement was "not absolutely clear[,]" but still argues that his admittedly vague assertion is evidence sufficient to support his contention that his left knee disability was aggravated by his service-connected right knee disability. [AB at 7]. Further, while Appellant correctly contends that he is competent to describe symptoms of his left knee disability, this does not transform his otherwise conclusory assertions into evidence which raised the reasonable possibility of substantiating his claim. *See* [AB at 7-8]; *see also Shade v. Shinseki*, 24 Vet.App. 10, 110, 117 (2010).

The Board further found that his claim for service connection for a left knee disability was previously denied in a January 2009 rating decision as the evidence

failed to demonstrate that it was due to his service but was actually a result of a post-service motor vehicle accident. [R. at 7]. And as the Board correctly found, his reports of pain and weakness of the left knee were previously considered in the January 2009 rating decision. *See* [R. at 8]; *see also* [R. at 1015 (1013-16) (January 2009 rating decision)]. Although Appellant alleged that this pain and weakness is due to his service-connected right knee disability, the Board correctly noted that these statements were mere assertions with no support in the record. *See* [AB at 7-8], [R. at 8]. Further, the record is devoid of evidence that Appellant or his counsel possess the requisite expertise to make such a determination. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007).

Although Appellant offers a new theory of entitlement through secondary service connection, the record is devoid of sufficient evidence to support that theory. *See Boggs*, 520 F.3d at 1336-37 (clarifying that if evidence which supports a new theory of entitlement is presented, then VA must reopen the claim under 38 U.S.C. § 5108). Here, Appellant fails to demonstrate that the Board erred in finding that he did not submit new and material evidence sufficient to reopen his claim of service connection for a left knee disability, and thus, the Board's finding should not be disturbed. *See Gilbert*, 1 Vet.App. at 53.

B. The Board Did Not Clearly Err In Finding That Appellant Failed To Request A New Hearing Prior To His Scheduled Hearing Date And Did Not File A Motion For A New Hearing Date Within 15 Days Of His Scheduled Hearing Date.

Appellant contends that VA failed to honor his request for a new hearing location in violation of 38 U.S.C. § 7107(d)(1)(B)(iii). The Could should find no clear error in the Board's decision because VA properly notified Appellant of his hearing date, he did not request to reschedule the September 17, 2018, prescheduled live video conference hearing, and he failed to show good cause for why he missed his hearing.

The Board is required to afford the appellant an opportunity for a hearing before deciding any appeal. 38 U.S.C. § 7107(b). Once an appellant requests a hearing, the Board must determine whether the hearing will be held at its principal location or at another VA facility or other appropriate Federal facility "located within the area served by a regional office" of VA. 38 U.S.C. § 7107(d)(1)(A)(i); *see also* 38 C.F.R. § 20.700(a). The applicable regulation provides that a hearing before the Board may be held either in Washington, DC or at a VA facility having adequate physical resources and personnel for the support of such hearings, "at the option of the appellant[.]" 38 C.F.R. § 20.705. The Board must notify the appellant of the location and type of hearing to be held. 38 U.S.C. § 7107(d)(1)(B)(i). Thereafter, the appellant may request a different location or type of hearing. 38 U.S.C. § 7107(d)(1)(B)(ii). Once requested, the Board "shall grant such request." 38 U.S.C. § 7107(d)(1)(B)(iii). A claimant may request a hearing before the Board at a VA

field facility when submitting the substantive appeal or anytime thereafter, subject to restrictions in 38 C.F.R. § 20.703 (2018). For electronic hearings, such a live videoconference hearing, the applicable regulation provides that "any such hearing will be in lieu of hearing held by personally appearing" before the Board. 38 C.F.R. § 20.700(e).

Although Appellant proffers several arguments in an effort to explain his failure to appear to the prescheduled Board live video conference hearing, he wholly ignores the plain language of the applicable regulations. *See* [AB at 11-16]. When an appellant fails to appear for a scheduled hearing and a request for postponement has not been received or granted, the case will proceed as if the hearing had been withdrawn, unless the appellant files within 15 days, a written motion for a new hearing date which explains why he failed to appear and why he could not submit a timely request for a new hearing date. 38 C.F.R. § 20.704(d).

Here, Appellant received notice that his live video conference hearing had been rescheduled from May 29, 2018, to September 17, 2018. [R. at 24-27]. Appellant did not seek to reschedule the hearing. *See* [R. at 5]. On September 17, 2018, Appellant did not appear for his prescheduled hearing. *Id*. He also did not file a written motion for a new hearing within 15 days of the missed hearing date, or at all. *See id*. Thus, the Court should find no error in the Board's decision to issue its decision without a hearing. *See* 38 C.F.R. § 20.704(d).

Appellant avers that his May 2018 correspondence constituted a request for a new hearing location. [AB at 12]. During his May 2018 telephone conversation

with a VA official, Appellant "requested [a] hearing reschedule" which was scheduled for Tuesday, May 29, 2018, at the Huntington RO in Huntington, WV. [R. at 35]. He advised that he worked from Tuesday to Saturday, and that his only available date would be Monday. *Id*. He also noted that the Huntington RO is "very far" from his home. *Id.* Appellant argues that "although his exact words are not recorded in the VA employee's report . . . it is clear that he was requesting a new location." [AB at 12]. This argument is plainly impermissible post-hoc rationalization which attempts to cure Appellant's failure to appear at his prescheduled hearing. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856 (1983). Appellant further argues that "there was no reason for [him] to provide the RO with this information . . . unless it was a request for a new location." This contention is purely speculative and based on nothing in the record. *See Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will not consider a "vague assertion" or an "unsupported contention" of error). Indeed, upon receiving notice that VA rescheduled his hearing to September 17, 2018, Appellant did not contact VA to advise of his purported desire to change the location of the hearing. *See* [R. at 28-31]. In fact, Appellant received two hearing notices, and still did not communicate his purported desire to attend a hearing at another location. [R. at 28-31 (June 12, 2018, hearing notice)], [R. at 24-27 (September 5, 2018, hearing notice)].

Appellant further asserts that the Board should have "offered to hold the hearing" in Washington, DC where its offices are located. [AB at 15]. However,

Appellant ignores that he explicitly chose to attend a video conference hearing, hearings which are held at the claimant's local RO. [R. at 158]. Indeed, the option to attend a BVA hearing in Washington, DC was an option available to Appellant but one which he opted to forgo. *See id*.

Here, the record is devoid of a request to reschedule the September 17, 2018, hearing pursuant to section 20.704(c), or a motion for a new hearing date pursuant to section 20.704(d). Furthermore, the record is devoid of a showing of good cause for Appellant's failure to appear for his prescheduled September 17, 2018, Board hearing and that the cause for the failure to appear arose under circumstances in which a timely request for postponement could not have been submitted prior to the hearing.

Thus, the Court should find that no clear error in the Board's decision to decide the case without a hearing.

V. CONCLUSION

Based upon the foregoing, the Secretary respectfully submits that the Court affirm the November 8, 2018, Board decision which declined to reopen the previously denied claim of service connection for a left knee disability.

Respectfully submitted,

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