Vet. App. No. 18-7225

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DAVID L. BAUGHMAN,
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. 18-7225
	)	
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. STATEMENT OF THE ISSUE

Whether this Court should affirm the September 20, 2018, decision of the Board of Veterans' Appeals (Board), which found that Appellant was not entitled to an effective date earlier than November 13, 2001, for the grant of service connection for posttraumatic stress disorder (PTSD) with secondary alcohol dependence (alternatively diagnosed as dysthymic disorder, mood disorder, and major depressive disorder).

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal contests the September 20, 2018, Board decision, which found that Appellant was not entitled to an effective date earlier than November 13, 2001, for the grant of service connection for PTSD. *See* [Record Before the Agency (R.) at 1-9]; [Appellant's Informal Brief (Br.) at 1-3]. The Court should affirm the Board's decision

because Appellant has not carried his burden of demonstrating that it is clearly erroneous or the product of any prejudicial error.

B. Statement of Relevant Facts and Proceedings Below

Appellant had qualifying service in the United States Army from October 1967 to December 1970. [R. at 2135] (DD Form 214).

In April 1987, the Department of Veterans Affairs (VA) produced a medical certificate that noted Appellant's complaints of chest pain; assessed him with possible musculoskeletal chest pain, anxiety, and depression; and provided him with a psychology referral for relaxation treatment. [R. at 3369-71]. In November 1987, a VA treatment note diagnosed Appellant with chronic anxiety syndrome with somatization/ heavy ethanol and possible delayed stress syndrome. [R. at 3367]. Appellant was referred to psychology, possibly for one-to-one counseling. [R. at 3367].

Years later, in April 1991, Appellant filed his initial claim seeking VA compensation for "delayed stress syndrome," among other physical conditions.[1] [R. at 3537]. He was provided with a VA examination in June 1991, which diagnosed dysthymic disorder, but not PTSD, and found that he was mentally "competent for VA purposes." [R. at 3527 (3522-27)]. In October 1991, the VA Regional Office (RO) issued a rating decision that denied Appellant's April 1991 claim for service connection for PTSD. [R. at 3509-11].

Approximately ten years later, on November 13, 2001, VA received an application from Appellant seeking service connection for PTSD. [R. at 3497-3500]. He was

[1] The Board incorrectly stated that "[t]he Veteran filed a service connection claim for 'delayed stress syndrome' in March 1987." [R. at 5 (1-9)]. Appellant's initial claim for "delayed stress syndrome" was filed in April 1991. [R. at 3537]; *see also* [R. at 3509 (3509-11)] (October 1991 rating decision listing the "date of claim" as April 10, 1991).

provided with a VA examination in March 2002, which diagnosed dysthymic disorder and indicated that he was "competent to manage his funds." [R. at 3471 (3467-71)]. In April 2002, the RO issued a rating decision that denied Appellant's claim for service connection for PTSD. [R. at 3461-64].

In an April 2004 decision, the Board found that the RO's October 1991 rating decision denying service connection for PTSD was not appealed and became final. [R. at 3357 (3351-62)]. However, it found that the evidence submitted since that prior final denial was new and material evidence, and it reopened Appellant's claim and remanded it on the merits for additional development. [R. at 3351-62].

After extensive additional proceedings, the Board ultimately granted Appellant service connection for a psychiatric disability, namely PTSD, in an October 2010 decision. [R. at 2765-77]. The RO then issued a rating decision in November 2011, which effectuated the Board's grant of service connection for PTSD, and it assigned a 0% evaluation effective November 13, 2001, the date that Appellant's claim was received. [R. at 2600-02, 2611-18].

In December 2011, Appellant, through his then-attorney, filed a claim of entitlement to service connection for coronary artery disease. [R. at 2548].

In April 2012, the RO issued a rating decision that granted Appellant an increased evaluation for PTSD, from 0% to 50%, effective November 13, 2001. [R. at 2503-07, 2518-23].

Appellant filed a Notice of Disagreement (NOD) with the RO's April 2012 decision in March 2013. [R. at 2353-55]. Appellant requested retroactive compensation back to October 31, 1991, based on his belief that he had dysthymic disorder diagnosed on

October 31, 1991. [R. at 2354 (2353-55)]. Appellant also stated that he felt he was not rated high enough for PTSD. [R. at 2354 (2353-55)].

The RO issued a rating decision in June 2013, which, in relevant part, granted Appellant service connection for ischemic heart disease/coronary artery disease with a 10% evaluation effective April 7, 2004, and a 30% evaluation effective May 6, 2010. [R. at 2247 (2232-37, 2247-54)]. Appellant filed an NOD in July 2014 indicating his request for an increased rating for ischemic heart disease, which VA accepted. [R. at 2218 (2217-18)]; *see* [R. at 2209-11] (VA accepting Appellant's NOD).

In January 2016, a VA Decision Review Officer (DRO) issued a decision that granted Appellant an increased rating for PTSD, from 50% to 100%, effective November 13, 2001. [R. at 897 (881-87, 897-906)]. The DRO's decision also granted Appellant entitlement to an earlier effective date of November 13, 2001, for service connection for coronary artery disease. [R. 897 (881-87, 897-906)]. At that time, the RO issued a Statement of the Case (SOC) on the issue of Appellant's entitlement to an earlier effective date for service connection for PTSD. [R. at 908-23]. The SOC explained that Appellant's 1991 claim of service connection for PTSD became final when it was not appealed and that the November 13, 2001, effective date currently assigned was the earliest date possible for his reopened claim, which was received by VA on November 13, 2001. [R. at 923 (908-23)].

In April 2016, VA received Appellant's written request to withdraw his appeal for an increased rating for ischemic heart disease. [R. at 871-72]; *see also* [R. at 891-93] (VA notice letter issued to Appellant and his accredited representative regarding withdrawal); [R. at 907] (report of contact from phone call).

In March 2016, Appellant perfected his appeal of the issue of his entitlement to an earlier effective date for PTSD by filing a Substantive Appeal to the Board on VA From 9. [R. at 877-78]. He wrote that he "was not mentally competent to file a timely appeal" and that VA "failed to recognize a diagnosis of [PTSD] in 1986" or that he was recommended for one-on-one counseling. [R. at 877 (877-78)].

The Board issued its decision on this matter on September 20, 2018. [R. at 1-9]. It found that Appellant was not entitled to an effective date earlier than November 13, 2001, for service connection for PTSD. [R. at 5-7 (1-9)]. The Board explained that Appellant's claim of service connection for PTSD was previously denied in an October 1991 RO rating decision that was not appealed and that became final. [R. at 6 (1-9)]. The Board addressed Appellant's contention that he was not mentally competent to appeal that decision, but it found that a contemporaneous VA examination in June 1991 described Appellant as competent and that no other evidence indicated Appellant was "incompetent or manifested the inability to understand the necessity and the process of appealing the now-final October 1991 rating decision." [R. at 6 (1-9)]. As a result, the Board found that the earliest possible effective date that could be assigned pursuant to 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400 was November 13, 2001, the date that VA received his claim to reopen. [R. at 6 (1-9)]; *see* [R. at 3497-3500] (November 13, 2001, claim). The Board determined that, because the RO had already "assigned the earliest possible effective date for its grant of service connection for PTSD," Appellant was not entitled to an effective date earlier than November 13, 2001. [R. at 6 (1-9)].

An appeal to this Court ensued.

III. ARGUMENT

The Court should affirm the September 20, 2018, Board decision, which found that Appellant was not entitled to an effective date earlier than November 13, 2001, for the grant of service connection for PTSD because the Board's decision is plausibly based on the evidence of record and is not clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Appellant has not demonstrated that the Board committed prejudicial error so as to warrant any action by the Court other than affirmance. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

The Board's factual findings, including its determination of the proper effective date for an award of VA benefits, is reviewed under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Evans v. West*, 12 Vet.App. 396, 401 (1999). Under the "clearly erroneous" standard, the Court must accept the Board's findings of fact unless firmly convinced, in light of the whole record, that they are mistaken. *Warren v. McDonald*, 28 Vet.App. 214, 218 (2016). The standard is not met simply because the Court would have decided matters differently had it been the trier of fact. *Id.*

The Board correctly determined that Appellant's currently-assigned effective date of November 13, 2001, for the award of service connection for PTSD is the earliest possible effective date that may be assigned pursuant to 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400. *See* [R. at 6 (1-9)]. Under 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." Under 38 C.F.R. § 3.400, the effective date generally "will be the date of receipt of the claim or the date entitlement arose, whichever is later." Because Appellant's claim of service connection for PTSD was denied in an unappealed and final October 1991 RO rating decision, and because Appellant's claim to reopen that previously-denied decision was received by VA on November 13, 2001, the currently-assigned effective date of November 13, 2001, is the earliest possible effective date that can be assigned. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i). Under the facts of this case, VA is prohibited from assigning an effective date earlier than date of receipt of Appellant's application to reopen his previously and finally denied claim. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i).

First, Appellant requests that the Court "award benefits for PTSD retroactive to December 22, 1970." [Br. at 3] (response to question 7). Because Appellant is proceeding pro se, he is entitled to have the Court sympathetically read his informal brief and liberally construe his arguments. *See De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992). However, Appellant still carries the burden of establishing

error in the decision on appeal. *Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151. Even pro se appellants must raise specific arguments demonstrating Board error as the Court may not manufacture arguments on behalf of appellants, including those proceeding pro se. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain arguments that are "far too terse to warrant detailed analysis by this Court"); *Evans*, 12 Vet.App. at 31 (stating that the Court will give no consideration to a "vague assertion" or an "unsupported contention"); *see also Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013) (explaining that "it is one thing to read a record sympathetically . . . it is quite another to read into the record an argument that had never been made").

Appellant states that "VA made gross errors in their denial for PTSD in 1991," because VA purportedly "ignored a diagnosis of PTSD in 1987," "failed to obtain PTSD treatment records in 1987-88," and "knew or should have known of earlier diagnosis or symptoms for service connected disabilities." [Br. at 1, 2] (response to questions 1, 2, 4, 5) (citing [R. at 3367, 3369 (3369-71)]). However, any alleged errors in the October 1991 rating decision should have been addressed though a direct appeal of that decision. Because Appellant did not appeal the RO's October 1991 rating decision, it became final and is not now the subject of this Court's review. *DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006) ("Except as provided by law, 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"); *see* [R. at 6 (1-9)] (Board finding that the October 1991 RO rating decision was not appealed and became final); *see also* [R. at 3357 (3351-62)] (an April 2004 Board

decision finding that the RO's October 1991 rating decision denying service connection for PTSD was not appealed and became final).

The Board rejected Appellant's contention that he was not mentally competent to appeal the RO's October 1991 decision, finding that a contemporaneous VA examination in June 1991 described Appellant as competent and that no other evidence indicated that Appellant was "incompetent or manifested the inability to understand the necessity and the process of appealing the now-final October 1991 rating decision." [R. at 6 (1-9)]; *see* [R at 3527 (3522-27)] (June 1991 VA examination report). Appellant's brief in no way challenges the Board's finding as to his competency to appeal the October 1991 rating decision. *See* [Br. at 1-3]. Indeed, Appellant's brief, even sympathetically read and liberally construed, in no way contests the Board's finding that the October 1991 RO rating decision, in fact, was not appealed and became final. *See* [Br. at 1-3].

As a result, the Board correctly found that the earliest possible effective date that could be assigned for Appellant's award of service connection for PTSD was his currently-assigned effective date of November 13, 2001, as that was the date that VA received Appellant's application to reopen his previously and finally denied claim of entitlement to service connection for PTSD. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i). Even if evidence of record shows the presence of psychiatric symptomatology prior to November 13, 2001, an effective date earlier than November 13, 2001, still would not be warranted because the law requires

that VA assign an effective date based on the "date of receipt of claim, or date entitlement arose, whichever is later." 38 C.F.R. § 3.400(b)(2)(i) (emphasis added). Appellant's November 13, 2001, claim to reopen was received later than any records that might potentially show that entitlement to service connection for PTSD arose in 1987 or 1988; therefore November 13, 2001, would be the properly assigned effective date under applicable law. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i). Although Appellant asserts that the Board failed to apply the benefit of the doubt, [Br. at 2] (response to question 5), here, the assignment of an even earlier effective date was precluded as a matter of law such that application of the benefit of the doubt doctrine was precluded. *See Sabonis v. Brown*, 6 Vet. App. 426, 429-30 (1994) (holding that where law and not evidence is dispositive, a claim should be denied or appeal terminated because of lack of legal merit or lack of entitlement under the law). Appellant has not raised any specific argument that demonstrates prejudicial Board error in finding that an effective date earlier than November 13, 2001, was not warranted. *Sanders*, 556 U.S. at 409; *Locklear*, 20 Vet.App. at 416; *Hilkert*, 12 Vet.App. at 151. Accordingly, the Court should affirm the Board's decision.

Second, Appellant requests that the Court award "service connection for AHC retroactive to 1985." [Br. at 3] (response to question 7). Appellant states that "the VA erred in their decision process by not including AHC in the review for an earlier date," that "AHC was not mentioned in report of problems [page] #1," and that "there is no mention of AHC." [Br. at 1, 3] (response to question 1, 2, 6) (citing [R. at 3369 (3369-71)];

[R. at. 2341 (2339-41)]). Appellant never specifies what "AHC" is. *See* [Br. at 1-3]. However, sympathetically reading his informal brief and liberally construing his arguments, it appears that Appellant may be referring to a heart condition, although that is unclear. The evidence of record cited by Appellant appears to relate to a heart condition. *See* [R. at 3369 (3369-71)] (an April 1987 VA medical certificate noting Appellant's complaints of chest pain); [R. at. 2341 (2339-41)] (a December 1993 private treatment record noting Appellant's complaints of chest discomfort and noting EKG results consistent with myocardial ischemia).

Appellant has not shown that any claim of service connection for a heart condition, or for an increased rating or earlier effective date for the award of service connection for a heart condition, was properly before the Board or was decided by the Board such that it is now properly before this Court. The Court's jurisdiction is generally limited to appeals of final adverse Board decisions. *See* 38 U.S.C. §§ 7252, 7266(a); *Howard v. Gober*, 220 F.3d 1341 (Fed. Cir. 2000) (holding that the Court shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals). Appellant bears the burden of demonstrating that the Court has jurisdiction, but he has not done so here. *See Bethea v. Derwinski*, 2 Vet. App. 252, 255 (1992).

The record reflects that, in December 2011, Appellant, through his then-attorney, filed a claim of entitlement to service connection for coronary artery disease. [R. at 2548]. The RO issued a rating decision in June 2013 that granted Appellant service connection for ischemic heart disease/coronary artery disease with a 10% evaluation effective April 7, 2004, and a 30% evaluation effective May 6, 2010. [R. at 2247 (2232-37, 2247-54)]. Appellant filed an NOD in July 2014 requesting an increased rating for ischemic

heart disease. [R. at 2218 (2217-18)]. Thereafter, in January 2016, a DRO decision granted Appellant entitlement to an earlier effective date of November 13, 2001, for service connection for coronary artery disease. [R. 897 (881-87, 897-906)]. In April 2016, VA received Appellant's written request to withdraw his appeal for an increased rating for ischemic heart disease. [R. at 871-72]; *see also* [R. at 891-93] (VA notice letter issued to Appellant and his accredited representative regarding withdrawal). As a result, no SOC was issued and no additional proceedings have occurred with regard to Appellant's service-connected ischemic heart disease/coronary artery disease.

Given the procedural history, Appellant has not shown that the Board committed any error in failing to consider "AHC," if that acronym refers to a heart condition. Appellant has not presented any argument that establishes that the issue of his entitlement to an earlier effective date for a heart condition was properly before the Board or is now properly before the Court. *See* 38 U.S.C. §§ 7252, 7266(a); *Howard v. Gober*, 220 F.3d 1341; *Bethea*, 2 Vet. App. at 255. As a result, the Court lacks jurisdiction over any such issue and should not entertain Appellant's request to "grant service connection for AHC retroactive to 1985." [Br. at 3] (response to question 7).

IV. CONCLUSION

Although mindful that Appellant is unrepresented before this Court, the Board's decision should be affirmed because Appellant has not presented any cogent argument to warrant a different result. Appellant has failed to present any argument demonstrating prejudicial Board error. *See Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 409-10. Because Appellant limited his allegations of error to those noted above, he has abandoned any other issues or arguments that he could have raised but did not.

Woehlaert v. Nicholson, 21 Vet.App. 456, 463 (2007); *see also Locklear*, 20 Vet.App. at 416-417 (terse or undeveloped argument is considered waived). The Secretary requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409-10.

In view of the foregoing, Appellee respectfully requests that the Court affirm the Board's September 20, 2018, decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under possible penalty of perjury under the laws of the United States of America, that on this, December 19, 2019, a copy of the foregoing was mailed, postage prepaid, to:

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