IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

OSCAR JOHNSON,

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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IN THE UNITED STATES COURT OF APPEALS
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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-2840
	)	
	)	
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. ISSUES PRESENTED

Whether the Court should affirm the April 10, 2019, Board of Veterans' Appeals (Board or BVA) decision that denied entitlement to: (1) reopen the issue of service connection for a low back disability because new and material evidence had not been received; (2) reopen the issue of service connection for hepatitis C because new and material evidence had not been received; (3) an initial rating higher than 10% for tinnitus; (4) an effective date earlier than May 16, 2013, for a 40% rating for traumatic brain injury (TBI) residuals; (5) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection tinnitus; (6) an effective date earlier than May 16, 2013, for the grant of service to service connection for cervical intervertebral disc syndrome; (7) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for right upper extremity radiculopathy; (8) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for an acquired psychiatric disorder; and (9) eligibility for specially adapted housing or a special home adaptation grant.

II. STATEMENT OF THE CASE

Appellant appeals the April 10, 2019, decision of the Board that denied entitlement to: (1) reopen the issue of service connection for a low back disability because new and material evidence had not been received; (2) reopen the issue of service connection for hepatitis C because new and material evidence had not been received; (3) an initial rating higher than 10% for tinnitus; (4) an effective date earlier than May 16, 2013, for a 40% rating for TBI residuals; (5) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection tinnitus; (6) an effective date earlier than May 16, 2013, for the grant of service to service connection for cervical intervertebral disc syndrome; (7) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for right upper extremity radiculopathy; (8) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for an acquired psychiatric disorder; and (9) eligibility for specially adapted housing or a special home adaptation grant. (Record (R.) at 3-34).

The BVA also remanded the claims for entitlement to: (1) service connection for chronic fatigue syndrome; (2) service connection for hypoglycemia; (3) an initial rating higher than 20% for cervical spine intervertebral disc syndrome; (4) an initial rating higher than 40% for right upper extremity radiculopathy; (5) a rating higher than 40% for TBI residuals; (6) an initial rating higher than 50% for an acquired psychiatric disorder; (7) an effective date earlier than May 16, 2013, for the grant of a total disability rating based upon individual unemployability (TDIU); (8) an

effective date earlier than May 16, 2013, for the grant of Dependents' Educational Assistance; and (9) an effective date earlier than April 9, 2010, for a 50% rating for headaches from a head injury, and these issues are not currently before the Court. (R. at 4, 28-34 (3-34)); *Breeden v. Principi*, 17 Vet. App. 475, 478 (2004); *see also* 38 U.S.C. § 7266 (a).

Factual Background

Appellant served on active duty from February 1964 to February 1967. (R. at 4221). An August 1966 service medical record (SMR) indicates that Appellant was involved in a jeep accident and had a laceration of the scalp, a puncture wound of the left hip, and a cerebral concussion. (R. at 3730 (3730-32)). A January 1967 SMR indicates that Appellant was involved in an accident six months earlier where he suffered a skull fracture and scalp laceration. (R. at 3728). The examiner also noted that Appellant experienced headaches. *Id*. In Appellant's January 1967 separation examination report, he denied experiencing a back condition. (R. at 3736).

In May 2010, the Board issued a decision denying entitlement to service connection for a low back disability. (R. at 4136-52). The Board determined that Appellant's low back disorder was first shown many years after service and the preponderance of the evidence was against a nexus between any current low back and any incident in service. *Id*. Appellant did not appeal this decision.

In February 2012, the Regional Office (RO) issued a rating decision denying Appellant's claim for entitlement to service connection for hepatitis C and granting a separate evaluation for service connection for TBI. (R. at 3985-94).

In May 2013, Appellant submitted an application for compensation benefits to include TBI, anxiety disorder, tinnitus, a back injury, hepatitis C, and all spine injuries. (R. at 3883). The following month, he submitted a claim for entitlement to service connection for depression and post traumatic stress disorder (PTSD). (R. at 3879).

A September 2014 rating decision granted entitlement to service connection for an acquired psychiatric disorder, right upper extremity radiculopathy, cervical spine intervertebral disc syndrome, tinnitus; increased Appellant's evaluation for residuals of TBI; and determined that new and material evidence had not been submitted to reopen Appellant's hepatitis C claim. (R. at 2482-93). Appellant submitted a Notice of Disagreement (NOD) the following month. (R. at 2434-46). He also submitted a statement in October 2014 noting that jet gun immunization and his assignment duties as a field medic showed that he had high risk factors for hepatitis C in service. (R. at 2404-05).

In June 2015, Appellant submitted an application for specially adapted housing or special home adaptation. (R. at 2306). In April 2016, the RO issued a rating decision denying the claim. (R. at 1047-56). The RO issued two SOCs in July 2016 and another SOC in August 2016. (R. at 779-94, 827-87, 779-94). Appellant filed a substantive appeal in August 2016. (R. at 734).

In April 2019, the Board denied entitlement to: (1) reopen the issue of service connection for a low back disability because new and material evidence had not been received; (2) reopen the issue of service connection for hepatitis C because new and material evidence had not been received; (3) an initial rating higher than 10% for tinnitus; (4) an effective date earlier than May 16, 2013, for a 40% rating for TBI residuals; (5) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection tinnitus; (6) an effective date earlier than May 16, 2013, for the grant of service to service connection for cervical intervertebral disc syndrome; (7) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for right upper extremity radiculopathy; (8) an effective date earlier than May 16, 2013, for the grant of entitlement to service connection for an acquired psychiatric disorder; and (9) eligibility for specially adapted housing or a special home adaptation grant. (R. at 3-34). This appeal followed.

III. ARGUMENT

The Court should affirm the decision on appeal. Appellant has not demonstrated any error in the BVA decision which would warrant remand or reversal. Appellant fails to present a cogent argument that would compel any decision other than affirmance. Appellant's Brief (App. Br.) at 1-19; *Sanders v. Shinseki*, 129 S.Ct. 1696, 1705-06 (2009) (party attacking agency determination has burden of showing error is harmful).

Pursuant to 38 U.S.C. § 5108, "[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." 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. 38 C.F.R. § 3.156(a); *see Shade v. Shinseki.* 24 Vet.App.110, 115–19 (2010). To be material, the evidence must relate to at least one "unestablished fact necessary to substantiate the claim" that was noted in the last denial of the claim. *Shade,* 24 Vet.App. at 117–22 (interpreting and applying 38 C.F.R. § 3.156(a)). The Court reviews whether an appellant has submitted new and material evidence to reopen a previously denied claim under the "clearly erroneous" standard of review. *Suaviso v. Nicholson,* 19 Vet.App. 532, 533 (2006); *see* 38 U.S.C. § 7261(a)(4). A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990).

New and material evidence for a back condition

The Board adjudicated Appellant's claim and properly found that new and material evidence had not been received to reopen the back condition claim. (R. at 7-11 (3-34)). At the time of the last final disallowance of Appellant's claim in the May 2010 Board decision, the Board determined that Appellant's low back disorder was first shown several years after service and the preponderance of the evidence

was against a nexus between a current low back disorder and service. (R. at 4136-52). In the decision on appeal, the Board considered the newly submitted evidence and determined that it was duplicative because it only showed continuous treatment for back pain. (R. at 10-11 (3-34)). Thus, the Board determined that there was no new evidence showing that Appellant had a back disability in service or that Appellant's current back disability was related to an in-service injury or service-connected disability. (R. at 11 (3-34)). The Board determined Appellant failed to submit new and material evidence to reopen his back condition claim and Appellant has not shown otherwise.

Appellant appears to argue that the Board erred because it had already determined that he had a back condition or back strain. App. Br. at 4-5. He states that the Board established a back disability during the 2004 adjudication of various claims and he cites (R. at 134) as evidence for this finding. App. Br. at 4. However, the record he cites shows that a back strain was not service-connected and the BVA did not previously establish entitlement to service connection for a back condition. (R. at 134). As noted above, the elements missing in order to reopen Appellant's back condition claim is an in-service injury and a nexus between his current back condition and an in-service event. (R. at 11 (3-34)). The Board had already acknowledged that Appellant currently has a back condition and Appellant has failed to show that the Board's determinations regarding the new and material claim are not plausibly based. (R. at 10 (3-34)).

Appellant appears to argue that his use of Dexamyl during service is evidence of a back condition in service. App. Br. at 5-6. However, the record Appellant cites for this proposition, (R. at 133), does not show that Appellant was using Dexamyl for any type of back condition. He has failed to show that that the September 1966 SMR shows that he had a back condition in service. (R. at 133).

Appellant contends that the Board erred by finding that he had a car accident in service. App. Br. at 6. He claims that there were no documents that can support this statement. *Id*. However, an August 1966 SMR indicates that Appellant was involved in a jeep accident and had a laceration of the scalp, a puncture wound of the left hip, and a cerebral concussion. (R. at 3906-07). In addition, in a January 1967 SMR, the examiner noted that Appellant was involved in an accident six months prior and Appellant had a skull fracture and a scalp laceration and experienced headaches. (R. at 133, 5902). Therefore, contrary to Appellant's arguments, his SMRs indicate that he was involved in a motor vehicle accident (MVA) while in service.

Appellant also cites an August 2005 medical opinion by Dr. Caryl S. Brailsford in which the examiner noted that Appellant did not have any current disc lesions which would explain his back injury. (R. at 339-45). As the Board noted in the decision on appeal, this record was before VA prior to the last disallowance of his claim during the May 2010 Board decision and it cannot be considered new and material evidence. It was received by VA in September 2005 as shown by the facsimile confirmation on the bottom of Dr. Brailsford's opinion. (R. at 4599-4604).

Appellant also states that the opinion could have led to an MRI examination; however, the Secretary is unable to discern his exact contention of error. App. Br. at 7-8.

To the extent that Appellant is arguing clear and unmistakable error (CUE) regarding Appellant's back condition claim, App. Br. at 4, there are no current CUE issues before the Court. (R. at 2-38). Each specifically alleged error is "a separate matter and . . . must be presented to and adjudicated by the RO in the first instance" before the Board has jurisdiction. *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc). The Court does not have jurisdiction to consider any allegation of CUE that was not decided by the Board. *Acciola v. Peake*, 22 Vet.App. 320, 324-25 (2008) (discussing *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002)); *see Joyce v. Nicholson*, 19 Vet.App. 36, 45 (2005).

New and material evidence for hepatitis C

The Board determined that Appellant had not submitted new and material evidence to reopen his claim for entitlement to service connection for hepatitis C. (R. at 12-13 (3-34)). The BVA noted that Appellant's claim was last denied in a February 2012 rating decision in which the RO determined that, although Appellant had a current hepatitis C diagnosis, his SMRs did not contain any complaint or treatment for hepatitis C and he did not show any risk factors for the condition while in service. (R. at 12 (3-34), 3993-94 (3985-94)). The Board then determined that none of the newly submitted evidence related to an unestablished fact necessary

to substantiate Appellant's claim and the requirements to reopen the hepatitis C claim had not been met. (R. at 13 (3-34)).

Appellant argues that he had high risk factors in service such as being inoculated with jet injection and being on duty in service at a field hospital. App. Br. at 8-9. However, the BVA considered these arguments and determined that Appellant's service records regarding his work as a medic was of record prior to the February 2012 final disallowance of Appellant's hepatitis claim and this new theory of entitlement for service connection for hepatitis C could not be considered new and material evidence. (R. at 12-13 (3-34)) (citing *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008)). Appellant has not shown otherwise.

Appellant indicates that VA erred by failing to provide him notice of his hepatitis C diagnosis. App. Br. at 9. However, Appellant is unclear as to VA's error and the type of notice he should have received and this argument is undeveloped and does not warrant detailed analysis by the Court. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006); *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006). Appellant also states that hepatitis C is now present and it should stand as verification of new and material evidence. App. Br. at 9. However, the February 2012 rating decision determined that Appellant had a current diagnosis of hepatitis C and evidence of a current condition of hepatitis C would not be considered new and material evidence to reopen his claim. (R. at 3993-94 (3985-94)).

The Court reviews the Board's findings of fact regarding an increased rating claim under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Proscelle v. Derwinski*, 2 Vet.App. 629, 631 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990); *see also Lovelace v. Derwinski*, 1 Vet.App. 73, 74 (1990) (determination of the degree of impairment is a question of fact). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948); *Gilbert*, 1 Vet.App. at 52 (1990). The effective date of a claim for disability compensation is the date of receipt of the claim, the day following separation from active service if a claim is received within one year after separation, or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(b)(2)(i). The effective date for service connection awarded on a reopened claim is the date that the request to reopen was received or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(b)(2)(i); *see also* 38 U.S.C. § 5110(a); *Lalonde v. West*, 12 Vet.App. 377, 382 (1999). The effective date of an increased rating may date back one year before the date the claim was filed if it is ascertainable that an increase in disability had occurred within that one-year period. 38 U.S.C. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2).

Increased rating for tinnitus; earlier effective dates for TBI residuals, tinnitus, cervical intervertebral disc syndrome, right upper extremity radiculopathy,

an acquired psychiatric disorder; and eligibility for specially adapted housing or a special home adaptation grant

With regard to the increased rating claim for tinnitus, the Board correctly noted that Appellant is currently receiving the maximum schedular evaluation of 10% for tinnitus. (R. at 14 (3-34)). The Board then considered Appellant's symptoms and found that the symptoms were accurately reflected by the schedular rating criteria. *Id*. Appellant has failed to show that the Board's findings were not plausibly based and the Court should affirm the denial of an increased rating for tinnitus.

The Board also properly determined that Appellant was not entitled to an earlier effective date for TBI residuals. The last disallowance of Appellant's TBI claim was in a February 2012 rating decision. (R. at 3985-94). Appellant's next claim for an increased rating for TBI residuals was in May 2013. (R. at 3883). The Board considered whether it was factually ascertainable that an increase in disability occurred one year prior to May 2013 increased rating claim, but the BVA determined that there was no increase in the disability that would warrant an earlier effective date. *See* 38 C.F.R. § 3.400(o)(2); *see Gaston v. Shinseki*, 605 F.3d 979, 983-84 (Fed. Cir. 2010) (to obtain an effective date earlier than the date of the claim for an increase, the increase must have occurred during the 1-year period prior to the date of the claim). Appellant has not made any specific arguments that the Board erred in its consideration of this claim and the Board's decision should be affirmed.

With regard to the earlier effective date claims for tinnitus, cervical intervertebral disc syndrome, right upper extremity radiculopathy, and an acquired psychiatric disorder, the Board considered the evidence of record and properly found that an earlier effective date was not warranted. In May 2013, Appellant submitted a claim of entitlement to service connection for all spinal injuries, including a cervical spine disorder, neurosis and anxiety, and tinnitus. (R. at 3883). The following month, he submitted a claim for entitlement to service connection for depression and PTSD. (R. at 3879). In a September 2014 rating decision, Appellant was granted entitlement to service connection for an acquired psychiatric disorder, to include PTSD, right upper extremity radiculopathy, cervical intervertebral disc syndrome, and tinnitus and assigned an effective date of May 16, 2013. (R. at 2482-93). The Board considered the evidence of record and determined that an earlier effective date for the claims noted above was not warranted.

Appellant's claim of entitlement to service connection for tinnitus was finally denied in a July 1989 decision letter. (R. at 6032). 38 U.S.C. § 7105. The Board issued decisions in August 2009 denying entitlement to service connection for a psychiatric disorder, and in May 2010, denying entitlement to service connection for a cervical spine disorder. (R. at 4257-4293, 4136-52). These decisions are also final. 38 U.S.C. § 7104. As the Board noted in the decision on appeal, the first correspondence received from Appellant regarding these claims was received by VA on May 16, 2013, his current effective date. (R. at 3883). Regarding the

claim for an earlier effective date for right arm radiculopathy, Appellant did not submit a claim of entitlement to service connection for radiculopathy and, instead, the disorder was found on examination of the cervical to be a secondary disability caused by cervical spine intervertebral disc syndrome. (R. at 2482-93).

With regard to Appellant's claim for entitlement to eligibility for specially adapted housing or a special home adaptation grant, the Board properly determined that the competent and probative evidence preponderates against a determination that Appellant's service-connected disabilities meet any of the criteria for specially adapted housing or home adaptation under 38 C.F.R. §§ 3.809 or 3.809a. (R. at 25-28 (3-34)).

In his brief, Appellant only makes a general statement that the Board's findings are clearly erroneous regarding the effective dates, although he does label this section of his brief as "all denials". App. Br. at 10-11. None of his assertions identify any law or regulation that was wrongfully applied by the Board, nor does Appellant offer any legal or factual challenge to demonstrate that the BVA decision is clearly erroneous regarding the above-noted claims. App. Br. at 10-11; *Locklear*, 20 Vet.App. at 416-417; *Overton*, 20 Vet.App. at 435. Although mindful that Appellant is unrepresented before the Court, Appellant has failed to present any cogent argument otherwise and he has not demonstrated that the Board's findings are clearly erroneous. App. Br. at 10-11; *Swain v. McDonald*, 27 Vet.App. 219, 225 (2015).

If Appellant is contending that the Board failed to apply various regulations to the facts of his case, he is merely arguing as to how the Board weighed the evidence of record. App. Br. at 10-11. It is the Board's duty to analyze the credibility and probative value of evidence when making its factual findings. *See Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010); *Washington v. Nicholson,* 19 Vet.App. 362, 367-68 (2005); *Madden v. Gober,* 125 F.3d 1477, 1481 (Fed. Cir. 1997). Appellant's disagreement as to how the Board weighed the evidence of record does not rise to the level of satisfying the criteria required to hold that the BVA decision was clearly erroneous. *Gilbert,* 1 Vet.App. at 53.

At the end of his brief, Appellant presents constitutional questions regarding the Executive and Legislative Branch's jurisdiction. App. Br. at 13-18. He cites general legal doctrine such as the Due Process and the Double Jeopardy Clause. App. Br. at 16 17. However, the Court does not need to address "mere assertions of constitutional impropriety for which [an appellant] has not provided any legal support." *Brewer v. West*, 11 Vet.App. 228, 236-37 (1998); see *Coker*, 19 Vet.App. at 442 (explaining that the requirement that an appellant plead his argument of error with particularity is to allow the Court to review and assess the validity of that argument).

Appellant also makes a general argument that his clinical records and SMRs are lost. App. Br. at 3. However, the record on appeal contains Appellant's SMRs (R. at 3725-3787) and Appellant has failed to provide specific arguments regarding any records that have not been included in the RBA. Appellant's undeveloped

contentions of error should be considered waived. *Locklear*, 20 Vet.App. at 416-417.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address the same if the Court deems it necessary or advisable for its decision. The Secretary also 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).

CONCLUSION

For the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully requests this Court to affirm the decision on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the United States of America, that on December 20, 2019, a copy of the foregoing was mailed, postage prepaid to:

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