Vet. App. No. 19-2133

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

ALBERT C. WASHINGTON,
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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I. ISSUES PRESENTED

Whether the Court should remand that part of the July 14, 2017, Board of Veterans' Appeals (Board) decision, which denied entitlement to service connection for coronary artery disease (CAD), associated with postoperative tibial fracture, with recurrent cellulitis; hepatitis/liver disease; a rating in excess of 10% for gastroesophageal reflux disease (GERD); and compensation under the provisions of 38 U.S.C. § 1151 for stomach and esophageal abnormalities, as a result of esophagogastroduodenoscopies (EGDs) performed by VA on February 4, and August 5, 2008.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal[1] pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Albert C. Washington, appeals the July 14, 2018, Board decision, which denied him entitlement to service connection for CAD, associated with postoperative left tibial fracture with recurrent cellulitis; hepatitis/liver disease; a rating in excess of 10% for GERD; and compensation under the provisions of § 1151 for stomach and esophageal abnormalities, as a result of EGDs performed by VA on February 4, and August 5, 2008. *See* Appellant's Informal Brief (App. Inf. Br.) at 1-9; (R. at 4-29).

With respect to his claim for entitlement to service connection for CAD, Appellant appears to allege only an error with respect to the Board's denial of his claim on a secondary service connection basis. *See* Appellant's Informal Brief (App. Inf. Br.) at 6 (where Appellant argues that NSAIDs "could increase the risk

[1] In his Informal Brief, Appellant also alleges that he is entitled to compensation under 38 U.S.C. § 1151 "for VA causing him to go blind in his right eye." App. Inf. Br. at 5. Yet, Appellant concedes that the claim "ha[d] not been official[ly] brought before the BVA." *Id*. This Court does not have jurisdiction over this claim pursuant to 38 U.S.C. § 7252(a), as the issue was not before the Board. *See* (R. at 4-29).

of heart attack and stroke"). The Secretary has limited his response to this contention only, and Appellant's failure to prosecute the issue of error with respect to the Board's denial of service connection of a direct basis should be deemed abandoned. *See Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal).

C. Statement of Relevant Facts

Appellant served in active service from October 1968 to October 1971. (R. at 3778).

Appellant filed a claim for service connection for stomach and esophageal abnormalities associated with the prolonged use of medication in June 2008. (R. at 2002). The Regional Office (RO) subsequently denied his claims of service connection for stomach, esophageal, and intestinal abnormalities in an October 2008 rating decision. (R. at 1761-79).

A November 2008 computed tomography (CT) of the abdomen showed Appellant's liver was of "minimally diminished attenuation and borderline cirrhotic in configuration." (R. at 1277 (1277-78)). The radiologist noted his impression of "[m]ildly enlarged mildly fatty and borderline cirrhotic liver." *Id*. at 1278. The examiner also noted "[n]o focal liver lesions or definite evidence of portal hypertension." *Id*.

In September 2009, Appellant submitted a claim alleging that his "civil right ha[d] been violated in treatment of the health care that he received at [] veteran's

affairs medical centers." (R. at 1734 (1734-48)). He alleged that there was "fraudulent, medication error." *Id*. He also alleged that physicians concealed from Appellant the "real seriousness results of his medical conditions that the [nonsteroidal anti-inflammatory drug (NSAID)] medication ha[d] caused to him." *Id*. In a January 2010 report of general information, a VA employee contacted Appellant to clarify the issues he was claiming. (R. at 1645). Appellant stated that "he wanted to file a 1151 claim because of a procedure performed at Birmingham VAMC starting in 8/13/07 – 8/5/08." *Id*.

In an October 2010 statement in support of his claim, Appellant stated that he was prevented "from discovering the malpractice by medical error for the NSAIDs to yet be prescribed to him" and that there was damage from those NSAID medications. (R. at 1095 (1090-1102)). In another, undated statement in support of his claim, Appellant alleged that his VA medical provider "conceal[ed] the real medical complications" that he had from NSAID medications. (R. at 1103 (1103-16)).

The RO denied Appellant claim for entitlement to compensation under 38 U.S.C. § 1151 for stomach and esophageal abnormalities secondary to EGD procedures performed on February 4, and August 5, 2008, in a September 2011 rating decision. (R. at 1340-42, 1346-49). In his August 2012 notice of disagreement (NOD), Appellant alleged that the "prolonged prescription by VA of Motrin trademark name for [i]buprofen . . . at both Birmingham . . . and Tuscaloosa"

VA medical centers (VAMCs) "was the causation of his abnormalities medical conditions (sic), and not the two EGD procedures." (R. at 1299).

Appellant claimed, in a December 2012 statement, that the colonoscopy procedure at the VAMC "may have expose[d] and gave [Appellant] hepatitis." (R. at 1259 (1259-60)).

In July 2014, Appellant filed a claim for GERD and for heart disease, both as secondary to NSAIDs taken for service-connected knee. (R. at 1253).

The RO issued a Statement of the Case (SOC) in August 2014 denying entitlement to compensation under 38 U.S.C. § 1151 for stomach and esophageal abnormalities secondary to EGD procedures performed on February 4, and August 5, 2008. (R. at 1231-48). In October 2014, Appellant filed his substantive appeal for his denied § 1151 claim. (R. at 1117-22).

In November 2014, VA provided Appellant with a VA examination for his claimed heart, esophageal, and hepatitis/liver conditions. (R. at 995-1015). For his heart condition examination, the examiner noted that she performed an in-person examination and reviewed the claims file (c-file). *Id*. at 996. She noted Appellant's diagnosis of CAD and related that diagnosis to 2010. *Id*. at 997-98. The examiner obtained a medical history of Appellant's heart condition and noted that he claimed service connection for a heart condition, secondary to the use of ibuprofen and/or other NSAIDs used to treat his left lower leg condition after surgery. *Id*. at 998. The examiner opined that his CAD was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. (R. at 1053

(1051-61)). The examiner explained the common and serious side effects of ibuprofen and lidocaine. *Id*. at 1053-55. She further explained in her rationale, based on literature, that ibuprofen and lidocaine only carried a remote chance of resulting heart disease, whereas Appellant had multiple likely risk factors that predisposed him to heart disease. *Id*. at 1056. As a result of those other risk factors, the examiner opined that Appellant's heart conditions was less likely than not the result of lidocaine and/or ibuprofen. *Id*.

On the esophageal conditions examination, the examiner noted that she reviewed the c-file, and diagnosed GERD as of 1998. (R. at 1006-07 (R. at 995-1015)). She described Appellant's history of impairment to include his contention that GERD was secondary to the use of NSAIDs used to treat his left lower leg condition. *Id*. at 1007. The examiner noted Appellant's symptoms of GERD to include dysphagia, pyrosis, and esophageal stricture, spasm, and diverticula. *Id*. at 1007-08.

As to hepatitis, the examiner performed an in-person examination and reviewed Appellant's c-file. *Id*. at 1010. The examiner opined that Appellant did not now have and never had been diagnosis with a liver condition. *Id*. at 1011. As to history of impairment, the examiner noted that Appellant claimed service connection for elevated aspartate transaminase (AST) and alanine aminotransferase (ALT)[2] secondary to NASAID use. *Id*. The examiner opined that

[2] A liver panel "may be used to help diagnose liver disease" and the panel typically consists of tests searching for enzymes to detect and/or diagnose liver disease

Appellant did not have signs or symptoms attributable to cirrhosis of the liver. *Id*. at 1012. The examiner noted that imaging studies were not performed, but that laboratory tests were performed. *Id*. at 1014.

In a January 20, 2015, rating decision, the RO granted service connection for GERD, with an evaluation of 10%, effective July 21, 2014, and denied his claims for service connection for CAD and hepatitis/liver disease. (R. at 476-87, 490-92, 762-67). Appellant filed his NOD in March 2015. (R. at 460-62). The RO issued a SOC in July 2016, continuing the denials of his claims of entitlement to an evaluation in excess of 10% for GERD, and entitlement to service connection for CAD and hepatitis/liver disease, (R. at 325-57), and Appellant appealed these claims to the Board in a September 2016 substantive appeal. (R. at 111-15, 117).

In September 2017, Appellant sought treatment at Rush Foundation Hospital for anemia and syncope. (R. at 44 (44-46)); *see also* (R. at 54-60). He had multiple scattered arteriovenous malformations (AVMs) and diminutive ulcerations were noted throughout the colon; there was no active bleeding noted; and capsule did not reach Cecum. (R. at 45 (44-46)). He "was found to be anemic with signs of a [gastrointestinal (GI)] bleed." (R. at 54 (54-60)). Appellant "reportedly required three units of blood during th[e] hospitalization." *Id*. He

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including ALT, to detect hepatitis, and AST. American Association for Clinical Chemistry, Lab Tests Online: Liver Panel, at http://www.labtestsonline.org/understanding/analytes/liver_panel/glance.html (last modified Dec. 6, 2019).

underwent a colonoscopy with polyp removal in October 2017. *Id*. He returned for follow-up treatment due to dark stools in November 2017. *Id*.

In December 2017 statement, Appellant reported to his representative before the Board that he "did not file an 1151 claim to [the] RO on 09-14-2009." (R. at 52).

The Board issued a June 2018 decision. (R. at 4-29). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should vacate and remand that portion of the Board's decision that denied entitlement to service connection for CAD, associated with postoperative tibial fracture, with recurrent cellulitis; hepatitis/liver disease; a rating in excess of 10% for GERD; and compensation under the provisions of 38 U.S.C. § 1151 for stomach and esophageal abnormalities, as a result of EGDs performed by VA on February 4, and August 5, 2008. The Board's statement of reasons or bases for denying his claim for CAD, as secondary to postoperative left tibial fracture, is inadequate because the Board denied the claim on an aggravation basis without medical support for its determination.

The Board's statement of reasons or bases denying Appellant's claim for a rating in excess of 10% for GERD is inadequate because the Board failed to discuss and discount favorable symptoms of anemia and syncope, requiring hospitalization. As to the hepatitis/liver disease claim, the November 2014 VA examination upon which the Board relied contained an inaccurate factual premise that Appellant never had a liver disease diagnosed which was

controverted by the record. Finally, the Board's statement of reasons or bases denying his claim for compensation under 38 U.S.C. § 1151 did not take into account all of Appellant's reasonably raised claims.

IV. ARGUMENT

A. The Secretary concedes that the Board's statement of reasons or bases denying Appellant's claim for CAD, as secondary to postoperative left tibial fracture, is inadequate.

Appellant contends that the Board erred in denying his claim because he "never did claim CAD as his heart disease cause[d] by [] medications." App. Inf. Br. at 5. While Appellant's arguments are difficult to follow, *see* App. Inf. Br. at 5-6, the Secretary acknowledges that the Board denied Appellant's claim for service connection on both a direct and secondary service connection basis. (R. at 12-13 (4-29)). Indeed, Appellant filed a claim for heart disease as secondary to his medication use for his service-connected knee condition. (R. at 1253). 38 C.F.R. § 3.310(a) provides an avenue for service connection on a secondary basis, as due to causation. 38 C.F.R. § 3.310(a) (providing that a "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected"). Subpart (b) provides an avenue for service connection on a secondary basis, but as due to aggravation. 38 C.F.R. § 3.310(b) (providing that "[a]ny increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not

due to the natural progress of the nonservice-connected disease, will be service connected").

Here, the Board denied Appellant's claim for secondary service connection under§ 3.310(a) by relying on the November 2014 VA examination to deny the claim. (R. at 12-13 (4-29)); *see* 38 C.F.R. § 3.310(a). The November 2014 VA examiner opined that Appellant's CAD was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. (R. at 1053 (1051-61)). The examiner explained in her rationale that ibuprofen and lidocaine only carried a remote chance of resulting heart disease. *Id*. at 1056. Indeed, the VA examiner provided an opinion as to whether Appellant's medication use for his service-connected condition caused his CAD. *Id*. at 1053-56. The examiner did not, however, provide an opinion as to whether his CAD was aggravated by his service-connected postoperative tibial fracture, to include medication use for the service-connected condition. *Id*. at 1051-61. The Board, in a conclusory finding, found that Appellant's CAD was not "caused or aggravated by use of lidocaine or ibuprofen [for] his service-connected post-operative tibial fracture." (R. at 13 (4-29)). But the Board did not cite medical evidence of record or recognized medical treatises to support the medical conclusion that there was no aggravation of CAD as due to Appellant's service-connected condition and medication use, and instead impermissibly relied upon its own medical conclusion. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991). As such, the Secretary concedes that the Board's statement of reasons or bases is inadequate, and remand is appropriate for the

Board to provide a statement of reasons or bases discussing whether Appellant's CAD warrants entitlement to service connection on a secondary basis, to include a discussion of whether CAD was caused or aggravated by Appellant's service-connected condition and medication use.

B. The Secretary concedes that the Board's statement of reasons or bases denying Appellant's claim for a rating in excess of 10% for GERD is inadequate.

Appellant contends that the Board erred in denying a rating in excess of 10% for GERD. App. Inf. Br. at 4. The Secretary concedes that the Board's statement of reasons or bases is inadequate. 38 U.S.C. § 7104(d)(1).

Appellant is service-connected for GERD under an analogous rating, Diagnostic Code (DC) 7346. *See* (R. at 6, 15-18 (4-29)). Under DC 7346, a 10% disability rating is warranted when a veteran has "two or more of the symptoms for the 30[%] evaluation of less severity"; a 30% disability rating is warranted for "[p]ersistently recurrent epigastric distress with dysphagia, pyrosis, and regurgitation, accompanied by substernal or arm or shoulder pain, productive of considerable impairment of health"; and a 60% disability rating is warranted for "[s]ymptoms of pain, vomiting, material weight loss and hematemesis or melena with moderate anemia; or other symptom combinations productive of severe impairment of health." 38 C.F.R. § 4.114, DC 7346.

In evaluating, Appellant's claim for an increased rating, the Board acknowledged the November 2014 VA examination and found that Appellant's

GERD was "manifested by heartburn, mild reflux, dysphagia and pyrosis." (R. at 17 (4-29)). The Board found that his symptoms were contemplated by the 10% evaluation under DC 7346. The Board also explicitly found that the record contained "no other probative evidence [] showing that [Appellant's] GERD is more severe for compensation purposes than demonstrated on the DBQ/VA evaluation." (R. at 17 (4-29)). However, the record shows that Appellant sought treatment, and was hospitalized, for anemia and syncope in September 2017. (R. at 44 (44-46)); *see also* (R. at 54-60). His treatment during hospitalization, and post hospitalization indicated that he had signs of a GI bleed, required "three units of blood during th[e] hospitalization," and underwent polyp removal. (R. at 45 (44-46)); (R. at 54 (54-60)). As Appellant exhibited signs of anemia and a GI bleed in 2017, and the Board's statement of reasons or bases did not discuss the aforementioned evidence, the Secretary concedes that remand is warranted for the Board to address whether a rating in excess of 10% for GERD was warranted. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (the Board's statement of reasons or bases should analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant); *see also* 38 C.F.R. § 4.114, DC 7346 (where a 30% rating contemplates symptoms causing considerable impairment of health and a 60% rating contemplates symptoms causing severe impairment of health).

C. The Secretary concedes that the Board failed to provide an adequate statement of reasons or bases in finding that Appellant did not have a current disability of a liver disorder, to include hepatitis.

Appellant contends that the Board erred in denying his claim for hepatitis/liver disease based on a lack of a current diagnosis. *See* App. Inf. Br. at 6-7. The Secretary concedes that the Board's statement of reasons or bases for finding that Appellant did not have a current disability was inadequate.

The Board relied upon the November 2014 VA examiner's opinion that concluded that Appellant did not have hepatitis or a liver disorder to deny Appellant's claim for lack of a current disability. (R. at 14-15 (4-29)); *see also* (R. at 1011 (995-1015)). Indeed, the examiner opined that Appellant did not now have and never had been diagnosis with a liver condition, *see* (R. at 1011 (995-1015)), and noted that she reviewed Appellant's c-file, *id*. at 1010. The examiner based the finding upon laboratory studies that negated a liver condition, but did not perform imagining studies. *Id*. at 1014.

The Board relied upon that VA examination to deny Appellant's claim. (R. at 14 (4-29)). In denying Appellant's claim, the Board also acknowledged that his record included a November 2008 CT of the abdomen which showed that Appellant's liver was of "minimally diminished attenuation and borderline cirrhotic in configuration." (R. at 1277 (1277-78)). The CT report also showed "[m]ildly enlarged mildly fatty and borderline cirrhotic liver." *Id*. at 1278. The Board discounted the CT findings because "recent objective testing ha[d] not revealed the present (sic) of liver disease." (R. at 14 (4-29)). However, the Board's

statement of reasons or bases did not discuss whether the "recent objective testing" included imagining studies, which showed that Appellant had mildly enlarged mildly fatty and borderline cirrhotic liver in November 2008. (R. at 1278 (1277-78)). In other words, the Board's reliance on the November 2014 VA examination that performed only laboratory studies, but not imaging studies (as was done in 2008), appeared to be the evidence upon which the Board relied in denying Appellant's claim notwithstanding that examination did not perform imaging studies that previously indicated a liver condition. (R. at 14 (4-29)).

In considering the aforementioned, the Secretary concedes that remand is warranted for a statement of reasons or bases discussing whether its reliance upon the November 2014 VA examination was appropriate considering the examination did not perform imaging testing, which was the type of objective medical testing that showed fatty and borderline cirrhotic liver prior to the examination in 2008. *See Caluza v. Brown*, 7 Vet.App. at 506.

D. The Secretary concedes that the Board did not provide an adequate statement of reasons or bases in denying his claim for compensation under 38 U.S.C. § 1151.

Appellant contends that he did not "recall making [a] claim" for compensation under 38 U.S.C. § 1151 for EGD procedures performed. App. Inf. Br. at 7. The record indicates that Appellant submitted a claim in September 2009 that his "civil right ha[d] been violated in treatment of the health care" received at VAMCs. (R. at 1734 (1734-48)). He specifically alleged that there was "fraudulent, medication error." *Id*. He also alleged that physicians concealed from him the "real

seriousness results of his medical conditions that the NSAID medication ha[d] caused to him." *Id*. VA contacted Appellant to clarify the issue he claimed, and the RO employee noted that Appellant wanted to file a section 1151 claim because of a procedure performed at Birmingham VAMC. (R. at 1645). In October 2010 Appellant also stated that he was prevented "from discovering the malpractice by medical error for the NSAIDs to yet be prescribed to him" and that there was damage from those NSAID medications. (R. at 1095 (1090-1102)).

In adjudicating Appellant's September 2009 claim in a September 2011 rating decision, the RO characterized Appellant's claim as one for entitlement to compensation under 38 U.S.C. § 1151 for stomach and esophageal abnormalities secondary to EGD procedures performed on February 4, and August 5, 2008. (R. at 1340-42, 1346-49). In his August 2012 NOD, Appellant again alleged that the issue was not the two EGD procedures, but rather the "prolonged prescription by VA of Motrin trademark name for [i]buprofen . . . at both Birmingham . . . and Tuscaloosa" VAMCs that caused his abnormalities. (R. at 1299).

Notwithstanding Appellant's continued disagreement with the characterization of the claim, the Board, too, adjudicated the section 1151 claim for stomach and esophageal abnormalities as due to EGD procedures, and not as due to prescription medication use. (R. at 21-25). The Board is, however, required to address all issues reasonably raised by either the claimant or the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), ***aff'd sub nom.*** *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Because the Board did not

address the specific issue Appellant raised, the Secretary concedes that remand is required for the Board to provide a statement of reasons or bases adjudicating the issue of Appellant's characterization of the section 1151 claim as due to prescription medication use.

E. Appellant has abandoned all issues not argued in his brief.

It is axiomatic that issues not raised on appeal are abandoned. *See Disabled Am. Veterans* at 688 n.3 (stating that the Court would "only address those challenges that were briefed"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Thus, any and all other issues that have not been addressed in Appellant's Informal Brief, have therefore been abandoned.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court remand for adjudication the issues of entitlement to service connection for CAD, to include as secondary to postoperative tibial fracture, with recurrent cellulitis; hepatitis/liver disease; a rating in excess of 10% for GERD; and compensation under the provisions of 38 U.S.C. § 1151 for stomach and esophageal abnormalities, as a result of EGDs performed by VA on February 4, and August 5, 2008.

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America that, on January 16, 2020, a copy of the foregoing was mailed postage prepaid to:

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