Vet. App. No. 19-4777

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARY E. SMITH,
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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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 19-4777
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the June 19, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to 1) an effective date earlier than September 8, 2015, for the award of a 10% disability rating for right knee patellofemoral syndrome; 2) an effective date earlier than September 8, 2015, for the award of a 10% disability rating for left knee patellofemoral syndrome; and 3) service connection for an undiagnosed illness or a medically unexplained chronic multi-symptom illness due to exposures in the Gulf War.

II. STATEMENT OF THE CASE

Jurisdictional Statement

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

Nature of the Case

Cary E. Smith, (Appellant), appeals the June 19, 2019, decision of the Board that denied entitlement to 1) an effective date earlier than September 8, 2015, for the award of a 10% disability rating for right knee patellofemoral syndrome; 2) an effective date earlier than September 8, 2015, for the award of a 10% disability rating for left knee patellofemoral syndrome; and 3) service connection for an undiagnosed illness or a medically unexplained chronic multi-symptom illness due to exposures in the Gulf War.

The Board also remanded the claims of entitlement to service connection for an acquired psychiatric disorder, to include dysthymic disorder with anxious features; a rating in excess of 10% for right knee patellofemoral syndrome since September 2015; and a rating in excess of 10% for left knee patellofemoral syndrome since September 2015. [Record (R.) at 5, (1-17)]. The Court lacks jurisdiction over these claims because a remand by the Board does not represent a final Board decision. *Breeden v. Principi,* 17 Vet.App. 475, 478 (2004) (per curiam order).

The Board also referred the issue of clear and unmistakable error (CUE) in a July 2015 rating decision because the Regional Office had not yet adjudicated the CUE claim in the first instance; thereby, the Board lacked jurisdiction. [R. at 7]; *see also Jarrell v. Nicholson*, 20 Vet.App. 326, 332 (2006) (en banc) (a motion for revision of a regional office decision based on CUE must first be considered by the regional office).

Statement of Relevant Facts

Appellant served on active military duty from March 1989 to March 1993. [R. at 526]. In January 1998, Appellant filed a Department of Veterans Affairs (VA) claim for entitlement to service connection for right and left knee patellofemoral syndrome. [R. at 674-677]. A July 1998 rating decision granted entitlement to service connection for both knees, 0% compensable. [R. at 659-663]. Appellant did not appeal this decision and it became final.

In September 2015, Appellant filed for an increased disability rating for both knees, and entitlement to service connection for an undiagnosed illness. [R. at 639-649]. Appellant was provided a VA examination in March 2016. [R. at 320-337]. Based upon this examination, an April 2016 rating decision awarded an increased 10% disability rating for right and left knee patellofemoral syndrome. [R. at 223-232; 272-281]. The Regional Office (RO) denied entitlement to service connection for an increased risk for kidney disease and diabetes (claimed as undiagnosed illness due to Gulf War hazards). [R. at 275]. In July 2016, Appellant filed a Notice of Disagreement (NOD). [R. at 215-216; 218].

In September 2017, Appellant was provided several VA examinations. [R. at 112-132]. At the diabetes mellitus examination, the examiner determined there was no diagnosis of diabetes mellitus. [R. at 112, 113, (112-113)].

At the kidney conditions examination, the examiner reported Appellant did not have a kidney condition. [R. at 122, (122-125)]. Appellant stated that the

representative who helped him with his claim said that he might have a kidney condition but that he did not know of any current kidney condition. *Id.* The examiner diagnosed microalbuminuria and noted Appellant has hypertension, a cause of microalbuminuria. [R. at 124].

At the VA Gulf War examination, the examiner opined that Appellant did not have diabetes mellitus or any other endocrine disorder. [R. at 128]. He opined there was no confirmation of a kidney condition but instead diagnosed microalbuminuria likely due to hypertension. *Id.* The examiner further opined that Appellant does not have a chronic illness or condition caused by environmental exposure to Southwest Asia. [R. at 128]. The examiner explained that Appellant's kidney condition has a known etiology and diagnosis that is not due to or cause by environmental exposures in Southwest Asia. *Id.* A Statement of the Case (SOC) was issued in March 2018. [R. at 59-86].

In the decision on appeal, the Board found no document in the record between the July 1998 rating decision and Appellant's September 2015 request to reopen his knee claims that could serve as an informal claim for an increased rating, and therefore, no pending claim between those dates. [R. at 10, (1-18)]. The Board further found no evidence dated within one year of the September 2015 indicating the applicability of a 10% rating for either knee. *Id.*

The Board found that Appellant did not have a diagnosis of diabetes mellitus or a kidney condition, and there was no medical evidence supporting Appellant's theory that increased risk for the conditions qualifies as a multi-symptom or an

undiagnosed illness (MUCMI). [R. at 13]. Regarding Appellant's diagnosed microalbuminuria, the Board found no evidence that it is a chronic condition, and the preponderance of the evidence showed that it was related to his hypertension, a nonservice-connected condition. *Id.* This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the June 19, 2019, decision of the Board that denied entitlement to an effective date earlier than September 8, 2015, for the award of a 10% disability rating for right knee patellofemoral syndrome; an effective date earlier than September 8, 2015, for the award of a 10% disability rating for left knee patellofemoral syndrome; and service connection for an undiagnosed illness or a MUCMI due to exposures in the Gulf War because the Board provided adequate reasons or bases for its determinations, plausibly based its determination on the facts and the law, and Appellant has not demonstrated the Board's decision is clearly erroneous or the result of prejudicial error.

IV. ARGUMENT

A. The Board Provided an Adequate Statement of Reasons or Bases for Denying Appellant's Claim for an Earlier Effective Date for the Grant of Entitlement to a 10% Disability Rate for Right and Left Knee Patellofemoral Syndrome.

The Court should affirm the Board's decision that denied entitlement to an effective date prior to September 8, 2015, for the award of a 10% disability rating for right and left knee patellofemoral syndrome because there is a plausible basis for the Board's determinations, the Board's conclusions are based on the law,

and Appellant has not demonstrated the Board's decision contained error. *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (noting that the appellant bears the burden of persuasion on appeals to this Court); *see also Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); 129 S.Ct. 1696, 173 L.ED. 2d 532 (2009) (Appellant bears the burden of demonstrating prejudicial error).

The effective date for disability compensation generally cannot be earlier "than the date of receipt of application." 38 U.S.C. § 5110(a). For a request to reopen, the effective date of any resulting award of disability benefits is the date VA received the request to reopen "or the date entitlement arose, whichever is later." 38 C.F.R. § 3.400(r).

The Board's determination of the proper effective date for an award of service connection is a finding of fact the Court reviews under the clearly erroneous standard of review. 38 U.S.C. § 7261(a)(4); *see Evans v. West,* 12 Vet.App. 396, 401 (1999). The Board must also support all its determinations with an adequate statement of its reasons or bases. *Allday v. Brown,* 7 Vet.App. 517, 527 (1995).

Turning to the facts of this case, Appellant's initial claim for entitlement to service connection for his knees was granted in July 1998 with an evaluation of 0%, effective January 23, 1998. [R. at 659-663]. Appellant did not appeal this decision and it became final. Appellant did not submit any additional evidence pertinent to the claims until his September 2015 statement which VA construed as a claim to reopen. [R. at 639]. After a March 2016 VA examination, the RO granted entitlement to a

10% disability rating for each knee, and assigned an effective date of September 8, 2015, the date of Appellant's claim to reopen. [R. at 274]. Therefore, as a matter of law, the effective date for the award of service connection for PTSD cannot be earlier than the date of receipt of his July 15, 2014, application to reopen. 38 U.S.C. § 5110(a); *DeLisio v. Shinseki*, 25 Vet.App. 45, 51 (2011).

Next, as to Appellant's contentions the Board erred because his CUE claim is inextricably intertwined with his earlier effective date claims, [Appellant's Brief (App. Br.) at 10-11], the law does not support his proposition. As previously explained, the Board properly referred the issue of CUE in a July 1998rating decision. *Jarrell,* 20 Vet.App. at 333 (holding that "each wholly distinct and different CUE theory underlying a request for revision is a separate matter and, when attacking a prior RO decision, each must be presented to and adjudicated by the RO in the first instance and, if not, the Board lacks jurisdiction over the merits of the matter"); *see also 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). The RO has not considered Appellant's CUE claim, and thus, the Board did not have jurisdiction to consider the claim. *Id.*

Furthermore, two issues are only inextricably intertwined if a decision on one issue would have a significant impact on another, and that impact could render review by the Court of the decision on the other issue meaningless and a waste of judicial resources. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998). Appellant

fails to show how his claims of an earlier effective date for his present 10% rating for his bilateral knees are inextricably intertwined with his assertion of CUE in the July 1998 rating decision – a rating decision that granted service connection and assigned a noncompensable rating – that concerns his belief that VA failed the duty to assist. [R. at 5]. Therefore, his contention is unpersuasive.

B. The Board Provided an Adequate Statement of Reasons or Bases for Denying Appellant's Claim for Entitlement to Service Connection for an Undiagnosed Illness or a Medically Unexplained Chronic Multi-Symptom Illness Due to Exposures in the Gulf War.

Service connection for a disability may be established on a presumptive basis for veterans with a qualifying chronic disability that became manifest during service in the Southwest Asia theater of operations during the Persian Gulf War or to a degree of 10% or more not later than December 31, 2021. *See* 38 U.S.C. § 1117(a); 38 C.F.R. § 3.317(a)(1)(i). A qualifying chronic disability may result from an undiagnosed illness or a MUCMI "that is defined by a cluster of signs or symptoms." 38 U.S.C. § 1117(a)(2)(A), (B); *see* 38 C.F.R. § 3.317(a)(2)(i). A MUCMI is defined as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii).

Here, the September 2017 VA examiner reported Appellant did not have diabetes mellitus or a kidney condition. [R. at 112, 122)]. The examiner diagnosed microalbuminuria and noted Appellant has hypertension, a cause of

microalbuminuria. [R. at 124]. Appellant's hypertension is not service-connected. The Board denied the claim based upon the examiner's opinion that Appellant did not have a diagnosis of diabetes mellitus or a kidney condition, and there was no medical evidence supporting Appellant's theory that he had an increased risk for the conditions and that qualifies as MUCMI. [R. at 13]. Regarding Appellant's diagnosed microalbuminuria, the Board found no evidence that it is a chronic condition, and the preponderance of the evidence showed that it was related to his hypertension, a nonservice-connected condition. *Id.*

Appellant asserts the Board did not provide adequate reasons or bases where it determined he did not have a chronic condition, but the September 2017 VA examiner diagnosed chronic microalbuminemia. [App. Br. at 12-15]. Contrary to Appellant's assertions, the VA examiner did not diagnose "chronic" microalbuminemia." Indeed, the examiner opined, "Veteran has microalbuminemia on exam today. There is no other confirmatory lags to confirm a chronic diagnosis or when this condition presented. Veteran has dx of htn which is a cause of microalbuminemia." [R. at 124]. Again, the examiner specifically stated there was no evidence to suggest it is chronic and associated it as most likely due to a non-service connected condition, not to any environmental exposures. Therefore, Appellant's contention is unpersuasive.

To the extent Appellant asserts the examiner reported albumin concentration in the blood is an early indicator of renal disease, [App. Br. at 12], the examiner found no evidence of renal dysfunction. [R. at 123]. While the examiner explained

that, generally speaking, microalbuminemia could be an indicator of insulin resistance and increased renal and cardiovascular risk associated with metabolic syndrome, [R. at 125], the examiner also specifically stated that Appellant does not have renal dysfunction, [R at 123], or any kidney condition, [R. at 122], or a diagnosis of diabetes mellitus, [R. at 113]. The examiner further noted there are no studies that would confirm that his microalbuminemia is chronic. [R. at 124]. Finally, as the Board explained, [R. at 13], the examiner opined that Appellant's microalbuminemia is likely due to his non-service connected hypertension, and not to any environmental exposures in service. [R. at 125]. Thus, there is no part of this examination that supports Appellant's theory that he has a qualifying chronic disability from an undiagnosed illness or a MUCMI. There is no evidence that Appellant had any of these disorders during service in the Southwest Asia theater of operations during the Persian Gulf War or to a degree of 10% or more. 38 U.S.C. § 1117(a); 38 C.F.R. § 3.317(a)(1)(i). Therefore, his arguments are unpersuasive.

To the extent Appellant argues the benefit of the doubt doctrine is applicable, [App. Br. at 14], this doctrine is not applicable in this case. Although it is true that where the record suggests an approximate balance of positive and negative evidence, the Board must apply the benefit of the doubt doctrine and resolve any doubt in favor of the claimant, the rule has no application where the preponderance of the evidence weighs against the veteran's claims. 38 U.S.C. § 5107(b); *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001). The benefit of the doubt rule "does not ease the veteran's initial burden of proof." *Gilbert v. Derwinski*, 1 Vet.App. 49, 55

(1990). In this case, the record does not suggest an approximate balance of positive and negative evidence, and thus, the benefit of the doubt is not for application. As the Board stated, there is no medical evidence of record indicating Appellant suffers a MUCMI related to his military service. [R. at 13 (noting there is no medical opinion to the contrary)]. As the Board also noted, there is no adequate and competent medical evidence in the record that supports an increased risk of diabetes mellitus or kidney disease, [R. at 14]. Without such evidence, Appellant has not met his burden of supporting his claim.

The Secretary is cognizant of the duty to give a liberal and sympathetic reading to the informal briefs of *pro se* Appellants and has done so in this case. *See Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with respect to all *pro se* pleadings, VA must give a sympathetic reading by "determining all potential claims raised by the evidence, applying all relevant laws and regulations") (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *Calma v. Brown*, 9 Vet.App. 11, 15 (1996); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); *see also* U.S. VET.APP. R. 28(e) (providing that a pro se appellant need not conform to the strictures regarding the content of his brief). Nonetheless, even a liberal and sympathetic reading of Appellant's informal brief fails to identify prejudicial error in the Board decision on appeal or any argument supporting his assertion that he should be afforded an earlier effective date for his service-connected right and left knee patellofemoral disorder, or entitlement to service connection for an undiagnosed illness or a MUCMI due to exposures in

the Gulf War. It is not the duty of this Court, or the Secretary, to search the record to uncover any errors not identified by Appellant. *See Breeden v. West*, 13 Vet.App. 250 (2000) (per curiam order).

The Secretary is sympathetic to Appellant's belief that an earlier effective date for right and left knee patellofemoral syndrome, and service connection for an undiagnosed illness or a MUCMI due to exposures in the Gulf War is warranted. However, again, under the law, an effective date earlier than September 8, 2015, for the award of a 10% disability rating for right and left knee patellofemoral syndrome and service connection for an undiagnosed illness or a MUCMI due to exposures in the Gulf War may not be assigned. The Board's conclusion is plausible and supported by an adequate statement of reasons or bases. Therefore, the Court should affirm the Board's decision.

V. CONCLUSION

The Secretary respectfully asserts that, for the reasons stated above, the Court should affirm the June 19, 2019, Board decision on appeal.

Respectfully submitted,

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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 February 10, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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