Vet. App. No. 19-1638

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FRANCIS J. SAMPSON, JR.,
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

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY A. FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

SHONDRIETTE D. KELLEY
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027I)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7091

Attorneys for Appellee

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	)	
v.	)	Vet.App. No. 19-1638
	)	
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 February 22, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to an effective date prior to March 31, 2013, for service connection for sleep apnea.

II. STATEMENT OF THE CASE

Jurisdictional Statement

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

B. Nature of the Case

Francis J. Sampson, Jr. (Appellant) appeals the February 22, 2019, decision of the Board, which denied entitlement to an effective date prior to March 31, 2013, for service connection for sleep apnea.

C. Statement of Relevant Facts

Appellant served in the United States Army from August 1967 to June 1969. (Record Before the Agency (R.) at 2930), (R. at 873). In August 2000, he filed an informal claim for post-traumatic stress disorder (PTSD). (R. at 2679). VA provided Appellant a compensation and pension (C&P) examination in March 2001. (R. at (2650-2651)). A June 2001 rating decision granted service connection for PTSD, with a 50% rating, effective August 31, 2000. (R. at 2641-2646).

In March 2014, Appellant filed a claim for compensation for sleep apnea as secondary to PTSD. (R. at 1286-1288). In June 2014, he submitted a statement in support of his claim with a private medical opinion. (R. at 1274-1276). A November 2014 rating decision awarded Appellant service connection for sleep apnea, with a 50% rating, effective March 31, 2014. (R. at 1058-1064). The following month, Appellant filed his notice of disagreement. (R. at 1015-1017). In May 2016, VA issued a statement of the case, which continued Appellant's effective date, as it was the date of receipt of his claim. (R. at 909 (893-912)). Later that month, Appellant perfected his appeal. (R. at 885-886). In November 2018, VA issued a supplemental statement of the case, which continued Appellant's effective date, finding "[w]e did not receive the medical evidence of link between sleep apnea and PTSD until after Dr. Thomas's statement of May 23, 2014, subsequent to date of claim." (R. at 142 (131-143)).

In February 2019, the Board issued the decision on appeal, which granted entitlement to an effective date of to March 31, 2013, but no earlier, for service connection for sleep apnea. (R. at 5-8). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the February 22, 2019, decision which denied entitlement to an effective prior to March 31, 2013, for service connection for sleep apnea. Specifically, the Board did not err in its statement of reasons or bases for the denial of Appellant's claim. It properly considered and interpreted the applicable law and adequately explained its determinations.

IV. ARGUMENT

THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DENIAL OF AN EARLIER EFFECTIVE DATE PRIOR TO MARCH 31, 2013, FOR APPELLANT'S SLEEP APNEA

In rendering a decision, the Board must consider all "potentially applicable" provisions of law, *Schafrath v. Derwinski,* 1 Vet.App. 589, 593 (1991), and must provide a statement of reasons or bases sufficient to enable a claimant and this Court to understand the basis of its decision, *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). The latter generally requires the Board to 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. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). Appellant asserts VA "erred by not fully and sympathetically

developing [his] claim for disability benefits and by not adjudicating his claim for sleep apnea." (Appellant Brief (App. Br.) at 6). This assertion is unpersuasive.

A November 2014 rating decision awarded Appellant service connection for sleep apnea, with a 50% rating, effective March 31, 2014, the date of his claim. (R. at 1058-1064). Appellant has asserted, before the Board and in his opening brief, that his effective date for sleep apnea should be August 31, 2000, the effective date for his service-connected PTSD. (R. at 1016), (R. at 885), (App. Br. at 6-12). In its present decision, the Board considered Appellant's arguments then found:

> Although the regulations in effect prior to 2014 did allow for informal claims, there is nothing in the record that would qualify as such. It is indisputable that the Veteran had a diagnosis of sleep apnea at the time of his August 2000 claim for PTSD; however, the mere presence of medical evidence of a disability does not show an intent on the Veteran's part to seek service connection and therefore does not constitute a claim; rather, the Veteran must assert a claim either expressly or impliedly.

(R. at 6-7). It also found, "while [Appellant] eventually was granted service connection for sleep apnea as secondary to the service-connected PTSD, this was after he submitted a medical opinion in support of his claim. While he submitted numerous claims over the years prior to March 2014, he did not mention his sleep apnea, and there is no unadjudicated claim for sleep apnea prior to November 2014." (R. at 7). The Board concluded, "given that [his] service connection claim for sleep apnea was under the [fully developed claim] program and received between August 6, 2013[,] and August 5, 2015, and the fact that he

had a diagnosis of sleep apnea for the year prior to submitting his claim, an earlier effective date of March 31, 2013 is warranted." (R. at 8).

The Board's analysis is correct. It is not disputed that the Board has an obligation to consider and address all issues raised by either the claimant or the evidence. *See Robinson v. Mansfield,* 21 Vet.App. 545, 552-56 (2008), ("The Board commits error only in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record."), *aff'd sub nom. Robinson v. Shinseki,* 557 F.3d 1355 (Fed. Cir. 2009). Nor is it disputed that the Secretary is required to review all communications in the record that may be interpreted as formal or informal claims and to consider whether, in the context of the record, they reasonably raise a claim for benefits. *Brannon v. West,* 12 Vet.App. 32, 35 (1998); *see also Beverly v. Nicholson*, 19, Vet.App. 394, 404 (2005) (recognizing that the Board is required to adjudicate "all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all documents and oral testimony in the record prior to the Board's decision"). However, it is equally well settled that an intent to apply for benefits is an essential element of any claim, whether formal or informal, and that such intent must be expressed in writing. *See Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009). The mere existence of medical evidence referencing symptoms of or treatment for sleep apnea does not raise an informal claim for benefits for sleep apnea as secondary to PTSD. *See Criswell v. Nicholson*, 20 Vet.App. 501, 503-

04 (2006) (holding that "where there can be found no intent to apply for VA benefits, a claim for entitlement to such benefits has not been reasonably raised"). Appellant fails to demonstrate otherwise.

Appellant contends that sleep apnea symptoms were "discussed and diagnosed" in his March 2001 C&P examination, private February 2004 opinion, and private January 2008 opinions for his PTSD. (App. Br. at 9 (6-9)); *see* (R. at 2650-2651), (R. at 2578-2580), (R. at 2659-2666). However, this contention is not supported by the evidence of record. While the March 2001 and February 2004 opinions discuss Appellant's trouble falling and staying asleep, neither opinion explicitly discusses sleep apnea nor lists it as an Axis III . (R. at 2651), (R. at 2580). The January 2008 opinion mentions Appellant's occasional nightmares, which are not evidence of sleep apnea. (R. at 2662). It also discusses Appellant's sleep apnea in its "problem history" section but does not relate it to Appellant's PTSD. (R. at 2660). Appellant also argues that the Board failed to adequately address his 2001 sleep apnea diagnosis. (App. Br. at 10). Records of Appellant's February 2001 emergent hospitalization for chest pains, include discussion of his "significant obstructive and central sleep apnea"; however, they include no discussion regarding Appellant's PTSD. (R. at 2114 (2110-2122)). As such, none of these records can be read as an informal claim for service connection for sleep apnea secondary to PTSD.

Sleep apnea is a disorder in which a person's breathing repeatedly stops and starts during sleep. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (DORLAND'S) 117 (32nd ed. 2012) (defining sleep apnea as "transient periods of cessation of breathing during sleep"; and obstructive sleep apnea as "sleep apnea resulting from collapse or obstruction of the airway"). Contrary to Appellant's contentions, trouble falling and staying asleep are symptoms of insomnia, not sleep apnea. (App. Br. at. 10-11); *see* DORLAND'S 944 (defining insomnia as "inability to sleep; abnormal wakefulness"); *Kern v. Brown,* 4 Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence"). The first evidence of record that directly relates Appellant's sleep apnea to his PTSD is a May 2014 private opinion, which opined "his PTSD contributes to and aggravates his sleep apnea." (R. at 1275). Prior to that, the evidence merely indicated the presence of both conditions. Accordingly, as the Board correctly found, a claim for sleep apnea was not reasonably raised by the record, prior to March 31, 2014, the date of Appellant's claim. (R. at 7-8); *see Criswell*, 20 Vet.App. at 503-04; *Brokowski*, 23 Vet.App. at 84. Therefore, Appellant's arguments fail, and he has not shown that the Board's statement of reasons or bases was prejudicially inadequate.

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 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).

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, Appellant has not demonstrated the Board committed clear error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY A. FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Shondriette D. Kelley
SHONDRIETTE D. KELLEY
Appellate Attorney
Office of the General Counsel (027I)

U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7091

Attorneys for Appellee
Acting Secretary of Veterans Affairs