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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2840

OSCAR JOHNSON, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

TOTH, *Judge*: Veteran Oscar Johnson served in the Army from 1964 to 1967. He appeals an April 2019 Board decision that adjudicated nine issues and remanded nine more. The Court has no jurisdiction over the matters remanded. *See Martinez v. Wilkie*, 31 Vet.App. 170, 173 n.2 (2019). And because the veteran does not contest the Board's denial of specially adapted housing or an increased rating for tinnitus, the appeal of those matters is dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc). The remaining issues before the Court are two claims to reopen previously denied claims and five requests for earlier effective dates for service-connected conditions. The Court notes at the outset that it generally construes pro se filings sympathetically and has done so here, *see Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015), but this favorable practice does not relieve the veteran of his burden to demonstrate that the Board committed prejudicial error, *see Abbott v. O'Rourke*, 30 Vet.App. 42, 48 (2018).

I. CLAIMS TO REOPEN

The first issue raised on appeal deals with the Board's denial of Mr. Johnson's request to reopen his claim for service connection for a low back disability. The veteran has pursued service connection for a low back disability since at least 1988, and this endeavor has included numerous

adverse VA decisions and attempts to reopen his claim. In May 2013, he asked VA again to reopen his claim. The agency rejected that request and he appealed.

The Board, in the decision now on appeal, acknowledged that Mr. Johnson had a longstanding back disability and that he also was injured in service during a vehicle accident. But it concluded that the doctor's report from 2005 that he submitted was neither new nor material, as it was previously considered by the Board and did not relate to a nexus between his in-service injury and his current disability. The Board also concluded that the various medical records he submitted from 2005 to 2009 served only to reinforce the fact that he had a current disability and thus did not relate to the unestablished fact necessary to substantiate the claim. That is, it didn't demonstrate a nexus between his current disability and service.

Veterans may reopen a claim by submitting new and material evidence. 38 C.F.R. § 3.156(a) (2019). New evidence is evidence not previously submitted to the agency. *Id*. To be material, it must relate to an unestablished fact in the previously denied claim. *Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010). But it need not relate "to each previously unproven element." *Id*. at 120. The Board's assessment of whether new and material evidence has been received is reviewed for clear error. *See Hill v. McDonald*, 28 Vet.App. 243, 255 (2016).

The issue here was service connection, and establishing "service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability." *Harvey v. Shulkin*, 30 Vet.App. 10, 15 (2018). The Board noted that his current disability and in-service injury were established. Thus, for evidence to be material, it needed to relate to the unestablished fact of nexus.

The veteran's informal brief suggests that the 2005 to 2009 medical records, which included various MRI reports, should have been considered new and material. But he doesn't explain how they help establish a nexus between his low back disability and service. Moreover, even if the Board erred and the evidence was material because it did relate to a nexus, it's not clear to the Court that the evidence was new. In other words, it appears that this evidence was already considered by the Board when it issued its previous decision in 2010. *See* R. at 4146 (2010 Board decision discussing the private examiner's review of the MRI results and other records). To reopen the claim, the evidence must be both new *and* material. As mentioned at the outset of this opinion,

the veteran must demonstrate prejudicial error, and he hasn't done so. *See Abbott*, 30 Vet.App. at 48.

Related to the same issue of his low back disability, the veteran introduces a constitutional argument, asking whether, in light of our constitutional structure and the separation of powers, an agency of the Executive Branch may be the judge of its own actions. He attempts to tie this question, so far as the Court can tell, to his belief that VA accepted as fact during past proceedings that he had a low back disability but later required him to demonstrate new and material evidence of that condition. At bottom, it seems that he misunderstands what he was required to show. The Board acknowledged that he had a longstanding low back disability, and he didn't have to prove that again. Rather, he had to show evidence that it was connected to service. Because he didn't, the Board properly denied his claim to reopen.

Mr. Johnson also sought to reopen a previously denied claim for hepatitis C. In a 2012 rating decision, VA denied service connection for hepatitis C based on his assertions that he contracted the disease from a jet injection vaccination gun during service. He did not appeal that decision, and it became final.

He argued before the Board that he worked in a field hospital and was exposed to the disease in that capacity. The Board found, however, that this evidence was already part of the record and that reopening his claim for hepatitis C on the basis of a new theory of service connection (as opposed to new and material evidence) was not permissible.

On appeal here, the veteran once again highlights his potential exposure to hepatitis C through the inoculation gun and his field hospital work. The law states, however, that, "when a claim is disallowed by the Board, . . . a claim based upon the same factual basis may not be considered." 38 U.S.C. § 7104(b). That is, the Board may not distinguish a new claim from one to reopen a previously disallowed claim unless it stands on a different factual basis. *See Boggs v. Peake*, 520 F.3d 1330, 1334 (Fed. Cir. 2008). And directly applicable here, the "presentation of new arguments based on evidence already of record at the time of the previous decision does not constitute the presentation of new evidence." *Untalan v. Nicholson*, 20 Vet.App. 467, 470 (2006). The Board did not err in this instance because the veteran's claim to reopen rested on the same factual basis.

II. EARLIER EFFECTIVE DATES

In a September 2014 rating decision, VA granted Mr. Johnson service connection for tinnitus, a psychiatric disorder, a cervical spine disorder, and radiculopathy secondary to the cervical spine disorder. It also granted an increased rating for TBI residuals. VA assigned an effective date of May 16, 2013, which was the date that he submitted claims to reopen past final decisions rendered on these conditions. He argued to the Board that the effective date should correspond to the original claims that he filed for these conditions. His original claims for service connection for tinnitus, a psychiatric condition, and a cervical spine disorder were denied in 1989, 2009, and 2010 respectively, and his claim for an increased rating for TBI residuals was denied in February 2012.

The Board found that earlier effective dates for these conditions were not appropriate because the claims at issue (except for radiculopathy, discussed below) were ones to reopen previously denied claims and they were submitted in May 2013. Moreover, there was no earlier correspondence that could be construed as a claim related to these matters.

The Board's assignment of an effective date is a factual determination reviewed for clear error. *See Taylor v. Wilkie*, 31 Vet.App. 147, 154 (2019). An "effective date generally will be the date of receipt of the claim or the date entitlement arose, whichever is later." *Id*. Similarly, the effective date for a claim to reopen is generally the date that the claim to reopen was received or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(q)(2), (r) (2019).

Mr. Johnson doesn't contest that his claims were construed as claims to reopen. And he doesn't suggest that he submitted any earlier correspondence on the matters. Thus, because his claims to reopen were not received prior to May 16, 2013, the Board's decision to deny an earlier effective date for these conditions was not improper.

Regarding Mr. Johnson's right arm radiculopathy, this condition was diagnosed and found to be secondarily related to his cervical spine disorder during a 2014 VA examination. Per the Board, Mr. Johnson submitted no claim, or correspondence that could be construed as an informal claim, for this condition at all, let alone prior to his claim to reopen the cervical spine disorder submitted in 2013. Again, the veteran doesn't contest this fact and the Board did not err by finding that an earlier effective date wasn't warranted.

III. CONCLUSION

Accordingly, the April 10, 2019, Board decision is AFFIRMED.

DATED: April 28, 2020

Copies to:

Oscar Johnson

VA General Counsel (027)