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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4993

RANDY L. WILLIAMS, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The self-represented appellant, Randy L. Williams, appeals a June 21, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for bilateral hearing loss, pharyngitis/viral syndrome, acne, and abnormal lab results. Record (R.) at 3-12. The Board remanded the matters of entitlement to benefits for a heart disorder and hypertension, initial disability ratings in excess of 10% each for a right ankle sprain and a thoracolumbar strain, and a compensable initial disability rating for restrictive lung disease. R. at 8-12. Those remanded matters are not before the Court at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision denying entitlement to benefits for bilateral hearing loss, pharyngitis/viral syndrome, acne, and abnormal lab results.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from October 1991 to October 1995. R. at 614. His service medical records reflect that he sought treatment for congestion, coughing, fever, and mild shortness of breath, among other symptoms, in August 1993; he was diagnosed with exudative pharyngitis. R. at 642-43. At a follow-up appointment the next day, he complained that his condition was worsening and a diagnosis of viral syndrome was added. R. at 644. In March 1995, he reported a sore throat, congestion, and a cough for the previous 4 days. R. at 566. He was diagnosed with clinically acute sinusitis. R. at 567. Several months later, he was again diagnosed with exudative pharyngitis, as well as rhinitis. R. at 569.

The appellant's service medical records contain several audiological records. In September 1993, his hearing was within normal limits except for mild hearing loss at 6000 hertz. R. at 645. In September 1994, he complained of ringing in his ears; his hearing was within normal limits. R. at 561-62. At the time of his separation audiological examination in September 1995, his hearing thresholds were characterized as "stable." R. at 570.

The appellant received treatment for acne in February 1994. R. at 649. A June 1994 dermatology record reflects that his acne had improved. R. at 653.

In January 2012, the appellant sought benefits for abnormal lab results, pharyngitis/viral syndrome, hearing loss, and acne. R. at 598-605, 606-13. He underwent VA examinations in November 2013. R. at 224-31, 256-67, 302-07. The examiner first determined that the appellant did not have a pharyngeal injury or any other pharyngeal conditions. R. at 258. He further determined that the appellant's in-service pharyngitis had resolved, R. at 261, explaining that he was treated for it and it is not a chronic condition, R. at 303. Audiological examination revealed that the appellant did not have a hearing loss disability for VA purposes. R. at 228. With respect to the appellant's skin, the examiner determined that his acne had resolved and there was no current diagnosis of the condition. R. at 263. He explained that the appellant's in-service episode of acne had resolved and that the condition was not chronic. R. at 306.

A VA regional office (RO) denied the appellant's claims in December 2013. R. at 204-11. The appellant filed a Notice of Disagreement (NOD) with that decision, alleging in part that the RO had committed clear and unmistakable error (CUE). R. at 164-77. He later perfected his appeal to the Board, reiterating his CUE allegations. R. at 23-33.

In the June 2019 decision on appeal, the Board denied each of the appellant's claims for lack of a current disability. R. at 6-8. The Board also determined that the appellant's allegation of CUE was improper because the December 2013 RO decision was not final. R. at 4-5. This appeal followed.

II. ANALYSIS

In his informal brief, which the Court construes liberally, *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), the appellant argues that the Board erred in failing to consider entitlement to benefits for each of his conditions under a theory of continuity of symptoms, *see* Appellant's Informal Brief (Br.) at 18-22. He also asserts that the Board failed to adequately account for his lay statements that he experiences hearing loss, pharyngitis, and acne and erroneously relied on the absence of contemporaneous medical evidence to deny his claims. Appellant's Informal Br. at 19-21. Next, he contends that the Board failed to consider the merits of his CUE motion. Appellant's Informal Br. at 8-10. Finally, he argues that the Board failed to consider whether abnormal lab results in September 2012¹ were a sign or symptom of an undiagnosed illness under 38 U.S.C. § 1117. Appellant's Informal Br. at 22. The Secretary disputes each of these arguments and urges the Court to affirm the Board decision. Secretary's Br. at 6-16.

Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). 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 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

¹ This document does not appear in the record of proceedings, although other records appear to refer to it. *See, e.g.*, R. at 36, 207.

The Board, in part relying on the November 2013 examiner's determination that the appellant does not have bilateral hearing loss for VA purposes, acne, or pharyngitis, denied each of the appellant's claims for benefits on the basis that he does not have a current disability.² R. at 6-8. Generally, establishing service connection requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). Where one of these elements is missing, a claimant is not entitled to benefits based on direct service connection.³

The appellant's primary challenge to the Board's finding that he does not currently have bilateral hearing loss, pharyngitis/viral syndrome, or acne is that the Board failed to consider his lay statements regarding his symptoms. Appellant's Informal Br. at 19-21. The Board, however, acknowledged the existence of lay evidence related to hearing loss, R. at 6, but explained that the question of whether a claimant has hearing loss for VA purposes is not a matter capable of lay observation, R. at 7. This is so because hearing loss must rise to a particular level—measured by objective audiological testing—to be considered a disability for VA purposes. *See Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992); 38 C.F.R. §§ 4.85, 4.86 (2019). Additionally, the appellant does not challenge the adequacy of the November 2013 audiological examination that the Board relied on to deny his claim. Accordingly, the Court concludes that the appellant has not demonstrated that the Board's determination that he does not have a current hearing loss disability is clearly erroneous. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *Russo*, 9 Vet.App. at 50.

² The Board additionally found that there was no evidence relating any current pharyngitis or acne condition to service. R. at 7.

³ There are two alternative methods of establishing entitlement to benefits for chronic diseases included in the provisions of 38 U.S.C. § 1101(3) and 38 C.F.R. § 3.309(a): chronicity and continuity of symptomatology. *See Walker v. Shinseki*, 708 F.3d 1331, 1335-36, 1340 (Fed. Cir. 2013). However, only the conditions enumerated in § 3.309(a) are eligible for service connection in this way; neither acne nor pharyngitis/viral syndrome are listed in § 3.309(a). Hearing loss, considered an "organic disease[] of the nervous system," 38 C.F.R. § 3.309(a); *see Fountain v. McDonald*, 27 Vet.App. 258, 263 (2015), is included, but evidence of a current hearing loss disability for VA purposes is also needed to establish entitlement to benefits for that condition under a theory of continuity of symptoms, *see* 38 U.S.C. § 1110; *Walker*, 708 F.3d at 1336; *Shedden*, 381 F.3d at 1166-67.

Similarly, with respect to the appellant's assertions of current acne or pharyngitis, the Board "acknowledge[d] that the [appellant] is competent to state that he has or has had symptoms of pharyngitis, or that he has acne," but found that he "has not been shown to possess the requisite medical training, expertise, or credentials needed to diagnose a disease." R. at 8. The Board also determined that the appellant's lay statements regarding acne and pharyngitis were "outweighed by the probative November 2013 VA opinion" that found no evidence of a current acne condition or pharyngitis. R. at 8. In other words, the Board did not deny the appellant's claims solely based on a lack of contemporaneous medical evidence, as the appellant argues. Appellant's Informal Br. at 19-21. Instead, the Board denied his claims because he is not competent to render a diagnosis of a current disability under these circumstances, and the competent evidence of record reveals no current acne condition or pharyngitis. *See Jandreau*, 492 F.3d at 1377. The appellant challenges neither the Board's competency determination nor its reliance on the November 2013 VA examination. Further, the appellant does not identify any lay evidence in the record that the Board overlooked. The Court therefore concludes that he has not carried his burden of demonstrating error in the Board's determination that he does not currently have acne or pharyngitis. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997).

Turning to the appellant's argument that the Board erred by not addressing the merits of his allegations of CUE in the December 2013 RO decision, Appellant's Informal Br. at 8-10, the Court finds no error. A request to revise a final Board or RO decision based on CUE is a collateral attack on that decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000). The "sole purpose of a CUE [motion] is to provide a VA claimant with an opportunity to challenge a decision that is otherwise final and unappealable." *May v. Nicholson*, 19 Vet.App. 310, 317 (2005) (emphasis omitted). As the Board found, the appellant filed an NOD with the December 2013 RO decision, *see* R. at 164-77, which abates the finality of that decision, R. at 4-5; *see Turner v. Shulkin*, 29 Vet.App. 207, 211 (2018) ("As a general matter, when an RO renders a decision on a claim and the claimant does not timely appeal, the decision becomes final."). Accordingly, the Court concludes that the Board correctly determined that the issue of CUE in the December 2013 RO decision was not before it. *See May*, 19 Vet.App. at 317 ("[A] CUE [motion] (or any collateral attack) cannot lie as to a decision that is still open to direct review." (emphasis omitted)).

Finally, the appellant argues that the Board failed to consider whether abnormal laboratory results in September 2012 might be a sign or symptom of an undiagnosed illness under 38 U.S.C. § 1117. Appellant's Informal Br. at 22. In that regard, the Board stated that the appellant had not "identified any chronic disability related to service that is manifested by an abnormal lab result, and service connection for such is not warranted." R. at 8. Before the Court, the appellant likewise does not identify any evidence of a chronic disability that may be related to his abnormal lab results, and the Court finds that he has not shown error in the Board's decision in that respect. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

Further, the appellant has not argued or demonstrated that he is included in the class of veterans covered by section 1117. That statute provides that 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) (2019). In that regard, the Secretary points out that the appellant's Form DD-214 does not indicate that he had any foreign service, Secretary's Br. at 16 (citing R. at 614), and the appellant does not assert in his initial brief or his reply brief that he did have such service. Therefore, the appellant has not shown that any purported error on the part of the Board is prejudicial. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error).

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's June 21, 2019, decision denying entitlement to benefits for bilateral hearing loss, pharyngitis/viral syndrome, acne, and abnormal lab results is AFFIRMED.

DATED: April 29, 2020

Copies to:

Randy L. Williams

VA General Counsel (027)