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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4777

CAREY E. SMITH, APPELLANT,

v.

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

Before DAVIS, *Senior Judge*.¹

MEMORANDUM DECISION

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

DAVIS, *Senior Judge*: Veteran Carey E. Smith, whose service in the U.S. Army included service in the Gulf War, suffers from left and right knee conditions and a chronic undiagnosed illness. He appeals a June 19, 2019, Board of Veterans' Appeals decision that denied an effective date earlier than September 8, 2015, for right and left knee patellofemoral syndrome and service connection for an undiagnosed illness or medically unexplained chronic multisymptom illness (MUCMI) due to his Gulf War service.²

Because the Board relied on an inadequate statement of reasons or bases to deny service connection for an undiagnosed illness or MUCMI, the Court will remand that matter. On the other hand, because the veteran has failed to show error in the Board's determinations regarding an

¹ Judge Davis is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 03-20 (Jan. 2, 2020).

² Record (R.) at 5-17. The Board also remanded the matters related to service connection for an acquired psychiatric disorder, to include dysthymic disorder with anxious features and ratings in excess of 10% after September 2015 for bilateral knee patellofemoral syndrome. These matters will not be addressed because they are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). Additionally, the Board referred to the agency of original jurisdiction (AOJ), for initial adjudication, a request to revise a July 2015 rating decision on the basis of clear and unmistakable error (CUE). Because the veteran has not brought any argument related to this determination, the Court will not address it. *See Young v. Shinseki*, 25 Vet.App. 201, 203 (2012) (en banc order).

earlier effective date for right and left knee patellofemoral syndrome, the Court will affirm that part of the decision on appeal.

I. ANALYSIS

The Court reviews the Board's factual determinations, including whether a medical examination is adequate, under the "clearly erroneous" standard of review.³ "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."⁴ Alternatively, the Court reviews issues of law *de novo*.⁵

As always, the Board must support its determinations with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court.⁶ The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence,⁷ discuss all issues raised by the claimant or the evidence of record,⁸ and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."⁹

In June 2019, the Board denied Mr. Smith an earlier effective date for his bilateral knee condition and service connection for an undiagnosed illness or a MUCMI due to Gulf War exposure, because there was no evidence that the veteran was entitled to these awards.¹⁰ As to the earlier-effective-date claims, the Board noted that Mr. Smith did not appeal the July 1998 decision granting him service connection at a noncompensable level for his knees; thus, that decision is final.¹¹ Further, the Board explained that because Mr. Smith did not file a request for an increased

³ *Arneson v. Shinseki*, 24 Vet.App. 379, 382 (2011); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995); *Wood v. Derwinski* 1 Vet.App. 190, 193 (1991).

⁴ *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁵ *Butts v. Brown*, 5 Vet. App. 532, 539 (1993) (en banc); see *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006).

⁶ 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

⁷ *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

⁸ *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

⁹ *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

¹⁰ R. at 10-13.

¹¹ *Id.* at 9. As the Court noted above, a CUE request related to this decision, which the Board referred to the AOJ, is currently open.

rating effective earlier than September 2015, for his 10% grant he is not entitled to an effective date earlier than that date.¹² The Board did concede that Mr. Smith's bilateral knee condition likely resulted in painful motion before September 2015, but because he filed no claim in relation to this painful motion until September 2015, an earlier effective was not warranted.¹³ Additionally, the Board stated that it relied on a September 2017 VA examination to determine that the veteran was not entitled to service connection for an undiagnosed illness or MUCMI.¹⁴

Mr. Smith argues that the Board provided an inadequate statement of reasons or bases for its determinations because it failed to address whether he was entitled to compensation for other conditions related to his diagnosed patellofemoral syndrome.¹⁵ Additionally, he argues that the Board did not adequately address evidence within the September 2017 examination regarding whether his microalbuminuria¹⁶ is chronic.¹⁷ The Secretary argues that the Board's decision should be affirmed because the Board did not err in its determinations.¹⁸

The Court concludes that the Board erred by relying on an inadequate September 2017 examination to deny service connection for an undiagnosed illness or MUCMI.¹⁹ The September 2017 examiner did not explain why the treatise evidence he used did not align with his conclusion that if Mr. Smith had "chronic microalbuminuria, it is likely due to his hypertension."²⁰ A review of the treatise information provided by the examiner shows that although there is a "correlation" between hypertension and microalbuminuria, it is unclear whether microalbuminuria is a "biomarker of increased cardiovascular risk" or "an indicator of . . . the increased . . . risk associated

¹² *Id.* at 10.

¹³ *Id.* at 10-11.

¹⁴ *Id.* at 12-13.

¹⁵ Appellant's Informal Brief (Br.) at 10-11.

¹⁶ "Microalbuminuria" is "urinary excretion of albumin in quantities that are above the reference interval but too low to be measured by conventional dipstick tests; it is an early indicator of glomerulopathy." *Microalbuminuria*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (32d ed. 2012).

¹⁷ Appellant's Informal Br. at 13.

¹⁸ Secretary's Br. at 5

¹⁹ R. at 12-14.

²⁰ R. at 125; *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that an adequate examination must not only contain data and conclusions, but it must also provide "a reasoned medical explanation connecting the two").

with [hypertension]."²¹ Because the treatise evidence used as a rationale is not definitive as to causation, the Board erred in relying on an examination that lacked an adequate rationale for its conclusion.²² Remand is therefore required for the Board to adequately address whether Mr. Smith is entitled to service connection for an undiagnosed illness or a MUCMI.²³

The Court, however, concludes that Mr. Smith has not persuasively shown any Board error with its determination regarding an earlier effective date for his 10% awards for right and left knee patellofemoral syndrome.²⁴ Mr. Smith has not provided any evidence showing that he either appealed his July 1998 noncompensable award, or submitted an increased-rating claim before September 2015.²⁵ Because the effective date for a compensable rating is based on which of the following happens later—the appearance of symptoms warranting an increased rating *versus* the filing of a claim with respect to those symptoms—Mr. Smith cannot as a matter of law be currently²⁶ granted an effective date earlier than September 2015.²⁷

Additionally, to the extent Mr. Smith argues that the Board should have addressed whether his diagnosed patellofemoral syndrome entitled him to compensation for his "hip, thigh . . . and main nerve of the anterior part of the thigh,"²⁸ he has not provided any evidence showing that his patellofemoral syndrome affects these areas of his body.²⁹ Further, because there is no medical evidence within the record suggesting that the veteran's patellofemoral syndrome affected any body part besides the veteran's knees, any potential error here is harmless at best.³⁰ Therefore, any perceived failure by the Board to address this theory does not necessitate remand.

²¹ *Id.*

²² *See Nieves-Rodriguez*, 22 Vet.App. at 301.

²³ ²³ *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate).

²⁴ *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (finding that the appellant bears the burden of persuasion on appeals to this Court), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

²⁵ *See Appellant's Informal Br.*

²⁶ The Court notes that Mr. Smith's CUE claim related to the July 1998 decision may allow for an earlier effective date once it is finally adjudicated by the AOJ.

²⁷ *See* 38 C.F.R. § 3.400 (2019).

²⁸ *Appellant's Informal Br.* at 10.

²⁹ *See Hilkert*, 12 Vet.App. at 151.

³⁰ *Id.*; *see also 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

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE that part of the Board's June 19, 2019, decision relating to service connection for an undiagnosed illness or MUCMI, and REMANDS that matter for further development consistent with this decision. The remainder of the decision on appeal is AFFIRMED.

DATED: April 29, 2020

Copies to:

Carey E. Smith

VA General Counsel (027)

because of VA error).