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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1457

ROBERT HUDSON, JR., APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Robert Hudson, Jr., appeals through counsel a November 2, 2018, Board of Veterans' Appeals (Board) decision that declined to reopen a claim for entitlement to service connection for a seizure disorder, denied entitlement to an initial compensable disability rating for left ear hearing loss, and denied entitlement to a disability rating greater than 20% for diabetes mellitus (DM). Record (R.) at 3-19.[1]

The Board reopened the appellant's previously denied, final claims for service connection for hypertension, including as secondary to PTSD, depressive disorder, and DM, or medications taken for those conditions. R. at 4. These are favorable findings that the Court will not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

[1] The Board also remanded the matters of an effective date earlier than May 20, 2014, for the grant of service connection for left ear hearing loss; whether to reopen a claim for service connection for a skin rash of the right lower extremity; service connection for tinnitus, including as secondary to service-connected left ear hearing loss; service connection for post-traumatic stress disorder (PTSD and a depressive disorder; service connection for a sleep disorder, including as secondary to PTSD and a depressive disorder; service connection for hypertension, including as secondary to PTSD, depressive disorder, DM, or medications taken for those conditions; and service connection for coronary artery disease, acid reflux, and erectile dysfunction, all including as secondary to PTSD, depressive disorder, or DM. R. at 4-5. The Court has no jurisdiction over the remanded matters and will not address them further. *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").

This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from January 1968 to December 1971. R. at 3306.

In June 2008, he filed a claim for service connection for seizures, among other claims. R. at 3108-22. The regional office (RO) denied the claim in a February 2009 rating decision because it found no evidence of a seizure disorder during service and because the appellant's first medical diagnosis of a seizure disorder occurred in 1997, 26 years after his discharge from service. R. at 2838-45. In July 2009, the appellant filed a Notice of Disagreement (NOD), R. at 2834, and the RO issued a Statement of the Case (SOC) in October 2009, R. at 2778-98. The appellant did not perfect the appeal and the RO's decision became final.

In January 2013, the appellant sought to reopen his previously denied seizure claim. R. at 2679-82. In an August 2013 letter, the RO advised the appellant that to reopen the claim, he needed to provide new and material evidence. R. at 2669. The appellant did not provide any additional evidence relating to his seizure claim, but, nonetheless, in a September 2013 rating decision, the RO reopened the seizure claim and denied service connection on the merits. R. at 2585-93.

In May 2014, the appellant underwent a VA hearing examination. R. at 2274-78. Audiological testing revealed that he had some hearing loss in his left ear, but it did not meet the criteria for consideration as a disability for VA purposes. R. at 2276. The examiner also noted that the appellant had a "significant threshold shift" at 3000-4000Hz at his separation examination and therefore opined that the appellant's left ear hearing loss was related to service. *Id.* In a June 2014 rating decision, the RO granted service connection for left ear hearing loss and assigned a noncompensable rating. R. at 2258.

In an April 2015 rating decision, the RO granted service connection for DM and assigned a 20% disability rating. R. at 2096-116. In June 2015 SOCs, the RO continued the noncompensable rating for the appellant's left ear hearing loss disability and continued to deny service connection

for a seizure disorder. R. at 2039-60, 2061-79. The appellant perfected his appeal of the left ear hearing loss claim to the Board in July 2015. R. at 2020, 2023; *see also* R. at 2033.

In a September 2015 VA examination for DM, the examiner noted that the appellant's DM was managed by restricted diet and oral hypoglycemic agents. R. at 1839-41. In a November 2015 rating decision, the RO continued the 20% disability rating for DM. R. at 1781-99.

In a January 2016 VA hearing examination, audiological testing revealed that the appellant had left ear hearing loss that did not meet the criteria for a disability for VA purposes. R. at 1496.

In a May 2017 VA examination for DM, the examiner noted that the appellant's DM was managed by restricted diet, oral hypoglycemic agents, and home monitoring of blood glucose. R. at 1144-46. The same month, the RO issued an SOC continuing the 20% disability rating for the appellant's DM, R. at 1115-35, and in June 2017 the appellant perfected his appeal of the claim to the Board, R. at 41-42.

In the decision on appeal, the Board declined to reopen the appellant's claim for service connection for seizures because the appellant failed to submit new and material evidence. R. at 9. The Board also determined that the evidence of record did not warrant higher disability ratings for the appellant's left ear hearing loss and DM disabilities. R. at 10, 12. This appeal followed.

II. ANALYSIS

A. Reopening of Seizure Disorder Claim

The appellant argues that the record contains new and material evidence that his seizure disorder and mental health disorders are related, thereby reasonably raising a new theory of entitlement that his seizure disorder is service connected on a secondary basis to his mental health disorders. Appellant's Brief (App. Br.) at 4-5. This evidence, he contends, consists of his January 2013 request to reopen his previously denied seizure claim, in which he addressed his mental health and seizure symptoms; and a December 2005 VA mental health treatment note stating that, on at least one occasion, the appellant had experienced visual hallucinations immediately before the onset of a grand mal seizure. R. at 4; *see* R. at 667, 2679-80. Therefore, he asserts that the Board's reasons or bases for discounting this evidence are inadequate and that the Board properly should have remanded his seizure disorder claim together with his other mental health disorder claims. R. at 5.

The Secretary responds that, while it was newly submitted since the previous February 2009 denial, the appellant's January 2013 statement is not material because, in it, the appellant does not assert that his seizure disorder and mental health symptoms are related. Secretary's (Sec.) Br. at 8. He further argues that the December 2005 VA treatment note is not new and material as a matter of law because it was part of the record when the RO denied the claim in February 2009. *Id.* at 8-9.

When entitlement to service connection was previously and finally denied by VA, new and material evidence must be submitted before there can be any further consideration of the claim on the merits. *See* 38 U.S.C. § 5108 ("If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim."). "New and material evidence" was defined during the pendency of the appellant's claims as follows:

> New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

38 C.F.R. § 3.156(a) (2019); *see Shade v. Shinseki*, 24 Vet.App. 110, 117 (2010) (holding that § 3.156(a) "suggests a standard that would require reopening if newly submitted evidence, combined with VA assistance and considering the other evidence of record, raises a reasonable possibility of substantiating the claim"). The language of § 3.156(a) "does not require new and material evidence as to each previously unproven element of a claim"; instead, it compels reopening whenever a claimant submits new and material evidence "as to an unestablished fact from the previously denied claim." *Id.* at 121.

In the decision on appeal, the Board determined that, "since the February 2009 rating decision, none of the evidence that has been added to the record reflects that the [v]eteran's seizures had their onset during service or within one year of separation . . . [or] that there is a relationship between the [v]eteran's seizure disorder and his military service." R. at 10. Therefore, the Board declined to reopen the appellant's claim for service connection for a seizure disorder. *Id.*

The appellant cites to two pieces of evidence that he asserts are new and material because they show that the issue of entitlement to service connection for a seizure disorder as secondary to

his mental health disorders was reasonably raised by the record. *See Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), (holding that the Board must consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *but see Brokowski v. Shinseki*, 23 Vet.App. 79, 88 (2009) (holding that the Board is not required to anticipate claims for disabilities yet to be "identified in the record by medical professionals or by competent lay evidence at the time a claimant files a claim or during its development."). First, he points to his January 2013 statement to VA in his request to reopen in which he reported symptoms of anger, lack of friendships, and difficulty in getting along with family members. R. at 2679. Regarding his seizures, he stated, "I don't like it when [family members] call me wired or crazy because I take medication or sometimes have seizures." *Id.*

The Court concludes that, even if the Board erred in failing to explicitly address whether the appellant's January 2013 statement constitutes new and material evidence, any such failure did not prejudice the appellant. *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). The Court has observed that, if the evidence of record supporting that an issue was reasonably raised by the record would not meet the low bar necessary to trigger the duty to obtain a medical opinion under *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006), any failure by the Board to discuss the issue would not be prejudicial to the appellant. *See Robinson*, 21 Vet.App. at 553.

Prejudice is not evident here because the appellant's statement, while new, does not reveal any attempt to relate his mental health symptoms to his seizure disorder and thus does not satisfy even the low bar of the *McLendon* test. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007) (holding that this Court may make factual findings in reviewing for prejudicial error). Instead, the appellant merely alludes to family members sometimes calling him insulting names due to his seizure disorder and other mental health symptoms. Thus, the appellant has not shown how the Board explicitly addressing his January 2013 statement could have resulted in its finding that the document was material evidence that reasonably raised the issue that his seizure disorder is secondary to his mental health conditions. *See Sanders*, 556 U.S. at 409; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating

error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (the appellant "always bears the burden of persuasion on appeals"); *see also Cacciola v. Gibson*, 27 Vet.App. 45, 57-58 (2014) (noting that when "an appellant states that he is appealing the Board's decision on an issue, but then makes . . . insufficient arguments, challenging the Board's determination[,] . . . the Court generally affirms the Board's decision as a result of the appellant's failure to plead with particularity the allegation of error and satisfy his burden of persuasion on appeal to show Board error").

The second piece of evidence that the appellant asserts is new and material is a December 2005 VA mental health treatment note stating that on at least one occasion, the appellant had experienced visual hallucinations immediately before the onset of a grand mal seizure. App. Br. at 4; *see* R. at 667. However, as the Secretary notes, this evidence cannot be considered new and material as a matter of law because it was submitted to the record prior to the final, unappealed February 2009 rating decision denying service connection for a seizure disorder. *See* 38 C.F.R. § 3.156(a) (noting that new evidence "means existing evidence not previously submitted to agency decisionmakers"). Thus, because the December 2005 record is not new evidence, the Board was not permitted to consider it when making the determination on whether to reopen the claim. *See id.*; *see also Untalan v. Nicholson*, 20 Vet.App. 467, 470 (2006) ("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"). Therefore, the appellant's argument in this regard is not persuasive.

Further, to the extent that the appellant argues that VA combined his seizure and mental health claims in its August 2013 notice letter by referring to his claims for "seizures [and] depression/sleep disorder," again, the appellant has not met his burden of demonstrating Board error. *See Hilkert*, 12 Vet.App. at 151; *see also Cacciola*, 27 Vet.App. at 57-58. A review of the record reveals that the notice letter simply said that VA would consider whether seizures and depression/sleep disorder are associated with dioxin exposure if medical evidence demonstrating such was received. R. at 2669. As such, the appellant's argument is wholly meritless.

Finally, the Court notes that the Secretary has asserted, and the appellant's attorney, who represented him before the Board, R. at 4, has not disputed, that the appellant failed before the Board to raise the argument that the record contains new and material evidence that his seizure disorder and mental health disorders are related and therefore reasonably raised a new theory of

entitlement that his seizure disorder is service connected on a secondary basis to his mental health disorders. *See Burton v. Principi*, 15 Vet.App. 276, 277 (2001) (per curiam order) ("We should not encourage the kind of piecemeal litigation in which the appellant here has engaged."); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation").

Thus, because the Board provided a plausible basis to deny reopening of the seizure disorder claim, and because the appellant's arguments fail to demonstrate prejudicial error in this finding, the Court affirms the Board decision declining to reopen the appellant's seizure disorder claim. *See Hilkert*, 12 Vet.App. at 151; *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that if there is a plausible basis in the record for a factual determination, the Court is not permitted to substitute its judgment).

B. Increased Rating for Left Ear Hearing Loss

The appellant asserts that, because the record shows that his hearing loss worsened between the VA examinations in May 2014 and January 2016, his hearing loss has likely continued to worsen since the January 2016 examination. App. Br. at 6-8. He argues that this fact rendered the medical examinations of record inadequately stale and not sufficiently contemporaneous because, at the time of the Board's decision, over three years had passed since the last examination took place. *Id.* He therefore argues that Board failed to provide adequate reasons or bases for its reliance on the inadequate medical examinations to deny an increased rating for his left ear hearing loss. *Id.*

The Secretary responds that the mere passage of time does not render an examination inadequate and that, therefore, the appellant's argument is unpersuasive. Sec. Br. at 11-12.

The Secretary's duty to assist includes, in appropriate cases, the duty to conduct a thorough and contemporaneous medical examination "when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see also Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). Where the record does not adequately reveal the current state of the appellant's disability, VA's fulfillment of its duty to assist requires a medical examination that considers the appellant's medical history. *Green*, 1 Vet.App. at 124; *see Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994).

Neither a "bald, unsubstantiated claim for an increase in disability rating," *Glover v. West*, 185 F.3d 1328, 1333 (Fed. Cir. 1999), nor the "mere passage of time" between a prior VA medical examination and the adjudication of a claim, is, without more, sufficient to compel VA to provide the veteran with a new, contemporaneous medical examination, *Palczewski v. Nicholson*, 21 Vet.App. 174, 180 (2007). However, reexamination is required when "evidence indicates there has been a material change in a disability or that the current rating may be incorrect.'" 38 C.F.R. § 3.327(a) (2019). To trigger VA's duty to provide a reexamination, "the [appellant] must come forward with at least some evidence that there has in fact been a material change in his or her disability." *Glover*, 185 F.3d at 1333; *see Snuffer v. Gober*, 10 Vet.App. 400, 403 (1997) ("[W]here the appellant complained of increased hearing loss two years after his last audiology examination, VA should have scheduled the appellant for another examination."); *Caffrey*, 6 Vet.App. at 381 (remanding the matter for VA to conduct a new, contemporaneous examination where the veteran asserted that his condition had worsened since the previous examination); *cf. Palczewski* 21 Vet.App. at 182 (holding that the Board did not err in finding an examination performed 5 years before sufficiently contemporaneous to inform its decision because the appellant had not alleged or submitted any additional evidence showing his condition had worsened).

The Board's determination whether the Secretary fulfilled his duty to assist with regard to providing an adequate medical examination is a finding of fact reviewed under the "clearly erroneous" standard of review. *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

In this case, the Board relied on the May 2014 and January 2016 VA hearing examinations that determined that the veteran's average left ear puretone thresholds at both examinations corresponded to a noncompensable disability rating. R. at 11-12; *see* 38 C.F.R. § 4.85, Tables VI, VIA, and VII, Diagnostic Code 6100 (2019). The appellant has not asserted, nor does the record show, that, prior to his brief before this Court, he complained of worsening hearing loss or submitted any additional evidence showing his condition had worsened since the January 2016 examination. Therefore, the circumstances of this case are more akin to *Palczewski,* 21 Vet.App. at 182, than *Snuffer*, 10 Vet.App. at 403 or *Caffrey*, 6 Vet.App. at 381.Though the appellant argues that the fact that his left ear hearing loss increased slightly between the May 2014 and the January 2016 examinations, without more – such as a complaint in the record from the appellant of increased or worsening hearing loss since the last VA examination – his argument must fail. *See Glover*, 185 F.3d at 1333; *Palczewski* 21 Vet.App. at 182.

Thus, because the Board provided a plausible basis to deny an increased rating for left ear hearing loss and because the appellant's arguments fail to demonstrate prejudicial error in this finding, the Court affirms the Board decision in this regard. *See Hilkert*, 12 Vet.App. at 151; *Owens*, 7 Vet.App. at 433.

C. Increased Rating for DM

The appellant asserts that the fact that his fasting glucose level worsened from 125 mg/dl at the September 2015 VA examination to 202 mg/dl at the May 2017 VA examination shows that his DM had worsened significantly between the examinations. App. Br. at 8-11. He therefore asserts that his VA examinations are inadequately stale and that the Board failed to provide adequate reasons or bases for its reliance on them to deny his claim. *Id.* at 11.

The appellant's DM is currently rated as 20% disabling. *See* 38 C.F.R. § 4.119, Diagnostic Code 7913 (2019). A 20% rating is warranted when there is DM type 2 that requires one or more daily injections of insulin and restricted diet, or oral hypoglycemic agent and restricted diet. *Id.* A 40% rating is warranted when there is DM type 2 that requires one or more daily injections of insulin, restricted diet, and regulation of activities (avoidance of strenuous occupational and recreational activities based on clinical findings by a medical professional). *Id.*

In the decision on appeal, the Board noted that the 2015 and 2017 examinations "expressly found that the [v]eteran uses an oral hypoglycemic agent and a restricted diet, but he requires neither insulin nor regulation of activities as part of medical management of [DM]." R. at 13. The Board found that the private and VA medical evidence of record did not contradict this finding and that the veteran also did not contend that he requires regulation of activities to control his DM. *Id.*

The Court does not find the appellant's argument persuasive. The appellant asserts that an increase in his fasting glucose level at the May 2017 VA examination corresponds to an increase in severity of his DM, yet neither he nor his counsel has demonstrated that they possess medical knowledge to interpret and explain the significance of his fasting glucose levels. *See 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"); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."). Thus, the appellant has failed to meet his burden to show that the May 2017 VA examination was not sufficiently

contemporaneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169; *see also Cacciola*, 27 Vet.App. at 57-58. Further, even if the increased fasting glucose level is an indication that his DM increased in severity from the time of the September 2015 examination to the May 2017 examination, without more – such as a complaint in the record from the appellant of increased or worsening of his DM symptoms since the last VA examination—his argument that the VA DM examinations of record are inadequately stale must fail. *See Glover*, 185 F.3d at 1333; *Palczewski* 21 Vet.App. at 182.

Thus, because the Board provided a plausible basis to deny an increased rating for DM and because the appellant's arguments fail to demonstrate prejudicial error in this finding, the Court affirms the Board decision in this regard. *See Hilkert*, 12 Vet.App. at 151; *Owens*, 7 Vet.App. at 433.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's November 2, 2018, decision that declined to reopen a claim for entitlement to service connection for a seizure disorder, denied entitlement to an initial compensable disability rating for left ear hearing loss, and denied entitlement to a disability rating greater than 20% for DM is AFFIRMED.

DATED: May 12, 2020

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