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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 19-0530

VERNON L. WINGERT, 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*: Vernon L. Wingert appeals through counsel a September 26, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date prior to May 18, 2015, for an increased disability rating for service-connected coronary artery disease, status post myocardial infarction and coronary artery bypass graft (CAD), and found that new and material evidence had not been submitted to reopen Mr. Wingert's claim for benefits of pleural effusion of the left lung.[1]

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 as the issue is 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 September 26, 2018, decision.

[1]The Board also denied entitlement to an increased disability rating for Mr. Wingert's service-connected diabetes and entitlement to special monthly compensation for Mr. Wingert's spouse. Mr. Wingert does not challenge those determinations, and the Court considers any appeal of those claims abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (finding claims not addressed in pleadings before the Court to be abandoned). The Board also remanded three claims that are not currently before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (stating that a Board remand decision is not a final decision over which this Court has jurisdiction).

I. FACTS

Mr. Wingert served on active duty in the U.S. Army from September 1969 to August 1971, June 1999 to September 1999, and October 2001 to July 2002. Record (R.) at 909, 910, 917. Mr. Wingert had a 48-year history of smoking until he quit in 2009. R. at 1418, 1016-19, 112-13.

In May 2009, Mr. Wingert sought treatment at a private hospital after experiencing chest pain. R. at 101-14. He was found to have CAD with inferior wall myocardial infraction and underwent a cardiac catheterization and coronary artery bypass graft. R. at 101, 114, 120. Following his cardiac surgery, he developed a left lung pleural effusion, or fluid in his lung. R. at 98. He underwent a pleurodesis procedure to treat his lung condition. R. at 188-89, 167-68.

In July 2012, Mr. Wingert filed a claim for VA benefits for a heart condition and a lung condition. R. at 1954. In November 2012, a VA regional office (RO) granted Mr. Wingert VA benefits for CAD, status post myocardial infraction and coronary artery bypass graft, found to be associated with herbicide exposure during service. R. at 1508. The RO assigned a 10% disability rating for Mr. Wingert's condition, effective July 31, 2011. R. at 1527-28. The RO also denied VA benefits for Mr. Wingert's lung condition. R. at 1509. In November 2012, Mr. Wingert filed a Notice of Disagreement (NOD) with the RO's denial of benefits for a lung condition, stating that he was seeking such benefits as secondary to his service-connected heart condition. R. at 1499-1500, 1503-04.

At a January 2013 VA medical examination, Mr. Wingert reported experiencing shortness of breath when picking up items. R. at 1418. The VA examiner stated that Mr. Wingert had an acute lung condition, pleural effusion, that was proximately due to or the result of his coronary artery bypass graft. R. at 1430. However, the examiner noted that this condition resolved with pleurodesis. *Id*. The examiner stated that based on x-ray evidence Mr. Wingert did not have any pleural effusion at the time of the examination. *Id*. The examiner opined that Mr. Wingert's current pulmonary function tests (PFTs) were more indicative of problems associated with his 48-year smoking history than a pleural effusion. *Id*. Thus, the examiner concluded that Mr. Wingert had "an acute lung condition (pleural effusion) that was caused after his [coronary artery bypass graft], however as currently seen on evidence, this resolved and there is no current chronic lung residuals from the status post acute pleural effusion seen at this time." *Id*. In a February 2013 addendum, the VA examiner opined that Mr. Wingert's current lung condition was less likely as not aggravated

by his coronary artery bypass graft, again stating that the pleural effusion was acute and had resolved. R. at 1414.

In February 2013, the RO issued a Statement of the Case continuing to deny Mr. Wingert VA benefits for left lung pleural effusion, claimed as a lung condition, after finding that the condition had resolved. R. at 1411-12. Mr. Wingert did not appeal that decision, and it became final. In July 2014, Mr. Wingert appointed his current counsel and sought to reopen his previously denied claim for benefits for "left lung pleural effusion, resolved claimed as lung condition." R. at 1348-49.

Mr. Wingert underwent multiple VA examinations in November 2014. At a respiratory examination, the examiner noted that Mr. Wingert had three diagnosed lung conditions, chronic obstructive pulmonary disease (COPD), diagnosed in 2013; restrictive lung disease, specified as "mild restrictive lung disease likely due to prior pleurodesis for pleural effusion," diagnosed in 2014; and pleural effusion, resolved, diagnosed in 2009. R. at 1017. The examiner discussed Mr. Wingert's medical history, including his history of smoking as well as the development of a persistent pleural effusion as a complication of coronary artery surgery in 2009. *Id*. The examiner noted PFTs performed in 2013 showed airflow obstruction thought to be related to Mr. Wingert's history of smoking and that current PFTs continued to show severe airflow obstruction. *Id*. The examiner also stated that August 2012 and January 2013 chest x-rays revealed no evidence of pleural effusion. *Id*.

As to Mr. Wingert's symptoms, the examiner noted that he reported being able to walk at his own pace and climb stairs without difficulty, but that he became short of breath and had to stop with minimal exertion such as carrying something. *Id*. Mr. Wingert also reported that his "heart is doing fine now" based on his most recent cardiac evaluation. *Id*. The examiner opined that Mr. Wingert's COPD with airway obstruction was the predominant condition limiting his pulmonary function and that, while he also had lung restriction, this condition was mild and not as responsible for limitation in pulmonary function. R. at 1018. The examiner stated that Mr. Wingert's respiratory condition affected his ability to work because he becomes dyspnea with any vigorous physical exertion and has to quickly stop and rest. *Id*.

Based on these findings, the examiner opined that it was less likely than not that Mr. Wingert's lung condition is proximately due to or caused by his CAD. *Id*. The examiner stated that

Mr. Wingert's obstructive lung disease was much more likely than not related to his history of smoking. *Id*. As to Mr. Wingert's pleural effusion, the examiner opined that the condition was as likely as not due to his CAD and related surgery, but that the condition had resolved. R. at 1019. The examiner further stated that Mr. Wingert's chest x-rays and PFTs suggested that he had only mild restriction of lung volumes, which would not lead to significant impairment. *Id*. The examiner explained that CAD, pleural effusion, and a prior pleurodesis would not be expected to cause the significant airway obstruction that was found in Mr. Wingert's case. *Id*.

In December 2014, the RO denied benefits for a lung condition, among other dispositions. R. at 1002. Mr. Wingert filed a Notice of Disagreement with that decision in March 2015. R. at 975-83. In a March 2015 written submission in support of his claim, he stated that his lung condtion caused pain and difficulty breathing. R. at 964. In May 2015, Mr. Wingert submitted an "Intent to File a Claim for Compensation." R. at 953-55. In July 2015, Mr. Wingert sought an increased disability rating for his service-connected "chest condition." R. at 947-49.

Mr. Wingert underwent a VA heart examination in July 2015, at which the examiner noted he had difficulty lifting. R. at 856. The examiner determined that Mr. Wingert's metabolic equivalents of task (METs) was between 3 and 5. *Id.* Based on that examination, in an August 2015 decision the RO increased Mr. Wingert's disability rating for CAD to 60%. R. at 838. The RO assigned an effective date of May 18, 2015, the date VA received his "Intent to File a Claim for Compensation." *Id*. Mr. Wingert disagreed with the effective date. R. at 782.

In September 2018, the Board issued the decision on appeal, denying entitlement to an effective date prior to May 18, 2015, for an increased disability rating for service-connected CAD and declining to reopen a claim of entitlement to benefits for pleural effusion of the left lung

Mr. Wingert argues that the Board erred in treating his claim for a lung condition as a claim to reopen a previously denied claim instead of a new claim for benefits. He argues that VA should have characterized his "claim to be one for pain," noting that the diagnostic criteria for COPD and chronic pleural effusion do not mention pain in the chest. He also argues that the Board erred in denying him an earlier effective date for the 60% disability rating for his CAD. He argues that the November 2014 VA respiratory examination revealed that he was easily fatigued and dyspneic with exertion, and that VA should have treated that examination report as an informal claim for an increased disability rating for his CAD.

The Secretary argues that the Board did not err by failing to consider Mr. Wingert's statement that he had chest pain as a new, freestanding claim for benefits. The Secretary also asserts that Mr. Wingert's November 2014 VA respiratory examination, which did not address his heart condition, was not an informal claim for an increased disability rating for CAD. Thus, the Secretary contends that the Board did not err by not addressing whether Mr. Wingert was entitled to an earlier effective date for the 60% disability rating for CAD based on that examination.

II. ANALYSIS

A. Lung Condition

Establishing service connection generally 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 Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Court reviews the Board's factual findings, including whether a claimant is entitled to service connection and whether a medical examination is adequate, under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993); *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). 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); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence 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).

In March 2015, Mr. Wingert submitted a statement in support of reopening his previously denied claim for VA benefits for a lung condition, in which he stated that his lung condition causes "pain and breathing issues." R. at 964. He argues that this statement, submitted through his current attorney, was sufficient to raise a new, freestanding claim for VA benefits for pain. The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that pain alone may constitute a disability, even without an identifiable underlying pathology. *Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018). However, "to establish a disability, the veteran's pain must amount to a functional impairment." *Id*. at 1367. "Functional impairment," the Federal Circuit noted, is defined as the inability of the body or a constituent part of it "'to function under the ordinary conditions of daily life including employment.'" *Id*. at 1363 (quoting 38 C.F.R. § 4.10).

Mr. Wingert argues that his March 2015 statement was sufficient to raise a new claim for VA benefits for pain. In support, he states that the diagnostic codes for COPD and chronic pleural effusion do not mention chest pain. However, he fails to explain how his pain causes functional impairment of earning capacity, as required by *Saunders*. *Id*. at 1367-68. Further, Mr. Wingert's March 2015 statement appears to attribute his pain to his diagnosed lung conditions. Thus, he does not explain how his pain is distinct from any of his lung conditions. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments). Consequently, he has failed to show that the Board erred by failing to construe a single reference to pain as a new claim for benefits. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

B. Coronary Artery Disease

Generally, the effective date of a disability rating increase is the date that VA received the claim for an increase or the date that entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(o)(1) (2019). Prior to March 24, 2015, 38 C.F.R. § 3.157(b)(1) (2014) provided that, in certain circumstances, a VA report of examination or hospitalization for a previously established service-connected disability "will be accepted as the date of receipt of an [in informal]

claim" for an increased evaluation. "[T]he purpose of § 3.157(b)(1) [was] to avoid requiring a veteran to file a formal claim for an increased disability rating where the veteran's disability [was] already service connected and the findings of a VA report of examination or hospitalization demonstrate that the disability ha[d] worsened." *Massie v. Shinseki*, 25 Vet.App. 123, 132 (2011), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013). To satisfy § 3.157(b)(1), a VA report of examination or hospitalization must identify at least one specific examination by date and indicate that the veteran's disability has worsened. *Massie*, 724 F.3d at 1328; *see also Criswell v. Nicholson*, 20 Vet.App. 501, 503-04 (2006) (noting that a medical record standing alone does not ordinarily establish intent to apply for benefits); *Brannon v. West*, 12 Vet.App. 32, 35 (1998) (same).

Mr. Wingert argues that the Board erred by failing to consider the November 2014 VA examination of his lungs as an informal claim for an increased disability rating for his CAD. He notes that the examination report indicated that he was easily fatigued and that he had labored breathing on exertion. The Board has a "duty to fully and sympathetically develop a . . . claim to its optimum" by "determin[ing] all potential claims raised by the evidence [and] applying all relevant laws and regulations." *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (internal quotation marks and citation omitted). However, in this case, the Board did not err in failing to address whether the November 2014 VA examination constituted an informal claim for an increased disability rating for CAD. The November 2014 VA examination concerned Mr. Wingert's respiratory condition, not his heart condition. The symptoms noted in that examination were attributed to Mr. Wingert's lung conditions, not his heart condition. Mr. Wingert has failed to point to anything in that examination that shows a worsening of his CAD, which would implicate § 3.157(b)(1). Indeed, at the time of his examination, Mr. Wingert told the examiner that his "heart is doing fine now." R. at 1017. Accordingly, the Court finds that the Board did not err in failing to consider the November 2014 VA examination an informal claim for an increased disability rating for CAD.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the part of the September 26, 2018, Board decision on appeal is AFFIRMED.

DATED: May 13, 2020

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