IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DONALD A. DALLMAN, Appellant,	)	
v.	)	Vet. App. No. 18-4075
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

SECRETARY'S MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S MAY 1, 2020, ORDER

Pursuant to the Court's Order of May 1, 2020, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), respectfully submits this response. The Order directed the Secretary to provide a memorandum of law addressing Appellant's January 3, 2020, Motion for Reconsideration and, more specifically, the question, "whether the Board's determination that a prior regional office decision is final is an independently appealable issue under 38 U.S.C. § 7252(a)"?

It is the Secretary's position that, no, in the context in which it was raised in this appeal, by virtue of 38 U.S.C. § 5108 (2018), the issue of finality of a prior regional office (RO) decision is not an independently appealable issue under § 7252(a). Rather, Appellant's attempt to have the Court vitiate the finality of the

December 1999 rating decision in this manner is contrary to a multitude of long-standing legal principles that deprive the Court of jurisdiction to review the Board's determination.

In December 1999, the RO denied Appellant's claim of entitlement to service connection for a right thigh hematoma. (R. at 4317 (4315-17)). Eleven years later, in December 2010, Appellant filed a claim of service connection for right thigh surgery, which the RO characterized as a claim for "resolved right thigh hematoma." (R. at 2735-37; 2532-40). In February 2011, Appellant's current counsel entered her appearance as Appellant's representative before the Agency. In 2012, Appellant's claim was denied and appealed. (R. at 2540, 2358). In March 2016, the Board remanded the claim, noting the claim on appeal was "[w]hether new and material evidence has been submitted to reopen a claim of entitlement to service connection for a right thigh disability." (R. at 1001 (1000-13)). Appellant's counsel was notified. (R. at 1000); *see also* (R. at 60 (58-64)) (finding that "[n]ew and material evidence has not been submitted to reopen a claim of service connection for a right thigh disability"). Appellant, through his counsel, responded addressing only the issue of whether entitlement to service connection was warranted, but not addressing whether the claim should be reopened. (R. at 49 (48-50)); *compare* (R. at 48) (characterizing the claim as service connection for right thigh disability) *with* (R. at 60, 1001) (characterizing the claim as a claim to reopen based on new and material evidence). The Board ultimately found new and

material evidence was received, reopened the claim, and remanded it for adjudication as to whether service connection was warranted.

To address Appellant's Motion for Reconsideration, the Secretary does not object to Appellant's reading of *Hickson* to the extent that it distinguishes between the adjudication of a claim to reopen based on new and material evidence and the adjudication of entitlement to service connection. *Hickson v. Shinseki*, 23 Vet. App. 394, 399 (2010) ("When the Board reopens a claim after the [regional office] has denied reopening that same claim, the matter generally must be returned to the RO for consideration of the merits."). However, to the extent Appellant reads *Hickson* to create an independent pathway for the Court to exercise jurisdiction over the downstream issue of an effective date, this interpretation is flawed.

First, a claim to reopen based on new and material evidence is premised on the fact that there is a prior final decision on the issue. The law in effect at the time of the Board's decision provided that "[i]f 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." 38 U.S.C. § 5108 (2018); *see also Sutton v. Brown*, 5 Vet.App. 127, 135 (1993) (stating that the Secretary has "defined a 'reopened claim' as any application for a benefit received after final disallowance of an earlier claim"). It would not be necessary to adjudicate the claim as one to reopen if there was no prior final denial. 38 U.S.C. § 7104(b). Notably, Appellant did not object to, or otherwise challenge, the characterization

of the appeal, thereby, acquiescing to such characterization as a claim to reopen the finally decided December 1999 rating decision based on new and material evidence. (R. at 48, 61, 1001).

Moreover, the premise that there is a prior final denial, and the need to reopen the previously denied claim, establishes distinct evidentiary and development thresholds not contemplated if the claim was an initial claim solely for entitlement to service connection. *See* 38 U.S.C. § 5103A(f)(2018) ("Duty to assist claimants"); c*ompare* 38 C.F.R. § 3.156(a) (2018), *with* 38 C.F.R. § 3.159 (2018); *see King v. Shinseki*, 23 Vet. App. 464, 468 (2010) (noting that in a claim to reopen the Secretary is only required to "provide some limited assistance"); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1341 (Fed. Cir. 2003) (holding that the duty to provide a medical examination or opinion is not mandatory until "new and material evidence is presented or secured"). Thus, it is unclear why an appellant, indeed one represented by counsel, would acquiesce to these thresholds established by § 5108 or § 3.156(a), if they believed the legal premise underlying the claim was wrong. *See Massie v. Shinseki*, 25 Vet.App. 123, 141 (2011) (noting that an appellant is held to the arguments raised by his or her counsel).

If Appellant believed the underlying premise of his claim to reopen – the existence of a prior final decision – was incorrect, then this was an independently appealable issue to be brought before the Agency of Original Jurisdiction (AOJ),

not sat on for 20 years only to be raised at the Court for the first time. If Appellant, believed the December 1999 rating decision was not final, and there remained an unadjudicated appeal, the appropriate procedure was to pursue resolution of the claim by the RO and seek the issuance of a final decision. *See* 38 U.S.C. § § 5104, 7105(c); *DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006); *Costanza v. West*, 12 Vet. App. 133, 134 (1999). Even more relevant to the underlying claim, the issue of whether a document constitutes a notice of disagreement (NOD) is an independently appealable issue. (Motion for Reconsideration at 1-2); *Palmer v Nicholson*, 21 Vet.App. 434 (2007); *Jarvis v. West*, 12 Vet.App. 559, 561 (1999); *Young v. Shinseki*, 22 Vet.App. 461, 466 (2009). Therefore, if Appellant, or his counsel, believed at any time following the issuance of the December 1999 rating decision that the issue remained pending, there were avenues of recourse before the Agency.

But those are not the facts here, where Appellant raised the issue of the finality of the December 1999 rating decision for the first time on appeal to this Court. *Fugere v. Derwinski*, 1 Vet. App. 103, 105 (1990) ("[a]dvancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court" because piecemeal litigation hinders the decisionmaking process), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992). Had Appellant believed the December 1999 rating decision remained pending, then he should have raised this issue below. Had Appellant done so, and properly pursued an

appeal of that issue, then the Court would have jurisdiction over the question of finality under 38 U.S.C. § 7252(a). But again, those are not the facts present in this appeal.

Rather, Appellant attempts to prematurely challenge the downstream issue of an effective date for the award of service connection for his right thigh hematoma. The Court has long held that the assignment of an effective date is a downstream issue following the award of service connection. *See Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997); *Urban v. Principi*,18 Vet.App.143, 145 (2004) (per curiam order). Here, service connection for a right thigh hematoma was not awarded until January 29, 2019, following the Board's April 4, 2018, decision. (R. at 29). Thus, the effective date was not ripe for review by the Board or this Court. 38 U.S.C. § 7104(a) ("All questions in a matter which under section 511(a) of this title [ ] is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary.").

Because this issue was not ripe for review, the Court here was limited in its jurisdiction to review only the issue of whether new and material evidence was received to reopen a claim of service connection for a right thigh hematoma. Notably, the Board's decision on this issue was favorable, ultimately reopening the claim; and, therefore, not subject to review by the Court.[1] 38 U.S.C. § 7266(a);

[1] Had the favorable finding of whether new and material evidence was received to reopen a claim of entitlement to service connection for a right thigh hematoma

Medrano v. Nicholson, 21 Vet.App. 165, 170 (2007) (noting the Court will not disturb favorable findings). However, for purposes of this memorandum, assuming the Board's decision was not favorable, the appellate analysis under § 5108, to determine whether new and material evidence was received to reopen a claim, includes review of two issues:

> (1) Is the evidence received new and material?
> (2) Does the evidence raise a reasonable possibility of substantiating the claim?

Shade v. Shinseki, 24 Vet. App. 110, 117-19 (2010).[2] This analysis is conducted under the clearly erroneous standard of review. *Hill v. McDonald*, 28 Vet.App. 243,

---

been the only issue on appeal in the Board's decision, the Court would have lacked jurisdiction over the decision in its entirety. This was the exact circumstance in *Colon v. Wilkie*, No. 18-1272, 2018 U.S. App. Vet. Claims LEXIS 1523 (Nov. 19, 2018), where the Court dismissed the appeal for lack of jurisdiction.

Appellant attempts to use *Colon*, and *Williams v. Wilkie*, No. 18-6531, 2019 U.S. App. Vet. Claims LEXIS 1790 (Oct. 10, 2019) to show "inconsistent" treatment by the Court on this issue. (Mot. for Reconsideration at 6). However, the Court's decisions in *Colon* and *Williams* do not show inconsistency. Rather, as noted above, *Colon* shows the Court considered Appellant's argument and rejected it on jurisdictional grounds. In *Williams*, the Court declined to even consider the issue, noting that it had not been raised. *Williams*, LEXIS 1790 at *1, Fn. 1.

[2] This current two-step analysis is consistent with the Court's earlier analysis of § 5108. *See Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991) ("[The Board] must perform a two-step analysis when a veteran seeks to reopen a claim based upon new and material evidence. . . First, the [Board] must determine whether the evidence is 'new and material.' 38 U.S.C. § 3008. Second, if the [Board] determines that the claimant has produced new and material evidence, the case is reopened and the [Board] must evaluate the merits of the veteran's claim in light of all the evidence, both new and old.") (emphasis omitted); *see also Crippen v. Brown*, 9 Vet.App. 412, 418 (1996) ("On a claim to reopen, a 'two-step analysis' must be conducted under section 5108.").

255 (2016). Appellate review at the Court in this context does not include a determination of finality, because a claim to reopen based on § 5108 is premised on the existence of a prior final denial. 38 U.S.C. § 5108 ("[i]f new and material evidence is presented or secured with respect to *a claim which has been disallowed*")(emphasis added). As stated above, if there was a question of finality, this is an independent issue subject to review at the Agency, and should be addressed prior to acquiescing to the development and adjudication of a claim to reopen under § 5108 or § 3.156(a).

Further, despite Appellant's arguments to the contrary, the Board's determination that the December 1999 rating decision was final does not deprive him of challenging the assignment of an earlier effective date, *once service connection has been awarded*. The Court addressed a similar fact pattern in *Myers v. Principi*, 16 Vet. App. 228 (2002). In *Myers*, the veteran's initial claim of service connection was denied in April 1958. *Id*. at 230. In 1994, the veteran filed a claim to reopen, which the Board reopened and remanded to the RO. In 1997, the RO awarded service connection and assigned an effective date. The veteran *then* appealed the assigned effective date, asserting at this time that his award should be from 1958, when he first filed his initial claim. The RO and the Board denied an earlier effective date. But, in October 1999, the Court remanded the Board's decision noting the Board failed to "analyze thoroughly the finality of the April 1958 RO decision" based on a letter the veteran had submitted in April 1959. *Id*., citing

Myers v. West, No. 98-864, 1999 U.S. App. Vet. Claims LEXIS 1210 at *11-15 (Oct. 22, 1999). Ultimately, the Court, when considering the appeal of the downstream issue of the assigned effective date, determined that the 1958 rating decision did not become final by virtue of this April 1959 document, which it determined was a NOD to the April 1958 rating decision. *Myers*, 16 Vet. App. at 236.

Thus, contrary to Appellant's arguments, and based on *Myers*, he would not be precluded from review of an earlier effective date, *if* raised in the appropriate context.[3] But, until Appellant does properly challenge the propriety of the assigned effective date, this Court lacks jurisdiction to hear Appellant's arguments.[4] *See Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1365 (Fed. Cir. 2005) ("'when the Board has not rendered a decision on a particular issue, the court has no jurisdiction to consider it under section 7252(a)'" (quoting *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000))).

---

[3] Additionally, Appellant may still challenge the finality of the December 1999 rating decision by bringing a claim based on clear and unmistakable error. *See Rudd v. Nicholson*, 20 Vet.App. 296, 300 (2006); *see also* 38 U.S.C. § 5109A(a) (explaining that a final decision "is subject to revision [for] clear and unmistakable error"); *Knowles v. Shinseki*, 571 F.3d 1167, 1170 (Fed. Cir. 2009) (holding that the law does not recognize a freestanding claim to challenge the finality of a prior decision, which must be made through "one of the statutory or regulatory exceptions to the rule of finality, such as a request for revision on the basis of CUE").

[4] As noted in the Secretary's May 4, 2020, *Solze* notice, Appellant has filed an appeal as to the effective date assigned for the award of service connection for right thigh hematoma residuals. As of the date of this pleading, this appeal remains pending at the Agency.

Thus, the finality of a prior rating decision by the Board is not reviewable by this Court if raised in the context of a claim to reopen based on new and material evidence under § 5108 and § 3.156(a).

WHEREFORE, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully responds to the Court's Order of May 1, 2020.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Megan C. Kral
MEGAN C. KRAL
Deputy Chief Counsel
Office of the General Counsel (027)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6908