IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

HERMAN O. BAILEY,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-2661
	)	
DAT P. TRAN,	)	
Acting Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 6, 2021, DECISION

Appellee, the Acting Secretary of Veterans Affairs (Secretary), respectfully moves this honorable Court to reconsider its January 6, 2021, decision from a panel of the Court, which set aside and remanded the portions of the Board of Veteran's Appeals' (Board) March 1, 2019, decision denying Appellant entitlement to a disability rating in excess of 60% for the residuals of prostate cancer. *See* U.S. Vet. App. R. 35(a). Upon reconsideration, the Secretary asks that the Court affirm the Board's decision in its entirety and find that the Board was not required to consider the issues of entitlement to secondary service connection under 38 C.F.R. § 3.310 for Appellant's diarrhea and lower extremity lymphedema. As grounds for this relief, the Secretary submits that the Court's decision appears to have overlooked certain aspects of fact or law, which support affirmance.

Reconsideration is appropriate where the Court has overlooked or misunderstood points of law or fact. U.S. Vet. App. R. 35(e)(1). In this case, the Court affirmed that portion of the Board's March 1, 2019, decision, which found that Appellant was not entitled to a disability rating in excess of 60% under 38 C.F.R. § 4.115b, Diagnostic Code 7528 for the residuals of prostate cancer.[1] However, the Court also found that the record in this appeal reasonably raised the question of entitlement to secondary service connection for Appellant's diarrhea and lower extremity lymphedema, and so the Court remanded Appellant's claim for an increased rating with instructions that the Board consider Appellant's entitlement to secondary service connection. (Slip Op. at 20.)

In reaching this conclusion, the Court explained that the March 2016 Department of Veterans Affairs (VA) medical examiner's statement "reasonably raised entitlement to secondary service connection for those conditions." (Slip Op. at 12.) The Court then explained that it interpreted 38 C.F.R. § 3.155(d)(2) to require consideration of these reasonably raised claims for secondary service connection within the context of Appellant's claim for an increased disability rating for his residuals of prostate cancer because Appellant's diarrhea and lymphedema

[1] The Secretary does not seek to disturb that part of the Court's decision in his motion for reconsideration. Nor, does the Secretary seek the Court's reconsideration on its determination that remand is warranted for the issue of entitlement to service connection for a total disability rating based upon individual unemployability.

fell within the scope of the regulations discussion of "complications for the claimed condition". 38 C.F.R. § 3.155(d)(2). (Slip Op. at 12-18.)

In support of its conclusion, the Court explained that the general definitions of the word "complications" "connote a causal or aggravative relationship between the primary disease or condition and the resulting disease or condition…" (Slip. Op. at 14.) The Court then stated that, "[t]his is the same relationship that exists between primary and secondary service-connected disabilities." (Slip Op. at 14.) In reaching this conclusion, the Court found that the holding of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Manzanares v. Shulkin*, 863 F.3d 1374 (Fed. Cir. 2017), was not controlling in this case because the Federal Circuit found in *Manzanares* that claims for service connection of a primary disability do not "necessarily encompass later claims for secondary service connection". (Slip. Op. at 16 (emphasis omitted).) The Court also noted that the Federal Circuit was not asked to address the "complications" portion of 38 C.F.R. § 3.155(d)(2) when it decided *Manzanares*. (Slip. Op at 16-17.)

However, the Court's decision in this case appears to overlook important distinctions in the cited caselaw and other applicable caselaw, as well as the language surrounding and qualifying the word "complications" in 38 C.F.R. § 3.155(d)(2). The Court's decision, and the results dictated by the Court's holding, appear to be in tension with the holding in the Federal Circuit's decision in *Manzanares*. The Secretary contends that these points support affirmance of the Board's decision in its entirety.

As an initial matter, the Secretary notes the Court's finding that the issues of entitlement to secondary service connection for diarrhea and lymphedema were reasonably raised by the record in this case. In support of this finding, the Court cited to the holding in *Fountain v. McDonald*, 27 Vet.App. 258, 275-276 (2015). (Slip Op. at 12.) In that case, the appellant sought entitlement to service connection for tinnitus. *Fountain*, 27 Vet.App. at 259. To that end, this Court held that "the Board erred when it failed to consider a theory of secondary service connection for tinnitus…", in addition to its consideration of direct service connection for that same disability. *Id*. at 275. The Court then explained that the Board "is required to consider all **theories** of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record." *Id*. (emphasis added).

The Court then referenced to its holding in *Robinson v. Mansfield,* 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). In that case, the appellant sought entitlement to service connection for heart disease and a thyroid disability, which he pursued before the Department only on the theory of secondary service connection. *Robinson*, 21 Vet.App. at 551. On appeal to this Court, the appellant in *Robinson* argued, for the first time, that the Board should have considered his entitlement to service connection of these disabilities on a direct basis. *Id*. Significantly, in considering the appellant's arguments, the Court noted that its exercise of jurisdiction over the appellant's claims "hinges on whether Mr. Robinson is advancing a new claim or

merely a new argument in support of this claim." *Id*. at 550. The Court then found that because the appellant was seeking entitlement to service connection of the same disability, and was simply advancing various theories of entitlement to those same benefits, it could exercise its jurisdiction, but it found that while "the Board's obligation to analyze claims goes beyond the arguments explicitly made", the Board was not required to "assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision." *Id*. at 553.

The Court's holdings in *Robinson* and *Fountain* make clear that VA is, without question, required to consider all *theories* of entitlement to the benefit sought, which are either specifically raised by the claimant or which are reasonably raised by the record. *Robinson*, 21 Vet.App. at 553; *Fountain*, 27 Vet.App. at 275.

However, these cases speak narrowly to the theories of entitlement which may be raised in the pursuit of the particular benefits sought by the claimant. *Id*. These cases do not require VA to consider a claimant's entitlement to benefits other than those sought in the claim before VA. *Id*. Nor do they stand for the proposition that a claim can be reasonably raised. In fact, the Court in *Robinson* was very clear that it does not retain jurisdiction to consider claims for benefits other than those which were sought by the claimant and decided by the Board. *Robinson*, 21 Vet.App. at 550.

These holdings from the Court in *Robinson* and *Fountain* are, further, consistent with this Court's holding in *DeLisio v. Shinseki*, 25 Vet.App. 45 (2011). In that case, the Court held that the effective date assigned to the appellant's

service-connected diabetes mellitus could be as early as the date of the appellant's claim for service connection for peripheral neuropathy, when the appellant's peripheral neuropathy was caused by his diabetes. *DeLisio*, 25 Vet.App. at 54-55. However, in reaching this holding, the Court took great pains to explain that "we do not hold that a claim for benefits reasonably encompasses a claim for unclaimed disabilities that are not a cause of the condition for which benefits are sought, **or for unclaimed disabilities that arise as a result of the condition for which benefits are sought**. *Id*. at 55 (emphasis added).

Robinson, *Fountain*, and *DeLisio* are consistent in their recognition that the condition for which benefits are sought is crucial to the scope of the VA's duty to consider entitlement to service connection. *See also Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (indicating that while the Secretary is required to construe a claim based on the reasonable expectations of the claimant and the evidence of record, "the claimant's intent in filing a claim is paramount to construing its breadth" and the Secretary's duty to consider the claimant's entitlement to benefits is not unbounded). This is a reflection of the need for the claimant to express some intent to seek a particular benefit. Under applicable law, a claimant is required to file a "specific claim", and the term "claim" is defined to mean "written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit…" 38 U.S.C. § 5101(a)(1)(A); 38 C.F.R. § 3.1(p). *See also* 38 C.F.R. § 3.155(b) (allowing for the submission of an "intent to file"); 38

C.F.R. § 3.160(a)(3) (explaining that a complete claim must identify the benefit sought).

In fact, even the informal claims previously permissible under 38 C.F.R. § 3.155(a) (2014) required the claimant to indicate "an intent to apply for one or more benefits…" and to "identify the benefit sought". *See MacPhee v. Nicholson*, 459 F.3d 1323, 1326-27 (Fed. Cir. 2006) (holding that the plain language of the regulations requires a claimant to have an intent to file a claim for VA benefits); *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009) (noting that the essential requirements of any claim, whether formal or informal, includes the intent to apply for benefits); *Brannon v. West*, 12 Vet. App. 32, 35 (1998) (stating that before VA can adjudicate a claim for benefits, "the claimant must submit a written document identifying the benefit and expressing some intent to seek it").

This need for an expression of intent from the claimant to seek a particular benefit is a reflection of the significant due process concerns inherent in the processing of a claim for benefits. *See* 38 U.S.C. § 7105 (requiring that the agency of original jurisdiction render a decision on a claim, and that such decision must be appealed to the Board before the Board has jurisdiction over the appeal). Indeed, the Court has emphasized that despite the requirement that the Secretary give a sympathetic reading to a veteran's filings, an intent to apply for benefits is an essential element of any claim, and therefore, "the mere existence of medical records generally cannot be construed as an informal claim." *Criswell v. Nicholson*, 20 Vet.App. 501, 503-04 (2006) (affirming the Board's finding that

although Mr. Criswell's medical records reflected complaints relating to his hands, they did not demonstrate he was seeking a benefit related to his hands); *see also Brannon*, 12 Vet.App. at 35 (holding that "[t]he mere presence of the medical evidence does not establish an intent on the part of the [appellant] to seek secondary service connection for the psychiatric condition" as related to his service-connected skin condition).

In this case, the record is clear that the claim before the Board at the time of its decision was only Appellant's entitlement to a disability rating in excess of 60% for his service-connected residuals of prostate cancer. [Record Before the Agency (R.) at 5.] The Board did not have jurisdiction over any entitlement to service connection of diarrhea or lymphedema at the time of its decision, because Appellant had not evinced an intent to seek such benefits, and any subsequent claim for such benefits had not been appealed to the Board at that time. As such, the Court's reliance on *Fountain* to determine that a claim for entitlement to secondary service connection was reasonably raised is misplaced, as *Fountain* and the related cases speak only to the consideration of alternate *theories* of entitlement to the benefit sought in the claim before the Board. They do not speak to the Board's consideration of separate claims for entitlement to benefits beyond those before the Board at the time of the Board's decision. As such, the Secretary asks that the Court reconsider its finding that claims for entitlement to service connection of diarrhea and lymphedema were reasonably raised by a March 2016 VA medical examiner's statement.

Additionally, the Secretary notes the Court's statement that "complications", as that term is interpreted in the Court's decision, "is the same relationship that exists between primary and secondary service-connected disabilities". To the extent that this holding indicates that claims for service connection of diarrhea and lymphedema were included in the claim before the Board at the time of its decision, so as to allow for the applicability of *Robinson* and *Fountain*, such a holding overlooks the regulatory guidance provided by 38 C.F.R. § 3.155(d)(2). As noted by the Court, the regulation specifically states that VA will

> "adjudicate entitlement to benefits for the claimant condition as well as entitlement to any additional benefits for complications of the claimant condition, **including those identified by the rating criteria for that condition in 38 C.F.R. Part 4, VA Schedule for Rating Disabilities**."

38 C.F.R. § 3.155(d)(2) (emphasis added). (Slip Op. at 13.)

The text of the regulation provides useful guidance in understanding the regulation's discussion of "complications". *See Holle v. McDonald*, 28 Vet.App. 112, 116 (2016) (indicating that statutory or regulatory terms are to be interpreted in the context of the statutory or regulatory scheme); *Gazelle v. McDonald*, 27 Vet.App. 461, 464 (2016) (holding that statutes and regulations are to be read as a whole and in the context of the surrounding scheme). As noted in the concurring opinion in this case, the text of § 3.155(d)(2) indicates plainly that the interpretation of "complications" should be made with reference to the term's use in Part 4 of Title 38. However, the equivalence between "complications" under 38 C.F.R. § 3.155

and secondary service connection under 38 C.F.R. § 3.310 fails to consider such contextual guidance.

Moreover, such an equivalence is inconsistent with persuasive precedent of the Federal Circuit. As the Secretary argued before the Court, the Federal Circuit has held in *Manzanares* that a claim for service connection of a secondary disability is not part of a claim for service connection of the primary disability. *Manzanares*, 863 F.3d at 1378. While the Court notes in its decision that *Manzanares* does not speak to the question of whether a claim for service connection of a primary disability *may* include a claim for service connection of a secondary disability and does not seek to interpret the "complication" language of 38 C.F.R. § 3.155(d)(2), the Secretary contends that the Court's stated equivalence between "complications" and secondary service connection run counter to the guidance provided in *Manzanares*.

Again, 38 C.F.R. § 3.155(d)(2) states that VA will adjudicate entitlement to benefits for the claimed condition, as well as any additional benefits for complications of the claimed condition, including those identified by the rating schedule. However, *Manzanares* instructs that claims for secondary service connection are not, as a matter of course, part of a claim for service connection of the primary disability. 863 F.3d at 1378 (noting that there is nothing in the language or history of § 3.310(a) that suggests a claim for secondary service connection should be treated as part of a claim for primary service connection). The Federal Circuit explicitly stated that § 3.310(a) "cannot mean that primary claims for service

connection or subsequent claims for increased ratings for primary conditions necessarily encompass later claims for secondary service connection." *Id*. at 1379.

The Court's finding in the instant appeal that "complications" are equivalent to secondary service connection would operate to require that claims for secondary service connection be adjudicated any time VA adjudicated a claim for service connection or a claim for increased ratings of a primary disability, because those secondary disabilities would constitute "complications" under the regulation. Such an outcome is in direct tension with the outcome in *Manzanares*. Finally, the Secretary notes that while the Court distinguished *Manzanares* as concerning effective dates, not formal claim requirements, (Slip op. at 16), the Secretary points out that the holding in this case, that secondary service connection can be a part of a claim for an increased rating, would, necessarily, eventually – if secondary service connection is granted – require an earlier effective date tied to the claim for the primary disability, which runs counter to the holding in *Manzanares*. Indeed, in that case the Federal Circuit specifically recognized that the effective date assigned for an increased rating claim was based on the date of a claim, which required evidence of intent to file a claim. 863 F.3d at 1377 (citing to 38 C.F.R. § 3.400(o)(2); *see* U.S.C. § 5110; *see also Ellington v. Peake,* 541 F.3d 1364, 1379 (Fed. Cir. 2008) (requiring primary and secondary claims to have the same effective date "would be illogical, given that secondary conditions may not arise until years after the onset of the original condition.*"*).

As such, the Secretary respectfully asks that the Court reconsider its decision regarding the interpretation of "complications" and the relationship between the adjudication of "complications" under 38 C.F.R. § 3.155(d)(2) and secondary service connection under 38 C.F.R. § 3.310 in the context of the language of the regulation and consistent with *Manzanares*.

WHEREFORE, in light of the foregoing, the Court should reconsider its January 6, 2021, decision to vacate the Board's decision to deny Appellant entitlement to a disability rating in excess of 60% for the service-connected residuals of prostate cancer and to remand the claim for consideration of claims for secondary service connection of diarrhea and lymphedema.

Respectfully submitted,

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