IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MICHAEL L. CHAVIS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-2928
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S MOTION FOR RECONSIDERATION BY THE PANEL OF PART OF THE COURT'S APRIL 16, 2021, PANEL DECISION

Appellee, Secretary of Veterans Affairs (Secretary), respectfully moves this honorable Court to reconsider its April 16, 2021, panel decision to the extent that the Court found that the Board of Veterans' Appeals (Board) had jurisdiction over Appellant's radiculopathy evaluations. *See* U.S. Vet. App. R. 35(a); *see also Chavis v. McDonough*, --- Vet.App. ---, 2021 U.S. App. Vet. Claims LEXIS 660, 25-34 (April 16, 2021). As grounds for this relief, the Secretary submits that the Court's decision finding that the Board had jurisdiction over Appellant's radiculopathy evaluations is inconsistent with statutory law and controlling legal precedent, which reflects that the Court overlooked or misunderstood relevant points of law and fact.

At the crux of the Court's holding is its finding that a sympathetic reading of Appellant's November 2009 Notice of Disagreement (NOD) encompassed, and placed into appellate status, the downstream issues of the proper evaluations for

Appellant's radiculopathy conditions. *See Chavis*, supra at *33. The Court's finding, however, not only erroneously circumvents the rule of finality and ignores the requirements of 38 U.S.C. § 7105, it overlooks timeworn legal precedent that is dispositive on the issue.

In order to put into context the points of law and fact that the Court overlooked or misunderstood in rendering its holding and finding in this case, the Secretary begins by noting what was encompassed within Appellant's November 2008 claim for an increased disability rating for his service-connected lumbar spine condition based on a sympathetic reading of that claim under the law. Particularly, the Secretary has acknowledged and conceded, in supplemental briefing to this Court in multiple cases, that, under the law, an issue of entitlement to service connection for a neurological impairment as secondary to the underlying and service-connected lumbar spine disorder may be encompassed within a claim for an increased disability rating for the underlying lumbar spine condition in light of the provision of 38 C.F.R. § 4.71a, Note (1), hereinafter "Note (1)", and when that issue is reasonably raised by the evidence and/or argument of record. *See Chavis* Supplemental Memorandum of Law (CSML) at 11 (1-21); *Kallaher v. McDonough*, 19-2227, Supplemental Memorandum of Law (KSML) at 2-4 (1-7). Accordingly, the Secretary agrees with the Court to the extent that it found that the lay and medical evidence of record, dated from December 2008 to November 2017, reasonably raised the issue of entitlement to service connection for neurological impairments as secondary to Appellant's underlying and service-connected lumbar

spine disorder such that it was encompassed within his underlying increased rating spine claim. *See Chavis*, supra at *30-31.

As such, it is a reasonable interpretation of the February 2009 rating decision to say that it implicitly denied the issue of entitlement to service connection for neurological impairments as secondary to Appellant's underlying and service-connected lumbar spine disorder. It is also a fair interpretation of Appellant's November 2009 NOD to say that it encompassed disagreement with the RO's implicit denial of the issue of entitlement to service connection for neurological impairments as secondary to Appellant's underlying and service-connected lumbar spine disorder. That, however, does not resolve the question presented by this case to the Court because it only deals with whether service connection for neurological impairment as secondary to Appellant's underlying and service-connected lumbar spine disorder, an upstream issue, was within the scope of and adjudication of the increased lumbar spine rating claim. It does not, and cannot, resolve what happens downstream after service connection is granted for that condition.

Here, Appellant was granted entitlement to service connection for right and left lower extremity radiculopathy with evaluations of 10%, effective February 1, 2017, by the RO in a January 2018 rating decision. R. at 51-52 (41-54). The RO's decision, as with all traditional service connection claims, represented a full grant of the benefit sought: Appellant's radiculopathy service connection claims that were encompassed within his underlying increased rating spine disorder claim.

See Holland v. Gober, 10 Vet.App. 433, 436 (1997). If Appellant wished to appeal the downstream issues of evaluation level or effective date, under the law, he needed to file an NOD with the RO's decision within one-year of the January 2018 rating decision. *See* 38 U.S.C. § 7105(b)(1) and (c); *March v. Nicholson*, 19 Vet.App. 381, 384 (2005) (noting that a failure to file a timely NOD deprives the Board of jurisdiction to consider the merits of an appeal). Because he did not, the relevant question for the Court was whether the issue of the proper evaluations for Appellant's bilateral lower extremity radiculopathy became part of his pending appeal of the rating assigned for his underlying back condition simply by virtue of his already-filed November 2009 NOD, even where VA granted the radiculopathy benefits more than eight years **after** Appellant had filed that NOD. This question has been asked and answered.

Legal precedent overlooked by the Court explicitly indicates that the downstream issue of the proper evaluations for Appellant's bilateral lower extremity radiculopathy cannot be properly considered to be placed into appellate status, and thus a part of Appellant's pending appeal for his underlying back condition, by his previously filed November 2009 NOD. Specifically, longstanding precedent of this Court explains that "a claimant's NOD cannot express disagreement with an issue that has not been decided." *Vargas-Gonzalez v. Principi*, 15 Vet.App. at 222, 228-29 (2001). It is undisputed in this case that the February 2009 rating decision did not address entitlement to increased evaluations for service-connected bilateral lower extremity radiculopathy as Appellant was not

service connected or rated for those conditions at that time. *See* R. at 3456-69. Indeed, and at best, the February 2009 rating decision implicitly denied entitlement to service connection for bilateral lower extremity radiculopathy. *Id.*

As such, and at most, Appellant's November 2009 NOD expressed disagreement with the RO's implicit denial of the up-stream issue of entitlement to service connection for the bilateral lower extremity radiculopathy. *See Infra* at 2-3. Even still, controlling legal precedent from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), overlooked by the Court, demands the same result. Particularly, it is well-settled that an NOD with respect to entitlement to service connection cannot initiate appellate review of the downstream elements of compensation level or effective date. *See Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997). The Federal Circuit explained that when an appeal concerns "the rejection of the logically up-stream element of service-connectedness, the appeal could not concern the logically downstream element of compensation level." *Id.*

So, even under this most favorable construction of the facts of this case and the November 2009 NOD under the law, Appellant was still required to submit an NOD with respect to the RO's January 2018 rating decision in order to initiate appellate review and express his disagreement with the evaluations or effective dates for his separately rated right and left lower extremity radiculopathy. *See Holland*, 10 Vet.App. at 436. It is undisputed that he did not. And the law makes clear that the jurisdictional requirement to file an NOD was not satisfied by an NOD

that predated the award of secondary service connection for radiculopathy. Accordingly, and under the aforementioned binding and controlling legal precedent overlooked by the Court, the Board did not have jurisdiction over the unappealed, downstream issues of entitlement to increased evaluations for Appellant's service-connected bilateral lower extremity radiculopathy.

The Court's reasoning for holding otherwise is not based on any contravening authority and is inconsistent with statutory law and controlling legal precedent. Particularly, the Court first notes that "the lay and medical evidence presented and developed in connection with the lumbar spine claim indicates that Mr. Chavis's radiculopathy is part of his lumbar spine disability." *Chavis,* supra at *31. In a similar vein, the Court points out that "VA considered Mr. Chavis's reports of neurologic sequelae as part of his claim seeking increased compensation for his back disability." *Chavis*, supra at *31-32. The Court, however, does not explain how the interconnectedness of the two conditions and VA's treatment of the neurological sequelae affects or changes longstanding appellate procedure and law, especially given the history and purpose of Note (1).

Mainly, neurological abnormalities were encompassed within the rating of the underlying spinal disability under the General Rating Formula for Diseases and Injuries of the Spine prior to 2003. *See* 38 C.F.R. § 4.71a (2002), Diagnostic Code (DC) 5293. However, VA recognized that there were separate neurological disabilities, including bowel or bladder impairment, that commonly resulted from disease or injury of the spine, "all of which have specific separate evaluation

criteria in the Digestive, Genitourinary, and Neurologic System sections of the rating schedule", and that the assignment of one rating for all of those disabilities was no longer feasible. *See Schedule for Rating Disabilities; The Spine*, Proposed Rule, 67 Fed. Reg. 56509, 56510 (Sept. 4, 2002). In turn, VA proposed adding what has become Note (1) to the General Rating Formula for Diseases and Injuries of the Spine to "direct the rating agency to separately evaluate any associated objective neurological abnormalities" that are shown in the record to be clearly associated with the underlying service-connected disease or injury to the spine "based on criteria in the Digestive, Genitourinary, and Neurologic System portions of the rating schedule." *Id.*

Essentially, as previously noted, Note (1) was created to ensure that consideration of entitlement to service connection for a neurological impairment as secondary to the underlying and service-connected lumbar spine disorder is a part of the adjudication of the underlying increased rating claim to the extent that the issue is reasonably raised by the record. *See Infra* at 2-3. Stated another way, the governing regulation mandates that neurological complications, such as Appellant's bilateral lower extremity radiculopathy, be treated as a part of the underlying back claim initially and when reasonably raised by the evidence and/or argument of record. So, the Court's notations serve to do nothing more than demonstrate VA's compliance with Note (1). Compliance with the regulation, however, by the adjudicator and in the development of the record as part of the underlying back claim, is irrelevant to the issue at hand because it deals with the

treatment of Appellant's neurological complications prior to the grant of service connection for those conditions. Plus, the language in Note (1) does not remove the requirement to file an NOD to disagree with any neurological evaluation assigned via Note (1).

As such, the downstream issues of proper evaluation or effective date do not and cannot live on with the underlying spine claim just because the issue of entitlement to service connection for those neurological conditions may have been initially encompassed within that claim. *See* CSML at 5-14 (1-21). Critically, the Court, in its decision, does not disagree that Note (1) does not remove the requirement to file an NOD to disagree with any neurological evaluation assigned via Note (1). *See Chavis*, supra at *28-34; *see also Chavis*, supra at *43 (Judge Meredith, *dissenting*, noting that "Note 1 does not resolve this question [whether the issue of the proper rating for the associated neurological complication becomes part of the pending appeal of the rating assigned for the underlying back condition simply by virtue of the already-filed NOD] because it does not address appellate procedure or indicate whether disputes concerning a separate *grant of benefits* for associated neurological abnormalities may be placed into appellate status absent an NOD that *postdates* the grant. Thus, there is no basis for concluding that Note 1 obviates the statutory requirement for placing an issue into appellate status: 'Appellate review will be initiated by a[n] NOD and completed by a substantive appeal after a[n] SOC is furnished.' 38 U.S.C. § 7105(a)(2009)") (emphasis in original).

Additionally, to the extent that the Court relied on provisions contained in VA's *Adjudication Procedures Manual* (M21-1), those provisions do not speak on appellate procedure and provide no basis for the circumvention of controlling statutory law and legal precedent. The Court noted that "the M21-1 details that, when using the General Rating Formula, adjudicators are to 'evaluate conditions based on chronic orthopedic manifestations. . .and any associated neurological manifestations. . .by assigning separate evaluations for the orthopedic and neurological manifestations.'" *Chavis*, supra at *32. This provision of the M21-1 just mimics the language of Note (1), which as noted above, only requires consideration of entitlement to service connection for a neurological impairment as secondary to the underlying and service-connected lumbar spine disorder as part of the adjudication of the underlying increased rating claim to the extent that the issue is reasonably raised by the record. It does not remove the requirement to file an NOD to disagree with any neurological evaluation assigned via Note (1), which is the issue in this case. *See* CSML at 6 (1-21).

The Court also noted that "the M21-1 instructs adjudicators that, '[b]ecause spinal disease can cause objective neurologic abnormalities, the onset of a neurologic complication represents medical progression or worsening of the spinal disease' and to treat a claim asserting a new neurologic complication as a claim for increase of the underlying spine disease.'" *Chavis*, supra at *32-33. But, again, the Court does not explain how this provision impacts appellate procedure as it only confirms the reason for Note(1) but does not speak to appellate procedure.

Id. Plus, the history of Note (1) informs that VA recognized that a veteran's spinal condition could progress or worsen to the point of creating a separate, but related neurological condition. *See Schedule for Rating Disabilities; The Spine*, Proposed Rule, 67 Fed. Reg. 56509, 56510 (Sept. 4, 2002). As such, and as a practical matter, it makes sense, and is veteran-friendly, for the adjudicator to consider the progression or worsening of the underlying spinal condition as the claimed neurological condition may not rise to the level of being separately service-connectable and ratable, but the progression or worsening of the underlying spinal condition could warrant an increase in the rating for that underlying spinal disability. But it bears emphasizing that the directive in this M21-1 provision speaks only to the treatment of a neurological condition prior to the grant of service connection for that condition, consistent with Note (1), whereas this case involves the requisite appellate procedure once service connection is granted.

Finally, the Court relies on "VA's duty to sympathetically read pro se pleadings", but nothing in that duty requires VA to contravene controlling statutory law and legal precedent to read disagreement with the downstream element of the proper evaluation of a service-connected condition in an NOD submitted eight years prior to a rating decision that, at best, denied entitlement to the upstream issue of service connection. *Chavis*, supra at *33. Indeed, the Court has explained that the duty to consider all issues reasonably raised based on a liberal reading of submissions is not "an exercise in prognostication." *Talbert v. Brown*, 7 Vet.App. 352, 356 (1995).

Moreover, while it is conceivable under the Federal Circuit's holding in *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000), that Appellant's November 2009 NOD expressed disagreement with the RO's implicit denial of the issue of entitlement to service connection for the bilateral lower extremity radiculopathy, it cannot be that Appellant's November 2009 NOD expressed disagreement with the RO's decision made eight years **after** that NOD was submitted to the RO. The Court's determination in that regard also flies in the face of the Federal Circuit's binding and controlling precedent that was not overturned by *Maggitt*. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (noting that "an NOD relates to a specific 'adjudicative determination' on a specific date"); *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997) (noting that while a veteran's overall claim for benefits is comprised of separate issues, an NOD with respect to that particular issue must be filed in order for an appeal to encompass that issue); *Grantham*, 114 F.3d at 1158-59 (noting that "[b]ecause the first appeal concerned the rejection of the logically up-stream element of service-connectedness, the appeal could not concern the logically down-stream element of compensation level"); *see also Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (recognizing that the Court of Appeals for Veterans Claims is bound to follow the precedent of the Federal Circuit and the Supreme Court of the United States).

Under the Federal Circuit's binding and controlling precedent, the RO would have had to have made an adjudicative determination as to the proper evaluations for Appellant's radiculopathy prior to November 2009 in order for Appellant's NOD

to have disagreed with the RO's decision in that regard. To this end, it is undisputed, even under the most sympathetic reading of the RO's February 2009 rating decision, that the RO did not. *See* R. at 3462-65. As such, the Secretary urges the Court to reconsider its decision in this regard and to align its legal reasoning with binding and controlling statutory law and legal precedent, which dictate that the Board did not have jurisdiction over Appellant's bilateral radiculopathy evaluations. *See* U.S. Vet.App. R. 35(e)(2), (3).

As a final matter, while it is clear under the binding and controlling statutory law and legal precedent that the Board committed legal error in finding that it had jurisdiction over Appellant's radiculopathy evaluations and that the Court should find that the Board did not have jurisdiction, the Secretary acknowledges that that should not necessarily end the Court's inquiry given the facts of this specific case. Particularly, and as noted in the Court's dissenting opinion, Appellant had eight-and-a-half months, at the time the Board issued the decision on appeal, to file an NOD with the RO regarding the January 2018 rating decision granting benefits for bilateral lower extremity radiculopathy. *See Chavis*, supra at *53-54. The Board decision on appeal also granted an increased rating to 20% for Appellant's bilateral lower extremity radiculopathy. The Secretary agrees this raises the legitimate question as to whether Appellant believed that he did not have to file an NOD as to the January 2018 rating decision. *See Chavis*, supra at *53-54. The Secretary also recognizes the dissent's concern over what recourse would be available to

Appellant if the Court were to find that the Board erroneously exercised jurisdiction. *Id*.

However, whether Appellant detrimentally relied on the Board's erroneous exercise of jurisdiction over his radiculopathy evaluations is a factual determination to be made by the Board in the first instance. *See Noah v. McDonald*, 28 Vet.App. 120, 133-34 (2016); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (An appellate court is not the appropriate forum for initial fact finding). Similarly, whether equitable relief may be appropriate for Appellant in this particular case is also a matter for the Secretary's discretion upon Appellant's request. 38 U.S.C. § 503(a), (b); *Schleis v. Principi*, 3 Vet.App. 415, 418 (1992) (recognizing that only the Secretary is permitted by statute to take equitable consideration into consideration when reviewing claims for administrative error). Accordingly, it is within the Court's discretion to remand Appellant's radiculopathy evaluations for the Board to address whether Appellant relied to his detriment on the Board's decision exercising jurisdiction over his radiculopathy evaluations, which will also permit Appellant to then make any equitable relief arguments to the Secretary. *See* 38 U.S.C. § 7252 (noting the Court's power to remand a matter as appropriate). In other words, the Court may still reach the appropriate legal conclusion by holding that the Board committed legal error in concluding that it had jurisdiction over the issue of the proper evaluations for bilateral radiculopathy where the claimant had not filed an NOD as to that issue, but nonetheless remand the case for consideration of detrimental reliance.

For the aforementioned reasons, the Court should reconsider its April 16, 2021, decision to the extent that it determined the Board had jurisdiction over Appellant's bilateral radiculopathy evaluations.

Respectfully submitted,

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