

On November 14, 2019, the Board remanded the only two claims before it (entitlement to an initial rating in excess of 10% for chronic sinusitis and an initial compensable rating for allergic rhinitis). (November 2019 Board remand, transmitted June 22, 2020). Appellant filed a Notice of Appeal with this Court on May 21, 2020. In October 5, 2020, the Secretary filed a Motion to Dismiss (Mot.

to Dismiss), for lack of subject matter jurisdiction, which was opposed by Appellant and granted by the Court in March 12, 2021 (March 2021 Court Order).

Appellant now seeks reconsideration of the March 2021 Court Order, dismissing the case. Appellant further moves for a panel decision in the event reconsideration is denied. He primarily argues that the Board's failure to refer claims for sleep apnea and vertigo to the Regional Office (RO) for initial adjudication is a jurisdictional decision that is appealable to this Court. In support, he states that the Board has a mandatory requirement to refer pending claims to the RO, under 38 C.F.R. § 20.904(b). (Mt. for Recon. at 2-4). He argues that the Board is required to adjudicate all issues reasonably raised by the record and expressly raised by the veteran, citing *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008). *Id.* at 4-5. He also points to an unpublished decision, *Trachsel v. Wilkie*, 2021 U.S. App. Vet. Claims LEXIS 46, *20, to support his case. *Id.* at 5-6. He further argues that his claim for service connection of a sinus condition, remanded by the Board, included a claim for vertigo, and the claim for vertigo was implicitly denied by the RO, and properly on appeal. *Id.* at 7.

ARGUMENT

The Court should deny Appellant's motion for reconsideration because none of Appellant's arguments change the fact that he seeks to appeal a non-final, Board remand, to this Court. The Court lacks the subject matter jurisdiction to address the issues of service connection for sleep apnea and vertigo, which were not referred or discussed in any way by the November 2019 Board remand.

As the Court has stressed, absent a final Board decision, the Court lacks jurisdiction to consider an appeal. See March 2021 Court Order at 2, *citing Breeden v. Principi*, 17 Vet.App. 475, 477 (2004) (per curiam order). Further, because the Court's jurisdiction is limited to review of final Board decisions, “[i]t follows that where the Board does not have . . . jurisdiction, then neither does the Court.” *Id.*, *citing King v. Nicholson*, 19 Vet.App. 406, 409 (2006). As the Secretary has previously explained, pursuant to 38 U.S.C. § 7266(a), in order for a claimant to obtain review of a Board decision by this Court, that decision must be final. See Mot. to Dismiss at 2. Furthermore, “[a] claimant seeking to appeal an issue to the Court must first obtain a final BVA decision on that issue.” *Id.*, *citing Horowitz v. Brown*, 5 Vet.App. 217, 225 (1993) (emphasis in original). See 38 U.S.C. §§ 7266(a), 7252(a). As the Secretary previously stated, “[a] BVA remand decision ‘is in the nature of a preliminary order and does not constitute a final Board decision.’ 38 C.F.R. § 20.1100(b).” Mot. to Dismiss at 2; *Zevalkink v. Brown*, 6 Vet.App. 483, 488 (1994). The Secretary continues to assert that the November 2019 Board remand is not a final decision of the agency and is therefore not within the jurisdiction of the Court.

As the Court has explained, Appellant’s argument that the Board erred in not referring the issues of service connection for vertigo and sleep apnea to the RO for initial adjudication, acknowledges that the Board did not have jurisdiction over any pending claims. See March 2021 Court Order at 2, *citing Young v. Shinseki*, 25 Vet.App. 201, 204 (2012) (en banc) (explaining that referral is the

appropriate action where the Board lacks jurisdiction over a matter); *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc) (explaining that the Board's jurisdiction is predicated on the filing of a Notice of Disagreement (NOD)); see also 38 C.F.R. § 20.904 (2020) (explaining that in legacy appeals, referral is warranted when the RO has not rendered an initial adjudication of a claim except for claims over which the Board has original jurisdiction).

Because the November 2019 Board remand is not a final decision, Appellant has not exhausted his administrative remedies. *Id.*; citing *In re Quigley*, 1 Vet.App. 1 (1990). As the Court has explained, if Appellant believes any claims for service connection for sleep apnea and vertigo are still pending, “the appropriate procedure . . . is to pursue a resolution of the original claim, e.g., seek issuance of a final RO decision with proper notification of appellate rights and initiate an NOD.” March 2021 Order at 2-3, citing *DiCarlo v. Nicholson*, 20 Vet.App. 52, 56 (2006), *aff'd sub nom. DiCarlo v. Peake*, 280 F. App'x 988 (Fed. Cir. 2008). Additionally, the Court explained that to the extent that Appellant argues that the Secretary has failed to process any claims, he may file a petition for extraordinary relief with this Court challenging the Secretary's refusal to act. *Id.*, citing *DiCarlo*, 20 Vet.App. at 56-57 (citing *Constanza v. West*, 12 Vet.App. 133, 134 (1999)).

Not only has Appellant not exhausted his administrative remedies, none of Appellant's arguments can overcome the jurisdictional barriers here. Appellant argues that the Board has a mandatory requirement to refer pending claims to the RO, under 38 C.F.R. § 20.904(b). (Mt. for Recon. at 2-4). While the Secretary

disputes any such mandatory requirement, this argument does not change the fact that there is no final Board decision for the Court to review, which is required by statute. See 38 U.S.C. §§ 7266(a), 7252(a). Appellant also argues that the Board is required to adjudicate all issues reasonably raised by the record and expressly raised by the veteran. *Id.* at 4-5; citing *Robinson*, 21 Vet.App. at 552. Importantly, as explained above, the Board had no jurisdiction over the issues of service connection for sleep apnea and vertigo; as Appellant advocates referral, he agrees that the Board had no jurisdiction of these issues. *Young*, 25 Vet.App. at 204. Without a final Board decision, an appeal to the Court is not possible. *Breeden*, 17 Vet.App. at 475.

Appellant points to *Trachsel v. Wilkie*, 2021 U.S. App. Vet. Claims LEXIS 46, *20, to support his case; notably, this case is unpublished and cannot be cited as precedent. U.S. Vet. App. R. 30(a). Further, this case is distinguished. In *Trachsel*, the Board denied entitlement to compensable disability ratings for right foot hallux valgus deformity and left foot strain with hallux valgus deformity. 2021 U.S. App. Vet. Claims LEXIS 46, *1. Critically, in *Trachsel*, the Board made a decision that it lacked jurisdiction over an appeal as to benefits for other foot conditions. *Id.* at 1, 14-15 (emphasis added). In contrast, here, Appellant seeks to appeal a Board remand which made no decision as to the issues of sleep apnea and vertigo. *Trachsel* does not rectify the main problem here, that there is no final Board decision to be appealed. *Breeden*, 17 Vet.App. at 475.

Further, in *Trachsel*, the parties agreed that the original claim for bilateral

foot conditions was broad, and the Court construed the Notice of Disagreement (NOD) filed as to other foot disabilities. 2021 U.S. App. Vet. Claims LEXIS 46, *15. Therefore, the Court in *Trachsel* found the Board's decision that it lacked jurisdiction over an appeal as to other foot conditions was erroneous. *Id.* at 19-20. In contrast, here, the Board entered a remand as to entirely separate claims—entitlement to an increased rating for sinusitis and allergic rhinitis—than the issues of service connection of vertigo and sleep apnea, which were neither decided nor addressed by the Board.

Appellant argues that his claim for service connection of sinusitis, included a claim for vertigo, and the claim for vertigo was implicitly denied by the RO and properly appealed. *Id.* at 7. As discussed above, Appellant has not exhausted his administrative remedies if he believes there was an implicitly denied claim which was appealed. The November 2019 Board remand made no decision to be appealed. Appellant simply seeks to appeal a remand to the Court, which is barred by law. *Zevalkink*, 6 Vet.App. at 488. Again, the Court lacks the subject matter jurisdiction to accept the appeal.

As stressed by the March 2021 Court Order, as there is no final Board decision for the Court to review, and the Board lacked jurisdiction to adjudicate the issues of service connection for sleep apnea and vertigo, this case must be dismissed. *Breeden*, 17 Vet.App. at 475.

WHEREFORE, the Secretary responds to the Court's June 8, 2021, Order and submits this response in opposition to the motion for reconsideration.

Respectfully submitted,

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