

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

RANDOLPH WILSON,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**SUPPLEMENTAL BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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I. INTRODUCTION

On June 8, 2021, the Court ordered the parties to submit supplemental briefs addressing this Court's holding in *Bailey v. Wilkie*, 33 Vet.App. 188 (2021) as it pertains to claims for secondary service connection “expressly¹ raised to the Board” of Veterans’ Appeals (Board). Docket No. 19-3791, June 8, 2021, Order. The Secretary responds herein.

II. APPELLEE’S RESPONSE

As an initial matter, and to answer the Court’s specific question raised in the June 8, 2021, Order, whether a potential claim of secondary service connection

¹ Of note, while the Court’s June 8, 2021, order noted that a claim for peripheral vestibular disorder (PVD), dizziness, or staggering was “expressly raised” because the Secretary acknowledged that Appellant indicated an informal intent to seek those benefits, (citing to Secretary’s Brief at 8), that was not a concession that a claim was expressly raised to the Board. Instead, it was an acknowledgement that to the extent Appellant’s appeal to the Board is construed as an informal intent to seek benefits for PVD, dizziness, or staggering, the Board did not have jurisdiction to address such a claim because Appellant failed to respond to the RO’s attempts to develop that claim, and because Appellant failed to show any conceivable link between hearing loss and PVD, dizziness, or staggering. Indeed, for Appellant’s claim to be *expressly* raised to the Board, there would have to be a formal claim, an initial development and adjudication of that claim, followed by a notice of disagreement (NOD), and a substantive appeal. See 38 U.S.C. § 7105(a) (“[a]ppellate review will be initiated by a [NOD] and completed by a substantive appeal after a statement of the case is furnished”); *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc) (“The request for appellate review by the Board is initiated by filing an NOD and is completed by filing a Substantive Appeal.”). But here, after the RO attempted to develop Appellant’s claim, Appellant chose not to pursue such a claim; and thus, the claim was not adjudicated, in appellate status, or expressly raised to the Board. See *King v. Nicholson*, 19 Vet.App. 406, 409 (2006); see *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (“[T]he court’s jurisdiction is premised on and defined by the Board’s decision concerning the matter being appealed.”).

was reasonably (or assuming *arguendo*, expressly) raised, be it in Appellant's VA Form 9 or otherwise, is of no consequence in this case because VA's actions here complied with the now holding of *Bailey*. Procedurally, it is not the Board, but the agency of original jurisdiction (AOJ), that develops claims. So, if a secondary service connection claim was either reasonably or even expressly raised before the Board, whether in a VA Form 9 or otherwise, it would necessarily require remand (or referral) to the AOJ for development in the first instance. See 38 C.F.R. §§ 3.159, 19.9, 19.31, 19.37 (2018); *Smith v. Brown*, 8 Vet.App. 546, 553, 554 (1996) (en banc); *Wilkinson v. Brown*, 8 Vet.App. 263, 268 (1995) (the Board is required to remand a claim for further development where the record is inadequate); see also *Goss v. Brown*, 9 Vet.App. 109, 114 (1996); *Floyd v. Brown*, 9 Vet.App. 88, 93 (1996); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991) (the Court remanded the claim "to give the Secretary the opportunity to assist the claimant by gathering additional evidence . . ."). Here, as will be outlined below, after receipt of Appellant's VA Form 9, the RO developed Appellant's claim for PVD². So, whether a secondary service connection claim was either reasonably

² PVD is a disorder pertaining to a space or cavity at the entrance of a canal and the outward part of a surface or structure (that is, the ear canal). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1437, 2082 (31st ed. 2007). It is a dysfunction of the balance organs of the inner ear that can result in dizziness, vertigo, and disequilibrium. See *Vestibular Disorders Ass'n*, Causes of Dizziness, <https://vestibular.org/article/what-is-vestibular/causes-of-dizziness/> (last visited June 18, 2021).

or expressly raised to the Board, whether in a VA Form 9 or otherwise, is of little or no consequence to the outcome of this appeal.

Also, Appellant advanced several arguments in his principal brief. Specifically, as related to the Court's June 8, 2021, Order, he alleged that the Board erred when it failed to address his PVD with dizziness and staggering. The undersigned submits that the Court's recent holding in *Bailey* does not support Appellant's argument; instead, it counsels against it for two reasons.

First, the disability adjudicated by the Board was an increased rating for service-connected bilateral hearing loss (BHL). Under *Bailey*, in order for a claim of secondary service connection, an appellant is required to show a link sufficient to reasonably raise the issue of entitlement to secondary service connection. *Bailey*, 33 Vet.App. at 198. Thus, here, Appellant was required to show a link that his PVD was caused, or aggravated, by his BHL. However, Appellant fails to note any record that indicates a link between BHL and PVD, dizziness, or staggering. Thus, even under *Bailey*, the issue of secondary service connection for those disabilities, as secondary to service-connected hearing loss, was not reasonably raised by the record.

Second, to the extent a claim of compensation for PVD, dizziness, or staggering was indeed reasonably or expressly raised, and to the extent *Bailey* requires VA to develop such a claim, the regional office (RO) already initiated such development, but did not adjudicate such claims because Appellant chose not to

pursue them. Thus, there is no Board error in failing to address claims of secondary service connection for PVD, with dizziness and staggering, and Court should affirm the Board's November 2018 decision.

A. Appellant has Failed to Present Any Evidence Indicating a Relationship Between PVD, Dizziness, or Staggering, and his Service-Connected Hearing Loss.

The primary claim on appeal in *Bailey* was an increased rating for prostate cancer. The appellant in *Bailey* argued that the Board should have addressed the issues of secondary service connection for diarrhea and lower extremity lymphedema, as secondary to service-connected prostate cancer. *Bailey*, 33 Vet.App. at 193. The Court consulted several dictionaries and concluded that the definitions of "complications" "connote a causal or aggravative relationship between the primary disease or condition and the resulting disease or condition," which the Court stated "is the same relationship that exists between primary and secondarily service-connected disabilities." *Id.* at 200. And because a medical examiner acknowledged the medical feasibility of a relationship between radiation treatment for prostate cancer (the service-connected disability) and diarrhea and lower extremity lymphedema (the non-service-connected disabilities), the Court found that the issue of compensation for the non-service connected disabilities was reasonably raised by the record, which required the Board to address them. *Bailey*, 33 Vet.App. at 198.

Contrarily, here, where the primary claim on appeal is an increased rating for service-connected BHL, Appellant has yet to point to any record, lay or otherwise, that even indicates a relationship between BHL and the non-service connected PVD, dizziness, or occasional staggering. Appellant's contention, as noted on his February 2017 appeal, was that he had not been "*test[ed]* for peripheral vestibular disorders [(PVD)], *which* [] cause[s] [him] to have dizziness and occasional staggering." (Record Before the Agency (R.) at 446 (446-67)) (emphasis added). That is, Appellant reported that (1) he was not tested for PVD and (2) that PVD caused him to have dizziness and staggering. See *id.* But PVD is not the disability on appeal. Appellant is also not service-connected for PVD. As such, Appellant's second statement, that PVD causes him to have dizziness or staggering, is irrelevant to this appeal. Additionally, neither Appellant's February 2017 appeal, nor his brief, explain how failure to test for PVD, shows a causative or aggravation relationship between PVD and hearing loss. Compare this to *Bailey*, in which the Court found that the issue of service-connected for non-service-connected conditions was reasonably raised because an examination report clearly documented Mr. Bailey's assertions that the diarrhea and lower extremity lymphedema "were caused by radiation treatment for prostate cancer" and the examiner "acknowledge[d] the medical feasibility of those theories" *Bailey*, 33 Vet.App. at 198; see also *id.* at 203-04 (remanding for the Board to address the non-service-connected claims after finding that the VA examiner's

acknowledgement of a possible nexus reasonably raised those claims). Thus, unlike *Bailey*, here, the record does not reasonably raise the issue of secondary service connection for PVD, dizziness, or staggering, as secondary to service-connected hearing loss.

Appellant presumes such a relationship exists only because he has “established service connection for two different ear conditions.” (Appellant’s Brief (App. Br.) at 7). And in his reply brief, he re-iterates that “PVD, dizziness, and staggering are related to the hearing loss,” (Appellant’s Reply Brief (App. Rep. Br.) at 2, 5), without citing to any evidence for that position. He cites to R. at 398 and 446, *id.* at 1, 3, to argue that this is “evidence” suggesting that the dizziness and staggering are “associated with his service.” But R. at 398 is a July 2016 rating decision assigning disability ratings for tinnitus and hearing loss, (entire decision on R. at 543-47, 550-56); it does not even remotely indicate a relationship between Appellant’s hearing loss (or his service) and PVD, dizziness, or staggering. Likewise, as explained above, R. at 446 is Appellant’s assertion that he was not *tested* for PVD and that PVD caused dizziness and staggering; it is not an assertion that hearing loss caused those issues. Thus, unlike *Bailey*, the case at hand only has Appellant’s assertion that he should be (1) tested for a non-service-connected condition (PVD), and that (2) that non-service-connected condition (PVD) causes him dizziness and staggering. There is no allegation that the service-connected condition on appeal (BHL) causes or aggravates his PVD, dizziness, or staggering.

This Court has long held, even before March 2015 amending regulation, that the mere mention of a disability does not establish an intent to apply for benefits and cannot give rise to a claim. See *Brannon v. West*, 12 Vet.App. 32, 35 (1998) (“The mere presence of the medical evidence does not establish an intent on the part of the veteran to seek . . . service connection.”); see *Ellington v. Nicholson*, 22 Vet.App. 141, 146 (2007) (holding that informal claim was not filed where veteran lacked intent and there was no reason to believe that application for benefits was being filed by completing medical questionnaire); see also *King v. Shinseki*, 23 Vet.App. 464, 470 (2010) (“The theory behind creating requirements for recognizing a document as an informal claim is that there must be a reasonable expectation for VA to act in the manner that the claimant intended.”); 79 Fed. Reg. 57660-01, 57662 (Sept. 25, 2014) (amending 38 C.F.R. § 3.155). Nothing in *Bailey* overturned this long-standing precedent.

Therefore, in light of Appellant’s repeated failure to present any argument or record citation which indicates a link between hearing loss and PVD, dizziness, or staggering, under *Bailey*, the issue of secondary service connection for those conditions was not reasonably raised by the record.

B. To the Extent the Record Did Raise a Claim of Secondary Service Connection for PVD, Dizziness, or Staggering, VA Initiated a Development of those Claims but Appellant Chose not to Pursue them.

The Court’s holding in *Bailey* was clear:

“[a]ll in all, the test, and purpose of [38 C.F.R] §§ 3.155(d)(2) and 3.160 indicate that VA is required to develop and adjudicate related claims for secondary service connection for disabilities that are reasonably raised during the adjudication of a formally initiated claim for the proper evaluation level for the primary service-connected disability.”

33 Vet.App. at 203. This holding contemplated a scenario where VA *failed* to act on a reasonably raised claim for secondary service connection. Here, VA did attempt to develop Appellant’s related claim of service connection for PVD, dizziness or staggering. After Appellant alleged to the Board that he had not been tested for PVD, which caused him dizziness and staggering, (R. at 446 (446-47)) (Appellant’s February 2017 Appeal to the Board), that same month, the VA RO started developing Appellant’s claim. First, in April 2017, it recognized that Appellant intended to seek compensation for PVD, with dizziness and staggering, noting that Appellant should be sent a letter and application for those claims. (R. at 443). Then, the same month, the RO notified Appellant that it had received his correspondence indicating his intent to file a claim for benefits, and that he should apply for compensation for those claims on appropriate forms. (R. at 433 (433-36)); *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 181 (2009) (recognizing that “an appellant has an obligation to cooperate in the development of evidence pertaining to his claim”). But instead of seeking compensation for PVD, staggering, or dizziness, Appellant responded that he had “no further claims to submit.” (R. at 430). He asked that the appeal process should continue. *Id.* Thus, to the extent *Bailey* requires that VA develop any claims “reasonably raised during the

adjudication of a formally initiated claim for the proper evaluation level for the primary service-connected disability,” 33 Vet.App. at 203, and to the extent the Court remanded for the Board to remand or refer the non-service-connected claims to the RO for further development, *id.* at 203-04, that action has already been undertaken here. See also 38 C.F.R. § 19.9; *Smith*, 8 Vet.App. at 553, 554; *Wilkinson*, 8 Vet.App. at 268

Once Appellant was invited to apply for those claims, but chose not to do so, his intention not to further seek compensation for those disabilities was evident; the RO was not required to develop a claim for PVD, dizziness, or staggering any further. See *MacPhee v. Nicholson*, 459 F.3d 1323, 1326–27 (Fed.Cir. 2006) (holding that the plain language of the Secretary's regulations requires a claimant to have an intent to file a claim for VA benefits); *Browkowski v. Shinseki*, 23 Vet.App. 79, 86 (2009). It is well settled that an intent to apply for benefits is an essential element of any claim, whether formal or informal, and, further, the intent must be communicated in writing. See *King v. Shinseki*, 23 Vet.App. 464, 469 (2010), *aff'd*, 430 F. App'x 890 (Fed. Cir. 2011); *MacPhee*, 459 F.3d at 1326-27 (holding that the plain language of the regulations requires a claimant to have an intent to file a claim for VA benefits). Even under *Clemons v. Shinseki*, there must be some intent expressed to apply for benefits. See 23 Vet.App. 1, 7 (2009). But where there is no intent to apply for VA benefits, “a claim for entitlement to such benefits has not been reasonably raised.” *Criswell v. Nicholson*, 20 Vet.App. 501,

503-04 (2006). Here, in light of Appellant's clear intention to not further seek compensation for PVD, dizziness, or staggering, there were no benefits related to such claims that can be paid or furnished. 38 U.S.C. § 5101(a); *see also Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998). In other words, because Appellant chose not to seek compensation for such benefits, the RO has not yet adjudicated such a claim, and neither the Board, nor this Court, have jurisdiction over it. *Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order); *see also Roy v. Brown*, 5 Vet.App. 554 (1993) (holding that in the absence of a properly perfected appeal, the Board is without jurisdiction to determine the merits of the case).

In sum, to the extent Appellant's briefs are predicated on a premise that his hearing losses causes or aggravates PVD, dizziness, or staggering, he has failed to cite to any record diagnosing him with such conditions or relating them to his service-connected hearing loss. On the contrary, the sum of Appellant's arguments is that the Board should have considered service connection for disabilities (1) he chose not to formally claim to the RO, (2) are not shown by the record to exist, and (3) are not shown by the record to be related to service-connected hearing loss. But the Board is not required to "conduct an exercise in prognostication." *Sondel v. Brown*, 6 Vet.App. 218, 220 (1994). As required by *Bailey*, VA did develop Appellant's claim of compensation for PVD, with dizziness and staggering, by requesting that he apply for such a claim; but Appellant chose not to pursue any further claims, and informed the RO that his appeal should

continue without those claims. Additionally, Appellant has failed to point to any record indicating a link between his service-connected disabilities and PVD, dizziness, or staggering. Thus, here, even under *Bailey*, there is no Board error in failing to address claims of secondary service connection for PVD, with dizziness and staggering, and Court should affirm the Board's November 2018 decision.

III. CONCLUSION

WHEREFORE, Appellee, the Secretary of Veterans Affairs, respectfully responds to the Court's June 8, 2022¹, Order and submits that the Court should affirm the Board's November 2018 decision.

Respectfully submitted,

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