

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

20-4870

THOMAS STEVENSON, JR.

Appellant,

v.

DENIS McDONOUGH
SECRETARY OF VETERANS AFFAIRS

Appellee.

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Reply Argument

I. The Board Failed to Explain its Reasons or Bases for why the Lack of a Current Disability is Fatal to the Claim.

The Secretary asks that this Court to affirm the Board decision because the Appellant did not have a “qualifying additional disability” under 38 U.S.C. § 1151. Specifically, the Secretary argues that the claim was not denied due to a lack of a current disability; but was instead denied due to a lack of a qualified additional disability. (Secretary’s Brief at 8). The Secretary’s argument is unavailing as both the Board, and the VA medical examiner, found that the Appellant did not have a “qualifying additional disability” because he did not have a current disability.

Section 1151 awards compensation for “qualifying additional disability” in the same manner as if such additional disability were service connected. "To determine whether a veteran has an additional disability, VA compares the veteran's condition immediately before the beginning of the . . . medical or surgical treatment . . . upon which the claim is based to the veteran's condition after such . . . treatment." 38 C.F.R. § 3.361(b). A “qualifying additional disability” is actually caused by VA care, treatment, or examination when the VA care, treatment, or examination “resulted” in the additional disability. 38 C.F.R. § 3.361(c)(1).

The Board made several findings that the Appellant did not suffer from a current disability, and therefore did not have a qualified additional disability. First, relying on the February 2019 VA medical opinion, the Board determined that “there was no evidence of an unhealed wound on the right side of the abdomen, as indicated by the February 2015 treatment record showing the wound had completely closed....” (R. 7). The Board, again relying on the VA examiner, found that there “was no evidence of additional disability, given that the wound had completely healed.” (R. 7).

As for the medical opinion itself, the medical examiner was limited to discussing the current status of the disability. For example, the examiner found that there was “no evidence of unhealed wound on the right side...Today’s evaluation further confirms that the right upper quadrant surgical wound has completely closed....” (R. 7208). The opinion repeats that the surgical wound has completely healed. (R. 7209).

The Board, and the VA medical examiner, focus on the fact that there is not currently an additional disability. However, this is not what the Appellant has asserted. The Appellant’s surgery was in July of 2014. (R. 9022-9031). Two months later, as the Appellant was still suffering complications, he sought service connection. (R. 9402). He asserted at that time that he had a “painful hole” in his stomach. (R. 9402). For over four months following the surgery, the Appellant had nurses appear at his house

daily to change his dressings on the wound. (R. 205, 6905). The Board, and the Secretary, assert that the wound was healed by February of 2015. (R. 7). That information is correct. However, neither the Board, nor the VA medical examiner, addressed whether this type of surgery would call for an individual to have an open wound for 8 months following surgery. No opinion or discussion was provided regarding whether an 8-month disability (an open wound requiring daily medical care) following surgery was the result of carelessness, negligence, lack of skill, or some other error. Instead, both the Board and the VA examiner simply conclude that there is not a current disability. This finding does not explain the 8 months of post-surgical disability (an open wound on the stomach).

II. The Remaining Arguments Raised by the Secretary.

The Appellant rests on the arguments contained in his principal brief regarding the remaining arguments of the Secretary.

Conclusion

For the reasons stated *supra* and additionally in Appellant's principal brief, Mr. Stevenson respectfully requests that this court vacate the March 25, 2020 decision of the Board of Veterans' Appeals and remand this matter.

Date: November 24, 2021

Respectfully submitted,

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