IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Pablo R. Martinez, Appellant,	)	
vs.	)	Vet. App. No. 21-5284
Denis McDonough, Secretary of Veterans Affairs, Appellee.	)	

MOTION FOR RECONSIDERATION OR A PANEL DECISION

The Appellant moves the Court for reconsideration of the October 24, 2022, decision on this appeal. U.S. VET. APP. R. 35(a). Alternatively, the Appellant moves the Court for a panel decision. U.S. VET. APP. R. 35(b).

I. Bases for reconsideration

For two reasons, the Court determined that "the Board was [not] required to look to the cognitive disorder evidence to find the February 9, 2010, written withdrawal valid." *Martinez v. McDonough*, No. 21-5284, 2022 WL 13838995, at *4 (Vet. App. Oct. 24, 2022). First, relying on *Hembree v. Wilkie*, 33 Vet.App. 1 (2020), it reasoned that "the withdrawal contained all necessary information and was unambiguous." *Martinez*, 2022 WL 13838995, at *4. Second, "Mr. Martinez did not raise the cognitive disorder argument before the Board." *Id.* Respectfully, the Court's reasoning shows that it overlooked or misunderstood two interrelated points. U.S. VET. APP. R. 35(e)(1).

First, the Court overlooked or misunderstood the interplay between *Hembree* and the Board's statutory obligation under 38 U.S.C. § 7104(a). The *Hembree* Court correctly stopped short of holding that 38 C.F.R. § 19.55 (2022) prohibits the Board from *ever* considering post-withdrawal evidence when a written "withdrawal contain[s] all necessary information and [is] unambiguous." *Martinez*, 2022 WL 13838995, at *4; *see Hembree*, 33 Vet.App. at 6, 8. As the Court acknowledged here, "under . . . § 7104(a), the Board must consider all evidence of record." *Martinez*, 2022 WL 13838995, at *4. A regulation that sets out the requirements for a written withdrawal's validity cannot obligate the Board to violate its duty under § 7104(a) by ignoring evidence that raises a veteran's lack of full understanding of his action. *See* 38 C.F.R. § 19.55; *Brown v. Gardner*, 513 U.S. 115, 117-20 (1994) (unanimously rejecting the government's efforts to impose limitations on the scope of a statute beyond those specifically dictated by Congress).

Consistent with § 7104(a), the *Hembree* Court left open the question of "[w]hether any post-withdrawal information *could* call the propriety of [an unambiguous] withdrawal into question." *Hembree*, 33 Vet.App. at 7 (emphasis in original). To have answered that question in the negative would have allowed a mere regulation to trump the statute.

In this case, section 19.55 did not permit the Board to ignore the evidence of Mr. Martinez's cognitive impairment at the time of the written withdrawal *coupled with* his reassertion of TDIU less than two months after VA's request to confirm or

disclaim the withdrawal of TDIU. App. Br. at 11-12, 17-18. Under § 7104(a), the Board was required to consider this evidence because it casts doubt on Mr. Martinez's understanding of the consequences of the withdrawal and therefore "call[s] the propriety of th[e] withdrawal into question." *Hembree*, 33 Vet.App. at 7; *see* App. Br. at 9.

It is one thing for the regulation to provide that the indicia of a written withdrawal's validity are within the withdrawal document's four corners. *See* 38 C.F.R. § 19.55; *Hembree*, 33 Vet.App. at 6. It is quite another for it to require the Board to ignore indicia of the withdrawal's invalidity that are outside the document's four corners. *See* 38 U.S.C. § 7104(a). Respectfully, the Court here overlooked the distinction between a duty to look at post-withdrawal evidence to *confirm the validity* of a facially valid withdrawal and a duty not to ignore post-withdrawal evidence that *casts doubt on* the veteran's understanding of the withdrawal's consequences. *Martinez*, 2022 WL 13838995, at *4. And in isolating its review of the Board's treatment of the reassertion of TDIU from the Board's failure to consider evidence of Mr. Martinez's cognitive functioning, the Court overlooked or misunderstood that Mr. Martinez's cognitive function *when* he withdrew and reasserted TDIU is what made the evidence relevant. *Id.*; *see* App. Br. at 17, 19.

Second, the Court overlooked or misunderstood *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), when it reasoned that the Board was not obligated to consider the evidence of cognitive deficiencies because "Mr. Martinez did not raise the

cognitive disorder argument before the Board." *Martinez*, 2022 WL 13838995, at *4. In *Robinson*, the Federal Circuit held that there is "an obligation on the Board to read . . . filings by claimants in a liberal manner, regardless of whether the claimant is represented by an attorney," 557 F.3d at 1359-60. Thus, although a veteran must "raise issues in the first instance before the VA where the record is being made . . . the veteran's efforts to raise issues on direct appeal should be liberally construed," and the Board must "determine all potential claims raised by the evidence." *Id.* at 1361-62.

Consistent with *Robinson*, the Federal Circuit repeatedly has explained that the citation of record evidence supporting an already raised issue is different from raising a new issue. *See Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016) ("[A]n argument that the Board failed to consider evidence contained in the record, which supports a veteran's established legal claim, should not be considered a new legal argument raised for the first time on appeal."); *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) ("[T]he veteran's interest is always served by [the Board's] examining the record for evidence that would support closely related claims that were not specifically raised.").

Here, Mr. Martinez argued to the Board that he had not withdrawn his appeal for TDIU "with a full understanding of the consequences of his actions in February 2010." R-29. On appeal to this Court, he did not raise a new argument; instead, he pointed to his February 2010 diagnosis with a cognitive disorder as evidence supporting his argument below. *See*, *e.g.*, App. Br. at 17. This Court overlooked or

misunderstood applicable Federal Circuit authority when it characterized Mr. Martinez as having raised a new "cognitive disorder argument" that he "did not raise . . . before the Board." *Martinez*, 2022 WL 13838995, at *4. This oversight or misunderstanding led to the Court's holding that "the Board was [not] required to look at the cognitive disorder evidence." *Id.*

For these reasons, Mr. Martinez respectfully moves the Court for reconsideration of its October 24 decision.

II. Bases for a panel decision

Resolution of whether the Board had to consider that Mr. Martinez was suffering from a cognitive disorder when he withdrew his TDIU appeal would establish a new rule of law, clarify or apply existing law to a novel fact situation, or constitute the only binding precedent on a particular point of law. U.S. VET. APP. R. 35(e)(2); *see Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The *Hembree* Court declined to rule on "[w]hether any post-withdrawal information *could* call the propriety of that withdrawal into question, 33 Vet.App. at 7. That question is implicated by this case, in which Mr. Martinez was diagnosed with a cognitive disorder just a week after withdrawing TDIU and then reasserted his entitlement to TDIU. R-3696-97; R-3715. A panel decision would establish a new rule and constitute the only binding precedent on whether the Board must consider whether a veteran's cognitive impairment affected the validity of a written withdrawal.

The *Hembree* Court also did not address whether the agency's regulation governing the validity of a written withdrawal can limit the Board's statutory obligation to base its decision on consideration of all evidence and material of record. *See* 38 U.S.C. § 7104(a); 38 C.F.R. § 19.55. A panel decision would apply to this novel fact situation the rule that an agency cannot limit a statute's applicability and would constitute the only binding precedent on this question. *See Gardner*, 513 U.S. at 117-20.

Wherefore, the Appellant moves the Court for reconsideration of its October 24 decision or for a panel decision on this appeal.

Respectfully submitted,

/s/ April Donahower
April Donahower

/s/ Zachary M. Stolz
Zachary M. Stolz

CHISHOLM CHISHOLM & KILPATRICK
321 S Main St #200
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile
Counsel for Appellant