IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PABLO R. MARTINEZ, Appellant,	)	
v.	)	Vet.App. No. 21-5284
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

APPELLEE'S RESPONSE TO COURT'S NOVEMBER 28, 2022, ORDER AND APPELLANT'S NOVEMBER 14, 2022, MOTION FOR RECONSIDERATION

Appellee submits this response to the Court's November 28, 2022, order, which directed him to respond to Appellant's November 14, 2022, motion for reconsideration or panel decision. As explained below, Appellant has not shown that the Court misapplied the law or overlooked any legal provision in its October 24, 2022, memorandum decision that affirmed a May 20, 2021, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than February 9, 2010, for the grant of a total disability rating based on individual unemployability (TDIU).

As a preliminary matter, Appellant did not clearly raise the matter of a potential conflict between the statute, 38 U.S.C. § 7104(a), and the regulation governing written withdrawals, 38 C.F.R. § 19.55, in his opening brief. *See* (Appellant's Brief); (Appellee's Brief at 10). Rather, in his opening brief, he seemingly argued that the two legal concepts needed to be considered consecutively – first, to determine if there was a valid withdrawal (§ 19.55) and then second, to determine if the record reasonably raised an issue as to the

effectiveness of the withdrawal (§ 7104(a)). (Appellant's Brief at 9-10, 12). Yet, he waited until his motion for reconsideration to argue that the regulation might conflict with the statute. *See* (Motion for Reconsideration). The Court should decline to entertain the arguments that Appellant has raised at this late stage. *See Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007) ("This Court has consistently held that it will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."); *see also Norvell v. Peake*, 22 Vet.App. 194, 201 (2008) (explaining that the Court has "repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court.").

This preliminary matter aside, Appellant has not shown that § 19.55 is inconsistent with the Board's obligation under § 7104(a) to base its decisions on the entire record. (Motion for Reconsideration at 2-3). In that regard, Appellant proposes a strained reading that § 19.55 requires the Board to "ignore[] evidence," contrary to the requirements from § 7104(a). (Motion for Reconsideration at 2). Section 7104(a) does not address the evidence the Board must address regarding a withdrawal but, rather, provides a *general* instruction that the Board must base its decision "on the entire record in the proceeding." 38 U.S.C. § 7104(a). It is the regulation, not any statute, that explains what *specific* evidence is relevant when the Board addresses the validity of a written withdrawal. 38 C.F.R. § 19.55 (b) (providing that the withdrawal contains the name of the claimant, the VA file number, a statement that the appeal is withdrawn, and, if applicable, a list of the

issues withdrawn from the appeal). And in *Hembree*, the Court clarified that the Board must also consider whether the withdrawal was explicit and unambiguous. *Hembree*, 33 Vet.App. at 5. But nothing in § 19.55 changes the Board's obligation to consider the entire record under § 7104(a). Instead, the regulation directs the Board to the kind of evidence it must address when evaluating the validity of a written withdrawal. *See* 38 C.F.R. § 19.55(b). Because § 7104(a) does not address the requirements for a written withdrawal and § 19.55(b) does not instruct VA adjudicators to ignore evidence of record, these provisions are in harmony with one another. *See* 38 U.S.C. § 7104(a); 38 C.F.R. § 19.55(b).

Indeed, even if there was some facially plausible inconsistency between those provisions – something Appellant has failed to show – it is a longstanding principle of regulatory interpretation that, where possible, courts should interpret regulations as being consistent with the statutes they implement. *See, e.g., Barry v. McDonough*, 35 Vet.App. 111, 123 (2022) (explaining that "when a regulatory provision can be interpreted in a way that harmonizes it with the statute it implements, courts should adopt such a harmonious interpretation."). The statute, 38 U.S.C. § 7105(b), provides that an appellant will be afforded a hearing as requested on a notice of disagreement. This statute also provides that the Secretary "shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement after the notice of disagreement has been filed under this section pursuant to such requirements as the Secretary may prescribe." 38 U.S.C. § 7105(b)(4). This includes withdrawing the requested

hearing. 38 C.F.R. § 19.55(c). There is nothing to indicate, nor has Appellant argued, that § 19.55 incorrectly implemented the statute. And, in interpreting that regulation with the general statutory scheme of Title 38, the most straightforward reading is that § 19.55 does not abrogate the Board's obligation to consider the entire record under § 7104(a) and to address any issues that are reasonably raised therein. *See Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) (explaining that the Board must address all issues raised either by the claimant or the evidence of record). Rather, it specifies what evidence in the record the Board must consider when evaluating a written withdrawal. *See* 38 C.F.R. § 19.55(b). In short, § 19.55 does not instruct the Board to ignore evidence of a claimant's lack of understanding of his action any more than, for example, the rating criteria for the one part of the body instructs the Board to ignore evidence about other parts of the body.

While Appellant frames his request for reconsideration as a misapplication of law, it is not. Rather, this is a question of fact, and whether, under § 7104(a), the validity of Appellant's written withdrawal made pursuant to § 19.55 was reasonably raised. As this Court has consistently explained, the Board's obligation to discuss the record is not unbounded, and it need only discuss theories that are *reasonably* raised by the record. *See Robinson*, 21 Vet.App. at 552-56. And there is no requirement that the Board "assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision." *Hembree*, 33 Vet.App. at 8 (citing *Robinson*, 21 Vet.App. at 553)). Moreover, the

Board is presumed to have considered all the evidence of record "absent specific evidence indicating otherwise," *Gonzales v. West,* 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and where it is silent as to a specific piece of evidence, the Court "must presume that the Board considered this evidence and found it too scant to warrant comment." *Robinson*, 21 Vet.App. at 555.

This is not to say, though, that there could never be a situation in which the Board might look beyond the four corners of a written withdrawal at evidence that a claimant did not intend to withdraw his appeal or clarify an ambiguous withdrawal. *See Hembree*, 33 Vet.App. at 8 (explaining that, "in an appropriate case, post-withdrawal evidence *could* call the effectiveness of the withdrawal into question."). The parties seemingly agree on this matter consistent with the holding in *Hembree*. *Id.* But the facts *here* do not present such a scenario. In that regard, Appellant's contention that the facts here so clearly raised the theory that his withdrawal was the result of a cognitive impairment – and not the result of a deliberate strategic choice to pursue an increased rating for posttraumatic stress disorder instead of TDIU – that the Board was required to address it is unsupported and relies on Appellant's counsel's lay speculation. *See* (Appellant's Brief 11-14; Appellee's Brief at 11). Indeed, Appellant does no more than assert that his cognitive disorder *might* have affected his ability to understand the effects of the written withdrawal without pointing to any specific evidence that it did so and despite the assistance of his representative in filing the withdrawal. *See* (Appellant's Brief at 11-14; Motion for Reconsideration at 3-4; R. at 3715). And

Appellant's attorneys' failure to argue to the Board that Appellant's cognitive problems prevented him from understanding his withdrawal, or otherwise point to evidence to that effect, should be fatal to their current argument that the record so obviously raised that theory that the Board was required to address it. *See* (R. at 2805-07 (January 2019 representative brief)).

In this vein, Appellant contends that the Court misunderstood *Robinson v. Shinseki*, 557 F.3d 13550 (Fed. Cir. 2009), when it observed that Appellant's attorney, who is a member of the same law firm that represented him before the Board, failed to raise the theory about Appellant's cognitive impairment to the Board. (Motion for Reconsideration at 3-4; Slip op. at 6-7). Specifically, Appellant asserts here that *Robinson* requires the Board to liberally construe a claimant's pleadings, even when that claimant is represented by an attorney. (Motion for Reconsideration at 4). And he asserts that the Court is not prevented from considering new evidence in support of a legal argument that was properly preserved before the Board. (Motion for Reconsideration at 4 (citing *Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016)). In sum, Appellant contends that, although his attorneys did not raise the theory that his cognitive condition impaired his understanding of the withdrawal before the Board, the Board was nonetheless required to address that theory, and the Court erred in considering his attorneys' failure to raise the argument. (Motion for Reconsideration at 4-5). Appellant is correct to note that, through his current counsel, he argued to the Board that the March 2010 application for TDIU should have been read *as a*

request to rescind his February 2010 withdrawal. (R. at 2806) ("VA must accept his March 29, 2010[,] VA Form 21-8940 submission as a timely response to *rescind* his previous withdrawal of the appeal for TDIU.") (emphasis added). But it was not argued before the Board that this withdrawal was made in error, and Appellant's counsel's failure to mention the theory that his cognitive disorder affected his understanding of the effects of a written withdrawal be – thus calling into question the validity of the withdrawal – undermines his current contention that the record reasonably raised such a theory. *See Robinson*, 21 Vet.App. at 552-56; *see also* (R. at 2806). And absent such evidence, the Court was correct in concluding that the Board did not have to address Appellant's subjective understanding of the effects of the withdrawal. *Hembree* 33 Vet.App. at 6 (explaining that "forcing an inquiring into the veteran's subjective understanding following the written withdrawal would impermissibly negate [the] provisions of the regulation.").

Finally, because the facts here (other than Appellant's counsel's belated lay speculation) do not raise a theory that Appellant's cognitive disability in any way affected his ability to understand the effects of his written withdrawal, this case is not appropriate for a panel decision. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). At a minimum, to answer the legal question of whether the Board need ever consider the effects of a cognitive impairment when evaluating a written withdrawal, the facts must raise such a scenario, but here, they do not.

WHEREFORE, Appellee responds to the Court's November 28, 2022, order.

Respectfully submitted,

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