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.	)	

APPELLANT'S REPLY TO APPELLEE'S DECEMBER 19, 2022, RESPONSE TO THE COURT'S NOVEMBER 28, 2022, ORDER

The parties agree that section 19.55 does not limit the Board's obligations under § 7104(a). *See* Secretary's Resp. at 3-4; Appellant's Br. at 16-17; Appellant's Mot. for Recon. at 2-3. However, for the following reasons, the Court should reject the Secretary's contention that Appellant did not raise below the issue of his understanding of the consequences of the February 2010 withdrawal of his appeal to the Board. *See* Secretary's Resp. at 5-7. He did, R-28-29, and § 7104(a) therefore required the Board to consider all the record evidence.

ARGUMENT

I. The parties agree that 38 C.F.R. § 19.55 does not limit the Board's obligation under 38 U.S.C. § 7104(a) to consider all evidence of record.

The Secretary agrees that "nothing in § 19.55 changes the Board's obligation to consider the entire record under § 7104(a)." Secretary's Resp. at 3. It is true that section 19.55 identifies specific information the Board must address when evaluating

whether a written withdrawal is valid. *See* 38 C.F.R. § 19.55; Secretary's Resp. at 3; Appellant's Br. at 9; Appellant's Mot. for Recon. at 3. However, section 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." Secretary's Resp. at 4; *see also* Appellant's Br. at 16-17; Appellant's Mot for Recon. at 3-4. Thus, when a claimant argues to the Board that he did not intend to withdraw the appeal or did not understand the consequences of the withdrawal, the parties agree that the regulation does not permit the Board to "ignore evidence of a claimant's lack of understanding of his action." Secretary's Resp. at 4.

The parties' interpretation of the interplay between section 19.55 and § 7104(a) is consistent with the Court's holding in *Hembree v. Wilkie*, 33 Vet.App. 1, 8 (2020). The *Hembree* Court held only that section 19.55 does not impose an *affirmative* duty upon the Board to assess whether the withdrawal is done with a full understanding. *Id.* at 5. The *Hembree* Court, however, did not hold that the Board is *never* to address a Veteran's understanding of the consequences of the withdrawal based on all the evidence if that issue is raised. *See id.* at 5-7. Indeed, the Court explicitly left open the possibility that "post-withdrawal information *could* call the propriety of that withdrawal into question." *Id.* at 7 (emphasis in original).

As the Secretary notes, the parties "seemingly agree" that there are situations in which the Board must "look beyond the four corners of a written withdrawal at evidence that a claimant did not intend to withdraw his appeal." Secretary's Resp. at

5; Appellant's Br. at 16-18; Appellant's Mot. for Recon. at 2-3. He also agrees that these situations can be reasonably raised by the record and that section 19.55 does not abrogate the Board's obligation to address reasonably raised theories. *See* Secretary's Br. at 4; Appellant's Br. at 8, 12, 17-18; Appellant's Mot. for Recon. at 3-4.

In this regard, section 19.55 operates similarly to the presumption of examiner competency. *Compare* 38 C.F.R. § 19.55 *with Francway v. Wilkie*, 940 F.3d 1304, 1308 (Fed. Cir. 2019). An examiner is presumed competent until a claimant challenges the examiner's competency to the Board. *See Francway*, 940 F.3d at 1308. Once that challenge is made, only then is the Board required to make factual findings regarding an expert's qualifications and provide reasons or bases for concluding whether the medical examiner is competent. *See id.* (citing 38 U.S.C. § 7104(d)).

Similarly, this Court held in *Hembree* that a facially valid written withdrawal is effective once it is received. *See* 33 Vet.App. at 6. But once a question as to the effectiveness of the withdrawal is raised to the Board—either explicitly or reasonably raised by the record—the Board is required to make responsive factual findings, based on all the evidence of record. *See* 38 U.S.C. § 7104(a); *cf. Francway*, 940 F.3d at 1308; *see also* Secretary's Resp. at 4-5.

The Court should also reject the Secretary's suggestion that section 19.55 defines "what *specific* evidence is relevant when the Board addresses the validity of a written withdrawal." Secretary's Resp. at 2 (emphasis in original); *see also id.* at 4 ("[Section 19.55] specifies what evidence in the record the Board must consider when

evaluating a written withdrawal)." Section 19.55 simply identifies what constitutes a *facially* valid written withdrawal. But once a claimant or the evidence raises an issue as to whether the claimant actually intended to withdraw the appeal or lacked a full understanding as to the consequences of the withdrawal, the Board must address this issue and make factual findings based on the entire evidence of record. *See* 38 U.S.C. § 7104(a); *Robinson v. Peake*, 21 Vet.App. 545, 557 (2008) (noting that "the Board is required to consider all issue raised either by the claimant . . . or by the evidence of record"), *aff'd sub nom. Robison v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The regulation does not specify what VA is to do after a challenge to a withdrawal is made and thus, there is no specific provision to trump the general provisions § 7104(a). *See* 38 C.F.R. § 19.55.

Accordingly, consistent with the parties' agreement, the Court should hold that although section 19.55 specifies what constitutes a facially valid written withdrawal, it does not allow the Board to ignore post-withdrawal evidence calling the propriety of the withdrawal into question when that issue is raised to the Board. *See* Appellant's Br. at 16-17; Appellant's Mot. for Recon. at 3.

II. The Secretary is mistaken that Mr. Martinez did not raise to the Board the issue of whether he withdrew his appeal with a full understanding of the consequences of his actions.

The Secretary argues that the Board had no obligation in this case to consider evidence of Mr. Martinez's subjective understanding of the consequences of his February 2010 withdrawal of his appeal because, according to the Secretary, the

Veteran did not "argue before the Board that [his] withdrawal was made in error." Secretary's Resp. at 7. The Secretary, however, ignores the Veteran's March 2021 argument to the Board that his withdrawal was not done "with a full understanding of the consequences of his actions." *See id.*; R-29. This explicitly raised the issue of whether the withdrawal was done with a full understanding of the consequences of his action and triggered the Board's duty to consider all post-withdrawal evidence relevant to this matter. *See* R-29; Appellant's Br. at 5, 12; Appellant's Mot. for Recon. at 4; 38 U.S.C. § 7104(a).

The Secretary's failure to account for the March 2021 argument to the Board clouds his analysis as to whether the Board was obligated to address the evidence of cognitive impairment. *See* Secretary's Resp. at 5-7. He contends that the Board had no such obligation because the "theory that his cognitive condition impaired his understanding of the withdrawal before the Board" was a new theory and a new argument raised for the first time at Court. *See id.* at 6. Mr. Martinez's identification of evidence of cognitive impairment was not a new "theory," but rather, a citation to evidence that was before the Board that supported the already raised issue that he did not understand the consequences of the withdrawal. *See* Appellant's Br. at 17; Appellant's Mot. for Recon. at 4-5. Mr. Martinez's argument to the Board was that his February 2010 written withdrawal was not done with a full understanding of the consequences of his actions. R-29. This is the same theory and argument he presented at Court—that the February 2010 written withdrawal was not done with a

full understanding of the consequences of the withdrawal and the Board erred when it looked strictly to the four corners of the document and ignored post-withdrawal evidence. *See* Appellant's Br. at 11-14, 17.

The Court should reject the Secretary's argument that Mr. Martinez had to explicitly identify the evidence of his cognitive impairment to the Board to trigger the Board's obligation to consider that evidence. *See* Secretary's Resp. at 7. As argued in the motion for reconsideration, the Board is always obligated to read filings by claimants in a liberal manner, even when represented by attorneys. *See Robinson*, 557 F.3d at 1359-60; Appellant's Mot. for Recon. at 3-4. And here, Mr. Martinez argued that his withdrawal was not done with a full understanding of the consequences of that withdrawal. *See* R-29. Liberally construed and coupled with record evidence documenting Mr. Martinez's cognitive impairments at the time of the withdrawal, the Board should have determined whether the lack of understanding was due to his cognitive deficits. *See Robinson*, 557 F.3d at 1359-60.

The Secretary is also wrong that Mr. Martinez has made a new argument to the Court. *See* Secretary's Resp. at 7. As argued, Mr. Martinez's argument to the Board and to this Court were consistent—his February 2010 withdrawal was not done with a full understanding of the consequences. *See* R-29; Appellant's Br. at 11-14, 17. On appeal to this Court, he did not raise a new argument, but instead pointed to the evidence of his cognitive impairment at the time of the withdrawal to support the argument he made to the Board. *See* Appellant's Br. at 11-14, 17. And he argued that

the Board had erred when it failed to account for that evidence. *See* Appellant's Br. at 11-14, 17. "[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." *Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016). Thus, the Court should address Mr. Martinez's argument that the Board erred when it did not account for evidence of cognitive impairments and whether the withdrawal was not proper in light of that evidence. *See* Appellant's Br. at11-14, 17; Appellant's Mot. for Recon. at 4-5.

Next, the Secretary suggests that any error in failing to address the evidence of cognitive impairment is harmless because Mr. Martinez has not "pointed to any specific evidence that" his cognitive impairment affected his ability understand the effects of the written withdrawal. Secretary's Br. at 5. But as argued in his opening brief, the record shows that at the time of the written withdrawal, Mr. Martinez had difficulty with thinking and processing information. R-1897; R-3696; Appellant's Br. at 8, 11. And only a week after the withdrawal, he was formally diagnosed with a cognitive disorder that rendered him unable to remember or carry out instructions. R-3696. This evidence of cognitive difficulties at the time of the written withdrawal, when coupled with the evidence showing that only weeks after the written withdrawal, he reasserted his entitlement to TDIU, reflects a lack of understanding of the consequences of the withdrawal. *See* Appellant's Br. at 11.

At any rate, whether Mr. Martinez's cognitive impairments affected his ability to understand the effects of the written withdrawal is a factual question that the Board needs to address in the first instance. *See Tadlock v. McDonough*, 5 F.4th 1327, 1334 (Fed. Cir. 2021). It is not evident that had the Board addressed the evidence of Mr. Martinez's difficulties with thinking, processing information, and remembering or carrying out simple instructions at the time of the withdrawal, it would have determined that his withdrawal was done with a full understanding and was therefore proper. *See id.*

Accordingly, the Court should reject the Secretary's argument that Mr. Martinez did not raise the issue of his lack of understanding of the consequences of the withdrawal before the Board and reject his invitation to weigh the evidence in the first instance. The Court should then hold that because Mr. Martinez had challenged the propriety of the written withdrawal to the Board, that the Board was obligated to address all favorable evidence of record consistent with its duties under 38 U.S.C. § 7104(a) and find that the Board erred when it ignored the evidence of Mr. Martinez's cognitive impairment. As a result, the Court should remand the matter for the Board to address that evidence in the first instance and whether the withdrawal was proper.

WHEREFORE, the Appellant respectfully requests the Court to interpret 38 C.F.R. § 19.55 as consistent with the Board's obligations under 38 U.S.C. § 7104(a) and hold that when a claimant challenges the validity of the withdrawal, the Board

must look outside the four corners of the document and consider all favorable record evidence.

Respectfully submitted,

/s/ Brittani Howell
BRITTANI HOWELL

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