

CARMEN L. ENCARNACION,)
Appellant,)
)
v.) Vet. App. 21-1411
)
DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
Appellee,)

On January 30, 2023, the Court issued an opinion that vacated the May 16, 2018,¹ and June 15, 2020, decisions of Board of Veterans' Appeals (Board or BVA) and remanded for the Board to consider a July 2018 notice of disagreement in accordance with the Court's decision in *Ratliff v. Shinseki*, 26 Vet.App. 356, 360 (2013). Under U.S. Vet. App. R. 35, the Secretary respectfully moves the Court to reconsider its January 30, 2023, opinion.

The Secretary respectfully submits that reconsideration of the Court's opinion is warranted on the grounds that the Court overlooked pertinent facts, does not have jurisdiction over the May 16, 2018, Board decision, misunderstands the law, and overlooked the rule of prejudicial error. See U.S. Vet. App. R. 35(e)(1).

As described in further detail below, the Secretary seeks reconsideration for the following reasons. First, the Court overlooked the Secretary's October 13,

¹ The Court's decision identified the Board's May 2018 decision as being dated May 30, 2018; however, the Board's May 2018 decision is dated May 16, 2018. [R. at 174-215].

2022, Notice Pursuant to *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013), in which the Secretary informed the Court that the Board has construed Appellant's July 18, 2018, notice of disagreement as a request for reconsideration with the May 16, 2018, Board decision. Therefore, the action the Court had ordered the Board to take in its January 30, 2023, opinion has already been completed, and remand serves no purpose.

Second, the Court does not have jurisdiction to vacate the May 16, 2018, Board decision because Appellant never appealed that decision to the Court. Also relevant to jurisdiction, the Board already has construed the July 18, 2018, notice of disagreement as a motion for reconsideration with the May 16, 2018, Board decision, such that the May 16, 2018, Board decision is not a final decision. Further, the Board made favorable findings of fact in the May 16, 2018, decision that cannot be vacated.

Third, vacating the May 16, 2018, Board decision and the June 15, 2020, Board decision, and remanding for the Board to determine whether the July 18, 2018, notice of disagreement is a motion for reconsideration is both unnecessary and contrary to the regulations governing motions for reconsideration because (1) pursuant to 38 C.F.R. § 20.1002(c), the Chairman of the Board, not the Veterans Law Judge who decided the appeal, issues the determination regarding motions for reconsideration; and (2) the May 16, 2018, and June 15, 2020, Board decisions stemmed from separate appeal streams. Thus, the decision on appeal,

in which the Board properly dismissed the appeal of the June 14, 2018, rating decision, is unrelated to the issue of whether reconsideration should be afforded to the May 16, 2018, Board decision. Therefore, the Secretary asks the Court to reconsider its opinion.

1. The Court overlooked the Secretary's October 13, 2022, Solze notice, which informed the Court that the Board has already construed the July 18, 2018, notice of disagreement as a motion for reconsideration.

Initially, in vacating and remanding the June 15, 2020, decision on appeal for the Board to determine whether the July 2018 NOD constituted a motion for reconsideration of the May 2018 Board decision, the Court overlooked the pertinent fact that Board already has made this finding pursuant to 38 C.F.R. § 20.1002. In its January 30, 2023, decision, the Court held that, “[b]ecause the Board should have assessed whether Ms. Encarnacion’s July 2018 submission qualifies as a motion to reconsider the Board’s decision, we remand for it to do so.” See *Encarnacion v. McDonough*, __ Vet.App. __ (2023); 2023 U.S. App. Vet. Claims LEXIS 127 at 12.

The Court’s holding in this regard overlooked the Secretary’s October 13, 2022, Solze Notice, in which the Secretary notified the Court that the Board Chairman had already determined that the July 18, 2018, notice of disagreement was a motion for reconsideration. Notably, attached to that filing, the Secretary provided the Court with the October 13, 2022, letter from the Board notifying Appellant that it construed the July 18, 2018, notice of disagreement as a request

for reconsideration of the May 2018 Board decision. See October 13, 2022, *Solze* Notice and Attachment. The Board notified Appellant that she would be notified regarding the disposition of the motion pursuant to 38 C.F.R. § 20.1002(c), and, if the motion is granted, she will be given an additional 60 days to present additional argument or evidence. See October 13, 2022, *Solze* Notice Attachment.

Thus, reconsideration is warranted as Board has already made the necessary finding as ordered in the Court's January 30, 2023, opinion. And as the Court overlooked that the Board has already made this determination, remand for the Board to again make this determination serves no purpose. See *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997) (holding that, "[i]n the absence of demonstrated prejudice," remand is unnecessary); cf. *Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose). Therefore, the Secretary respectfully asserts that reconsideration is warranted as the Court overlooked that the action ordered has previously been completed, and remand serves no purpose.

2. The Court does not have jurisdiction to vacate the May 16, 2018, Board Decision.

The Secretary also respectfully submits that reconsideration is warranted as to the Court's determination to vacate and remand the May 16, 2018, Board decision, because the Court does not have jurisdiction to vacate that decision.

First, as noted by the Court in its decision, “[w]hen a written expression of disagreement with a Board decision is filed with the [Agency of Original Jurisdiction] during the 120-day period to submit a Notice of Appeal to this Court, ‘the filing abates finality of the Board decision for purposes of appealing to the Court.’” *Encarnacion*, __ Vet.App. __ (2023); 2023 U.S. App. Vet. Claims LEXIS 127 at 11-12 (citing *Ratliff v. Shinseki*, 26 Vet.App. 356, 360 (2013)). And this Court’s caselaw is clear that a Board decision is not subject to judicial review while a motion for reconsideration by the Appellant is pending. *Pulac v. Brown*, 10 Vet.App. 11 (1997) (“Given that there is no final BVA decision in this matter, there is no appeal before the Court over which it could exercise its jurisdiction.”); *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991) (motion for reconsideration filed during 120-day judicial appeal period after Board decision abates finality of Board decision); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) (“[CAVC] has jurisdiction only when the appellant files a timely appeal from a *final* decision of the Board”) (emphasis added); *Losh v. Brown*, 6 Vet.App. 87, 90 (1993) (simultaneous filing of motion for reconsideration and NOA renders BVA decision nonfinal, and jurisdiction remains with BVA); *cf. Brienza v. Derwinski*, 2 Vet.App. 584, 585 (1992) (“when there is a motion for reconsideration filed within the 120-day judicial appeal period . . . the original BVA decision [is] rendered a nullity [and] the subsequently filed NOA of that decision [is] also a nullity and the appeal must be dismissed.”).

Further relevant to the issue of jurisdiction with regard to the May 2018 Board decision, the Court did not consider that Appellant has never filed a notice of appeal with the Court regarding the May 16, 2018, decision. Indeed, in Appellant's February 27, 2021, Notice of Appeal which initiated this appeal, she only identified the decision she sought to appeal as the one dated June 15, 2020, which was mailed to Appellant on December 30, 2020. See February 27, 2021, Notice of Appeal; see *also* March 17, 2021, Corrected Notice of Docketing. Therefore, as there was no notice of appeal to the Court regarding the May 16, 2018, decision, and because that decision is not final given the Board's finding that the July 18, 2018, notice of disagreement is a motion for reconsideration, the Court does not have jurisdiction to vacate the May 16, 2018, decision of the Board. See *Henderson v. West*, 11 Vet.App. 245, 246-67 (1998).

Further relevant to jurisdiction, the Court failed to take account that vacatur of the May 16, 2018, decision, would include vacating the favorable portions of that decision insofar as therein the Board granted entitlement to (1) service connection for depression, (2) a separate initial rating of 10% for right knee limitation of flexion, (3) a separate initial rating of 10% for left knee limitation of flexion, and (4) a separate initial 10% rating for left knee limitation of flexion. [R. at 176-77 (174-215)]. This Court's caselaw is clear that the Court cannot vacate favorable findings of fact. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (explaining the Court is not permitted to reverse favorable findings of fact made by the Board).

For these reasons, reconsideration is warranted as the Court did not have jurisdiction to vacate the May 16, 2018, Board decision.

3. Vacating the May 16, 2018, Board decision and the June 15, 2020, decision for the Board to determine whether the July 18, 2018, notice of disagreement is a motion for reconsideration is unnecessary and contrary to the regulations governing motions for reconsideration

Finally, reconsideration is warranted because the Court misunderstood the law governing motions for reconsideration. Specifically, under 38 C.F.R. § 20.1002(c), the Chairman of the Board, not a Veterans Law Judge, is required to make determinations with regard to motions for reconsideration. If the Chairman allows the motion, the underlying Board decision is then vacated as the Chairman assigns a Reconsideration panel in accordance with 38 C.F.R. § 20.1004. But if the Chairman denies the motion, the appellant is notified of the decision, and this constitutes the final disposition of the motion. 38 C.F.R. § 20.1002(c)(1). Further, if the appellant filed a motion for reconsideration within 120 days of the Board's decision (as was the case here), once the motion was denied or if the appellant withdraws the motion, "[a] new 120-day period begins to run on the date on which the BVA mails to the claimant notice of its denial of the motion to reconsider, or, if the claimant withdraws the request for reconsideration, on the date on which the BVA receives a notification from the claimant of the withdrawal." *Rosler*, 1 Vet.App. at 249 (citation omitted). And if the motion for reconsideration was granted by the Chairman, "the 120-day appeal period as to that reconsidered BVA

decision commences on the date that notice of the decision of an expanded section of the BVA is mailed to the claimant.” *Id.*

Here, regarding the May 16, 2018, Board decision, vacatur of the decision is not appropriate prior to the Chairman determining whether Appellant’s July 18, 2018, motion for reconsideration should be allowed. Once the May 16, 2018, decision is vacated by the Court, there will be no Board decision for the Chairman to make a determination as to whether reconsideration should be allowed or denied. The Chairman, therefore, would be unable to rule on the motion for reconsideration because there is no longer a Board decision to reconsider. Nor would there be a decision to appeal to this Court should the Chairman attempt to deny the motion, as the underlying decision has already been vacated. And, as discussed above, the Court does not yet have jurisdiction over the May 16, 2018, decision because there is not yet a final Board decision.

Further, as discussed above, the Court overlooked the rule of prejudicial error because the Board has already made the required findings of fact regarding whether the June 18, 2018, notice of disagreement is a motion for reconsideration. See October 13, 2022, *Solze* Notice. Further, 38 C.F.R. § 20.1002(c) makes clear that determinations regarding motions for reconsideration are decisions of the Chairman of the Board, not the Board member who decided the appeal. Therefore, taking into account the relevant law and the rule of prejudicial error, remand would serve no purpose because the Chairman, not the Veterans Law Judge, makes the

ultimate determination regarding a motion for reconsideration, and as discussed above, the Board has already notified Appellant that it has construed the July 2018 notice of disagreement as a motion for reconsideration. Therefore, remand serves no purpose as there is no prejudicial error – the finding of fact the Court has ordered has already been made.

Additionally, the Court misunderstands the procedural history of the appeal. The Board's May 16, 2018, decision stemmed from the March 8, 2012, notification letter denying Appellant accrued benefits, for which Appellant filed a notice of disagreement in March 2012. [R. at 2342-46]; [R. at 2335]. Based on her November 2014 substantive appeal, [R. at 2144], Appellant's appeal for accrued benefits was assigned Docket Number 14-41 146 at the Board. See [R. at 1829-40 (May 2016 Board Remand)]; [R. at 283-89 (September 2017 Board Remand)]; [R. at 174-215 (May 2018 Board Decision)]. Appellant's docket number for her appeal for entitlement to accrued benefits remained under Docket Number 14-41 146 until the May 16, 2018, Board decision. *Id.*

However, following the June 14, 2018, rating decision (which enacted the grant of benefits awarded in the May 2018 Board decision), [R. at 125-30], Appellant attempted to file a new appeal when she filed the July 18, 2018, notice of disagreement. [R. at 109-11]. Based on the October 9, 2018, substantive appeal, [R. at 70-71], Appellant's attempted appeal of the June 2018 rating decision was assigned Docket Number 18-47 949. See [R. at 29-41 (May 2019

Board Decision)); [R. at 1-7 (June 2020 Board Decision)]. Therefore, the June 15, 2020, decision over which the Court has jurisdiction, was processed in a different appeal stream than the decision issued on May 16, 2018.

Given that the May 16, 2018, decision and June 15, 2020, decision stem from separate appeals that consistently have been processed as separate appeals, the June 15, 2020, decision (which dismissed the appeal of the June 2018 rating decision) has no impact or outcome on whether reconsideration can be afforded to the May 16, 2018, Board decision. Indeed, the June 15, 2020, Board decision only addressed whether the Board could hear the appeal stemming from the June 2018 rating decision and July 2018 notice of disagreement. [R. at 1-7]. Even if the Board made a finding at the time of the June 15, 2020, decision regarding whether the July 18, 2018, notice of disagreement could be sympathetically and liberally construed as a motion for reconsideration, this could not change the outcome of the appeal of the June 2018 rating decision, as dismissal of that appeal was required. And, because that appeal stemmed from the separate appeal stream initiated by the NOD filed following the June 2018 rating decision, which was assigned a 2018 docket number, the appeal still must have been dismissed for lack of jurisdiction as the June 2018 rating decision was not a decision of the Secretary that could be appealed. *Encarnacion*, __ Vet.App. __ (2023); 2023 U.S. App. Vet. Claims LEXIS 127 at 10.

Further, affirmance of the June 2020 decision would not impact Appellant's ability to seek reconsideration of the May 16, 2018, Board decision because the May 16, 2018, decision was based on the original appeal of the 2012 notification letter, which was perfected in 2014 and assigned Docket Number 14-41 146 by the Board. [R. at 2342-46]; [R. at 2335]; [R. at 2144]. Nor would a ruling on the motion for reconsideration by the Chairman impact the finality of the June 15, 2020, Board decision, as that decision was issued from the 2018 appeal stream, assigned Docket Number 18-47 949 by the Board. Therefore, even if the Court grants reconsideration and affirms the June 15, 2020, decision, Appellant's motion for reconsideration of the May 16, 2018, Board decision remains pending before the Chairman of the Board. And once the Chairman issues a ruling on the motion – either by denying the motion or granting the motion, assigning a Reconsideration panel, and issuing a new decision – Appellant may then directly appeal the May 16, 2018, decision (or reconsidered decision) to the Court, as her time to appeal the Board's May 2018 decision directly has been tolled. See *Rosler*, 1 Vet.App. at 249. Thus, as the June 15, 2020, Board decision has no bearing on the Board's ability to reconsider the May 16, 2018, decision, the Court should reconsider its January 30, 2023, opinions and affirm the June 15, 2020, Board decision.

WHEREFORE, the Secretary respectfully requests that the Court reconsider its January 30, 2023, decision in this matter and affirm the June 15, 2020, Board decision.

Respectfully submitted,

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