United States Court of Appeals for Veterans Claims

Vet. App. No. 22-6609

JACOB BANSCHBACH,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

REGULATIONS

CITATIONS TO THE RECORD BEFORE THE AGENCY

APPELLANT'S REPLY ARGUMENTS IN RESPONSE TO THE SECRETARY'S PRINCIPAL BRIEF

ARGUMENT

Appellant's claims for increased ratings in two separate rating periods arise from scars and nerve damage from his service-connected left inguinal hernia repair and scarring resulting from that surgery. Because the Secretary's arguments are effectively the same for each rating period, Appellant's responses are to the Secretary's arguments for both rating periods.

I. The Secretary fails to successfully argue that a claimant cannot receive a separate disability rating for neuritis and/or neuralgia of a given nerve when the claimant has already received a disability rating for paralysis of that nerve.

Appellant contends that the Board erred by not assigning separate ratings under the Diagnostic Codes ("DCs") for paralysis (DC 8530), neuritis (DC 8630), and neuralgia (DC 8730) of the ilio-inguinal nerve. Appellant's Br. at 6-14. The Secretary argues that neuritis and neuralgia are rated by degree of paralysis, and thus if Appellant has been assigned a rating under the DC for paralysis for the ilio-inguinal nerve, then he cannot receive a separate rating for neuritis or neuralgia for the same nerve. Secretary's Br. at 9-10 and 12-13.

However, the Secretary's arguments on this point do not withstand basic scrutiny.

First, the fact that the Secretary's own regulations contain Diagnostic Codes for paralysis, neuritis, and neuralgia of various nerves indicates the Secretary's intention that they are separate conditions which can be separately ratable, depending on the evidence. *See* 38 C.F.R. 4.124a.

Second, the Secretary incorrectly claims that his own regulations state that disability ratings for neuritis and neuralgia in a given nerve are "determined by the level of paralysis"

(Secretary's Br. at 9) and "are rated by degree of paralysis" (*Id.* at 12). In other words, the Secretary argues that the VA should subsume any potential disability rating for neuritis and/or neuralgia within the disability rating for paralysis when paralysis is assigned a disability rating.

Neuritis and neuralgia are defined in 38 C.F.R. §§ 4.123 and 4.124, respectively. The language of the neuritis regulation states that "neuritis ... is to be rated on the scale provided for injury of the nerve involved, with a maximum equal to severe, incomplete, paralysis. See nerve involved for diagnostic code number and rating." 38 C.F.R. § 4.123. The language of the neuralgia regulation states that "neuralgia ... is to be rated on the same scale, with a maximum equal to moderate incomplete paralysis. See nerve involved for diagnostic code number and rating." 38 C.F.R. § 4.124. Turning then to the rating scales for the ilio-inguinal nerve, we see that the rating scale for paralysis contains one rating for "mild to moderate" and one rating for "severe to complete." 38 C.F.R. § 4.124a, DC 8530.

Contrary to the Secretary's arguments, these two regulations defining and setting forth the rating scale to use for neuritis and neuralgia do not say that if a nerve is rated under the Diagnostic Code for paralysis, then a rating for neuritis or neuralgia of a given nerve is subsumed within that paralysis disability rating. Nor do these regulations say that the veteran cannot receive separate compensable disability ratings for neuritis and neuralgia alongside the disability rating for paralysis. In fact, the Secretary points to no authority to support his argument for this position, relying only on his own unsupported conclusion that is contrary to the plain language of the regulation.

These two regulations for neuritis and neuralgia are simply saying that the VA is not going to replicate the same scale for each Diagnostic Code for paralysis, neuritis, and neuralgia of the same nerve. These two regulations clearly mean that when a given nerve is assigned disability ratings under the Diagnostic Codes for neuritis or neuralgia, then the rater is to use the same scale of mild, moderate, moderately-severe, or severe, or whatever scale is actually set forth in the rating section of the Diagnostic Code for incomplete paralysis of that nerve, with maximum possible ratings of "severe" for neuritis and "moderate" for neuralgia.

No other interpretation makes sense. If the Secretary wished to deny separate disability ratings for neuritis or neuralgia of a given nerve when the VA has already assigned a disability rating for paralysis of that nerve, then the Secretary's own regulations should say so. Those regulations do not say so, and thus they do not support the Secretary's arguments.

The Secretary maintains the mistaken belief that the neuritis and neuralgia regulations' instructions to use the same rating scale as that used for incomplete paralysis of the given nerve means that neuritis and neuralgia are rated not based on the symptoms listed for neuritis in 38 C.F.R. § 4.123 (loss of reflexes, muscle atrophy, sensory disturbances, and constant pain, at times excruciating) and for neuralgia 38 C.F.R. § 4.124 (dull and intermittent pain) but instead are rated based on the level of paralysis present in that nerve. This flies in the face of logic and the interpretation of the plain language of the regulations.

If the Secretary did not want to have these neuritis and neuralgia symptoms capable of being separate compensable when paralysis is present, then the Secretary's regulations

should say so. As it stands, the Secretary's brief contains no case law that supports this narrow reading of the neuritis and neuralgia regulations. Nor does the Board's decision.

The Secretary may not step into the Board's shoes to meet the Board's reasons-or-bases requirement. *See Simmons v. Wilkie*, 30 Vet. App. 267, 277 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020). "'[L]itigating positions' are not entitled to deference when they are merely appellant counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court"). *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991). "Appellate tribunals are not appropriate fora for initial fact finding." *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). This Court may not substitute new rationales of its own to correct the Board's decision. *Scott v. Wilkie*, 920 F.3d 1375, 1380 (Fed. Cir. 2019).

For these reasons, the Secretary's arguments to affirm the Board's decision on the contention that no claimant can receive separate disability ratings for neuritis or neuralgia when he or she has a disability rating for paralysis are not persuasive and do not prevail against Appellant's arguments.

II. The Secretary incorrectly argues that Appellant cited to no authority for the proposition that neuritis and neuralgia of a given nerve may be rated separately from a rating of paralysis of the same nerve.

The Secretary next argues that Appellant cites to no authority for the proposition that neuritis and neuralgia of a given nerve may be rated separately from a rating of paralysis of the same nerve. Secretary's Br. at 10 and 12.

This is patently incorrect. In Appellant's principal brief, he clearly and cogently discussed the law explicitly authorizing separate compensable ratings for multiple disabilities arising out of the same injury:

> The Court has held that when Diagnostic Codes address different and distinct disabling conditions from which a veteran suffers due to one injury, disease, or condition, separate disability awards may be established for separate disabilities arising out of one injury, disease, or condition. *Esteban v. Brown*, 6 Vet. App. 259, 262 (1994) (holding that when a veteran suffers from three disabling conditions as the result of a car accident, namely cosmetic damage, pain, and limitation of function, then separate disability awards could be established for each disabling condition).
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> The Court has further held that "[a]ll disabilities, including those arising from a single disease entity, are to be rated separately, and then all ratings are to be combined pursuant to 38 C.F.R. § 4.25, except as otherwise provided in the rating schedule." *Colayong v. West*, 12 Vet. App. 524, 531 (1999) (citing to *Esteban*, 6 Vet. App. at 261).

Appellant's Br. at 6-7. This Court's holdings in both *Esteban* and *Colayong* clearly support Appellant's argument that all disabilities arising from a single disease entity are to be rated separately, and thus that a given nerve can receive separate compensable ratings for paralysis, neuritis, and neuralgia when the evidence supports such ratings.

The Secretary cites to *Esteban* for the proposition that the Board's finding that there was no showing of severe or incomplete paralysis of the ilio-inguinal nerve prior to March 2012, and thus the Board did not err in failing in failing to discuss whether Appellant was entitled to separate disability rating for neuritis and/or neuralgia of that nerve. Secretary's Br. at 10.

However, the Secretary's reliance on *Esteban* is misplaced because the Secretary's arguments are rooted in the same fatal error as discussed in the preceding section of this reply brief. The Secretary maintains the mistaken belief that the neuritis and neuralgia regulations' instructions to use the same rating scale as that used for incomplete paralysis of the given nerve means that neuritis and neuralgia are rated not based on the symptoms listed for neuritis in 38 C.F.R. § 4.123 (loss of reflexes, muscle atrophy, sensory disturbances, and

constant pain, at times excruciating) and for neuralgia 38 C.F.R. § 4.124 (dull and intermittent pain) but instead are rated based on the level of paralysis present in that nerve.

For this reason, the Secretary's arguments to affirm the Board's decision on the contention that no claimant can receive separate disability ratings for neuritis or neuralgia when he or she has a disability rating for paralysis are not persuasive and do not prevail against Appellant's arguments.

III. The Secretary fails to successfully argue that assignment of separate disability ratings for paralysis, neuritis, and neuralgia of a nerve is impermissible pyramiding.

The Secretary next argues that assignment of separate disability ratings for neuritis and/or neuralgia of a given nerve when that nerve is assigned a disability rating for paralysis constitutes impermissible pyramiding and is thus forbidden. Secretary's Br. at 10 and 12.

Under the VA rating system, unless otherwise specifically provided, all disabilities, including those arising from a single disease or injury, are to be rated separately, and then all ratings are to be combined pursuant to 38 C.F.R. § 4.25. One exception to this rule is provided for in the anti-pyramiding provision set forth in 38 C.F.R. § 4.14. The concept of anti-pyramiding is a prohibition against compensating a veteran more than once for the "same disability" or the "same manifestation." *Id.*

The Secretary cites to *Esteban* in support of the contention that assigning separate ratings for neuritis, neuralgia, and paralysis is impermissible pyramiding, specifically quoting the portion of *Esteban* which says, "the critical element is that none of the symptomatology for any . . . condition . . . is duplicative of or overlapping with the symptomatology of the other . . . conditions." Secretary's Br. at 10 (citing to *Esteban*, 6 Vet. App. at 262).

Again, the Secretary's reliance on *Esteban* is misplaced. Neuritis, neuralgia, and paralysis are separate conditions with their own Diagnostic Codes for each nerve and with different symptomatology defining each. The symptoms of paralysis include loss of use or range of motion, the symptoms of neuritis are loss of reflexes, muscle atrophy, sensory disturbances, and constant pain, at times excruciating, and the symptom of neuralgia is dull and intermittent pain.

The Secretary's fundamental incorrect presumption (as discussed in the first section of this reply brief) is that neuritis and neuralgia of a given nerve can only be rated based on the symptoms of paralysis of that nerve, which makes no sense and flies in the face of the plain reading of the neuritis and neuralgia regulations.

In fact, the Court's holding in *Esteban* supports Appellant's arguments far more than it supports the Secretary's arguments (which *Esteban* does not support at all). In *Esteban*, the Court held that when Diagnostic Codes address different and distinct disabling conditions from which a veteran suffers due to one injury, disease, or condition, separate disability awards may be established for separate disabilities arising out of one injury, disease, or condition. *Esteban*, 6 Vet. App. at 262.

In Appellant's case, paralysis, neuritis, and neuralgia of a given nerve are separate disabilities: paralysis involves loss of use or range of motion; neuritis involves loss of reflexes, muscle atrophy, sensory disturbances, and constant pain; neuralgia involves dull and intermittent pain.

Therefore, under *Esteban*, paralysis, neuritis, and neuralgia resulting from damage to the ilio-inguinal nerve due to the inguinal surgery are each separate disabilities with distinct

and different symptomatology, and thus separate disability awards may be established for each. Thus, the Secretary is incorrect when he argues that assignment of separate disability ratings for paralysis, neuritis, and neuralgia of a given nerve is impermissible pyramiding.

For this reason, the Secretary's arguments to affirm the Board's decision on the contention that separate disability ratings for neuritis or neuralgia when he or she has a disability rating for paralysis is impermissible pyramiding are not persuasive and do not prevail against Appellant's arguments.

IV. The Secretary incorrectly argues that the Court should ignore evidence of Appellant's diagnoses of and symptoms of his neuritis and neuralgia of the ilio-inguinal nerve.

Appellant noted in his principal brief that VA medical records from 2010 contain diagnoses of neuritis and neuralgia resulting from his left inguinal hernia surgery. Appellant's Br. at 8. Appellant also noted that the Board conceded at R. at 10-12 that various VA examinations had noted that Appellant had symptoms of neuritis and neuralgia:

- August 2011: numbness involving ilio-inguinal nerve due to left inguinal hernia repair.
- March 2012: chronic pain, moderate intermittent pain, mild paresthesias, mild numbness involving left ilio-inguinal nerve.
- September 2016: mild paresthesias, mild intermittent pain, decreased sensation in the left upper thigh.

Appellant's Br. at 8. The point of this recitation to demonstrate that Appellant not only has diagnoses of neuritis and neuralgia of the ilio-inguinal nerve resulting from his left inguinal hernia repair surgery (for which he is service-connected), but that since those diagnoses he continued to have symptoms of neuritis in the forms of constant pain and sensory

disturbances (numbness, paresthesias, decreased sensation) and symptoms of neuralgia in the form of intermittent pain. *See* 38 C.F.R. §§ 4.123 and 4.124, respectively.

Thus, because neuritis and neuralgia of the ilio-inguinal nerve were diagnosed and have continued to manifest since diagnosis, the issue of separate disability ratings for neuritis and neuralgia was reasonably raised by the evidence and the Board was required to adjudicate such ratings in its statement of reasons or bases.

The VA must determine all potential claims raised by the evidence. *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). It is the VA's responsibility to develop any claim "to its optimum." *Norris v. West*, 12 Vet. App. 413, 420 (1999). The law requires that VA sympathetically read the veteran's record to determine "all potential claims raised by the evidence, applying all relevant laws and regulations." *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (quoting *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004)).

When a veteran files a claim, the VA is obligated not only to consider the claims specifically mentioned by the veteran, but also all benefits to which the veteran might be entitled that are supported by evidence of record. Once a claim is received, the VA must review the claim, supporting documents, and oral testimony in a liberal manner. *See, e.g., Douglas v. Derwinski*, 2 Vet. App. 435, 439 (1992) (en banc). The VA has a duty to sympathetically read a pro se veteran's filings to determine whether a claim has been raised and investigate potentially applicable theories of service connection that are reasonably raised. *Ingram v. Nicholson*, 21 Vet. App. 232, 239 (2007); *Delisio v. Shinseki*, 25 Vet. App. 45, 55 (2011).

The Board is required to address issues that are specifically raised by the claimant or reasonably raised by the evidence of record. *Doucette v. Shulkin*, 28 Vet. App. 366, 369-70 (2017). The Board errs when it fails to adequately address all issues expressly raised by the claimant or reasonably raised by the evidence of record. *Robinson v. Peake*, 21 Vet. App. 545, 555 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The Court has jurisdiction to determine in the first instance whether an issue was reasonably raised by the record. *Barringer v. Peake*, 22 Vet. App. 242, 244 (2008).

Thus, in Appellant's case, the evidence of record reasonably raised the issue of separate disability ratings for neuritis and neuralgia of the ilio-inguinal nerve. The Board failed to address this issue, and this constitutes a prejudicial error requiring remand to correct.

The Secretary argues that Appellant is not a medical professional and thus is not competent to interpret the medical evidence himself to make a medical opinion finding that the uncontroverted evidence of his intermittent pain is evidence of neuralgia and that the uncontroverted evidence of his constant pain and sensory disturbances is evidence of neuritis. Secretary's Br. at 10-11.

However, there are two problems with the Secretary's position.

First, the evidence clearly indicates that Appellant has diagnoses of neuritis and neuralgia resulting from the ilio-inguinal nerve, the nerve for which he is service-connected due to the left inguinal hernia repair surgery. R. at 891 (889-91) and 931 (930-32). That alone reasonably raises the issue of entitlement to separate disability ratings for neuritis and neuralgia of the ilio-inguinal nerve alongside the disability rating for paralysis.

Second, the evidence in the various VA examinations to which Appellant cited for his symptoms of neuritis and neuralgia is not Appellant's interpretation of the evidence. Instead, it is the medical conclusion of the VA examiner at each VA examination. The VA itself has diagnosed Appellant with neuritis and neuralgia, and the VA's own medical examiners have found Appellant to have symptoms of pain and sensory disturbances resulting from the ilio-inguinal nerve. Appellant's recitation of that evidence in his principal brief is exactly that, a recitation of the uncontroverted and uncontested evidence in the RBA as provided by VA medical professionals.

Therefore, the Secretary is incorrect when he characterizes the VA's diagnoses of, and the VA examiner's notations of symptoms of, neuritis and neuralgia as Appellant's own impermissible medical opinion. Thus, the Secretary errs when he asks the Court to disregard the evidence of neuritis and neuralgia in the RBA. Accordingly, Appellant asks that the Court find that the issues of separate disability ratings for neuritis and neuralgia were not reasonably raised and that the Board committed a prejudicial error by failing to adjudicate entitlement to service connection for these disabilities.

For this reason, the Secretary's argument to disregard Appellant's citation to his VA diagnoses of neuritis and neuralgia and the VA examiners' documentation of his symptoms of his neuritis and neuralgia is not persuasive and does not prevail against Appellant's arguments.

CONCLUSION

For the reasons set forth above and in Appellant's principal brief, the Board committed prejudicial errors when its statement of reasons or bases failed to discuss whether

Appellant's ilio-inguinal nerve injury arising out of his left inguinal hernia repair warranted separate ratings under the Diagnostic Codes for neuritis and neuralgia of that nerve.

Therefore, Appellant respectfully requests that this Court set aside that portion of the Board's decision which denied his claims for higher ratings for his nerve injuries arising out of his left inguinal hernia repair for both ratings periods prior to and after March 28, 2012.

Appellant further respectfully requests that the Court remand these claims to the Board with instructions (1) to conduct an analysis of whether entitlement to separate ratings for Appellant's neuritis and neuralgia of the ilio-inguinal nerve are warranted, and (2) in conducting that analysis, to consider all evidence in the claims file that Appellant has diagnoses of, manifestations of, and/or treatment for neuritis and neuralgia of the left lower extremity.

Respectfully submitted,

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