IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FELIX PAUL PHILLIPS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 22-2575
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S REPLY TO
APPELLANT'S RESPONSE TO THE COURT'S JULY 5, 2023, ORDER

In its March 24, 2023, single-judge decision, the Court set aside the portion of the April 1, 2022, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a total disability evaluation based on individual unemployability (TDIU) prior to April 7, 2020, and remanded the matter for readjudication. On April 14, 2023, the Secretary moved for reconsideration of the decision or for panel review. On July 5, 2023, the Court withdrew its May 2023 decision and ordered the case submitted to panel. In the same order, Court directed Appellant to file a response to the Secretary's motion for reconsideration and gave the Secretary an opportunity to file a subsequent reply. Appellant filed his response on September 6, 2023, and the Secretary respectfully files this reply.

INTRODUCTION

The Secretary argued in his motion for reconsideration that, contrary to the conclusion reached by the single judge, the "date of receipt of application" for purposes of determining the earliest possible effective date of Appellant's award of TDIU cannot, in

this case, which stems from his April 2021 Form 21-8940, Application for Increased Compensation Based on Unemployability, be the date of receipt of his posttraumatic stress disorder (PTSD) or skin conditions claims.[1] The Secretary asserted that the single judge's decision was both inconsistent with the provisions of the Veterans Improvement and Modernization Act (AMA) and also unsupported by the specific facts of this case, and provided examples in support of both propositions.[2] (Sec. Mo. at 5-12). In particular, the Secretary challenged the single judge's reliance on *Rice v. Shinseki*, 22 Vet.App. 447 (2009), on grounds that, to the extent the decision in that case remains applicable to cases processed and adjudicated under the AMA, it must be applied consistent with the statutes and regulations enacted and promulgated under the AMA. (Sec. Resp. at 5-9).

[1] The single judge stated that the date of claim for effective date purposes should have been the date of receipt of Appellant's "increased evaluation claims." *Phillips v. McDonough*, Vet. App. No. 22-2575, 2023 WL 2623101, * 4 (Mar. 23, 2023). Presumably, the single judge meant to refer to the dates of receipt of Appellant's August 28, 2002, request to reopen his skin conditions claim, which resulted in the May 2018 rating decision that granted service connection for his skin conditions, effective the date of receipt of that request, R. at 5990-95, 6077-80, and November 25, 2009, mental conditions claim, which resulted in the May 2020 regional office decision that granted service connection for PTSD, effective the date of that claim. effective November 25, 2009, R. at 4038-77. The increased rating claims adjudicated by the agency of original jurisdiction (AOJ) in January 2022 were initial claims for increase that were construed to have been raised within the scope of Appellant's April 2021 Form 21-8940. R. at 87-105, 120-25.

[2] For example, the Secretary emphasized that (1) Appellant's Form 21-8940 was accepted and adjudicated as an initial claim for an increased rating, separate and apart from any previously filed claims related to his PTSD and skin conditions that may also have encompassed the issue of his entitlement to individual unemployability; (2) the filing of the Form 21-8940 is not an action that can be taken under 38 U.S.C. § 5110(a)(2) in continuous pursuit of a claim; and (3) when Appellant filed his Form 21-8940, he had already selected a review option in connection with his skin conditions claim and did not have any claim or appeal pending in connection with his posttraumatic stress disorder.

Appellant does not refute or even directly respond to these arguments. Instead, his main contention is that his Form 21-8940 was not, as adjudicated by the agency of original jurisdiction (AOJ), a "new claim" for increased compensation based on individual unemployability because either the issue of unemployability was already raised by the record as part of his pursuit of skin conditions claim and was and thus a part of his "continuous pursuit" of an increased initial rating for his skin conditions, (App. Resp. at 2-3), or it was actually a supplemental claim filed in continuous pursuit of a higher initial rating for his PTSD, (App. Resp. at 5-6). Both arguments are inconsistent with the law, and the second is not only based on an entirely new and previously unraised legal theory, but it is also premised on a position that is fundamentally incompatible with the position Appellant took at the Board and throughout this appeal.[3]

A. It is irrelevant to the subject matter jurisdiction of the Board in this case whether the issue of entitlement to TDIU was raised within the scope of Appellant's August 2002 skin conditions claim and encompassed within any subsequent administrative appeal of a decision made with respect to that claim.

While Appellant argues that the record reasonably raised the issue of entitlement of TDIU as part of his August 2002 skin conditions claim prior to his filing of the Form 21-8940, that skin condition claim was not on appeal to the Board. As the Secretary explained in his motion for reconsideration, in the course of the appeal of his August 2002

[3] Indeed, to the extent that both of Appellant's arguments made in response to the Secretary's motion for reconsideration are predicated exclusively on his attempts to recharacterize his Form 21-8940 as something other than an initial claim, Appellant appears to accept that, if his Form 21-8920 was an initial claim for increased compensation, then, under the AMA, the effective date for his award of TDIU made by the Board in its decision must be tied to the date of receipt of that Form 21-8940.

skin conditions claim, in December 2020, Appellant filed a Form 20-0966, Decision Review Request: Higher-Level Review, in response to a June 2020 AOJ decision that denied him entitlement to a compensable initial evaluation for his skin condition prior to November 16, 2016, an initial evaluation greater than 10 percent from that date, and an earlier effective date for the award of service connection. (Sec. Mo. at 2). In response, in March 2022, the AOJ issued a higher-level review decision that denied higher evaluations and an earlier effective date. (Sec. Mo. at 3). This March 2022 higher-level review decision was issued separate and apart from the January 2022 decision issued by the AOJ in response to Appellant's Form 21-8940, which construed the Form 21-8940 to include an initial April 2021 increased rating claim for skin conditions and is the decision that indisputably was the decision on appeal to the Board in this case.[4] (Sec. Mo. at 3). In other words, Appellant's August 2002 skin condition claim was not on appeal, and any derivative issue of his entitlement to TDIU encompassed by that claim was not within the scope of the Board's review in this case. (Sec. Br. at 7).

Appellant does not address any of this. Rather, he takes a position that is as counterintuitive as it is bereft of legal support. According to Appellant, the January 2022 AOJ decision, which indisputably was the decision on appeal to the Board and indisputably was issued in response to his Form 21-8940, could not have decided a new claim for increased compensation based on individual unemployability because, when he filed his

[4] Appellant does not dispute this. Nor could he reasonably do so. His Form 10182, which indisputably prompted the Board's April 2022 decision, clearly identified the January 2022 decision as the decision being appealed. (Sec. Br. at 3); R. at 65 (65-83).

Form 21-8940, the question of his entitlement to TDIU was already a "part of" his skin conditions claim.

Assuming arguendo that entitlement to TDIU was already "a part" of his August 2002 skin conditions claim pending higher level review, Appellant does not point to any authority to support the proposition that his entitlement to TDIU could not exist both as part his attempt to secure a higher initial rating as part of his August 2002 skin conditions claims and as part of a new April 2021 claim for increased compensation. Claims for increased ratings have for decades been recognized as new claims and distinguished from earlier filed claims seeking service connection and disagreements with downstream issues associated with the adjudication of those claims such as with respect to initial ratings and effective dates. *See*, *e.g.*, *Fenderson v. West*, 12 Vet.App. 119, 125 (1999) ("A claim for an increased rating is a new claim."). What's more, the Secretary's current regulations, applicable to claims proceeding under the AMA, specifically distinguish between "new claims" and "increased rating claims" and regard both as different types of "initial claims." 38 C.F.R. § 3.1(p)(1)(i)-(ii); *see also* VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 139 (Jan. 18, 2019) (explaining "a claim for increase is based on a change or worsening of condition or circumstance since a prior VA decision and not based on disagreement with that decision.").[5]

[5] Indeed, while Appellant submits that his Form 21-8940 was not an initial claim for increased compensation, he does not explain what it was. Appellant already elected higher-level review of the AOJ decision made with respect to his skin conditions claim, and the evidentiary window with respect to his pursuit of that claim was closed. If anything, Appellant's position suggests that the AOJ never should have issued a decision on TDIU in the first place, and the Board, in turn, never should have granted TDIU.

B. Appellant never asserted that his Form 21-8940 was a "supplemental claim" filed in continuous pursuit of his PTSD claim, and his current position is both inconsistent with the positions he took before the Board and in his briefs to this Court, and incompatible with his explicit concession that his PTSD claim was not actively pending when he filed the Form 21-8940.

Appellant's sole argument in his opening brief was that the Board failed to address the arguments he raised in connection with his January 2022 Form 10182 that the record reasonably raised his entitlement to TDIU as part of his claim for disability compensation for a skin condition, and that the record showed that he was entitled to such benefits from August 2002 on an extraschedular basis and as early as November 2009 on a schedular basis. R. at 83 (65-83); (App. Br. at 12, 14, 15-16). His sole contention within the scope of this argument was that the issue of TDIU was reasonably raised by the record as part of his skin condition claim, which had been pending since August 2002. (App. Br. at 12, 14).[6] Appellant essentially reiterated the same argument and underlying contention in his reply. (App. Reply at 1-5).

Not once in either pleading did Appellant contend that the issue of TDIU was raised in connection with his PTSD claim let alone argue that his April 2021 Form 21-8940 was a supplemental claim filed in connection with and continuous pursuit of that PTSD claim. Indeed, Appellant made no such arguments despite expressly acknowledging the

[6] (App. Br. at 12) (arguing that the issue of entitlement to individual unemployability benefits "was reasonably raised by the record as part of his claim for a higher initial rating for his service-connected skin condition," which he asserted had been "pending since August 2002"); (App. Br. at 14) (arguing that the Board failed to address his arguments raised in his notice of disagreement that "the record reasonably raised his claim for TDIU benefits as part of his underlying claim seeking service-connected benefits for a skin condition, which has remained pending since August 2002").

Secretary's position that he did not dispute the fact that, as the Board found, the claims stream on appeal originated from his April 2021 Form 21-8940. (App. Reply at 3, 4, 5). To the sole extent that Appellant's reply did not simply reiterate the same basic contentions he made in his opening brief, it asserted only that it would be inconsistent with this Court's caselaw if the issue of his entitlement to a higher initial rating for his skin claim and the issue of TDIU followed different procedural paths. (App. Reply at 4).

But that's not all. Appellant in fact explicitly conceded in his opening brief to this Court that he did not appeal the rating or effective date assigned to his PTSD. (App. Br. at 10). He also did not challenge or dispute the Secretary's emphasis of this fact, (Sec. Br. at 4 & n. 6), in his reply brief, (App. Reply at 1-5). Indeed, Appellant also took this position before the Board, stating unequivocally through his attorney in connection with his January 2022 Form 10181 that he "did not appeal the rating or effective date assigned for his posttraumatic stress disorder" and that his "acquired psychiatric claim was not actively pending at the time he filed his Form 21-8940." R. at 73, 78 (65-83).

Simply put, it is not just that Appellant did not raise his newly formed "supplemental claim" theory prior to this point.[7] This newly raised theory is fundamentally incompatible with the position he advanced, and the explicit concessions he made, to both the Board in his administrative appeal of the January 2022 AOJ decision and to the Court in his opening

[7] This alone, however, is more than a sufficient basis to decline to consider Appellant's argument. *See*, *e.g.*, *Massie v. Shinseki*, 25 Vet.App. 123, 127 (2011) (explaining that allowing a veteran, through counsel, to raise different arguments at different stages of litigation would encourage gamesmanship and promote inefficient resolutions of claims and invoking doctrine of exhaustion of remedies to theory in support of earlier effective date raised for the first time on appeal).

and reply briefs. Indeed, the gamesmanship of his approach aside, Appellant's concessions to the Board and this Court about the status of his PTSD claim is of profound significance, and dispositively fatal to his current argument, because it demonstrates that, when he filed his Form 21-8940, he did not intend it to be construed as a "supplemental claim" for an increased initial PTSD rating.[8] *Cf. Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006) (recognizing that "intent" is "an essential element of any claim").

C. *Rice* is not inapplicable to claims processed and adjudicated under the AMA.

Rice states that a request for TDIU is "not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability" either "as part of the initial adjudication of a claim, or . . . as part of a claim for increased compensation." 22 Vet.App. at 453-54. The Secretary's primary contention in his motion for reconsideration was that where, as was the situation in this case, a claimant is awarded TDIU based on a Form 21-8940 adjudicated under the AMA, neither *Rice* nor the general principles expressed in that case can permit or compel the assignment of an effective date for that award more than one year prior to the date on which the Form 21-8940 was received

[8] The Secretary disagrees with Appellant's argument that the Court should invalidate his definition of "initial claim" as arbitrary and capricious to the extent it includes within that definition "claim for an increase in a disability evaluation rating or rate of benefit paid based on a change or worsening in condition or circumstances since the last decision issued by VA for the benefit," (App. Resp. at 6-9), and position that the filing of a Form 21-8940 qualifies as a filing made in continuous pursuit of a claim under 38 U.S.C. § 5110(a)(2), (App. Resp. at 9-10). However, given the Secretary's responses above, the fact that Appellant did not raise any of these issues previously, and the specific issue identified by the Court as warranting panel consideration, the Secretary does not further engage in these issues at this time. Should the Court find that further response from the Secretary is warranted on the issues, the Secretary respectfully requests that he be permitted to provide such further response at that time.

because any such earlier effective date would be inconsistent with the provisions of the AMA. (Sec. Mo. at 4-6). More broadly, however, it does not appear that *Rice* remains applicable at all to claims processed and adjudicated under the AMA.

While certain principles expressed in *Rice* might still be applicable as derived from other sources of authority, the central holding in *Rice* as to the nature and character of requests for unemployability benefits is based on regulations and a legal framework that no longer exist.[9] Moreover, to the extent that *Rice* specifically concluded that, under those extant regulations and that extant legal framework, requests for unemployability benefits were not freestanding or separate claims for benefits due to the nature and characteristics of what they seek, the Secretary's current regulations specifically contemplate that they can be. As the Court reasoned in *Rice,* a request for unemployability benefits was not a "claim" under the extant understanding of claims because it is simply an attempt to obtain an increase in the rate of a benefit paid in connection with one or more already-service connected disabilities. *See* 22 Vet.App. at 452 (reasoning that a request for TDIU was not a freestanding or separate claim for benefits because a finding of entitlement to TDIU "merely means that the veteran has met certain qualifications entitling him to . . . a

[9] Indeed, *Rice's* fulcrum, the regulatory definition of the term "claim" has changed significantly. When *Rice* was decided, a "claim" was defined as "a formal or informal communication . . . requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (2006). The present definition of "claim" not only requires that it be "submitted on an application form prescribed by the Secretary," but it also specifically defines the different types of claims a claimant can file, including "initial claims," "new claims," "claims for increase," and "supplemental claims." 38 C.F.R. § 3.1(p) (2022). What is more, the Secretary now provides a specific regulatory definition of what is encompassed within the scope of a claim. *Compare* 38 C.F.R. § 3.155 (2019), *with* 38 C.F.R. § 3.155 (2015).

disability rating of 100%"). Under the Secretary's current regulations, a "claim for increase" is an "initial claim" and it specifically includes a claim "for increase in . . . rate of a benefit paid." 38 C.F.R. § 3.1(p)(1)(ii). Thus, under the Secretary's current regulations, a completed Form 21-8940 can give rise to a freestanding initial claim for unemployability benefits independent of any issue of unemployability that might also been raised as part of an original claim and separate from a claim for an increased rating for a particular service-connected disability.

CONCLUSION

WHEREFORE, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully files this reply to Appellant's September 6, 2023, response.

Respectfully submitted.

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