

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-7301

LESLIE C. LONG, JR., APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

ALLEN, *Judge*: Appellant Leslie C. Long served the Nation honorably in the U.S. Army from April 1968 until April 1970, including service in the Republic of Vietnam.¹ Appellant applied to VA for certain benefits and, on October 3, 2019, the Board issued a decision denying some claims and dismissing others for lack of jurisdiction.² Appellant now appeals³ the portions of October 3, 2019, Board decision that denied earlier effective dates for (1) appellant's service-connected tinnitus, and (2) appellant's service-connected traumatic brain injury (TBI), headaches, and an eye injury. For the following reasons, we will dismiss the appeal as to appellant's service-connected TBI, headaches, and eye injury, and we will affirm the decision as to appellant's claim for an earlier effective date for tinnitus. Also pending before the Court is appellant's May 19, 2020, motion for oral argument. Because we find oral argument unnecessary, we will deny appellant's motion.

¹ Record (R.) at 1580, 1586, 2370, 2978.

² R. at 5-32.

³ Appellant is represented by a non-attorney practitioner. Accordingly, appellant is entitled to a sympathetic reading of his briefs and a liberal construction of his arguments. *Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

I. UNAPPEALED PORTIONS OF BOARD DECISION

Appellant does not appeal the Board decision except with respect to the issues concerning effective dates for tinnitus, TBI, headaches, and an eye injury. In particular, he makes no argument concerning the Board's dismissal of his claims for (1) service connection for cardiac diastolic dysfunction with mild left ventricular hypertrophy; (2) an initial disability rating in excess of 10% for service-connected tinnitus; (3) an initial disability rating in excess of 20% for shell fragment wound of the right shoulder; (4) an initial compensable disability rating for shell fragment wound of the right upper thigh (flexion); (5) entitlement to an initial disability rating in excess of 10% for shell fragment wound of the right upper thigh (extension); (6) a disability rating in excess of 20% for status post right (dominant) forearm shell fragment wound with cutaneous neuropraxia from shrapnel wound right dorsum hand and distal radial forearm; (7) a compensable disability rating for bilateral deafness; (8) an initial compensable rating for scars, pepper spots on the right side of neck; (9) an initial compensable disability rating for scars, pepper spots of the right arm (dominant); (10) an initial disability rating in excess of 30% for painful scars, pepper spots of the right arm, right leg, right pelvic region, and left hand; (11) an initial compensable disability rating for scars, pepper spots of the right leg, right pelvic region, and left hand; (12) a rating in excess of 50% from March 30, 2015, for PTSD; (13) a disability rating in excess of 70% from September 28, 2017, for PTSD; (14) entitlement to special monthly compensation based on the need for aid and attendance; (15) entitlement to an effective date earlier than March 30, 2015, for scars, pepper spots of the right arm, right leg, and right pelvic region; (16) an effective date earlier than March 30, 2015, for scars, pepper spots of the right arm, right leg, and right pelvic region; (17) an effective date earlier than March 30, 2015, for scars, pepper spots on the right side of neck; and (18) an effective date earlier than March 30, 2015, for shell fragment wound of the right upper thigh (flexion). Nor does appellant advance argument concerning the Board's dismissal of his claims asserting there was clear and unmistakable error (CUE) in (1) the September 30, 1970, rating decision, which would support an effective date earlier than March 30, 2015, for a compensable evaluation for scars, pepper spots of the right arm, right leg, and right pelvic region; and (2) the September 30, 1970, rating decision, which would support an effective date earlier than March 30, 2014, for service connection for tinnitus.

Appellant also does not appeal those portions of the Board decision that denied (1) an initial compensable disability rating for shell fragment wound of the right upper thigh (abduction,

adduction, and rotation); (2) a disability rating in excess of 10% for right corneal shell fragment wound with foreign body residual and pseudoaphakia with sympathetic left eye; (3) entitlement to an effective date earlier than March 30, 2015, for service connection for PTSD; (4) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound of the right upper thigh (extension); (5) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound of the right shoulder (dominant); (6) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound to the right upper thigh (abduction, adduction, and rotation); (7) entitlement to an effective date earlier than March 30, 2015, for a total disability rating based on individual unemployability; and (8) entitlement to an effective date earlier than March 30, 2015, for eligibility to dependents' educational assistance under Chapter 35 of Title 38 of the U.S. Code.

Appellant has abandoned all issues not raised in his opening brief.⁴ Therefore, we will not address them further.

II. CLAIMS WE WILL DISMISS FOR LACK OF JURISDICTION

Although appellant argues that he is entitled to an earlier effective date for his service-connected TBI, headaches, and eye injury,⁵ we lack jurisdiction to consider his arguments as to these issues. Entitlement to an earlier effective date on these claims was not before the Board and the Board, thus, did not consider these issues or render a final decision on appellant's entitlement to an earlier effective date. Consequently, we lack jurisdiction to consider these issues and will dismiss the appeal as to these matters.⁶

III. TINNITUS

As noted above, appellant also appeals the portion of the Board decision that denied an earlier effective date for his service-connected tinnitus. The Board did render a final decision as to appellant's entitlement to an earlier effective date for his service-connected tinnitus, and we have jurisdiction to consider this issue.⁷ However, we lack jurisdiction to consider appellant's arguments

⁴ *Pederson v. McDonald*, 27 Vet.App. 276, 283-84 (2015) (en banc).

⁵ Appellant's Brief (Br.) at 14-16.

⁶ *King v. Nicholson*, 19 Vet.App. 406, 411-12 (2006).

⁷ *See id.*

to the extent appellant claims that his tinnitus is secondary to his TBI and that he is entitled to an earlier effective date for his tinnitus claim based on entitlement to an earlier effective date for his TBI.⁸ As noted above, we lack jurisdiction over appellant's claim for entitlement to an earlier effective date for his TBI, so we also lack jurisdiction to consider any arguments pertaining to claims flowing from appellant's claimed entitlement to an earlier effective date for his TBI.

"[T]he effective date of an award based on an original claim . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor."⁹ The Board's determination of an effective date is a finding of fact that we review for clear error.¹⁰ We may not reject the Board's conclusion if it is supported by a plausible basis in the record.¹¹ We are not permitted to substitute our own judgment for that of the Board in its factual determinations, even if we might have reached a different conclusion.¹² As with all material determinations of fact and law, the Board is required to support its effective-date determinations with an adequate statement of reasons or bases.¹³

As to his claim for tinnitus, appellant argues that an earlier effective date is warranted for several reasons. First, appellant argues that he is entitled to reconsideration of his tinnitus claim under 38 C.F.R. § 3.156(c). We disagree. Although 38 C.F.R. § 3.156(c) does allow retroactive evaluation of benefits in certain circumstances, that regulation only becomes relevant if VA has previously decided a claim.¹⁴ There is no indication in the record that VA ever issued a decision on appellant's tinnitus claim *before* granting appellant's claim for service connection for tinnitus. We therefore conclude that 38 C.F.R. § 3.156(c) is not relevant to appellant's tinnitus claim, and we reject appellant's argument to the contrary.

Second, appellant argues, alternatively, that his claim for service connection for tinnitus has remained pending since he filed an informal claim for that condition in 1970. Consequently,

⁸ See Appellant's Br. at 17, 29.

⁹ *McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (omission in original) (quoting 38 U.S.C. § 5110(a)).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-59 (1990).

¹⁴ 38 C.F.R. § 3.156(c)(1) ("[A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim.").

he argues that the effective date for service connection should date back to 1970. The Secretary disagrees, arguing that the Board's determination that the 1970 claim did not include an informal claim for tinnitus was a plausible finding and that we must, therefore, affirm the Board's decision as to the effective date.

The U.S. Court of Appeals for the Federal Circuit very recently addressed formal and informal claims. A legally sufficient claim, formal or informal, must "provide information, even at a high level of generality, to identify the sickness, disease, or injury for which benefits are sought."¹⁵ The Federal Circuit explicitly rejected the idea that "a formal claim specifying at least one identified condition for which benefits are sought invokes the Secretary's duty to assist, not only to fully develop the specified condition but also to search the veteran's records to identify and fully develop any additional claim the record may support."¹⁶ Finally, the Federal Circuit addressed the Secretary's duty to assist and opined that "[u]ntil the Secretary comprehends the current condition on which [a] claim is based, the Secretary does not know where to begin to develop the claim to its optimum."¹⁷

In finding that appellant's 1970 formal claim did not include an informal claim for tinnitus, the Board offered the following explanation:

Regarding [appellant's] claim for an earlier effective date for the grant of service connection for tinnitus, the Board . . . finds that there is no evidence of any unadjudicated formal or informal claim for service connection for tinnitus prior to March 24, 2015, and no evidence of any unadjudicated formal claim for service connection between March 24th and March 30, 2015. [Appellant's] June 1970 application [for benefits] specifically listed "perforated ear drums" and made no notation of tinnitus or ringing in the ears, a separate and distinct disability from perforated ear drums. Although [appellant] reported ringing in his right ear and some tinnitus, along with other symptoms related to his ear, during an August 1970 VA examination, the Board does not find such a report sufficient to raise an informal claim for tinnitus. There was no communication or action from [appellant] that indicated an intent to seek service connection for tinnitus or the ringing in his ears at the time of the August 1970 VA examination or prior to the September 1970 rating decision. In fact, [appellant] did not indicate any intent to seek service connection for tinnitus until more than 40 years later. Thus, in light of the foregoing, the Board finds that neither a formal or informal claim for such was received until

¹⁵ *Sellers v. Wilkie*, No. 2019-1769, 2020 WL 3980701, at *7-8 (Fed. Cir. July 15, 2020) (citation and internal quotation marks omitted).

¹⁶ *Id.*, at *7 (footnote omitted).

¹⁷ *Id.*

March 30, 2015.[¹⁸]

We see no error in the Board's finding that appellant did not file an informal claim for service connection for tinnitus in 1970. Although a claimant proceeding pro se before VA is entitled to a sympathetic reading of his filings, including his claim,¹⁹ VA is only required to address those claims that are reasonably raised by the evidence.²⁰ Appellant's 1970 claim identifies four separate injuries for which he sought benefits: (1) Perforated ear drums, (2) perforation[, right] cornea, (3) [shell fragment wound, right] hand and [right] arm and side, and (4) [shell fragment wound, right] side of head.²¹ Appellant did not identify any other injuries or conditions, including tinnitus, for which he sought benefits. Nor did his 1970 submission refer to existing medical records that themselves referred to tinnitus, something that could constitute an informal claim.²² Appellant's primary contention is that his 1970 claim included a claim for all residuals of perforated ear drums, to include tinnitus.²³

We agree with the Board that appellant's 1970 claim did not include either a formal or an informal claim for tinnitus. First, the Board seems to have accurately recited the facts with respect to appellant's purported claim for tinnitus, and appellant does not contend that the Board's statement of reasons or bases on this issue is based on an inaccurate factual premise. In any event, we find no clear error in the Board's factual findings or factual conclusions.²⁴ Based on those facts, even when viewed sympathetically in appellant's favor, we find that a claim for perforated ear drums, without more, is insufficient to raise a claim for tinnitus.

Additionally, although appellant did not explicitly raise a reasons-or-bases challenge to the Board's decision, we find that the Board satisfied its obligation, as to the finding that appellant did not file an informal claim for tinnitus, to provide an adequate statement of reasons or bases on all findings of material fact and law.²⁵ The Board fully explained why it found that appellant's claim

¹⁸ R. at 26-27.

¹⁹ *Roberson v. Principi*, 251 F.3d 1378, 1382, 1384 (Fed. Cir. 2001).

²⁰ *Brokowski v. Shinseki*, 23 Vet.App. 79, 86 (2009).

²¹ R. at 3250.

²² *See Shea v. Wilkie*, 926 F.3d 1362, 1369-70 (Fed. Cir. 2019).

²³ Appellant's Br. at 13.

²⁴ *McGrath*, 14 Vet.App. at 35.

²⁵ *Gilbert*, 1 Vet.App. at 56-59.

for perforated eardrums did not encompass a claim for tinnitus, and the Board also explained why it found appellant's reports of tinnitus during a VA medical examination inadequate to constitute a freestanding claim, or an issue that VA was required to adjudicate.²⁶

Finally, appellant seems to suggest that the Board wrongly denied appellant the service-connection presumption to which combat veterans are entitled under 38 U.S.C. § 1154(b).²⁷ As we understand appellant's argument, he contends that the Board assigned him a later effective date for tinnitus because the Board found appellant's description of the alleged in-service injury to be incredible. But the Board did not find appellant incredible on the issue of whether he sustained an in-service injury that led to his tinnitus. In fact, the Board "noted that [appellant] experienced an explosive concussion event."²⁸ Moreover, the Board's denial of an earlier effective date for tinnitus hinged on the date appellant first filed a claim for service connection, not whether appellant experienced an in-service injury that caused his tinnitus.²⁹ And, finally, appellant's argument pertains to whether he is entitled to service connection for tinnitus. But that issue had already been resolved in appellant's favor and was not before the Board in the decision on appeal.³⁰ The only issue before the Board was whether appellant was entitled to an earlier effective date for his tinnitus, and 38 U.S.C. § 1154(b) has no bearing on that issue in this appeal.

Appellant identifies no other error and we see none. We will, therefore, affirm the Board's decision to the extent we have jurisdiction to review the decision.

IV. ORAL ARGUMENT

The last matter for us to address is appellant's pending motion for oral argument. We will deny the motion. Oral argument is "allowed only when ordered by the Court."³¹ Furthermore, the Court will generally deny a motion for oral argument if "the Court does not believe that it will materially assist in the disposition of [the] appeal."³² We are able to fully resolve this appeal on

²⁶ R. at 3250.

²⁷ See Appellant's Br. at 16 (subheading), 20, 27.

²⁸ R. at 26.

²⁹ R. at 26-27.

³⁰ See *id.* (noting that appellant's tinnitus was already service connected and that the Board was simply reviewing whether appellant was entitled to an earlier effective date for service connection).

³¹ U.S. VET. APP. R. 34(a).

³² *Winslow v. Brown*, 8 Vet.App. 469, 471 (1996).

the briefing, and we are of the opinion that oral argument would not be materially beneficial in resolving this appeal. We therefore find it appropriate to deny the motion for oral argument.

V. CONCLUSION

After consideration of the parties' briefs, the record on appeal, and the governing law, we will AFFIRM the Board's October 3, 2019, Board decision to the extent we have jurisdiction over it, and we will DISMISS the balance of the appeal for lack of jurisdiction. Appellant's motion for oral argument is denied.

DATED: July 31, 2020

Copies to:

Gordon A. Graham (Non-Attorney Representative)

VA General Counsel (027)