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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-4412

LAWYER PORTER, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Army veteran Lawyer Porter challenges a Board decision that denied an effective date earlier than February 23, 2010, for the award of service connection for hepatitis C. He argues, in part, that a 2002 claim is still pending because, during the claim stream, service department records were associated with his file and the Board did not reconsider his claim using those records. Under 38 C.F.R. § 3.156(c)(1), "at 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." This regulation is intended to place a veteran in the position he or she would have been had VA properly "considered the relevant service department record before the disposition of [the] earlier claim." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). So, if the eventual grant of service connection is based all or in part on the newly added service department records, the effective date may be commensurate with the date of the original claim. 38 C.F.R. § 3.156(c)(3) (2022); *see Stowers v. Shinseki*, 26 Vet.App. 550, 556 (2014).

The record is unequivocal that Mr. Porter's grant of service connection for hepatitis C was based at least in part on his newly associated service department records. Section 3.156(c) contains

various provisions that direct the assignment of an effective date in such cases and the Court remands for VA to award an effective date in accordance with such.

I. BACKGROUND

Mr. Porter served from June 1974 to August 1976. In 1976, he was hospitalized on three occasions for hepatitis, the third of which delayed his discharge from the Army. One month after his discharge, he filed a claim for benefits for hepatitis that was denied and never appealed.

In 2001, Mr. Porter requested that the regional office (RO) reopen his hepatitis claim. VA secured a medical opinion from Dr. B.W., who noted no hepatitis screening was in the veteran's records and, based on the records available, the veteran must have had acute hepatitis A during service. (For reference, hepatitis A is commonly caused by exposure to contaminated food and water; most people infected recover with no permanent liver damage.)* Relying on Dr. B.W.'s opinion, VA denied service connection. Mr. Porter then submitted a claim in November 2002 clarifying that he sought service connection for hepatitis C, not hepatitis A. The RO denied this claim as well, partially relying on Dr. B.W.'s 2001 opinion.

In 2010, Mr. Porter submitted another request to reopen his claim for benefits for hepatitis C, which the RO denied in August 2010 based on the finding that no new and material evidence had been submitted. In 2012, Mr. Porter testified before a decision review officer (DRO) where he submitted service department records, including a 1976 liver biopsy, not previously associated with the claims file. R. at 3480; *see also* R. at 3298. In response, VA obtained additional service department records that were not previously associated with the veteran's claims file.

After the records were newly associated with the claims file, a VA examiner, Dr. P.H., reviewed the new records and wrote a positive nexus opinion because "the veteran's severe hepatitis medical course could not have just been due to Hepatitis A (food-born type) in 1976." R. at 1255-56. In 2015, Dr. B.W. wrote a positive nexus opinion that referenced the liver biopsy and negative hepatitis B screening. He relied on "U.S. Army Viral Hepatitis Data" and a negative hepatitis B screening to determine that Mr. Porter's "protracted hospitalizations while on active duty were more likely than not due to [hepatitis C]." R. at 1572.

* *See Hepatitis A*, Mayo Clinic (Aug. 27, 2022) <https://www.mayoclinic.org/diseases-conditions/hepatitis-a/symptoms-causes/syc-20367007>.

In 2016, the RO granted service connection for hepatitis C with an effective date of September 23, 2015. Mr. Porter appealed, seeking an earlier effective date. The Board granted an earlier effective date of February 3, 2010, on procedural grounds. He appealed this decision to the Court, which led to a joint motion for remand to the Board.

In its May 2021 decision now on appeal, the Board denied an effective date earlier than February 3, 2010, but it did not discuss § 3.156(c). Mr. Porter appealed.

II. ANALYSIS

A. *Section 3.156(c)*

Mr. Porter contends that his 2002 claim for hepatitis C remains pending because the Board did not reconsider his claim after new service department records were associated with his claims file, as is required under 38 C.F.R. § 3.156(c)(1). The Secretary urges this Court to decline to consider this argument because the veteran's counsel did not raise it before the Board.

In *Massie v. Shinseki*, this Court exercised "an abundance of caution" in addressing whether a veteran's newly raised argument for an earlier effective date was reasonably raised by the record. 25 Vet.App. 123, 130 (2011). And here, upon review of the record, the Court finds that the issue of whether Mr. Porter is entitled to an earlier effective date under § 3.156(c) was reasonably raised by the record and is thus not subject to same issue exhaustion considerations that normally arise when a represented party fails to raise an issue before the Board. *See Garner v. Tran*, 33 Vet.App. 246, 247 (2021) (holding that, when the Board fails to assess whether an issue was reasonably raised by the record, the Court may conduct that analysis in the first instance).

The record demonstrates that Mr. Porter submitted new service department records in 2012, including a 1976 liver biopsy. R. at 3480. The submission of those records led to the RO securing additional clinical records from Fort Campbell regarding one of the veteran's hospital stays due to hepatitis. R. at 3298-99. Thereafter, two separate examiners relied on those records in providing positive nexus opinions. Moreover, Mr. Porter discussed at length how his "records were lost" at his October 2019 testimony before the Board. *See* R. at 910; *see also, e.g.*, R. at 906-07.

VA has an unmistakable duty to reconsider the claim if service department records are later associated with the claims file and, if an award is based on those records, to provide an effective date corresponding to the date of the original claim. 38 C.F.R. § 3.156(c)(1)-(3). Here, nowhere in the record does VA address this regulation despite the clear impact of the service department

records on Mr. Porter's claim. Because the Board failed to address this reasonably raised issue below, the Court does so now. *See Garner*, 33 Vet.App. at 247.

Turning to the merits, "reconsideration" under § 3.156(c)(1) requires VA to reassess its original decision "in light of the new service records," which may include the development of additional evidence. *George v. Shulkin*, 29 Vet.App. 199, 205 (2018). The Court disagrees with Mr. Porter's contention that his claim was not "reconsidered" in light of the newly associated service department records. In its September 2012 Statement of the Case (SOC), VA discussed new service department records that were obtained through "further development to the service department" after Mr. Porter submitted some of the new records during the May 2012 hearing. R. at 3299. Moreover, it conducted additional development by securing another medical opinion. R. at 3301-02. Then, in the 2012 SOC, VA readjudicated the issue of service connection based on the new records and medical opinion. And when Mr. Porter's claim was returned to the RO in 2016, the RO listed the service department records and new medical opinions as evidence and ultimately considered each service-connection element and granted his claim. Accordingly, VA reconsidered the claim under § 3.156(c)(1).

But even though VA satisfied its duties under subsection (c)(1), its inquiry was not finished. Once a claim is reconsidered, § 3.156(c)(3) requires VA to consider whether the veteran is entitled to an earlier effective date. Specifically, if, after reconsideration, a claim is granted "based all or in part on the records identified by paragraph (c)(1)," the effective date will be the date "entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3). Essentially, VA must ask whether service records that existed, but were not considered at the time of the initial decision, were relied upon in awarding service connection. *Jones v. Wilkie*, 964 F.3d 1374, 1379 (Fed. Cir. 2020). Moreover, service records "newly associated with the claims file and forming the basis for a positive medical nexus opinion can establish entitlement to an effective date as early as the date of the *original claim* for service connection." *Stowers v. Shinseki*, 26 Vet.App. 550, 556 (2014) (emphasis added); *see also* New and Material Evidence, 70 Fed. Reg. 35,388, 35,389 (June 20, 2005). In other words, if a medical examiner relies on the newly associated service records to form a positive nexus opinion, and VA then relies on that opinion in awarding service connection, that triggers § 3.156(c)(3).

In this case, the evidence of record clearly triggered § 3.156(c)(3) such that Mr. Porter's effective date should have been evaluated based on that provision. Specifically, his newly

associated service records were crucial to his award of service connection because they generated two favorable nexus opinions. Further, one of those medical opinions was from Dr. B.W.—the same doctor whose prior negative nexus opinion was relied upon in denying the veteran's claim. But, after reviewing the newly associated service records—records that supported his claim of a blood transfusion, showed the results of a liver biopsy, and included results of a hepatitis B screening—that doctor changed his opinion. R. at 1572. Both medical opinions were then cited as evidence by the RO when it granted service connection.

The record is unequivocal that the 1976 service records directly contributed to the grant of service connection for hepatitis C. Both favorable nexus opinions relied on these documents. Significantly, his claim was consistently denied before 2016 on the grounds that the evidence of record did not show a nexus between his hepatitis C and service. *See* R. at 3695 (2002 rating decision); R. at 3676 (2008 rating decision); R. at 3571-72 (2009 SOC); R. at 3495 (2010 rating decision); R. at 3302 (2012 SOC); R. at 2453-54 (2015 Supplemental SOC). Once his claim was returned to the RO, it reviewed the two new positive nexus opinions—the only ones of record—and granted service connection. It is clear to this Court, then, that service connection was granted at least in part based on the positive nexus opinions that relied on the newly submitted service records.

For its part, § 3.156(c) mandates the assignment of an effective date falling on either the date of the previously decided claim or the date entitlement arose, whichever is later. The Court cannot determine, based on the record before it, the date Mr. Porter's entitlement to service connection for hepatitis C arose, so remand is warranted for the Board to make this factual determination. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *Taylor v. Wilkie*, 31 Vet.App. 147, 154 (2019).

However, the Court reiterates that Mr. Porter could be entitled to an effective date as early as his *original claim* if the Board determines that his entitlement to service connection arose before August 30, 1976. This Court's case law has consistently interpreted § 3.156(c)(3) as requiring an effective date of either the original claim or the date entitlement arose, whichever is later. *See, e.g., Stowers*, 26 Vet.App. at 556; *Mayhue v. Shinseki*, 24 Vet.App. 273, 279 (2011); *Vigil v. Peake*, 22 Vet.App. 63, 66-67 (2008). Thus, on remand, the Board need only determine the date entitlement arose because the date of Mr. Porter's original claim is clear from the record.

B. *Remaining Argument*

The Court notes that Mr. Porter further argued that he is entitled to an earlier effective date because his 1976 claim never became final when VA did not adhere to its regular mailing practices. However, because the Court finds that the 2002 decision is final, under *Williams v. Peake*, the 1976 decision is also final. 521 F.3d 1348, 1351 (Fed. Cir. 2008) (holding that, if a claim for a particular benefit becomes final, then any earlier claims for the same benefit that may be pending also become final); *see also Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion").

III. CONCLUSION

Based on the foregoing, the Board's determination regarding an effective date earlier than February 23, 2010, is REVERSED and the remainder of its May 5, 2021, decision is VACATED and REMANDED for the Board to award the proper effective date for Mr. Porter's hepatitis C in accordance with 38 C.F.R. § 3.156(c).

DATED: October 18, 2022

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