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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 09-3294

ROBERT J. GEORGE, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge.*

MEMORANDUM DECISION

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

HAGEL, *Judge*: Robert J. George appeals through counsel a May 7, 2009, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for hepatitis C.[1] The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the May 2009 Board decision. Because the Board did not clearly err in finding that Mr. George failed to report to a scheduled VA examination without good cause, the Court will affirm the May 2009 Board decision.

I. FACTS

Mr. George served on active duty in the U.S. Army from February 1980 to June 1983. Private treatment records reflect that, in July 1994, he was diagnosed with hepatitis C.

In April 2006, Mr. George filed a claim for VA benefits for hepatitis C. In May 2006, he filled out a VA questionnaire pertaining to hepatitis C, indicating that he had never used intravenous drugs or intranasal cocaine; engaged in high-risk sexual activity; had hemodialysis, any tattoos, or

[1] The Board also denied Mr. George's claims for VA benefits for a psychiatric disorder, chronic pathology of internal organs, a blood disease due to exposure to toxic chemicals, a heart disability, and human immunodeficiency virus. However, on appeal, Mr. George does not make any arguments pertaining to these claims. Accordingly, the Court deems these claims abandoned. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

body piercings; or been a health care worker. He also indicated that, while in the military, he shared razor blades and toothbrushes and possibly had acupuncture with non-sterile needles. Finally, he indicated that he had a blood transfusion in 1989.

In a November 2006 rating decision, a VA regional office denied Mr. George's claim for VA benefits for hepatitis C because there was no evidence that this diagnosis was related to his military service. Mr. George appealed that decision.

In March 2007, VA sent Mr. George a notice letter that stated:

> For the claimed [h]epatitis C only, we asked the VA medical facility nearest you to schedule you for an examination. **They will contact you about when and where to report for the exam. This exam is very important.** Without it, we may have to deny your claim, or you might be paid less than you otherwise would. If you can't report for the examination as scheduled, contact the medical facility and arrange a more convenient place or time. Their letter will give you the phone number to call.

Record (R.) at 75.

An April 2007 internal VA correspondence indicates that Mr. George was scheduled for an examination, but that the examination was cancelled because he failed to report. In August 2007, VA issued a Statement of the Case, informing Mr. George that "[t]he VA medcial center notified us that you failed to report to [your scheduled] examination. No 'good cause' has been shown for your failure to report." R. at 67. The Statement of the Case also provided him with the text of 38 C.F.R. § 3.655, which explains the consequences of failure to report for a scheduled VA examination without good cause. Mr. George continued his appeal to the Board.

In the May 2009 Board decision currently on appeal, the Board found that Mr. George was not entitled to VA benefits for hepatitis C. The Board explained that:

> In regard to the claim of service connection for hepatitis C, VA attempted to conduct medical inquiry in the form of a VA compensation examination in an effort to substantiate the claim. [Mr. George] was advised in a March 2007 letter that he would be scheduled for an examination, and he was informed of the importance of attending the examination as without it his claim may be denied. Documentation dated in April 2007 indicated that [he] failed to report to his scheduled examination, and a statement of the case dated in August 2007 noted his failure to report and the fact that no "good cause" had been provided for his absence.

> [Mr. George] still has not indicated the reason for his failure to appear or to indicate that he was willing to report to another examination, if possible. Under these circumstances, [ ] VA has made reasonable efforts to help [Mr. George] to obtain necessary evidence to substantiate his claim. The duty to assist a claimant is not a one-way street, and in this case [Mr. George] has failed to cooperate to the full extent in development of his claim. *Wood v. Derwinski*, 1 Vet.App. 406 (1991). In light of the foregoing, and in recognition of the fact that the present claim essentially arises out of an initial claim for compensation, the Board proceeds to review and decide the hepatitis C claim based on the evidence that is of record. 38 C.F.R. § 3.655.

R. at 9-10.

On appeal, Mr. George's sole argument is that VA violated his due process rights because he did not receive notice of his scheduled VA examination. On appeal, the Secretary disputes this contention and argues that the Court should affirm the May 2009 Board decision.

II. ANALYSIS

The Court has long recognized that "'there is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties.'" *Sthele v. Principi*, 19 Vet. App. 11, 16 (2004) (quoting *Ashley v. Derwinski*, 2 Vet.App. 307, 308-09 (1992)). The Court has applied the presumption of regularity to various processes and procedures throughout the VA administrative process, including the regional office's mailing of a notice of a VA medical examination. *See Jones v. West*, 12 Vet.App. 98, 100-02 (1998). The presumption of regularity is not absolute; however, it may only be overcome by the submission of "clear evidence to the contrary." *Ashley*, 2 Vet.App. at 390. A claimant's mere statement of nonreceipt is insufficient for that purpose. *See Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). Whether the presumption of regularity attaches to the public actions of a public official is a question of law that the Court reviews de novo. *See Marsh v. Nicholson*, 19 Vet.App. 381, 385 (2005). Additionally, whether clear evidence exists to rebut the presumption of regularity is a also a question of law that the Court reviews de novo. *See Clark v. Nicholson*, 21 Vet.App. 130, 133 (2007).

In this case, Mr. George argues only that he did not receive notice of the scheduled VA examination and that the Board does not point to any VA letter in the record showing that he was notified of the examination. First, as was noted above, a claimant's mere statement of nonreceipt is

insufficient for rebutting the presumption of regularity. *See Butler*, 244 F.3d at 1340. Second, as to Mr. George's argument that there is no VA notice letter in the claims file showing that he was scheduled for a VA examination, the Court recently addressed this scenario in *Kyhn v. Shinseki*, __ Vet.App.__, 2011 WL 135820, No. 07-2349 (Jan. 18, 2011). In that case, the Court noted that VA had an established procedure for notifying claimants of scheduled VA examinations and held that, "the fact that there is no copy of VA's computer-generated notice to [the veteran] of the [scheduled] examination" was not sufficient to rebut the presumption of regularity. *Id.* at *5. The Court explained that "[b]ecause the regular practices of VA do not include maintaining a hard copy of the veteran's notice of his or her scheduled VA examination, the absence of any such copy from the claims file cannot be used as evidence to demonstrate that the notice was not mailed." *Id.* The Court went on to state that,

> even if VA practice were to include a copy of the notice letter in the veteran's claims file, the absence of the letter from the claims file would not rebut the presumption of regularity. There is no requirement for that document to be contained in the record for the presumption of regularity to apply.

Id. The Court notes that other than Mr. George's assertions and the lack of a notice letter in the record, Mr. George does not point to any other evidence indicating that he did not receive notice of the scheduled VA examination. Further, even if Mr. George did not initially receive notice of the scheduled examination, VA made him aware of that examination and the consequences of his failure to report to it in the August 2007 Statement of the Case. At no time prior to the Board's May 2009 decision did Mr. George assert that he had not received notice of his scheduled examination, despite having the opportunity to do so. Indeed, the record before the Board does not contain any statements from Mr. George that he did not receive notice of the scheduled examination.

The Court's decision in *Kyhn* is dispositive and, as such, Mr. George has not rebutted the presumption of regularity with clear and convincing evidence. The Court therefore concludes that VA properly mailed Mr. George notice of his scheduled VA examination and that he did not present "good cause" for his failure to report to the scheduled examination. Consequently, the Board did not clearly err in denying Mr. George's claim and, indeed, it was compelled to do so by § 3.655(b); *see also Wood*, 1 Vet.App. at 93. The Court will therefore affirm the May 2009 Board decision.

III. CONCLUSION

Upon consideration of the foregoing, the May 7, 2009, Board decision is AFFIRMED.

DATED: February 24, 2011

Copies to:

Jeany C. Mark, Esq.

VA General Counsel (027)