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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-2329

VICTOR ORTIZ-ALVARADO, 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*: Victor Ortiz-Alvarado appeals through counsel an April 4, 2012, Board of Veterans' Appeals (Board) decision that adjudicated his August 2008 statement as a motion for revision of a July 22, 2008, Board decision that denied his claims for benefits for residuals of a scalp laceration and post-traumatic stress disorder based on clear and unmistakable error, rather than as a motion for reconsideration. Mr. Ortiz-Alvarado's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). Neither party requested oral argument, nor have the parties identified issues that they believe require a precedential decision of the Court. Because the Board erred in finding Mr. Ortiz-Alvarado's August 2008 statement was a motion to revise a July 2008 Board decision based on clear and unmistakable error rather than a motion for reconsideration, the Court will reverse the Board's finding in that regard and remand for reconsideration of the July 2008 Board decision by the Board chairman.

I. FACTS

Mr. Ortiz-Alvarado served on active duty in the U.S. Army from September 1952 to October 1958, including periods of service in the U.S. Army National Guard.

In May 2000, Mr. Ortiz-Alvarado filed a claim for benefits for residuals of a head wound.[1] In May 2002, the regional office issued a decision denying his claim for benefits for residuals of a scalp laceration. Mr. Ortiz-Alvarado filed a Notice of Disagreement with that decision. Shortly thereafter, Mr. Ortiz-Alvarado filed a second Notice of Disagreement and a statement indicating that he was also seeking entitlement to benefits for post-traumatic stress disorder. In October 2002, the regional office issued a Statement of the Case that continued the denial of Mr. Ortiz-Alvarado's claim for benefits for a head injury; however, it did not mention post-traumatic stress disorder. Mr. Ortiz-Alvarado ultimately appealed that decision to the Board.

In September 2004, the regional office denied Mr. Ortiz-Alvarado's claim for benefits for post-traumatic stress disorder. Mr. Ortiz-Alvarado filed a Notice of Disagreement with that decision and ultimately appealed to the Board.

On July 22, 2008, the Board issued a decision that denied Mr. Ortiz-Alvarado's claims for benefits for residuals of a scalp laceration *and* post-traumatic stress disorder. Along with that decision, the Board sent Mr. Ortiz-Alvarado a notice of his appellate rights. On August 12, 2008, 21 days later, Mr. Ortiz-Alvarado sent a statement to VA stating that it is "[i]n reply of 0141-A2[2] dated in July 22/2008 for [s]ervice-[c]onnected . . . [h]ead injury and [post-traumatic stress disorder]," and "requesting to revise the [July 2008 Board] decision based on clear and unmistakable errors." R. at 196. Mr. Ortiz-Alvarado then described the errors he believed the Board had committed. That same month, the Board sent Mr. Ortiz-Alvarado a letter stating that they had received his statement and construed it as a motion to revise the July 2008 Board decision based on clear and unmistakable error.

In September 2009, the Board found that the July 2008 decision did not contain clear and unmistakable error. Mr. Ortiz-Alvarado appealed that decision to the Court. In August 2011, the

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[1] In a July 2001 rating decision, the regional office construed Mr. Ortiz-Alvarado's May 2000 claim as one to reopen a previously denied claim for headaches. As a result, the regional office denied that claim because Mr. Ortiz-Alvarado failed to submit new and material evidence. In September 2001, the regional office sent Mr. Ortiz-Alvarado a letter acknowledging the error. The regional office then stated that it was going to construe his claim as a new claim for residuals of a scalp laceration, otherwise referred to as a head injury, and it becomes the underlying claim for this appeal. Record (R.) at 1013.

[2] This number refers to the number listed on the cover letter accompanying Mr. Ortiz-Alvarado's July 22, 2008, Board decision. R. at 200.

Court granted the parties' joint motion for remand. The parties agreed that the Board failed to explain whether Mr. Ortiz-Alvarado's August 2008 statement was properly construed as a motion to revise the July 2008 Board decision based on clear and unmistakable error or as a motion for reconsideration.

In April 2012, the Board issued the decision on appeal. The Board explained that Mr. Ortiz-Alvarado's August 2008 statement was not a motion for reconsideration because he "did not actually ask the Board to reconsider the prior decision. . . . the Board stated that he specifically requested that the prior Board decision be revised based on "clear and unmistakable errors." R. at 6. The Board also explained that "neither [Mr. Ortiz-Alvarado] or his then representative . . . made any efforts to clarify that the August 2008 correspondence was actually intended to be a motion for reconsideration." R. at 7.[3] The Board then denied Mr. Ortiz-Alvarado's motion to revise the July 2008 Board decision based on clear and unmistakable error. This appeal followed.

II. ANALYSIS

On appeal, Mr. Ortiz-Alvarado argues that the Board failed to sympathetically read his August 2008 statement and erred when it found that it was not a motion for reconsideration of a July 2008 Board decision. Appellant's Brief (Br.) at 6. The Court agrees.

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that "with respect to all pro se pleadings, [ ] VA [must] give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations, *regardless of whether the claim is specifically labeled as a claim for [a particular benefit]*." *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (emphasis added). In fact, this Court has explained that documents filed with the Court or VA "must be construed liberally in the context of its language and circumstances of filing." *Rickett v. Shinseki*, 26 Vet.App. 210, 220 (2013)*; see also Kouvaris v. Shinseki*, 22 Vet.App.377, 381 (2009) (determining that a filing below was a motion for

[3] A review of the record does not reflect that the Board ever asked for clarification of Mr. Ortiz-Alvarado's statement. Rather, as previously mentioned, the Board sent Mr. Ortiz-Alvarado a letter indicating that it construed his statement as a motion to revise a prior decision based on clear and unmistakable error. R. at 190. A copy of that letter was also sent to Mr. Ortiz-Alvarado's representative at the time, a service office employed by Puerto Rico Public Advocate for Veterans Affairs. *Id.*

reconsideration and not a Notice of Appeal). As it pertains to motions for reconsideration, the Court explained, in *Ratliff v. Shinseki*, that it was the Secretary's policy to treat "every expression of disagreement with a Board decision as a possible motion for Board reconsideration." 26 Vet.App. 356, 360 (2013).

Here, the Board noted that it read Mr. Ortiz-Alvarado's August 2008 submission sympathetically when it determined that his statement was not a motion for reconsideration. However, a review of its decision reveals otherwise.

First, the Board found "that [Mr. Ortiz-Alvarado's] August 2008 correspondence does not reasonably raise a motion for reconsideration of [its July 2008 decision]." R. at 6. The Board explained that Mr. Ortiz-Alvarado specifically uses the word "revise" which mirrors the requirements of a motion to revise a prior final decision based on clear and unmistakable error as opposed to a motion for reconsideration of the Board's decision. However, there is no requirement that a motion for reconsideration has to contain the word "reconsider" *or* that a motion to revise a prior final decision based on clear and unmistakable error has to include the word "revise." *See* 38 C.F.R. §§ 20.1001(a) (2013), 20.1404(a)-(b)(2013).

Second, the Board stated that the August 2008 correspondence was filed within the 120-day appeal period and then relied on this Court's decision in *May v. Nicholson* for the proposition that "upon receipt of a premature [motion to revise a prior final decision based on clear and unmistakable error] the Board must hold the [motion] and not file it at that time, and then, upon expiration of the 120-day judicial appeal period without [a Notice of Appeal] having been filed, file the [motion]." 19 Vet.App. 310, 320 (2005). However, the Board's discussion of that case is incomplete. The Board ignores the Court's analysis in that case regarding the collateral nature of motions to revise a prior final decision based on clear and unmistakable error. In *May,* the Court stated that "[t]he sole purpose of a [motion to revise a prior decision based on clear and unmistakable error] is to provide a VA claimant with an opportunity to challenge a decision that is otherwise *final and unappealable*." *Id.* at 317 (emphasis added). More importantly, the Court held that such motions "cannot properly be filed while that claim is still appealable on direct review." *Id.* at 318.

Thus, in light of the foregoing, if the requirements for a motion for reconsideration can be met, the Board should have liberally construed Mr. Ortiz-Alvardo's statement as a motion for

reconsideration rather than a motion to revise a prior final decision based on clear and unmistakable error.

The Court has the authority to consider whether a document is a motion for reconsideration. *See Fithian v. Shinseki*, 24 Vet.App. 146, 157 (2010); *see also Kouvaris*, 22 Vet.App. at 381 (determining that a filing below was a motion for reconsideration and not a Notice of Appeal); *cf. Beyrle v. Brown*, 9 Vet.App. 24, 28 (1996) ("Whether a document is [a Notice of Disagreement] is a question of law for the Court to determine de novo under 38 U.S.C. § 7261(a)."); *Gibson v. Peake*, 22 Vet.App. 11, 15 (2007) (stating that whether a document constitutes a Substantive Appeal to the Board is a matter of law, which the Court reviews de novo). Pursuant to regulation,

> a motion for reconsideration must be in writing and must include (1) the name of the veteran, (2) the applicable VA file number, and (3) the date of the Board's decision to be reconsidered. It must also set forth the alleged obvious error of fact or law in the applicable decision of the Board, or other appropriate basis for requesting reconsideration.

Boone v. Shinseki, 22 Vet.App. 412, 414 (citing 38 C.F.R. § 20.1001(a)). Here, a review of Mr. Ortiz-Alvarado's August 2008 statement reveals that it is in writing; contained his name, his VA file number, and the date of the Board's decision; *and* set forth a basis for the alleged errors. *See* R. at 196. For example, Mr. Ortiz-Alvarado stated that the October 2005 "examiner [did] not exam the right way." *Id.* Further, he stated "[post-traumatic stress disorder] it is [e]stablished by my official record." R. at 197. At the end of his statement, Mr. Ortiz-Alvarado asserted that his "claim must be afforded expeditious treatment." *Id.* In light of the fact that Mr. Ortiz-Alvarado's statement contained the requirements for a motion for reconsideration set forth in § 20.1001(a) and because VA should have read his August 2008 statement liberally in favor of Mr. Ortiz-Alvarado, the Court concludes that the Board erred when it found Mr. Ortiz-Alvarado's August 2008 statement constituted a motion to revise a prior final Board decision based on clear and unmistakable error rather than a motion for reconsideration. *See Boone*, 22 Vet.App. at 414-15.

Accordingly, the Court concludes that reversal of the Board's finding that the August 2008 statement is a motion to revise a prior final Board decision based on clear and unmistakable error is warranted and the Court will remand the matter to the Board for reconsideration of its July 2008 decision by the Board chairman. The Court asks the Board to take into consideration Mr. Ortiz-

Alvarado's advanced age and several apparently life-threatening disabilities when dealing with this matter. Once the final Board action on the decision on the motion for reconsideration is taken, Mr. Ortiz-Alvarado will have 120 days from the date of that decision to file a Notice of Appeal with the Court if he so chooses. *See Ratliff*, 26 Vet. App. at 361; *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991).

III. CONCLUSION

Upon consideration of the foregoing, the Court REVERSES the April 4, 2012, Board finding that Mr. Ortiz-Alvarado's August 2008 statement is a motion to revise the July 2008 Board decision based on clear and unmistakable error rather than a motion for reconsideration and REMANDS the matter to the Board for reconsideration of its July 2008 decision by the Board chairman.

DATED: February 19, 2014

Copies to:

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