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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-333

GLEN P. HOFFMANN, APPELLANT,

V.

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

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: Glen P. Hoffmann appeals pro se the January 14, 2013, Board of Veterans' Appeals (Board) decision that denied his entitlement to an effective date prior to October 31, 2007, for VA benefits based on service connection for degenerative arthritis of the right knee. Record (R.) at 3-12. The appellant argues that he should be granted service connection for his knee disability dating back to a claim he filed in February 1990. Appellant's Informal Brief (Br.) at 1-2. Review by a single judge is authorized by 38 U.S.C. § 7254(b), *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990), and although the Court acknowledges "the justice of [veterans'] claims and the meritorious character of the claimants," *United States v. Yale Todd* (1794) (unreported decision discussed in the margin of the opinion in *United States v. Ferreira*, 54 U.S. 40 (1852)), the Court's scope of review is limited to that authorized by 38 U.S.C. § 7261.

On March 31, 2014, the Court issued a single-judge memorandum decision vacating the January 2013 Board decision and remanding this matter for readjudication. On April 11, 2014, the appellant filed a motion for reconsideration, arguing that there was sufficient evidence of record for the Court to reverse, rather than remand, his claim. Appellant's Motion for Reconsideration (Mot.) at 1-3. To clarify its decision, the Court will grant the appellant's motion for single-judge reconsideration, withdraw its March 31, 2014, memorandum decision, and issue this opinion in its

stead. Because the Board merely failed to provide an adequate statement of reasons or bases for its determination that the appellant failed to submit a signed claim form in 1990, the Court cannot reverse the Board's January 2013 decision but will instead vacate that decision and remand this matter for readjudication consistent with this opinion.

The appellant served honorably in the U.S. Army from October 1981 to February 1990 as a fire support specialist. R. at 390 (DD Form 214). On February 26, 1990, VA received an application from the appellant for benefits based on service connection for a right knee disorder. R. at 854-57. Two weeks later, the regional office (RO) returned the application form to the appellant because he had not signed or dated it, and explained in an accompanying letter that it could not take action on his claim until he completed and returned the form. R. at 853.

Seventeen years passed. On October 31, 2007, the RO received a claim from the appellant seeking VA benefits based on service connection for a right knee disorder. R. at 751-60. On the form, the appellant noted that he had never before filed a claim with VA. R. at 751. The following June, the RO granted service connection for a right knee disability, effective Halloween 2007, the date it received the appellant's claim. R. at 782-91. The appellant submitted a Notice of Disagreement (NOD) in September 2008, arguing that his effective date should be "backdated 3-4 years" from his discharge. R. at 735-36. On April 15, 2009, the RO provided the appellant with a Statement of the Case (SOC) that denied an earlier effective date. R. at 610-34. On November 16, 2009, the appellant sent a letter to VA explaining that, while going through old documents, he had discovered the application form that VA had returned to him in March 1990, and to the November 16 letter he attached the form, signed April 2, 1990. R. at 604-08. He again requested an earlier effective date. *Id.*

In November 2009, the RO sent the appellant a letter stating that it was working on his claim for an "earlier effective date." R. at 591-97. In December 2009, the RO denied the appellant an earlier effective date for his right knee disability. R. at 536-42. In December 2009, the appellant submitted an NOD in which he asserted that he had signed and returned his application form in April 1990. R. at 528-29. In a Supplemental SOC, the RO found that the appellant had not resubmitted a signed application for benefits in 1990 and continued the denial of his claim. R. at 139-47. The appellant appealed to the Board. R. at 189-90. In September 2011, the appellant testified before the Board that he had resubmitted his claim in April 1990 and that VA had returned a signed copy of

the form to him, but that he did not have the return envelope. R. at 67-79. He also claimed that he received a lump sum payment following his service, which he assumed came from VA for his knee disability, but which apparently came from the Department of Defense. R. at 67-68.

In the decision currently on appeal, the Board found that the appellant had not resubmitted his claim after receiving it back from the RO in 1990. The Board denied entitlement to an effective date prior to October 2007. R. at 3-12. The Board found that if the appellant had resubmitted his form in April 1990, then it would have been in his claims file, pursuant to normal VA practice and the presumption of regularity. *See Ashley v. Derwinski*, 2 Vet.App. 307, 308 (1992). No signed form was, however, found in the claims file. R. at 10. The Board also questioned the appellant's credibility in waiting 17 years after allegedly submitting the signed form to contact VA and referenced the notation on his 2007 application that he had never before applied for VA benefits. *Id.*

The appellant argues that he submitted a signed application in 1990 and VA erred in failing to adjudicate his claim. Appellant's Informal Br. at 1-2. As proof, the appellant relies on two copies of the 1990 application form that he alleges demonstrate that VA deleted certain information to hide its error in not responding to his claim in April 1990. Appellant's Informal Br. at 1-2, Exhibits A-B. The Secretary argues that the Board's decision finding that the appellant did not resubmit his claim in 1990 was plausibly based upon the record and should therefore be affirmed. Secretary's Br. at 4-13. Unfortunately, the Court's appellate review is thwarted by the Board's failure to address the appellant's arguments and evidence of record, requiring the Court to vacate the Board's January 2013 decision and remand this matter for the Board to provide an adequate statement of reasons or bases.[1]

The effective date for a grant of VA benefits based on service connection is either the day VA receives the claim or the day the appellant becomes entitled to compensable rating, whichever is later. 38 U.S.C. § 5110(a). If a veteran files a claim for VA benefits within one year of discharge,

[1] The Court notes that, although the appellant failed to timely appeal the RO's initial decision that he was not entitled to an earlier effective date, the Board has authority to adjudicate untimely claims if it so desires, which it did in this case. *See Percy v. Shinseki*, 23 Vet.App. 37, 45 (2009) (holding that the period to file a Substantive Appeal is not jurisdictional and may be waived by VA); *cf. Rudd v. Nicholson*, 20 Vet.App. 296, 300 (2006) (stating that there is no freestanding claim for an earlier effective date). Here, the Board waived the timeliness requirement for the appellant's appeal, which meant that the appellant's initial claim for benefits remained open, and the Court will not disturb that favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority").

the date of entitlement will be the date of discharge. 38 U.S.C. § 5110(b)(1). If a veteran submits an incomplete application for benefits, VA will notify the veteran of the evidence necessary to complete it, but if the veteran does not submit the completed application within one year of such notification, he will not be entitled to an effective date of the original application for any subsequent payment of VA benefits. 38 C.F.R. § 3.109(a) (2013); *see* 38 C.F.R. § 3.155 (2013) (informal claims).

In his brief, the appellant asserts that he submitted an unsigned claims form in February 1990 (R. at 854) and that he resubmitted a signed copy of that form in April 1990 (R. at 605). Appellant's Br. at 1-2. He also asserts that the form he submitted in 2009 (R. at 605) is a copy of his signed April 1990 application that VA had mailed to him after he had resubmitted it. *Id.* The appellant points out that the forms contain unexpected differences that conflict with the Board's findings. *Id.* Particularly, the appellant argues that, because the April 1990/2009 form had his VA file number written on it, but that the February 1990 form did not, VA must have altered the file to cover up its wrongdoing. *Id.* Similarly, the February 1990 form contained a notation that it had been "returned for signature," but the April 1990/2009 form did not. *Id.*

Read liberally, the appellant's arguments and evidence suggest a favorable narrative: in March 1990, the RO returned the appellant's February form, including the notation "returned for signature" but without a VA file number, since the unsigned form could not be a formal application. Then, after the appellant returned the form in April 1990, VA mailed him a copy, this time sensibly erasing "returned for signature" and adding a VA file number, indicating that his claim would be processed. The Board failed to address the appellant's argument and evidence of record, stating instead that it was not required to accept the appellant's assertions without corroborating evidence. R. at 11. But the discrepancies in the forms potentially corroborate the appellant's story: if the document the appellant submitted in 2009 was in fact the same document VA sent him in March 1990, as the Board assumes, then why are the documents not identical? Because the appellant provided the Board with potentially corroborating evidence, the Board erred in failing to discuss his assertions in its opinion. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (stating that the Board must provide reasons for its rejection of any material evidence favorable to the veteran), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Rather than sweeping the appellant's plausible story away with the presumption of regularity,

the Board must examine the story and explain its rejection, if the Board is not convinced. Because the Board did not adequately address the appellant's argument and evidence, the Court has no way of knowing whether the Board might find that the appellant's argument and evidence are sufficient to rebut the presumption of regularity or whether the Board merely misunderstood the appellant's point. As a result, the Court's appellate review is thwarted and this matter must be returned to the Board for readjudication. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1).

The Court notes that the Secretary has provided several alternative theories for the discrepancies in the record. *See* Secretary's Br. at 9-14. However, these post hoc rationalizations only serve to highlight the Board's failure to adequately explain its rejection of the appellant's argument; the Court will not accept them as a substitute for Board analysis. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("Litigating positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action, advanced for the first time in the reviewing court." (internal quotation marks omitted)).

In his motion for reconsideration, the appellant urges the Court to reverse, rather than remand, the Board's January 2013 decision, because his submission proves by a preponderance of the evidence that he returned the form in March 1990 and the inconsistencies in his story can be explained as misunderstandings with instructions from VA about how to fill out his 2007 claim. Appellant's Mot. at 1-3. However, the Court cannot provide the appellant with the relief he seeks. The Court may only reverse Board decisions that are clearly erroneous. 38 U.S.C. § 7261(a)(4) (stating that the Court shall reverse a factual finding adverse to the veteran "if the finding is clearly erroneous"). "[I]f there is a 'plausible' basis in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations, we cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Here, the Court cannot say that the appellant's narrative is the *only* way that accounts for all the facts; it is possible that there is another explanation. As a result, because the evidence potentially supports more than one plausible narrative, the Court cannot reverse the Board's decision consistent with the law. 38 U.S.C. § 7261(a)(4).

Instead, because the Board failed to provide an adequate statement of reasons or bases for

its conclusions by ignoring the appellant's favorable construction of facts, which makes it impossible for the Court to ascertain why the Board reached its decision, the proper remedy is to remand the case for the Board to better explain itself. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy"). Although the Court is unable to provide the appellant with the relief he seeks at this time, nothing in this opinion shall prevent him from presenting to the Board every argument he made before the Court; if he persuades the Board, he wins.

On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom [C]ongress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one . . . ." (internal quotation marks omitted)).

The Court's March 31, 2014, memorandum decision is WITHDRAWN, and after consideration of the parties' briefs and a review of the record, the appellant's motion for reconsideration is granted, the Board's January 14, 2013, decision is VACATED and this matter is REMANDED for readjudication consistent with this opinion.

DATED: April 30, 2014

Copies to:

Glen P. Hoffmann

VA General Counsel (027)