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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-1036

JAMES B. WALKER, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, James B. Walker, through counsel, appeals a February 21, 2013, Board of Veterans' Appeals (Board) decision that denied his request for an effective date earlier than October 10, 2006, for the award of service connection for prostate cancer. Record (R.) at 3-13. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will reverse the February 21, 2013, decision and remand the matter for further proceedings consistent with this decision.

The appellant filed his initial claim for benefits on October 10, 2006. R. at 357-66. VA, in March 2007, awarded the appellant entitlement to service connection for prostate cancer associated with herbicide exposure, effective October 10, 2006. R. at 321-30. Responding to the March 2007 rating decision, in December 2007 the appellant requested an earlier effective date. R. at 284. In September 2009, the appellant submitted an August 31, 2009, letter from his treating physician, Dr. Tinetti. R. at 163-64. Dr. Tinetti stated that

[the appellant] was diagnosed definitively with prostate cancer in 1998. However, earlier than that in 1995 he had symptoms consistent with prostate difficulties and inflammation. Our belief is that it was most likely that the prostate cancer was

present in the 1995-96 time frame but masked somewhat by inflammation and prostatitis.

R. at 164.

In the February 21, 2013, decision on appeal, the Board denied the request for an earlier effective date, finding that (1) the initial claim was received on October 10, 2006, (2) "there is no evidence of a definitive diagnosis until 1998" and (3) "as the preponderance of the evidence is against this claim, under these circumstances the benefit-of-the-doubt doctrine does not apply." R. at 4, 10-11. In doing so, the Board noted that "[d]espite elevated PSA levels and [Dr. Tinetti's] indication of onset sometime in 1995 or 1996, biopsies were normal until August 1998, and the earlier presence of cancer is not indicated." R. at 10. This appeal followed.

On appeal, the appellant, in pertinent part, contends that the effective date of service connection should be one year earlier than the date he filed his claim, based on the provisions of 38 C.F.R. § 3.114(a)(3). Appellant's Brief (Br.) at 4-7, 9; Reply Br. at 3-8. Specifically, he asserts that the requirements for service connection were met in 1996, when prostate cancer was added to the list of diseases for presumptive service connection and that the Board violated *Colvin v. Derwinski*, Vet.App. 171, 172 (1991) (the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion."), in its decision, by "review[ing] the medical data in the file and ma[king] a determination that the test and laboratory results did not indicate that prostate cancer had its onset before 1998." Appellant's Br. at 4, 6; Reply Br. at 6-8.

The Secretary responds that the Board properly determined the "exact date of onset" based on the medical evidence of record. Secretary's Br. at 14-16. In addition, the Secretary argues that there was no *Colvin* violation, as the Board's decision was "plausibly based on the medical evidence of record." Secretary's Br. at 12-14. Finally, the Secretary argues that, "the evidence of record would have to demonstrate that [the appellant] was diagnosed with prostate cancer prior to and including November 7, 1996, which is the effective date of the VA liberalizing law. *See* 61 Fed. Reg. 57,586-87 (November 7, 1996)." Secretary's Br. at 15.

In general, the effective date of an award of benefits based on an original claim is the date of VA's receipt of the application or the date entitlement arose, whichever is later. 38 U.S.C.

§ 5110(a); *see also* 38 C.F.R. § 3.400(b)(2)(I) (2014). The effective date of an award in disability compensation granted pursuant to a "liberalizing law" may be up to one year prior to the date of receipt of application. 38 C.F.R. § 3.114(a), (a)(3) (2014). Specifically, "[i]f a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request." 38 C.F.R. § 3.114(a)(3). The Board's determination of the proper effective date for an award of VA benefits is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Evans v. West*, 12 Vet.App. 396, 401 (1999).

In this matter, the Secretary overstates the role of the Board in evaluating medical evidence. Board members, as lay adjudicators, generally lack the competence to offer their own diagnoses or opinions on medical matters and are therefore prohibited from relying on their own unsubstantiated medical judgment in deciding claims. *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) (delineating the distinct roles of medical examiners and VA adjudicators), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009); *see generally Kahana v. Shinseki*, 24 Vet.App. 428, 438 (2011) (Lance, J., concurring) (noting that "any given medical issue is either simple enough to be within the realm of common knowledge for lay claimants and adjudicators or complex enough to require an expert opinion").

Moreover, in *Jandreau v. Nicholson*, the U.S. Court of Appeals for the Federal Circuit noted that identifying a form of cancer was an example of when a lay person—in this case, the Board—*would not be competent to identify a condition*. 492 F.3d 1372, 1377 fn 4 (Fed. Cir. 2007). Therefore, *the only competent opinion as to the onset of the appellant's prostate cancer is Dr. Tinetti's August 31, 2009, letter*, which dates the onset of the appellant's prostate cancer in 1995-96. *Cf. Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) ("[T]he Board may not consider the absence of evidence as substantive negative evidence.) Accordingly, the Board's requirement of a "definitive diagnosis" and its determination that the presence of cancer earlier than 1998 was not indicated is simply untenable. *See DeLisio v. Shinseki*, 25 Vet.App. 45, 56 (2011) ("entitlement to benefits for a disability or disease does not arise with a medical diagnosis of the condition, but with the manifestation of the condition . . .").

Based on the foregoing, the Court holds that the Board clearly erred when it determined that the preponderance of the evidence was not at least in equipoise as to an onset of the appellant's prostate cancer earlier than 1998. *See Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) ("The Court reviews factual findings under the 'clearly erroneous' standard such that it will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect."); *Mariano v. Principi*, 17 Vet.App. 305, 313 (2003) (applying the "clearly erroneous" standard to assess the Board's application of the "equipoise standard" under 38 U.S.C. § 5107(b)); *see also* 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."). Thus, the Court will reverse and remand the Board's decision for it to assign an effective date of October 10, 2005. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (holding that reversal is the appropriate remedy when the Board's decision is clearly erroneous because the "only permissible view of the evidence is contrary to the Board's decision").

To the extent that the appellant asserts that his assigned disability rating was determined using the wrong diagnostic code (DC), the Court will not address the issue. Appellant's Br. at 8-9. Rather, the Court does not have jurisdiction over this issue, as the selection of the DC and disability rating itself are separately appealable issues and the appellant did not appeal them to the Board. R. at 284 (Dec. 2007 request for an earlier effective date); 249-53 (Oct. 2008 rating decision denying an earlier effective date); 239 (Nov. 2008 Notice of Disagreement as to effective date); *see* 38 U.S.C. § 7252; *Ledford v. West*, 136 F.3d 776, 780 (Fed. Cir. 1998) (holding that the Court lacks jurisdiction over claims not appealed to and unaddressed by the Board). Moreover, the Court notes that the appellant chose to ignore the Secretary's arguments in his reply brief and, without more, the Court is not persuaded. *See* Reply Br. at 1-11; *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Accordingly, on remand, the Board must enter a finding of an effective date of October 10, 2005. The appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73

(1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's February 21, 2013, decision is REVERSED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: September 8, 2014

Copies to:

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