

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-667

ALLEN B. WILSON, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before IVERS, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet.App. R. 28(i),
this action may not be cited as precedent.*

The veteran had active service from August 1965 to February 1966. Record (R.) at 46. His claim to establish service connection for a psychiatric disorder was originally adjudicated in an unappealed rating decision dated May 1966. R. at 43. In that decision, the rating board noted that the appellant had been diagnosed with schizophrenic reaction during service but concluded, contrary to findings of a Physical Evaluation Board (R. at 31), that the condition had preexisted the veteran's period of service and was not aggravated during service. R. at 44. Subsequent attempts to reopen the claim were denied in June 1976 and August 1979. R. at 59, 92. The August 1979 rating decision confirmed a prior denial of service connection for the veteran's "nervous condition" as "not incurred in or aggravated by [his] military service." R. at 90, 92.

In November 1994, the veteran again sought to reopen his claim. R. at 110. He submitted a physician's statement that diagnosed bipolar disorder. R. at 107. Dr. Heilpern asserted that the veteran's illness was misdiagnosed in service, that service triggered the onset of his condition, and that he had been consistently and chronically impaired, with typical remissions and active phases since service. *Id.* Another statement, from Dr. Pohl, concurred with Dr. Heilpern's assessment. R. at 143-44. Both the regional office (RO) and the Board of Veterans' Appeals (Board or BVA) concluded that this evidence was not new and material and declined to reopen the appellant's previous claim. R. at 1, 114-15.

The Court generally reviews new-and-material-evidence determinations under a deferential standard of review. *Elkins v. West*, 12 Vet.App. 209, 217-18 (1999) (en banc). That standard may be the "clearly erroneous" standard if the Board has resolved a question of fact, or the "arbitrary and capricious" standard if the Board has applied the law to the facts. *Id.*; see also 38 U.S.C. § 7261(a). The Court will review the BVA decision now on appeal under the latter standard of

review, because the Board applied existing case law to the facts to support the conclusion that new and material evidence had not been submitted to reopen the veteran's claim.

The Board cited *Evans v. Brown*, 9 Vet.App. 273, 283 (1996), for the proposition that new evidence "must address the specified basis for the last disallowance" of a claim in order to be probative and, thereby, material. R. at 6. The Board based its decision on a determination that the evidence submitted since the last disallowance of the veteran's claim, in August 1979, did not address the specified basis for that disallowance. R. at 6-7. The Board clearly erred in its reading and application of the law.

Evans states that newly submitted evidence must be probative of an "issue which was a specified basis for the last final disallowance," *not* that the evidence must address the specified basis for the disallowance. *Evans, supra*. The issue that has been the specified basis for the disallowance of the veteran's claim all along, and that was expressly stated as the basis for the disallowance of his claim in 1979, is whether his psychiatric disability was incurred in or aggravated by service for purposes of service-connected disability benefits. See R. at 90, 92. The Board misstated the issue as whether his condition had been aggravated by service, and concluded that the newly submitted evidence was not probative of that issue. R. at 7. The Board's conclusion was a misapplication of law and the matter requires readjudication. See *Elkins, supra*; 38 U.S.C. § 7261(a).

Upon consideration of the foregoing, it is

ORDERED that the veteran's motion for summary disposition and remand, on a basis other than that stated herein, is denied, the Secretary's motion for summary affirmance is denied, the November 25, 1997, BVA decision is VACATED, and the matter is REMANDED for readjudication consistent with this order.

DATED: Sep 22 1999

BY THE COURT:

DONALD L. IVERS
Judge

Copies to:

Sean Kendall, Esq.
1942 Broadway, Suite 403
Boulder, CO 80302

Office of General Counsel (027)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420