

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

LEON H. MCCORMICK,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-1752

Appeal from the United States Court of Appeals for
Veterans Claims in No. 21-3242, Judge William S. Green-
berg.

Decided: November 3, 2022

LEON HARDY MCCORMICK, Petersburg, VA, pro se.

JOSHUA A. MANDLEBAUM, Commercial Litigation
Branch, Civil Division, United States Department of Jus-
tice, Washington, DC, for respondent-appellee. Also repre-
sented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M.
McCARTHY; RICHARD STEPHEN HUBER, Y. KEN LEE, Office
of General Counsel, United States Department of Veterans
Affairs, Washington, DC.

Appendix A

Before DYK, TARANTO, and HUGHES, *Circuit Judges*.

PER CURIAM.

Leon H. McCormick, a veteran of the Korean War, was diagnosed with asbestosis with pulmonary nodules and sought compensation for his disability from the Department of Veterans Affairs. The Board of Veterans' Appeals ("Board") found that Mr. McCormick's condition, though service connected, did not entitle him to compensation, and the United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed. Because Mr. McCormick raises no colorable constitutional questions on appeal, and all his other challenges would require us to review factual determinations, the application of law to facts, or decisions in other proceedings not properly part of this appeal, we lack jurisdiction. *See* 38 U.S.C. § 7292(a), (d)(2). *We dismiss.*

BACKGROUND

Mr. McCormick served in the Air Force between 1952 and 1953 during the Korean War. Mr. McCormick suffers from asbestosis—a lung disease caused by the inhalation of asbestos fibers. The VA has determined that his condition is service connected, but with a 0% disability rating.

Under VA regulations, a veteran with service-connected asbestosis is entitled to a compensable rating when his or her lung capacity falls below 80 percent of predicted capacity as measured by forced vital capacity or diffusion capacity for carbon monoxide. *See* 38 C.F.R. § 4.97 (2020). Between 2014 and 2019, Mr. McCormick's lung capacity was tested four times. In all but one of those tests, Mr. McCormick's lung capacity exceeded the threshold under which he would be entitled to a compensable rating. In one of those pulmonary function tests, however, administered in July 2016, Mr. McCormick showed notably weaker lung

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capacity, in the compensable range under both relevant metrics.

In January 2018, the VA denied Mr. McCormick's request for compensation for his asbestosis. Mr. McCormick filed a notice of disagreement with the agency, and ultimately an appeal with the Board. In July 2019, the Board denied Mr. McCormick's request for a higher rating. The Board recognized that Mr. McCormick's July 2016 test had shown his lung function to be "significantly worse than [the] other test findings" reflected, but concluded that, in light of Mr. McCormick's "overall medical history," the result was "an outlier." S.A. 34–35.

On appeal at the Veterans Court, the parties jointly moved to remand the case in light of what they agreed was an inadequate explanation by the Board for rejecting the July 2016 test results. The court granted the motion. On remand, the VA asked a medical examiner if the July 2016 pulmonary tests accurately represented Mr. McCormick's asbestosis. The physician, a general practitioner and specialist in obstetrics and gynecology, concluded that the 2016 results "were spurious" and inconsistent with other evidence of Mr. McCormick's medical condition. S.A. 18.

In January 2021, the Board reweighed the evidence and, relying in part on the medical examiner's report, again denied Mr. McCormick's claim for a higher rating for his asbestosis.

Mr. McCormick appealed to the Veterans Court. Finding no clear error in the Board's decision, the court affirmed. This appeal followed.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited by statute. See 38 U.S.C. § 7292. "[A]bsent a constitutional issue, [we] may not review challenges to factual determinations or challenges to the application of a law or regulation to facts." *Cook v. Principi*, 353 F.3d 937,

939 (Fed. Cir. 2003). Mr. McCormick has not raised an issue over which we have jurisdiction.

Mr. McCormick has not pointed to a statutory or regulatory interpretation by the Veterans Court with which he disagrees. He contends that the Board failed to comply with the Veterans Court remand, violated its duty to review the entire record, and reached its decision based on an incomplete Disability Benefits Questionnaire. *See* Appellant's Informal Br. Doc. 2 at 3–4. He also asserts that the VA appointed an inadequate medical examiner, failed to assist him properly in pursuing his claim, and ignored factual findings in his favor. *Id.* All of those arguments either address factual determinations or “reduce[] to” challenges to the “application of the law to facts.” *Cook*, 353 F.3d at 937.

Mr. McCormick also raises several issues unrelated to the Veterans Court decision that he has appealed, primarily related to another claim for service-connected disability and the agency's appointment of a fiduciary on his behalf. *See* Appellant's Informal Br. Doc. 2 at 3–4. We lack jurisdiction to consider challenges to decisions other than those rendered by the Veterans Court in this case. *See* 38 U.S.C. § 7292(a).

Finally, Mr. McCormick argues that he was denied due process under the Fourteenth Amendment, but does not explain how. *See* Appellant's Informal Br. Doc. 2 at 2; Appellant's Informal Reply Br. 2. Bare invocations of the Constitution do not suffice to grant us jurisdiction, “and this is not a case where a constitutional claim is apparent in the absence of explanation.” *Booker v. McDonough*, No. 2021-1566, 2021 WL 3871966, at *3 (Fed. Cir. Aug. 31, 2021); *see Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999) (“To the extent that [the veteran] has simply put a ‘due process’ label on his contention that he should have prevailed on his . . . claim, his claim is constitutional in name only. . . . [The veteran's] characterization of [a]

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question as constitutional in nature does not confer upon us jurisdiction that we otherwise lack.”).

CONCLUSION

We dismiss Mr. McCormick’s appeal for lack of jurisdiction.

DISMISSED

COSTS

No costs.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-3242

LEON H. MCCORMICK, APPELLANT,

v.

DENIS McDONOUGH,
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*: Korean War veteran Leon H. McCormick pro se appeals a January 13, 2021, Board of Veterans' Appeals decision that denied an initial compensable disability rating for asbestosis with pulmonary nodules. Record (R.) at 15-25. The pro se appellant makes multiple undeveloped assertions of error regarding the Board's denial of a higher rating for his service-connected asbestosis, and the Court will therefore construe his arguments liberally as a general allegation of error in the Board decision.¹ *See* Appellant's Informal Brief at 1-13; *see also Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (it is the Court's practice to liberally construe the pleadings of pro se appellants). For the following reason, the Court is left with no choice but to affirm the January 2021 decision on appeal.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation

¹ The appellant raises multiple arguments pertaining to matters that were not the subject of the Board decision on appeal. The only matter the Court can address here is whether the Board erred in denying a compensable rating for asbestosis with pulmonary nodules, because this is the subject of the Board decision on appeal. 38 U.S.C. § 7252(a). To the extent the appellant cites pages of the record as evidence in support of his claim, these documents do not support a higher rating and it is not clear why the appellant has cited them. Appellant's Informal Brief at 1.

Appendix B

of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Air Force from February 1952 to October 1953, including service during the Korean conflict. R. at 3644. He is service connected for asbestosis with pulmonary nodules. R. at 1371-84.

In February 2020, the Court granted the parties' joint motion for remand, wherein they agreed that the Board failed to properly address favorable July 2016 pulmonary function test (PFT). R. at 476-82. The Board then sought a VA opinion to address these results. In September 2020, a physician provided this opinion:

It appears that the PFTs [pulmonary function tests] 7/20/16 were spurious. The PFTs [undergone on] 5/27/14 showed mild restrictive lung disease, with a normal DLCO [diffusing capacity of carbon monoxide]. The PFTs [undergone on] 8/16/17 had similar parameters with minimal obstructive and mild restrictive lung disease. The DLCO was 105 (high normal). Additionally, DLCO [on] 4/9/19 was 99, with "no impact on diffusion", per the report. The values [revealed on] 7/20/16 show moderate restrictive lung disease with severely reduced DLCO. Conditions that impact DLCO[] generally do not get better, and do not fluctuate from normal to frankly abnormal and back to completely normal, without symptoms or a defining event. The veteran has a history of PE [pulmonary embolism] in 2012 and 2017. There is no evidence of any singular pulmonary event in 2016 to account for the spurious results. The likelihood of the veteran being asymptomatic with PEs in 2016 is near zero. It is almost medically impossible for the veteran to go a year with undiagnosed and untreated pulmonary emboli, given his history and the depth of his medical care. Therefore, the records in 2016 do not reflect the veteran's current status nor his status in 2014. The 2016 PFTs, more likely than not, do not reflect the veteran's true respiratory status in 2016. There are no records suggestive of PEs in a medical community aware of the veteran's history, as well documented in the medical records. If an unexplained/undocumented event accounts for these DLCO and other changes, it clearly resolved or improved dramatically within one year. There is no clear explanation for the veterans claimed increase in symptoms. Pulmonary emboli do not spontaneously resolve.

R. at 64.

In the January 2021 decision on appeal, the Board denied an initial compensable rating for the appellant's service-connected asbestosis with pulmonary nodules. R. at 15-25. The Board addressed the medical evidence of record and relied on the September 2020 VA opinion to discount the favorable July 2016 PFT results. R. at 16-25. This appeal followed.

The Court discerns no clear error in the Board's denial of a compensable rating for the appellant's asbestosis. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) ("[I]t is the function of this Court to decide whether such factual determinations made by the [Board] . . . constituted clear error."). The Board addressed the medical evidence of record and explained why the appellant was not entitled to a compensatory rating based on the appellant's PFT results. The Board acknowledged that the July 2016 PFT results were favorable evidence of a higher rating, but the Board relied on the September 2020 examiner's opinion that adequately explained why he believed the July 2016 PFT results were incorrect. *See* R. at 20-21. The Board addressed all favorable evidence of record and provided an adequate statement of reasons or bases for denying a compensable rating here. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."). Because the Board properly relied on the evidence of record, the Court, unfortunately, concludes that there is no clear error in the Board's determination. *See Gilbert*, 1 Vet.App. at 53 (1990).

For the foregoing reason, the January 13, 2021, Board decision on appeal is AFFIRMED.

DATED: February 8, 2022

Copies to:

Leon H. McCormick

VA General Counsel (027)

Leon H. McCormick
CAVC
BVA
2 pages

RELATED CASES

1. McCormick V. Wilkie NO. 19-8541, July 24, 2020 United States Court of Appeals for Veterans Claims (CAVC) Remand to include Asbestos Exposure, by Veterans Law Judge: Meredith Washington D.C.
2. McCormick V. Wilkie No. 19-7600, February 20, 2020 United States Court of Appeals for Veterans Claims (CAVC) Joint Motion Partial Remand for Asbestosis with Pulmonary Nodules, by Veterans Law Judge Allen, Washington D.C.
3. McCormick No. 19-02 878A Board of Veterans' Appeals (BVA) June 25, 2020 Remanded for Asbestosis with Pulmonary Nodules, Veteran Law Judge Larkin Washington D.C.
4. McCormick No. 19-02-878A Board of Veterans' Appeals (BVA) July 9, 2019 Order denied for compensable Rating for Asbestosis, Veteran Law Judge Brown Washington D.C.
5. McCormick No. 19-02-878A Board of Veterans Appeals (BVA) January 13, 2021 Order against Asbestosis Veteran Law Judge Pryce Washington D.C.
6. McCormick No. 190619-10237 Board of Veterans' Appeals (BVA) February 27, 2021 Veterans Law Judge March Washington D.C. Asbestosis related

Appendix C

7. McCormick No. 16-57317 Board of Veterans' Appeals (BVA) July 13, 2017 Remanded for Asbestosis and other conditions Veteran Law Judge Auer Washington D.C.

8. McCormick No. 16-57317 Board of Veterans' Appeals (BVA) April 25, 2018 Remanded for Asbestosis and other conditions, Veteran Law Judge Auer Washington D.C.