

NOTE: This disposition is nonprecedential.

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

DAVID O. KEEL,
Claimant-Appellant

v.

**ROBERT WILKIE, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee

2020-1733

Appeal from the United States Court of Appeals for
Veterans Claims in No. 18-3786, Judge Joseph L. Toth.

Decided: October 7, 2020

DAVID O. KEEL, Hualapai, AZ, pro se.

JOSHUA E. KURLAND, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent-appellee. Also represented by
JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT
EDWARD KIRSCHMAN, JR.

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

PER CURIAM.

David Keel appeals the decision of the United States Court of Appeals for Veterans Claims (“Veterans Court”) that dismissed in part and vacated and remanded in part an appeal from the Board of Veterans’ Appeals (“Board”). We *affirm* the Veterans Court’s dismissal of the appeal from the Board’s remand decision. We *dismiss* Mr. Keel’s appeal of the Veterans Court’s order vacating and remanding for lack of jurisdiction.

BACKGROUND

Mr. Keel served in the Army from May to December 1980. Since 1981, Mr. Keel has repeatedly sought disability benefits from the Department of Veterans Affairs (“VA”), and his requests have been repeatedly rejected.

In 2011, Mr. Keel filed a claim for benefits, seeking (1) to reopen previously denied claims for service connection for bilateral hip disorder, ischemic heart disease, gastroesophageal reflux disease (“GERD”), and low back disorder, and (2) benefits based on various other new conditions. His claims were denied by the VA regional office (“RO”).

Mr. Keel appealed to the Board. As part of Mr. Keel’s appeal, he participated in a Board hearing in October 2017, held by video conference. According to Mr. Keel, the transcript he received of the hearing was unreadable, omitted testimony, and “ran together” text. He also claimed that, at the hearing, his representative from Disabled American Veterans, a veterans service organization, improperly testified against him. App’x 3.¹

In a July 2018 order, the Board denied Mr. Keel’s request to reopen service connection claims for a bilateral hip

¹ “App’x” refers to the appendix attached to the government’s response brief.

disorder, ischemic heart disease, and GERD. The Board granted Mr. Keel's request to reopen a claim for service connection for a low back disorder and remanded that claim and the three other new claims for further record development.

Mr. Keel appealed the Board's order to the Veterans Court. First, Mr. Keel raised perceived errors with the transcript of the October 2017 Board hearing. The Secretary conceded error in that there was no evidence that Mr. Keel had been advised of his right to review the hearing transcript and seek correction of any perceived errors, and the Secretary requested the Veterans Court to remand so that Mr. Keel could seek correction of any transcript errors from the Board. The Veterans Court accepted the Secretary's concession of error, vacated the Board's decision, and remanded "to allow Mr. Keel to submit a request for correction of any perceived errors in the transcript of the October 2017 Board hearing" in accordance with the Board's procedural rules. App'x 4.

Second, Mr. Keel argued that the conduct of a representative from Disabled American Veterans at the October 2017 Board hearing had been improper. "Mr. Keel assert[ed] that the representative 'testified against' him and otherwise took actions on his behalf with which he disagreed." *Id.* (internal citation and punctuation omitted); see also Reply Br. 4. The Veterans Court rejected his argument, finding that, "[e]ven assuming for present purposes that Mr. Keel's assertions are accurate, a representative from a veterans service organization is not a VA employee over whom the Secretary has authority or a legal practitioner over whom the Court has oversight." App'x 4-5.

Third, Mr. Keel appealed the portion of the Board's order that remanded the low back service-connection claim and three other issues to the RO. The Veterans Court found that it did not have jurisdiction over the Board's remand because it was not a final Board decision.

Mr. Keel appeals.

DISCUSSION

Mr. Keel on appeal seeks review of the Veterans Court's remand order and the Board's remand order.

I

We first conclude that we have no jurisdiction to review the Veterans Court's decision remanding claims to the Board. "[W]e generally do not review the Veterans Court's remand orders because they are not final decisions." *Ebel v. Shinseki*, 673 F.3d 1337, 1340 (Fed. Cir. 2012). "Such a finality requirement is based on prudential considerations." *Williams v. Principi*, 275 F.3d 1361, 1363 (Fed. Cir. 2002). We will depart from this strict rule of finality when three conditions ("the *Williams* conditions") are met:

(1) [T]here must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, (c) if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and, (3) there must be a substantial risk that the decision would not survive a remand, i.e., that the remand proceeding may moot the issue.

Id. at 1364 (footnotes omitted).

The Veterans Court's remand order regarding the transcript does not meet these conditions. There has been no showing that any legal ruling would be mooted by the remand. Because Mr. Keel's appeal of the Veterans Court's order to remand does not meet the *Williams* conditions, we dismiss it for lack of jurisdiction.

II

Mr. Keel also appeals the Veterans Court's rejection of his complaints regarding the representative from Disabled Veterans of America's conduct during the October 2017 board hearing. That issue concerns the claims that have been remanded to the Board and as to which there is no final decision. While we are uncertain that the asserted conduct of the representative would not be proper grounds for an appeal to the Veterans Court, this issue can be raised again before the Veterans Court on appeal of a new decision by the Board as to those claims and then, if necessary, to this court.

III

Finally, we affirm the Veterans Court's judgment that it lacked jurisdiction over the low back service-connection claim and other issues that the Board remanded to the RO. Although we lack jurisdiction to review the Veterans Court's remand order regarding the hearing transcript, that does not deprive us of jurisdiction to consider other claims on appeal that are separate from the remanded claims. "This court has consistently recognized that the various claims of a veteran's overall 'case' may be treated as distinct for jurisdictional purposes." *Elkins v. Gober*, 229 F.3d 1369, 1374 (Fed. Cir. 2000). Here, the claims for low back service connection and the three other issues remanded by the Board to the RO are distinct from the claims for service connection for bilateral hip disorder, ischemic heart disease, and GERD, which the Veterans Court remanded to the Board in connection with the hearing transcript.

We review the Veterans Court's determination of its own jurisdiction de novo. *Maggitt v. West*, 202 F.3d 1370, 1374 (Fed. Cir. 2000). The Veterans Court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252. "Our case law and [38 U.S.C § 7104(d)(3)] define a Board decision as including an

order granting appropriate relief or denying relief.” *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005) (Board’s remand “for additional medical examinations” was not a “decision” because it did not grant or deny relief). Here, the Board’s remand for further record development did not grant or deny relief. Thus, the Board’s remand did not constitute a decision within the Veterans Court’s jurisdiction.

AFFIRMED IN PART, DISMISSED IN PART

COSTS

No costs.

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JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED IN PART, DISMISSED IN PART

ENTERED BY ORDER OF THE COURT

October 7, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3786

DAVID O. KEEL, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: In a July 2018 decision, the Board found new and material evidence had not been submitted and therefore declined veteran David O. Keel's request to reopen service-connection claims for a bilateral hip disorder, ischemic heart disease, and gastroesophageal reflux disease (GERD). (The Board reopened a service-connection claim for a low back disability and remanded that claim, along with three other issues. As remands are not final Board decisions, the Court has no jurisdiction over those matters. *See Martinez v. Wilkie*, 31 Vet.App. 170, 173 n.2 (2019).) Mr. Keel appeals and is self-represented.

His handwritten informal briefs are not easy to follow. But one thing with which he clearly takes issue concerns the October 2017 Board hearing. The hearing was held via videoconference with the Board member in Washington, D.C., and the veteran in Phoenix, Arizona; a representative from Disabled American Veterans also participated. Per Mr. Keel, the hearing transcript contained in the record before the agency—which he received on a digital disc in September 2018—was unreadable, omitted testimony, and "ran together" text. Informal Br. at 1. In fact, he raised these allegations when the record before the agency was first served on him. This prompted the Secretary to move unilaterally for remand so that the veteran could seek correction of any transcript errors from the Board. But Mr. Keel opposed the motion, believing it would require him to start the

claims process from scratch. In April 2019, the Court denied the Secretary's motion without prejudice and advised that he could reassert his arguments, if appropriate, during briefing.

Because Mr. Keel's opening brief again raised the transcript issue, the Secretary again concedes error and urges the Court to remand. The Secretary relies on Rule 714 of the rules governing Board hearings, which provides:

If an appellant wishes to seek correction of perceived errors in a hearing transcript, the appellant or his or her representative should move for correction of the hearing transcript within 30 days after the date that the transcript is mailed to the appellant. The motion must be in writing and must specify the error, or errors, in the transcript and the correct wording to be substituted. The motion must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. The ruling on the motion will be made by the presiding Member of the hearing.

38 C.F.R. § 20.714 (2019).¹ The Secretary contends there is no evidence that Mr. Keel was advised of his right to review the hearing transcript and seek correction of any perceived errors or of the timeframe in which he needed to exercise that right. Indeed, the Secretary observes, there is no indication that the veteran was even sent a copy of the hearing transcript prior to his receipt of the record before the agency in September 2018. The Secretary maintains, therefore, that remand is necessary to provide Mr. Keel the opportunity to exercise his procedural rights before the Board.

Mr. Keel's informal reply brief does not clearly indicate his position on the Secretary's proposal to remand, but it still maintains that the Board hearing transcript is incomplete or otherwise defective. In these circumstances, the Court accepts the Secretary's concession of error, vacates the Board decision, and remands the matter to allow Mr. Keel to submit a request for correction of any perceived errors in the transcript of the October 2017 Board hearing in accordance with the procedures specified in Rule 714.

The only other obvious complaint in the veteran's briefs relates to the conduct during the Board hearing of his Disabled American Veterans representative. Mr. Keel asserts that the representative "testified against" him, Informal Br. at 1, and otherwise took actions on his behalf with which he disagreed. Even assuming for present purposes that Mr. Keel's assertions are accurate, a representative from a veterans service organization is not a VA employee over whom

¹ The Secretary cites this provision as Rule 716, but it was redesignated as Rule 714, effective February 19, 2019. *See* VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 188 (Jan. 18, 2019).

the Secretary has authority or a legal practitioner over whom the Court has oversight. So, any complaints Mr. Keel may have regarding his representative are outside the scope of this appeal.²

The Court VACATES the portions of the July 9, 2018, Board decision relating to hip, cardiac, and GERD claims and REMANDS those matters for further proceedings consistent with this opinion.

DATED: February 28, 2020

Copies to:

David O. Keel

VA General Counsel (027)

² The Court has tried to discern whether there are any other meritorious arguments in the remainder of Mr. Keel's briefs but has been unable to do so.