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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-2760

EDWIN A. SCHWANKE, JR., APPELLANT,

V.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Edwin A. Schwanke, Jr., through counsel appeals an April 11, 2022, Board of Veterans' Appeals (Board) decision denying (1) restoration of a 100% rating for lung cancer, status post resection of the left upper lobe lung, and (2) a compensable rating for residuals of lung cancer, status post resection of the left upper lobe lung. Record (R.) at 4-15. In September 2022, the Court granted the appellant's motion to stay proceedings in this matter pending resolution by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) of *Love v. McDonough*, 106 F.4th 1361 (Fed. Cir. 2024), and this Court's issuance of mandate. The Federal Circuit issued its decision in *Love* in July 2024, and the parties recently completed the briefing in this case.

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from July 1969 to July 1971. R. at 2923. After he filed a claim in December 2019, a VA regional office (RO) awarded disability

compensation for lung cancer in a March 2020 rating decision and assigned a 100% rating under Diagnostic Code (DC) 6819. R. at 1967-75. The RO informed the appellant that the 100% rating was based on active malignancy and that the rating would "continue beyond the cessation of any surgery, radiation treatment, antineoplastic chemotherapy or other therapeutic procedures." R. at 1968; *see* 38 C.F.R. § 4.97, DC 6819 note (2024). Further, "[s]ix months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination." *Id.* The appellant underwent a VA examination in October 2020. R. at 1841-52. The examiner opined that the appellant's lung cancer was in remission, noting that the appellant underwent surgery in November 2019 and that an April 2020 computed tomography scan revealed "no cancer." R. at 1850; *see* R. at 1848-50.

Based on that examination report, the RO proposed to decrease the appellant's lung cancer rating to 0%. R. at 1831-32. In March 2021, the RO decreased the rating to 0%, effective June 1, 2021. R. at 1699. The appellant appealed to the Board, seeking restoration of the 100% rating. R. at 54. In that regard, his counsel submitted argument that the DC 6819 note exceeds VA's authority under 38 U.S.C. § 1155[1] to adopt and apply a rating schedule and, therefore, VA erred by reducing the appellant's lung cancer rating without affording him certain protections found in 38 C.F.R. § 3.343. R. at 57-59.

In April 2022, the Board denied restoration of the 100% rating for lung cancer and denied a compensable rating for residuals of lung cancer. R. at 4-15. Regarding the reduction of the rating from 100%, the Board found that the October 2020 examination report reflected that the appellant's lung cancer was in remission and that there were no residual conditions or complications. R. at 10. Further, the Board found that there was no evidence of recurrence or metastasis of the neoplasm or additional treatment after November 2019. *Id.* The Board concluded that, pursuant to relevant

[1] The statute provides as follows:

> The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10[%], 20[%], 30[%], 40[%], 50[%], 60[%], 70[%], 80[%], 90[%], and total, 100[%]. The Secretary shall from time to time readjust this schedule of ratings in accordance with experience. However, in no event shall such a readjustment in the rating schedule cause a veteran's disability rating in effect on the effective date of the readjustment to be reduced unless an improvement in the veteran's disability is shown to have occurred.

38 U.S.C. § 1155.

caselaw and the DC 6819 note, the appellant's 100% rating for lung cancer was properly reduced. R. at 9-12. Turning to the appropriate rating following the reduction, the Board found that a compensable rating was not warranted based on the appellant's scar resulting from his November 2019 surgery and his respiratory functioning. R. at 12-15. This appeal followed.

II. ANALYSIS

A. Parties' Arguments

The appellant first contends that, although the Court is generally precluded by 38 U.S.C. § 7252(b) from reviewing the rating schedule, he presents a constitutional challenge to a rating schedule provision, which the Court is permitted to review. Appellant's Brief (Br.) 6-8 (citing *Wingard v. McDonald*, 779 F.3d 1354, 1356-57 (Fed. Cir. 2015)). He further acknowledges that, in *Love*, the Federal Circuit held that subsection 7252(b) foreclosed judicial review of the veteran's argument that the note accompanying DC 7528,[2] which is substantially similar to the DC 6819 note, exceeded the Secretary's authority under section 1155. *Id.* at 5-7. However, he asserts that the Federal Circuit did not address whether such regulatory provisions are invalid as unconstitutional. *Id.* at 7-8.

In that regard, he maintains that the DC 6819 note exceeds the Secretary's authority under section 1155 to promulgate the rating schedule and is therefore an unconstitutional usurpation of legislative power. Appellant's Br. at 8-14; Reply Br. at 2-7. He asserts that section 1155 only authorizes "the Secretary to develop and maintain classifications by 10% interval[s] of the extent to which disabilities decrease an average veteran's earning capacity," and the Secretary is not permitted "to include in th[e] ratings schedule any regulatory provision addressing any other subject." Appellant's Br. at 11. Thus, he submits, that part of the rating schedule containing a mechanism (here, the DC 6819 note) for "VA to discontinue a 100% rating evaluation irrespective of whether VA has afforded the procedural protections of § 3.343(a) is . . . unconstitutional." *Id.*

[2] The note accompanying DC 7528 provides as follows:

> Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100[%] shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local reoccurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant.

38 C.F.R. § 4.115b, DC 7528 note (2024).

at 10. Specifically, he avers that including "an off-topic provision within [the rating schedule] violates the Constitution's separation of powers" because it amounts to VA adopting a "legislative rule" whereas "legislative power [is vested] in Congress." *Id.* at 11, 12; *see id.* at 13 ("Promulgating a legislative rule beyond the scope of Congress's delegation of authority is what the Secretary has done here."). Finally, the appellant argues that the Board prejudicially erred by relying on the unconstitutional note to reduce his 100% lung cancer rating and that the part of the Board's decision assigning a noncompensable post-decrease rating is inextricably intertwined with the validity of the decrease. *Id.* at 15-16.

The Secretary counters that the appellant has not presented an actual constitutional challenge to DC 6819 and that he has instead proffered the same statutory interpretation that the Federal Circuit held it could not review in *Love*. Secretary's Br. at 5-8. Accordingly, the Secretary concludes, the appellant's challenge to the DC 6819 note is not subject to review by the Court, and the appellant has not demonstrated Board error. *Id.* at 9. In reply, the appellant maintains that he presents a constitutional challenge to the rating schedule over which the Court has jurisdiction. Reply Br. at 2-7.

B. Law

The appellant's lung cancer is rated under 38 C.F.R. § 4.97, DC 6819, as a malignant neoplasm of the respiratory system. DC 6819 provides ratings for all malignant neoplasms of the respiratory system at 100%, which "shall continue beyond the cessation of any surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure," and the veteran must undergo a VA examination 6 months after treatment ends to determine the proper disability rating. 38 C.F.R. § 4.97, DC 6819 note. If, after 6 months, "there has been no local recurrence or metastasis," the rating schedule directs that the condition be "rate[d] on residuals." *Id.* The Board's determination of the proper disability rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Buckley v. West*, 12 Vet.App. 76, 81 (1998). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Pursuant to 38 U.S.C. § 7252(b), "[t]he Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule." 38 U.S.C. § 7252(b). In *Wanner v. Principi*, the Federal Circuit held that

the statutory scheme in sections 7252(b) and 7292(a) "consistently excludes from judicial review all content of the ratings schedule as well as the Secretary's actions in adopting or revising that content." 370 F.3d 1124, 1129 (Fed. Cir. 2004). The Federal Circuit also held that "[t]he Secretary's discretion over the schedule, including procedures followed and content selected, is insulated from judicial review." *Id.* at 1131; *see Larson v. McDonough*, 10 F.4th 1325, 1327-28 (Fed. Cir. 2021). Then, in *Wingard*, the Federal Circuit reiterated its holding in *Wanner*, explaining that section 7252(b) "squarely precludes [this Court] from determining whether the schedule . . . substantively violates statutory constraints." 779 F.3d at 1356. The Federal Circuit also laid out three exceptions to the principle that this Court may not review the rating schedule. *Id.* at 1356-57. Those exceptions are cases (1) involving a constitutional challenge, (2) involving an interpretation of language in the regulations related to the schedule, and (3) involving a purely procedural challenge to the Secretary's adoption of schedule regulations. *Id.*

C. Discussion

The Court concludes that the appellant has not demonstrated that the Court has jurisdiction to address his argument that the DC 6819 note exceeds the Secretary's authority under section 1155. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188-89 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992) (explaining that the ultimate burden of establishing jurisdiction rests with the appellant). In that regard, although the appellant avers that he raises a constitutional question rather than one of statutory interpretation, he did not in his opening brief acknowledge the veteran's specific contentions in *Love* or explain how there is any distinction between his argument in the current appeal and the one rejected by the Federal Circuit in *Love*. The crux of the appellant's argument here is that "the part of DC 6819's [n]ote that purports to permit VA to discontinue a 100% rating evaluation irrespective of whether VA has afforded the procedural protections of § 3.343(a)," Appellant's Br. at 10, "exceeds [section] 1155's scope of authority that Congress delegated to the Secretary for creating and maintaining [the rating schedule's] classifications by 10% intervals of disabilities' severity and impact on average earning capacity," *id.* at 14. In other words, he submits, the inclusion of rating procedures in the rating schedule, rather than elsewhere in title 38 of the Code of Federal regulations, "violates [the U.S.

Constitution's] Article I, section 1[] assignment of legislative power to Congress and, in turn, is invalid as unconstitutional." *Id.* at 13-14.

By comparison, in *Love*, the Federal Circuit summarized the veteran's arguments as follows:

> Mr. Love argues that the Secretary may not adopt a ratings schedule that exempts certain diagnostic codes from the procedural protections for reductions set out in § 3.344 and similar regulations. [He] asserts that the Secretary's authority to promulgate a ratings schedule under [section] 1155 "extends *only* to correlating . . . a disability's symptoms with . . . the average resultant decrease that they cause in civilian earning capacity" and further that the scope of authority "simply does not extend to what requirements an examination report or medical opinion must (or need not) meet to be adequate for any particular adjudicative purpose."

106 F.4th at 1367 (citations omitted). Notably, although not explicitly discussed by the Federal Circuit, the veteran in *Love* (who was represented by the same counsel as the appellant) alleged that, "for the Secretary to exceed [section] 1155's scope of delegated authority by adopting into DC 7528's [n]ote an exception to the non-[rating schedule] examination-adequacy requirements authority *would usurp Congress' Article I legislative power*." Brief for the Appellant at 30-31, *Love v. McDonough*, No. 2023-1465 (Fed. Cir. June 16, 2023) (emphasis added). Despite Mr. Love's invocation of the U.S. Constitution, the Federal Circuit clearly held that his argument "that the Secretary exceeded his authority in promulgating DC 7528 is precisely the 'substantive statutory challenge' that *Wingard* concluded [the Federal Circuit] cannot review except under a 38 U.S.C. § 502 review proceeding." *Love*, 106 F.4th at 1368 (quoting *Wingard*, 779 F.3d at 1356); *see* Appellant's Br. at 6-7. Although the appellant attempts to distinguish his position from that in *Love* by couching his argument as involving a constitutional question, he fails to acknowledge that the Federal Circuit did not find the matter to be constitutional in nature, and he fails to otherwise explain how an argument premised on VA having exceeded its statutory authority truly amounts to a constitutional challenge. Ultimately, he does not persuasively explain how his contention is, at bottom, anything other than the same substantive challenge to the rating schedule that the Federal Circuit, and therefore this Court, held it cannot review. *See Love*, 106 F.4th at 1368.

In light of this conclusion, the Court need not address the remainder of the appellant's arguments that flow from his assertions regarding the validity of the DC 6819 note. Accordingly, the Court will affirm the Board's decision.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's April 11, 2022, decision is AFFIRMED.

DATED: May 16, 2025

Copies to:

Kent A. Eiler, Esq.

VA General Counsel (027)