

JAMES N. KITCHENS, APPELLANT, v. JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
APPELLEE.
7 Vet. App. 320; 1995 U.S. Vet. App. LEXIS 30
No. 93-256
January 19, 1995, Decided
UNITED STATES COURT OF VETERANS APPEALS
Before KRAMER, MANKIN, and HOLDAWAY, Judges. MANKIN, Judge, filed the opinion of the
Court, in which HOLDAWAY, Judge, joined. KRAMER, Judge, filed a concurring opinion.

Counsel

Ronald J. Marzullo for the appellant.

David W. Engel, Deputy Assistant General Counsel, with whom
Mary Lou Keener, General Counsel, Norman G. Cooper, Assistant General Counsel, and
Ralph G. Davis were on the brief, for the appellee.

Opinion

Editorial Information: Prior History

On Appeal from the Board of Veterans' Appeals

Opinion by: MANKIN

{7 Vet. App. 321} MANKIN, *Judge*: The appellant, James N. Kitchens, appeals the December 14, 1992, decision of the Board of Veterans' Appeals (BVA or Board) which denied restoration of a 100 percent rating for grand mal seizure disorder. The Secretary filed a brief, and the appellant filed a brief and a reply brief. Telephonic oral argument was held on November 30, 1994. The Court has jurisdiction pursuant to 38 U.S.C. § 7252 (a). The appellant seeks reversal of the BVA decision and reinstatement of his previous 100 percent disability rating. The Secretary urges affirmance of the BVA decision denying restoration of the previous rating. The Court will reverse the Board's decision and remand the matter for reinstatement of the 100 percent rating.

I. FACTUAL BACKGROUND

The appellant, James N. Kitchens, served on active duty in the United States Navy from June 30, 1960, to April 30, 1961. His entrance medical exam is negative for any abnormality or medical problem other than obesity. On an undetermined date in December 1960, while on the cruiser U.S.S. Dewey, the appellant was discovered unconscious. The service medical records of the appellant's indicate that he was found "blue and slobbering in his rack." The appellant could not recall this event when he was seen in sick bay. He was transferred to the destroyer U.S.S. Sierra where he was seen by the medical officer aboard. The medical officer's clinical impression was noted as "seizure? hypoglycemic[?]." On February 24, 1961, the appellant was transferred to the U.S. Navy Hospital in Portsmouth, Virginia, where he was diagnosed with epilepsy, grand mal. Two electroencephalograms (EEGs) were performed that revealed a "generalized borderline abnormal record." An April 3, 1961, report from a VA medical board interpreted the continuity of the abnormal EEGs as consistent with a grand mal disorder rather than an isolated seizure. On May 1, 1961, the appellant was transferred to the Temporary Disability Retired List and granted service connection for epilepsy, grand mal, effective upon his release from active duty service. A March 20, 1962, rating decision assigned a 10 percent rating to the appellant's disability and granted an effective date of May 1, 1961. On October 6, 1981, the VA regional office (RO) issued a rating decision that confirmed and continued the 10 percent rating which had become statutorily protected. See 38 U.S.C. § 110; _CFR_3.951 38 C.F.R. § 3.951(b) (1993).

In July and August 1982, the RO received two statements related to the appellant's claim. The first statement was from an acquaintance of the appellant who had witnessed the appellant having a seizure. The second statement was from the appellant's wife who stated that the appellant's seizure activity had increased in frequency and severity. {7 Vet. App. 322} On August 1, 1982, the appellant was admitted to a VA hospital for reevaluation of pain in the lower extremities. The admission notes for this period of hospitalization said the appellant complained of multiple types of seizures that were

inadequately controlled. On October 22, 1982, the RO issued a rating decision granting the appellant a temporary 100 percent disability rating based on this period of hospitalization.

On October 11, 1983, the appellant and his wife testified before a rating panel concerning the issues of entitlement to: (1) an increased disability rating for a seizure disorder; and (2) service connection for a back condition. The appellant received a 40 percent rating for his epilepsy in a November 4, 1983, rating decision, effective September 1, 1982. The rating increase for the seizure disorder was based on the testimony given before the rating panel and on hospital records.

The appellant was hospitalized on November 14, 1984, after having a seizure with a prolonged period of unresponsiveness. When admitted, the appellant reported a history of grand mal seizures since 1961 and a recent frequency of one to four seizures per month. In June and July 1985, two lay statements concerning the nature and frequency of the appellant's seizures were submitted to the RO. On July 3, 1985, a rating decision granted the appellant a 100 percent rating for epilepsy, grand mal.

the veracity of this patient's seizures. I do believe that he has a real seizure disorder. It is a well known fact that in many seizure patients the EEG's never show seizure focus[,] especially in deep temporal lesions. I have conducted an EEG with Topographic Brain Mapping Electroencephalograph activity in the left temporal lobe with a delayed P-300 response which is also compatible with decreased left temporal lobe function. This is well explained after the chronic history of seizures which are probably coming from the left temporal lobe.

On June 27, 1990, the RO hearing officer issued a decision denying the appellant's claim for permanent restoration of the previously assigned 100 percent disability rating. The reduction was effective as of April 1, 1990. The appellant filed a VA Form 1-9, Appeal to the BVA, on September 26, 1990. On December 6, 1990, the RO issued a confirmed rating decision continuing the appellant's reduced rating of 10 percent. The appellant's case proceeded to the BVA and on September 18, 1991, the Board issued a decision remanding the case to the RO for additional evidentiary development.

The appellant was admitted to a VA medical center where an EEG was performed on November 9, 1991. The EEG reported normal sleep activity, and no irritation was found. A seizure was not induced during this hospitalization because a VA cardiologist felt the appellant's condition was not stable enough for this procedure. The appellant was discharged with the recommendation that he return for observation and evaluation when he was cleared by a cardiologist. On March 9, 1992, the appellant was readmitted to a VA medical center for observation and evaluation. When the appellant was admitted, he gave the history of his seizure disorder. No seizures were observed during the observation and evaluation.

On April 10, 1992, the RO found that there was no clinical evidence of seizure activity and issued a confirming rating decision. The appellant's case was then returned to the BVA for final action. In the appeal, the appellant's representative argued:

The rating of [January 4, 1990] clearly violated the aforementioned provisions of _CFR_3.344 38 C.F.R. 3.344 , and was therefore erroneous. We ask that a gradual reduction in evaluation be assigned, provided further evaluation and examination demonstrates that sustained improvement has been achieved.

On December 14, 1992, the BVA issued a final decision denying the appellant's claim for entitlement to restoration of the 100 percent rating, currently rated as 10 percent disabling. The BVA found:

It [the record] supports a finding that sustained improvement has been shown, and that the improvement has been maintained. While the veteran has testified and has provided lay testimony concerning his seizure disorder, the medical evidence does not support a finding that he has seizures of the frequency and severity which would warrant a 100 percent evaluation. . . . All postservice electroencephalograms have been normal. After the RO was informed that the veteran was manufacturing his symptoms, a thorough and complete observation and evaluation was performed. There is medical opinion based on that hospitalization that he was exaggerating the frequency of his seizures.

James Kitchens, BVA 91-21 215, at 10-11 (Dec. 14, 1992).

{7 Vet. App. 324} II. ANALYSIS

A. Failure to Consider Applicable Regulations

In order for the VA to reduce certain service-connected disability ratings, the requirements of _CFR_3.344 38 C.F.R. § 3.344(a) and (b) must be satisfied. Because the appellant's rating had been in effect for more than five years, _CFR_3.344 38 C.F.R. § 3.344 (a) and (b) (1993) apply. See _CFR_3.344 38 C.F.R. § 3.344(c) (1993).

The appellant asserts, inter alia, that his 100 percent disability rating was reduced in violation of _CFR_3.344 38 C.F.R. § 3.344(a) . The Secretary acknowledges that § 3.344(a) is applicable but asserts that the BVA decision complied with this section. That section provides:



and lay evidence of record. As such, an increased evaluation will be denied.

Id. at 10-11. The above quoted statements show that the Board improperly reversed the standard of proof by requiring the appellant to prove entitlement to restoration of his previous 100 percent rating.

In *Brown v. Brown*, 5 Vet. App. 413 (1993), this Court held that when the issue is whether the RO is justified in reducing a veteran's protected rating, the BVA is required to establish, by a preponderance of evidence and in compliance with CFR 3.344 38 C.F.R. § 3.344(a) , that a rating reduction is warranted. Here, the Board erroneously reversed the burden, requiring that a preponderance of the evidence demonstrate that an increase is warranted.

III. CONCLUSION

Where, as here, the Court finds that the BVA has reduced a veteran's rating without observing applicable laws and regulation, such a rating is void ab initio and the Court will set it aside as "not in accordance with the law." 38 U.S.C. § 7261 (a)(3)(A); *see Brown, supra; Horowitz v. Brown*, 5 Vet. App. 217 (1993). Accordingly, the BVA decision of December 14, 1992, is REVERSED and the case REMANDED to the Board with instructions to reinstate the appellant's prior 100 percent rating effective the date of the reduction.

Concur

Concur by: KRAMER

KRAMER, *Judge*, concurring: In sustaining a rating reduction for epilepsy, the Board of Veterans' Appeals, pursuant to CFR 4.124A 38 C.F.R. § 4.124a , Diagnostic Code (DC) 8910 (1994), must make, based on adequate evidence of record, a finding as to the frequency and type of seizures that the veteran is experiencing. That finding must then, under the DC, support a rating at the reduced level. Here neither the medical opinion relied on by the Board nor the lay statements provide such evidence, and consequently the Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261 (a)(3)(A).