

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 12-0053

ROBERT M. BAUMAN, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: U.S. Navy veteran Robert M. Bauman appeals through counsel from a December 6, 2011, Board of Veterans' Appeals (Board) decision in which the Board denied service connection for diabetes mellitus, Parkinson's disease, essential tumors, and a pulmonary disorder, all as due to herbicide exposure. For the reasons stated below, the Court will set aside the December 2011 Board decision, and remand the claims for further proceedings.

I. BACKGROUND

While on active duty during the Vietnam War, Mr. Bauman was assigned to the U.S.S. *Enterprise* that ported at Subic Bay, Philippines. While in Subic Bay, sailors were permitted to take liberty and Mr. Bauman occasionally swam recreationally in Subic Bay. Some 20 years later, Mr. Bauman developed diabetes mellitus, Parkinson's disease, essential tumors, and chronic obstructive pulmonary disease. Mr. Bauman asserts that all of these disorders were caused by exposure to the herbicide Agent Orange that leaked into Subic Bay from storage on its piers.

The Board decision on appeal denied service connection for these disorders because the evidence did not establish that Mr. Bauman was exposed to Agent Orange. Record (R.) at 4, 10. The Board further found that a medical examination was "not needed because there is no indication

that the claimed disabilities may be related to an in-service event." R. at 7. Thus, the Board concluded that there was no evidence of a causal connection between Mr. Bauman's disabilities and military service, to include exposure to Agent Orange. R. at 4, 12.

Mr. Bauman requested that his appeal be expedited by this Court because his treating physician opined that, because of Mr. Bauman's cancerous condition, his life expectancy is 6 to 12 months as of February 2012. The Court granted expedited proceedings.

II. ANALYSIS

A. Favorable Evidence

Mr. Bauman first argues that the Board did not properly consider favorable evidence he presented to prove he was exposed to Agent Orange in Subic Bay. The Board must provide the reasons for its rejection of any material evidence favorable to the claimant, and its failure to do so renders its statement of reasons or bases inadequate. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

At a hearing before the Board, Mr. Bauman offered into evidence a Board decision in another veteran's case. R. at 30. He asserted that, although he understood that Board decisions pertaining to other veterans's claims are not precedential, the decision contained factual evidence that Agent Orange was present in Subic Bay. R. at 29. Mr. Bauman specifically pointed out to the hearing officer that the Board decision referred to congressional documents¹ relating to the presence of Agent Orange in Subic Bay, as well as Internet and newspaper articles confirming the same. R. at 30.

¹ The previous Board decision identified

a September 1966 Report of Staff Visit, Phillippines, Taiwan, and Okinawa. This report indicates that an Air Force representative visited several named locations in August 1966 - including Subic Bay, Phillippines, specifically to participate in a joint Navy-Air Force Pest Control Conference and to review base programs and assist individual bases with the establishment of safer and more effective programs. Specifically, the items addressed were . . . herbicides. And as specifically concerning these herbicides, the report provides that herbicide literature was handed out at the Subic Bay conference and samples mailed. . . . The recommendations addressed herbicide spraying, securing surgeons' approval of nonstandard herbicides, securing data sheets on each product, and procuring sprayers.

See Appellant's Brief Exhibit (Ex.) A, p. 11.

The Board decision in Mr. Bauman's appeal merely stated it "can not comment on the rationale for that decision." R. at 10. This statement, however, mischaracterized the purpose for which he offered the evidence. Mr. Bauman did not offer the other veteran's Board decision in order for the Board to comment on the rationale for that decision. Instead, he offered the Board decision for the underlying factual basis of the presence of Agent Orange in Subic Bay. Mr. Bauman was clearly asking the Board to take notice that evidence that corroborated his assertions existed in the nature of a congressional document and Internet and newspaper articles. R. at 14-15. This is an acceptable utilization of another veteran's Board decision. *See* 38 C.F.R. § 20.1303 (2012) ("Prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case.").

The hearing officer was, therefore, on notice that additional evidence existed relevant to Mr. Bauman's claim, some of it in control of the Government. *Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010) (per curiam), stated that 38 C.F.R. § 3.103(c)(2) imposes "two distinct duties" on a hearing officer: "The duty to explain fully the issues and the duty to suggest the submission of evidence that may have been overlooked." The hearing officer did not, however, explain to Mr. Bauman that he should attempt to obtain the Internet and newspaper articles or the congressional documents for submission in support of his claim.

Additionally, the Board did not recognize that a remand should be ordered for VA to obtain the congressional documents in accordance with VA's duty to assist. *See* 38 U.S.C. § 5103A(b)(3) (stating that VA's duty to assist in obtaining "records from a Federal department or agency . . . shall continue until the records are obtained"). There was no effort by VA to request this congressional document. The Court thus considers the Board's finding that "neither the veteran nor his representative have made the RO or the Board aware of any additional evidence that needs to be obtained in order to fairly decide this appeal" to be clearly erroneous. R. at 6; *see* 38 U.S.C. § 7261.

Consequently, the Court concludes that the Board erred in its treatment of favorable evidence in Mr. Bauman's case. On remand, the Board must attempt to obtain the congressional documents identified in the previous veteran's Board decision, and Mr. Bauman must be provided the opportunity to submit any additional evidence, including but not limited to the referenced Internet and newspaper articles, in support of his claim. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

B. Lay Statements

Mr. Bauman next argues that the Board categorically refused to consider his lay statements in violation of well-established law. Particularly, Mr. Bauman takes issue with the Board's statement that "the Veteran has not provided any competent or probative evidence of actual exposure, his bare assertions will not suffice." R. at 10.

The Board is required to consider "all pertinent medical and lay evidence." 38 U.S.C. § 1154(a); *see also* 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.303(a), (b), and 3.307(b) (2012). The Board's decision, however, fails to include a discussion as to the credibility or competence of Mr. Bauman's assertion that he was exposed to Agent Orange while in Subic Bay that, if accepted, could lead to an award of service connection. *See Dalton v. Nicholson*, 21 Vet.App. 23, 38 (2007) ("The [Board] has the duty to assess the credibility and weight to be given to the evidence." (quoting *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991))); *see also McLendon v. Nicholson*, 20 Vet.App. 79, 84 (competent testimony "can be rejected only if found to be mistaken or otherwise deemed not credible, a finding . . . the Court cannot make in the first instance"). Indeed, while the Court offers no opinion on the probative weight of Mr. Bauman's testimony, to the extent that it is found to be both credible and competent, it is favorable evidence that must be accounted for by the Board. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (Board required to include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for its decision and to facilitate informed review in this Court).

Additionally, although the record does not reflect whether Mr. Bauman ever personally witnessed the Agent Orange storage or use, the absence of such an assertion would not be fatal to his claim. Were the evidence to show that Agent Orange or any other such herbicide was routinely stored or used in Subic Bay during the time he was there, such evidence would tend to support the inference that he was exposed to it. *Cf. Pentecost v. Principi*, 16 Vet.App. 124 (2002) (indicating the mere fact that a veteran was stationed with a unit that was present while enemy attacks occurred strongly suggests that he was, in fact, exposed to those attacks).

C. Duty to Assist

Mr. Bauman next argues that the Board's determination that VA satisfied its duty to assist was in error because VA did not attempt to obtain records of Agent Orange use or storage through the VA Compensation and Pension Service or the U.S. Army and Joint Services Records Research Center (JSRRC). Although the Court has already determined that the Board's finding that VA's duty to assist was satisfied is clearly erroneous, the Court will nonetheless address Mr. Bauman's argument.

The Secretary's *Adjudication Procedures Manual*, M21-1MR, part IV, subpart ii, 2.C.10.o, sets forth procedures for the verification of herbicides in areas outside Vietnam. The manual provides at least two locations where VA is to obtain information for non-Vietnam herbicide exposure: The VA Compensation and Pension Service, and the JSRRC. The Secretary does not dispute that VA only requested records from the JSRRC and not from the Compensation and Pension Service, but argues that the M21-1MR does not constitute a substantive rule, only a guideline. Thus, he argues, failure to comply with the manual cannot constitute a failure in VA's duty to assist. *See* Secretary's Brief (Br.) at 7-8. The Secretary also does not dispute that the records request sent to JSRRC via the Defense Personnel Records Information Retrieval System (DPRIS) concerned the transportation, storage and use of herbicides *on major U.S. ships*, and not in Subic Bay. R. at 61-62; Secretary's Br. at 7.

Irrespective of the authority of M21-1MR, it is clear that VA entirely neglected to contact the Compensation and Pensions service, and made an inaccurate request for information from JSRRC. On remand, the Board must additionally ensure that accurate requests are made for information from both agencies to further develop the record in these claims.

D. Due Process

Mr. Bauman further argues that his due process rights were violated because he was not treated the same as a similarly situated veteran. Appellant's Br. At 14-15. Because the Court is remanding Mr. Bauman's claims, a determination on this issue would be premature. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

E. Medical Evidence

The Court notes that, in denying the claims, the Board relied on the assertion that "there is no credible medical evidence of record suggesting a connection between any claimed in-service exposure to herbicides and [Mr. Bauman's] type I diabetes, Parkinson's disease, essential tumors, and pulmonary disorder." R. at 12.

The lack of medical evidence suggesting a connection appears directly related to the fact that Mr. Bauman was not provided with a VA medical examination. R. at 7 ("In this case, the Board concludes that an examination is not needed because there is no indication that the claimed disabilities may be related to an in-service event."). When the evidence is further developed on remand, an indication of in-service exposure to Agent Orange may arise. In *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006), the Court noted that this requirement has a "low threshold," which the Board must take into consideration when determining whether Mr. Bauman is entitled to a medical examination. On remand, the Board must reevaluate this determination in view of any new evidence.

Mr. Bauman suffers from at least one disorder listed as presumptively associated with Agent Orange exposure: Parkinson's disease.² See 38 C.F.R. § 3.309(e) (2012). The statute and regulation governing presumptive service connection for certain disabilities on the basis of Agent Orange exposure are not limited in scope to veterans who served in Vietnam if a veteran can prove actual exposure to Agent Orange during service. See 38 U.S.C. § 1116(a)(1)(A), 38 C.F.R. § 3.307(a)(6)(iii). In a comment on the final rule in § 3.309(e), VA noted that 38 U.S.C. § 1116(a)(3)

establishes a presumption of exposure to certain herbicides for any veteran who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, and has one of the diseases on the list of diseases subject to presumptive service

² The record indicates that Mr. Bauman also suffers from, and made a disability claim to VA for, prostate cancer, a disease listed in § 3.309(e) as presumptively associated to Agent Orange exposure. R. at 361. The prostate cancer claim was, however, not a subject of the Board's decision.

Mr. Bauman is currently also diagnosed with rectal cancer. See Appellant's Motion for Expedited Proceedings, Ex. A at 1. There is no indication in the record that he has made a compensation claim for this condition, and there is presently also no evidence in the record that rectal cancer is secondary to, or aggravated by, any of the disabilities for which he is seeking service connection on this appeal. 38 C.F.R. § 3.310(a) (2012) (secondary service connection is awarded when a disability "is proximately due to or the result of a service-connected disease or injury"); see also *Libertine v. Brown*, 9 Vet.App. 521, 522 (1996) ("Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a).").

connection. However, if a veteran who did not serve in the Republic of Vietnam, but was exposed to an herbicide agent defined in 38 C.F.R. § 3.307(a)(6) during active military service, has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides.

66 Fed. Reg. 23,166 (May 8, 2001). Should the evidence support a finding that Mr. Bauman was actually exposed to Agent Orange during service, then VA must grant service connection on a presumptive basis for any disease listed in 38 C.F.R. § 3.307(a)(6), including but not limited to Parkinson's disease.

III. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's December 6, 2011, decision and REMANDS the claims for further proceedings consisted with this decision. Mr. Bauman is entitled to expeditious treatment of his claims. *See Vargas-Gonzalez v. Principi*, 15 Vet.App. 222 (2001).

On remand, Mr. Bauman will be free to submit additional evidence and argument, and the Board is required to consider any such evidence and argument. *See See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). A final Board decision following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court upon the filing of a new Notice of Appeal with the Court not later than 120 days after the date on which notice of the Board's new final decision is mailed to Mr. Bauman. *Marsh v. West*, 11 Vet.App. 468, 472 (1998).

DATED: July 31, 2012

Copies to:

John H. Young, Esq.

VA General Counsel (027)