

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 11-2847

MARK R. NUNLEY, APPELLANT,

v.

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

Before GREENE, *Judge*.

MEMORANDUM DECISION

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

GREENE, *Judge*: The appellant, Mark R. Nunley, through counsel, appeals a July 29, 2011, Board of Veterans' Appeals (Board) decision that denied his claim for VA disability compensation for a low back disability. Record (R.) at 3-26. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely and the Court has jurisdiction. *See* 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons that follow, the Court will affirm the July 29, 2011, decision.

This claim hinges on whether Mr. Nunley can establish that the Board erred when it found that his lay statements about continuous symptoms of back pain since military service were not credible. *See* 38 C.F.R. § 3.303(b) (2012) (service connection may be established by showing continuity of symptomatology, which requires (1) that a condition was "noted" during service; (2) evidence of postservice continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the postservice symptomatology); *see also Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (whether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board); *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007); *Charles v. Principi*, 16 Vet.App. 370, 374 (2002) (appellant is competent to testify

where symptoms are capable of lay observation, such as ringing in the ears); *Layno v. Brown*, 6 Vet.App. 465, 469 (1994) (lay testimony is competent to establish the presence of an observable symptomatology and "may provide sufficient support for a claim of service connection").

In this case, the only evidence of continuous back symptoms are the statements of Mr. Nunley and his family, asserting that he has experienced back pain since his military service. R. at 1139-50, 1495-96, 1499. Mr. Nunley states that he did not seek treatment for these symptoms until 1979 because he is afraid of doctors and had no health insurance. He states that he self-medicated for his back pain until he sustained additional back injuries at work in 1979, when the pain became too great to bear and he finally saw a doctor. R. at 1143-44; see *Savage v. Gober*, 10 Vet.App. 488, 496 (1997) ("[S]ymptoms, not treatment, are the essence of any evidence of continuity of symptomatology."). The Board found that these statements were not credible. R. at 21.

Mr. Nunley alleges that the Board failed to adequately explain its negative credibility determination and also erred when it relied on three negative medical nexus opinions that did not consider his statements. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board's statement of reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court"); *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (medical opinion must be based on accurate factual premise). When assessing the credibility and probative weight of evidence, the Board may consider factors such as facial plausibility, bias, self interest, and consistency with other evidence of record. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006); *Caluza v. Brown*, 7 Vet.App. 498, 511 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); cf. *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (Board may consider "evidence of a prolonged period without medical complaint . . . along with other factors"). The Board may consider the absence of contemporaneous medical evidence when determining the credibility of lay statements, but may not determine that lay evidence lacks credibility *solely* because it is unaccompanied by contemporaneous medical evidence. *Buchanan*, 451 F.3d at 1337. Personal interest may affect the credibility of the evidence; however, the Board may not disregard testimony simply because a claimant stands to gain monetary benefits. *Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991).

In this case, the Board devoted almost two pages of its decision to reviewing and analyzing the statements submitted by Mr. Nunley, his sister and a fellow service member. R. at 20-21. The Board concluded:

[T]he Veteran's reported history of continued symptomatology since active service, while competent, is nonetheless not credible. The Board again notes that the medical evaluation board examination was normal, indicating low back problems were not present at that time. Such evidence is more reliable than the Veteran's subjective observations. The Board also emphasizes the multi-year gap between discharge from active duty service (1971) and initial reported symptoms related to back problems in approximately 1979 (more than 8 years). . . . The Board has weighed the Veteran's statements as to continuity of symptomatology and finds his current recollections and statements made in connection with a claim for benefits to be of lesser probative value.

R. at 21. Although the Board considered the significant gap between Mr. Nunley's dates of service and his first report of symptoms in 1979, it did not violate *Buchanan* by relying solely on this information. The Board also weighed Mr. Nunley's separation examination, which documented no back problems at the time, and his personal interest in his claim for benefits, both of which are permissible considerations. Therefore, the Board permissibly based its credibility determination on its assessment of "facial plausibility, bias, self interest, and consistency with other evidence of record" and provided an adequate statement of the reasons or bases for its decision. *See Buchanan, Caluza, and Allday, all supra*. Therefore, the Board's negative credibility determination was not clearly erroneous. *See Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) (factual findings such as credibility are reviewed for clear error).

In addition, the Board did not err by relying on the three negative medical nexus opinions of record, all of which concluded that Mr. Nunley's current low back pain was not related to the two muscle spasm incidents that were noted during his military service. R. at 78-86 (July 2010), 157-66 (January 2009), 1096-97 (June 2002), 1154-59. In providing these opinions, the VA examiners relied on Mr. Nunley's separation evaluation of a normal spine; the fact that he worked at a fencing company after service, which would have been difficult if he had chronic low back pain; the fact that his in-service injuries were soft-tissue injuries of muscle strain and spasm, whereas his postservice injuries were the first of any bone injuries mentioned; their determination that there is no evidence in medical literature linking soft tissue injuries to the development of arthritis; and the fact that

medical evidence from 1984 indicated that, 5 years after the 1979 injuries, Mr. Nunley "still had a very weakened structural problem" and had not recovered from the postservice injuries. *Id.* As discussed above, the Board permissibly found that Mr. Nunley's statements about continuity of symptomatology were not credible. R. at 21. Therefore, it did not err in also relying on medical opinions that did not consider these statements, because the statements do not affect the factual premise of the medical opinions. *See Ardison, supra.*

After consideration of the briefs and a review of the record, the Board's July 29, 2011, decision is AFFIRMED.

DATED: September 21, 2012

Copies to:

David E. Boelzner, Esq.

VA General Counsel (027)