Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 12-1892

THOMAS R. CERNEY, APPELLANT,

V.

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

Before KASOLD, *Chief Judge*.

MEMORANDUM DECISION

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

KASOLD, *Chief Judge*: Veteran Thomas R. Cerney appeals through counsel that part of a May 3, 2012, decision of the Board of Veterans' Appeals (Board) that denied entitlement to compensation pursuant to 38 U.S.C. § 1151 for residuals of septic shock and abscess surgery – disabilities that, Mr. Cerney asserts, stem from constipation caused by the prolonged use of morphine prescribed to him by VA physicians. Mr. Cerney also appealed that portion of the Board's decision denying entitlement to an initial disability rating in excess of 20% for an injury to the right foot, but states in his reply brief that he elects to withdraw his appeal relative to this claim. As to his claim for benefits pursuant to section 1151, Mr. Cerney argues that the Board failed to (1) provide an adequate statement of reasons or bases for its weighing of the medical evidence, and (2) recognize a regional office (RO) hearing officer's failure to comply with his duties to (a) suggest the submission of evidence, and (b) show fairness and courtesy to Mr. Cerney. The Secretary disputes these arguments. Single judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, Mr. Cerney's appeal will be dismissed in part, and that portion of the Board decision remaining on appeal will be set aside and the matter remanded for further proceedings consistent with this decision.

Mr. Cerney's statement that he elects to withdraw his appeal relative to his claim for

increased benefits for his right-foot disability will be construed as a motion to dismiss that part of his appeal and, as construed, will be granted. *See Hansen v. Principi*, 16 Vet.App. 261, 261 (2002) (dismissing appeal where, after the appellant filed his appeal and the parties filed their respective briefs, the appellant filed a letter that the Court construed as a motion to dismiss the appeal pursuant to U.S. VET. APP. R. 42).

The record of proceedings supports Mr. Cerney's inadequate-reasons-or-bases argument. Specifically, the Board noted that a May 2009 VA medical examination report states that the examiner's review of a medical literature database did not reveal that constipation can cause "perianal glands to become infected and then . . . develop[ment of] tissue in a horseshoe [shape]," which appears to be a statement that the medical literature the examiner reviewed did not support a finding that constipation could cause the septic shock and abscess for which Mr. Cerney was treated. *See* Record at 17-18, 205. The lack of medical literature supporting such a finding, in turn, appears to be a basis for the examiner's opinion that Mr. Cerney's constipation did not cause his septic shock and abscess. Yet, as Mr. Cerney discussed at a December 2009 hearing before the RO and later cited to the Board, medical evidence retrieved from MerckSource (which the Secretary asserts is a website) indicates that constipation can cause abscess.

Although the Board acknowledged Mr. Cerney's medical research, it gave greater weight to the May 2009 medical examination report because it addressed Mr. Cerney's specific condition in contrast to the general research Mr. Cerney noted. However, while medical opinions directed at specific patients generally are considered more probative than medical treatises, *see Herlehy v. Brown*, 4 Vet.App. 122, 123 (1993), here, the medical evidence submitted by Mr. Cerney raises questions about the foundation of the 2009 medical examiner's opinion. Under such circumstances, the Board should have sought clarification from the examiner, or explained why such clarification was not needed to properly decide the claim. *See Vazquez-Flores v. Peake*, 22 Vet.App. 37, 50 (2008) (if evidence is unclear, Board should return a medical examination for clarification or explain why such action is unnecessary), *vacated on other grounds sub nom. Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009); *see also Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008) (in weighing probative value of medical opinion, Board must consider the foundation upon which medical opinion is based). The Board's failure to do so frustrates judicial review. *See Allday v.*

Brown, 7 Vet.App. 517, 527 (1995) (Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court").

In support of his remaining argument, Mr. Cerney asserts that a hearing officer at the RO failed to (1) show Mr. Cerney fairness and courtesy, as required by 38 C.F.R. § 4.23 (2013) (Attitude of Rating Officers), when, after his December 2009 hearing, Mr. Cerney "walked into another office at the VA and encountered the [RO] hearing officer telling an amusing story about him to four or five co-workers" (Appellant's Brief at 11), and (2) suggest that Mr. Cerney submit additional, more-specific causation evidence, rather than rely only on the general medical references that he alluded to at the hearing and later submitted to the Board. Assuming, arguendo, the accuracy of Mr. Cerney's asserted RO failures, Mr. Cerney nevertheless fails to demonstrate that these asserted failures affected the Board's de novo review of his claim, which the Board conducts without any deference to the RO. *See* 38 U.S.C. § 7104(a) (Board decision based on entire record); *Bowen v. Shinseki*, 25 Vet.App. 250, 253 (2012) (Board conducts de novo review of RO proceedings based on the record) (citing, inter alia, *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005)).

Indeed, with regard to the first asserted failure, the only record evidence of Mr. Cerney's assertion of RO bias is in a letter he wrote to his Congressman. Given the de novo review that the Board conducts when it adjudicates a claim, the issue of bias on the part of the RO does not appear to be an issue material or relevant to the Board's decision, and thus, the Board did not err by not addressing it. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (Board required to address all issues reasonably raised either by claimant or by evidence of record). Regardless, Mr. Cerney points to no evidence indicating that the RO hearing officer's conduct in any way influenced or impaired the decision-making process of the Board, and he otherwise fails to demonstrate that the Board's not addressing the hearing officer's conduct constitutes prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (appellant bears burden of demonstrating prejudice on appeal); *Annoni v. Brown*, 5 Vet.App. 463, 468 (1993) (concluding that inappropriate statement by RO rating specialist – though violative of the spirit, if not the letter, of § 4.23 – did not constitute prejudicial error where there was no evidence that the statement in any way influenced or impaired the decision-making process of the RO or the Board).

As to the second asserted failure, there is no requirement for the RO or Board hearing officer to preadjudicate a claim by assessing the credibility and probative weight of the record evidence. *See Bryant v. Shinseki*, 23 Vet.App. 488, 496 (2010). Moreover, in light of the need to remand the matter, Mr. Cerney's assertion is moot because he can submit additional evidence on remand. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (Board must consider any additional evidence and argument in support of the matter remanded); *Dunn v. West*, 11 Vet.App. 462, 467 (1998) (remand of appellant's claim under one theory moots the related theories advanced on appeal). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

Upon consideration of the foregoing, Mr. Cerney's construed motion to dismiss the appeal in part is granted, his appeal as to that portion of the May 3, 2012, Board decision denying a disability rating greater than 20% for his right foot is accordingly DISMISSED, and that portion of the Board decision denying entitlement to compensation pursuant to 38 U.S.C. § 1151 for residuals of septic shock and abscess surgery is SET ASIDE and the matter is REMANDED for further proceedings consistent with this decision.

DATED: October 21, 2013

Copies to:
Eric A. Gang, Esq.
VA General Counsel (027)