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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-2832

STEPHEN A. MAUGHAN, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Stephen A. Maughan, appeals through counsel an August 30, 2012, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for a liver disability. Record (R.) at 3-23. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from January 1982 until June 1992. R. at 628. In April 1991, he was "exposed to hydrazine" and inhaled chemical vapors. R at 444.

In May 2007, the appellant filed a claim for entitlement to disability benefits for a liver disorder. R. at 684-703. The appellant stated that he was exposed to monomethylhydrazine during his service and that soon thereafter he began experiencing fatigue and joint pain. R. at 695. He stated that his care providers diagnosed him with a fatty liver in April 1999, a liver cyst and hepatitis

in 2004, and two liver cysts in 2007. *Id.* In a July 2007 statement, the appellant asserted that tests performed in about 2002 revealed that he had elevated liver enzymes. R. at 486.

In September 2007, the VA regional office (RO) issued a Personnel Information Exchange System (PIES) request to determine whether the appellant served in Southwest Asia. R. at 464. In an October 1, 2007, statement, the appellant asserted that he served in "Saudi Arabia (Bahrain)" from October 1991 until January 1992. R. at 465. The appellant stated that he was one of about 20 soldiers sent to Bahrain and he named two officers who, he alleged, served with him during his deployment. *Id*. He attached to his submission a form indicating that he served from August 2, 1990, until June 22, 1992, "in support of Operation Desert Shield/Storm." R. at 467. He also attached four "personal photos" that he alleged were taken during his deployment. R. at 465, 469-75. On October 17, 2007, the entity responding to the RO's PIES request reported that "there is no evidence in the record that indicate[s] the veteran served in Southwest Asia." R. at 464.

In January 2008, the RO denied the appellant entitlement to disability benefits for a liver disorder. R. at 454-58. In October 2008, the appellant submitted a Notice of Disagreement with the RO's decision. R. at 450. In a June 2009 Statement of the Case, the RO again denied his claim. R. at 282-312. In July 2009, the appellant appealed to the Board. R. at 278.

In March 2011, the Board remanded the appellant's claim for additional development. R. at 197-221. The Board determined that it "is unclear whether [the appellant's] disability is related to his service and particularly to his in-service exposure to hydrazine." R. at 219. The Board ordered VA to obtain a medical opinion from "a hepatologist or gastroenterologist if at all possible" describing "the nature, extent, onset, and etiology of any liver disability found to be present." R. at 219-20.

In May 2011, the appellant underwent two VA medical examinations. R. at 122-34. In a February 2012 deferred rating decision, VA's Appeals Management Center concluded that the May 2011 VA examination reports are inadequate. R. at 48. The Appeals Management Center ordered VA to "request a[] specialty examination with a hepatologist (liver specialist) opinion" addressing whether the appellant's "liver disability is due to service. Is it related to possible exposure to hydrazine in April 1991[?]" *Id.*

In March 2012, a VA urologist diagnosed the appellant with non-alcoholic steatohepatitis. R. at 50. The examiner wrote that he could not state whether the appellant's exposure to monomethylhydrazine resulted in his current liver disorder "without resort to mere speculation." R. at 51. The examiner supported his conclusion by citing to two web sites. *Id.* In a May 2012 Supplemental Statement of the Case, VA once more denied the appellant's claim. R. at 40-44.

In its August 30, 2012, decision here on appeal, the Board denied the appellant entitlement to disability benefits for a liver disorder. R. at 3-23. The Board first addressed the appellant's theory that his liver disorder was caused by contaminants that were present in the part of Southwest Asia where he served. R. at 18-19. The Board concluded that the appellant's assertion that he served in Saudi Arabia or Bahrain from October 1991 until January 1992 is not credible, and thus "[i]t follows that exposure to environmental hazards and carcinogens during service there also has not been established." R. at 19. Next, the Board addressed the appellant's theory that his liver disorder was caused by his exposure to monomethylhydrazine. R. at 19-23. The Board relied on the March 2012 medical examiner's opinion to reject the appellant's argument. R. at 22-23.

The appellant raised three arguments on appeal. First, he argued that the March 2012 examination report did not comply with the Board's March 2011 remand instructions because the examiner was a urologist rather than a hepatologist or a gastroenterologist. Appellant's Brief (Br.) at 6-10; Reply Br. at 1-5. Second, he asserted that the March 2012 examination report is inadequate. Appellant's Br. at 10-13; Reply Br. at 5-6. Finally, he argued that VA should have made additional attempts to confirm his assertion that he served in Saudi Arabia or Bahrain from October 1991 until January 1992. Appellant's Br. at 13-16; Reply Br. at 6-7.

II. ANALYSIS

A. March 2012 VA Examination Report

1. The Examiner's Specialty

In March 2011, the Board ordered the Secretary to obtain a medical opinion addressing the appellant's claim, and it stated that the opinion should be written by either a hepatologist or a gastroenterologist "if at all possible." R. at 219-20. It its February 2012 deferred rating decision, the VA Appeals Management Center dropped the equivocating language from the Board's order and

insisted that VA obtain a "specialty" medical opinion from a "hepatologist (liver specialist)." R. at 48. The March 2012 opinion, however, was submitted by a urologist. R. at 50-51. The appellant asserts that because the Secretary did not obtain a medical opinion from a hepatologist or gastroenterologist, he contravened the Board's explicit instructions and the Board erred by subsequently accepting the urologist's opinion. Appellant's Br. at 6-10; Reply Br. at 1-5.

"[A] remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). A remand "imposes upon the Secretary . . . a concomitant duty to ensure compliance with the terms of the remand." *Id.* In cases where "the remand orders of the Board or this Court are not complied with, the Board itself errs in failing to insure compliance." *Id.* The Secretary is not required, however, to precisely comply with Board remand instructions. The Secretary's response to a Board remand is acceptable as long as he substantially complies with the Board's orders. *Dyment v. West*, 13 Vet.App. 141, 147 (1999); *see also Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010).

The Board concluded that, even though a urologist rather than a hepatologist or gastroenterologist performed the appellant's March 2012 examination, the Secretary substantially complied with its March 2011 remand instructions. R. at 7. The Board explained:

> A specialist, albeit not the specific specialist the Board had in mind, performed the examination. Further, the Board left open the possibility for this scenario as well as for the scenario of a general physician rather than a specialist performing the examination. Use of the phrase "if at all possible" indeed conveys acknowledgment by the Board that a hepatologist or gastroenterologist might not be able to perform the examination.

R. at 7.

When making factual determinations, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 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). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide

the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert,* 1 Vet.App. at 57.

The Board's reasoning is problematic for a few reasons. First, the Board insinuated that so long as the Secretary obtained an opinion from a specialist, any specialist at all, then he substantially complied with its instructions. By requesting an opinion from a hepatologist or gastroenterologist, the Board indicated that it believed the controversy in this case could not be resolved without placing it before a medical examiner with specialized knowledge about the liver. Applying the Board's present logic, an opinion from a podiatrist, or an ophthalmologist, or a dermatologist would have been acceptable because those examiners are specialists in *something*, even though their knowledge of liver disease might be restricted to what they learned years ago in their general medical school courses. This cannot be a proper application of the "substantial compliance" standard. *See D'Aries v. Peake*, 22 Vet.App. 97, 105-06 (holding that an examiner's opinion substantially complied with the Board's remand instructions in part because the examiner's speciality indicated that he had advanced knowledge concerning the anatomical region affected by the appellant's disorder). The Board should have instead focused on whether the specialist that the Secretary did engage was sufficiently versed in liver disorders to speak authoritatively about the medical question in this case. *Id.* If so (and if it demonstrated that a hepatologist or gastroenterologist was unavailable), the Board would have been justified in finding that, although the examiner is not a hepatologist or a gastroenterologist, his opinion is reliable and useful and substantially complies with its March 2011 remand instructions. *Id.*

Next, the Board believed that its inclusion of the phrase "if at all possible" in its remand instructions "left open the possibility" that an expert who is not a hepatologist or gastroenterologist might provide the opinion it requested. R. at 7, 219-20. That may be true in general. But what the Board suggests is that "if at all possible" is a tool to allow it to disregard its earlier impression that this case cannot be resolved without the aid of a liver specialist for, really, no other reason than that a specialist in some medical field submitted a medical opinion and it used the phrase "if at all possible." That is an untenable position. Otherwise, the Board could throw "if at all possible" into every one of its remand orders so that it could opt out of those orders in the future if it finds it

convenient to do so. That would rob Board remand orders of any real meaning. Once again, the "substantial compliance" inquiry in this case should have focused on whether the Secretary met the Board's concerns by obtaining an opinion from an expert who demonstrated a deep knowledge of the intricacies of the liver disorder at issue here. *See D'Aries*, *supra*.

Finally, the Board inappropriately attempted to soften the meaning of "if at all possible" and render it a more malleable phrase than it actually is. "If at all possible" conveys that the Secretary should obtain an opinion from a hepatologist or gastroenterologist unless it is impossible to do so and that the Secretary should not obtain an opinion from another kind of specialist unless all attempts to engage a hepatologist or gastroenterologist have been exhausted. The Board cited to no evidence demonstrating that it was impossible for the Secretary to obtain an opinion from a hepatologist or gastroenterologist in this case and that he engaged a urologist as a last resort attempt to comply with the Board's remand orders.[1]

The vehemence with which the Board and the Appeals Management Center insisted that a liver expert review this case led the appellant to expect that the Secretary would make every effort to obtain an opinion from a hepatologist or gastroenterologist. The Board did not adequately explain to the appellant why the Secretary's failure to do so was not error. The Court therefore concludes that Board's statement of reasons or bases explaining its determination that the Secretary substantially complied with its March 2011 remand is inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday*, *Caluza*, and *Gilbert*, all *supra*.

This conclusion is largely subsumed beneath the Court's determination, explained below, that the March 2012 examination report is inadequate. On remand, however, the Board should be mindful of the errors discussed here when, in all likelihood, it orders an additional medical opinion in this case and then decides if the additional opinion it receives substantially complies with its instructions.

There is another facet to the Board's March 2011 remand instructions with which the Secretary clearly failed to substantially comply. The Board asked the Secretary to request that a

[1] The Secretary argues that the "VA medical center determined that the most appropriate physician available to conduct the examination was the chief urology resident" and that the "VA medical center properly selected the most appropriate available physician to provide the requested examination." Secretary's Br. at 13. Nothing in the Board decision, the Secretary's brief, or the record supports these statements.

medical examiner describe "the nature, extent, onset, and etiology of any liver disability found to be present." R. at 219-20. The Board further stated that the examiner "shall opine as to whether it is at least as likely as not . . . that [the appellant's liver disorder] had its onset during or otherwise is related to [his] service, to include his exposure to hydrazine in April 1991." R. at 220.

The March 2012 examiner only discussed whether the appellant's exposure to monomethylhydrazine caused his current liver disorder. R. at 51. He did not describe the nature and likely etiology of the appellant's disorder nor did he address whether it is connected to the appellant's service via a disease or injury other than monomethylhydrazine exposure. *Id.* The Board thus decided this case without having before it any evidence indicating what caused the appellant's disorder to develop. That left a large gap in the Board's analysis. The Board essentially told the appellant that it has no idea what may have caused his disorder, but it was sure that it wasn't caused by his service. The Board should have done much more before it reached such an incomprehensible determination. The Court therefore concludes that, because the Secretary failed to ensure that the March 2012 medical examiner discussed the likely etiology of the appellant's liver disorder and explained whether it is likely related to his service for any reason (not just monomethylhydrazine exposure), he did not substantially comply with the Board's March 2011 remand instructions. The Board's finding to the contrary is clearly erroneous.

2. Adequacy of the Report

The March 2012 examiner concluded that he could not state whether the appellant's monomethylhydrazine exposure resulted in his current liver disorder without resorting to speculation. R. at 51. "An examiner's conclusion that a diagnosis or etiology opinion is not possible without resort to speculation is a medical conclusion just as much as a firm diagnosis or a conclusive opinion." *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). "Thus, before the Board can rely on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence." *Id.*

> In general, it must be clear on the record that the inability to opine on questions of diagnosis and etiology is not the first impression of an uninformed examiner, but rather an assessment arrived at after all due diligence in seeking relevant medical information that may have bearing on the requested opinion.

Id. at 389.

For the Board to accept a medical examiner's conclusion that determining the etiology of a disorder would require speculation, the evidence must demonstrate that "no medical expert can assess" the nature of the claimed disorder or that "the valid application of current medical knowledge could yield multiple possible etiologies with none more likely than not the cause of a veteran's disability." *Id.* Whether a medical examination report is adequate is generally a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

> The March 2012 examiner supported his conclusion with the following statement:
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> It is known that the [appellant] had an acute exposure. [He] also worked in an area that could result in occupational exposures, although he cannot report any other known incidents. At all other times, the hydrazine detectors registered safe levels. In animal studies, acute exposures cause symptoms such as tremor, but not changes in the liver. Chronic exposure in several animal models resulted in liver disease and steatosis. There are no studies that identify the results of acute exposure long term in humans. Ultimately the effect on the liver is unknown. Therefore the above opinion is given. With further research on the effects of hydrazine, it may be more clear in the future.

R. at 51.

The examiner's findings are deficient for a few reasons. First, under the heading "pertinent evidence," the examiner cited to two web sites. *Id.* The first links to a report published in *1987*. *See* www.inchem.org/documents/ehc/ehc/ehc68.htm (last visited January 30, 2014).[2] The references cited by the authors of that report include dozens of studies from the 1970s and 1960s and even a few studies from the 1950s. It is beyond belief that research on this topic, which had been extensive, suddenly ceased in 1987, and that the examiner's thorough research turned up nothing of note written since that time. Regardless, without a statement from the examiner explaining why a 25-year-old report is the best and most recent evidence describing the effects of monomethylhydrazine exposure,

[2] In this decision, the Court exercises its authority to take judicial notice of the information found at this web address. *See Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (holding that the Court "'may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is general known within [its] jurisdiction.'") (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988)).

the Court is not convinced that the examiner exercised "all due diligence in seeking relevant medical information." *Jones*, 23 Vet.App. at 389.

Furthermore, the 1987 report addresses the effects of hydrazine. Documents before the Court indicate that hydrazine and monomethylhydrazine are related but distinct chemicals. R. at 635-73. Indeed, one document before the Court indicates that "[m]ethyl hydrazine is *more toxic* than hydrazine" and the "*most toxic* of the methyl/substituted hydrazine/derivatives." R. at 635, 637, 643 (emphasis added). The examiner did not clearly indicate that he understood the difference between hydrazine and monomethylhydrazine, did not explain why he relied on a medical report addressing hydrazine to formulate an opinion about a case concerning monomethylhydrazine, and did not compare and contrast the effects of hydrazine and monomethylhydrazine on humans. Finally, as the appellant notes (Appellant's Br. at 12-13), the 1987 report indicates that hydrazine has been known to affect the human liver.

The second web site relied on by the examiner is no longer operative but appears to have been produced by a private corporation specializing in toxic gas detection.[3] A May 2007 printout from this web site is included in the record and contains synopses of various toxicity studies. R. at 635-73. Whether this material is the actual material reviewed by the examiner is unclear but irrelevant. It plainly demonstrates why the examiner's conclusion is deficient. According to the printout, studies reveal that monomethylhydrazine (1) causes "fatty degeneration" of the liver; (2) is a "[s]evere health hazard" that can cause "damage to liver"; (3) may result in "[f]atty degeneration and occasional hepatic necrosis" following acute exposure "in human poisonings"; (4) is "a potential occupational carcinogen"; and (5) has resulted in "fatal hepatic necrosis," apparently after an acute exposure. R. at 635-73. The studies also reveal that "hydrazines are known hepatoxins." R. at 641. The examiner did not address these findings, which clearly call into question his conclusion that "the effect [of monomethylhydrazine] on the liver is unknown." R. at 51.

Finally, the examiner failed to fully describe the appellant's disorder and suggest its possible etiologies. He did not describe what, other than monomethylhydrazine exposure, could cause the appellant's symptoms to develop. He has consequently not demonstrated that "no medical expert can

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[3] The Court attempted on January 24, 2014, to visit the web address cited in the examiner's report (www.gasdetection.comTECH/mnh.html).

assess" the etiology of the appellant's disorder or that "the valid application of current medical knowledge could yield multiple possible etiologies with none more likely than not the cause of a veteran's disability." *Jones*, 23 Vet.App. at 389.

The examiner's truncated, imprecise, and dated review of medical evidence concerning the effects of monomethylhydrazine exposure does not convincingly demonstrate that the medical community at large would be unable to conclude whether the appellant's monomethylhydrazine exposure resulted in his current disorder. *Id.* The Board's conclusion that the examiner's report is adequate is therefore clearly erroneous.

B. Other Matters

The Court need not at this time address the appellant's other arguments, including his contention that VA should have made additional efforts to confirm his claim that he served in Southwest Asia from October 1991 until January 1992. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's August 30, 2012, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: February 10, 2014

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