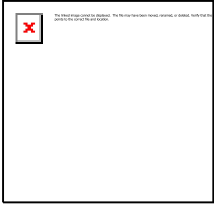

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
DOVAIN V. OTTERSON

DOCKET NO. 07-10 289) DATE *7 JAN 2015*
) *MDP*
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Paul, Minnesota

THE ISSUE

Entitlement to service connection for a thoracolumbar spine disability.

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

L. Zobrist, Associate Counsel

INTRODUCTION

The appellant is a Veteran who served on active duty from September 1956 to September 1960. This matter is before the Board of Veterans' Appeals (Board) on remand from the United States Court of Appeals for Veterans Claims (Court).

This matter was originally before the Board on appeal from a July 2006 rating decision of the St. Paul, Minnesota, Department of Veterans Affairs (VA) Regional Office (RO) that, inter alia, denied service connection for a back disability. In May 2007, the Veteran testified at a Decision Review Officer (DRO) hearing; a transcript of this proceeding is associated with the claims file. In a December 2010 Board decision, an Acting Veterans Law Judge (VLJ) remanded the matter to attempt to obtain additional private treatment records. In a January 2013 Board decision, the matter was remanded by the undersigned to obtain an adequate VA examination.

In a July 2013 decision by the undersigned VLJ, the Board denied service connection for a back disability. The Veteran appealed that decision to the Court. In June 2014, the Court issued a Memorandum Decision that vacated the July 2013 Board decision and remanded the matter for readjudication consistent with the instructions outlined in the Memorandum Decision.

FINDING OF FACT

The preponderance of the evidence is against a finding that the Veteran's current thoracolumbar spine disability is causally related to, or aggravated by, an event, injury, or disease in service.

CONCLUSION OF LAW

Service connection for a thoracolumbar spine disability is not warranted.
38 U.S.C.A. §§ 1131, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2014).

REASONS AND BASES FOR FINDING AND CONCLUSION

Veterans Claims Assistance Act of 2000 (VCAA)

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), the United States Department of Veterans Affairs (VA) has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2012).

Duty to Notify

Upon receipt of a complete application, VA must notify the claimant of the information and evidence not of record that is necessary to substantiate a claim, which information and evidence VA will obtain, and which information and evidence the claimant is expected to provide. 38 U.S.C.A. § 5103(a).

The notice requirements apply to all five elements of a service connection claim: 1) veteran status; 2) existence of a disability; 3) a connection between the veteran's service and the disability; 4) degree of disability; and 5) effective date of the disability. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). The notice must be provided to a claimant before the initial unfavorable adjudication by the RO. *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

The notice requirements may be satisfied if any errors in the timing or content of such notice are not prejudicial to the claimant. *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).
The RO provided the appellant with proper notice by letter dated in June 2006. This notice complied with the specificity requirements of *Dingess*, identifying the five elements of a service connection claim, and *Quartuccio v. Principi*, 16 Vet. App. 183 (2002), identifying the evidence necessary to substantiate a claim and the relative duties of VA and the claimant to obtain evidence.

The Veteran has received all essential notice, has had a meaningful opportunity to participate in the development of his claim, and is not prejudiced by any technical notice deficiency along the way. *See Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004). In any event, the Veteran has not demonstrated any prejudice with regard to the content of the notice. *See Shinseki v. Sanders*, 129 S.Ct. 1696 (2009) (reversing prior case law imposing a presumption of prejudice on any notice deficiency, and clarifying that the burden of showing that an error is harmful, or prejudicial, normally falls upon the party attacking the agency's determination); *see also Mayfield v. Nicholson*, 444 F.3d 1328, 1333-34 (Fed. Cir. 2006).

Duty to Assist

Furthermore, the Board finds that there has been compliance with the assistance provisions set forth in the law and regulations. VA has obtained available service treatment records (STRs) and pertinent postservice medical records. The Veteran gave testimony at a Decision Review Officer (DRO) hearing in May 2007. In December 2010, the Board remanded this issue to the AOJ to attempt to secure additional private treatment records regarding chiropractic treatment received since October 1961 from Dr. N. R. S. In January 2011, the Veteran provided 16 pages of records from Dr. N. R. S. and, in November 2012, the Veteran's representative indicated that there was "no additional evidence or argument to submit." As such, the Board finds that there has been substantial compliance with the December 2010 Board remand and that no additional assistance in this regard is required. *See Stegall v. West*, 11 Vet. App. 268 (1998) (a remand by the Board confers on the appellant, as a matter of law, the right to compliance with the remand orders); *see also Dyment v. West*, 13 Vet. App. 141, 146-47 (1999) (remand not required under *Stegall* where the Board's remand instructions were substantially complied with), *aff'd*, *Dyment v. Principi*, 287 F.3d 1377 (2002).

VA afforded the Veteran his first VA examination in August 2007. In its January 2013 decision, the Board found that the August 2007 examination was not adequate as to nexus and remanded this issue for the AOJ afford the Veteran a new VA examination and readjudicate the claim.

The Veteran received a second VA examination in March 2013. The examiner considered the relevant history of the Veteran's thoracolumbar spine disability, to include the lay evidence of record, performed a physical examination, and provided a rationale to support the conclusions reached. *See Stefl v. Nicholson*, 21 Vet. App. 12, 123-24 (2007). The Board finds that the March 2013 examination is adequate for adjudication purposes (and notes that the adequacy of the March 2013 examination was not raised before the Court). *See Barr v. Nicholson*, 21 Vet. App. 303 (2007) (VA must provide an examination that is adequate for rating purposes). As such, the Board finds that there has been substantial compliance with the January 2013 Board remand. *See Dyment* and *Stegall*, both *supra*. The Board finds that no additional assistance in this regard is required.

With respect to the Court's June 2014 Memorandum Decision, the Board has addressed the issues raised with respect to the competence and credibility of the lay evidence in the discussion below.

The National Personnel Records Center stated that the Veteran's STRs were fire-related, and thus his service treatment records (STRs) may not be complete. The Board is mindful that, in a case such as this, where some or all of the Veteran's service records are unavailable, VA has a heightened obligation to assist the Veteran in the development of his claim. *O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991); *Pruitt v. Derwinski*, 2 Vet. App. 83, 85 (1992). However, the Board further notes that neither the Veteran nor his representative have asserted that the Veteran suffered any back injuries or received any medical treatment in service other than what is discussed below. Thus, the Board finds that further development of the record with respect to the Veteran's STRs is not required.

All known and available records have been obtained and associated with the Veteran's claims file, and the Veteran and his representative have not contended otherwise. In April 2013, the Veteran indicated that he had no other information or evidence to submit for Board consideration. Thus, the Board finds that the record as it stands includes adequate competent evidence to allow the Board to decide this matter and that no further development of the evidentiary record is necessary. VA

has complied with the notice and assistance requirements, and the Veteran is not prejudiced by a decision on the claim at this time.

Legal Criteria, Factual Background, and Analysis

Legal Criteria

The Board notes that it has reviewed all of the evidence in the Veteran's claims file, with an emphasis on the evidence relevant to the matter on appeal. Although the Board has an obligation to provide reasons and bases supporting its decision, there is no need to discuss, in detail, every piece of evidence of record. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (VA must review the entire record, but does not have to discuss each piece of evidence). Hence, the Board will summarize the relevant evidence as appropriate and the Board's analysis will focus specifically on what the evidence shows, or fails to show, as to the claim.

Applicable law provides that service connection will be granted if it is shown that the veteran suffers from disability resulting from an injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury or disease in line of duty, in the active military, naval, or air service. 38 U.S.C.A. § 1131; 38 C.F.R. § 3.303. That an injury occurred in service alone is not enough; there must be chronic disability resulting from that injury. Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Under 38 C.F.R. § 3.303(b), with an enumerated "chronic disease" (such as arthritis) shown in service (or within the presumptive period under § 3.307), subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. *See also Groves v. Peake*, 524 F.3d 1306, 1309 (2008). This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear

cut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity of symptomatology. 38 C.F.R. § 3.303(b).

38 C.F.R. § 3.303(b) also provides another route by which a Veteran can establish service connection for an enumerated chronic disease such as arthritis - by way of continuity of symptomatology. Continuity of symptomatology after discharge is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned, i.e., "when the fact of chronicity in service is not adequately supported." When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support a claim for disability compensation for the chronic disease. Proven continuity of symptomatology establishes the link, or nexus, between the current disease and serves as the evidentiary tool to confirm the existence of the chronic disease while in service or a presumptive period during which existence in service is presumed. 38 C.F.R. § 3.303(b). See also *Walker v. Shinseki*, 708 F.3d 1331, 1338-39 (Fed. Cir. 2013).

For continuity of symptomatology, the Board cannot determine that lay evidence lacks credibility solely because it is unaccompanied by contemporaneous medical evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006). Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology. *See Cartright v. Derwinski*, 2 Vet. App. 24, 26 (1991). The Board may, however, consider a lack of contemporaneous medical evidence as one factor, among others, in determining the credibility of lay evidence. *Buchanan*, 451 F.3d at 1337.

Certain chronic disabilities, such as arthritis, are presumed to have been incurred in service if manifest to a compensable degree within one year of discharge from service. 38 U.S.C.A. §§ 1101, 1133; 38 C.F.R. §§ 3.307, 3.309.

In rendering a decision on appeal, the Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Board determinations with respect to the weight and credibility of evidence are factual determinations going to the probative value of the evidence. *Layno v. Brown*, 6 Vet. App. 465, 469 (1994).

Competency of evidence differs from weight and credibility. Competency is a legal concept determining whether testimony may be heard and considered by the trier of fact, while credibility is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown*, 10 Vet. App. 67, 74 (1997); *Layno*, *supra*.

A veteran is competent to describe symptoms that he experienced in service or at any time after service when the symptoms he perceived, that is, experienced, were directly through the senses. 38 C.F.R. § 3.159 (competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience; lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person); *Layno*, 6 Vet. App. at 469-71 (lay testimony is competent as to symptoms of an injury or illness, which are within the realm of one's personal knowledge; personal knowledge is that which comes to the witness through the use of the senses; lay testimony is competent only so long as it is within the knowledge and personal observations of the witness, but lay testimony is not competent to prove a particular injury or illness); *see Barr*, 21 Vet. App. at 308 (lay testimony is competent to establish the presence of observable symptomatology, where the determination is not medical in nature and is capable of lay observation).

The absence of contemporaneous medical evidence is a factor in determining

credibility of lay evidence, but lay evidence does not lack credibility merely because it is unaccompanied by contemporaneous medical evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (lack of contemporaneous medical records does not serve as an "absolute bar" to the service connection claim); *Barr*, 21 Vet. App. at 310 ("[T]he Board may not reject as not credible any uncorroborated statements merely because the contemporaneous medical evidence is silent as to complaints or treatment for the relevant condition or symptoms."). In determining whether statements submitted by a veteran are credible, the Board may consider internal consistency, facial plausibility, consistency with other evidence, and statements made during treatment. *Caluza v. Brown*, 7 Vet. App. 498 (1995).

Lay evidence may establish a diagnosis of a simple medical condition, a contemporaneous medical diagnosis, or symptoms that later support a diagnosis by a medical professional. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). Also, a veteran as a lay person is competent to offer an opinion on a simple medical condition. *Davidson v. Shinseki*, 581 F. 3d 1313, 1316 (Fed. Cir. 2009) (citing *Jandreau*).

VA must consider the competency of the lay evidence and cannot outright reject such evidence on the basis that such evidence can never establish a medical diagnosis or nexus; however, this does not mean that lay evidence is necessarily always sufficient to identify a medical diagnosis, but rather only that it is sufficient in those cases where the lay person is competent and does not otherwise require specialized medical training and expertise to do so, *i.e.*, the Board must determine whether the claimed disability is a type of disability for which a layperson is competent to provide etiology or nexus evidence. *See Davidson*, 581 F. 3d at 1316 (recognizing that, under 38 U.S.C.A. § 1154(a), lay evidence can be competent and sufficient to establish a diagnosis of a condition when a lay person is competent to identify the medical condition; he is reporting a contemporaneous medical diagnosis; or lay testimony describing symptoms at the time supports a later diagnosis by a medical professional).

Factual Background

The Veteran claims entitlement to service connection for a back disability that he contends is related to two incidents in active service. In his initial claim, and during his May 2007 DRO hearing, the Veteran averred that he first injured his back in 1956, while in mechanic school. He stated that the injury happened when he was carrying a 100-pound sack of potatoes up a flight of stairs and the sack slipped off his shoulders, causing a shoulder and neck injury with pain radiating into his lower back. He further stated that he did not seek medical treatment for this injury because he did not want to "wash out" of mechanic school. (*See* DRO hearing transcript, page 13).

The Veteran has asserted that he suffered further back injury in 1958, when he injured his lower back while replacing generators. In his initial claim, he stated that after transferring to a base in Oklahoma, the pain in his back was so bad that he had to sleep with a pillow under his back and finally sought medical treatment. He stated that he also sought medical treatment while stationed in Tennessee. The Board notes that, in his initial claim, he stated that he did not have an exit physical or examination. He asserted that he went to chiropractors after his discharge, including one in 1960 that he saw for unspecified treatment and from whom records are unavailable, and that he has continued to have symptoms since separation from service.

The Veteran's entrance examination and medical history report were negative for any back condition, and the Veteran is presumed to have entered service in sound condition. His STRs confirm that he sought medical care in January 1958 for a backache of several months' duration. The pain was described as a dull ache on his left side, just over the sacroiliac area. He was given a complete orthopedic exam, which was negative. X-rays were likewise negative. The Veteran again sought treatment in February 1958, and X-rays were again negative. The Veteran was put on light duty for one week, and the treatment provider stated: "I doubt serious back trouble." In March 1958, the Veteran again sought treatment for back pain. Spine films were noted to be negative. There are no additional reports of treatment for back pain during service.

On his August 1960 medical history report at separation from service, the Veteran denied that he experienced any disability, including arthritis, bone/joint deformity, lameness, and painful joints. He also denied having any other unlisted illness, injury, or medical treatment. On the medical examination report, completed at the same time, he was clinically evaluated as normal across all systems, including his spine/musculoskeletal system.

Private treatment records confirm that the Veteran received regular chiropractic treatments for complaints of back pain beginning in 1961. In a May 2007 treatment summary, Dr. N. R. S., a chiropractor, stated that the Veteran first came to see him in 1961 for immobilizing back pain and muscle spasms that occurred after trying to lift a wheel and experiencing a "severe catch" in the lower back and that the Veteran had continued to experience back symptoms "[f]rom that time on." The chiropractor included treatment records and accounting statements of services rendered that indicate the Veteran first received treatment in October 1961 and continued to receive periodic treatment after that point, although the purpose of each treatment session (*i.e.*, the precipitating incident) was not consistently recorded (*e.g.*, listings are generically for "chiropractic adjustments"). However, the Board notes that a summary of treatment provided by Dr. N. R. S. in January 2008 lists the treatment areas (*e.g.*, lower back, cervical problem) for several of the treatments received.

In addition to on-going chiropractic treatment, private treatment records note a number of additional postservice back injuries. For example, in November 1987, the Veteran reported that he hurt his left lower back while working under a truck. (*See* treatment from Dr. N. R. S.) In March 1992, the Veteran reported that he had been run over by a tractor several years prior. (*See* treatment record from Albert Lea Regional Medical Group.) In June 1995, the Veteran reported hurting his right shoulder and neck while working on cars. (*See* treatment record from Dr. N. R. S.) In September 1995, the Veteran reported that he hurt his back when leaning over a car to change its thermostat. (*See id.*) In October 1995, the Veteran reported that he strained his back "working underneath a car removing an automatic transmission." (*See id.*) In February 1998, the Veteran reported pain and stiffness

after kicking loose a towing chain. (*See* treatment record from Dr. M. P. C.) In October 1999, the Veteran twisted his back rolling up the window in his pickup. (*See id.*) In April 2001, the Veteran was in a motor vehicle accident, during which his vehicle "was struck from behind by a fast moving Dodge pickup," causing the Veteran to "slam [] up against the left side of the car." (*See* treatment record from Albert Lea Medical Center.) In February 2006, the Veteran received treatment for his lumbar spine after "working on vehicle". (*See* treatment record from Dr. J. D. P.)

In August 2006, the Veteran submitted a number of lay statements from others in support of his claim. M. O. stated that the Veteran has told her that he has back pain that started in service. L. O. stated that the Veteran has had back pain since service. The Veteran's brother stated that the Veteran had back pain at separation from service that has continued since that time. T. L. stated that the Veteran has been his mechanic for 35 years and that he has heard about and witnessed the Veteran's back pain during that time. M. F. stated that he remembered the Veteran having back problems in the 1960s. M. S. and T. S. stated that the Veteran has had back pain since service and currently wears a special belt to alleviate the condition. R. H. stated that he has known the Veteran since service and that the Veteran has back problems.

The Veteran was afforded an initial VA examination in June 2007. As that VA examiner did not adequately consider the entire record (and did not diagnose any back pathology), the Board previously found that it was in adequate and has not considered the June 2007 examiner's findings in its current analysis. (*See* January 2013 Board remand.)

In July 2007, one of the Veteran's treating chiropractors, Dr. N. R. S., provided a nexus opinion. Dr. N. R. S. stated that he was first consulted by the Veteran shortly after his separation from service, that the Veteran had injured his back and received treatment while in service, and that the Veteran's subsequent back disabilities were the result of the injuries in service. The chiropractor did not provide a rationale for his opinion.

The Veteran was afforded a VA examination in March 2013. The 2013 examiner reviewed the Veteran's claims file and extensively reviewed and summarized the Veteran's postservice medical records, noting specific chiropractic treatments and diagnoses, as well as references to the Veteran's back contained in medical records related to treatment for other conditions. The 2013 VA examiner also noted and considered the lay statements submitted by others on behalf of the Veteran.

The 2013 examiner recorded, in detail, the Veteran's subjective complaints, including the variations of symptom severity, duration, and impact on functioning. The examiner noted that the Veteran reported his baseline pain level at 5/10 and was able to sit without pain for over two hours and get up out of a chair, even repeatedly, without any increase to his back pain. The Veteran reported being able to rake leaves and retrieve objects from the floor without additional pain, but stated that his pain increases sometimes when he shovels snow or reaches up over his head to grasp or retrieve an item. The examiner noted that, after standing in one position for 20 minutes, the Veteran feels weak and his back begins to ache. The Veteran also reported that his back would tire after walking a half mile, but that he had no back pain increase in doing so. The examiner also considered the Veteran's reports of functional impairments and flare-ups related to his back pain, including the effects of repeat episodes of heavy lifting required by the Veteran's occupation and the need for chiropractic treatments after such episodes.

The 2013 examiner also conducted an in-person physical examination, to include thoracic and lumbar spine X-rays. Range of motion tests indicated painful and reduced range of motion in forward flexion (limitation to 75 degrees with pain), extension (limitation to 15 degrees with pain), right lateral flexion (limitation to 20 degrees with pain, left lateral flexion (limitation to 25 degrees with pain), and right and left lateral rotation (limitation to 15 degrees with pain). The Veteran's range of motion did not decrease further after repetition. The examiner opined that this range of motion was normal for this Veteran, due to the aging process.

The 2013 examiner confirmed that arthritis had been documented through imaging studies of the thoracolumbar spine. March 2013 thoracic spine findings were unremarkable, with normal height and alignment of the thoracic vertebral bodies,

disc height maintained, and no significant degenerative changes. (Findings related to the lower cervical spine are not relevant to this analysis.)

February 2013 lumbar spine findings revealed disc space narrowing at all levels except for L4-L5, hypertrophic spurring in the mid-levels, and slight retrolisthesis L4 and L5. There was no evidence of fracture, and sacroiliac joints were negative. The diagnosis was degenerative disc disease (DDD), unchanged since prior radiological study.

Thoracic spine findings from April 2009 showed intact alignment, no compression fractures, and early DDD and were otherwise unremarkable. April 2009 lumbar spine findings revealed disc space narrowing throughout with marginal spurring most evident at L2-L3 and L3-L4. Mild degenerative changes were noted at L4-L5 and L5-S1.

After acknowledging the Veteran's complaints of continuous symptomatology since service, including back pain and stiffness, and considering the Veteran's report of in-service injury as credible, the 2013 examiner ultimately opined that the Veteran's current back disabilities are "less likely than not . . . related to active duty service." The 2013 examiner noted that, based on the private treatment records (to include the May 2007 letter from Dr. N. R. S.) the first documented/identified postservice treatment "was most likely related to an intervening interceding injury to the back after separation from active duty service related to lifting a wheel." Thus, considering that the Veteran's STRs were negative for any spine pathology during, or at separation from, service; that the Veteran received treatment shortly after service for severe, sustained back pain following an intervening injury; and that there was no evidence on current physical examination of ligamentous instability or radiculopathy of the thoracolumbar spine," the examiner concluded that the current clinical findings of DDD and degenerative joint disease (DJD) were "less likely than not (less than 50/50% probability) related to active duty status."

The Board acknowledges that the 2013 examiner initially noted that the Veteran had not previously been diagnosed with a thoracolumbar spine condition. However, the Board notes that the 2013 examiner's thorough review of postservice medical

records includes recognition of diagnoses provided by treating physicians starting in May 2003 and that the examiner summarizes recent radiological evidence demonstrating mild joint space narrowing, spurring, and DDD. Thus, the Board finds that the 2013 examiner did consider the diagnoses contained in the Veteran's available medical records. Furthermore, the 2013 examiner provided current diagnoses of mild DDD in the Veteran's lower thoracic spine and multilevel DDD and DJD in the lumbosacral spine. The Board finds that this examination is adequate with respect to its consideration of current and prior diagnoses of the spine. *See Acevedo v. Shinseki*, 25 Vet. App. 286, 294 (2012) (medical reports must be read as a whole and in the context of the evidence of record).

Analysis

It is not in dispute that the Veteran sought treatment for complaints of back pain during service, or that he has a current back disability. What must be resolved is whether the current disability is etiologically related to the back pain noted in service and the related incidents described by the Veteran. The Board finds that the preponderance of the evidence of record is against the Veteran's claim.

While there is evidence of treatment in service for complaints of back pain, the contemporaneous evidence at separation from service is negative for complaints of back pain or pathology at that time. The Board acknowledges that the Veteran's records are fire-related, and that he has reported experiencing symptoms during service that are not documented in the STRs available in the record. However, despite the Veteran's assertions in his initial claim, his 1960 examination and medical history report at separation are in the record. In the examination report, the examiner found that the Veteran's back was clinically normal. In the medical history report, the Veteran denied any complaints related to his back. The Board finds that this is probative evidence weighing against the Veteran's claim that he was experiencing back pain at separation from service.

Additionally, the 2013 VA examination is negative medical evidence weighing against the Veteran's claim. The examination report encompassed a full review (including citation to specific documents) of the claims file and postservice medical

records, thoroughly documented and considered the Veteran's statements and the "buddy statements" included in the record, is supported by sufficient detail, and provides a complete rationale for the opinion stated, which is supported by the evidence of the record. Thus, the Board finds that the 2013 VA examination, taken as a whole, is probative evidence weighing against the Veteran's claim.

The Board has considered the private medical evidence of record, noting treatment as early as October 1961, but notes that, in the May 2007 letter, despite relating *the Veteran's* contentions (not *the treatment provider's* medical opinion) that the back complaints were related to service, the treatment provider described the 1961 treatment as related to a specific, postservice work injury. The Board further notes that the private treatment provider, in the May 2007 statement, appeared to link subsequent manifestations of back pain to the 1961 injury, not to the Veteran's service, and that private treatment records note a number of additional intervening postservice back injuries. Thus, the Board finds that the postservice medical treatment records do not support the Veteran's claim that his current back disability is related to service, to include under a theory of chronicity. No diagnosed chronic back pathology was noted in service, and postservice medical records document several intercurrent causes, to which the 2013 VA examiner attributed the current back disability.

The Board has considered the Veteran's treating chiropractor's subsequent July 2007 nexus opinion relating the Veteran's current back disabilities to service. However, the treatment provider did not provide a rationale, nor did he review the claims file, and he failed to discuss the numerous, documented postservice injuries for which he (as well as others) treated the Veteran. Consequently, the Board finds that the nexus opinion from the Veteran's treating chiropractor, Dr. N. J. S. lacks probative value and does not support the Veteran's claim. *See Nieves-Rodriquez v. Peake*, 22 Vet. App. 295 (1998) (the most probative value of a medical opinion comes from its reasoning).

The Board has also considered the lay evidence of record, to include statements from the Veteran and from those who provided statements on his behalf. At the outset, the Board notes that, in this case, providing an opinion as to the etiology of a

spine disorder falls outside the realm of common knowledge of a lay person as it is not the type of disability for which a layperson is competent to provide etiology or nexus evidence, particularly in light of the evidence of record of numerous, significant post-service back injuries. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007) (lay persons not competent to diagnose cancer). The Veteran has not shown that he, or those who provided statements on his behalf, possesses the medical training and expertise necessary to opine as to the *medical* etiology of his current disability. *See* 38 C.F.R. § 3.159.

However, laypersons are competent to report on what they experience through their senses, such as experiencing or observing someone else experience symptoms of pain. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). Thus, the lay statements of record have been considered in the context of the Veteran's claim to service connection based on a theory of continuity of symptomatology.

As regards the lay statements submitted by others on behalf of the Veteran, the Board first notes that T. L. indicated that he has known the Veteran for the past 35 years, *i.e.*, well after separation from service. Thus, while T. L. is competent to report that the Veteran has experienced back pain for the last 35 years, he is not competent to opine as to whether the Veteran has experienced back pain *since service* because he did not know the Veteran during his initial postservice years. Similarly, M. O., L. O., T. S., and M.S. reported, generally, that the Veteran has experienced back pain since service. M. F. stated that the Veteran has had back problems since the 1960s. Likewise, R. H. stated that he has known the Veteran since service and that the Veteran currently has back problems.

The Board has also considered the statement from the Veteran's brother, which specifically asserts knowledge that the Veteran had back pain at separation from service that has continued since that time. The Board does not contest the brother's competency to describe what he observes, or question that the brother was familiar with the Veteran's condition at separation from service.

While continuity of symptomatology can constitute the required nexus for establishing that arthritis is of service origin, in this case continuity of

symptomatology is interrupted by the records of his numerous postservice injuries: In 1961 the Veteran tried to lift a wheel and experiencing a "severe catch" in the lower back. (*See* treatment from Dr. N. R. S.). In November 1987, the Veteran reported that he hurt his left lower back while working under a truck. (*See* treatment from Dr. N. R. S.) In March 1992, the Veteran reported that he had been run over by a tractor several years prior. (*See* treatment record from Albert Lea Regional Medical Group.) In June 1995, the Veteran reported hurting his right shoulder and neck while working on cars. (*See* treatment record from Dr. N. R. S.) In September 1995, the Veteran reported that he hurt his back when leaning over a car to change its thermostat. (*See id.*) In October 1995, the Veteran reported that he strained his back "working underneath a car removing an automatic transmission." (*See id.*) In February 1998, the Veteran reported pain and stiffness after kicking loose a towing chain. (*See* treatment record from Dr. M. P. C.) In October 1999, the Veteran twisted his back rolling up the window in his pickup. (*See id.*) In April 2001, the Veteran was in a motor vehicle accident, during which his vehicle "was struck from behind by a fast moving Dodge pickup," causing the Veteran to "slam [] up against the left side of the car." (*See* treatment record from Albert Lea Medical Center.) In February 2006, the Veteran received treatment for his lumbar spine after "working on vehicle". (*See* treatment record from Dr. J. D. P.). The belief of friends and family that his current back disability is related to his post-service symptomatology, given the history complicated by as many as 8 or more post-service back injuries, including one shortly after service, extends beyond an immediately observable cause-and-effect relationship to which a lay person's observation is competent. As such, these lay statements are not competent evidence to address the linkage element of the continuity-of-symptoms inquiry in the present case. *See Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007).

The Board notes that, to the extent that any of these statements could be considered competent and credible reports linking the Veteran's current condition to postservice symptoms, they have minimal probative value as they are contradicted by the contemporaneous medical evidence of record (and the Veteran's own contentions on his medical history report) noting no complaints of back pain or back pathology at separation from service. The Board finds that the Veteran's own, contemporaneous, denial of back symptomatology is more probative/persuasive,

than testimony offered by others in the context of a claim for compensation benefits many years later.

As to the Veteran's own lay statements, the Board acknowledges that, during the May 2007 DRO hearing, the Veteran stated that his back did bother him when he was discharged from service and that his back pain symptoms had continued consistently from his 1956 injury throughout service. The Veteran is competent to give evidence about observable symptoms such as back pain. *Layno v. Brown*, 6 Vet. App. at 465. Furthermore, as noted above, lay evidence concerning continuity of symptoms after service, if credible, is ultimately competent, regardless of the lack of contemporaneous medical evidence. *See Buchanan*, *supra*. However, in this instance, there are contemporaneous records – the Veteran's examination report and self-provided medical history report, created at separation from active service – that *contradict* the Veteran's contention, years later, that he has experienced a continuity of symptomatology since service. *See Struck v. Brown*, 9 Vet. App. 145 (1996) (discussing how contemporaneous medical findings may be given more probative weight than contrary evidence offered years later, long after the fact). Not only may the Veteran's memory be faulty with the passage of time (especially given the documented injury that occurred shortly after separation from service), but self-interest may play a role in the more recent statements. *See Pond v. West*, 12 Vet. App. 24, 25 (1991).

The Veteran asserts that his private treatment records demonstrate "nearly continuous treatment from 1961 to the present time." The Board does not dispute that contention. However, the treatment provider indicated that the treatment that began in 1961 followed an injury incurred *at that time* (*i.e.*, postservice). Thus, the Board finds that that injury, and any subsequent residuals, are not related to the Veteran's active service.

The Veteran also asserts that he received medical treatment in 1960, but that he was unable to obtain any records related to that treatment. However, he did not specify the nature of that treatment or the area of the spine affected. Thus, the Board is unable to conclude that such records are related to a claim for *back* disability. (The Board notes that a claim for *neck* (cervical spine) disability has been previously

referred to the AOJ for adjudication and is not presently before the Board.) Furthermore, the Board notes, again, that the Veteran's separation examination and medical history report contradict his later assertion that he has continued to experience back pain since his injury in service.

In addition, the Board notes that, on March 2013 VA examination, the Veteran "denied any acute injuries to his back after separation from active duty status." This assertion is contradicted by the medical evidence of record, which, as noted above, describes several incidents of work-related back injury throughout the Veteran's career as a mechanic, as well as being run over by a tractor and in a motor vehicle accident. The Board finds that this contention calls into question the credibility of the Veteran's lay testimony as a whole. *See Cartright v. Derwinski*, 2 Vet. App.24, 25 (1991) (finding that, while the Board may not ignore a Veteran's testimony simply because he or she is an interested party and stands to gain monetary benefits, personal interest may affect the credibility of the evidence); *see also Caluza*, 7 Vet. App. at 510-511 (credibility can be generally evaluated by a showing of interest, bias, or inconsistent statements, and the demeanor of the witness, facial plausibility of the testimony, and the consistency of the testimony).

In summary, the probative medical evidence of record reflects that the Veteran was treated for a back injury while in service, that he received treatment shortly after service for a 1961 postservice injury, that he was injured several more times following the 1961 postservice injury, that he has received intermittent treatment as a result of these postservice injuries, and that his current back disabilities are more likely than not related to his postservice injuries. The positive nexus opinion of record is unaccompanied by any rationale, appears to contradict an earlier statement by the same practitioner linking subsequent back treatments to the 1961 injury, and is not probative evidence in support of the Veteran's claim. Likewise, the lay evidence of record either is not shown to be competent or is *contradicted* by the contemporaneous medical evidence of record.

In light of the foregoing, the preponderance of the evidence is against the claim, and, therefore, the benefit-of-the-doubt doctrine does not apply. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

ORDER

Entitlement to service connection for a thoracolumbar spine disorder is denied.

M. C. GRAHAM
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.*

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court,** not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: http://www.uscourts.cavc.gov.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).