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

IN THE APPEAL OF [redacted]
FREDRICK GARCIA

DOCKET NO. 10-33 923) DATE *23 OCT 2014*
) *MDP*
)

On appeal from the
Department of Veterans Affairs Regional Office in North Little Rock, Arkansas

THE ISSUES

1. Entitlement to service connection for a bilateral hip disability, originally claimed as pelvic joint deterioration.

2. Entitlement to service connection for colon cancer.

REPRESENTATION

Appellant represented by: Military Order of the Purple Heart of the U.S.A.

WITNESS AT HEARING ON APPEAL

Appellant

IN THE APPEAL OF [redacted]
FREDRICK GARCIA

ATTORNEY FOR THE BOARD

Patricia Veresink

INTRODUCTION

The Veteran served on active duty from April 1968 to April 1972.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an April 2009 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Little Rock, Arkansas.

The Veteran appeared at a hearing before a Veterans Law Judge (VLJ) in August 2011. A transcript of that hearing has been associated with the file. As that VLJ retired prior to a decision on the merits could be issued, the Veteran was afforded another VA hearing in February 2013. A copy of the transcript has also been associated with the claims file.

The issues were remanded for further development by the Board in January 2012 to afford the Veteran with a VA examination and nexus, as well as to obtain any outstanding VA treatment records. It was additionally remanded in January 2013 to afford the Veteran a new hearing. A review of the record indicates that the Board's directives were substantially complied with. *See Stegall v. West,* 11 Vet. App. 268, 271 (1998).

The issue of entitlement to service connection for colon cancer is addressed in the REMAND portion of the decision below and is REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. The Veteran had no complaints, treatment, or diagnosis of a bilateral hip disability during service.

2. The Veteran's current hip complaints are causally related to the aging process and are not causally or etiologically related to service

CONCLUSION OF LAW

The criteria for service connection for a bilateral hip disability have not been met. 38 U.S.C.A. §§ 1131, 5103, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 3.303 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

Under the Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107 and 5126 (West 2002) and 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2010), VA has a duty to notify the claimant of any information and evidence needed to substantiate and complete a claim, and of what part of that evidence is to be provided by the claimant and what part VA will attempt to obtain for the claimant. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b)(1).

The record shows that through VCAA letters dated October 2008 and January 2012 the Veteran was informed of the information and evidence necessary to substantiate the claim for service connection. The Veteran was also advised of the types of evidence VA would assist in obtaining, as well as the Veteran's own responsibilities with regard to identifying relevant evidence. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Charles v. Principi*, 16 Vet. App. 370 (2002).

The United States Court of Appeals for Veterans Claims (Court) decision in *Pelegrini v. Principi*, 18 Vet. App. 112 (2004) held, in part, that a VCAA notice as required by 38 U.S.C. § 5103(a), must be provided to a claimant before the initial unfavorable agency of original jurisdiction decision on a claim for VA benefits. Further, 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 VCAA letter to the Veteran was provided in October 2008 prior to the initial unfavorable decision in April 2009. In this case, the Veteran was also advised of the criteria for rating a disability and those governing effective dates of awards in the October 2008 letter, prior to the most recent adjudication by the RO.

The Board also finds that there has been compliance with the VCAA assistance provisions. The record in this case includes service treatment records, VA examination reports, VA treatment records, Social Security Administration records, and lay evidence. The Board finds that the record as it stands includes adequate competent evidence to allow the Board to decide the case, and no further action is necessary. *See generally* 38 C.F.R. § 3.159(c). No additional pertinent evidence has been identified by the Veteran.

The Veteran was afforded a VA examination in March 2012. 38 U.S.C.A. § 5103A(d); 38 C.F.R. § 3.159(c)(4). The Board notes that the examiner was provided with an accurate history, the Veteran's history and complaints were recorded, and the examination report sets forth detailed examination findings. Therefore, the examination report is adequate to decide the claim of service connection. Thus, further examination is not necessary regarding the issues on appeal.

In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the Court held that 38 C.F.R. § 3.103(c)(2) requires that the VLJ who conducts a hearing fulfill two duties to comply with the above regulation. These duties consist of (1) the duty to fully

explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked. During the hearing, the Veteran was assisted at the hearing by an accredited representative from the Military Order of the Purple Heart of the U.S.A. The undersigned explained the issue on appeal and sought testimony from the Veteran regarding the manifestations of his disability. The undersigned also solicited information on the availability of any additional relevant evidence for development. Neither the representative nor the Veteran has suggested any deficiency in the conduct of the hearing. Therefore, the Board finds that, consistent with *Bryant*, the undersigned complied with the duties set forth in 38 C.F.R. § 3.103(c)(2).

Service Connection – Bilateral Hip Disability

Service connection may be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred or aggravated in active military service. This means that the facts establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed.Cir.2009); *Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), aff'd per curiam, 78 F. 3d 604 (Fed. Cir. 1996) (table).

In making all determinations, the Board must fully consider the lay assertions of record. A layperson is competent to report on the onset and continuity of his current symptomatology. *See Layno v. Brown*, 6 Vet. App. 465, 470 (1994) (a Veteran is competent to report on that of which he or she has personal knowledge). Lay evidence can also be competent and sufficient evidence of a diagnosis or to

establish etiology if (1) the layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). When considering whether lay evidence is competent the Board must determine, on a case by case basis, whether the Veteran's particular disability is the type of disability for which lay evidence may be competent. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77.

The Board has reviewed all the evidence in the record. Although the Board has an obligation to provide adequate reasons and bases supporting this decision, there is no requirement that the evidence submitted by the appellant or obtained on his behalf be discussed in detail. Rather, the Board's analysis below will focus specifically on what evidence is needed to substantiate the claim and what the evidence in the claims file shows, or fails to show, with respect to the claim. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) and *Timberlake v. Gober*, 14 Vet. App. 122, 128-30 (2000).

The Veteran's service treatment records are silent regarding any complaint, treatment, or diagnosis of a hip disability. On the Veteran's April 1972 separation report of medical history, the Veteran specifically marked no when asked if he ever had or currently had arthritis, rheumatism, bursitis, or bone, joint, or other deformity. He noted that he was in excellent health at the time of separation. On the corresponding report of medical examination, the examiner noted a clinically normal musculoskeletal system.

The Veteran asserts that he visited the clinic during service for complaints of groin pain. He noted that this groin pain continued post-service despite the lack of medical documentation. He reported that he could not afford treatment post-service, but rather self-medicated with over-the-counter painkillers.

The Veteran was afforded a VA examination in March 2012. The examiner diagnosed degenerative joint disease of the bilateral hips diagnosed in 2008 and

total hip arthroplasty diagnosed in 2010. The examiner noted that the Veteran's bilateral hip pain began in the 1990s, based on a review of the records and claims file as well as the progression to need total hip arthroplasty in 2010. The examiner performed a thorough physical examination and found that the Veteran's hip disability was less likely than not incurred in or caused by the Veteran's service. He provided a rationale noting no evidence to connect his hip disability to military service events or occurrences. Rather, his hip disability is as likely as not due to normal aging and wear and tear. The examiner also referred to a treatment record from 2008, in which the Veteran reported that his hip discomfort began in the 1990s. The examiner noted that the Veteran reported his health to be in excellent condition at separation from service.

The Veteran has not demonstrated that he has expertise in medical matters. While there is no bright line exclusionary rule that a lay person cannot provide opinion evidence as to a nexus between an inservice event and a current condition, not all medical questions lend themselves to lay opinion evidence. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009). In *Davidson,* the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) referred to *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) for guidance. In footnote 4 of *Jandreau*, the Federal Circuit indicated that the complexity of the claimed disability is to be considered in determining whether lay evidence is competent. As to a nexus opinion relating any inservice complaints to his present disability, the Board finds that the etiology of the Veteran's hip disability is too complex an issue, one typically determined by persons with medical training, to lend itself to lay opinion evidence.

The Veteran is certainly competent to testify as to symptoms such as pain, which are non-medical in nature; however he is not competent to render a medical diagnosis or etiology. *See Barr v. Nicholson*, 21 Vet. App. 303 (2007) (lay testimony is competent to establish the presence of observable symptomatology that is not medical in nature); *see also, Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007) (certain disabilities are not conditions capable of lay diagnosis). No medical evidence of record finds a relation between active duty service and the Veteran's current degenerative joint disease. The only medical opinion in the file was

provided by the VA examiner in March 2012. There is no contrary medical opinion of record.

Additionally, the Board finds the Veteran's lay statements regarding the onset of his disability to be not credible. The Board finds that the Veteran's more recently-reported history of continued symptoms of degenerative joint disease since active service is inconsistent with the other lay and medical evidence of record. Indeed, while he now asserts that his disorder began in service, in the more contemporaneous medical history he gave at the service separation examination, he denied any history or complaints of symptoms of arthritis.

Specifically, the service separation examination report reflects that the Veteran was examined and his musculoskeletal system was found to be clinically normal. His in-service history of symptoms at the time of service separation is more contemporaneous to service, so is of more probative value than the more recent assertions made many years after service separation. *See Harvey v. Brown*, 6 Vet. App. 390, 394 (1994) (upholding a Board decision assigning more probative value to a contemporaneous medical record report of cause of a fall than subsequent lay statements asserting different etiology); *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (upholding Board decision giving higher probative value to a contemporaneous letter the veteran wrote during treatment than to his subsequent assertion years later).

When the Veteran sought to establish medical care for his hips in 2008, he did not report the onset of hip symptomatology during or soon after service. In July 2008, he specifically notes that the discomfort began about 10 years prior in the 1990s. Such histories reported by the Veteran for treatment purposes are of more probative value than the more recent assertions and histories given for VA disability compensation purposes. *Rucker v. Brown*, 10 Vet. App. 67, 73 (1997) (lay statements found in medical records when medical treatment was being rendered may be afforded greater probative value; statements made to physicians for purposes of diagnosis and treatment are exceptionally trustworthy because the declarant has a strong motive to tell the truth in order to receive proper care).

When weighing the evidence, the Board finds that the preponderance of the evidence is against the claim for service connection for a bilateral hip disability. As the preponderance of the evidence is against the claim for service connection for a bilateral hip disability, the benefit of the doubt rule does not apply. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102.

ORDER

Entitlement to service connection for a bilateral hip disability is denied.

REMAND

In a May 17, 2014 rating decision, the RO denied entitlement to service connection or colon cancer. In August 2014, the Veteran submitted a timely notice of disagreement with this decision. The RO has not issued a statement of the case pertaining to this issue. When there has been an initial RO adjudication of a claim and a notice of disagreement as to its denial, the claimant is entitled to a statement of the case, and the RO's failure to issue a statement of the case is a procedural defect requiring remand. *Manlincon v. West*, 12 Vet. App. 238 (1998).

Accordingly, the case is REMANDED for the following action:

> The RO must provide the Veteran and his representative with a statement of the case concerning the issue of entitlement to service connection for colon cancer. They should be given an appropriate opportunity to respond. If the Veteran perfects the appeal of this issue by submitting a timely substantive appeal, the case should be returned to the Board for further appellate consideration.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2013).

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L. M. BARNARD
Acting 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 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*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

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. *See* 38 C.F.R. 20.904. 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 the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (888) 838-7727.

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).