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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-0995

CAMMIE WYNN, JR., APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Cammie Wynn, Jr., through counsel, appeals a December 11, 2013, Board of Veterans' Appeals (Board) decision in which the Board denied his claim for disability compensation for degenerative arthritis of the thoracolumbar spine. Record of Proceedings (R.) at 3-14. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from December 1952 to December 1954. R. at 551-52. In September 2008, the appellant filed a claim for disability compensation for a back disorder. R. at 532-46. In September 2009, he submitted a statement explaining that he injured his back while driving a "5-ton" truck over "bomb cratered" roads during service in Korea. R. at 353. He submitted an additional statement asserting that he received medical treatment for his condition in Korea and was told that his "back was crooked." R. at 327. That same month, VA issued a rating decision denying service connection for a back disorder because there was no medical

evidence of a diagnosis of or treatment for a back disorder during service. R. at 560-68. VA also made a formal finding that the appellant's service medical and personnel records were unavailable for review. R. at 370, 562. At a June 2010 Board hearing, the appellant testified that he experienced back pain for about four or five months after he started driving over "rough roads" on which he "hit the ditches." R. at 327. The appellant asserted that he sought treatment in service and was told that his "back was crooked" and that the doctors wanted to "break [his] back and straighten it." R. at 285-86. He explained that he did not want surgery and instead was treated with medication and heat treatment. *Id.* He asserted that he sought treatment within a year after service, and thought that those records may be available. R. at 290. He also reported that, beginning in 1985, he was treated for his back by Dr. Bhagat who opined that there was a good possibility that his back condition was related to service. R. at 291. The Board member noted that if the appellant authorized it, VA would seek to obtain records from Dr. Bhagat. *Id.*

Accordingly, on June 30, 2010, the appellant signed a VA Form 21-4142, Authorization and Consent to Release Information, allowing VA to request medical records from Dr. Bhagat from 1984 to 1990. R. at 232-33. The authorization noted that VA had already obtained records from Dr. Bhagat from 1990 to the present. R. at 233. These records include a treatment record from 1993 indicating that the appellant experienced back pain when he bent over to feed his dog and tried to get up. R. at 432. In May 2001, the appellant was in a motor vehicle accident (MVA) that resulted in minor neck problems. R. at 417, 419-20. A June 2002 lumbar spine x-ray revealed degenerative changes in the lumbar spine. R. at 499. The appellant continued to complain of back pain in January and April 2003. R. at 413-14. Imaging studies from 2004 to 2006 also reveal mild arthritis or degenerative changes in the lumbar spine. R. at 486, 488, 496. The records also reflect that the appellant was in another MVA in 2008 resulting in some back pain and neck pain. R. at 395.

On October 21, 2010, VA requested treatment records from 1984 through 1990 from Dr. Bhagat. R. at 209. In September 2013, the Board noted that these records were still outstanding and remanded the appellant's claim for VA to obtain them. R. at 52-53. The appellant was provided with an additional VA Form 21-4142 that he did not complete. R. at 35-39. Additionally, the appellant underwent a VA medical examination in October 2013. R. at 27-34. The appellant reported that he had experienced back problems in service and that his back would hurt "off and on"

after service. R. at 28. The examiner noted that although the appellant reported he was treated for back pain in service, "[t]here is no medical evidence of ongoing back problems immediately after discharge. He was able to work as a metal finisher. The first medical evidence of a back condition was in 1993. 39 years after service." R. at 34. The examiner concluded that the back condition was less likely related to service and "is due to the aging process and the MVA after service." *Id.*

In the December 11, 2013, decision on appeal, the Board found that the duty to assist had been satisfied because VA had obtained the available relevant medical records and provided the appellant with an adequate examination. R. at 6-7. Although the Board found the appellant both competent and credible to report on his symptoms since service, the Board relied on the October 2013 VA medical opinion that determined that because the first medical evidence of a back disorder did not appear until 1993, the appellant's condition was less likely than not related to service and, instead, was due to the aging process and the postservice MVA. R. at 11-12. Finding the weight of the evidence was against the appellant, the Board denied his claim. R. at 13. This appeal followed.

II. ANALYSIS

The appellant makes two primary arguments that the Board erred in reaching its decision. The appellant argues that the Board failed to ensure that the duty to assist was satisfied because (1) it did not obtain relevant medical records despite a 2010 authorization to do so and (2) the 2013 VA medical opinion was inadequate. Appellant's Brief (Br.) at 15-21. Alternatively, the appellant argues that the Board provided inadequate reasons or bases: the Board failed to explain why the appellant's competent and credible lay evidence was insufficient to establish service connection through continuity of symptomatology where the VA examination was not "clear evidence" of an intercurrent event. *Id.* at 10-15.

The Secretary argues that the Board satisfied the duty to assist in obtaining records because the Board appears to have found the appellant's 2010 authorization was "stale," and thus, the Board was not under an obligation to obtain new records where the appellant failed to resubmit his authorization in 2013. Secretary's Br. at 13-14. The Secretary also asserts that the 2013 VA medical examination was adequate. *Id.* at 15-16. Finally, the Secretary maintains that the appellant's

reasons-and-bases argument overstates the law: there is no heightened "clear evidence" standard for intercurrent causes in continuity-of-symptomatology cases. *Id.* at 9-10.

A. VA's Duty To Obtain Medical Records

The Secretary has a duty to assist claimants in developing their claims. 38 U.S.C. § 5103A. That duty to assist includes the duty to make "reasonable efforts to obtain relevant records," as long as the claimant "adequately identifies" those records to the Secretary and authorizes the Secretary to obtain them. 38 U.S.C. § 5103A(b)(1); *see also Loving v. Nicholson*, 19 Vet.App. 96, 102 (2005). VA will make reasonable efforts to obtain relevant private medical records generally consisting of an initial request for the records and, if the records are not received, at least one followup request. 38 C.F.R. § 3.159(c)(1) (2014). If the Secretary is unable to obtain those records after making reasonable efforts to do so, the Secretary must provide notice of that fact to the claimant. *See* 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.159(e). The Board's determination that VA has satisfied the duty to assist is reviewed under the "clearly erroneous" standard of review. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert*, 1 Vet.App. at 52.

In the decision on appeal, the Board stated that "all identified and available private medical records pertinent to the years after service are in the claims file." R. at 6. The Board acknowledged that the September 2013 remand identified the appellant's outstanding private medical records and that VA subsequently asked the appellant to complete an authorization form allowing VA to seek those records. R. at 7. The Board noted that the appellant did not return these forms to VA, and therefore, VA did not attempt to obtain these records. *Id.* Accordingly, the Board found that the duty to assist regarding obtaining records had been satisfied. *Id.*

The Board's limited discussion of the September 2013 remand implies that the appellant only identified these outstanding medical records immediately prior to the remand. In actuality, the appellant identified the missing 1984 to 1990 records from Dr. Bhagat at the 2010 Board hearing. R. at 291. Consequently, the appellant completed the appropriate VA Form 21-4142 in June 2010. R. at 232-33. VA made one request to Dr. Bhagat's office in October 2010. R. at 209. There is no

evidence in the record that VA made a second request for records or otherwise notified the appellant that these records were unattainable. The September 2013 remand stated that the October 2010 request noted that although VA had received records from Dr. Bhagat from 2008 to 2013, no records from 1984 to 1990 were received. R. at 52. Accordingly, the Board remanded the appellant's claim for VA to obtain these outstanding records. R. at 53. In response, VA asked the appellant to submit a VA Form 21-4142 apparently ignoring that the appellant had already done so in 2010.

The Secretary argues that the Board appears to have determined that the 2010 authorization had grown stale, and therefore, the Board reasonably concluded that a new authorization was necessary. Secretary's Br. at 14. The Court finds the Secretary's argument unpersuasive as it is a post hoc rationalization with no foundation in the Board's analysis. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigation positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action advance for the first time in the reviewing court."). Section 3.159(c)(1) provides that VA will make reasonable efforts to obtain relevant private medical records generally consisting of an initial request for the records and, if the records are not received, at least one followup request. VA made only one request to obtain the appellant's records, and therefore, the Court finds that VA efforts were insufficient to satisfy the duty to assist.[1] 38 C.F.R. § 3.159. Accordingly, the Court will vacate the Board decision and remand the matter for VA to seek the appellant's outstanding medical records.

B. Inadequate Medical Examination

"[O]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim, he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's "'evaluation of the claimed disability will be a fully informed one."'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown,* 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski,* 1 Vet.App. 121, 124 (1991))). "Whether a medical opinion

[1] The Court recognizes that the duty to assist is not a one-way street. *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). Therefore, the appellant should promptly complete and return any forms necessary for VA to fully develop the appellant's claim.

is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Gilbert*, 1 Vet.App. at 52. As with any determination, the Board must provide a written statement of the reasons and bases for its conclusion enabling the appellant to understand the precise basis for the Board's decision and facilitating review in this Court. *Duenas v. Principi*, 18 Vet.App. 512, 517 (2004). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence 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).

In the decision on appeal, the Board found the appellant's reports about his observable symptoms and his postservice treatment competent and credible. R. at 8, 10. The appellant testified that he sought medical treatment during service, shortly after service, and again beginning in 1985. R. at 285-86, 290-91. Nevertheless, the Board relied on the October 2013 VA medical opinion that the appellant's back condition was less likely than not due to or a result of service because it was "due to the aging process and the post-service motor vehicle accident." R. at 9.

The appellant argues that the medical examination was inadequate because it was based on an inaccurate factual premise: that, despite the appellant's lay testimony to the contrary, the appellant did not have any back problems after service and that it is based on the absence of documented treatment for a low back disorder. Appellant's Br. at 10. The Court finds that the Board's reliance on the 2013 medical opinion is flawed. As noted above, the Board found the appellant competent and credible to report his observable symptoms and what treatment he received after service. R. at 8, 10. However, as the Board noted, the VA medical examiner concluded that the appellant's condition was due to aging and the postservice MVA in large part because there was no medical evidence of a back condition until 1993 – ignoring the appellant's competent and credible lay evidence regarding the existence of and treatment for his back condition. R. at 12, 34. Thus, the examiner impermissibly relied on a lack of treatment records to find that there was no evidence of aggravation. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (noting that VA's examiner's opinion, which relied on the absence of contemporaneous medical evidence, "failed to consider whether the lay statements presented sufficient evidence of the etiology of [the veteran's]

disability such that his claim of service connection could be proven"); *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007) (finding a medical examination inadequate where the examiner "impermissibly ignored the appellant's lay assertions that he had sustained a back injury during service"). Accordingly, the Court finds that VA medical examination was inadequate and the Board erred in relying on it – particularly as the examiner's opinion conflicts with the Board's express finding that the appellant provided competent and credible lay testimony pertaining to postservice symptoms and treatment. R. at 8, 10. On remand, the Board shall obtain a new medical examination considering the full evidence of record – including the appellant's lay statements.

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *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) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *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 Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the parties' pleadings, and a review of the record, the Board's December 11, 2013, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: June 1, 2015

Copies to:

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