IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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Vet. App. No. 15-335

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DOVAIN V. OTTERSON
Appellant,

v.

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

BRIEF FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
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DOVAIN V. OTTERSON, Appellant,	)	
v.	)	Vet. App. No. 15-335
ERIC K. SHINSEKI, Secretary of Veterans Affairs, Appellee.	)	

BRIEF OF THE APPELLANT

Pursuant to U.S. Vet. App. R. 28 and 31, Dovain V. Otterson, (Appellant) respectfully submits to the United States Court of Appeals for Veterans Claims (Court or CAVC) the initial Brief of the Appellant stating that there are errors of law contained within the Department of Veterans' Affairs (DVA, VARO or VA) decision of January 7, 2015. In that decision, the Board of Veterans' Appeals (Board or BVA), denied entitlement to service connection for thoracolumbar spine disability. In support of his position, Appellant relies on the information contained within the Record Before the Agency (RBA or R.) as filed with the Court and the following Brief of the Appellant.

STATEMENT OF THE ISSUES

I. Whether the Board committed remandable error when it failed to adequately explain how it determined continuity of symptomatology was interrupted by intervening causes as required by 38 U.S.C. § 7104(d)(1).

STATEMENT OF THE CASE

A. Jurisdiction

This Honorable Court has jurisdiction to review the January 7, 2015, Board decision under the authority of 38 U.S.C. § 7252(a).

B. Nature of the Case

The appellant appeals the January 7, 2015, decision of the Board of Veterans' Appeals ("Board" or "BVA") that denied his claim of entitlement to service connection for thoracolumbar spine disability. On appeal, Mr. Otterson submits that the Court should reverse the Board's finding that a 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, hold that the Board failed to provide an adequate statement of reason or bases, vacate the Board's decision, and remand for readjudication.

C. Pertinent Facts

Mr. Otterson served honorably on active military service from September 1956 to September 1960. **(RBA. at 47)**. Mr. Otterson maintains that he first injured his back in 1956, during basic training when lifting a 100 pound sack of potatoes up stairs. **(RBA 441 (432-459))**. Mr. Otterson stated that he did not seek treatment at that time because he thought it would prevent him from attending mechanic's school. **(RBA. 444 (432-459))**.

Mr. Otterson sustained further injury in 1957, when he injured his lower back while replacing generators. His service treatment records (STRs) confirm that in January 1958, he was treated for a backache of several months' duration. **(RBA. 581 (576-597))**. The pain was described as a dull ache on the Veteran's left side, just over the sacroiliac area. He was given a complete orthopedic exam and x-rays were obtained. The results were negative at that time.

Mr. Otterson sought treatment again in February 1958 and March 1958. Following examination, he was placed on light duty for one week. He stated that he was provided over-the-counter (OTC) pain medication. The appellant was discharged from service without seeking additional treatment.

Mr. Otterson maintains that his back continued to bother him upon discharge, so much so that he sought treatment within a few months of getting out of service in 1960. Unfortunately, he was unable to locate the medical treatment records. **(RBA. 454 (432-459)).** The Board acknowledged that the appellant sought chiropractic treatment beginning in 1961, but determined they were unable to tell what part of the back was

being treated. Although, the July 2007 letter from Dr. Shoff clearly shows treatment for the mid back and upper thoracic spine. **(RBA. 405-406).**

Mr. Otterson submitted private treatment records showing treatment beginning in October 1961. **(RBA. 464-493)**. At that time, Dr. Niles R. Shoff, stated in a letter of May 2007, that Mr. Otterson had symptoms that began in service and continued to increase in severity. He first sought treatment for a low back problem that began when lifting a wheel. He experienced a severe catch in his lower back with spasms in the left sacrospinalis muscle. Mr. Otterson and his private physician, maintains that these symptoms first appeared in service and any additional symptoms were exacerbations.

Mr. Otterson submitted several buddy statements stating how appellant complained of back pain since his discharge from service. **(RBA. 520-535)**. Statements from Ms. M.S. and T.S. state Mr. Otterson required the use of a special belt, while Dr. T.L. states that Mr. Otterson was unable to perform as a mechanic due to his back pain. Mr. Otterson's brother specifically stated that Mr. Otterson had back pain at separation from service and continues to suffer from back pain.

Mr. Otterson originally sought service connection in May 2006. His claim was denied and he appealed to the Board. The Board remanded his case for a second time in January 2013 for further development and an examination. The Board determined that the examination was inadequate and the Regional office failed to consider statements of continuity of symptomatology.

Dr. Shoff's addendum dated July 27, 2007, stated Mr. Otterson sought treatment shortly upon discharge from service. He treated him for complaints to include the mid

back and upper thoracic spine. Dr. Shoff opined that Mr. Otterson's current degenerative disc disease (DDD) is the result of service and is getting worse.

Mr. Otterson presented for a C&P examination in March 2013. **(RBA. 136-171)**. His diagnosis was mild DDD lower thoracic spine and multilevel DDD and degenerative joint disease (DJD) of the lumbosacral spine. The examiner opined that the mild DDD of the lower thoracic spine and multilevel DDD and DJD of the lumbosacral spine is less likely than not (less than 50/50% probability) related to active duty status. As rationale, the examiner stated that since Mr. Otterson's enlistment history and physical examination identified no physical abnormalities of the spine; in service treatment was conservative; and that post-service treatment followed an intervening cause, that his current diagnosis was not due to service.

In April 2013, the Appeals Management Center (AMC) issued a Supplemental Statement of the Case (SSOC) denying the claim. **(RBA. 125-135)**. The AMC stated that the medical evidence did not show Mr. Otterson's disability was incurred in or the result of service.

On July 30, 2013, the Board denied the appellant's claim based on the VA expert examiner's opinion, stating that the preponderance of the evidence is against the claim, and that the benefit of the doubt rule is inapplicable. The Board determined that Mr. Otterson's thoracolumbar was not incurred in or the result of service. The Board found the VA examiner's opinion as highly probative against the claim and did not consider the buddy statements as competent.

On June 30, 2014, the Court set aside the July 2013, Board decision and remanded the matter for readjudication. The Court determined that it was not "harmless error" for the Board to fail to address the competence of the veteran's friends and family members when they were providing evidence as to the linkage element of the continuity-of-symptoms inquiry.

The Board issued the current decision on January 7, 2015. **(RBA. 2-25).** The Board determined that the lay statements were not competent evidence to establish linkage based on its belief of post-service injuries.

SUMMARY OF THE ARGUMENT

The Appellant argues that the Board's determination that his thoracolumbar spine disability was not causally related to or aggravated by, an event, injury or disease during service is clearly erroneous. The Board violated 38 U.S.C. § 7104(d)(1) by failing to adequately explain how it determined continuity of symptomatology was interrupted by intervening factors. Therefore, vacatur and remand is the appropriate remedy.

ARGUMENT

I. THE BOARD COMMITTED REMANDABLE ERROR WHEN IT FAILED TO ADEQUATELY EXPLAIN HOW IT DETERMINED CONTINUITY OF SYMPTOMATOLOGY WAS INTERRUPTED BY INTERVENING FACTORS IN VIOLATION OF 38 U.S.C. § 7104(d)(1).

A. Standard of Review

The Board's finding that thoracolumbar spine disability was not causally related to or aggravated by, an event, injury or disease in service is clearly erroneous. Findings of material fact made by the Board are subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). The CAVC has the authority to hold unlawful and set aside or reverse a VA finding of material fact adverse to the claimant if the finding is clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); L*ennox* v. *Principi*, 353 F.3d 941,945 (Fed.Cir. 2003); *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 52 (1990). A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert at 52 (quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948).

The clearly erroneous standard of review also applies to the Board's application of the evidentiary "benefit-of-the-doubt standard set forth in 38 U.S.C. § 5107(b). Under 38 U.S.C. § 5107 (b), the preponderance of the evidence must be against the claim for benefits to be denied." *Padgett v. Nicholson*, 19 Vet. App. 133, 146 (2005), *withdrawn on other grounds*, 19 Vet. App. 334 (2005), *reversed and remanded*, 473 F.3d 1164 (Fed.

Cir. 2007), *reinstated*, 22 Vet. App. 159 (2008). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102. To deny a claim on its merits, the evidence must preponderate against the claim. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

Board decisions must include a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." *Sanders v. Principi*, 17 Vet. App. 232, 235 (2003) (citing 38 U.S.C. § 7104(d)(1)); *Simmons v. Principi*, 17 Vet. App. 104, 111 (2003). Compliance with this mandate requires "clear analysis and succinct but complete explanations. A bare conclusory statement . . . is neither helpful to the veteran, nor clear enough to permit effective judicial review[.]" *Simmons*, 17 Vet. App. at 115 (quoting *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990)) (internal quotation marks omitted). The Board must consider all applicable laws and regulations. 38 U.S.C. § 7104(a). An inadequate statement necessitates remand for further adjudication. *Kay v. Principi*, 16 Vet. App. 529, 532 (2002).

B. Continuity of Symptomatology

Pursuant to 38 C.F.R. § 3.303(b), "[c]ontinuity of symptomatology 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." It is "symptoms, not treatment, [that] are the essence of any evidence of continuity of symptomatology." *Savage v. Gober*, 10 Vet. App. 488, 496 (1997).

In this instance, the Board determined that continuity of symptomatology was interrupted by the records of numerous post-service injuries. **(RBA. 17 (2-25)).** Mainly, in 1961, the appellant tried to lift a wheel and experienced a "severe catch" in his lower back. Next in 1987, Mr. Otterson reported hurting his low back while working on a truck. In March 1992, he reported being run over by a tractor and there were several more reoccurrences of low back injuries that eventually led to his current diagnosis of DDD. The Board stated that Mr. Otterson was competent to give evidence about observable symptoms of back pain, however the Board found that there are contemporaneous medical evidence that break continuity. In doing so, the Board failed to discuss whether if found Mr. Otterson's statement of seeking medical treatment immediately upon discharge from service credible, but that he was unable to obtain those records. The Board also disregarded the fact that when Mr. Otterson presented for treatment in October 1961, he related his injury to service. This report was also contemporaneous to his seeking medical treatment. Also, within this report is Dr. Shoff's statement that he has no question that Mr. Otterson's back disability began in service. The Board failed to adequately explain how they would accept the portion of the report that Mr. Otterson's low back disability was due to lifting a heavy object, and reject the portion of the report where Dr. Shoff relates the disability to an in-service event. This report is credible evidence that continuity of symptomatology was not interrupted. These statements were made in 1961 at the time of seeking treatment. As such, the Board has

not provided a plausible basis for rejecting evidence of continuity pursuant to 38 C.F.R. § 3.303(b).

The BVA may not reject a veteran's competent lay evidence, regarding matters that are within his or her personal knowledge and experience, based solely upon the fact that the record fails to contain corroborating medical evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006). While the veteran may not provide a medical diagnosis, he may testify as to matters in which he has firsthand knowledge. *See Layno v. Brown*, 6 Vet. App. 465, 469 (1994) (stating a witness is competent to testify if he or she has personal knowledge of the matter and that personal knowledge is that "which comes to the witness through the use of his senses—that which is heard, felt, seen, smelled, or tasted"). *See also Barr v. Nicholson*, 21 Vet. App. 303, 310 (2007) (citing *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006) (stating "when subject is one to which lay person is 'competent' to testify, such 'testimony can be rejected only if found to be mistaken or otherwise deemed not credible")).

Dr. Shoff opined there is no question in his mind that Mr. Otterson suffered an injury in service. Dr. Shoff has contemporaneous medical records and his itemized statements showing treatment beginning in October 1961. His records provides the necessary nexus between the in-service event and the continuity of symptomatology. However, the Board erroneously rejected the evidence stating that it was less probative than the 2013 VA examiner's opinion because there was no detailed rationale for the opinion. Although Dr. Shoff's opinion does not provide a detailed rationale concerning the medical diagnosis, it does provide the necessary nexus as to the in-service event and

the continuing symptomatology. As such, Dr. Shoff's report should be afforded the appropriate weight. Mr. Otterson's medical diagnosis of DDD is not in dispute. The parties agree, and the medical evidence of record confirms this. Mr. Otterson's statement recounting his back pain during the time following his in-service injury is a particularly trustworthy corroboration of his later statements regarding the same. The Board's credibility finding, therefore, is based on a mischaracterization of the evidence that caused great prejudice to Mr. Otterson by contributing to the Board's finding that he did not suffer continuous symptoms since service.

The Board failed to adequately explain why Mr. Otterson's statements and his numerous buddy statements, are not "persuasive and competent" evidence indicating a possible association sufficient to satisfy chronicity and continuity of symptomatology. *See McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006) (noting the "low threshold"). Medical evidence is not necessary to establish an indication of a possible association between a current disability and a service-connected disability when competent lay evidence provides such a link. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Shinseki*, 23 Vet. App. 12, 15 (2009) (citing *Layno v. Brown*, 6 Vet. App. 465, 470 (1994)). The Board, therefore, did not provide an adequate statement of reasons or bases as to why they are requiring medical evidence of continuity. The lay evidence rebuts the Board's finding that several years passed without complaints and that there was an intervening cause. *See* 38 C.F.R. §§ 3.303(a), 3.307(b) (lay evidence alone may establish the factual basis for service connection).

For these reasons, the Board's reasons-or-bases statement is inadequate, section 7104(d)(1) compels the Board to adequately explain its findings so the Court can "'understand and evaluate the proceedings as part of its review.'") (quoting S. Rep. No. 100-418, at 37-38 (1988)); *Dalton v. Nicholson*, 21 Vet. App. 23, 35 (2007) ("'Whether the B[oard's] ultimate conclusions are correct or not, . . . the incomplete nature of the decision below does not permit proper review by this Court.'") (quoting *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991)).

CONCLUSION

For the foregoing reasons, Mr. Otterson requests that the Board's January 2015 decision be remanded for proper adjudication consistent with applicable law.

July 1, 2015

Respectfully submitted,

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