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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0335

DOVAIN V. OTTERSON, APPELLANT,

V.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Dovain V. Otterson appeals through counsel a January 7, 2015, Board of Veterans' Appeals (Board) decision denying service connection for a thoracolumbar spine disability. Record (R.) at 2-22. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the January 2015 decision.

I. FACTS

Mr. Otterson served on active duty in the U.S. Air Force from September 1956 to September 1960. R. at 47. According to the veteran, he initially injured his back in 1956 during basic training when carrying a 100-pound bag of potatoes up stairs. R. at 441-42. He stated that he did not seek treatment for the back injury at that time because he thought it would prevent him from attending mechanic school. R. at 444. Mr. Otterson also stated that, in late 1957, he reinjured his back lifting generators. R. at 444-45. Service medical records (SMRs) reflect that he sought treatment for low back pain of several months duration in January, February, and March 1958. R. at 581. X-rays and spine films taken at those times were negative for any spine abnormalities, and he was variously

prescribed anti-inflammatory medication and placed on restricted duty. *Id.* Upon separation from service, he denied musculoskeletal abnormalities and his spine was evaluated as normal. R. at 576-79.

In May 2006, Mr. Otterson filed a claim for service connection for a back disability, asserting that he had had back problems since service. R. at 624-36. Later that month, he submitted copies of private medical records reflecting treatment for numerous post-service back injuries, including a February 1998 incident where he kicked a towing chain (R. at 641), an October 1999 incident where he twisted his back rolling up a car window (*id.*), an April 2001 motor vehicle accident (R. at 664-66, 670-71), and a February 2006 injury sustained while working on a car (R. at 657). In July 2006, a VA regional office (RO) denied the claim (R. at 569-73), and, the following month, the veteran timely filed a Notice of Disagreement as to that decision (R. at 561-63). Mr. Otterson perfected his appeal in September 2006 and submitted various statements from friends and family members who averred that the veteran has had back problems since the 1960s. R. at 520-35.

In May 2007, Mr. Otterson submitted a letter and medical records from a private chiropractor, Dr. Niles R. Shoff, who had treated him for back and shoulder problems since 1961. R. at 464-93. According to Dr. Shoff, Mr. Otterson first sought treatment with him after "experienc[ing] a severe catch in his lower back" caused by "trying to lift a wheel." R. at 464. That incident caused low back pain and muscle spasms that left the veteran "almost immobilized" and, since that time, he has experienced "like symptoms which would 'lay him up' for a week or ten days." *Id.* Dr. Shoff also noted that, from the outset of treatment, it has been Mr. Otterson's contention that his initial back problems began in service. *Id.* The associated medical records showed treatment for back pain ascribed to automobile maintenance injuries in November 1987 (R. at 492), June 1995 (R. at 491), September 1995 (*id.*), and October 1995 (R. at 490).

Later in May 2007, Mr. Otterson testified at a decision review officer hearing that, although his back was "fairly decent" upon separation from service, he has continued to have the "same problem[s]" since separation. R. at 447. He also indicated that in the fall of 1960, prior to beginning treatment with Dr. Shoff, he sought treatment from another doctor but those records were not longer available. R. at 453-54.

In July 2007, Mr. Otterson submitted an addendum from Dr. Shoff, which noted that the veteran "had several bouts of [back] problems when he was working in [the] maintenance profession while in the Air Force" and first sought treatment with Dr. Shoff "shortly after being discharged." R. at 405. Dr. Shoff opined that there was "no question in [his] mind that [Mr. Otterson] suffered an injury in the service and it is worsening with age" and that his postservice back problems were "based on the initial injury doing his maintenance work in the Air Force." *Id*.

In December 2010 and January 2013, the Board remanded the veteran's claim for further development. R. at 192-207, 287-92. The latter remand directed the RO to provide Mr. Otterson with a VA spine examination, which was provided in March 2013. R. at 136-71. The veteran denied any acute back injuries after separation from service (R. at 139), but the examiner's review of the claims file, including the records from Dr. Shoff, noted numerous such injuries, as outlined above (R. at 139-54). After summarizing those documents and performing a physical examination, the examiner diagnosed mild degenerative disc disease (DDD) of the lower thoracic spine and multilevel DDD and degenerative joint disease (DJD) of the lumbosacral spine. R. at 169. The examiner acknowledged Mr. Otterson's statements of continuing low back pain and stiffness since service but opined that the diagnosed back conditions were less likely than not related to service because the veteran did not need ongoing care for back problems in service following the 1958 treatment, his separation examination did not reflect any back abnormalities, his chiropractic treatment after service was related to an "intervening interceding injury," there were no "identifiable diagnoses" of a back disability until May 2003, and he did not have ligamentous instability or radiculopathy of the thoracolumbar spine at this phsycial examination. R. at 169-71.

In July 2013, the Board denied service connection for a thoracolumbar spine disability. R. at 92-114. Mr. Otterson appealed and, in June 2014, the Court set aside the July 2013 Board decision because it inadequately addressed the lay evidence of record and remanded the claim for readjudication. R. at 77-86.

The case was returned to the Board and, in January 2015, it issued the decision currently on appeal. R. at 2-22. The Board found that the most probative evidence of record–namely, the service separation documents and the March 2013 VA examination–indicated that, although the veteran injured his back in service, his current back problems were more likely than not related to post-

service injuries, including the 1961 incident lifting a wheel. R. at 16-21. Relevant to this appeal, the Board found that Mr. Otterson was not a credible historian because he denied any postservice back injuries, despite evidence of more than eight such injuries in the record. R. at 21. This appeal followed.

II. ANALYSIS

Mr. Otterson argues that the Board provided inadequate reasons or bases for its finding that he did not have continuing back problems since service sufficient to support a grant of service connection for a thoracolumbar spine disability. Appellant's Brief (Br.) at 7-12. Specifically, he asserts that the Board (1) erroneously rejected his lay statements of receiving back treatment shortly after service; (2) improperly discounted Dr. Shoff's positive linkage opinion; and (3) failed to adequately explain why the buddy statements of record were not probative as to continuity. *Id.* at 8-11. The Secretary disputes these contentions and urges the Court to affirm the Board decision because the Board's denial of service connection was plausibly based on the evidence of record and was adequately explained. Secretary's Br. at 10-19. The Court agrees with the Secretary.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). For chronic diseases listed in 38 C.F.R. § 3.309(a)–including arthritis[1]–service connection may also be established by showing continuity of symptoms. 38 C.F.R. § 3.303(b) (2015); 38 C.F.R. § 3.309(a) (2015); *see Walker v. Shinseki*, 708 F.3d 1331, 1340 (Fed. Cir. 2013) (holding that only those chronic diseases listed in § 3.309(a) are subject to service connection by continuity of symptoms as described in § 3.303(b)); *Savage v. Gober*, 10 Vet.App. 488, 495-98 (1997).

The Court reviews the Board's factual findings regarding entitlement to service connection under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). "A factual finding 'is "clearly erroneous" when although there

[1]DJD is another name for osteoarthritis. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 532 (32d ed. 2012).

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.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). As with any finding on a material issue of fact and law presented on the record, the Board must support its service connection determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for rejecting 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).

Mr. Otterson's arguments are unavailing. Regarding the veteran's lay statements, the Board plausibly found that Mr. Otterson was not a credible historian because, at the March 2013 VA examination, he denied any postservice back injuries even though the record documented at least eight such injuries. R. at 21; *compare* R. at 139 (veteran's statement to March 2013 VA examiner), *with* R. at 464, 490-92, 641, 657, 664-66, 670-71 (treatment records reflecting postservice back injuries). The Board explained that this inconsistency with the other evidence of record "call[ed] into question the credibility of the [v]eteran's lay testimony as a whole," including his report that he sought treatment for in-service injuries in 1960, shortly after separation from service. *Id*. The Board is permitted to impugn the veteran's credibility based on discrepancies between the veteran's lay statements and the other evidence of record, *see Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006); *Caluza*, 7 Vet.App. at 511, and the Board adequately explained its reasons or bases for doing so in this case, *see id*. at 506; *Gilbert*, 1 Vet.App. at 52. Accordingly, Mr. Otterson's first argument fails.

Regarding Dr. Shoff's positive linkage opinion, the Board found that it lacked probative value because it did not contain supporting rationale and did not reference the veteran's numerous post-service back injuries. R. at 17. Because "most of the probative value of a medical opinion comes from its reasoning," *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008), the Board was

permitted to discount Dr. Shoff's opinion for not containing a clear supporting rationale.[2] Likewise, the Board was allowed to find that opinion less probative based on Dr. Shoff's failure to account for Mr. Otterson's numerous postservice injuries, which are relevant to his claimed continuity of back symptoms since service. *See id*. ("Critical pieces of information from a claimant's medical history can lend credence to the opinion of the medical expert who considers them and detract from the medical opinions of experts who do not. "). Given that the Board clearly explained why it was discounting Dr. Shoff's positive linkage opinion and articulated proper bases for doing so, the Court discerns no error in the Board's reasons or bases for its weighing of that opinion. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 52.

Finally, regarding the buddy statements of record, the Board found that they were not competent to establish continuity of back symptoms since service because the declarants either did not know the veteran since service–and therefore lacked personal knowledge as to the continuity of his back symptoms–or did not possess the medical expertise to distinguish between back symptoms related to in-service injuries and those related to postservice injuries proximate to separation from service. R. at 17-18. Because competence involves personal knowledge of a fact and the expertise necessary to testify to that fact, *see Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994), the lack of either would diminish the probative value of the buddy statements, as outlined by the Board. R. at 17-18. Thus, it did not err in discounting the probative value of the buddy statements in those regards.

But, even if the Board erred in assessing the competence of that lay evidence as the veteran alleges (Appellant's Br. at 11), Mr. Otterson has not carried his burden of demonstrating that that error prejudiced his claim. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's

[2]To the extent that Mr. Otterson concedes that Dr. Shoff did "not provide a detailed rationale" but nevertheless argues that the opinion should be "afforded appropriate weight" (Appellant's Br. at 10-11), his argument amounts to nothing more than a disagreement with the Board's weighing of that opinion, which he has failed to show was clearly erroneous. *See Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010) ("The Board, not the Court, is responsible for assessing the credibility and weight to be given to evidence, and the Court may overturn the Board's assessments only if they are clearly erroneous." (citing *Owens v. Brown*, 7 Vet.App. 429, 433 (1995))); *see also Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005).

determination"). Significantly, the Board found in the alternative that, to the extent that the buddy statements could be considered competent evidence of continuity of symptoms since service, they were outweighed by other evidence of record, including the medical evidence of no back symptoms or spine abnormalities at separation from service, Dr. Shoff's initial 1961 treatment records for a work-related back injury, and the adequate March 2013 VA examination finding no link between the veteran's current back disability and service. R. at 16-17, 19-20. Given that Mr. Otterson does not challenge the adequacy of the March 2013 VA examination nor argue that the Board provided inadequate reasons or bases for favoring any of the other negative evidence over the buddy statements, the Court cannot conclude that any error in assessing the competence of the favorable buddy statements prejudiced Mr. Otterson's claim. *See* 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409; *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (holding that "strict adherence" to the reasons-or-bases requirement is not warranted where it would impose additional burdens on the Board with no benefit flowing to the veteran).

In sum, the Court concludes that the Board's decision to deny service connection for a thoracolumbar spine disability has a plausible basis in the record and is supported by adequate reasons or bases. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 52.

III. CONCLUSION

Upon consideration of the foregoing, the January 7, 2015, Board decision is AFFIRMED.

DATED: January 21, 2016

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