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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0770

LAWRENCE B. BATES, 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, Lawrence B. Bates, through counsel appeals a February 5, 2015, Board of Veterans' Appeals (Board) decision that denied VA disability compensation for a (1) right hip disability, status post right hip replacement, to include as secondary to a service-connected right foot disability; and (2) low back disability, to include as secondary to a service-connected right foot disability. Record of Proceedings (R.) at 1-13. 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 February 2015 decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served honorably on active duty in the U.S. Marine Corps from November 1956 to February 1959. R. at 1189. In July 1958, the appellant sustained a severe crushing injury to both feet. R. at 254-57, 1195. As a result of that injury, the appellant was discharged in February 1959. R. at 157, 1197-98.

In March 1959, the appellant filed a claim for disability compensation for bilateral foot injuries. R. at 1189-92. That same month, a VA examination diagnosed the appellant with a fracture deformity of the right foot. R. at 1160-63. VA awarded disability compensation for a fracture deformity of the right foot, with a 100% convalescence rating from March 1959 to October 1959, and a 10% disability rating from October 13, 1959. R. at 1134-35, 1181.

The appellant disagreed with the rating decision and in February 1960, underwent an orthopedic examination. R. at 1113-14, 1124. At that time, the appellant reported that he experienced some lumbosacral aching when he stands for a long time. R. at 1113-14. The appellant also testified at an April 1960 hearing that he experienced back aches as a result of walking two or three blocks. R. at 1104. Similarly, an August 1963 hospital record reveals that the appellant experienced some back pain for 2 to 3 days following right foot surgery. R. at 1036-37.

In March 2004, the appellant filed a disability compensation claim for arthritis. R. at 950-51. Two months later, the appellant stated that for 3 or 4 years he had thought that he had a "groin pull or hamstring," but that when he went to see a doctor, he learned that he needed to have his right hip replaced. R. at 947-48. The appellant noted that he underwent hip replacement surgery in March 2002 and also informed VA about his July 1958 injury in the Marine Corps. *Id.*

In April 2009, the appellant filed a claim for disability compensation for right hip and lower back disabilities secondary to his service-connected right foot disability. R. at 560-61, 581, 583, 610. In September 2009, the VA regional office (RO) obtained a VA medical opinion, which was provided based on review of the claims file without a physical examination. R. at 572-73. The physician determined that there was no medical evidence to support any causal relationship between the appellant's claimed hip and low back disabilities and his service-connected right foot deformity. *Id.* Based on this examination, the RO denied both claims. R. at 555-58. The appellant disagreed with the rating decision and perfected an appeal to the Board. R. at 427-34, 479-510, 543-51.

At an August 2014 Board hearing, the appellant testified that the physician who performed his right hip replacement had indicated that his right hip arthritis was probably caused by his service-connected injuries and that an orthopedic doctor similarly related his low back arthritis to his service-connected right foot disability. R. at 1284, 1294-95. The following month, the Board found that the September 2009 VA examination was inadequate because the examiner had not performed a physical

examination of the appellant or opined whether the appellant's service-connected disabilities aggravated his right hip or low back disability. R. at 134. The Board remanded both claims to obtain outstanding medical records and to provide a VA medical examination to determine the nature and etiology of the claimed conditions. R. at 134-35. The Board's remand directed that "[t]he examiner should review the records associated with the paper claims file and the electronic records on VBMS [(Veterans Benefits Management System)] and Virtual VA." R. at 135. Additionally, the Board "invited" the examiner's attention to (1) the appellant's June 2009 statement and October 2009 Notice of Disagreement, which included the appellant's reports of "stress and tension on his right hip and lower back [as a result of his] right lower extremity disability and the right leg being shorter than the left leg" and "instability and altered gait"; and (2) March 2010 private orthopedic treatment records that contained medical evidence of antalgic gait. R. at 136-37.

In November 2014, the appellant underwent an examination of his lower back and hip. R. at 36-55. The VA examiner noted that she reviewed the appellant's VA treatment records and VBMS, but indicated that she did not review the VA claims file and the "hard copy paper c-file." R. at 36-37, 45-46. The examiner also considered the appellant's lay statements regarding the onset of his conditions, noting that the appellant stated he began having back pain in 2004 or 2005 and right groin pain in 2000. R. at 37, 47. Following a physical examination and diagnostic testing, the examiner opined that it was less likely than not that the appellant's claimed disabilities were etiologically related to service because there was no evidence in the appellant's service medical records of complaints or treatment for the hip or back. R. at 53-54. The examiner further opined that it was less likely than not that the appellant's claimed disabilities were caused, or aggravated by, his service-connected disability, to include as a result of an altered gait or a leg-length discrepancy. R. at 54-55. The examiner explained:

Review of the mainstream medical literature does not support the claim that ankle injury with altered gait and/or leg length discrepancy causes or aggravates beyond the natural progress arthritis of the hip or lumbar disc disease, DJD [(degenerative joint disease)] of the spine, [or] spinal stenosis. The [v]eteran[']s hip and back condition are more likely the result of normal aging. The [v]eteran has arthritis in multiple other joints as well.

Id.

In its February 2015 decision, the Board denied disability compensation for right hip and low back disabilities, to include as secondary to the appellant's service-connected right foot disability. R. at 1-13. The Board stated that "[t]here is no lay allegation or medical evidence to indicate that the [v]eteran's right hip and low back disabilities, to include arthritis, manifested in service, within the first post-service year, or are otherwise related to service." R. at 7. The Board further found it significant that "the evidence of record shows no complaints or treatment pertaining to the right hip or low back in service and until over three decades after separation from service." *Id.* The Board then relied primarily on the November 2014 VA examiner's opinion to deny both claims. R. at 9. The Board noted that the examiner examined the appellant and based her opinion on a review of the claims file, the appellant's lay statements, and a review of the medical literature. *Id.* After recounting the examiner's rationale, the Board acknowledged the appellant's report that private physicians had related his hip and back disabilities to his service-connected right foot disability, but stated that the appellant did not report that the physicians provided any rationale for their opinions. R. at 9-10. Accordingly, the Board assigned less probative value to the private physicians' opinions and concluded that the preponderance of the evidence weighed against the appellant's claims. *Id.* This appeal followed.

II. ANALYSIS

The appellant raises four contentions of error: (1) The Board erred by relying on the November 2014 VA examination, which he asserts is inadequate; (2) the Board erred when it found that VA substantially complied with its remand instructions; (3) VA violated its duty to assist; and (4) the Board's decision is not supported by an adequate statement of reasons or bases. Appellant's Brief (Br.) at 6-17; Reply Br. at 1-7. The Secretary argues for affirmance of the Board's decision. Secretary's Br. at 5-15.

A. Compliance with Prior Remand and VA's Duty To Assist

A remand by the Board "confers on the veteran . . . , as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary

is required to comply with remand orders, it is substantial compliance, not absolute compliance, that is required. *See Dymment v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (holding that remand was not warranted because the Secretary substantially complied with the Board's remand order).

Additionally, although VA need not provide a medical examination in all cases, "once 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) (internal quotation marks omitted) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). Additionally, the opinion must "support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Stefl*, 21 Vet.App. at 124-25; *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). However, the law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

"Whether a medical opinion 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). "A factual 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.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). As to any finding on a material issue of fact and law presented on the record, the Board must support its finding with an adequate statement of reasons or bases that enables the claimant to

understand the precise basis for that finding and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991).

The appellant argues that the Board failed to ensure compliance with its remand order and that the November 2014 examination is inadequate, in part, because the examiner did not review the claims file. Appellant's Br. at 6-13. The Secretary counters that the examiner "substantially complied with the September 2014 remand order because the examiner reviewed [the] [a]ppellant's VA treatment records and VBMS." Secretary's Br. at 8. He contends that the examiner could not have reviewed a hard copy of the claims file because, as of the date of the examination, "the paper file had been scanned into VBMS and, as such, was the [a]ppellant's claims file." *Id.* at 8-9.

In the decision on appeal, the Board found that there had been substantial compliance with its remand instructions, noting that an examination and opinion were obtained. R. at 4. The Board did *not* discuss whether the examiner complied with its specific instructions to "review the records associated with the paper claims file *and* the electronic records on VBMS *and* Virtual VA" (R. at 135 (emphasis added)), although later in its opinion the Board found that the opinion was of probative value, in part, because the opinion was based on review of the "[v]eteran's claims file" (*compare* R. at 4, *with* R. at 9). The Board's failure to address this aspect of the examiner's compliance with the remand instructions frustrates judicial review because the examiner twice reported that she had *not* reviewed the claims file or paper file. R. at 37, 45-46.

Although the Secretary baldly asserts that the examiner could not have reviewed the paper file because it had already been scanned into VBMS, his argument ignores the plain language of the Board's remand instructions, which directed the examiner to review *both*. Further, there is no evidence in the record when the claims file might have been scanned or whether it remained available for review. Accordingly, the Court finds that the Secretary's argument is nothing more than a post hoc rationalization, which will not be accepted in lieu of explanation from the Board. *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 advanced for the first time in the reviewing court.").

Accordingly, both claims must be remanded for the Board to determine whether the examiner substantially complied with the Board's remand instructions and to support its decision with an adequate statement of reasons or bases. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

B. Additional Arguments

Although the Court has already determined that remand is necessary, the Court will nevertheless address the appellant's argument that the Board ignored potentially favorable evidence to ensure a proper decision by the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted). Specifically, the appellant argues that the Board clearly erred when it found no evidence of complaints or treatment pertaining to the low back "in service *and until over three decades after separation*." R. at 7 (emphasis added). The Court agrees.

Contrary to the Board's finding, the record contains medical and lay evidence of back pain in 1960, within the 1-year presumptive period following separation from service, as well as in 1963. *See* R. at 1104 (appellant's testimony at an April 1960 hearing), 1113-14 (February 1960 medical record), 1036-37 (August 1963 medical record). The Board erred when it failed to discuss this evidence, *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"), and its statement that there is *no* evidence of back complaints for over 3 decades is clearly erroneous. *See Hersey, supra*. The Board's errors frustrate judicial review and provide a further basis for remand. *See Tucker and Gilbert, both supra*.

Lastly, the Court notes that the appellant also argues that the November 2014 examination is inadequate because the examiner failed to reconcile her opinion that the appellant's current disabilities are more likely the result of normal aging, with the medical and lay evidence from 1960 and 1963 indicating that the appellant experienced back pain in his early 20's. Appellant's Br. at 10-

11. The Secretary argues that the appellant is not competent to opine what evidence is relevant to the examiner's opinion and that it is the Board's, not the examiner's, duty to assess the evidence. Secretary's Br. at 11-12.

Here, the Board found the VA examination adequate in part because the examiner had reviewed the record and the appellant's lay statements. R. at 9. Although there is no requirement that a medical examiner comment on every favorable piece of evidence in the record, *see Monzingo, supra*, the Court notes that there is no indication in the examination report that the examiner was aware that the appellant had complained of back pain within 1 year after service. R. at 36-45, 53-54. Instead, the examiner opined that the appellant's back condition was not related to service because his service medical records were silent for back complaints or treatment. R. at 53-54. Because the Board's decision is based in part on the mistaken premise that the appellant had no back symptoms until more than 3 decades after service, on remand the Board must also reassess whether the VA examiner based her opinion upon consideration of the appellant's complete medical history such that the Board's determination may be fully informed. *See Stefl, supra*; *see also Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994) (The Board may not evade its statutory reasons-or-bases requirement by adopting an inadequate medical opinion that fails to discuss evidence supporting the veteran's position.).

In pursuing the matter 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 the 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 the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's February 5, 2015, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision

DATED: June 30, 2016

Copies to:

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