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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1525

RICHARD BARBETT, APPELLANT,

v.

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

Before HAGEL, *Senior Judge*.¹

MEMORANDUM DECISION

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

HAGEL, *Senior Judge*: Richard Barbett appeals through counsel an April 9, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to VA disability benefits for Parkinson's disease. Mr. Barbett's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Board's denial of benefits for Parkinson's disease was clearly erroneous, the Court will reverse the April 2015 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Barbett served on active duty in the U.S. Air Force from September 1975 to September 1982. His primary military occupational specialty was law enforcement specialist.

In April 2010, Mr. Barbett filed a claim for VA disability benefits for Parkinson's disease, alleging herbicide exposure in service while he was stationed at Fort McClellan in Anniston,

¹ Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 09-16 (Oct. 13, 2016).

Alamba. In November 2010, a VA regional office denied his claim. Mr. Barbett filed a Notice of Disagreement with that decision and ultimately appealed to the Board.

In December 2011, Mr. Barbett submitted a lay statement indicating that he believed he was exposed to toxic chemicals while stationed at Fort McClellan, Alabama.

After further development, including a remand by this Court, the Board issued the decision on appeal denying Mr. Barbett's claim. The Board found that Mr. Barbett has a current diagnosis of Parkinson's disease and that some level of exposure to polychlorinated biphenyls and other toxic substances may be assumed. This appeal followed.

II. ANALYSIS

Mr. Barbett asserts that the Board erred in concluding that he was not exposed to herbicides and therefore not entitled to benefits. The Court agrees.

Parkinson's disease is specifically recognized as a disease associated with exposure to herbicide agents. 38 C.F.R. § 3.309(e) (2016). Although VA has not established a presumption of herbicide exposure for veterans who served at Fort McClellan, Mr. Barbett may establish herbicide exposure based on the evidence available. *See* 38 U.S.C. § 1116(a); 38 C.F.R. §§ 3.303 (2016), 3.307(a)(6)(i)-(iii) (2016). Accordingly, if Mr. Barbett can show exposure to herbicides in service, he is entitled to disability compensation for his diagnosed Parkinson's disease. A finding of entitlement to benefits generally involves findings of fact. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). The Court is required to reverse "a finding of material fact . . . if the finding is clearly erroneous." 38 U.S.C. § 7261(a)(4). "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)).

Here, the Board recognized that Mr. Barbett is currently diagnosed with Parkinson's disease, that there was "facility-wide" use of herbicides at Fort McClellan, and that Mr. Barbett experienced "at least some level of exposure to [polychlorinated biphenyls] and other toxic substances" during his service at Fort McClellan. R. at 7. The Board then concluded, however, that Mr. Barbett's exposure to herbicides at Fort McClellan was nothing "other than the result of a routine application

in accordance with [the] manufacturer's directions." R. at 13. Accordingly, the Board denied his claim for benefits for Parkinson's disease. This was error.

Nothing in the regulation precludes a veteran from receiving benefits pursuant to § 3.307 because the application of herbicides was "routine." The Board conceded that Mr. Barbett was exposed to herbicides during service and that he has a current diagnosis of Parkinson's disease. Accordingly, the Board's determination that Mr. Barbett is not entitled to benefits is erroneous as a matter of law. *See* 38 C.F.R. §§ 3.307, 3.309(e). The Court will reverse the Board decision on appeal and remand this matter with instructions for the Board to grant Mr. Barbett's claim for benefits pursuant to §§ 3.307(a)(6)(i)-(iii) and 3.309(e) and to assign the appropriate disability rating and effective date. On remand, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

III. CONCLUSION

Upon consideration of the foregoing, the April 9, 2015, Board decision is REVERSED, and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 25, 2016

Copies to:

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