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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3057

DAVID C. KISSEL, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, David C. Kissel, appeals through counsel a June 23, 2015, decision of the Board of Veterans' Appeals (Board) that, among other things, denied entitlement to service connection for diabetes mellitus type II, hypertension, and hyperlipidemia, all to include as due to in-service herbicide exposure, with hypertension and hyperlipidemia also to include as secondary to diabetes mellitus type II.[1] Record (R.) at 3-22. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the Board's decision as to service connection for diabetes mellitus type II, hypertension, and hyperlipidemia and remand the matters for further proceedings consistent with this decision.

[1]The appellant does not address the Board's denial of service connection for bilateral hearing loss and tinnitus. Accordingly, the Court finds that the appellant has abandoned his appeal as to these issues and will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

I. RELEVANT FACTS

Mr. Kissel served on active duty in the U.S. Air Force from March 1966 to January 1970. R. at 528-36. From October 1967 to October 1968, he served as an aircraft mechanic stationed at Takhli Royal Air Force Base in Thailand. R. at 530-32.

In July 2011, Mr. Kissel filed a claim for entitlement to service connection for diabetes, hypertension, and hyperlipidemia, all to include as secondary to Agent Orange exposure. R. at 493-512. In August 2011, a VA regional office (RO) requested additional information from Mr. Kissel to determine whether he was exposed to Agent Orange. R. at 421. That same month, the RO submitted to the National Personnel Records Center (NPRC) a request for personnel records to determine whether Mr. Kissel had service in Vietnam and an inquiry to determine exposure to herbicides. R. at 414-15. In September 2011, the RO received a negative response from the NPRC regarding both inquiries. *Id.*

In April 2012, the RO issued a formal finding that VA lacked the information necessary to verify that Mr. Kissel met the criteria for presumptive exposure to Agent Orange. R. at 210-11. The RO noted that Mr. Kissel had failed to respond to requests for additional information regarding his military service and therefore determined that it lacked sufficient information to make a request for information from the Joint Services Records Research Center (JSRRC). R. at 210.

In October 2012, the RO issued a rating decision denying Mr. Kissel's claims here on appeal. R. at 159-66. In November 2012, Mr. Kissel filed a Notice of Disagreement (NOD), stating that, during his active duty, he worked around aircraft on a regular basis and twice flew to Vietnam for 1-2 days to repair damaged aircraft. R. at 156-57. In April 2013, the RO issued a Statement of the Case (SOC) continuing to deny the claims. R. at 71-96. In September 2013, Mr. Kissel perfected his appeal to the Board. R. at 68-69.

In January 2014, Mr. Kissel testified before the Board. R. at 696-712. He stated that, while in Thailand, he worked as a flight mechanic on the flight line by the runway. R. at 703. If he was scheduled on flight duty, which included inspections for foreign object damage along the runway, he would have to walk along the runway, which included policing the fence on a regular basis. R-703-04. The Board member conducting the hearing explained that "VA regulations say that one who served in Thailand . . . might be considered exposed to . . . herbicide[s], but only if they had

certain duties, perimeter duties, security guard, things like that, perimeter security things, certain duties." R. at 706.

On June 23, 2015, the Board issued the decision currently on appeal. R. at 3-22.

II. ANALYSIS

Under 38 U.S.C. § 1116(a) a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, is presumed service connected for certain conditions likely caused by exposure to Agent Orange, including DM and prostate cancer, even without actual proof of exposure to a qualifying herbicide. 38 U.S.C. § 1116(a); 38 C.F.R. § 3.309(e) (2016). "'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (2016). In *Haas v. Peake*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) adopted VA's interpretation of the statutory phrase "served in the Republic of Vietnam" to mean that, for a veteran to be entitled to the presumption, he or she must have been present at some point on the landmass or inland waters of Vietnam. 525 F.3d 1168, 1182-83 (Fed. Cir. 2008).

The Veterans' Benefits Manual (M21-1MR), Part IV, Subpart ii, Chapter 2, Section C(10)(q) states that "special consideration of herbicide exposure on a factual basis should extend to [v]eterans whose duties placed them on or near the perimeters of Thailand military bases" with service in the U.S. Air Force in Thailand during the "Vietnam Era," which is defined as the period of time from February 1961 to May 1975. *Id*. The manual provides that herbicide exposure will be factually conceded if service was as an Air Force "security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence[.]" *Id*.

A veteran who does not meet the criteria governing herbicide exposure and service connection on presumptive bases may nevertheless establish entitlement to benefits on a direct basis. 38 C.F.R. § 3.303(d) (2016) ("Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. . . . The presumptive provisions of the statute and [VA] regulations implementing them are intended as liberalizations applicable when the evidence would not warrant

service connection without their aid."); *see Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (noting that a veteran may also obtain disability compensation based on in-service herbicide exposure by demonstrating "direct actual causation").

The appellant argues that the Board improperly required corroboration of his lay statements of service near the base perimeter and wrongly rejected his statements merely because they were not corroborated by objective evidence of record. Appellant's Brief (App. Br.) at 9-14; Reply Br. at 1-3, 4-9.

"Lay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection.'" *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (quoting *Layno v. Brown*, 6 Vet.App. 465, 469 (1994)); *see Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that whether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board). If the lay evidence is competent, the Board must weigh the competent lay evidence against the other evidence of record in determining credibility. *Buchanan v. Nicholson*, 451 F.3d 1331, 1334-37 (Fed. Cir. 2006). However, the absence of corroborating records is an insufficient basis on which to find lay statements not credible. *Id.* at 1337 (although the absence of corroborating or contemporaneous evidence may be a factor to consider, "the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence"); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Rather, the Board must "first establish a proper foundation for drawing inferences against a claimant from an absence of documentation." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); *see Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012) (absence of evidence cannot be taken as substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact").

In the decision on appeal, the Board first noted the appellant's lay statements that his duties entailed checking the runway and that this was done around the perimeter of the base on a regular basis. R. at 19. However, the Board noted that the appellant's job was not one of the military occupational specialties listed in the M21-1MR that VA determined would require him to have regular contact with the base perimeter. *Id.* at 19-20. The Board also found that the appellant's lay

statements were contradicted by the official service department personnel records, which did not include any records of exposure to herbicides. R. at 20.

The Court concludes that the Board erred in its treatment of the appellant's lay evidence and that its decision in this regard lacks adequate reasons or bases. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (1996) (table). Although it was required to do so by *Buchanan* and *Fountain*, the Board provided no foundation for its negative credibility finding, such as whether and why it would be expected that the personnel records of veterans in the appellant's situation would normally note if exposure to herbicides had occurred. Instead, the Board simply noted that the appellant did not hold one of the jobs explicitly listed in the M21-1MR as covered by the exposure presumption. Further, and significantly, the Board also failed to consider whether the appellant's service meets the requirement of a job "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence[.]" M21-1MR, IV(ii) (2) c (10) (q). The appellant's lay testimony certainly appears to constitute such "evidence of daily work duties" or "other credible evidence" of a job near the air base perimeter, and the Board should have discussed whether or not the lay testimony meets this description.

The Board found that the appellant's lay evidence stated that his job was near the air base perimeter and that the appellant was competent to so testify. On remand, if the Board wishes to discount the credibility of such statements, it must point to negative evidence tending to show that exposure did not occur or provide a sufficient foundation for its conclusion that the absence of corroborating exposure evidence outweighs the appellant's lay evidence. *See Fountain* 27 Vet.App. at 272; Horn, 25 Vet.App. at 239.

Although the Secretary relies in part on the Court's holding in *Bardwell v. Shinseki* for his position that the Board properly discounted the appellant's lay statements, that case is distinguishable here. In *Bardwell*, the Court emphasized that a non-combat veteran's lay statements must be weighed against other evidence, including the absence of military personnel records supporting the veteran's lay assertions of gas exposure. 24 Vet.App. 36, 40 (2010). However, in that case, unlike

here, the Board found that the appellant's assertions were not credible because there was no record of such an event in Mr. Bardwell's records *and because "it was unlikely that he would have been exposed to chemicals or gas without such an event being noted in the records*." *Id.* at 39 (emphasis added). The Board in *Bardwell* therefore provided a foundation for its credibility finding pursuant to *Fountain*. Here, as noted above, the Board provided no such foundation for its credibility finding, such as why or whether it would be expected that the personnel records of veterans in the appellant's situation would normally note if exposure to herbicides had occurred. Indeed, the fact that VA has provided for a presumption of exposure in the M21-1MR for veterans who had specific jobs such as a security guard tend to prove that the opposite is true in this case–i.e. that personnel records for Air Force veterans with service on Thai bases normally *would not* contain information about exposure, even if it had occurred. Accordingly, the Court concludes that *Bardwell* is not dispositive in the appellant's case.

The appellant also argues that VA failed to satisfy its duty to assist in obtaining unit records to determine whether any planes were downed in Vietnam, which would corroborate his reports that he was sent to Vietnam. App. Br. at 17; Reply Br. at 9-11. The Court declines to address this argument at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining 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 matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372 (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 appellant's and Secretary's briefs, and a review of the record on appeal, the Board's June 23, 2015, decision as to service connection for diabetes mellitus type II, hypertension, and hyperlipidemia is VACATED and the matters are REMANDED for further proceedings consistent with this decision. The appeal of the Board's decision as to denial of service connection for bilateral hearing loss and tinnitus is DISMISSED.

DATED: November 23, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)