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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 15-4564

JOHN H. DAVIS, 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 John H. Davis appeals through counsel an October 8, 2015, Board of Veterans' Appeals (Board) decision denying service connection for arthritis of the neck as secondary to a service-connected left knee condition. Appellant's Brief (Br.) at 1. 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 set aside the October 8, 2015, Board decision and remand the case for further proceedings consistent with this decision.

**I. FACTS**

Mr. Davis served on active duty in the U.S. Army from September 1983 to July 1986. Record (R.) at 1843.

In November 2004, a VA physician diagnosed Mr. Davis with cervical degenerative disc disease. R. at 3066. In 2005, Mr. Davis fell in his bathroom after his left knee gave way, hitting the bathtub on his left side and then falling onto the floor. R. at 1132. The record illustrates that Mr. Davis experienced consistent and increasing neck pain over the course of several years. *See* R. at 3066 (indicating neck pain for about six months, with onset in April 2004), 1238 (indicating neck

pain for approximately 4-5 months prior to June 2006), 1218 (indicating "pain increasing in his neck" in March 2007), 2901 (indicating "increased neck pain" in November 2007), 889 (indicating the presence of neck pain for at least a year prior to January 2008).

In January 2007, Mr. Davis filed a claim for service connection for arthritis of the neck. R. at 1311-12. In September 2007, the VA regional office (RO) issued a rating decision denying Mr. Davis's claim. R. at 1154-58.

In March 2008, Mr. Davis filed a new claim for service connection for his neck condition, clarifying that he believed that his neck condition was secondary to residuals of his service-connected left knee disability because he had fallen and hurt his neck when his knee gave out. R. at 982. In August 2008, the RO requested a VA medical opinion as to whether Mr. Davis's neck injury was "related to the service connected disability of residuals, injury, left knee, with partial meniscectomy." R. at 780. The inquiry request required the examiner to "identify the specific evidence" used to form the opinion, "provide a rationale (explanation/basis) for the opinion presented," and state his conclusion "using one of the following legally recognized phrases":

- a) \_\_\_\_\_ is caused by or a result of \_\_\_\_\_
- b) \_\_\_\_\_ is most likely caused by or a result of \_\_\_\_\_
- c) \_\_\_\_\_ is at least as likely as not (50/50 probability) caused by or a result of \_\_\_\_\_
- d) \_\_\_\_\_ is less likely than not (less than 50/50 probability caused by or a result of: \_\_\_\_\_
- e) \_\_\_\_\_ is not caused by or a result of \_\_\_\_\_
- f) \_\_\_\_\_ I cannot resolve this issue without resort to mere speculation.

*Id.* The examination was performed in September 2008. R. at 756-57. The examiner noted that, although Mr. Davis had previously injured his back and neck when getting out of his tub, his disc disease was caused by a cervical spine degenerative process. R. at 757. The examiner opined that Mr. Davis's neck condition was "more likely secondary to referred pain from his bulging cervical disc into his trapezii and upper extremities and . . . less likely than not related to the left knee." *Id.*

On the basis of this opinion, the RO issued a decision in October 2008 continuing its denial of service connection for the neck condition. In the same month, Mr. Davis filed a Notice of Disagreement (NOD). R. at 725-28. In July 2009, the RO issued a Statement of the Case (SOC) confirming its denial of service connection. In August 2009, Mr. Davis perfected his appeal to the

Board. The RO issued a Supplemental SOC (SSOC) in February 2015 that continued the denial of service connection.

In October 2015, the Board issued the decision on appeal. R. at 2-16. The Board concluded that the June 2006 rating decision denying service connection for Mr. Davis's left shoulder condition was final and found that new and material evidence sufficient to reopen that claim had not been submitted. R. at 4. The Board held that Mr. Davis was not entitled to service connection for neck arthritis because his condition was not incurred in or aggravated by active service, subject to a presumption of service connection, or caused or aggravated by a service-connected disability. *Id.* This appeal followed.

## II. ANALYSIS

On appeal, Mr. Davis argues that the Board erred in denying secondary service connection for neck arthritis on the basis of an inadequate VA examination, which he claims focused solely on direct causation and did not adequately address the issue of secondary service connection based on aggravation. Appellant's Br. at 3. He asserts that, in relying on the September 2008 examination, the Board failed to ensure that VA satisfied its duty to assist. *Id.* Additionally, Mr. Davis argues that the Board failed to provide adequate reasons or bases for its denial of secondary service connection based on aggravation. *Id.* The Secretary responds that the veteran failed to carry his burden of demonstrating prejudicial error, arguing that the Board did not need to discuss whether secondary service connection was warranted due to the service-connected knee disability aggravating the neck arthritis condition. Secretary's Br. at 4-5.

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). Secondary service connection will be granted if a disability is proximately due to or the result of a service-connected disease or injury or aggravated by a service-connected disease or injury. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc); 38 C.F.R. § 3.310(a)-(b) (2016). With respect to aggravation, "[a]ny increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a

service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected." 38 C.F.R. § 3.310(b).

When the Secretary provides a veteran with a medical examination, the examination must be adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is adequate "when it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991); *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical examination and opinion must contain "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). The adequacy of a medical examination and opinion is a finding of fact that the 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)).

In its decision, the Board concluded simply that the duty to assist had been satisfied because the record "contain[ed] sufficient evidence to make a decision on the claims." R. at 6. However, the September 2008 VA examination—which constituted the basis of the denial on appeal—did not adequately address the issue of secondary service connection based on aggravation. The examiner indicated that Mr. Davis's neck condition was "more likely secondary to referred pain from his bulging cervical disc into his trapezii and upper extremities and . . . less likely than not related to the left knee." R. at 757. However, this opinion addresses only the matter of secondary service connection based on causation. Indeed, the examiner's opinion may have perhaps been limited by the language of the inquiry request itself, which did not specifically ask the examiner to provide an opinion as to the two types of secondary service connection and instead required the examiner to state his conclusion using one of the legally recognized phrases that were provided, which appear to address direct causation. Nevertheless, this Court has found that VA's error in framing the scope of inquiry does not palliate VA's duty to provide a thorough examination, which should include an

opinion as to secondary service connection based on aggravation—where applicable, as is the case here—to be found adequate as a basis for a Board decision. *See El-Amin v. Shinseki*, 26 Vet.App. 136, 141; *cf. Bielby v. Brown*, 7 Vet.App. 260, 269 (1994) (finding that the Board's reliance on an independent medical opinion that was constrained by the scope of inquiry was improper).

The Secretary posits that the Board had no duty to address in the first instance the issue of secondary service connection based on aggravation because the veteran did not expressly raise the issue in his appeal and the record did not raise it. Secretary's Br. at 5-10. The Secretary further argues that any evidence that might suggest a relationship between Mr. Davis' neck injury and his service-connected left knee condition points only to the issue of secondary service connection based on causation rather than secondary service connection based on aggravation. *Id.* at 6-9. However, contrary to the Secretary's arguments, a theory of entitlement based on aggravation is reasonably raised by the record. The record indicates that Mr. Davis was experiencing neck pain prior to his 2005 slip-and-fall incident and that he had been diagnosed with cervical degenerative disc disorder the year prior to the incident. R. at 3066. Because there is evidence that Mr. Davis's neck condition may have been ongoing at the time of his slip-and-fall, the appropriate inquiry for the VA examiner should have included whether that incident—which apparently was caused by a service-connected left knee condition—aggravated Mr. Davis's neck condition.

Because the September 2008 examination on which the Board relied was inadequate insofar as it failed to provide sufficient insight on the matter of secondary service connection based on aggravation, thereby impeding the Board from rendering a fully informed decision, the Court will remand the matter for further development. *See Barr*, 21 Vet.App. at 311; *Ardison*, 6 Vet.App. at 407 (holding that the Board errs when it relies on an inadequate examination). Given this disposition, the Court need not address Mr. Davis's additional reasons-or-bases arguments, which could not result in a remedy greater than remand. On remand, Mr. Davis will be free to present these arguments, as well as any additional arguments and evidence, to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court notes that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be handled expeditiously in accordance with 38 U.S.C. § 7112.

### **III. CONCLUSION**

Upon consideration of the foregoing, the Board's October 8, 2015, decision is SET ASIDE, and the case is REMANDED for further development and readjudication consistent with this decision.

DATED: November 30, 2016

Copies to:

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