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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3315

ROBERT L. ALLEN, SR., 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, Robert L. Allen, Sr., appeals through counsel a July 9, 2015, Board of Veterans' Appeals (Board) decision in which the Board (1) denied him entitlement to disability benefits "for hair loss of the head and face, to include a skin disorder"; and (2) remanded his claim for entitlement to disability benefits for headaches for additional development. Record (R.) at 2-17. The issue remanded by the Board is not before the Court and the Court may not review it at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the portion of the Board's decision addressing the appellant's hair loss and skin disorder claim and it will remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from February 1987 until January 1995. R. at 211. He spent part of his service in Southwest Asia during the Persian Gulf War. *Id.* At least

four times during his active service, he sought treatment for rashes. R. at 293, 340, 367, 380. He and his wife have both asserted that he began to experience hair loss on his face and head at about the time that he left active duty, and he has stated that he believes there is a link between his hair loss and the rashes that he developed during his service. R. at 581-82, 650, 712.

In July and December 1998, the appellant sought treatment for alopecia areata. R. at 552-53. In December 2002, his care providers diagnosed him with folliculitis barbae. R. at 548. In March 2010, he sought treatment for a skin disorder that his care provider described as "hyperpigmented dermatitis most likely tinea versicolor. The rapidity of which this has spread certainly argues against any type of vitiligo." R. at 541. His care providers subsequently diagnosed him with idiopathic vitiligo, advanced vitiligo, and severe vitiligo. R. at 537, 539-40.

In May 2009, the appellant filed a claim for entitlement to disability benefits for hair loss. R. at 706-19. In October 2009, the VA regional office (RO) denied his claim. R. at 660-66. In April 2010, he filed a Notice of Disagreement with the RO's decision. R. at 646-48. In a July 2010 Statement of the Case and June 2011 Supplemental Statement of the Case, the RO continued its prior decision. R. at 525-28, 615-35. In August 2010, he appealed to the Board. R. at 605.

In April 2014, the Board denied the appellant's claim. R. at 472-84. He appealed to the Court and, in November 2014, the parties filed a joint motion asking the Court to vacate the Board's decision and remand his claim for further proceedings consistent with their motion. R. at 130-35. The parties agreed that the Board should have sought the opinion of a medical expert before it reached a dispositive conclusion. On December 10, 2014, the Court granted the parties' motion. R. at 129, 136.

In January 2015, the Board remanded the appellant's claim for additional development. R. at 102-07. In March 2015, a VA medical examiner concluded that "it is less likely than not that the [appellant's] alopecia and vitiligo are related to [his] military service, to include service in the Gulf War theater." R. at 51.

In a March 2015 Supplemental Statement of the Case, VA continued its prior decision. R. at 27-37. On July 9, 2015, the Board issued the decision here on appeal. R. at 2-17.

II. ANALYSIS

Establishing service connection for a claimed disorder, and therefore entitlement to disability benefits, generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinkseki,* 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson,* 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *Hickson v. West,* 12 Vet.App. 247, 253 (1999).

"Persian Gulf veterans" are automatically entitled to disability benefits for "certain disabilities" that are "due to undiagnosed illness and medically unexplained chronic multisymptom illnesses." 38 C.F.R. § 3.317(a) (2016). "[T]he term medically unexplained chronic multisymptom illness means a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(ii)(2)(ii).

The Board concluded that the appellant is not entitled to benefit from § 3.317 and that he is not otherwise entitled to the compensation that he seeks. The explanation that the Board gave for its decision is deficient for a number of reasons.

First, the Board did not satisfactorily explain its conclusion that the March 2015 VA medical examination report is adequate to allow it to make a well-informed decision.[1] *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that a medical opinion is 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.'") (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)).

The examiner's opinion reads as follows:

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[1] The Board's adequacy finding in this case is the same unhelpful boilerplate that has become common in Board decisions. R. at 5.

> Review of the medical reference "Gulf War and Health: Volume 8: Update of Heal[]th Effects of Serving in the Gulf War" from the Institute of Medicine [(IOM report)] reveals that the committee studying the association of health outcomes to exposure to the Gulf War environment concluded that there is inadequate/insufficient evidence of an association between deployment to the Gulf War and skin disorders. Therefore it is less likely than not that the [appellant's] alopecia and vitiligo are related to the [appellant's] military service, to include service in the Gulf War theater. There is also no established association between exposure to the Gulf War environment and development of autoimmune disorders such as vitiligo.

R. at 50-51.

The IOM report does not mention alopecia or vitiligo.[2] It does contain discussion about skin disorders as an overarching category encompassing multiple abnormalities. As the examiner reported, the IOM committee concluded that "there is inadequate/insufficient evidence of an association between deployment to the Gulf War and skin disorders." IOM report at 167.

The examiner took that conclusion to mean that there likely is no link between the appellant's service in Southwest Asia and his disorder. "[I]nadequate/insufficient evidence," however, is a term of art that the IOM committee uses to convey its level of certainty about an association between diseases and temporally and geographically limited foreign service. IOM report at 5. It means that "available studies are of insufficient quality, validity, consistency, or statistical power *to permit a conclusion* regarding the presence or absence of an association." *Id.* (emphasis added). In other words, the IOM committee was unable, based on current medical literature, to form an opinion about whether skin disorders are linked to Gulf War service.

The examiner's conclusion that there is "less likely than not" a link between the appellant's disorders and his service "in the Gulf War theater" does not comport with the IOM findings. R. at 51. It is unclear how she was able to form a definitive opinion on a matter that the IOM committee felt unable to address. The fact that she relied on the IOM report to support her conclusion strongly suggests that she misinterpreted that report.

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[2] VA provides a link to the IOM report on its Web site. www.publichealth.va.gov/exposures/gulfwar/reports/health-and-medicine-division.asp (last visited December 5, 2016); *see Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (holding that the Court "'may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within [its] jurisdiction.'" (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988)).

The examiner also did not discuss other potentially pertinent notations in the IOM report. One of the appellant's key arguments is that the rashes that he developed in service led to his present disorders. He also noted that he was exposed to pesticides while in Southwest Asia. The IOM report confirms that pesticides including methyl carbamates, organophosphates, pyrethroids, and chlorinated hydrocarbons were used and often misused by soldiers serving in Southwest Asia during the Gulf War. IOM report at 15. The IOM committee stated that "[s]kin conditions, particularly rashes, are among the most frequent health problems reported by Gulf War veterans" and that the "toxicants" to which soldiers were exposed "could cause allergic skin reactions." *Id.* at 164.

Also, the IOM acknowledged that, although it did not feel comfortable confirming a link between skin disorders and Gulf War service, some studies seem to show that "unrelated skin conditions occur more frequently among Gulf War deployed veterans." *Id.* A few of those studies specifically addressed hair loss rates. They revealed that rates are higher for veterans who deployed to Southwest Asia during the Persian Gulf War than for those who did not. *Id.* at 164-68.

The Court does not have the expertise to draw any conclusions from these observations. They seem to demonstrate, however, that the March 2015 examiner's review of the medical questions raised by this case was superficial.

Furthermore, the record, the parties' joint motion, and the prior Board decisions raise numerous medical questions that the examiner did not fully address. The only medical opinion that the examiner supported with rationale addressed whether the environmental conditions in the Persian Gulf region during the Gulf War caused the appellant's disorders to develop. She did not analyze in detail whether there is a link between the rashes the appellant developed during his active service and his present disorders.[3] She did not identify the likely etiology of the appellant's present disorders and she did not state whether those disorders are related to one another.[4]

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[3] The examiner stated that the appellant received treatment for "a heat rash" in March and December 1993. R. at 48. She failed to note that the appellant also received treatment for rashes in 1991 and 1992 and that he was prescribed triamcinolone acetonide cream in 1988. R. at 364, 380, 402; *see Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) ("An opinion based on an inaccurate factual premise has no probative value."). The Board should review its conclusion that she reached her decision after "a complete review of the record." R. at 13-14.

[4] The Board noted that the appellant "is not competent to address etiology in the present case." R. at 13. It did not, however, acknowledge that it is also "not competent to address etiology" and that the record contains no medical opinion identifying the etiology of the appellant's disorders. *Id.*; *see Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011)

Most importantly, the parties in their joint motion and the Board in its January 2015 remand decision agreed that this case cannot be resolved until a medical examiner specifically decides whether the appellant's illnesses constitute a "medically unexplained chronic multisymptom illness" qualifying him for disability benefits under § 3.317(a). *See* 38 C.F.R. § 3.317(b)(2) ("Signs of symptoms which may be manifestations of undiagnosed illness and medically unexplained chronic multipsymptom illness include, but are not limited to . . . [s]igns or symptoms involving skin"). The examiner addressed that issue by placing an "X" next to the word "no" under a question asking her to state whether "there [are] any diagnosed illnesses for which no etiology was established." R. at 42.

Once again, she did not identify the etiology of the appellant's disorders, state whether they are related, or otherwise explain her opinion. The Board should have discussed whether her opinion adequately responded to the instructions found in its January 2015 remand decision and the parties' joint motion. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (holding "that a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders"). For this and the other reasons stated above, the Board should reconsider whether it had before it medical evidence sufficient for it to make a well-informed decision.

Second, the Board found that because the appellant's skin disorders "have specific diagnosis, neither is an undiagnosed illness and service connection under 38 C.F.R. § 3.317 is not warranted." R. at 8-9. In their joint motion, the parties acknowledged that the appellant does not have an undiagnosed illness. They wrote, however, that they "agree that the Board failed to adequately explain how it determined Appellant's condition does not constitute a 'medically unexplained chronic multisymptom illness' under section 3.317." R. at 132-33. The Board repeated that error in the decision presently on appeal. The agreement reached by the parties in their joint motion is controlling. *See Carter v. Shinseki*, 26 Vet.App. 534, 543 (2014) (citing *Forcier v. Nicholson*, 19 Vet.App. 414, 426 (2006)). The Board must honor it on remand. *Stegall*, 11 Vet.App. at 271.

(holding that, when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that, when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence").

Third, the Board did not adequately explain its conclusion that the lay statements submitted by the appellant and his wife are not credible. Both reported that the appellant began to experience hair loss at about the time that he left active service. The Board dismissed their statements in part by noting that the appellant "did not report having hair loss/skin problems at the time of his separation from service."[5] R. at 12.

When he left active service, the appellant filled out a prepared medical form asking him to place a check mark next to all diseases on a list of diseases and disorders that he "ever had or have . . . now." R. at 308. Hair loss and rashes were not on the disorder list. "Skin diseases" was, but the appellant chose not to acknowledge that he had ever had a skin disease. *Id.* There appears to be no place on the form for a service member to report a disorder that isn't specifically listed.

There is no dispute that the appellant had rashes during his active service. For an unknown reason, however, he chose not to classify his rashes as a "[s]kin disease" or otherwise acknowledge that he had "ever had" them on his separation medical form. *Id.* On remand, the Board should review its finding that the appellant "did not report having hair loss/skin problems at the time of his separation from service" and take into account the limited nature of the medical form given to him and the choices that he made while filling out that form.[6] R. at 12.

Finally, relying on *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000), the Board determined that the "passage of time" between the appellant's service and his alopecia areata and vitiligo diagnoses is evidence against his claim.[7] R. at 13. When the Board uses the passage of time

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[5] The Board found other statements that the appellant made to be credible and then used those credible statements to undermine his wife's credibility. R. at 13.

[6] The Board's determination that the appellant "did not report" skin disorders when he left active service is technically accurate. R. at 12. The Board clearly believes, however, that the appellant did not report skin disorders because he had no skin disorders. The evidence discussed above may undermine that inference.

[7] At the same time that the Board cited to *Maxson*, it also cited to *Curry v. Brown*, 7 Vet.App. 59, 68 (1994), for the proposition that "contemporaneous evidence has greater probative value than history as reported by a veteran." That is a misrepresentation of the Court's decision that fails to capture its nuances. In that case, the Court agreed with the Board that lay statements that the veteran made soon after "the events at issue" were credible "because [they were] supported by contemporaneous medical evidence and . . . had been made close in time" to those events. *Curry*, 7 Vet.App. at 68. Lay statements that the veteran made later were not credible, and a physician's statement based on those statements "was of limited probative value because it was based primarily on the veteran's discredited" statements. *Id.* When citing Court precedent, the Board should take care to quote or paraphrase that precedent accurately and apply it faithfully.

as evidence against a claim, it must establish a factual predicate for doing so by "consider[ing] all of the evidence including the availability of medical records, the nature and course of the disease or disability, the amount of time that elapsed since military service, and any other relevant facts." *Maxson*, 230 F.3d at 1333; *see also Horn v. Shinseki*, 25 Vet.App. 231, 240 n.7 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be "'a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact.'") (quoting *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (Lance, J., dissenting)). The Board did not establish a properly supported factual predicate necessary to rely on the length of time between the appellant's service and his diagnoses to deny his claim.

The Court need not at this time address any other arguments that the appellant has raised. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding 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, 372-73 (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 briefs and a review of the record, the portion of the Board's July 9, 2015, decision denying the appellant entitlement to disability benefits "for hair loss of the head and face, to include a skin disorder" is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: December 19, 2016

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