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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-2273

REBECCA DICKSON, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: Rebecca Dickson,¹ surviving spouse of U.S. Navy veteran Charley W. Dickson, appeals through counsel from an April 3, 2015, Board of Veterans' Appeal (Board) decision that denied disability compensation for a respiratory disorder (including chronic obstructive pulmonary disease, emphysema, and lung cancer), a collapsed lung, neuropathy of the left upper extremity, and neuropathy of the bilateral lower extremities, to include as secondary to asbestos exposure or a service-connected disability. For the following reasons, the Court will set aside the Board's April 2015 decision and remand the matters for further proceedings.

I. ANALYSIS

Ms. Dickson argues that the Board erred in finding an October 2014 VA medical opinion adequate. Appellant's Brief at 5-13. A medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the

¹ The veteran, Charley W. Dickson, died during the pendency of this appeal. In a December 1, 2016, order, this Court granted the motion of Rebecca Dickson, Mr. Dickson's wife, to be substituted as the appellant in this appeal. *See Breedlove v. Shinseki*, 24 Vet.App. 7 (2010) (per curiam order) (holding that a veteran's claim for disability benefits survives the death of the veteran, not for purposes of providing VA benefits to a veteran, but for the purpose of furthering the claim of an eligible accrued-benefits claimant).

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. 123, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). The report must contain clear conclusions and supporting data, as well as "a reasoned medical explanation" connecting the data and conclusions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

Whether a medical opinion is adequate is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As always, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions of fact and law that adequately enables an appellant to understand the basis for the Board's decision and facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57.

In the decision here on appeal, the Board found that the October 2014 VA opinion was adequate because "the medical advisor was informed of the relevant facts regarding [Mr. Dickson's] medical history, and the overall opinion shows that he considered all relevant evidence of record." Record (R.) at 8. However, a review of the medical opinion reveals that the examiner failed to sufficiently answer the questions posed in the Board's September 2014 request for a medical opinion. The examiner was instructed to opine (1) whether any of Mr. Dickson's respiratory disorders are "at least as likely as not" related to asbestos exposure, and (2) if so, whether it is "at least as likely as not . . . that any neuropathy of the left upper extremity and bilateral leg disorder" are caused by or aggravated by the respiratory disorder. R. at 38. When the examiner addressed Mr. Dickson's lung cancer, he summarily concluded that Mr. Dickson's "tobacco history [makes] it [] impossible to

blame his lung cancer on *purely* asbestos exposure." R. at 34 (emphasis added). The examiner failed to answer whether Mr. Dickson's lung cancer was "at least as likely as not" related to service and instead subjected him to an unnecessarily high standard. *Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010) ("If the physician is able to state that a link between a disability and an in-service injury or disease is 'less likely than not,' or 'at least as likely as not,' [then] . . . there is no need to eliminate all lesser probabilities or ascertain greater probabilities."). Accordingly, the Court concludes that the examination lacked sufficient detail to fully inform the Board's decision. *See Stefl, supra*.

Additionally, the examiner failed to provide an adequate rationale supporting his opinion that Mr. Dickson's respiratory disorders are not related to his in-service asbestos exposure. In answering whether Mr. Dickson's lung cancer was related to asbestos exposure, the examiner opined that

[t]here is a relative risk of acquiring lung cancer after asbestos exposure of 3.5. The difficulty is that the patient's risk of acquiring lung cancer goes up 16 fold if you add tobacco to asbestos exposure. Yes people are at increased risk of lung cancer from asbestos exposure but due to this patient's tobacco history it is impossible to blame his lung cancer on purely asbestos exposure.

R. at 34. In rendering his opinion, the examiner neither explained what "3.5" means nor described how Mr. Dickson's specific tobacco history would affect his susceptibility to lung cancer. The examiner also tersely concluded that Mr. Dickson's collapsed lung was "[m]ore than likely associated with lung cancer therapy" without providing "a reasoned medical explanation." *See Nieves-Rodriguez, supra*. Given these deficiencies, the Court concludes that the October 2014 VA medical opinion was inadequate. Therefore, the Board erred in relying on it. *See Stefl* and *Nieves-Rodriguez*, both *supra*.

Because the Board relied on an inadequate medical opinion, the ability of the Court to review the Board's decision is frustrated and remand is required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the record is inadequate); *see also Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (holding that the Board has a duty under 38 C.F.R. § 19.9(a) (2016), to remand a case "[i]f further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision"). In light of this remand, the Court need not address Ms. Dickson's argument that the Board provided an inadequate statement of reasons or bases. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) (finding that when remand is

proper, the Court need not analyze all claimed errors that would result in a remedy no broader than remand).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's April 3, 2015, decision and REMANDS the matter for further adjudication consistent with this decision.

DATED: December 22, 2016

Copies to:

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