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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0666

JESSIE L. BROWN, 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*: Jessie L. Brown appeals through counsel a January 12, 2016, Board of Veterans' Appeals (Board) decision denying service connection for arthritis of the fingers and right hand. Record (R.) at 2-11.[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 portion of the January 6, 2015, Board decision denying service connection for arthritis of the fingers and right hand and remand the matter for readjudication consistent with this decision.

[1] The Board remanded for additional development a claim for entitlement to compensation under 38 U.S.C. § 1151 for residuals of a cerebrovascular accident. R. at 2, 9-11. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider this matter at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2016). The Board also referred a clear and unmistakable error (CUE) motion as to a December 2001 regional office (RO) decision denying service connection for arthritis of the feet. Because, inter alia, Mr. Brown does not challenge the propriety of this referral, the Court does not have jurisdiction over this matter. *See Young v. Shinseki*, 25 Vet.App. 201, 202 (2012) (en banc order) (holding that the Court's jurisdiction to review a Board referral is limited to instances in which the appellant argues that remand rather than referral is appropriate and where the appeal is otherwise properly before the Court).

I. FACTS

Mr. Brown served on active duty in the U.S. Army from September 1958 to September 1961. R. at 2265. A July 1960 service treatment record (STR) noted a laceration of the veteran's right little finger that was smashed with a truck tailgate and treated with four stitches. R. at 789. A follow-up visit the same month indicated that the laceration was healing nicely. *Id*. August 1960 STR notations noted the removal of sutures and that the veteran was healing slowly. R. at 789-90.

During a September 2002 VA rheumatology consultation for Mr. Brown's ankles, the examiner noted frostbite of the distal extremities, as well as some radial deviation of the right hand and a hard nodule on the right index finger, which the veteran stated had reoccurred after he had surgery three years prior. R. at 1640-41.

A June 2007 VA treatment note indicated right hand pain from arthritis with restriction in movement, and chronic foot pain due to a history of "frozen feet in [the] military." R. at 3044-45. During a June 2007 VA rheumatology consultation, the veteran reported worsening pain and stiffness in, inter alia, the wrists and fingers, which had progressed gradually for 15 years. R. at 1385. The examiner noted that the veteran worked as a cook and had trouble lifting pots onto the stove and had difficulty putting on shirts. *Id*. The examiner noted three tender nodules over the proximal interphalangeal (PIP) joint of the right index finger with ulnar deviation of the right fingers, and probable rheumatoid arthritis. R. at 1385-86. A July 2007 VA rheumatology note indicated cystic swelling around the right index finger PIP joint and an aspiration was attempted, rending blood but no mucionous material. R. at 1383. The examiner's impression was a probable mucionous cyst of the right index finger PIP joint and probable osteoarthritis. *Id*. Radiographs of the hands were normal. *Id*.

In July 2007, Mr. Brown filed a claim for service connection for arthritis of the fingers, stating that the condition started in service and worsened with age. R. at 1482, 1484. In June 2008, the RO denied service connection for arthritis of the fingers because there was no diagnosis or evidence linking such a condition to service. R. at 1324, 1331-32. It does not appear that the veteran filed a Notice of Disagreement (NOD) as to that decision.

A July 2008 treatment note indicated that the veteran had degenerative joint disease (DJD) in hands, feet, and ankles, which caused changes to his hands, and a history of frostbite injury in

service. R. at 2892. During an August 2009 VA orthopedic consultation, Mr. Brown reported joint pain in his hands and worsening finger deformity. R. at 2808. The examiner noted slight ulnar deviation of his fingers on both hands, prominent nodular swelling over the right thumb PIP joint, and prominent metacarpophalangeal (MCP) joints in the right hand. R. at 2809. In September 2009, the veteran received treatment for an apparent synovial cyst of the right index finger, and capsular thickening of the right second MCP joint and reducible ulnar drift were noted. *See* R. at 2326. In June 2010, the veteran received a steroid injection for a cyst in his right index finger PIP joint. *See id.* A November 2010 VA rheumatology note indicated that a radiograph of the veteran's right hand showed some mild osteoarthritic changes in his right thumb and little finger. R. at 3234. The examiner noted mild capsular swelling in the right second MCP and several cystic nodules around the right index finger PIP joint with some mild tenderness on palpation and stated that there was apparent synovial or mucinous cysts of the right index finger. *Id*.

In January 2011, Mr. Brown filed to reopen his claim for service connection for arthritis of the hands, R. at 1242, 1245, and also filed a claim for arthritis in both feet due to exposure to cold in service. *Id.* In February 2012, the RO denied service connection for arthritis of the hands and fingers, concluding that no new and material evidence had been submitted. R. at 1070, 1072. That same month, the veteran filed an NOD as to his fingers and right hand arthritis claim. R. at 1067.

During an April 2012 RO hearing, the veteran testified that he believed the arthritis in his hands was caused by exposure to cold when he served in Germany. R. at 1008. He stated that as a combat engineer he used his hands outdoors for prolonged periods and ungloved his right hand in order to use it, whereas he would put a glove on his left hand. He stated that while on duty one night he almost froze. R. at 1005-06. He testified that he complained about his right hand in service and used medication but mostly received treatment for his feet, started having trouble with his hand when he returned home, and had two right hand operations after discharge. R. at 1009-1010. He stated that he saw a private doctor in the 1970s and 1990s when he noticed knots on his hands, the doctor initially believed these were cysts but later concluded it was arthritis, and the veteran did not seek treatment at VA for his right hand until recently because the doctor indicated that nothing could be done to treat arthritis. R. at 1012-16. When asked if a doctor had indicated that the arthritis in his

right hand was caused by cold weather in service, the veteran responded, "not since I've been out, no." R. at 1019.

In April 2012, the RO issued a Statement of the Case (SOC) continuing to deny reopening of his claim for service connection for arthritis of the fingers and right hand due to cold injury. R. at 991. The RO concluded that current evidence, including the veteran's testimony regarding cold exposure, was cumulative and there was no new and material evidence to reopen the claim. *Id*. Mr. Brown perfected his appeal in May 2012. R. at 966.

During a June 2012 VA rheumatology visit, the veteran reported decreasing grip strength in his right hand. R. at 2326. He also stated that private orthopedists had removed several cysts in his right index finger and one orthopedist remarked that he had arthritis. *Id*. The examiner noted that a cyst was still present in the right index finger and that the veteran's statements suggested rheumatoid nodule rather than a mucinous cyst. *Id.* The examiner's impression was a three-to-four-year history of "right 2nd MCP [joint] and 1st PIP [joint] involvement" and possible low-grade rheumatoid arthritis, but the examiner expressed doubt as to the correct diagnosis. *Id*.

In July 2012, Mr. Brown's representative submitted a statement that the veteran's STRs were negative for complaints or treatment of cold weather injuries, but VA treatment records showed decades of treatment for tinea, a fungal infection of the feet, hands, and groin, and that the veteran was granted service connection for tinea, resistant to treatment with deformity of the toenails and fingernails, with a noncompesable evaluation effective December 1964 and a 60% evaluation effective 1995. R. at 928, 930; *see* R. at 1335.

During an August 2012 VA rheumatology visit, Mr. Brown reported that loss of hand function and pain began 18 years prior. R. at 2284. The examiner indicated that July 2012 x-rays of the hands and feet suggested inflammatory arthritis and areas of osteoarthritis. *Id*. The examiner noted several non-tender nodules on the right index finger and shooting pain with wrist flexion. *Id*. The examiner's impression was longstanding, non-inflammatory MCP joint flexion contractures of the index, middle, and ring fingers and hyperextension of PIP joints, with PIP joint nodules of "unclear etiology" because, although there was the appearance of rheumatoid arthritis, the condition was not behaving like rheumatoid arthritis since there was no stiffness and the veteran had been

seronegative on multiple prior draws. *Id*. The examiner suggested Jaccoud's arthropathy as a differential diagnosis.

During a March 2013 VA foot examination, the examiner stated that there was no evidence of an in-service cold injury and prior claims had been denied. R. at 610. The examiner noted that the veteran was now claiming to have mycotic, or fungal,[2] arthritis. R. at 8. The examiner explained that chronic pedis tinea, for which the veteran was service connected, is a superficial infection that is not a well-documented cause of mycotic arthritis. The examiner therefore opined that it was less likely than not that the veteran's arthritic foot condition was mycotic in nature, and less likely than not due to or the result of service-connected tinea.

In February 2015, the Board determined that there was new and material evidence, including the June 2012 VA treatment record, sufficient to reopen the claim for service connection for arthritis in the fingers and right hand, and remanded for adjudication of the claim. R. at 817-822. In July 2015, the RO issued a Supplemental SOC continuing to deny service connection because evidence did not link his condition to service. R. at 90-91.

In January 2016, the Board issued the decision on appeal, finding that a VA examination as to Mr. Brown's claim for arthritis in his fingers and right hand was not necessary because evidence did not indicate that his disability–rheumatoid arthritis with rheumatoid nodules affecting the fingers–may be associated with an established event, injury, or disease in service. R. at 5. The Board stated that, although the veteran was treated for a finger laceration in service, it appeared to be a superficial injury because no further treatment was noted and the skin and upper extremities were noted as normal at separation. R. at 7. The Board found no competent evidence suggesting a relationship between the current rheumatoid arthritis and in-service laceration. *Id*.

As to the veteran's contention that arthritis was caused by service-connected tinea, the Board found that medical records did not suggest a link between rheumatoid arthritis and tinea, R. at 7, and that the March 2013 VA foot examination report weighed against finding that his hand and finger arthritis were secondary to service-connected tinea because the examiner explained that there was no documentation of mycotic (fungal) or infectious arthritis and tinea was not a well-documented

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[2] *See* National Institute of Health, U.S. National Library of Medicine, Medline Plus Medical Encyclopedia, https://medlineplus.gov/ency/article/000444.htm (last visited December 19, 2016).

cause of mycotic arthritis. *Id*. The Board concluded that, although veterans are competent to provide opinions on some medical issues, Mr. Brown was not competent to determine whether his rheumatoid arthritis of the fingers and right hand was related to service. R. at 8.

II. ANALYSIS

Mr. Brown argues, inter alia, that the Board erred by focusing on whether arthritis of the fingers and right hand was caused by service-connected tinea when he specifically claimed that it was the result of in-service cold exposure. Appellant's Brief (Br.) at 9-10; Appellant's Reply Br. at 3. The Secretary disputes the veteran's arguments and urges the Court to affirm the January 2016 Board decision. Secretary's Br. 4-11.

In rendering a decision, the Board must support its determination with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for the finding and to facilitate review by this Court. *See* 38 U.S.C. § 7104(d)(1) (2014); *Washington v. Nicholson*, 19 Vet.App. 362, 366-67 (2005); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Although the Board is not required to discuss all of the evidence of record, *see Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), the Board must account for any evidence it finds to be persuasive or unpersuasive and provide reasons for rejecting any material evidence favorable to the claimant, *Caluza v. Brown*, 7 Vet.App. 498, 507 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

In addition, the Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 3 (2009) (per curiam order) (noting that the Court has "jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, with regard to a claim properly before the Court, but failed to do so").

First, the Court is compelled to address the Board's unexplained characterization of the veteran's finger and hand condition as rheumatoid arthritis. R. at 6-8. The record contains not only diagnoses of degenerative joint disease (DJD) of the fingers and hands, R. at 2892 (July 2008

treatment note concerning DJD of the hands), 3234 (November 2010 VA rheumatology note showing mild osteoarthritic changes in the right hand and fingers), 2284 (referencing July 2012 x-rays that suggest, inter alia, osteoarthritis of the hands), but a rheumatology examination report dated August 2012 wherein a rheumatologist expressed doubt that the veteran's finger and hand problems were due solely to rheumatoid arthritis, R. at 2284 (rheumatologist explains that the etiology of some of Mr. Brown's finger joint conditions is unclear and is inconsistent with rheumatoid arthritis). Given this record evidence, it is incomprehensible that the Board describes the veteran's hand and finger conditions as rheumatoid arthritis with no explanation whatsoever as to this characterization. This failure to provide reasons or bases as to the Board's description of the veteran's hand and finger condition as solely rheumatoid arthritis requires remand. *See Gilbert,* 1 Vet.App at 52.

Further, Mr. Brown testified in April 2012 that he believed the arthritis in his hands was caused by exposure to cold during his service in Germany, having his right hand ungloved while he worked outside for hours at a time. R. at 1005-06, 1008. That same month, the RO issued an SOC continuing to deny service connection for arthritis of the fingers and right hand, including as due to cold injury. R. at 991. Although the issue was raised overtly by the veteran and addressed by the RO, the January 2016 Board decision did not address the veteran's April 2012 testimony or assess whether arthritis of his right hand and fingers was related to cold exposure in service; instead, it addressed only whether the veteran's right hand and finger arthritis was linked to the in-service laceration of his little finger or to his service-connected tinea. R. at 7-8. Because the veteran expressly raised the issue of a link between cold exposure in service and arthritis of his right hand and fingers, the RO clearly acknowledged this contention and addressed it, and the veteran properly appealed the RO decision, the Board was required to address this theory of service connection. *See Schroeder*, 212 F.3d at 1271; *Robinson*, 21 Vet.App. at 552. Because the Board failed to consider the veteran's expressly raised theory that cold exposure in service caused arthritis in his right hand and fingers, remand is required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Although the Secretary argues that Board error in this regard was harmless because it denied service connection for all types of arthritis, the Board consistently referred to the veteran's arthritis

as rheumatoid, R. at 6-8, and thus the Court remains unpersuaded by the Secretary's arguments. *See Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995) ("'Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

In addition, the Board's failure to address the cold exposure issue deprived the veteran of Board consideration of provisions relating to cold injury that may prove beneficial to his case. VA recognizes that cold injuries may cause residual osteoarthritis. *See* 38 C.F.R. § 4.104, Diagnostic Code 7122 (2016) (listing the presence of osteoarthritis among the criteria for evaluating cold injury residuals); VA'S ADJUDICATION PROCEDURES MANUAL REWRITE (M21-1MR), pt. III, subpt. iv, ch. 4, § E(2)(a), (c) (explaining that exposure to cold may affect bones, leading to chronic symptoms and increased risk of developing arthritis); (d) ("The fact that a [non-service-connected] systemic disease that could produce similar findings is present . . . does not necessarily preclude service connection for residual conditions in the cold-injured areas").

In addition, as the veteran argues, the Board failed to provide reasons or bases sufficient to permit Mr. Brown to understand the precise basis for its finding that he is not entitled to a VA examination and opinion as to his claims for service connection, and to facilitate judicial review of that decision, particularly as to his cold injury allegation. *Gilbert*, 1 Vet.App. at 52; *see also McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (specifying criteria for entitlement to a VA examination and opinion). As to the first *McLendon* factor, the Secretary concedes that the veteran has a diagnosis of osteoarthritis or persistent or recurrent symptoms thereof. *See* R. at 2284, 2892, 3234; *see also* Secretary's Br. at 6. As to the second *McLendon* factor, the veteran provided testimony that, as a combat engineer in Germany, he used his hands outdoors in the cold for prolonged periods and ungloved his right hand in order to use it. R. at 1005-06. The Board did not find Mr. Brown's statements regarding these in-service events not credible. As to the third *McLendon* factor, Mr. Brown appears to have provided continuity of symptom statements to satisfy

the low *McLendon* threshold. Mr. Brown testified that he complained about his right hand in service and used medication, started having trouble with his hand when he returned home, saw a private doctor in the 1970s and 1990s when he noticed knots on his hands that the doctor concluded was arthritis, and did not seek treatment at VA for his right hand until recently because the private doctor indicated that nothing could be done to treat arthritis. R. at 1009-16. The Board did not address the fourth *McLendon* factor.

Because the Board did not provide a *McLendon* analysis, particularly as to the cold injury theory, the Court concludes that the Board failed to provide adequate reasons or basis for its determination that a VA medical examination and opinion is not warranted, necessitating remand. *See Tucker*, 11 Vet.App. at 374; *Gilbert,* 1 Vet.App at 52. On remand, Mr. Brown is free to present additional arguments and evidence to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

III. CONCLUSION

The Court will SET ASIDE the portion of the January 12, 2016, Board decision denying service connection for arthritis of the fingers and right hand and REMAND that matter for readjudication consistent with this decision.

DATED: December 29, 2016

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