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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4150

FRANCISCO R. CASTILLO, APPELLANT,

v.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Francisco R. Castillo, through counsel appeals an August 26, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for hypertension. Record of Proceedings (R.) at 1-17. The Board remanded the appellant's claim for disability compensation for onychomycosis. Therefore, that issue is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from April 1969 to March 1971, including service in Vietnam. R. at 239, 521. In October 2006, the appellant filed a disability compensation claim for hypertension. R. at 957-68. In September 2007, the regional office denied the claim. R. at 782-93. The appellant perfected an appeal to the Board and asserted that his hypertension was the result of exposure to Agent Orange. R. at 726-27, 757-58, 776-77.

In May 2013, the Board acknowledged the appellant's belief that his hypertension was related to exposure to Agent Orange as well as the appellant's claim that "there are medical studies which document a connection between hypertension and herbicide exposure." R. at 358. In this regard, the Board noted that "VA found that there was not enough evidence in the [National Academy of Sciences (NAS)] studies to find a presumptive connection between hypertension and herbicide exposure," but that "VA's discussion . . . makes clear that there are some studies, . . . which demonstrate 'limited or suggestive evidence of [an] association.'" *Id.* (quoting Health Outcomes Not Associated With Exposure to Certain Herbicide Agents; Veterans and Agent Orange: Update 2008, 75 Fed. Reg. 81,332-01 (Dec. 27, 2010)). Consequently, the Board determined that the Secretary's duty to assist required VA to obtain an examination and opinion addressing the nature and etiology of the appellant's hypertension. *Id.*

In June 2013, the appellant underwent a VA examination. R. at 319-22. After a review of the claims file and an examination of the appellant, the VA examiner confirmed the appellant's diagnosis of hypertension, but opined that it was less likely than not incurred in or caused by service. R. at 322. The examiner's rationale for this opinion was that

[t]here is no known association between hypertension in later years and service in the Republic of [Vietnam]. But there is clear association between hypertension and both age and weight. The older and the more one weighs the likelier it is to have hypertension. More than 40 years have passed since [the] veteran was in [Vietnam]. His [body mass index (BMI)] went from 21.5 to 34.8. That is sufficient causation for his present hypertension and this causation has no relationship to service in [Vietnam].

Id.

On August 26, 2015, the Board denied the appellant's disability compensation claim for hypertension, finding that the June 2013 VA examiner's opinion was entitled to substantial probative weight. R. at 1-17. This appeal followed.

II. ANALYSIS

The appellant argues that the Board relied on an inadequate medical examination to deny his claim and requests that the matter be remanded for an additional examination. Appellant's Brief (Br.) at 2-8; Reply Br. at 1-3. The Secretary argues for affirmance, stating that the June 2013 examination was adequate and that the Board did not err in relying on the examination. Secretary's Br. at 3-12.

Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "[E]xamination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). A medical opinion based on an inaccurate factual premise has no probative value. *Reonal v. Brown*, 5 Vet.App. 458, 460 (1993); *see also Vazquez-Flores v. Shinseki*, 24 Vet.App. 94, 97 (2010) (holding that Board erred by not explaining the discrepancy between a VA examiner's report and apparently contradictory information in the record).

In the decision on appeal, the Board found the June 2013 examination adequate and afforded the examiner's opinion substantial probative weight. In reaching this conclusion, the Board noted that the examiner based his opinion on an examination of the appellant and a review of his medical records and reported history, and that the examiner's opinion was accompanied by "a specific rationale that is not inconsistent with the evidence of record." R. at 11.

The appellant argues that the examination is inadequate because the opinion is based on an inaccurate factual premise – that "[t]here is no known association between hypertension in later years and service in the Republic of [Vietnam]." Appellant's Br. at 4-8. The appellant contends that the examiner is incorrect because NAS studies, including studies acknowledged by the Board in the May 2013 remand, indicate that there is "limited or suggestive evidence of an association" between hypertension and Agent Orange. *Id.* at 4, 7. The Secretary responds that, because there is no reasons-or-bases requirement imposed on examiners, the examiner was not required to discuss the NAS studies. Secretary's Br. at 7-8. The Secretary further asserts that the examiner's opinion that there is no known association between hypertension and Agent Orange is consistent with the NAS studies, asserting that limited or suggestive evidence of an association is not a known, or firm, association. *Id.* at 8-9.

In this case, the Court agrees with the appellant that the Board clearly erred when it found the June 2013 examination adequate. Because the Board had already determined that there was evidence indicating an association between hypertension and Agent Orange, the medical examiner's blanket statement that there is no known association renders the examination report inadequate. The Court will not address the Secretary's attempt to categorize the strength of the association because the mere existence of an association was previously acknowledged by the Board and, therefore, the Secretary's contention is an improper post hoc rationalization of the

evidence. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigation positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action advanced for the first time in the reviewing court.").

Because the examiner's rationale is based in part on an inaccurate factual premise – i.e., that there is no known association between hypertension and Agent Orange – the Board should have returned the report as inadequate or asked the examiner to opine whether the NAS studies finding limited or suggestive evidence of an association altered the examiner's opinion. *See Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010) (noting that the Secretary must ensure that any medical opinion is "based on sufficient facts and data" (quoting *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008))); *see also Vazquez-Flores and Reonal*, both *supra*. Accordingly, the Court finds that the June 2013 medical examination was inadequate and that the Board clearly erred when it relied on the examination report to deny the appellant's claim. *See D'Aries, supra*.

In pursuing the matter on remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings, and a review of the record, the Board's August 26, 2015, decision denying disability compensation for hypertension is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: February 8, 2017

Copies to:

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