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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3245

ROBERT E. SHAW, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
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, Robert E. Shaw, through counsel, appeals a July 16, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied his disability compensation claim for left hip osteoarthritis as secondary to service-connected prostate cancer. Record of Proceedings (R.) at 1-16. 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 decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from June 1958 to March 1969. R. at 59, 861, 1188. In May 2006, he was diagnosed with prostate cancer and underwent radiation treatment. R. at 329-33. In September 2006, the appellant underwent transperineal prostate brachytherapy surgery, during which surgeons placed him in the lithotomy position and implanted his prostate with Palladium-103 seeds. R. at 334-35.

In April 2007, the appellant filed a disability compensation claim for prostate cancer, and in October 2007 the regional office (RO) granted his claim and assigned a 100% disability rating, effective April 18, 2007. R. at 1090-95.

During a March 2008 VA examination, the appellant reported postsurgery groin pain that caused him to limp, which the appellant asserted was caused by his positioning during his September 2006 prostate surgery. R. at 392-95. The examiner opined that the appellant's groin pain may be "referred pain from hip [versus] muscle strain from positioning during prostate surgery." R. at 392.

At a January 2009 examination, the appellant reported having post-surgical left hip pain that had slightly improved with physical therapy, as well as left groin pain. R. at 399-402. Additionally, a VA psychologist in June 2009 opined that the appellant had "chronic pain and ambulation disability" in the left leg as a result of "surgical complications and direct local effect of radiation." R. at 446.

In December 2010, the appellant filed a disability compensation claim for a "left leg condition as a residual of prostate surgery." R. at 643-45. In October 2011, the appellant's radiation oncologist stated that it is "possible that the external radiation therapy may exacerbate arthritis in the hips." R. at 262. In a separate letter, the same radiation oncologist stated that "side effects of radiation therapy may include a rare but potential avascular necrosis in the hips[,] and it is also possible that radiation therapy can exacerbate arthritis in the hips." R. at 260.

In October 2011, the RO denied the appellant's left leg claim, characterizing his condition as left hip osteoarthritis. R. at 421-25. In December 2011, the appellant submitted a Notice of Disagreement. R. at 350.

In October 2012, the appellant underwent a total left hip replacement. R. at 2327-29. In December 2012, the RO issued a Statement of the Case (SOC) continuing the denial of the appellant's disability compensation claim for left hip osteoarthritis secondary to his service-connected prostate cancer and its treatment. R. at 263-77. Subsequently, the appellant filed a Substantive Appeal. R. at 248.

The appellant underwent a VA hip examination in May 2013. R. at 1402-17. The examiner opined that the appellant's left hip condition was less likely than not due to or the result of his service-connected prostate cancer. R. at 1415. The examiner also stated that the appellant's condition was "at least as likely as not" aggravated beyond its natural progression by the prostate

cancer treatment. R. at 1416. Despite this finding, the examiner stated that she "could find no medical evidence in multiple resources . . . that listed a potential for aggravation of osteoarthritis by brachytherapy or external beam radiation treatments for prostate cancer." *Id.* Lastly, the examiner opined that "it is possible that radiation therapy may be playing a significant role in exacerbating [the appellant's] left hip arthritis." *Id.*

VA subsequently requested an addendum opinion from the same examiner in order to reconcile some of her seemingly contradictory statements. R. at 1214-15. In the addendum, the examiner rescinded her opinion found in the May 2013 examination and stated that the appellant's left hip condition was not at least as likely as not aggravated by his brachytherapy or external radiation treatments. R. at 1214. The examiner concluded that the medical literature does not support a finding that osteoarthritis can be caused or aggravated by brachytherapy or external radiation treatments for prostate cancer. *Id.* In May 2014, VA issued a Supplemental SOC, continuing the denial of the appellant's disability claim. R. at 172-77.

In July 2015, the Board issued the decision on appeal denying the appellant's disability claim for left hip osteoarthritis secondary to his service-connected prostate cancer and its treatment. R. at 1-16. This appeal followed.

II. ANALYSIS

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). Although VA need not provide a medical examination in all cases, "once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is considered 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.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted). However, the law does not impose any reasons-or-bases

requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

Determinations of service connection and whether a medical opinion is adequate are findings of fact that the Court reviews under the "clearly erroneous" standard. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Swann v. Brown*, 5 Vet.App. 229, 232 (1993). 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." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

In rendering its decision the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza*, 7 Vet.App. at 506.

In the decision on appeal, the Board relied on the May 2013 examination, stating that the opinion was "adequate to address the issue decided" and that the examiner "provided a thorough rationale for her findings and her observations are consistent with the evidence of record." R. at 5. The appellant asserts that the Board failed to ensure that VA complied with the duty to assist because the May 2013 VA examiner failed to opine whether the appellant's left hip osteoarthritis was caused or aggravated by his placement in the lithotomy position during prostate surgery. Appellant's Brief (Br.) at 9. The Secretary asserts that the Board decision should be affirmed because the medical opinions that the Board relied on were adequate for rating purposes. Secretary's Br. at 10-11.

The Court agrees with the appellant that the Board violated its duty to assist by finding the May 2013 medical examination and its addendum adequate. The Board found the May 2013 medical opinion to be the "most probative medical opinion of record," noting that the examiner "clearly stated that medical research literature did not support the contention that osteoarthritis was caused or aggravated by the type of cancer treatment the [appellant] received." R. at 11. However, as the appellant correctly notes in his principal brief, the medical examiner appears to avoid all

discussion of whether the appellant's physical positioning during surgery either caused or aggravated his left hip osteoarthritis, focusing instead on whether the actual radiation treatment caused or aggravated the hip condition. *See* Appellant's Br. at 10; *see also* R. at 1417 (medical examiner notes that "[t]here is no medical information that states that osteoarthritis can be caused by . . . external radiation and brachytherapy for prostate cancer"). Although there is no reasons-or-bases requirement placed on VA medical examiners, *see Monzingo*, 26 Vet.App. at 107, the examiner's lack of discussion regarding whether the positioning of the appellant during his prostate surgery caused or aggravated his left hip condition – a theory raised by the appellant repeatedly in the record – makes the examination inadequate and frustrates judicial review. *See Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (concluding that an inadequate medical evaluation frustrates judicial review).

Accordingly, the Board's determination that the May 2013 examination and its addendum were adequate is clearly erroneous, and the matter will be remanded in order for the Secretary to provide the appellant with a new medical examination in order to determine whether the appellant's physical placement during his prostate surgery caused or aggravated his left hip osteoarthritis. *See Green v. Derwinski*, 1 Vet.App. 121, 124 (1991) (holding that remand is appropriate where the Board relied on an inadequate medical examination report); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "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").

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *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 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 benefit sought); *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 Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: March 9, 2017

Copies to:

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