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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0288

JACK D. RAUTIO, 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, Jack D. Rautio, through counsel, appeals a November 24, 2015, Board of Veterans' Appeals (Board) decision that denied service connection for a right hip disability. Amended Record of Proceedings (R.) at 2-12. 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). Both parties filed briefs, and the appellant filed a reply brief. 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. Army from April 1976 to March 1979. R. at 25. In October 1976,¹ the appellant sustained a pelvic fracture, neck and back strain, and a

¹ The Court notes that the Secretary's brief states the appellant was injured in November 1976, but the record indicates the injury occurred on October 13, 1976. R. at 275.

dislocated right sternoclavicular joint. R. at 275. In February 1977, the appellant complained of hip pain and tenderness in the right buttock area following physical therapy. R. at 270.

In April 1979, the VA regional office (RO) awarded service connection for the appellant's fractured pelvis and assigned a 0% disability rating, effective March 1, 1979. R. at 246. In March 1995, the RO granted a disability rating of 10% for low back strain, effective March 30, 1995. *Id.* Subsequently, his disability rating was increased to 20% with an effective date of November 14, 1996. *Id.*

In October 2003, the appellant requested an increased rating for his service-connected back disability and requested service connection for a right hip disability. R. at 613-14. The appellant explained that his "L/Hip pelvis [was] causing severe pain in R/pelvis due to gate [sic]." R. at 614.

In July 2004, the appellant underwent a medical examination during which he had to discontinue treadmill testing after 1 minute and 10 seconds as a result of "severe back pain and right lower extremity leg pain." R. at 509. The same medical examiner noted that the appellant had a "severe antalgic gait." *Id.* In August 2004, the RO denied the appellant's claims for increased disability ratings and denied service connection for a left and right hip disability. R. at 475-86. There is no indication in the record that the appellant appealed the August 2004 RO decision.

In October 2007, the appellant filed claims for increases in the disability ratings for his service-connected disabilities and a claim to reopen service connection for a right hip disability. R. at 437-48. In March 2008, a VA examiner diagnosed the appellant with trochanteric bursitis of the right hip. R. at 349. A brief examination of the appellant's right hip revealed tenderness over the right greater trochanteric bursa. *Id.* The examiner reviewed a September 2007 x-ray, which he stated revealed a normal right hip, and no evidence of residuals of the left superior ramus fracture. *Id.* The examiner opined that the appellant's right hip disability was not the result of his "well-healed left superior pubic ramus fracture." R. at 349. Further, the examiner stated that a left superior pubic ramus fracture is "usually a pelvic fracture that results in little or no disability and then only on the left side." *Id.*

In March 2008, the RO denied the appellant's increased-rating claims for his service-connected disabilities, and after reopening the claim, the RO denied service connection for his

right hip disability. R. at 241. In May 2008,² the appellant appealed the RO decision stating that a physician had informed him that his right hip disability was related to his altered gait, which was in turn caused by his pelvis injury. R. at 229-33.

In February 2010, the appellant sought treatment for his back injury, and his physician noted that he had an "antalgic, wide-based gait." R. at 97. In November 2010, a physician noted the appellant had chronic low back pain, including "pain into right hip." R. at 93.

In November 2015, the Board issued the decision here on appeal and concluded that the appellant's right hip disability was not caused or aggravated by his service-connected pelvis fracture. R. at 10. 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). A disability will be granted service connection on a secondary basis when it is proximately due to or the result of a service-connected disease or injury or aggravated by a service-connected disease or injury. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc); 38 C.F.R. § 3.310 (2016).

Pursuant to 38 U.S.C. § 5103A, the Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and describes the disability, if any, in sufficient detail so that the Board's "evaluation of the claimed disability will be a fully informed one." *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124

² The Court notes that the Secretary's brief states that the appellant's NOD was filed in May 2009, but the record suggests the appellant's NOD was submitted in May 2008. R. at 230.

(1991)) (internal quotation marks omitted). A medical opinion as to secondary service connection is inadequate to inform the Board's decision as to aggravation if it fails to address that issue. *El-Amin v. Shinseki*, 26 Vet.App. 136, 140 (2013). "[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). The medical opinion "must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124; see *Nieves-Rodriguez*, 22 Vet.App. at 304 (noting "most of the probative value of a medical opinion comes from its reasoning"). The Board's determination as to the adequacy of an examination is reviewed for clear error. See *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Here, the March 2008 VA examiner opined that the appellant's right hip disability was "not caused by the well-healed left superior pubic ramus fracture." R. at 349. The Board relied on this opinion to conclude that the appellant's right hip disability was not caused or aggravated by his service-connected fractured pelvis. R. at 3. In doing so, the Board found that the March 2008 medical opinion was adequate. R. at 4-5. The appellant argues that the March 2008 examination report is inadequate because the medical examiner addressed only whether the fractured pelvis caused the right hip disability but failed to address whether the pelvis injury aggravated the right hip disability. Appellant's Brief (Br.) at 5. The appellant raised this issue before the Board, but it rejected the appellant's argument after concluding that although the examiner did not specifically use the word "aggravation," "a reasonable and common sense reading of the report clearly reflects the opinion that the service-connected pelvis fracture did not result in any disabling effects that would have affected his right hip condition." R. at 9. The Secretary echoes the Board and argues in his brief that when the March 2008 medical examination report is read as a whole, it indicates that the appellant's well-healed pelvic fracture had no residual effects so it could not have aggravated the right hip disability. Secretary's Br. at 10.

After reviewing the March 2008 report, the Court agrees with the appellant that the Board and the Secretary's interpretation of that report overstate the examiner's conclusion. The medical examiner merely noted that the x-ray of the pelvis showed "no evidence of residual of the left superior pubic ramus fracture." R. at 349. Although the examiner opined that the x-ray showed that the fracture had healed, he did not opine that there were no disabling effects from the healed pelvis fracture. The Court agrees with the appellant that the doctor's statement that the appellant's right hip disability "is not *caused* by the well-healed left superior pubic ramus fracture" only contemplates causation, not aggravation of the fractured pelvis on the right hip disability. *Id.* (emphasis added). See *El-Amin, supra*.

The Court finds the Board failed to address whether the service-connected pelvic injury could have aggravated the right hip condition; therefore, remand is the appropriate remedy. See *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 determination, or where the record is otherwise inadequate").

The appellant also argues that the Board failed to adjudicate an alternative theory for service connection that was reasonably raised by the record. Appellant's Br. at 8. More specifically, the appellant asserts that the Board failed to consider whether the appellant's right hip disability was related to the altered gait caused by his service-connected back disability. *Id.* at 9. The Secretary responds that there is no evidence that the appellant's altered gait, due to his service-connected back injury, is related to his right hip condition. Secretary's Br. at 11-13.

The Court agrees with the appellant that the Board erred by failing to adjudicate the alternative theory for service connection that was reasonably raised by the record. The Board has a duty to address all issues reasonably raised either by the appellant or by the contents of the record, see *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), and the Court's jurisdiction includes review to determine whether the Board erred in failing address an issue reasonably raised. See *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008).

The record raises the alternative theory for service connection. First, the appellant's 2004 medical examination suggested that he had to discontinue treadmill testing because of severe back pain and lower right extremity pain, and that after that he had a "severe antalgic gait." R. at 509. The appellant's 2008 NOD also asserted that a physician had informed him that his right hip condition was related to his altered gait. R. at 232; *see Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting that lay testimony may be competent "to establish a diagnosis of a condition when . . . the layperson is reporting a contemporaneous medical diagnosis"). The appellant also presented medical reports from 2010 stating that he had low back pain into his right hip and an altered gait. R. at 92, 97. Despite this evidence, the Board failed to contemplate whether the appellant's right hip condition is related to his service-connected back injury. Therefore, the Court will vacate the Board's decision and remand the matter for further proceedings. On remand, the Board should determine whether development of evidence to establish this theory for service connection is required. *See* 38 U.S.C. § 5103A; *see also Tucker, 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 appellant's and the Secretary's pleadings, and a review of the record, the Board's November 24, 2015, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: April 28, 2017

Copies to:

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