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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0690

CHARLES F. DEAN, 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, Charles F. Dean, through counsel, appeals a January 13, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for heart disease, to include arteriosclerotic cardiovascular disease with paroxysmal tachycardia arrhythmia (previously characterized as tachycardia). Record of Proceedings (R.) at 2-38. The Board reopened and remanded claims for service connection for a back disability and for a bilateral hip disability. *Id*. The Board also remanded claims for a compensable disability rating for residuals of a fracture of the fourth metatarsal of the left foot; a disability rating greater than 10% for degenerative changes of the left knee; and a total disability rating based on individual unemployability (TDIU). *Id*. These claims are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). 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 vacated matter for readjudication.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from October 1971 to November 1974. R. at 1834. In his September 1971 entrance examination, the appellant reported a history of pain and pressure in his chest, along with palpitations or pounding heart. R. at 223. In December 1972, the appellant sought treatment for chest pain, tachycardia, dizziness, and headaches. R. at 196. The appellant's electrocardiogram (EKG) was within normal limits. *Id*. The doctor's impression was "probable PAT [paroxysmal arrhythmia tachycardia]." The appellant's November 1974 separation examination report, which included a medical history provided by the appellant, stated that "pressure in chest refers to one episode of tach[y]chardia" during service. R. at 228.

In January 2003, the appellant complained of chest pain, palpitations, and shortness of breath. R. at 1523-31. The doctor noted that, 4 months earlier, the appellant experienced an episode of tachycardia with pain and had to lie on the floor because of lightheadedness. R. at 1523. A stress test and EKG were normal, and the doctor prescribed Toprol XL. R. at 1525. In June 2007, the appellant developed chest pains during physical therapy. R. at 1209.

In January 2008, the appellant filed a claim for service connection for tachycardia. R. at 1820-30. An October 2008 rating decision denied his claim. R. at 1393-1401. The appellant did not appeal this decision. In November 2010, the appellant filed a claim to reopen the tachycardia claim. R. at 1098.

In a March 2012 general VA examination, the examiner noted that the appellant was diagnosed with arteriosclerotic cardiovascular disease in February 2011. R. at 939. In an April 2012 VA examination, the examiner concluded that the appellant's current heart condition was less likely as not permanently aggravated or a result of any event or condition that occurred in service or within 1 year of discharge. R. at 872. He opined that it was more likely related to the fainting episodes the appellant had experienced since age 14 or the postservice coronary artery disease. *Id*. The examiner further stated that the in-service "tachycardia" noted on the history portion of the separation examination was a report from the veteran and not a medical diagnosis. *Id*.

A June 2012 rating decision denied service connection for heart disease. R. at 849-53, 860-66. The appellant filed a timely Notice of Disagreement. R. at 767-69. In April 2013, a Statement of the Case continued denying service connection for heart disease. R. at 699. The appellant perfected his appeal the same month. R. at 657.

At an October 2015 Board hearing, the appellant reported that he was treated for tachycardia in service when he was standing in line and his "heart just started just freaking out . . . it overwhelmed me and I just fell over." R. at 50.

In the January 13, 2016, decision here on appeal, the Board reopened and denied the appellant's claim for service connection for heart disease, to include arteriosclerotic cardiovascular disease with paroxysmal tachycardia arrhythmia (previously characterized as tachycardia). R. at 2-38. In making this determination, the Board stated that the record did not support an etiological link between the appellant's current heart disease and active service. R. at 23. This appeal followed.

II. ANALYSIS

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). Under 38 C.F.R. § 3.03(d), service connection may be granted for conditions first diagnosed after the veteran is discharged from service, "when all the evidence, including that pertinent to service, establishes that the disease was incurred in service." 38 C.F.R. § 3.03(d) (2016); *see also Summers v. Gober*, 225 F.3d 1293, 1297 (Fed. Cir. 2000) (explaining that § 3.03(d) "provides an opportunity for veterans with injuries or diseases diagnosed after they have completed service to make a valid claim of service connection").

"[O]nce 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) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991))).

Additionally, the opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id*. at 124-25; *see also Nieves-Rodriguez v. Peake*,

22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). The reasoning underlying a medical opinion is important because "most of the probative value of a medical opinion comes from its reasoning." *Id.* at 304. Further, the Court has held that "[a]n opinion based upon an inaccurate factual premise has no probative value." *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993). "If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes." 38 C.F.R. § 4.2 (2016); s*ee Stegall v. West*, 11 Vet.App. 268, 270-71(1998) (remanding matter where VA examination was inadequate under § 4.2); *Hicks v. Brown,* 8 Vet.App. 417, 422 (1995) (concluding that an inadequate medical examination frustrates judicial review).

"Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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*, 1 Vet.App. at 53.

The appellant argues that the April 2012 examination[1] was inadequate because it relied on a lack of diagnosis in service to support the conclusion that the appellant's heart disability was not related to service. Appellant's Brief (Br.) at 5. By relying on this lack of diagnosis, the appellant asserts, the Board misinterpreted 38 C.F.R. § 3.303(d). *Id.* at 5-6. He further contends that the examiner did not review the actual treatment record from service, only the notation of the complaint on the appellant's separation examination report. *Id*. The appellant argues that it is unclear whether the examiner's opinion would change upon review of the actual treatment record. *Id*.

The Secretary responds that the appellant attempts to "inflate the presence of cardiac issues" in his service treatment records even though there is only one reported instance of tachycardia. Secretary's Br. at 7. The Secretary argues that the examiner considered the "scant

[1] The Court notes that the appellant in his brief and the Board in its decision incorrectly refer to the March 2012 VA examination report as the report that provided the opinion regarding service connection. Instead, it is the April 2012 examination provided by a different doctor that the Board relies upon and the appellant quotes.

evidence" of heart issues in service and weighed it against the appellant's medical history in making his determination. *Id*. at 7-8.

The examiner concluded that the appellant's heart condition was less likely than not incurred in or caused by any in-service condition or within 1 year of discharge. R. at 872. He reasoned that the "tachycardia" reported in service was a "report from the [v]eteran, not a medical diagnosis." *Id*. The examiner further stated that the appellant's passing out episodes he experienced from age 14 "may represent early arrhythmia symptoms with no aggravation by service, as the natural history did not change as a result of service. Coronary artery disease is an established cause of paroxysmal arrhythmias." R. at 873.

After reviewing the record, the Court finds that the April 2012 examination was based on an inaccurate factual premise and should not have been relied upon by the Board. *See Reonal*, 5 Vet.App. at 461. The examiner's negative opinion was based, in part, on the fact that the in-service episode of tachycardia "is a report from the [v]eteran, not a medical diagnosis." R. at 872. However, in addition to the separation report, which included a medical history provided by the appellant, the record includes a treatment note indicating that the appellant saw a doctor for chest pain, tachycardia, dizziness, and headaches in 1972. R. at 196. It is not clear from this record that the tachycardia was not a diagnosis. The doctor wrote that his impression was "probable [paroxysmal arrhythmia tachycardia]." While this is not a definitive diagnosis, the tachycardia was not simply a report from the veteran, as the examiner incorrectly had characterized it.

It appears that the examiner only reviewed the separation examination report that recounted the 1972 episode of tachycardia instead of the actual service record documenting the appellant's treatment for tachycardia. R. at 871 (noting the examiner reviewed the November 1974 separation examination report of medical history that included one episode of tachycardia). However, if the examiner had reviewed the actual service record he may have reached a different conclusion about the relationship between service and the appellant's current disability. The examiner's report is inaccurate and based on an incomplete review of the appellant's medical history.

Because the examiner's report is inadequate, the Board clearly erred when it relied on the examination to deny the appellant's claim. *See D'Aries, supra*. Remand is therefore required for a new opinion. *See Bowling v. Principi,* 15 Vet.App. 1, 12 (2001) (citing 38 C.F.R. § 19.9(a) (2000) when holding that the Board has a duty 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"); *see also Green*, *supra*; 38 C.F.R. § 4.2.

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 January 13, 2016, decision is VACATED and the matter is REMANDED to the Board for a new examination and adjudication consistent with this decision.

DATED: May 10, 2017

Copies to:

Angela Bunnell, Esq.

VA General Counsel (027)