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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0824

BOYD J. MOODY, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Boyd J. Moody appeals through counsel a January 15, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for hypertension. The Board also remanded the issue of the appropriate effective date for the grant of benefits for tinnitus and that issue is not before the Court at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004). 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 as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the January 15, 2016, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Moody served on active duty for training from May to September 1976, and active duty in the U.S. Army from December 1976 to June 29, 1980, and June 30, 1980, to April 9, 1984. His period of active duty from December 28, 1980, until April 9, 1984, is characterized as dishonorable.

In May 2004, Mr. Moody filed a claim for VA benefits for hypertension, which was denied in November 2004. He did not appeal that decision and it became final. Medical records from 2005 to 2009 show diagnoses of hypertension. In January 2009, he sought to reopen his previously denied claim for benefits for hypertension. In a September 2009 statement, he asserted that his hypertension began in service in 1978.

After VA denied his claim, Mr. Moody appealed and appeared at a hearing before the Board in August 2011. At the hearing, the Board member told him that, to be entitled to benefits, he needed to show "a disease or injury in service, something in service, something today, and a link between the two." Record (R.) at 2902. The Board issued a decision in January 2012, declining to reopen his claim. That decision was later vacated and remanded by this Court, after which the Board reopened Mr. Moody's claim for benefits for hypertension.

On January 15, 2016, the Board issued the decision on appeal. In that decision, the Board denied entitlement to VA benefits for hypertension after finding that, although there were several elevated blood pressure readings during service, there was no evidence that Mr. Moody had hypertension at that time. The Board also found that there was no medical evidence linking Mr. Moody's hypertension to his military service.

On appeal, Mr. Moody argues that the Board erred by failing to ensure that the August 2011 hearing officer adequately informed him of the evidence needed to establish his claim. He also argues that the Board erred in finding that VA was not required to provide him with a medical examination to satisfy its duty to assist.

In response, the Secretary argues that the Board did not err in denying entitlement to VA benefits for hypertension. With respect to Mr. Moody's argument concerning the Board hearing, the Secretary argues that he failed to raise that argument before the Board or before this Court during a prior appeal and thus should be precluded from raising it now. Alternatively, the Secretary argues that the hearing officer did inform Mr. Moody of the elements to establish service connection and that he also had actual knowledge of those elements. The Secretary also argues that the Board did not err in finding that VA was not required to provide Mr. Moody with a medical examination.

II. ANALYSIS

A. Board Hearing

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); *see also Heuer v. Brown*, 7 Vet.App. 379, 384 (1995). A veteran may also establish entitlement to disability benefits for a chronic disorder listed in 38 C.F.R. § 3.309(a) by demonstrating a "continuity of symptomatology." *Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed. Cir. 2013); 38 C.F.R. § 3.303(b) (2016). Continuity of symptomatology may be established by showing (1) that a condition was "noted" during service; (2) evidence of continuous symptoms after service; and (3) medical, or in certain circumstances, lay evidence of a nexus between the current disability and the postservice symptoms. *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997).

"It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2) (2016); *see also Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010) (stating that the regulation imposes "two distinct duties" on hearing officers: the duty to fully explain the issues and the duty to suggest that a claimant submit evidence that may have been overlooked). This provision applies to hearings both before the regional office (RO) and the Board. *Procopio v. Shinseki*, 26 Vet.App. 76, 79-81 (2012).

Mr. Moody argues that, based on his current hypertension and his elevated blood pressure readings during service, the hearing officer should have informed him that he should procure evidence of continuity of symptomatology to establish service connection for hypertension. Although the Secretary argues that Mr. Moody should be precluded from making this argument since he did not raise it during a prior appeal, the Court finds that argument without merit. Mr. Moody's prior appeal concerned whether to reopen his previously denied claim for hypertension

and did not address the merits of that matter. Thus, the Court will address his current argument concerning the hearing officer's responsibilities regarding the merits of his claim.

The Secretary does not dispute that the hearing officer did not inform Mr. Moody that he should submit evidence of treatment for hypertension during service or within one year after his service. However, the Secretary states that Mr. Moody had actual knowledge of that information and notes that, during the one-year period after his honorable service, he was still in service, but this period is considered dishonorable. The Secretary states that Mr. Moody only points to treatment for hypertension in June 1980 and does not allege any prejudice based on the hearing examiner's failure to inform him of the evidence necessary to substantiate his claim.

Here, Mr. Moody was informed at his hearing that he needed to show "a disease or injury in service, something in service, something today, and a link between the two." R. at 2902. However, he was not informed that he could submit evidence regarding continuity of symptomatology or that his condition had its onset within one year of his service. Further, nothing cited by the Secretary indicates that Mr. Moody had actual knowledge of this information. Additionally, contrary to the Secretary's argument that Mr. Moody only referred to a June 1980 treatment for hypertension, Mr. Moody also noted that he was treated for hypertension in May, October, and December 1980. "Prejudice arises from the failure of the hearing officer to assure the clarity and completeness of the hearing record . . . and the lost additional opportunity [for the veteran] to try and submit such evidence before his claim finally was adjudicated." *Bryant*, 23 Vet.App. at 499 (internal quotation marks and citations omitted). Based on the record of proceedings before the Court, the Court cannot say whether Mr. Moody could have submitted additional evidence or argument to support his claim in the absence of the Board hearing officer's error; thus the Court finds that remand is required. *See id*.

B. Medical Examination

The Secretary's duty to assist requires that he provide a VA medical examination to a claimant when there is

> (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service or, for certain diseases, manifestation of the disease during an applicable presumptive period for which the claimant qualifies; and (3) an indication that the disability or persistent or recurrent symptoms of the disability may be associated with the veteran's service or with another service-connected disability; but (4)

> insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

38 U.S.C. § 5103A(d)(2); *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4)(i) (2016). "The Board's ultimate conclusion that a medical examination is not necessary pursuant to 38 U.S.C. § 5103A(d)(2) is reviewed under the 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard of review." *McLendon*, 20 Vet.App. at 81.

As with any determination, the Board must provide a statement of the reasons and bases for its determination that VA has fulfilled its duty to assist, 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); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). 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 v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

The Board found that a medical examination was not required because there was no evidence of an in-service occurrence, of continuity of symptomatology since service, or that the condition may be related to service. Mr. Moody argues that the Board erred in finding that he was not entitled to a VA medical examination. Here, Mr. Moody has a current diagnosis of hypertension and there is evidence that he had elevated blood pressure readings during his honorable period of active duty service. The third element, whether the evidence of record "indicates" that the current disability "may be associated with the claimant's . . . service," 38 U.S.C. § 5103A(d)(2), "requires only that the evidence 'indicates' that there 'may' be a nexus between the two. This is a low threshold." *McLendon*, 20 Vet.App. at 83. The Board did not discuss whether Mr. Moody's elevated blood pressure readings during service constitute evidence that his current condition may be associated with service. Thus, the Court holds that the Board has provided an inadequate statement of reasons or bases to support its conclusion that an examination was not warranted. *See Allday*, 7 Vet.App. at 527. The Court will, therefore, remand the Board's decision.

On remand, Mr. Moody is free to present additional arguments and evidence in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the January 15, 2016, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: May 19, 2017

Copies to:

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