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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0283

LAWRENCE F. NOWAKOWSKI, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Air Force veteran Lawrence F. Nowakowski appeals through counsel a November 16, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for left shoulder and upper arm and left hip, leg, and foot disabilities. For the following reasons, the Court will set aside the Board's November 2015 decision and remand the matter for further proceedings.

I. ANALYSIS

Mr. Nowakowski argues, in part, that the Board provided an inadequate statement of reasons or bases for rejecting his own lay statements of postservice symptoms. Specifically, he argues that based on the fact that medical records do not mention treatment or complaints of injury after an in-service fall, the Board improperly discredited his report of experiencing pain in his left upper and lower extremities. The Court agrees.

It is within the Board's province, as finder of fact, to determine the credibility and probative weight of lay testimony. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005). In making credibility determinations, the Board may consider factors such as facial plausibility, bias, self-interest, and consistency with other evidence of record. *Caluza v. Brown*, 7 Vet.App. 498,

511 (1995); *see Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) ("The Board retains discretion to make credibility determinations and otherwise weigh the evidence submitted"); *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). The Board may consider the absence of contemporaneous medical evidence when determining the credibility of lay statements, but the Board may not find that lay evidence lacks credibility solely because it is unaccompanied by contemporaneous medical evidence. *Buchanan*, 451 F.3d at 1331.

The Board must address the credibility of lay statements when their relevance is raised by the claimant or the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009); *see also Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (Board must explain the reasons for discounting favorable evidence). Any such credibility findings must be explained in a statement of reasons or bases that is adequate to "enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Court holds that remand is warranted for the Board to adequately address Mr. Nowakowski's account of experiencing symptoms of injury in his left upper and lower extremities following a fall in service. The Board found that service medical records "are negative for symptoms, complaints, findings, or diagnosis" related to injury to his left side and noted that "[i]t would be reasonable to expect that there would be some notation of an accident of such magnitude as [Mr. Nowakowski] has described." Record (R.) at 10. The Board further noted that Mr. Nowakowski's statements about postservice symptoms were "substantially rebutted by the complete absence of complaints pertaining to the left upper and left lower extremities" until July 2008, nearly 40 years after service. R. at 12-13.

In rejecting Mr. Nowakowski's lay statements solely because they were not corroborated by medical records, the Board erred. *See Buchanan*, 451 F.3d at 1331. The Board's findings as to Mr. Nowakowski's statements about continued symptoms since service also contradict its finding in its August 2014 remand, which concluded that his lay statements were "competent reports of injury in service and continuous symptoms since service." R. at 341; *see Browder v. Brown*, 5 Vet.App. 268, 270 (1993) (holding that "law of the case" doctrine mandates that "questions settled on a former appeal of the same case are no longer open for review"). Thus, remand is warranted for the Board to adequately address his statements in the first instance. *See Robinson*, 21 Vet.App. at 552; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate

"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"); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding").

To the extent that the October 2014 VA examiner also relied upon the absence of medical evidence to find that Mr. Nowakowski's left-extremities disabilities were not related to service, the examination is inadequate, and a new one is warranted on remand. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (when providing a medical examination, "the Secretary . . . must ensure that the examiner providing the report or opinion is fully cognizant of the claimant's past medical history"). In addition, the Board did not explain why it relied on a medical examination that disregarded lay statements because they were not supported by contemporaneous medical evidence. *See Buchanan*, 451 F.3d at 1331; *see also Tucker*, 11 Vet.App. at 374.

Because the claims are being remanded, the Court need not address Mr. Nowakowski's additional arguments as to the adequacy of the Board's discussion. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claims on remand, Mr. Nowakowski is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order) and, in fact, is encouraged to do so. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board must consider such evidence and argument.

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's November 16, 2015, decision and REMANDS the matter for further proceedings consistent with this decision.

DATED: June 27, 2017

Copies to:

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