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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2349

LOIS O'SHELL, 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*: The appellant, Lois O'Shell, appeals through counsel a June 6, 2016, Board of Veterans' Appeals (Board) decision in which the Board denied her entitlement to "dependency and indemnity compensation (DIC) due to service connection for the cause of the . . . death" of her husband, veteran James M. O'Shell. Record (R.) at 2-11. This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are 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 Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

Mr. O'Shell served on active duty in the U.S. Air Force from December 1957 until December 1983. R. at 656. Throughout his service, he received treatment for a duodenal ulcer. R. at 43-44, 47, 241, 465-68. VA later granted him entitlement to disability benefits for his duodenal ulcer, diabetes mellitus, and other disorders. R. at 641.

In March 2007, Mr. O'Shell's care providers discovered that he had developed gastric cancer. R. at 1309. They performed two surgical procedures to treat the disease. R. at 79, 92. A year later, he returned for a third surgery. R. at 592. His health rapidly deteriorated after the procedure, and he died on March 20, 2008. R. at 1099.

In April 2008 and March 2009, the appellant filed claims for entitlement to DIC. R. at 1016-23, 1258-71. The VA regional office (RO) denied her claims in decisions dated July 2008, August 2009, and April 2010. R. at 950-52, 972-74, 1068-70, 72. The appellant filed Notices of Disagreement with the RO's decisions in October 2009 and August 2010. R. at 964-67, 895.

In February 2012, a VA medical examiner opined that Mr. O'Shell's "duodenal ulcer was not related to the gastric cancer." R. at 874. In May 2014, the Board remanded the appellant's claim for additional development. R. at 794-98. The Board ordered the Secretary to ask either the February 2012 examiner or another examiner to state "whether it is as likely as not . . . that [Mr. O'Shell's] gastric cancer developed as a result of herbicide exposure." R. at 797-98. The Board also wrote that the examiner should "provide an opinion as to whether it is at least as likely as not . . . that a service-related injury or disease contributed substantially or materially to [his] death." R. at 797-98.

In July 2014, an independent medical examiner concluded that neither Mr. O'Shell's service-connected disorders nor herbicide exposure "substantially and materially" contributed to his death. R. at 790. The examiner noted that the "etiology of [Mr. O'Shell's gastric cancer] was *Helicobacter* (H.) *Pylori*." *Id.* In February 2015, the examiner who wrote the February 2012 examination report opined that Mr. O'Shell's gastric cancer was not linked to his active service and that his service-connected disorders did not contribute "substantially or materially" to his death. R. at 633-34.

On June 6, 2016, the Board issued the decision presently under review. R. at 2-11.

II. ANALYSIS

The Board considered and rejected three theories of entitlement to the benefits that the appellant seeks: (1) whether herbicide exposure or another in-service incident caused Mr. O'Shell's gastric cancer to develop; (2) whether a service-connected disorder caused his cancer to develop or otherwise contributed to his death; and (3) whether *H. pylori* caused his cancer to develop. In each

part of the Board's analysis, the explanation that it gave for its decision is deficient for a number of reasons.

A. Herbicide Exposure/In-service Incident

In May 2005, Mr. O'Shell stated that he was exposed to asbestos during his military service. R. at 1449. Service department records reveal that he "developed an asbestos control and removal program" while on active duty. R. at 669. In August 2013, the appellant submitted evidence indicating that "asbestos exposure" can increase the risk of stomach cancer. R. at 814. The Board did not consider whether Mr. O'Shell's asbestos exposure caused or contributed to the development of his gastric cancer. The record reasonably raised that issue, and the Board should address it on remand. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 1999).

The Board found it noteworthy that Mr. O'Shell's gastric cancer did not "manifest[until] approximately 25 years after [his] retirement from active service." R. at 10. When the Board uses the passage of time as evidence against a claim, it must establish a factual predicate for doing so by "consider[ing] all of the evidence including the availability of medical records, the nature and course of the disease or disability, the amount of time that elapsed since military service, and any other relevant facts." *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000); *see also Horn v. Shinseki*, 25 Vet.App. 231, 240 n.7 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact.") (quoting *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (Lance J., dissenting)). The Board did not establish the factual predicate necessary for relying on the amount of time that elapsed between Mr. O'Shell's service and the onset of his gastric cancer to deny the appellant's claim.

The Board found that "there is no competent evidence of record that gastric cancer is related to herbicide exposure in service." R. at 10. In its May 2014 remand, the Board sought a medical opinion addressing whether herbicide exposure caused Mr. O'Shell's gastric cancer to develop. R. at 797-98. The July 2014 examiner responded to the Board's inquiry. The portion of her opinion addressing herbicide exposure, however, contains deficiencies that the Board should have addressed. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must

"contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (holding that a medical opinion is 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.'" (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994))).

The examiner first concluded that, because "it remains unclear if [Mr. O'Shell] experienced occupational exposure to herbicides . . . [,] it would be *mere speculation* to assume a relationship to herbicidal exposure and cause of death without additional clarification." R. at 791 (emphasis is the examiner's). The Board found that he "had service in the Republic of Vietnam." R. at 3. The examiner, therefore, should have presumed that he was exposed to herbicides during his service. *See* 38 C.F.R. § 3.307(a)(6)(iii) (2016).

Despite indicating that she could not reach a definitive conclusion about the question that she was asked to investigate, the examiner went on to state that it is not likely that "adenocarcinoma of the stomach . . . [is] directly related to, caused by, nexus to or aggravated by an exposure to Agent Orange." R. at 791. Her discussion reveals, however, that the only reason for her opinion is that adenocarcinoma of the stomach is not related to soft tissue sarcoma and thus is not one of the disorders that the Secretary presumes to be related to herbicide exposure. *See* 38 C.F.R. § 3.309(e) (2017).

It is inappropriate to "permit the denial of direct service connection simply because there is no presumptive service connection." *Polovick v. Shinseki*, 23 Vet.App. 48, 55 (2009). The Board should have recognized that the examiner did not discuss whether herbicides directly caused Mr. O'Shell's gastric cancer to develop, and it should have considered whether it needed to obtain additional medical evidence addressing that matter before deciding the appellant's case.

B. Service-Connected Disorders

Mr. O'Shell spent much of his adult life taking medications to treat service-connected disorders. In her August 2010 Notice of Disagreement, the appellant stated that he "suffered throughout his life with . . . numerous medication and diet changes." R. at 895. A February 2007 medical record indicates that when he sought treatment for "suspected gastric cancer," he had been

taking "Metformin for diabetes" for "about two years" and "his stomach pain worsened" during that time. R. at 1472. The Board should review this and other evidence in the record and decide if it must consider whether the medications and diet changes that Mr. O'Shell's care providers prescribed to treat his service-connected disorders caused or worsened his gastric cancer. *See Robinson*, 21 Vet.App. at 552.

The Board noted that Mr. O'Shell's "duodenal ulcer had been diagnosed in service in the early 1960s, but . . . the gastric ulcer had not been manifested until 2007, approximately 45 years later. In fact, the duodenal ulcer had been quiescent for many years." R. at 10. The Board did not establish the factual predicate necessary for relying on the temporal gap between the dates that Mr. O'Shell's duodenal ulcer developed and receded and the date that he developed gastric cancer to decide this case. *See Maxson*, 230 F.3d at 1333. The Board also did not acknowledge that Mr. O'Shell's gastric cancer was advanced by the time that he sought treatment and likely manifested well before he received a diagnosis. R. at 1315 (stating that in March 2007 Mr. O'Shell's cancer was "51 to 60 [centimeters], stage T3, N1").

The Board did not critically review the medical evidence before it. In February 2012, the VA medical examiner assigned to address this case opined that "the duodenal ulcer was not related to the gastric cancer" because "a duodenal ulcer . . . is not the same thing as a gastric ulcer and is in a different location." R. at 874. It is unclear what the examiner meant by "not the same thing." *Id.* He may have meant that duodenal ulcers and gastric ulcers generally are known to have different etiologies and therefore cannot possibly be related to one another. If so, he did not state his opinion directly or explain his position. He may have meant that the record convinced him that Mr. O'Shell's duodenal ulcer and gastric cancer were not etiologically related even though a duodenal ulcer and a gastric ulcer have similar etiologies. If so, once again, he did not directly state his opinion or explain his position.

Furthermore, both he and the Board ignored medical evidence in the record indicating that *H. pylori* "is a major risk factor for peptic ulcer disease[,] is responsible for the majority of ulcers of the stomach and upper small intestine[,] and is "the primary identified cause of stomach cancer." R. at 814-15. That evidence demonstrates that there is at least one etiological link between stomach ulcers, duodenal ulcers, and gastric cancer, and it should have been addressed. *See Thompson v.*

Gober, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

The examiner may have meant only that Mr. O'Shell's duodenal ulcer and gastric cancer were not related because they did not occur in the exact same location. Once again, the examiner did not say that duodenal ulcers are known to have completely different causes than gastric ulcers or address record evidence showing that they can both be caused by *H. pylori*.

In both his February 2012 and February 2015 reports, the examiner plainly put forth minimal effort and grounded his opinions on basic observations. The Board should review his opinions on remand and decide whether he provided it with medical evidence sufficiently explaining the etiology of duodenal ulcers and gastric cancer and showing why Mr. O'Shell's ulcer and cancer could not possibly be related.¹

When the Board reviews this case on remand, it should note that Mr. O'Shell had numerous symptoms that affected his gastrointestinal organs. It is hard to imagine how the Board can decide this case before it has obtained medical evidence identifying the cause of his symptoms and, if they are linked to service-connected disorders, demonstrating whether they, in turn, caused or worsened his gastric cancer. When it analyzes this evidence, it should be on the lookout for signs that 38 C.F.R. §§ 3.312(c)(3), (4) apply to this case.

C. H. Pylori

The Board concluded that "there are no[] competent finding[s] that *H. pylori* was related to service or to the fatal gastric cancer."² R. at 11. The second half of that finding is clearly erroneous. The July 2014 examiner plainly stated that the "etiology of disease was [*H.*] *Pylori*." R. at 790.

¹ The Court is tempted to summarily find the three medical opinions discussed in this decision to be inadequate. The Board's decision, however, contains only a single sentence that suggests an adequacy determination and that sentence is even more concise than the unhelpful boilerplate that the Board often deploys when it must make adequacy findings. Consequently, the Court leaves it to the Board to make findings about the adequacy of the three opinions in the first instance and explain why it relied on them despite the deficiencies that the Court has identified. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"); *see also* 38 U.S.C. § 7261(c).

² The Board seems to have accepted medical evidence indicating that Mr. O'Shell had "*H. pylori* like organisms" in his stomach in February 2007. R. at 1345.

Moreover, "there are no[] competent finding[s] that H. pylori was related to service" because VA never specifically asked anyone to investigate that question. As the Board seemed to recognize, the record reasonably raised a medical question about whether Mr. O'Shell developed an H. pylori infection during his active service. *See* R. at 895 (the appellant stated that "he was infected with [H. pylori] as likely as not due to the unsanitary conditions of war"). The Board should have supported its implied conclusion that Mr. O'Shell did not contract an H. pylori infection during his service with adequate medical evidence. *See Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) (holding that, when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that, when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence").

When it reviews the matter on remand, it also should keep in mind, as it did in 2014, that evidence that the appellant submitted indicates that a duodenal ulcer is a symptom of an H. pylori infection. *See Thompson*, 14 Vet.App. at 188; R. at 797, 819 (individuals with "duodenal ulcers or a documented history of ulcers should be tested for" H. pylori). That evidence undermines the Board's conclusion that Mr. O'Shell's service medical records are "negative for any evidence of an H. pylori infection." R. at 6.

D. Other Matters

The Court need not at this time address any other arguments that the appellant has raised. *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 matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *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 the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's June 6, 2016, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: July 7, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)