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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2015

MARVIN R. BETTS, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Marvin R. Betts appeals through counsel a May 11, 2016, Board of Veterans' Appeals (Board) decision denying service connection for type II diabetes mellitus and prostate cancer as due to herbicide exposure, upper and lower bilateral extremity peripheral neuropathy as secondary to diabetes, hypertension as due to herbicide exposure and/or as secondary to diabetes, and erectile dysfunction and prostatectomy scar residuals as secondary to prostate cancer; the Board also denied entitlement to special monthly compensation (SMC) based on loss of use of a creative organ. Record (R.) at 2-21.¹ Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons that follow, the Court will set aside the May 2016 Board decision and remand the matter for additional development, if necessary, and readjudication consistent with this decision.

¹ The Board remanded the issue of service connection for hepatitis C. R. at 19-21. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider that issue. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2017).

I. FACTS

Mr. Betts served on active duty in the U.S. Army from April 1968 to April 1970. R. at 83. From September 1968 to September 1969, he worked at Camp Friendship adjacent to Korat Air Base in Thailand; his military occupation specialty (MOS) was supply specialist and stock clerk and he was assigned to the 590th Supply and Service Company.² R. at 4, 122-25.

The veteran was diagnosed with type II diabetes mellitus in December 1997 and underwent a radical peroneal prostatectomy as treatment for prostate cancer in February 2002. R. at 72, 77-78, 955-56. In April 2005, he sought service connection for these disabilities based on herbicide exposure in Vietnam. R. at 977, 1013-31. In June 2006, the VA regional office (RO) denied these claims, noting that military personnel records showed that the veteran served in Thailand and did not serve in Vietnam. R. at 922-31. He did not appeal this decision and it became final. R. at

In August 2011, Mr. Betts sought to reopen the diabetes and prostate cancer claims and filed new claims for service connection for hypertension, peripheral neuropathy, scar, and erectile dysfunction, as well as entitlement to SMC. R. at 901-04. In March 2012, the RO found reopening of the two earlier claims was not warranted and denied the remaining claims on the merits. R. at 406-22. The veteran timely disagreed with this decision, R. at 401, the RO continued its denials, R. at 369-98, and he appealed to the Board, R. at 362. During November 2012 testimony before the Board, he asserted that he worked at a large supply depot at Korat Air Base in northern Thailand and that he worked near the base perimeter where supplies entered and exited. R. at 332-33, 340-41. In November 2014, the Board reopened the diabetes and prostate cancer claims but remanded them, along with all other claims, for VA to attempt to verify the veteran's exposure to herbicides. R. at 197-208; *see also* R. at 60.

In July 2015, the RO submitted a request for verification to the U.S. Army and Joint Records Research Center (JSRRC). *See* R. at 47. JSRRC responded in November 2015—which the RO's JSRRC coordinator summarized in a contemporaneous memorandum—advising that it was unable to locate 1968-1969 unit records for the 590th Supply and Service Company but, based on records from the depot to which the 590th was attached, could verify that the company

² The record does not make clear where Camp Friendship and Korat Air Base were located in relation to each other, *cf. Parseeya-Picchione v. McDonald*, 28 Vet.App. 171, 176-77 (2016) (noting a similar problem), but resolution of this issue is not necessary for the purposes of the present appeal as the Board did not rely on any material distinction between the two.

was located at Camp Friendship, Korat, Thailand, as well as that unit's general responsibilities and activities. R. at 39-40. JSRRC noted that a Defense Department report "contain[ed] evidence that there was a significant use of herbicides on the fenced-in perimeters of military bases in Thailand to remove foliage that provided cover for enemy forces." R. at 40. However, while acknowledging Mr. Betts's description of his duties, JSRRC was unable to confirm that his duties brought him within close proximity to the perimeter of the base such that exposure to herbicides could be verified. *Id.*; *accord* R. at 38. Based on the JSRRC response, the RO continued to deny the claims in a November 2015 Supplemental Statement of the Case (SSOC) and informed the veteran that he had 30 days in which to respond with additional evidence or argument as to how he disagreed with the SSOC's conclusion. R. at 45-58. Thereafter, the matter returned to the Board.

In the May 2016 decision on appeal, the Board denied service connection for type II diabetes mellitus and prostate cancer as due to herbicide exposure, as well as the remaining claims as secondary to those conditions. The Board concluded that the veteran's statements that he worked along the perimeter of Korat Air Base were not credible because they were "in direct[] conflict with official service department records that fail to demonstrate that the type of duties [he] performed . . . placed him along the perimeter of the Air Base." R. at 16. The Board observed that, unlike security police officer, security patrol dog handler, or security police squadron member, VA has not included supply specialist or stock clerk among MOSs acknowledged to have placed servicemembers along the perimeter of Thai air bases. R. at 16-17. "Moreover," the Board observed, Mr. Betts had "not identified or submitted any evidence that would corroborate or confirm that his duties placed him along the perimeter at Korat. . . . As such, the [v]eteran's lay assertions of such exposure [were] less credible and persuasive in light of" the JSRRC response. R. at 17. This appeal followed.

II. ANALYSIS

Mr. Betts argues that the Board provided inadequate reasons or bases to support its decision. Specifically, he asserts that the Board legally and clearly erred in finding not credible his assertions of in-service exposure to herbicides at the perimeter of Korat Air Base and, thus, failed to adequately explain its determination that his statements were inadequate to establish his duties at the base perimeter. Appellant's Brief (Br.) at 3-8; Reply Br. at 1-6. The Secretary

disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 6-16.

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the claimant to understand the precise basis for the Board decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting 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). Remand is appropriate when the Board fails to provide an adequate statement of reasons or bases for its determinations. *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Certain diseases associated with exposure to herbicides such as Agent Orange may be entitled to service connection on a presumptive basis; type II diabetes mellitus and prostate cancer are among such diseases. 38 C.F.R. § 3.309(e) (2017). VA regulations provide that exposure to herbicides may be presumed for veterans who, in specified circumstances and during specified times, served in Vietnam or the Demilitarized Zone of Korea; or who operated, maintained, or served aboard certain U.S. Air Force aircraft. 38 C.F.R. § 3.307(a)(6) (2017).

Special VA rules were also issued governing adjudication of claims based on veterans' assertions that they were exposed to herbicides while serving at certain military bases in Thailand during the Vietnam War Era. *See* VA ADJUDICATION PROCEDURES MANUAL (M21-1), Pt. IV, sbpt. ii, ch. 1, sec. H.5; *see also Effective Date for Claims Involving Exposure to Agent Orange with Thailand Base Perimeter Duty*, VA Compensation Service Bulletin 1-2 (Dec. 2011). This M21-1 provision states that, "to verify exposure to herbicides," VA should first determine whether a veteran served at one of seven Royal Thai Air Force Bases—among which is Korat—and whether the veteran served in the U.S. Air Force as a security police officer, security patrol dog handler, member of the security police squadron, or was "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." M21-1, Pt. IV, sbpt. ii, ch. 1, sec. H.5.b. Alternatively, herbicide exposure may be conceded for U.S. Army veterans who served at a Royal Thai Air Force Base if the veteran alleges that she or "he was involved in perimeter security duty" and "there is additional credible evidence supporting this statement." *Id.* This provision also states that

herbicide exposure may be conceded for a veteran who served at a U.S. Army base in Thailand during the Vietnam era³ when the veteran alleges that duties placed him or her at or near the base perimeter, provided that the veteran was a military police unit member or had a military police occupational specialty. *Id.* For a veteran whose circumstances do not meet those outlined above, VA must ask the veteran for the approximate dates, location, and nature of the alleged exposure; review this information; and determine based on this review whether "exposure to herbicides [can] be acknowledged on a direct or facts-found basis." *Id.* If not, the matter must be referred to JSRRC "for verification of exposure to herbicides." *Id.*

Turning to the present case, the Court concludes that the Board's reasons or bases for rejecting Mr. Betts's lay statements are inadequate. Preliminarily, the Court agrees with the veteran that the Board clearly erred when it determined that his assertions of working near the perimeter of Korat Air Base were in "direct[] conflict with official service department records." R. at 16; *see* Appellant's Br. at 7. According to the RO's November 2015 memorandum summarizing JSRRC's response, the JSRRC could not access the veteran's unit records and, in addition, service records could not confirm whether Mr. Betts's duties regularly placed him at or near the Korat Air Base perimeter. R. at 40. A lack of confirmation is not the same as a contradiction of the veteran's assertions. *See Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012) (observing that the absence of evidence is not necessarily substantive negative evidence). Rather, the Board generally must "first establish a proper foundation for drawing inferences against a claimant from an absence of documentation." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); *see also Horn*, 25 Vet.App. at 239. Here, the Board never explained the foundation for its negative credibility determination. That is, the Board did not explain whether and why it would be expected to find corroboration of the veteran's daily presence at the perimeter of the base—in accordance with his duties as a supply specialist and stock clerk—in his service records or in the records of a depot to which the veteran's unit was attached. Consequently, it is not apparent to the Court on what basis the Board concluded that service department records reviewed by the JSRRC constituted substantive negative evidence. *See Fountain*, 27 Vet.App. at 272; *Horn*, 25 Vet.App. at 239. Indeed, the Board did not appear to

³ Mr. Betts's years of service (1968 to 1970) fall within the Vietnam era, which is defined as "[t]he period beginning on February 28, 1961, and ending on May 7, 1975, inclusive, in the case of a veteran who served in the Republic of Vietnam during that period" and "[t]he period beginning on August 5, 1964, and ending on May 7, 1975, inclusive, in all other cases." 38 C.F.R. § 3.2(f) (2017).

take account of the fact that the JSRRC did not even review unit records for the 590th Supply and Service Company, to which Mr. Betts was assigned. R. at 39-40. This deficiency in the Board's reasons or bases renders them inadequate and necessitates remand. *See Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506; *see also Tucker*, 11 Vet.App. at 374.

The Secretary's contentions to the contrary are unavailing. First, he asserts that the veteran is arguing "that evidence that he specifically did not serve along the base perimeter is required to discredit his lay testimony." Secretary's Br. at 9. The remand necessary in this case, however, is predicated on the Board's failure to provide an adequate foundation for its negative credibility determination. Absent such foundation, neither the Board nor the Secretary has cited an exception to the rule that a lack of corroborative records "does not, in and of itself, render lay evidence not credible." *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006).

Second, the Secretary asserts that the Board's negative credibility finding was supported by the facts that the veteran's statements were made in the context of a claim for VA benefits and that he had made inconsistent statements regarding the circumstances of his service during the course of the claim. Secretary's Br. at 13-14. Although these can be permissible bases to impugn a veteran's credibility, *see Caluza*, 7 Vet.App. at 711-12, they do not appear to be bases on which the Board relied. The Board mentioned in passing that the veteran's statements were "made in connection with his pending claim for VA benefits," R. at 17, but did not actually cite this as a basis for impugning his credibility, nor did it attempt to explain how this rationale alone—one that would be applicable to the vast majority of statements in every case before VA—would be a sufficient basis for discounting the credibility of Mr. Betts's statements. And as for purported inconsistencies in the veteran's statements, this was not an issue that the Board identified. Indeed, the Secretary's present assertion that Mr. Betts made inconsistent statements during his claim rests on gratuitously unfavorable interpretations of those statements. *See* Secretary's Br. at 13 (opining that a 2005 statement from the veteran "might suggest that he had or that he meant he served in 'Vietnam' generally"). In any event, putting aside the dubious merits of these arguments, they are simply not bases articulated by the Board to support its determination.⁴ *See Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is

⁴ The Secretary has not argued that any Board error, if found, would be harmless, and it is not clear to the Court that affirmance after a prejudicial error analysis would be appropriate here. *See Southall-Norman v. McDonald*, 28 Vet.App. 346, 356 (2016) (remanding a claim "because the Court [could not] conclude that the Board's reasons or bases errors in assessing the veteran's credibility were harmless").

required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg, J., concurring) ("[T]he Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases.").

Last, the Secretary attempts to argue that service connection for Mr. Betts's claimed disabilities on a presumptive basis would not necessarily be established, even if his regular presence at or near the perimeter of Camp Friendship or Korat Air Base were determined, because the commercial herbicides used at bases in Thailand are different from the herbicide agents defined in 38 C.F.R. § 3.307(a)(6)(i) on which the presumption of service connection for certain diseases is based. Secretary's Br. at 14-16. This novel argument was not one of the reasons articulated by the Board for denying Mr. Betts's claims for service connection and, for the reasons noted above, the Court will not consider it in the first instance, except to note that the Secretary has not cited, and the Court is not aware of, any instance in which VA has distinguished—for *adjudication* purposes—herbicides used in Thailand from those used in Vietnam or elsewhere. *Cf. Parseeya-Picchione v. McDonald*, 28 Vet.App. 171, 177 (2016) ("The VA Compensation Service has acknowledged that there was some evidence that the herbicides used on the Thailand base perimeters may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides." (internal quotation marks omitted)).

Before concluding, the Court reiterates the relatively straightforward question at issue in this case. The VA Compensation Service "has determined that a special consideration of herbicide exposure on a factual basis should be extended to [v]eterans whose duties placed them on or near the perimeters of Thailand military bases." M21-1, Pt. IV, sbpt. ii, ch. 1, sec. H.5.a. Except for those veterans with certain MOSs, VA must review the approximate dates, location, and nature of the alleged exposure and determine whether "exposure to herbicides [can] be acknowledged on a direct or facts-found basis." M21-1, Pt. IV, sbpt. ii, ch. 1, sec. H.5.b. Only if that determination is answered in the negative is the matter referred to the JSRRC. Thus, it need only be determined that Mr. Betts's duties as a supply specialist and supply clerk at least as likely as not placed him on or near the Camp Friendship or Korat Air Base perimeters for a concession of herbicide exposure to follow. *See* 38 U.S.C. § 5107(b) ("When there is an approximate

balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

III. CONCLUSION

Upon consideration of the foregoing, the May 11, 2016, Board decision is SET ASIDE and the matter is REMANDED for additional development, if necessary, and readjudication consistent with this decision.

DATED: July 27, 2017

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