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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2823

MARK A. RICHARDSON, 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*: Mark A. Richardson appeals through counsel a July 6, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for prostate cancer, erectile dysfunction, and an acquired psychiatric disorder. 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 July 6, 2016, Board decision and remand the matters for readjudication consistent with this decision.

I. FACTS

Mr. Richardson served on active duty in the U.S. Army from October 1969 to August 1971, including service in Korea from September 1970 to August 1971.

In March 2011, he submitted a claim for VA benefits for prostate cancer and depression, later adding a claim for VA benefits for erectile dysfunction. He asserted that his prostate cancer

was caused by exposure to herbicides during service and that his other conditions were secondary to his prostate cancer. In June 2011, he stated that, while in Korea, he was a sentry dog handler with Battery B, 7th Battalion, 5th Artillery, from September 1970 to February 1971, except for 30 days in October 1970, when he was stationed at Camp Mercer at dog training school. He also stated that from February 1971 to August 1971, he served as a correctional specialist in the "249th MP Det." Record (R.) at 136.

VA requested information from the Defense Personnel Records Information Retrieval System (DPRIS) regarding Mr. Richardson's exposure to herbicides, asking "was 7th [Battalion] HAWK 5th [Artillery] [a]ttached to the 2nd Inf[antry] Combat Brigade in Korea? (possibly the 38th depending on which one is on the list, as vet's higher was 38th [Artillery] Brigade)." R. at 111. DPRIS responded that it had

reviewed the 1970 unit history submitted by the 7th Battalion, 5th Artillery The history documents that the [7th Battalion, 5th Artillery] was located at Camp Page, approximately six miles from the Demilitarized Zone (DMZ). However, the history does not document the use, storage, spraying, or transporting of herbicides. In addition, the history does not mention or document any specific duties performed by unit members along the DMZ.

R. at 114. In May 2013, VA reported that every effort to verify herbicide exposure had been exhausted and that any additional attempts would be futile. A VA regional office then denied Mr. Richardson's claims, finding that there was insufficient evidence to verify exposure to herbicides during service.

Mr. Richardson appealed the denial of his claim, asserting that his duty station in Korea was near the DMZ and involved patrolling the perimeter of a remote hawk missile battery site on top of a mountain. He also stated that he worked with at least one dog that had been transferred from Vietnam and was not bathed. He also stated that he traveled to Camp Casey to transport veterinary technicians for training.

In January 2014, Mr. Richardson submitted another statement, again asserting that he was stationed near the Korean DMZ and that, as a sentry dog handler, he patrolled the perimeter of the base nightly. He stated that the base was on a barren and defoliated mountaintop. He also

stated that he saw "Korean civilian contractors with backpack sprayers assembled along the perimeter fence." R. at 38.

On July 6, 2016, the Board issued the decision on appeal, in which it found that Mr. Richardson could not be presumed to have been exposed to herbicides during his service in Korea. In support, the Board noted the DPRIS findings and VA determination that exposure to herbicides could not be established for Mr. Richardson. The Board also noted that Mr. Richardson reported serving at Camp Casey and Camp Page, but found that those camps are 13 and 6 miles, respectively, from the DMZ. Thus, the Board stated that neither camp is considered part of the DMZ for VA purposes. The Board also stated that, although Mr. Richardson was competent to report the condition of the landscape and seeing herbicide sprayers, his statements were not sufficient to establish actual herbicide exposure. The Board also denied entitlement to VA benefits on a direct basis.

On appeal, Mr. Richardson argues that the Board erred by failing to ensure that VA fulfilled its duty to assist because VA was required to request verification of his exposure to herbicides based on his service with the 249th Military Police detachment from February 1971 until he left Korea. He also argues that the Board erred by failing to discuss favorable evidence, including his statements that he handled at least one dog that had been exposed to herbicides in Vietnam. Lastly, he argues that his claims for VA benefits for erectile dysfunction and an acquired psychiatric disorder should be remanded as inextricably intertwined with his claim for VA benefits for prostate cancer.

In response, the Secretary argues that VA was not required to request verification of any additional duty locations, because Mr. Richardson has only alleged exposure to herbicides while serving in the 7th Battalion, 5th Artillery as a dog handler. The Secretary also argues that the Board fully considered the lay evidence of record and that lay statements alone are not sufficient to show herbicide exposure. Based on these arguments, the Secretary states that there is no basis to remand any of Mr. Richardson's claims.

II. ANALYSIS

Under 38 U.S.C. § 1116, if a veteran served between April 1, 1968, and August 31, 1971, in a unit found to have operated in or near the Korean DMZ—where herbicides are known to have been applied—then he or she is presumed to have been exposed to herbicides containing Agent Orange. 38 C.F.R. § 3.307(a)(6)(iv) (2017). For claimants who successfully established the presumption of exposure to herbicides and who seek benefits for prostate cancer, VA will also grant a presumption of nexus to service "even though there is no [contemporaneous] record of such disease during service." *See* 38 C.F.R. § 3.309(e) (2017) (specifying certain diseases for which a nexus to service will also be presumed in the event the presumption of exposure is successfully applied).

The Secretary has a duty to assist claimants in developing their claims, including by attempting to obtain any relevant records in the custody of a Federal department or agency that may assist in substantiating the claims. 38 U.S.C. § 5103A; 38 C.F.R. § 3.159(c)(2), (3) (2017). When the claim is for service connection for a disability allegedly resulting from in-service exposure to herbicides in an area other than the Republic of Vietnam or the Korean DMZ, internal VA guidelines instruct VA to ask the veteran for the approximate dates, locations, and nature of the alleged exposure and, if the claimant timely provides that information, to furnish that description to the Compensation Service and request a review of the Department of Defense's (DOD) inventory of herbicide operations to determine whether herbicides were used as alleged. VA ADJUDICATION PROCEDURES MANUAL REWRITE (M21-1MR), pt. IV, subpt. ii, ch. 2, § C(10)(o).

Mr. Richardson argues that VA failed in its duty to assist by not requesting records regarding his potential herbicide exposure just outside the Korean DMZ with the 249th military police. The Secretary acknowledges that VA did not make any request for records pertaining to Mr. Richardson's service at this location, but argues that he never expressly claimed to have been exposed to herbicides while stationed with the 249th military police.

Here, Mr. Richardson filed a claim for benefits for prostate cancer and stated that he believed he was exposed to herbicides while serving in Korea. He subsequently provided dates and locations pertaining to that service, informing VA that he served in "Battery B, 7th Battalion

[], 5th Artillery," from September 1970 to February 1971, except for 30 days in October 1970 when he was stationed at Camp Mercer, and in the "249th MP Det" from February 1971 to August 1971. R. at 136. He did not express any belief regarding at which location he was exposed to herbicides. However, as acknowledged by the Secretary, based on this information, VA only sought records pertaining to his service with the "7th [Battalion] [] 5th [Artillery]." R. at 111.

Although the Board acknowledged that Mr. Richardson had served in multiple locations in Korea, it did not specifically discuss his service with the 249th military police detachment from February to August 1971. Consequently, the Board did not explain why VA's attempt to obtain records from only one period and location of Mr. Richardson's service in Korea, as the only means to corroborate his herbicide exposure, was sufficient. Based on the record of proceedings before the Court and the Board's discussion, the Court concludes that the Board erred in finding that VA satisfied its duty to assist. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000) (holding that the Court reviews the Board's determination that VA satisfied its duty to assist under the "clearly erroneous" standard of review). Because the record is inadequate without these records, or a finding that such records could not be obtained, the Court will remand the matter to the Board for further action. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "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").

Because a grant of VA benefits for prostate cancer may entitle Mr. Richardson to VA benefits for erectile dysfunction and an acquired psychiatric disorder, both claimed as secondary to his prostate cancer, the Court finds that those issues are inextricably intertwined and must be remanded as well. *See Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (explaining that, "in the interests of judicial economy and avoidance of piecemeal litigation," claims that are "intimately connected" should be adjudicated together); *Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and a waste of judicial resources, the two [issues] are inextricably intertwined."

(internal quotations and alterations omitted)). Accordingly, the Court will remand the claims of entitlement to VA benefits for erectile dysfunction and an acquired psychiatric disorder along with Mr. Richardson's claim for benefits for prostate cancer.

Given this disposition, the Court will not, at this time, address Mr. Richardson's other arguments concerning the Board's reasons or bases regarding his lay statements. *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, he 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 the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the July 6, 2016, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 31, 2017

Copies to:

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