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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2196

MARK YOUNG, 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, Mark Young, is the fiduciary for veteran Darrel E. Young. Record (R.) at 4836. On behalf of the veteran, Mr. Young appeals, through counsel, a May 6, 2016, Board of Veterans' Appeals (Board) decision in which the Board (1) denied the veteran entitlement to disability benefits for type II diabetes mellitus (diabetes), on a direct basis and as secondary to herbicide exposure; (2) denied a disability rating greater than 10% for residuals of a left femur fracture; (3) granted entitlement to separate disability ratings for orthopedic (10%, but no higher) and neurological (20%, but no higher) impairment resulting from residuals of a fracture of the right radius, throughout the period on appeal; and (4) granted him entitlement to separate disability ratings for orthopedic (10%, but no higher) and neurological (20%, but no higher) impairment resulting from residuals of fractures of the left radius and ulna, throughout the period on appeal. R. at 2-45.

The Board's decision to grant the veteran entitlement to separate disability ratings for orthopedic and neurological impairment resulting from fractures of the right radius and left radius and ulna is favorable to him. The Court, therefore, will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The appellant does not challenge the Board's conclusions that the veteran's diabetes did not first manifest during service (or within the first postservice year) and

that the veteran is not entitled to a rating in excess of 10% for left femur fracture or ratings in excess of those assigned in the May 6, 2016, Board decision for fractures of the right radius and left radius and ulna. Those issues are therefore deemed to be abandoned on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc); *Cacciola v. Gibson*, 27 Vet.App. 45, 56–57 (2014) (when an appellant abandons an issue, the Court will not decide it).

The only issue on appeal is the Board's conclusion that it cannot presume that the veteran's diabetes mellitus is linked to herbicide exposure during active service. 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 May 6, 2016, Board decision that the veteran is not entitled to service connection for diabetes on a presumptive basis, based on herbicide exposure, and remand the matter for readjudication consistent with this decision.

I. RELEVANT FACTS

The veteran served on active duty in the U.S. Air Force from February 1962 to September 1982. R. at 2319. In 1973 and 1974, he served as a missile maintenance shift supervisor stationed at Korat Royal Thai Air Force Base (RTAFB) in Thailand. R. at 2322, 3660-61, 3674-75.

In September 2001, the veteran filed a claim for entitlement to service connection for diabetes, to include as secondary to Agent Orange exposure. R. at 3832. In a December 2001 statement, he stated that, while stationed in Thailand, he worked within 200 yards of stored Agent Orange. R. at 3725. The veteran's former superior at Korat RTAFB, retired Chief Master Sergeant Richard J. Langer, provided a written statement, dated in January 2002, in which he asserted that their squadron "had and stored [A]gent [O]range" and that the veteran "may have come in contact with it." R. at 3622. In a March 2002 rating decision, the regional office (RO) denied the veteran's claim, finding no evidence of exposure to Agent Orange during active service. R. at 3613-14.

In his timely January 2003 VA Form 9, the veteran stated that Agent Orange was stored in the bomb dump where he worked and that C-123 airplanes flew operations from Korat RTAFB. R. at 3584. In November 2004, the Board remanded the matter for the RO to consider recent information provided to VA by the Department of Defense (DOD) regarding the use of Agent Orange outside of Vietnam. R. at 3559-61.

An undated memorandum from VA's compensation service regarding the use of herbicides in Thailand states that DOD and service department records confirm that the U.S. military ceased using or storing tactical herbicides in Thailand several years prior to the veteran's service there. R. at 2204-05. The memorandum acknowledged that commercial herbicides were used "on allied bases in Thailand . . . within fenced perimeters" and that veterans whose duties required regular contact with the perimeter had "a greater likelihood of exposure" to commercial herbicides. R. at 2205. The compensation service directed that ROs forward further requests for information to the Joint Services Records Research Center (JSRRC), "unless the claim is inherently incredible, clearly lacks merit, or there is no reasonable possibility that further VA assistance would substantiate the claim." *Id*. In a September 2008 Supplemental Statement of the Case, the RO found that the veteran's only report of exposure to herbicides was to stored Agent Orange. R. at 3216. Based on the report that the DOD and service departments denied any storage of tactical herbicides in Thailand during the period in question, the RO found it "inconceivable that any further development of this issue" would support the veteran's assertions. *Id*.

In a response statement received by VA in February 2009, the veteran alleged that in the summer of 1973, he was in the company of Chief Master Sergeant Langer when they passed a "huge tank of Agent Orange." R. at 3268 (capitalization omitted). He stated that at the time he did not know who was using the Agent Orange, but that he had later "found out" from the JSRRC that C-123 aircraft were used by Air America (i.e., a non-military entity) to drop the Agent Orange in Laos and Cambodia. *Id*.

In August 2011, the Board again remanded the matter with instruction that the RO: (1) request that the veteran identify a more precise, 60-day time window in which his alleged exposure occurred, to allow the JSRRC to research the matter, and (2) conduct the appropriate development for claims asserting Agent Orange exposure in Thailand. R. at 3024-30. While the matter was on remand to the RO, the veteran underwent a June 2013 VA Agent Orange Registry examination, during which he reported that he had touched a large metal barrel containing Agent Orange. R. at 439. In January 2014 correspondence, the RO requested that the veteran identify a specific 60-day period during which he was exposed to Agent Orange. R. at 2853. The following month, the veteran provided a medical records release form on which he stated that "the entire bomb dump is [within] 600 yards of the perimeter fence," R. at 2837 (capitalization omitted), but he did not provide the requested 60-day exposure window, *see* R. at 2207. As a result, the RO issued a

December 2014 formal finding that VA lacked the information necessary to verify that the veteran met the criteria for presumptive exposure to Agent Orange. R. at 2206-07.

A June 2015 report from Senator Mike Crapo's office documents the veteran's report of exposure, while stationed at Korat RTAFB, to a large, unlabeled storage tank that he asserted held Agent Orange, as well as near daily use of a road alongside and crossing the perimeter to access a missile parts storage shed. R. at 1247.

In the May 6, 2016, Board decision on appeal, the Board, citing to *Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991) (noting that the "duty to assist" is not a one-way street), found that the veteran's failure to respond to VA's request that he "narrow down his time period of exposure to 60 days" relieved VA of further obligation to assist him in verifying the claimed Agent Orange exposure. R. at 11. Consequently, the Board found that there had been substantial compliance with its prior remand instruction requiring that VA attempt to verify the claimed exposure. R. at 9; *see Stegall v. West*, 11 Vet.App. 268, 271 (1998). The Board observed that "the claims file is replete with records documenting the [v]eteran's diagnoses of diabetes," R. at 18, and noted that service connection for such disability is warranted, on a presumptive basis, for veterans "exposed to certain herbicide agents," R. at 13; *see also* 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307 (2017), 3.309 (2017). However, after reviewing the record, the Board found that the "general statements" from the veteran and his superior regarding proximity to stored Agent Orange had "not been offered in conjunction with any other credible evidence" and did not support his claim. R. at 17. As regards the veteran's alleged duties near the perimeter, the Board found that the only evidence of record supporting the veteran's contentions was his own lay statements, which were not corroborated by "any other credible evidence" and, thus, not sufficient to support his claim. R. at 16.

On appeal, the appellant argues that the Board erred by (1) failing to comply with the Court's holding in *Gagne v. McDonald*, 27 Vet.App. 397, 402 (2015), regarding the duty to make all necessary requests to obtain relevant records when the claimant has provided the necessary identifying information, Appellant's Brief (Br.) at 17-21; Reply Br. at 11-14; (2) requiring supporting evidence to corroborate the veteran's lay statements that his duties required work near the perimeter of Korat RTAFB, Appellant's Br. at 8-12; Reply Br. at 2-7; and (3) providing inadequate reasons or bases by failing to consider whether the performance evaluations of record supported the veteran's statements regarding duties near the perimeter, Appellant's Br. at 12-16; Reply Br. at 7-9. The Secretary disputes the appellant's contentions. Secretary's Br. at 6-14.

II. ANALYSIS

The Court agrees with the appellant that the Board failed to satisfy its duty to assist (and consequently did not substantially comply with the remand directives of record) because it did not make all necessary efforts to substantiate the veteran's claims of exposure to herbicides. The Court held in *Gagne* that VA generally may not, as provided in its M21-1 Adjudication Procedures Manual, require a veteran to narrow the potential date of an event in question to a 60-day period before requesting that the JSRRC conduct a search but, rather, is generally required to submit multiple 60-day record search requests if the veteran cannot narrow the time period to 60 days. 27 Vet.App. at 404 (finding that a 13-month date range was not an unreasonably long period under the circumstances presented). The Court further held that VA may discontinue a search for records from a federal agency or department only when such a search becomes "futile" and stated that "the fact that multiple records searches would burden JSRRC employees does not mean that those efforts would be 'futile'." *Id*. at 403.

Here, based on the facts outlined above, the veteran presented two separate theories of potential entitlement to service connection for diabetes on a presumptive basis: (1) based on exposure to stored Agent Orange, which may have been the property of a non-military entity, and (2) based on duties requiring proximity to the perimeter of Korat RTAFB. Regarding the first theory, the veteran asserted that records held by the JSRRC would corroborate his account. R. at 3268. However, in January 2014, based on procedures in use at that time, VA required the veteran to narrow his reported exposure period of "summer 1973" to a specific 60-day window before it would attempt to corroborate his accounts. R. at 2853-54, 3268. The veteran did not do so; therefore, the RO decided that the information provided by the veteran was insufficient to send to the JSRRC. R. at 2206-07.

The Board concluded that VA satisfied its duty to assist in this regard because the veteran failed to meet his "obligation to assist VA in the development of his diabetes claim." R. at 11. However, *Gagne*, which the Board did not discuss, invalidated the requirement that the veteran narrow the potential time period of the event in question to 60 days. Therefore, in light of *Gagne*, remand is warranted for the Board to consider and address whether VA's statutory duty to assist requires in this case a research request (or multiple requests) to the JSRRC.

The Court will address one aspect of the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that the Court may address an appellant's other

arguments to provide guidance on remand). As regards the veteran's second theory of herbicide exposure, the appellant argues that the Board improperly required corroboration of the veteran's lay statements of service near the base perimeter and wrongly rejected those statements merely because they were not corroborated by objective evidence of record. Appellant's Br. at 8-12; Reply Br. at 2-7.

Where lay evidence is competent, the Board must weigh the competent lay evidence against the other evidence of record in determining credibility. *Buchanan v. Nicholson*, 451 F.3d 1331, 1334–37 (Fed. Cir. 2006). However, the absence of corroborating records is an insufficient basis on which to find lay statements not credible. *Id*. at 1337 (although the absence of corroborating or contemporaneous evidence may be a factor to consider, "the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence"); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Rather, the Board "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 Horn v. Shinseki*, 25 Vet.App. 231, 239 n.7 (2012) (absence of evidence cannot be taken as substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact").

In the decision on appeal, the Board noted the veteran's reports that he worked near the perimeter of Korat RTAFB, as well as the written statement from his superior, and acknowledged that the veteran "is competent to relate his occupational duties." R. at 16. The Board did not make an explicit finding as to the veteran's credibility in making such reports. Nonetheless, the Board found the absence of DOD records affirmatively confirming that the veteran's duties required work near the base perimeter was more probative that the veteran's lay reports of his duties and, therefore, determined that there was "no indication" of such work. *Id*.

The Court concludes that the Board erred in its treatment of the appellant's lay evidence and that its decision in this regard lacks adequate reasons or bases. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (1996) (table). Although it was required to do so by *Buchanan* and *Fountain*, the Board provided no foundation for its implied negative credibility finding, such as whether and

why it would be expected that the personnel records of veterans in this situation would normally note if exposure to herbicides had occurred or that his duties required work near the base perimeter. On remand, if the Board wishes to discount the credibility of such statements, it must point to negative evidence tending to show that exposure did not occur or provide a sufficient foundation for its conclusion that the absence of corroborating exposure evidence outweighs the veteran's lay evidence. *See Fountain* 27 Vet.App. at 272; *Horn*, 25 Vet.App. at 239.

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 (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 Secretary's briefs, and a review of the record on appeal, the Board's May 6, 2016, decision as to service connection for diabetes is VACATED and the matter is REMANDED for further proceedings consistent with this decision. The appeal of the Board's decision as to the ratings assigned for left femur fracture, right radius fracture, and left radius and ulna fractures is DISMISSED.

DATED: December 15, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)