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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3796

JERRY KIELER, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Veteran Jerry E. Kieler appeals a September 2016 Board decision to deny service connection for degenerative disc disease and disc herniations of the thoracolumbar spine as secondary to a service-connected chronic lumbar strain.¹ For the reasons discussed below, the Court will vacate the Board's decision and remand the matter for readjudication.

I. BACKGROUND

Mr. Kieler receives VA compensation for residuals of a chronic lumbar strain he suffered while on active duty in 1991. According to private chiropractic notes and VA treatment records, he began experiencing a new and different kind of back pain in the summer of 2000, radiating down his left leg and into his left foot and causing numbness and weakness. This new pain was later diagnosed as herniated discs due to thoracolumbar degenerative disc disease.

¹ The Board's decision also denied a disability rating higher than 40% for low back strain. As Mr. Kieler does not challenge this determination, the appeals as to this matter is dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc). The Board also remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). The Court lacks jurisdiction to review remanded matters and so does not address this issue. *See Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011); 38 C.F.R. § 20.1100(b) (2017).

In January 2008, Mr. Kieler filed a claim for VA compensation for his thoracolumbar degenerative disc disease as secondary to his service-connected chronic lumbar strain residuals. During the development of his claim, he attended in-person VA examinations in 2011, 2013, and 2016; additionally, two VA medical opinions based on reviews of the record were obtained in 2014. Each examiner concluded that Mr. Kieler's thoracolumbar degenerative disc disease was not caused by his service-connected lumbar strain because the injury first manifested in 2000, almost 10 years after the chronic lumbar strain first manifested. Each examiner also found that thoracolumbar degenerative disc disease was not aggravated by Mr. Kieler's chronic lumbar strain because a soft tissue injury, such as lumbar strain, is unrelated to the development of degenerative disc disease.²

The Board found the examinations adequate because they were undertaken with a review of the record and "provide sufficient clinical and diagnostic findings for purposes of determining the nature and etiology" of Mr. Kieler's lumbar degenerative disc disease. R. at 6. The Board further found that the VA medical opinions, when "taken together, provide a sound rationale that explains how these two conditions are unrelated." R. at 13-14. This appeal followed.

II. ANALYSIS

Mr. Kieler first asserts that the Board did not adequately address the issue of whether his thoracolumbar degenerative disc disease was aggravated by his chronic lumbar strain. *See El-Amin v. Shinseki*, 26 Vet.App. 136, 140 (2013). The Secretary disagrees, arguing that, because each of the VA examinations relied upon by the Board addressed the issue of aggravation, the Board's conclusions as to adequacy are not clearly erroneous.

Whether a medical opinion is adequate is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *see also Prinkey v. Shinseki*, 735 F.3d 1375, 1383 (Fed. Cir. 2013). A finding is clearly erroneous when, "although there is evidence to

² Secondary service connection will be granted if a disability is proximately due to or the result of a service-connected disease or injury. 38 C.F.R. § 3.310(a) (2017). A veteran can also be compensated for aggravation of a non-service-connected disability by a service-connected disability. *Id.* § 3.110(b). Aggravation is defined as "[a]ny increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease." *Id.*

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Sharp v. Shulkin*, 29 Vet.App. 26, 32 (2017).

The Secretary argues that the VA examiners' treatment of the issue of aggravation is adequate, but the Court disagrees. The overall tenor of the examiners' findings is that thoracolumbar degenerative disc disease cannot be aggravated by chronic lumbar strain because the two diseases are unrelated. However, a conclusion that the two disease processes are unrelated to each other still does not adequately address the question of whether Mr. Kieler's thoracolumbar degenerative disc disease is more severe than it should be because of the symptoms of thoracolumbar strain. *See, e.g., Allen v. Brown*, 7 Vet.App. 439, 449 (1995) (where an examiner noted "no etiological relationship" between a service-connected disability and a non-service-connected one, it was "a big stretch of the English language" to construe the phrase as encompassing aggravation).

Here, the VA examiners did not address whether any residuals of the chronic lumbar strain, such as gait abnormality, limitation of motion, muscle spasm, or other similar symptoms, increased the severity of the symptoms of lumbar degenerative disc disease beyond the degree of disability that would be present without the chronic lumbar strain and its residuals. As a result, the Board erred in relying on the examiners' conclusory statements to deny service connection for thoracolumbar degenerative disc disease based on the theory that it was aggravated by Mr. Kieler's service-connected chronic lumbar strain or its residuals.

Mr. Kieler also argues that the Board erred in failing to address his December 2006 lay statement that his private chiropractor told him that his chronic lumbar strain caused or aggravated his thoracolumbar degenerative disc disease. The Secretary asserts that this Court lacks jurisdiction to address this because Mr. Kieler raised the issue for the first time on appeal. *See, e.g., Robinson v. Peake*, 21 Vet.App. 545, 552-53 (2008). He further asserts that, if the Court does exercise jurisdiction over this issue, the Board did not err in failing to address this potentially favorable evidence because contemporaneous medical records from the same physician do not support the assertion that Mr. Kieler made in the December 2006 statement.

Again, the Court disagrees. First, Mr. Kieler could not have taken issue with the Board's failure to address this evidence prior to the issuance of the Board's decision in September 2016. Thus, it is unclear to the Court how it is precluded from considering this issue on appeal. Second, the Secretary's assertion that contemporaneous medical evidence does not support the assertions

Mr. Kieler made in his December 2006 statement is a post-hoc rationalization that the Court may not accept. *See Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (en banc). Remand is necessary so that the Board may address the probative value of the December 2006 statement.

III. CONCLUSION

On consideration of the foregoing, the Court VACATES the September 30, 2016, Board decision as to lumbar degenerative disc disease and REMANDS the matter for further proceedings consistent with this decision. The balance of the appeal is DISMISSED.

DATED: December 15, 2017

Copies to:

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