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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3390

KATHY ROBERTS, 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*: Kathy Roberts, surviving spouse of veteran Hubert D. Roberts, appeals through counsel a June 10, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for a lower back disorder. Record (R.) at 2-18. 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 June 10, 2016, Board decision and remand the matter for further development and readjudication consistent with this decision.

I. FACTS

Mr. Roberts served on active duty in the U.S. Air Force (USAF) between April 1962 and February 1966. R. at 45-46. In May 1963, he was involved in a motor vehicle accident (MVA). A contemporaneous service medical record (SMR) from USAF Hospital Andrews indicates that Mr. Roberts reported pain around the twelfth thoracic vertebrae. R. at 52. The service clinician noted that x-ray results were negative, prescribed a muscle relaxant, and instructed Mr. Roberts to return for additional treatment as needed. *Id.*; *see* R. at 78. SMRs dated two and three days later reflect complaints of a sore throat but do not mention back pain. R. at 55.

In February 1964, Mr. Roberts was involved in a second MVA and was initially treated at a private hospital. A contemporaneous private treatment record indicates that Mr. Roberts complained of posterior neck pain and was diagnosed with a cervical sprain. R. at 72-74.

Upon separation examination in February 1966, the service physician documented a normal spine and did not include a spinal condition among Mr. Roberts's current defects or diagnoses. R. at 85-86. In a contemporaneous Report of Medical History form, Mr. Roberts denied "recurrent back pain," having ever "worn a brace or back support," and receiving treatment "by clinics, physicians, healers, or other practitioners within the past 5 years." R. at 64-65.

In March 2006, Mr. Roberts filed a claim for service connection for "a lower back injury that occurred during an automobile accident near Andrews Air Force Base" during service. R. at 1046. In a June 2006 statement, he indicated that he was hospitalized at Andrews Air Force Base for several days and that, following discharge from inpatient treatment, he received ongoing physical therapy until service separation and was prescribed use of a back brace. R. at 737. He further stated that he continued to experience low back pain that necessitated continued use of the back brace and led to surgical treatment in 1968, 1972, 1975, 1996, and 1998. R. at 737-39. Mr. Roberts acknowledged that his low back disability was not entirely the result of the in-service MVA, "but that's where it all started." R. at 739.

Upon VA examination in November 2006, Mr. Roberts stated that he was hospitalized for two to three days at Andrews Air Force Base following the in-service MVA, at which time "[a]pparently he was told that he had a fractured disk in his lumbar spine." R. at 709. He stated that after the hospitalization, he wore a back brace and attended some physical therapy sessions, but primarily "he just lived with the pain and continued to do his duties until he was eventually discharged." *Id*. He further stated that since service, he has continued to experience pain and functional limitations as a result of his back. *Id*. Following examination, the examiner opined that Mr. Roberts's chronic low back pain "originally developed as a result of a vehicle accident while he was in the [m]ilitary in 1963 that has required a total of five surgeries on his lumbar spine." R. at 711.

In April 2007, VA submitted a Personnel Information Exchange System (PIES) request seeking medical records from Andrews Air Force Base hospital relating to the May 1963 MVA and medical records from Bolling Air Force Base hospital relating to the February 1964 MVA. R.

at 701. In May 2007, VA received a PIES response indicating the absence of 1963 or 1964 medical records from Andrews Air Force Base for Mr. Roberts. R. at 700.

Upon VA examination in October 2007, Mr. Roberts again stated that his back disability began after the 1963 in-service MVA. R. at 680. Following examination, however, the examiner opined that Mr. Roberts's back condition was less likely than not caused by or a result of the in-service injury. R. at 690. As rationale, the examiner noted that the in-service injury occurred to Mr. Roberts's thoracic spine whereas his current disability and all of his prior surgeries involve his lumbar spine. *Id*.[1]

In October 2007, a VA regional office denied service connection for a low back disability. R. at 1186-88. In November 2007, Mr. Roberts filed a Notice of Disagreement, stating that following the in-service MVA he was fitted with a girdle brace and attended physical therapy sessions twice a week for three months. R. at 664. He further stated that his 1968 surgery was a direct result of the in-service injury. *Id*. Following a July 2008 Statement of the Case, R. at 415-50, Mr. Roberts perfected an appeal to the Board in August 2008, R. at 411-12.

During an October 2010 Board hearing, Mr. Roberts testified regarding the two in-service MVAs. He stated that the May 1963 accident resulted in minor injuries and the February 1964 accident resulted in a lower back injury that necessitated an eight-day hospital stay, a back brace, and physical therapy visits twice a week for the remainder of his time in the Air Force. R. at 372-77. He further testified that he sought private medical treatment following service, but it did not appear that his claims file contained those records. R. at 382-83.

In February 2011, the Board remanded the claim for additional development. Specifically, the Board determined that remand was necessary to confirm whether all of Mr. Roberts's SMRs had been obtained and requested that any outstanding records from Bolling Air Force Base be obtained, if such records existed. R. at 361-62. In addition, the Board noted that it was unclear whether the prior VA examiners reviewed and considered another veteran's SMRs in conjunction with providing their opinions and, therefore, it requested a new VA examination and medical opinion that considered the correct facts regarding Mr. Roberts's in-service injuries. R. at 362-64.

[1] The examiner also noted that SMRs documented another MVA that resulted in a fracture to Mr. Roberts's femur and pelvis. Subsequently, it was determined that these SMRs were not Mr. Roberts's, but instead another veteran's records that were inadvertently comingled with Mr. Roberts's claims file. *See* R. at 370, 401, 703.

In February 2013, Mr. Roberts died from injuries sustained in a MVA six days prior. R. at 353. In March 2013, Ms. Roberts requested to be substituted as claimant in the pending claim. R. at 352. Ms. Roberts's request was granted in May 2016. R. at 93.

In October 2014, VA submitted a PIES request for any outstanding 1963 or 1964 records from Bolling Air Force Base. R. at 134. The PIES response indicated that no outstanding records were located. *Id*. In November 2014, VA notified Ms. Roberts that no outstanding records from Bolling Air Force Base were located. R. at 135-37.

In a December 2014 medical opinion, the October 2007 VA examiner opined that it was less likely than not that Mr. Roberts's low back disorder was incurred in or caused by an in-service event, injury, or illness. R. at 121, 1150. As rationale, the examiner noted that, although Mr. Roberts had reported on-going complaints of low back pain stemming from an in-service motor vehicle injury, the examiner found no evidence within the SMRs that indicated he experienced a residual low back disorder severe enough to necessitate spinal fusion following service. R. at 118, 121, 1147, 1150.

In the June 2016 decision on appeal, the Board denied the claim for service connection, finding that the evidence preponderated against service connection based on direct service connection and continuity of symptoms theories. R. at 16-18. The Board found the December 2014 medical opinion more probative than other evidence in determining the etiology of Mr. Roberts's lower back disability. R. at 16-18. This appeal followed.

II. ANALYSIS

Ms. Roberts argues, inter alia, that the Board erred when it found that VA satisfied its duty to assist with respect to obtaining private treatment records. Appellant's Brief (Br.) at 24-26. The Secretary responds that neither Mr. Roberts during his lifetime nor Ms. Roberts since she was substituted as claimant authorized VA to obtain private medical records and, therefore, VA was under no duty to obtain such records. Secretary's Br. at 17-18.

The Secretary has a duty to assist claimants in developing their claims. 38 U.S.C. § 5103A. That duty includes "mak[ing] reasonable efforts to obtain relevant records not in the custody of a Federal department or agency," such as private medical records. 38 C.F.R. § 3.159(c)(1) (2017); *see* 38 U.S.C. § 5103A(b)(1). "Relevant records for the purpose of [section] 5103A are those

records that relate to the injury [or condition] for which the claimant is seeking benefits and have a reasonable possibility of substantiating the claim." *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010). The Court reviews the Board's determination of whether the duty to assist has been satisfied for clear error. *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant and request that the claimant provide a release for the records or, if the claimant does not provide any necessary release, VA will request that the claimant obtain the records and provide them to VA. 38 C.F.R. § 3.159(e)(2) (2017); *see Solomon v. Brown*, 6 Vet.App. 396, 401 (1994) ("[W]here [] VA is on notice that records supporting an appellant's claim may exist, [] VA has a duty to assist the appellant to locate and obtain these records."); *Ivey v. Derwinski*, 2 Vet.App. 320, 323 (1992) (holding that evidence of record before VA may "raise [] enough notice of pertinent private medical records to trigger the duty to assist").

During the October 2010 Board hearing, Mr. Roberts testified that he sought treatment at Lansing Hospital and St. Joseph Mercy Hospital soon after discharge from service. R. at 371, 379, 382-83. When asked by the Board member who conducted the hearing if VA was in possession of records from those private hospitals, Mr. Roberts stated that VA "should have them," but that he was unable to locate them in the copy of the claims file sent to him by VA. R. at 382. The Board member responded that she "would check and make sure [that the records were in claims file.] And if we don't have [them,] we may have to get them." R. at 383. Mr. Roberts indicated that these records were important because he had multiple back surgeries at those private hospitals. *Id*.

In its February 2011 remand, the Board requested additional development including requesting additional SMRs and records from the Social Security Administration and affording Mr. Roberts a new VA examination. R. at 361-64. The Board did not reference any outstanding private medical records. *Id*. In November 2014, the RO informed Ms. Roberts that additional *service* medical records could not be located and informed her to submit any such records in her possession. R. at 135-37. In the June 2016 decision on appeal, the Board found VA's duty to assist, including with respect to obtaining private medical records, satisfied because VA obtained private treatment records and "[n]either [Mr. Roberts] during his lifetime, not [Ms. Roberts] since she has substituted into [his] claim, identified any additional available evidence for consideration." R. at 5.

The Court agrees with Ms. Roberts that the Board erred in finding that VA satisfied its duty to assist with respect to obtaining private medical records. Mr. Roberts's testimony during the October 2010 Board hearing notified VA of relevant private medical records and his belief that VA was already in possession of those records. R. at 382-83. The Board member who conducted the hearing then informed Mr. Roberts that she would review the claims file in search of the identified private medical records and indicated that if the records were not in the claims file, VA may need to obtain them. R. at 383. The identified private medical records are not contained in the record of proceedings. Neither the Board, in its February 2011 remand, nor the RO, in its November 2014 correspondence, informed Mr. or Ms. Roberts that the private medical records identified were not contained in the claims file. Likewise, neither the Board nor the RO sought authorization from Mr. or Ms. Roberts or informed them to submit any private medical records in their possession. *See* 38 C.F.R. § 3.159(e)(2).

The record is replete with references to the outstanding private medical records as reflecting multiple back surgeries in the first several years following service. The October 2007 VA examiner specifically noted that evidence of Mr. Roberts's initial surgery in 1968 is "compelling evidence that [his claimed low back disability] might be service connected." R. at 690. The identified private medical records are clearly relevant and there exists a "reasonable possibility" that these records would help substantiate Ms. Roberts's claim. *Golz*, 590 F.3d at 1321. VA was therefore required to attempt to obtain such records. *See Solomon*, 6 Vet.App. at 401. Accordingly, the Board's finding that the duty to assist was satisfied is clearly erroneous and remand is warranted in that regard. *See Nolen*, 14 Vet.App. at 184; *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 inadequate statement of reasons or bases for its determination, or where the record is otherwise inadequate").

Given this disposition, the Court need not address Ms. Roberts's additional arguments, which could not result in a remedy greater than remand. However, for the sake of guidance, the Court finds it unclear whether the December 2014 examiner properly considered Mr. Roberts's lay statements made prior to his death regarding the extent of his in-service injuries and subsequent treatment. *See* R. at 121. Specifically, it is unclear whether the examiner ignored Mr. Roberts's statements because they were not corroborated by contemporaneous medical evidence or found

that, even considering his statements, the evidence in total did not establish an in-service injury severe enough that would have led to the 1968 spinal fusion and subsequent lower back disability. To the extent that the examiner found Mr. Roberts's statements inconsistent with a lack of contemporaneous medical evidence, it is the responsibility of the Board, not medical examiners, "to assess the credibility and weight to be given to evidence." *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). In this regard, the Board did not make a credibility determination regarding Mr. Roberts's statements of the extent of his in-service injuries and subsequent treatment, but only found his statements to be a less "reliable indicator" with respect to linkage. R. at 17. Therefore, upon remand, the Board, absent an express credibility determination, should address whether a new opinion is necessary. *See Dalton v. Nicholson*, 21 Vet.App. 23, 296 (2007) (faulting examiner for ignoring veteran's lay statements); *but see Coburn v. Nicholson*, 19 Vet.App. 427, 432 (2006) (explaining that "reliance on a veteran's statement renders a medical report incredible . . . if the Board rejects the statements of the veteran").

On remand, Ms. Roberts is free to submit those arguments, as well as additional arguments and evidence, to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the June 10, 2016, Board decision is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: December 18, 2017

Copies to:

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