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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0227

JAMES R. JONES, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, James R. Jones, through counsel appeals a December 20, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for pseudogout, to include as secondary to a service-connected left knee disability. Record (R.) at 1-11. 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. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from April 1972 to June 1975. R. at 733. The appellant injured his left knee during active duty and underwent surgery in February 1975. R. at 300. In May 1976, VA awarded disability compensation for a left knee disability, effective June 26, 1975. R. at 692-93.

In 1994, the appellant was diagnosed with pseudogout when calcium pyrophosphate deposition crystals were found in sample fluid aspirated from the appellant's left knee. R. at 816,

826, 1020. April 2004 and October 2006 emergency department notes reflect that the appellant presented with complaints of left knee pain and reported a history of pseudogout. R. at 1028-30; *see* R. at 1028 ("[The patient h]ad [anterior cruciate ligament (ACL)] and meniscus surgery in the [19]70s and gets periods [of] flares of pseudogout since then.").

In November 2009, the appellant filed a disability compensation claim for pseudogout. R. at 639-40. In February 2010, a VA regional office (RO) denied his claim. R. at 591-98. The appellant disagreed with the decision, asserting that he had been diagnosed with pseudogout in the 1990s and had been told by his physician that pseudogout "attacks damaged joints." R. at 584-88. An August 2011 letter from the chief of the Arthritis Section at the VA Puget Sound Health Care System, Seattle Division, reflects that phosphate crystals were found in the appellant's joint fluid and that x-rays showed calcium in the knee cartilage, which indicated "definite pseudogout also called CPPD arthritis or calcium pyrophosphate deposition disease." R. at 1009. The letter further indicates that the appellant did not "have an underlying metabolic disorder contributing [to] or causing the CPPD arthritis" and that there is "no specific treatment for CPPD arthritis other than use of nonsteroidal anti-inflammatory drugs." *Id*. At a January 2012 follow-up visit, the appellant reported that he had experienced several attacks of acute pain and swelling in the left knee, which lasted up to 1 or 2 weeks. R. at 1006. The examiner assessed osteoarthritis of the left knee and "[c]hondrocalcinosis with episodic pseudogout attacks." R. at 1007; *see id*. (noting that x-rays showed "marked medial compartment narrowing in the left knee with osteophyte formation and extensive chondrocalcinosis" and "chondrocalcinosis in his right knee but no evidence for osteoarthritis").

In January 2013, the appellant perfected an appeal to the Board, R. at 473-76, 478-501, and in March 2015, the Board remanded the matter to obtain a VA rheumatology examination and opinion, R. at 371-86. The Board instructed the examiner to opine whether the appellant's pseudogout is at least as likely as not (1) etiologically related to service; (2) caused by the appellant's service-connected left knee disability; or (3) "permanently worsened beyond normal progression (versus temporary exacerbation of symptoms) by [his] service-connected left knee disability"; and "[i]f the claimed pseudogout was permanently worsened beyond normal progression by the service-connected left knee disability (aggravated)[,] the examiner should attempt to quantify the extent of aggravation." R. at 382-83.

In June 2015, the appellant underwent the requested examination. R. at 65-76. In response to the Board's questions, the examiner opined that the appellant's pseudogout was less likely than not related to or incurred during service, R. at 66, or proximately due to or the result of the appellant's service-connected left knee disability, R. at 67. Lastly, the examiner opined:

> The [appellant]'s [p]suedogout . . . less likely than not (less than 50% probability) has been permanently worsened beyond its normal natural progression [because] there is no objective evidence . . . during the service or post his Navy [s]eparation [m]edical record showing that his [l]eft [k]nee's [status post] [a]rthroscopic [c]orrective surgery for [t]orn [m]edial [m]eniscus and ACL absence worsens temporarily or permanently his [p]seudogout.

R. at 75. In a November 2015 addendum opinion, the examiner restated the opinions provided in June 2015 and further explained that "[because] the [appellant]'s claimed psuedogout was NOT permanently worsened beyond its normal natural progression," the Board's question regarding the extent of aggravation "does NOT need to be addressed." R. at 56-58.

On December 20, 2016, the Board denied entitlement to disability compensation for pseudogout, to include as secondary to a service-connected left knee disability. R. at 1-11. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred in relying on the 2015 VA medical opinions to deny his claim because the examiner (1) failed to provide an adequate rationale for his conclusion regarding aggravation and (2) applied a higher legal standard than the law requires to establish that a non-service-connected disability is aggravated by a service-connected disability. Appellant's Brief (Br.) at 5-11. The Secretary responds that (1) the Board did not clearly err when it found the June and November 2015 medical opinions adequate and (2) the appellant fails to demonstrate that he was "prejudiced by the examiner's alleged error in using 'permanent worsening' language in his opinion" because the examiner also opined that the appellant's left knee disability neither temporarily nor permanently worsened his pseuodgout. Secretary's Br. at 5-12.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi,* 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v.*

Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2017). Service connection may be established on a secondary basis for a current disability that is either proximately caused by or aggravated by a service-connected disability. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc); 38 C.F.R. § 3.310(a), (b) (2017).

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion] when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id*. (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id*. at 105-06.

"Whether a medical [examination or] opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board found the duty to assist had been satisfied in part because "VA medical opinions were obtained." R. at 4. The Board did not render any additional findings regarding the overall *adequacy* of the 2015 VA examiner's opinion. *See id*. However, in addressing the merits of the appellant's claim, the Board recounted the examiner's negative nexus opinion, noting with regard to aggravation, the examiner's opinion that "the [appellant]'s pseudogout was less likely than not permanently worsened beyond normal progression by his service-connected left knee disability because no objective evidence exists in post[]service medical

records showing that his left knee corrective surgery for his torn medial meniscus and ACL tear temporarily or permanently worsens his pseudogout." R. at 7. The Board then stated that the opinion is "highly probative," noting that the examiner "considered the [appellant]'s history and referenced treatment reports, and the opinion contained adequate rationale for the conclusions reached." R. at 8.

The appellant disagrees with the Board's finding that the examiner provided an adequate rationale, asserting that the examiner essentially "concluded that the left knee did not aggravate pseudogout[] because there is no evidence that the left knee aggravated pseudogout." Appellant's Br. at 7. He argues that the Board remanded the matter to obtain a medical opinion because it had determined that there was insufficient evidence in the file to render a decision and the examiner's "finding . . . that there is no other evidence in the record . . . showing aggravation simply restates what the Board already determined . . . when it remanded the issue in March 2015." *Id*. at 7-8. The Secretary counters that the appellant fails to read the examination report as a whole and that reading the report as a whole demonstrates that the examiner provided "substantial support for his findings." Secretary's Br. at 7-8.

As reflected above, the Board recounted the examiner's opinion regarding aggravation and concluded that the opinion contains an "adequate rationale." R. at 7-8. The Board provided no further discussion of the examiner's opinion or what it gleaned from the examiner's rationale, which, as argued by the appellant, appears to be based on a statement of fact concerning the state of the record. *See* Reply Br. at 3. Absent further analysis, the Court cannot understand the basis for the Board's reliance on the 2015 examiner's opinion, *see Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("The Court has long held that merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases." (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992))), and the Secretary's arguments to the contrary amount to post hoc rationalizations, which the Court cannot accept, *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). Accordingly, the Court will remand the matter

to allow the Board to provide an adequate statement of reasons or bases for its decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998); *see also Allday*, 7 Vet.App. at 527.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *see Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal,[1] 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 the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's December 20, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: January 12, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

[1] To the extent that the appellant argues that the Board requested, and the examiner provided, an opinion that imposed a higher legal standard than the law requires to establish that a non-service-connected disability is aggravated by a service-connected disability, the Court notes that this issue is currently pending before a panel of the Court, *see Ward v. Shulkin*, U.S. Vet. App. No. 16-2157 (Appellant's Dec. 4, 2017, opposed motion to consolidate appeal with *Neal v. Shulkin*, U.S. Vet. App. No. 17-1204), and the basis of a motion for class certification, *see Neal*, No. 17-1204 (Appellant's Nov. 30, 2017, opposed motion for class certification and Nov. 30, 2017, opposed motion to consolidate with *Ward*, No. 16-2157).