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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0315

CHARLES J. BREINER, 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, Charles J. Breiner, through counsel appeals a December 28, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a left knee disability. Record (R.) at 1-12. 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

A. General History

The appellant served on active duty in the U.S. Navy from July 1969 to September 1971, in the U.S. Army National Guard from June 1973 to August 1990, and in the U.S. Army Reserve from November 1994 to October 2010. R. at 183-84, 653. A May 1989 Statement of Medical Examination and Duty Status reflects that the appellant was on "active duty for training" from May 13, 1989, to May 27, 1989. R. at 17. A service treatment record (STR) from May 26, 1989, reflects that the appellant sought treatment for a "bruised left knee" after hitting his knee on the

concrete edge of a hole, had pain on bending, walking, and on marked extension, and was assessed as having a "bruised left knee [rule out (r/o)] fracture." R. at 128; *see* R. at 41. A February 1991 Report of Medical Examination reflects that the appellant marked that he did not suffer from "trick" or locked knee, and the examiner found that his lower extremities were "normal" and that he was qualified for retention. R. at 465-67.

In September 2010, the appellant was diagnosed with "[m]edial meniscal tear and chondromalacia of patella" of his left knee, and he underwent left knee surgery. R. at 399-400. In December 2010, the appellant filed a claim for disability compensation for his left knee disability. R. at 373. In June 2011, a VA regional office (RO) denied the appellant's claim because "this condition neither occurred in nor was caused by active service" and "[t]here is no evidence showing that [the appellant was] on active duty in May 1989, when [he] injured [his] left knee." R. at 225; *see* R. at 223-27. The appellant disagreed with the decision and perfected his appeal. R. at 163-82, 194-95. In April 2014, the appellant testified before the Board. R. at 130-41.

In April 2015, the Board remanded the appellant's claim for "verification of any and all periods of active duty for training and/or inactive duty for training with the Army National Guard and Reserve[]." R. at 122; *see* R. at 119-24. On December 28, 2016, the Board denied the appellant's claim. R. at 1-12. This appeal followed.

B. Specific Medical & Lay Evidence

An October 1998 private medical record reflects that the appellant complained of left knee pain, but he "denie[d] any trauma to the area." R. at 488. After a physical examination, the examiner found that the knee was stable and the appellant had "some mild pain," but an x-ray revealed no fractures. *Id.* The examiner's impression was that the appellant suffered "[l]eft knee pain"; and he was referred to physical therapy and advised to use ibuprofen for the pain. *Id.*

A March 2010 private medical record reflects that the appellant had osteoarthritis of the knee, which was a "problem for the past several months"; his "[s]ymptoms have been progressive and worsening"; and the "[p]rimary joints affected include [the] left knee." R. at 311. An April 2010 private medical record reflects that the appellant underwent a magnetic resonance imaging test for a potential left knee meniscal tear, and the examiner's impression was that the appellant had a "[b]ucket-handle tear of the medial meniscus[, m]ild degenerative arthritis[, s]mall joint effusion[, and a s]mall anterior cruciate ligament, though probably intact." R. at 307-08. A June 2010 private medical report reflects that the appellant had moderate left knee joint pain, which

lasted for 4 months, and he experienced "episodic flare-ups," and "*redness, crepitation[,] and 'pops' sometimes.*" R. at 405.

In March 2011, the appellant submitted the following statement in support of his claim:

On [May 2,] 1989[,] I injured my knee while on active duty. . . . In 1999[,] Dr[.] True performed surgery for a [t]orn meniscus on the knee I hurt in the guards Shortly after the operation[,] the knee started to act up again. The knee has been hurting all the time. So when I moved to [Virginia,] I had to see [a doctor] for the same knee. The doctor said [that] he had to operate on that knee again and repaired a ligament tear. And to date[,] this knee still gives me trouble.

R. at 243. In April 2014, the appellant testified before the Board: "[During active duty training in May 1989,] there was a crack in the cement and I fell down in the crack[,] and my knee hit the cement[,] and I got a bad bruise and pulled a tendon in my knee." R. at 133; *see* 136-40. The Board Member asked the appellant: "Did you or do you experience any popping, cracking in the legs or the knee joints?" R. at 135. The appellant replied: "Yes, I do and I do currently get this." *Id.* In December 2015, the appellant submitted the following statement in support of his claim: "I got hurt on [a]ctive [d]uty. Still [t]o this day[,] I have trouble with that [l]eft [k]nee." R. at 20.

II. ANALYSIS

The appellant argues that the Board erred in finding that a VA medical examination was not necessary to determine whether the appellant's left knee disability was related to service and to satisfy the duty to assist. Appellant's Brief (Br.) at 10-15; Reply Br. at 3-10. Further, the appellant argues that the Board's statement of reasons or bases—for finding that a VA medical examination is not necessary and that it was not clear whether the appellant was on active duty when he injured his left knee—is inadequate. Appellant's Br. at 8-15; Reply Br. at 1-10. The Secretary counters that the appellant fails to show how the Board's determination was arbitrary and capricious, the Board's statement of reasons or bases is adequate, and the appellant fails to demonstrate prejudicial error. Secretary's Br. at 6-16.

To satisfy the duty to assist, VA must provide a medical examination where there is "competent evidence that the claimant has a current disability" and the evidence "indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service," but there is insufficient "medical evidence for the Secretary to make a decision on the claim." 38 U.S.C. § 5103A(d). In *McLendon v. Nicholson*, the Court set forth a four-part test clarifying that an examination is warranted when there is

(1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

20 Vet.App. 79, 81 (2006); *see* 38 C.F.R. § 3.159(c)(4) (2017). Further, the third *McLendon* element "requires only that the evidence 'indicates' that there 'may' be a nexus between the [first] two [elements] [and t]his is a low threshold." *McLendon*, 20 Vet.App. at 83 (emphasis added) (quoting 38 U.S.C. § 5103A(d)(2)(B)). Moreover, the third prong of the *McLendon* test may be shown by "credible evidence of continuity of symptomatology." *Id.*

If the Board determines that a medical examination is not necessary, such a determination may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81. When the Board considers whether a medical examination is necessary under section 5103A(d) and § 3.159(c)(4), it must provide a written statement of the reasons or bases for its conclusion, pursuant to 38 U.S.C. § 7104(d)(1), and, absent a finding of nonprejudicial error, vacatur and remand are warranted when it fails to do so. *Duenas v. Principi*, 18 Vet.App. 512, 517-18 (2004) (per curiam) (citing *Tucker v. West*, 11 Vet.App. 369, 374 (1998)); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (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"); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

The appellant argues that the Board's following statement of reasons or bases for finding a VA medical examination not necessary is inadequate:

[T]here is some question as to whether the [appellant] was on . . . a period of active military service when he injured his knee. However, even if the Board were to find that the [appellant]'s knee injury occurred during a period of active military service, there is no[] competent and credible evidence that the [appellant]'s left knee disability is in any way related to his military service. There is also no competent and credible evidence that the [appellant]'s disability manifested shortly after service or that the [appellant] has had continuous symptoms since the in-service injury. . . . Finally, the only evidence of record relating the [appellant]'s left knee disability to service are the [appellant]'s own general conclusory statements, which

do not meet the low threshold of an indication that the claimed disability is due to service.

R. at 5; *see* Appellant's Br. at 10-15. Specifically, the appellant asserts that the Board should have adequately explained why—despite finding the appellant competent and not explicitly finding him not credible—the appellant's following lay statements, which he alleges, "described symptoms . . . from a left knee injury sustained during service that continued to the present," Appellant's Br. at 12, were too "general [and] conclusory [to] meet the low threshold of an indication that the claimed disability is due to service," R. at 5:

(1) the appellant's March 2011 statement that he injured his knee in service, his knee has been hurting "all the time," and his "knee still gives [him] trouble," R. at 243;

(2) his April 2014 Board hearing testimony that he "do[es] currently get" knee problems, R. at 135; *see* Appellant's Br. at 12 (interpreting his testimony as experiencing knee problems "from his [in-service] knee injury continuing to the present"); and

(3) his December 2015 statement that he "got hurt on [a]ctive [d]uty[, and s]till [t]o this day[, he] ha[s] trouble with that left knee," R. at 20. *See* Appellant's Br. at 12-13; Reply Br. at 8-9; *see also* R. at 5, 9; *McLendon*, 20 Vet.App. at 83.

The Court agrees with the appellant's arguments. When an appellant is found "competent to testify to any pain he may have suffered" and the Board has not made an adverse credibility determination, "the evidence of [an] in-service injury, testimony of pain since that injury (if ultimately deemed credible), and his current disability 'indicate' that his current disability 'may be associated' with his in-service injury." *McLendon*, 20 Vet.App. at 84 (quoting 38 U.S.C. § 5103A(d)(2)(B)). In this case, the Board found that the appellant was competent to "report his symptoms" and that there was evidence of "a current diagnosis of osteoarthritis of the left knee." R. at 7, 9; *see* Appellant's Br. at 11-12. Moreover, for purposes of its *McLendon* analysis, the Board assumed that the left knee injury occurred during a period of active military service. *See* R. at 5; *see also* R. at 7; Appellant's Br. at 11. As relevant here, the only remaining question was whether the record contained credible evidence of pain since the in-service injury.

The Board did not specifically identify which of the appellant's statements it deemed too "general" and "conclusory" nor did it explain its finding that there was no credible evidence of continuous symptoms since the in-service injury. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (holding that the Board must analyze

the credibility and probative value of the material 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); *see also Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005) (it is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence).

Contrary to the Secretary's assertion, it is unclear whether the Board found the appellant not credible. *See* Secretary's Br. at 13-14; Reply Br. at 8. On the one hand, the Board stated that there is "no[] competent and credible evidence" relating the appellant's current disability to service or that the appellant had continuous symptoms since the in-service injury. R. at 5. On the other hand, the Board stated that "the only evidence" relating the appellant's current disability to service are the appellant's lay statements. *Id.* The Secretary relies on the Board's discussion of the merits to support his assertion that the Board questioned the appellant's credibility, noting that the Board found inconsistencies between the appellant's assertions and the contemporaneous medical evidence. *See* Secretary's Br. at 13-14. However, as argued by the appellant, although the Board may have questioned the consistency of some of the appellant's statements with the medical records, the Board did not explicitly determine that he was not credible. Reply Br. at 8; *see* R. at 9 (noting that the contemporaneous service treatment records do not reveal any tendon problems; citing the February 1991 report of medical examination as an indication that the condition resolved; and citing the absence of postservice complaints). Absent further discussion, the Court cannot understand why the Board found the appellant's lay statements too "general" and "conclusory" to satisfy the third prong of *McLendon*, including whether the appellant's statements noted above constitute credible evidence of pain since the in-service injury.

Accordingly, the appellant's claim must be remanded for the Board to analyze the credibility of the appellant's lay evidence to determine whether it satisfies the *McLendon* standard. If the Board determines that a medical examination is not required, the Board must provide an adequate statement of reasons or bases for its determination. *See Tucker*, 11 Vet.App. at 374 ("[W]here 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, a remand is the appropriate remedy.").

The Court acknowledges that the appellant also argues that the Board's determination that it is "not clear" whether the appellant injured his left knee during a period of active military service,

R. at 9; *see* R. at 5, is "contrary to the record," or at a minimum, required the Board to remand the matter to clarify the issue, Appellant's Br. at 6, 10. Because the Board assumed, for purposes of its *McLendon* analysis, that the appellant's injury occurred during active duty, any error is prejudicial only if the evidence otherwise demonstrates that the appellant's current disability may be associated with his May 1989 left knee injury. Accordingly, on remand, if the Board finds that the evidence indicates there may be an association, the Board must resolve the question whether the appellant was on active military service when he injured his left knee, and the Board must support its determination with an adequate statement of reasons or bases. The Court may not make this determination in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding").

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, 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 28, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: January 23, 2018

Copies to:

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VA General Counsel (027)