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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2692

MARY WATSON, APPELLANT,

v.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: Veteran Raymon L. Watson appealed through counsel a June 14, 2016, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to service connection for pancreatic cancer, to include as due to herbicide exposure in the Republic of Vietnam, and to include as secondary to service-connected hypertension. Record of Proceedings (R.) at 2-19. The Board also remanded Mr. Watson's claim for entitlement to service connection for sleep apnea. R. at 13-19. The remanded matter is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court).

Appellant's counsel notified the Court that Mr. Watson had died on March 11, 2017. On July 7, 2017, the Court granted the motion of Mr. Watson's widow, Mary Watson, to substitute. 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 denying service connection for pancreatic cancer and remand the matter for readjudication.

I. BACKGROUND

The veteran, Raymon L. Watson, served on active duty in the U.S. Army from June 1963 to November 1988, including service in the Republic of Vietnam from March 1968 to March 1969. R. at 59-60. In August 2011, Mr. Watson submitted a claim for disability compensation for pancreatic cancer due to Agent Orange exposure. R. at 795-96. In support of his claim, Mr. Watson submitted letters from his private treating physicians, Dr. Adrian Douglass and Dr. Charles Henderson. R. at 757, 768. Dr. Douglass opined that Mr. Watson's exposure to Agent Orange contributed to his pancreatic cancer. R. at 768. Dr. Henderson, Mr. Watson's oncologist, stated that he is not an expert in environmental medicine and occupational safety, but that he could not rule out the possibility that Agent Orange exposure caused Mr. Watson's pancreatic cancer. R. at 757.

In July 2012, the regional office (RO) denied Mr. Watson's claim for service connection for pancreatic cancer. R. at 622-30. Mr. Watson appealed the RO's decision. R. at 577-79, 621. The Board issued decisions in December 2013 and July 2014 remanding Mr. Watson's pancreatic cancer claim for the scheduling of a hearing. R. at 433-35, 477-81. Mr. Watson and his wife testified at a hearing before the Board in August 2014. R. at 42-52. In November 2015, the Board referred Mr. Watson's claim for a medical expert opinion. R. at 35-37.

VA oncologist, Dr. Daniel Becker, provided the requested medical opinion in December 2015. R. at 33-34. Dr. Becker noted that Mr. Watson "served in Vietnam, was exposed to herbicides there, and subsequently developed unresectable pancreatic cancer." R. at 33. He stated that the association of pancreatic cancer and herbicides had been reviewed in the Institute of Medicine's biennially updated *Veterans and Agent Orange: Update 2012* (VAO Update). *Id.* Dr. Becker explained that the literature contained within the VAO Update does not report an increased risk of pancreatic cancer among male Vietnam veterans. *Id.* Dr. Becker concluded that Mr. Watson "was at increased risk for pancreatic cancer because of obesity and black race, both established risk factors for pancreatic cancer, but [that] there is insufficient evidence to conclude that his pancreatic cancer is 'at least as likely as not' . . . related to his service in Vietnam." *Id.*

The Board issued the decision currently on appeal on June 14, 2016. R. at 2-19. The Board found the medical opinions provided by Mr. Watson to be of little probative value because neither doctor provided a rationale for his opinion. R. at 10. The Board found that Dr. Becker's December 2015 VA medical opinion had "high probative value" because Dr. Becker "reviewed the evidence

and cited to medical literature in support of the opinion, and provided an adequate rationale for the opinion." R. at 10-11. Accordingly, the Board found that Mr. Watson had not established a nexus between his pancreatic cancer and his service, including herbicide exposure and denied Mr. Watson's claim. R. at 12. This appeal followed.

II. ANALYSIS

Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, are presumed to have been exposed to herbicide agents, such as Agent Orange, unless there is affirmative evidence to the contrary. 38 U.S.C. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6)(iii) (2017). Section 1116 further provides that certain diseases determined by the Secretary will be presumed service connected by reason of having positive association with exposure to herbicide agents. 38 U.S.C. § 1116. However, the availability of presumptive service connection for some conditions based on exposure to Agent Orange does not preclude direct service connection for other conditions based on exposure to Agent Orange. *Polovick v. Shinseki*, 23 Vet.App. 48, 53 (2009) (holding a condition's absence from the presumptive list does not preclude a veteran from establishing direct service connection by showing that it is as likely as not that his condition is due to in-service herbicide exposure); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

The Secretary's duty to assist includes, in appropriate cases, "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d). Although VA need not provide a medical examination in all cases, "once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl*, 21 Vet.App. at 123 (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). "A medical nexus opinion finding a condition is not related to service because the condition is not entitled to presumptive service connection, without clearly considering direct service connection, is inadequate on its face." *Stefl*, 21 Vet.App. at 123; cf. *Wise v. Shinseki*, 26 Vet.App. 517, 532 (2014) (reasoning that the Board, when evaluating evidence, may not demand a level of acceptance

in the scientific community greater than the level of proof required by the benefit of the doubt rule). Additionally, the opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id.* at 124-25; *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"). "Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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); *Gilbert*, 1 Vet. App. at 52.

In every decision, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

There is no dispute that the veteran is presumed to have been exposed to Agent Orange during service in Vietnam, that he was diagnosed with pancreatic cancer, and that his specific type of cancer is not presumptively linked to Agent Orange. The appellant argues that the Board erred in relying on the December 2015 VA medical opinion in denying her husband's claim. Appellant's Brief (Br.) at 5-12. She asserts that the December 2015 opinion was inadequate because the examiner relied on the fact that the VAO Update does not establish a causal connection between pancreatic cancer and herbicide exposure. *Id.* The Secretary argues that the opinion is adequate because although the examiner relied on the VAO Update in part, he also considered the underlying studies the VAO Update was based on and addressed Mr. Watson's additional risk factors of race and obesity. Secretary's Br. at 9-11.

Although the Secretary is correct that statistical analysis can be a factor in formulating a medical opinion, the examiner's reference to only the studies reviewed in the VAO Update merely

supports VA's decision not to include pancreatic cancer on the list of presumptively service connected conditions. Moreover, the Court agrees with the appellant that the examiner's general reference to two known risk factors, the veteran's race and obesity, does not amount to a sufficient analysis to justify his negative nexus opinion. The examiner did not discuss the likelihood that Mr. Watson's risk factors were or were not associated with his pancreatic cancer. Accordingly, the Court holds that the December 2015 opinion does not provide the Board with the detail and rationale necessary to make an informed decision as to direct service connection for the veteran's pancreatic cancer. *See Nieves-Rodriguez*, 22 Vet.App. at 304; *Stefl*, 21 Vet.App. at 124. Thus, the Court holds that the Board clearly erred when it relied upon an inadequate medical opinion and a remand is required. *See D'Aries*, 22 Vet.App. at 103; *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 adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's June 14, 2016, decision denying the veteran's claim for entitlement to service connection for pancreatic cancer, to include as due to herbicide exposure in the Republic of Vietnam is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: January 31, 2018

Copies to:

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