

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0193

CRAIG A. LACHANCE, APPELLANT,

V.

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

Before GREENE, *Senior Judge*.¹

MEMORANDUM DECISION

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

GREENE, *Senior Judge*: The appellant, Craig A. Lachance, appeals, through counsel, a November 17, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for nonalcoholic steatohepatitis (NASH). Record (R.) at 2-16. This appeal is timely, and the Court has jurisdiction to review the Board's decision under 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matter for further development and adjudication consistent with this decision.

I. BACKGROUND

Mr. Lachance served on active duty in the U.S. Army from July 1984 until July 1991 and from March 2003 until February 2004. R. at 3, 37, 1940. November and December 2004 VA examinations of Mr. Lachance's liver functioning revealed elevated lipid levels and elevated liver enzyme levels. R. at 1133. In March 2005, he was diagnosed with NASH, based on a liver biopsy. R. at 951, 1133. In August 2007, Mr. Lachance filed a claim for service connection for, *inter alia*,

¹ Judge Greene is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 01-18 (Jan. 16, 2018).

NASH. R. at 1836. In a November 2007 rating decision, VA denied Mr. Lachance's claim, and he appealed. R. at 1476-79, 1684-88, 1697-1703. In August 2010, the Board remanded the claim for further development. R. at 1154-60.

In July 2014, after reviewing his service treatment records, a VA examiner opined that it was less likely than not that Mr. Lachance "had symptoms of [NASH] in service," based on no "evidence of abdominal pain, obesity or diabetes mellitus in service," and "no blood tests regarding liver enzymes or liver function tests." R. at 567. Relying on that opinion, the Board denied Mr. Lachance's claim. R. at 529-41. He appealed to the Court. R. at 520-24.

On December 11, 2015, the Court granted a joint motion for partial remand (JMR) and ordered the Board to obtain a new medical opinion to address "whether it is as likely as not that [the] [a]ppellant's NASH was incurred in service," based on the Board's failure to ensure that the Secretary fulfilled the duty to assist. R. at 521-24. In the JMR, the parties agreed that the July 2014 VA medical opinion was inadequate because

the pertinent VA regulation (38 C.F.R. §3.303(a)) does not require symptoms to be manifest during service to establish entitlement to service connection. Rather, the pertinent inquiry is whether it is as least as likely as not that [the] [a]ppellant's NASH was incurred in service – not whether symptoms of NASH were evident in service.

R. at 521. The Court order directed that the new medical opinion "should be supported by an adequate rationale." R. at 521.

Pursuant to the Court order, a VA medical examiner opined in April 2016 that Mr. Lachance's NASH was "not more likely than not" "related to his military service," "or in any way manifest during his time in service," and his service did not "in any way appear causative for the development of NASH." R. at 479, 500-01. The examiner noted that a NASH diagnosis is made by a liver biopsy, and that the development of NASH is

multifactorial and is frequently but not always associated with factors such as obesity, dyslipidemia, hypertension and insulin-resistance (diabetes) . . . [and] appears to result in individuals with an underlying predisposition for the disease in the setting of conducive environmental factors (such as dietary habits and degree of exercise), though no clear pathway for developing this disorder will be applicable to all.

R. at 479. Further, the examiner opined that it was "not possible to conclude" that Mr. Lachance's NASH "occurred during, or was the result of weight gain (approximately 23 pounds) that is

documented to have occurred between the [v]eteran[']s 2003-2004 military service." R. at 479. In a May 2016 addendum, the examiner added that his opinion was

based on lack of objective evidence that the disease in question was present during the time the patient was in service. Specifically, this condition was not manifest in any way (e.g. elevated liver tests or abnormal hepatic imaging) during his time in the service.

R. at 478, 494-95. The examiner also clarified that NASH "may or may not be associated with . . . obesity"; and that "there is not sufficient evidence to conclude that [NASH] had its onset or was the result of the documented weight gain (approximately 23 pounds) which occurred between the [v]eteran's 2003-2004 military service time." R. at 478.

The Board issued its decision on appeal on November 17, 2016. R. at 2-16. After reviewing the procedural history of the case, including the JMR, the Board determined that the April 2016 VA negative nexus opinion, along with the May 2016 addendum, were adequate, and the "most probative" because the examiner "discussed the [v]eteran's medical history, addressed the [v]eteran's reports as to weight gain during service, referred to a medical treatise regarding weight gain issues, and provided rationales for his opinions." R. at 7, 15. Relying on these opinions, the Board determined that the preponderance of the evidence was against granting Mr. Lachance's claim. R. at 15-16. He again appealed to the Court.

On appeal, Mr. Lachance argues that the Board failed to ensure compliance with the duty to assist and terms of the Court's December 2015 remand order, and inadequately explained why the April and May 2016 opinions were the most probative evidence. Appellant's Brief (Br.) at 8-17; Reply Br. at 1-8. He contends that those opinions were inadequate because the examiner "did not explain whether the [v]eteran's [NASH] was at least as likely as not present in service" given that NASH "tends to be asymptomatic in its early stages" and in light of "how closely the [v]eteran's diagnosis followed his discharge." Appellant's Br. at 9-13; Reply Br. at 1. Further, he argues that the examiner improperly relied on a "lack of objective evidence" of the disease in service, in violation of the remand order. Appellant's Br. at 9; Reply Br. at 2-3. Similarly, he maintains that there is "no requirement of a causal nexus between service and the disease incurred therein." Reply Br. at 4. And, he faults the examiner for providing what he characterizes as a speculative opinion. Reply Br. at 5-6.

The Secretary responds that the April 2016 opinion and May 2016 addendum substantially complied with the terms of the remand order and VA's duty to assist. Secretary's Br. at 7. Specifically, the Secretary maintains that the examiner was requested to opine as to whether Mr. Lachance's NASH was "incurred" in service and, after considering all the evidence, the examiner did so, appropriately. Secretary's Br. at 7-13. Thus, the Secretary urges the Court to affirm the Board decision.

II. ANALYSIS

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). When a claim is remanded to provide the claimant with a VA medical examination or opinion, the Secretary must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). The Board may commit error requiring remand when it relies on an inadequate medical examination. *Hicks v. Brown*, 8 Vet.App. 417, 421 (2005) (holding that the Board's reliance on an inadequate medical examination is cause for remand); *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (holding that an inadequate medical examination frustrates judicial review).

A medical nexus opinion 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 v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison*, 6 Vet.App. at 407). 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"). Further, the medical examiner providing the opinion may not rely on the absence of objective medical evidence, without further explanation, to conclude that a veteran's symptoms did not occur during service. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (2006); *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) (noting that the absence of evidence is not substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact") (quoting *Horn v. Shinseki*, 25 Vet.App. 231, 239 n. 7 (2012)); *Kahana v. Shinseki*,

24 Vet.App. 428, 440 (2011) ("[T]he Board may use silence in the SMRs [(service medical records)] as contradictory evidence only if the alleged injury, disease, or related symptoms would ordinarily have been recorded in the SMRs."); *Dalton v. Nicholson*, 21 Vet.App. 23, 40 (2007) ("[T]he medical examiner cannot rely on the absence of medical records corroborating that injury to conclude that there is no relationship between the appellant's current disability and his military service."). Although an examiner does not have a reasons-or-bases requirement, he or she must provide support for the opinion rendered. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

The Board's determination of the adequacy of a medical nexus opinion is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009) (the Board's determination as to whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews under the "clearly erroneous" standard of review).

In this case, the Court holds that the Board's determination regarding the adequacy of the April and May 2016 VA medical nexus opinions is clearly erroneous. 38 U.S.C. § 7261(a)(4); *Van Valkenburg*, 23 Vet.App. at 120; *D'Aries*, 22 Vet.App. at 104; *Barr*, 21 Vet.App. at 311. Specifically, the April and May 2016 nexus opinions lack a reasoned medical explanation as to why the examiner believed that a "lack of objective evidence" necessarily excludes the possibility that NASH was incurred during service. *R.* at 478; *see Buchanan*, 451 F.3d at 1336; *Fountain*, 27 Vet. App. at 272; *Kahana*, 24 Vet. App. at 440; *Nieves-Rodriguez*, 22 Vet.App. at 301; *Dalton*, 21 Vet.App. at 40. This lack of clarity renders his opinions inadequate, and the Board erred in relying on them. *See Acevedo*, 25 Vet.App. at 293; *Nieves-Rodriguez*, 22 Vet.App. at 301. Accordingly, a remand is necessary to return the April and May 2016 nexus opinions for clarification. *See Hicks*, 8 Vet.App. at 421; *Ardison*, 6 Vet.App. at 407; *see also Barr*, 21 Vet.App. at 311; *Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (citing 38 C.F.R. § 19.9(a) (2000) (holding that the Board has a duty to remand a case "[i]f further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision")).

Because the Court is remanding the matter, it need not address Mr. Lachance's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). In pursuing the matter on remand, he is free to submit additional evidence and argument on the remanded matters 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). "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

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 November 17, 2016, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: February 28, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)