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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 17-0035

CLAYTON R. HUGHES, APPELLANT,

v.

ROBERT L. WILKIE,  
ACTING 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, Clayton R. Hughes, through counsel appeals a November 25, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for a left wrist disability, to include arthritis and carpal tunnel syndrome; right knee degenerative joint disease, status post meniscectomy; hiatal hernia and gastroesophageal reflux disease (GERD); and right eye retinal detachment. Record (R.) at 1-22. The appellant limits his arguments on appeal to the Board's decision denying disability compensation for right knee degenerative joint disease, status post meniscectomy (right knee disability) as secondary to his service-connected left knee disability, and hiatal hernia and GERD, on a direct basis. *See* Appellant's Brief (Br.) at 1-15; Reply Br. at 1-7. Therefore, the Court finds that he has abandoned his appeal as to the denial of disability compensation for a left wrist disability, to include arthritis and carpal tunnel syndrome, right eye retinal detachment, hiatal hernia and GERD on a presumptive basis for service in the Southwest Asia theater of operations during the Persian Gulf War, and a right knee disability on a direct basis. The Court will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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 November 25, 2016, decision denying disability compensation for hiatal hernia and GERD on a direct basis and for a right knee disability on a secondary basis and remand the vacated matters for further proceedings consistent with this decision.

## **I. BACKGROUND**

The appellant served on active duty in the U.S. Army from August 1979 to October 1997, including service in Southwest Asia during the Persian Gulf War. R. at 1637. Service treatment records reflect that the appellant was treated for viral diarrhea in August 1986, stomach pain and diarrhea in April 1989, and acute gastroenteritis in April 1995. R. at 49-50, 702, 859. A February 1996 report of medical examination was silent for any gastrointestinal or right knee abnormalities. R. at 709-10.

A June 2006 diagnostic report shows the presence of a small hiatal hernia with mild to moderate GERD. R. at 654. A contemporaneous private treatment record reflects a diagnosis of GERD and esophageal narrowing, which was treated with Nexium. R. at 656-57. A May 2007 VA treatment record documents a history of chronic heartburn that is asymptomatic with Nexium, and no ulcer disease, difficulty swallowing, diarrhea, or constipation. R. at 1827.

In September 2008, the appellant filed a claim for disability compensation for, among other things, hiatal hernia and GERD and a bilateral knee condition. R. at 1837-48. In February 2010, a VA regional office (RO) denied these claims. R. at 1639-51. The appellant timely perfected his appeal of this rating decision. R. at 1511-12 (Substantive Appeal), 1543-66 (Statement of the Case), 1634-36 (Notice of Disagreement).

In March 2014, the appellant underwent a VA examination. R. at 992-1041.<sup>1</sup> The appellant reported that he was exposed to burning oil fields and burning bodies in Iran, Saudi Arabia, and Iraq. R. at 992. With respect to his gastrointestinal complaints, he also reported that he first began to experience heartburn in 1989 and vomiting of his meals. R. at 1030. He also stated that he sought

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<sup>1</sup> The Court observes that the appellant underwent a VA examination in March 2014 but the report for that examination was not finalized until April 2014. R. at 992. Although the Board refers to this VA examination by the April 2014 date, the parties reference it by the March 2014 date, and, for ease of reference, the Court will do so as well.

medical treatment for heartburn in 2004 and was prescribed Prilosec. *Id.* He described symptoms of difficulty breathing, regurgitation, coughing, heartburn, and, at times, nausea, which would resolve within 30 to 60 minutes of taking medication, and he also stated that he experiences sleep disruption due to substernal pain and regurgitation at night, which resolve when he drinks water. *Id.* The examiner diagnosed the appellant with GERD with a date of diagnosis of 1989, concluding that such disability is less likely than not related to "a specific exposure event . . . during service in Southwest Asia" because GERD is related to laxity in the sphincter between the esophagus and stomach, which has not been "objectively clinically proven to be associated with environmental toxins." R. at 994.

With respect to his knees, the appellant reported that he began to experience bilateral knee pain in the 1980s but was told not to talk about the pain, and that he did not seek medical treatment. R. at 998. He stated that he has had recurrent bilateral knee pain, sought treatment for both knees and was given a right knee brace in 2007, and underwent surgery for a torn meniscus of the right knee in 2013. *Id.* The examiner diagnosed the appellant with degenerative joint disease of the knees with a diagnosis date of the 1980s, opining that the appellant's mild degenerative joint disease of the left knee is at least as likely as not related to service because service treatment records reflected an in-service, left knee injury, abnormal x-ray changes, and swelling in the left knee, and that such knee injuries can result in maladaptive stress on the knee, which when compounded by vigorous physical activity over an extended period, can result in degenerative changes. R. at 998, 1034.

In May 2014, the RO granted disability compensation for the left knee with a disability rating of 10% effective September 16, 2008. R. at 2166-78. In April 2015, the appellant testified at a Board hearing. R. at 524-57. He stated that his right knee issues "probably" or "could have started back in the days of infantry" when he continually wore boots for walking, training, and "everything" and that he believed that this "took a toll [] on our knees." R. at 533. He further testified that "it's playing both knees, where I favored one and now the other is acting up," expressing his belief that his right knee disability is secondary to his service-connected left knee disability. R. at 533-34. As for GERD, the appellant also described symptoms that he experienced in service, such as acid reflux, diarrhea, constipation, difficulty swallowing food and breathing, and other digestive issues. R. at 544. He stated, essentially, that he has experienced continuous gastrointestinal symptoms since service and that these symptoms have "escalated to where [he has]

diverticulitis." R. at 545. The appellant also suggested that his GERD may be due to environmental toxins that he was exposed to during his Persian Gulf service, including toxins from burning human waste and gas and diesel. R. at 548.

In July 2015, the Board remanded the appellant's claims for further development to determine whether the appellant's hiatal hernia and GERD and right knee disability are directly related to service and whether his right knee disability is secondarily related to his service-connected left knee disability. R. at 514-19. Later that month, the appellant underwent a VA examination. R. at 489-92. The examiner diagnosed the appellant with diverticulitis and diarrhea secondary to partial colon resection, opining that such conditions were less likely as not due to a specific exposure event during service in Southwest Asia because, respectively, diverticulitis is caused by diet and aging, diarrhea is more likely caused by bowel surgery as this symptom began just after surgery, and because neither of these conditions is medically considered to be due to exposure to toxins. R. at 491-92.

In October 2015, the RO obtained a VA opinion concerning the appellant's hiatal hernia and GERD and right knee disability. R. at 94-97. The examiner determined that it is less likely than not that the appellant's right knee disability is related directly to service or secondarily to his service-connected left knee disability. R. at 95-96. Additionally, the examiner opined that the appellant's GERD with hiatal hernia is less likely than not incurred in service because the gastrointestinal conditions that he experienced in service were caused by viral infections which resolved without residual and because viral illness does not lead to GERD. R. at 96.

In a November 2015 statement, the appellant indicated that his gastrointestinal problems "never resolve[d]." R. at 53. On November 25, 2016, the Board denied disability compensation for right knee degenerative joint disease, status post meniscectomy, and for hiatal hernia and GERD. R. at 1-20. This appeal followed.

## **II. ANALYSIS**

The appellant argues that the Board erred by relying upon inadequate VA examinations in denying his disability compensation claims for hiatal hernia and GERD and for a right knee

disability. Appellant's Br. at 1-15; Reply Br. at 1-7. The Secretary principally contends that the Board relied upon adequate VA examinations. Secretary's Br. at 1-16.

"[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.

With respect to the VA examinations provided to the appellant, the Board found:

The [appellant] was also provided with VA examinations which, collectively, contain a description of the history of the disabilities at issue; document and consider the relevant medical facts and principles; and provide opinions regarding the etiology of the [appellant's] claimed conditions. VA's duty to assist with respect to obtaining relevant records and an examination has been met.

R. at 19 (citations omitted).

#### A. Hiatal Hernia and GERD

In its decision, the Board began its analysis of hiatal hernia and GERD (hereinafter GERD) by cataloging certain evidence of record. Significantly, the Board quoted key findings of the October 2015 VA examiner, who opined that the appellant's GERD was less likely than not related

to service because (1) the appellant's in-service gastrointestinal conditions were caused by viral infections that resolved without residual, (2) viral illness does not lead to GERD, and (3) the appellant first sought medical treatment for GERD in 2004. R. at 15. The Board also specifically found that, "[t]o the extent [that the appellant] has offered his own medical opinion concerning the etiology of his GERD," he was not competent to do so and that his opinion was "entitled to low probative weight." R. at 16. Then, with respect to the appellant's Persian Gulf War service, the Board "note[d] that GERD is not an undiagnosed illness nor has any treatment provider opined that it is a symptom of a chronic multisymptom illness" and then quoted the March 2014 VA examiner's findings that

GERD is related to a laxity in the sphincter between the esophagus and the stomach. This has not been objectively[,] clinically proven to be associated with environmental toxins. Therefore, it is less likely than not that the [appellant's] current GERD is related to a specific exposure event experienced by the [appellant] during service in Southwest Asia.

R. at 16-17 (quoting R. at 993-94). Finally, based upon its preceding review of the evidence, the Board concluded that "entitlement to service connection for GERD or a hiatal hernia is denied." R. at 17.

*i. March 2014 VA Examination*

The appellant first maintains that the Board imposed a higher evidentiary burden than that permissible under VA law when it relied upon the March 2014 VA examiner's opinion, which found the appellant's GERD less likely than not related to a specific exposure during service in Southwest Asia because GERD has not been "objectively, clinically" associated with environmental toxins. R. at 17; *see* Appellant's Br. at 7-9; Reply Br. at 1-2. The appellant further asserts that here, as in *Wise v. Shinseki*, the Board—by merely adopting the March 2014 examiner's finding that there was no objective, clinical evidence of a relationship between GERD and his in-service exposure to environmental toxins—impermissibly demanded a standard of proof "'greater than the level of proof required by the benefit of the doubt rule.'" Appellant's Br. at 7-8 (quoting 26 Vet.App. 517, 532 (2014)); Reply Br. at 1. In response, the Secretary argues that *Wise* is distinguishable because, most pertinently, that case applies only to the *Board's* imposition of an evidentiary standard impermissibly higher than the benefit of the doubt standard, not a VA examiner's, and because VA examiners are not subject to any reasons-or-bases requirement in forming their opinions. Secretary's Br. at 7-9.

The general standard of proof in veterans benefits cases—the "benefit of the doubt"—provides that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see* 38 C.F.R. § 3.102 (2017). Evidence on an issue is in "approximate balance" when the evidence for and against a finding on that issue is "almost exactly or nearly equal" or "too close to call." *Ortiz v. Principi*, 274 F.3d 1361, 1364-65 (Fed. Cir. 2001). This "unique standard of proof" is a standard lower than any other in contemporary American jurisprudence and reflects "the high esteem in which our nation holds those who have served in the Armed Services." *Gilbert*, 1 Vet.App. at 54.

Here, it is unclear whether the Board imposed a standard greater than the benefit of the doubt because the Board simply recounted the VA examiner's opinion before stating a conclusion—"[f]or all the above reasons, entitlement to service connection for GERD or a hiatal hernia is denied." R. at 17. As maintained by the appellant, it appears that the Board may have merely adopted the conclusion of the March 2014 VA examiner, who rendered an adverse nexus opinion based upon the lack of objective, clinical evidence of a relationship between GERD and environmental toxin exposure. *See Wise*, 26 Vet.App. at 531-32 (finding, in part, that the Board, when evaluating expert medical evidence, cannot impose a level of proof greater than that required by the benefit of the doubt rule); *see also 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))). However, given the lack of clarity in the Board's decision regarding the extent to which it relied on the examiner's finding of no objective, clinical proof, the Court finds that a lack of sufficient reasons or bases warrants remand as review by the Court is otherwise impeded. *See Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

#### *ii. October 2015 VA Opinion*

The appellant also argues that the opinion of the October 2015 VA examiner is inadequate because she predicated her opinion upon an incorrect factual premise that his in-service gastrointestinal issues had fully resolved and because she failed to determine whether his current gastrointestinal symptoms are the same as those he had experienced in service. Appellant's Br. at 9-12; Reply Br. at 2-3. Additionally, the appellant maintains that the October 2015 VA examiner failed to address his statements of continued or persistent gastrointestinal symptomatology.

Appellant's Br. at 11; Reply Br. at 2-3. The Secretary contends that the examiner did not base her opinion upon a factually inaccurate premise and that she was not required to specifically address whether his current gastrointestinal symptoms are the same as those he experienced in service because there is no reasons-or-bases requirement for examiners. Secretary's Br. at 12-13.

The Court generally finds the appellant's arguments to be more persuasive. As noted above, the Board determined that the VA examinations of record were collectively adequate because the examiners, in part, "document[ed] and consider[ed] the relevant medical facts and principles." R. at 19. As the appellant accurately maintains, however, the October 2015 VA examiner did not address his statements of ongoing gastrointestinal symptoms since service or for a period after service but prior to 2004, which he made for the first time at the April 2015 Board hearing. Appellant's Br. at 11; Reply Br. at 2. Although the law does not impose any reasons-or-bases requirement on medical examiners, and the 2015 VA examiner noted that she had considered the appellant's history, the Board did not reconcile the examiner's statement that the appellant's in-service gastrointestinal conditions resolved without residual with the appellant's statements regarding a history of continued or persistent symptomatology. *See Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994) (noting that the Board may not evade its statutory reasons-or-bases requirement by adopting a medical opinion that fails to discuss evidence supporting the veteran's position). In this regard, the Court observes that the Board did not make any evidentiary findings concerning the appellant's statements of ongoing or persistent symptomatology, except to find that, to the extent that any statements made by the appellant amounted to an etiology opinion, the appellant was incompetent to do so as a lay person and the probative value of those statements was diminished. R. at 15-16. Therefore, the Court finds that the Board did not support its finding concerning the adequacy of the October 2015 VA opinion with sufficient reasons or bases, and its failure to do so impedes review of this matter by the Court. *See Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

#### B. Right Knee Disability

The appellant argues that the Board erred in relying upon the October 2015 VA opinion, which he alleges is inadequate because the examiner "conflated the causation and aggravation inquiries when she opined that the [appellant's] right knee disability was less likely than not related to his service-connected left knee disability." Appellant's Br. at 12-13; *see* Reply Br. at 5-6. The Secretary contends that the October 2015 examiner made clear that the appellant's right knee



disability was not caused or aggravated by his service-connected left knee disability and that the Board's reliance on this opinion was proper. Secretary's Br. at 14-16.

The Board denied the appellant's claim based upon the October 2015 VA opinion that the appellant's right knee disability was not directly related to service or secondarily related to his service-connected left knee disability. R. at 11-14. As quoted by the Board, the October 2015 examiner found as follows:

It is less likely than not that [the appellant's] left knee would *cause* [degenerative joint disease] in the right knee, as *aggravation* affects the superior joint—i.e. hip, and not a lateral joint—i.e. right knee. Therefore[,] it is less likely than not that the DJD of the right knee was caused or aggravated by his service-connected left knee disability.

R. at 12 (emphasis added) (quoting R. at 95). This finding constitutes the entirety of the October 2015 VA examiner's analysis concerning possible aggravation of the appellant's right knee disability. R. at 95.

On the whole, the Court is persuaded by the appellant's contentions. As he argues, the Board, in finding the October 2015 VA opinion adequate, did not address whether the October 2015 VA examiner may have conflated the terms "cause" and "aggravation" and whether the opinion in fact addressed both potential avenues to entitlement to disability compensation on a secondary basis. *See* Appellant's Br. at 13 ("Although the examiner used the word 'aggravation,' her rationale demonstrates that she only considered the theory of direct causation."); *see also Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc) (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); 38 C.F.R. § 3.310(a), (b) (2017). Additionally, as the appellant avers, the Board did not address whether the examiner considered the appellant's statements that his right knee disability had worsened because he put more weight on it to compensate for his service-connected left knee disability. Appellant's Br. at 13; Reply Br. at 6; *see* R. at 534. The Board found the October 2015 VA opinion adequate without addressing or reconciling these ambiguities or omissions. R. at 19.

The Secretary's arguments, which attempt to offer clarifying interpretations of the October 2015 VA opinion to cure any ambiguity, *see* Secretary's Br. at 14-15, 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 finds that the Board did not support its finding concerning the adequacy of the October 2015 VA opinion with sufficient reasons or bases, which impedes review by the Court. *See Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant regarding the merits of his claims. *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 matters, 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**

The appeal of the Board's November 25, 2016, decision denying disability compensation for a left wrist disability, to include arthritis and carpal tunnel syndrome; right eye retinal detachment; hiatal hernia and GERD on a presumptive basis for service in the Southwest Asia theater of operations during the Persian Gulf War; and a right knee disability on a direct basis is **DISMISSED**. After consideration of the parties' pleadings and a review of the record, the Board's November 25, 2016, decision denying disability compensation for hiatal hernia and GERD on a direct basis and a right knee disability on a secondary basis is **VACATED** and the matters are **REMANDED** for further proceedings consistent with this decision.

DATED: March 30, 2018

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