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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0609

DOROTHY R. GOHL, APPELLANT,

V.

ROBERT L. WILKIE,
ACTING 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*: The appellant, the veteran's surviving spouse, appeals through counsel, a February 15, 2017, Board of Veterans' Appeals (Board) decision that denied service connection for the cause of the veteran's death.[1] Record of Proceedings (R.) at 2-15. Single-judge disposition is appropriate. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a) and 7266(a). For the following reasons, the Court will vacate in part the Board's decision and remand the vacated matter for further proceedings consistent with this decision.

I. BACKGROUND

The veteran served in the U.S. Army from December 1941 to August 1945. R. at 1389.

An August 1998 rating decision shows that the veteran was service connected for subtotal gastrectomy, duodenal ulcer, post-traumatic stress disorder (PTSD), incision hernia, malaria, left humerus fracture, and abrasions. R. at 5070.

[1] The February 15, 2017, Board decision also denied entitlement to dependency and indemnity compensation (DIC) under 38 U.S.C. § 1318. The appellant does not challenge this aspect of the Board's decision. Accordingly, this matter is deemed abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

A certificate of death reflects that the veteran died in April 2005. R. at 42. The immediate cause of death was acute myocardial infarction and the conditions leading to death were coronary atherosclerosis and end stage renal disease. *Id*.

On April 18, 2005, VA received the appellant's claim for service connection for the cause of the veteran's death. R. at 5032-37. The regional office (RO) denied service connection for the cause of the veteran's death and determined that, prior to the veteran's death, there was no continuous cohabitation between the veteran and the appellant. R. at 4919-24, 4983-88.

In May 2008, VA received the appellant's claim to reopen her claim for death benefits. R. at 4895, 4903. A May 2009 decision denied the appellant's claim to reopen her claim for death benefits. R. at 1446-48. In a January 30, 2014, decision, the Board determined that new and material evidence had been received to reopen a claim of entitlement to recognition of the appellant as the surviving spouse of the veteran for the purposes of VA benefits. R. at 1371-84. The RO again denied service connection for the cause of the veteran's death and the appellant appealed the decision to the Board. R. at 1349,1351-68.

In February 2016, the Board sought an expert opinion from a VA physician concerning the cause of the veteran's death. R. at 31-33.

The Board asked the VA physician to provide an opinion regarding whether it was at least as likely as not that "any disability arising from the [v]eteran's active service caused, or contributed substantially or materially to cause [] the [v]eteran's death." R. at 32. The physician responded that it was "less likely as not." R. at 30. The physician stated that the veteran was service connected for subtotal gastrectomy, duodenal ulcer, PTSD, incisional hernia, malaria, left humerus fracture, and abrasions, and that there was "neither evidence in the medical literature, consensus in the medical community or evidence in this specific case that supports a causal/aggravation relationship between these conditions and the veteran['s] [ ] cause of death." *Id*.

The Board also asked the physician whether it was at least as likely as not that any of the veteran's service-connected disabilities proximately caused or aggravated the myocardial infarction, coronary atherosclerosis, end stage renal disease, or any other cause of death. R. at 32. The physician opined that it was "[l]ess likely than not." The physician explained:

> I believe there is neither evidence in the medical literature, consensus in the medical community[,] or evidence in this specific case that supports a causal/aggravation relationship between these conditions. Although there is an association between

> PTSD and some of the medications that the veteran used for treatment of this, causation/aggravation has not been established by the medical community.

R. at 30.

The February 15, 2017, Board decision denied service connection for the cause of the veteran's death. R. at 2-15. The Board accorded great probative weight to the August 2016 VA physician's opinion and determined that the veteran's service-connected disabilities, including medications required for PTSD, were not shown to have caused or resulted in his death. R. at 8-9. This appeal followed.

II. ANALYSIS

When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion provided is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA 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 . . . 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 quotations 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). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

The Court reviews the Board's determination regarding the adequacy of a medical examination or opinion under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The appellant asserts that the Board failed to ensure that the duty to assist was satisfied by relying on an inadequate VA medical opinion. Appellant's Brief (Br.) at 5. The appellant states that the August 2016 VA physician did not provide an adequate rationale to support his conclusion that there was no connection between the veteran's cause of death and his PTSD and medications used for PTSD. *Id*. Specifically, the appellant argues that the physician's finding that there was an association between the veteran's cause of death and his PTSD or medications used to treat PTSD was inconsistent with the conclusion that there was "no evidence" to support a causal or aggravation relationship. *Id*. at 8. The Secretary responds that the VA physician considered the veteran's service-connected disabilities and found no basis in current medical research to conclude that any of the veteran's disabilities caused his death, and that the physician provided an adequate explanation to facilitate the Board's review. Secretary's Br. at 8.

The Court agrees with the appellant. In its decision, the Board found that the August 2016 VA physician's opinion was accorded great probative weight because the physician "provided a complete rationale, as well as clear conclusions with supporting references to medical literature and the medical community in general." R. at 7. The Board stated that the physician acknowledged an association between PTSD and the medications that the veteran took for his heart and renal conditions; nevertheless, the physician opined that it was less likely as not that there was a causal relationship between the service-connected PTSD and the conditions that led to his death. *Id*.

The August 2016 VA physician opined that it was "[l]ess likely than not" that any of the veteran's service-connected disabilities proximately caused or aggravated the myocardial infarction, coronary atherosclerosis, end stage renal disease, or any other cause of death. R. at 30. The physician explained that "[a]lthough there is an association between PTSD and some of the medications the veteran used for treatment of this, causation/aggravation has not been established by the medical community." *Id*. On the one hand, the physician stated that there was an association between the veteran's PTSD and his causes of death, but then stated there was no causation or aggravation "established" by the medical community. *Id*. The physician did not elaborate concerning what association exists between the conditions and, therefore, the physician's reasoning for the opinion is unclear. *See Monzingo*, 26 Vet.App. at 105 (medical opinions are adequate where they "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion"). Although "there is no reasons or bases requirement

imposed on examiners," *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012), "an adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports." *Id*.

Accordingly, the Court concludes that the Board clearly erred when it found that the August 2016 VA opinion is adequate and a remand is appropriate. *See D'Aries*, 22 Vet.App. at 104; *Ardison*, 6 Vet.App. at 407 (1994) (holding that the Board errs when it relies on an inadequate medical examination report or opinion). Remand is warranted for the Board to obtain a new VA medical opinion or to seek clarification of the August 2016 VA opinion that adequately addresses whether it is at least as likely as not that the veteran's service-connected disabilities proximately caused or aggravated his cause of death. *See 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").

The appellant also argues that the Board erred by relying on the August 2016 VA physician's opinion because the physician applied the incorrect standards for assessing a relationship between the veteran's cause of death and his service-connected conditions. Appellant's Br. at 6-9. In response, the Secretary argues that the August 2016 VA physician's opinion was adequate because the physician was not required to apply the benefit of the doubt doctrine when evaluating the veteran's cause of death. Secretary's Br. at 8-9. In the reply brief, the appellant avers that she did not argue that the VA physician was required to apply the benefit of the doubt when evaluating the veteran's disability and cause of death, but that the physician's requirement of an "established medical link" between heart disease and PTSD rendered the Board's reliance on the opinion erroneous because the Board effectively required a standard of proof counter to the benefit of the doubt rule. Appellant's Reply Br. at 3.

The Court finds it troubling that the Board relied on the August 2016 VA physician's opinion to deny the appellant's claim for service connection for the cause of the veteran's death. As discussed above, the physician's reasoning for the opinion was that there was an association between the veteran's PTSD and his cause of death, but that causation or aggravation had not been established by the medical community. R. at 8. In *Wise v. Shinseki*, the Board relied on a medical opinion that rejected a secondary-service-connection theory because that theory was not widely

accepted in the medical community. 26 Vet.App. 517 (2014). The Court in *Wise* remanded the claim, stating that "the Board, when evaluating [record] evidence, cannot demand a level of acceptance in the scientific community [(51%)] greater than the level of proof required by the benefit of the doubt rule [(50%)]." *Id*. at 531. The Board's reliance here is similar to that in *Wise* and the Board is advised to consider the case upon readjudication of the appellant's claim.

Given this disposition, the Court will not address the remaining arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam). On remand, the appellant is free to present any additional arguments and evidence to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner 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 February 15, 2017, decision regarding the denial of service connection for the cause of the veteran's death is VACATED in part and the matter is remanded for further proceedings consistent with this decision.

DATED: May 15, 2018

Copies to:

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