Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1968

FREDERICK W. STEWARD, APPELLANT,

V.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: It is undisputed that U.S. Army veteran Frederick W. Steward was diagnosed with asthma as early as age nine.[1] The report from his induction physical, however, did not note this condition; this omission triggered a legal doctrine known as the presumption of soundness. Under this presumption, any disease or injury occurring in service is presumed to be incurred in the line of duty unless the Secretary proves, by clear and unmistakable evidence, (1) that the condition existed before service and (2) was not aggravated by service. In this case, the Court considers whether the Secretary has produced clear and unmistakable evidence to prove lack of aggravation.[2] Because the Secretary's evidence was insufficient for that purpose, the Court will reverse the Board's finding that the presumption of soundness was rebutted, and remand the issue of service connection for asthma for the Board to find whether Mr. Steward had active asthma during the appeal period and whether that asthma was caused by the aggravation during service.

[1] *See* Appellant's Brief at 1; R. at 1 (Board decision), 73 (2013 VA medical examination report), 304 (private medical record).

[2] The Board also denied service connection for a right calf condition and for bilateral arthritis of the hips. Mr. Steward raised no arguments with respect to these determinations, and, therefore, the Court considers these issues abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

I. ANALYSIS

In finding that the presumption of soundness, including lack of aggravation, had been rebutted, the Board relied on reports from Mr. Steward's separation physical, and on a 2013 VA medical examination report. Mr. Steward argues that the Board erred in relying on this evidence. He asserts that the Board depended on the absence of evidence in the separation physical and that the 2013 VA examiner report did not present an adequate rationale to support her conclusions.

A. The Court reviews de novo whether the secretary has carried his burden of rebutting both prongs of the presumption of soundness.

"Every veteran shall be taken to have been in sound condition when [inducted], except as to defects, infirmities, or disorders noted at the time of the [induction] examination, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."[3] "[T]he correct standard for rebutting the presumption of soundness under [section] 1111 requires *the government to show* by clear and unmistakable evidence that (1) the veteran's disability existed prior to service and (2) that the pre-existing disability was not aggravated during service."[4] Clear and unmistakable evidence is evidence that "'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'"[5]

"Once the presumption of soundness applies, the burden of proof remains with the Secretary on both the preexistence prong and the aggravation prong; it never shifts back to the claimant."[6] The Secretary may prove lack of aggravation with clear and unmistakable evidence either that there was no increase in disability during service or that any increase in disability was caused by the natural progress of a preexisting condition.[7]

The Court reviews de novo the Board's determination that the evidence is adequate to rebut the presumption of soundness.[8] The Secretary's effort to argue that this determination is made under the "clearly erroneous" standard is simply wrong.[9]

---

[3] 38 U.S.C. § 1111.

[4] *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004) (emphasis added).

[5] *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (quoting *Vanerson v. West*, 12 Vet.App. 254, 258-59 (1999)).

[6] *Horn v. Shinseki*, 25 Vet.App. 231, 235 (2012).

[7] *Wagner*, 370 F.3d at 1096; *Horn*, 25 Vet.App. at 235

[8] *Horn*, 25 Vet.App. at 236.

[9] *See* Secretary's Brief (Br.) at 6. Certain underlying factual determinations are reviewed under the "clearly

B. In this case, the evidence from the separation physical is too uncertain to yield a conclusion of clear and unmistakable evidence.

The Board relied, in part, on the content of the separation physical report and an accompanying questionnaire in which Mr. Steward answered questions about his medical history and current medical condition. The Board noted that Mr. Steward denied having a history of or a present condition of asthma, and that the examination report stated that his nose, mouth, throat, lungs, and chest were "normal."[10] The Board may have surmised that this evidence supported a conclusion that the preexisting asthma underwent no increase in disability during service. This evidence, however, is too insubstantial to contribute to clear and unmistakable evidence.

It is not at all clear what tests or evaluations led to the assessment that Mr. Steward's breathing apparatus was normal, or even what that assessment meant. Moreover, neither the Board nor the Secretary pointed to any evidence that the medical procedures in the separation physical would have revealed the presence of asthma, in either the active or quiescent state.

Both at induction and separation, Mr. Steward responded, "no," to the question "Have you ever had or have you now . . . asthma [or] shortness of breath?"[11] Given Mr. Steward's undisputed history of asthma, these responses might indicate that he has a problem with the truth.

There is, however, another view. The disjunctive "or" might have been interpreted by an unsophisticated 17-year-old inductee as creating alternative questions requiring an answer to only one. Mr. Steward might have interpreted the question as asking only whether he was experiencing a flareup or attack at the time of the physicals.

In either view of the matter, Mr. Steward was hardly competent to assess whether his preexisting asthma underwent any permanent increase in severity during service. Only a physician could properly make that assessment.

The context of the separation examination also weighs against the Board's conclusion. It is undisputed that Mr. Steward suffered an asthma attack during basic training, for which he was prescribed medication by an Army physician. He attributed this attack to a gas mask drill plus

---

erroneous" standard, *see Horn* at 236, but not the overall assessment of the adequacy of the evidence to rebut the presumption of soundness.

[10] R. at 8.

[11] R. at 337, 343.

daily 5-mile runs. The record contains no evidence suggesting that Mr. Steward's discharge after slightly more than 6 months service was attributable to anything but the resurgence of his asthma.

There is no evidence associated with the separation physical that can establish clear and unmistakable evidence of lack of aggravation or even contribute to that conclusion. The Board's extrapolations of that evidence are not valid.

C. The September 2013 VA examination report is entitled to no weight because the examiner's conclusions lack any rationale.

The examiner reiterated Mr. Steward's medical history, and then stated: "In my opinion and based on the veteran's own statement, his [a]sthma clearly existed prior to active duty and not aggravated by active duty."[12] No analysis or reasoning supports this opinion.

That such an examination report is still submitted to the Court, to support a conclusion of clear and unmistakable evidence yet, suggests that the Board and the Secretary avoid learning at all costs.[13] It has been 9 going on 10 years since this Court's decision in *Nieves-Rodriguez*, which stated that, even as a general matter, "a VA medical examination is entitled to [no] weight in a service-connection or rating context if it contains only data and conclusions."[14] Moreover, "the concerns for articulated sound reasoning underlying *Nieves-Rodriguez* are at their zenith when VA attempts to carry its burden of rebutting either prong of the presumption of soundness by clear and unmistakable evidence." [15]

Therefore, it is inexplicable that the Board stated that this examiner "explained with adequate rationale that the [v]eteran's asthma clearly was not aggravated by active duty."[16] In fact, there was no rationale at all to support the examiner's conclusion with respect to aggravation.

The Court concludes that the Board erred in finding that clear and unmistakable evidence demonstrated lack of aggravation. Neither the documents associated with the separation physical nor the September 2013 VA examination report, alone or in combination, amounts to clear and unmistakable evidence.

---

[12] R. at 75.

[13] *See* Francisco Gino & Bradley Staats, *Why Organizations Don't Learn*, HARV. BUS. REV., Nov. 2015.

[14] 22 Vet.App. 295, 304 (2008).

[15] *Horn*, 25 Vet.App. at 241; *see also* 38 C.F.R. § 3.304 (2017).

[16] R. at 9.

The Board further erred in stating that the cited evidence "weigh[ed] against the [v]eteran's credibility as to the assertion that the pre-existing asthma was aggravated during or by service."[17] There is no issue of Mr. Steward's credibility; the claimant has no burden to produce evidence of aggravation.[18] Rather, it is VA's burden to produce clear and unmistakable evidence either that there was no increase in severity of the preexisting condition, or that any increase was due to the natural progression of the condition.

"After VA and the Board have had a full opportunity to develop the record . . . the Court's role is basically to assess whether the Secretary has succeeded in carrying his burden."[19] In this instance, the Court holds that the conclusory VA medical report and the evidence associated with the separation physical were insufficient to carry the burden of proving lack of aggravation by clear and unmistakable evidence. The Court therefore will reverse the Board's determination that the Secretary rebutted the aggravation prong of the presumption of soundness, and direct a finding of aggravation of the preexisting asthma.[20]

D. The Board must develop the record with respect to the other requirements for service connection.

It does not necessarily follow that Mr. Steward is entitled to service connection for aggravation of asthma. He still must demonstrate that his asthma was a disability during the appeal period, and that there is a nexus between that disability and the in-service aggravation.[21] The Board made no findings whether Mr. Steward demonstrated active asthma at any time during the appeal period, or if so, whether the condition was caused by in-service aggravation. The only evidence of record is the VA examiner's statement that "[i]t is less likely as not the veteran's asthma is related to military service."[22] This statement is no more helpful to the Board's analysis than the conclusory statements on aggravation.

The Court therefore must remand the asthma claim for further adjudication of the service-connection requirements. The Board may undertake further development of the record as

---

[17] *Id.*

[18] *Horn*, 25 Vet.App. at 238.

[19] *Id.* at 243.

[20] *See id.* at 243-44.

[21] *Id.* at 236-37 (and cases it cites).

[22] R. at 75. The Court further notes that the examiner promised an addendum to the report on completion of a pulmonary function test (PFT). The record contains no such addendum or any results of a PFT.

necessary to make findings on the present disability and nexus requirements. On remand, Mr. Steward is free to submit additional evidence and argument, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

For these reasons, the Court REVERSES the Board's January 28, 2016, determination that the presumption of soundness was rebutted, DIRECTS that a finding of in-service aggravation of the preexisting asthma be entered, SETS ASIDE the Board's decision with respect to the asthma claims, and REMANDS that matter for further proceedings consistent with this decision.

DATED: June 29, 2018

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)