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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2100

ROBERT L. RABORN, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Robert L. Raborn served the country honorably in the United States Navy. He filed a claim seeking service connection for paruresis, also referred to as "shy or bashful bladder," is "the inability to urinate in the presence of others."[1] In a June 7, 2017, decision, the Board of Veterans' Appeals (Board) denied that claim.[2] Appellant timely appealed that determination and the Court has jurisdiction over his appeal.[3] As described below, the Board's conclusion that the presumption of soundness has been rebutted–the basis for its decision–is not supported by an adequate statement of reasons and bases. As such, the Court will set aside the Board's decision on appeal and remand the matter for further proceedings.

I. ANALYSIS

[1] THE FREE DICTIONARY, http://medical-dictionary.thefreedictionary.com/paruresis (last visited July 15, 2018).

[2] Record (R.) at 2-19.

[3] 38 U.S.C. §§ 7252(a) and 7266(a).

Appellant entered the Navy in January 1951.[4] At that time, he reported that it was difficult for him to urinate in front of others.[5] Oddly, however, despite this self-reported fact, appellant's physical examination upon his entry into service did *not* "note" this condition.[6] Thus, appellant was considered to have been in "sound condition" with respect to the inability to urinate among others, i.e., paruresis.[7]

In July 2008, appellant filed a claim for service connection for paruresis.[8] That claim was denied and then began a lengthy procedural history, many details of which are not relevant to this appeal. That procedural journey ended, at least administratively, with the Board's decision on appeal.

In the decision on appeal, the Board continued to deny service connection to appellant for paruresis.[9] In sum, the Board accepted that the presumption of soundness (discussed in greater detail below) applied, meaning that appellant was presumed not to have had paruresis when he entered service.[10] However, the Board then concluded that the presumption of soundness had been rebutted, leading it to deny the claim.[11]

Under the presumption of soundness,

> every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.[12]

In *Wagner v. Principi*, the United States Court of Appeals for the Federal Circuit held that "the 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

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[4] R. at 454.

[5] R. at 418.

[6] *See* R. at 337-38.

[7] *See* 38 U.S.C. § 1111.

[8] R. at 1150.

[9] R. at 17.

[10] *See, e.g.,* R. at 6-7.

[11] *See, e.g.,* R. at 7-17.

[12] 38 U.S.C. § 1111.

prior to service *and* (2) that the pre-existing disability was not aggravated during service."[13] Importantly, "[t]he government may show lack of aggravation by establishing that there was no increase in disability during service or that any 'increase in disability [was] due to the natural progress' of the preexisting condition."[14] To qualify as "clear and unmistakable," evidence "cannot be misinterpreted and misunderstood, i.e., it [must be] undebatable."[15] The presumption of soundness ordinarily operates to satisfy the second element of service connection without further proof, meaning that the presumption "strongly favors the conclusion that any occurrence of injury or disease during service establishes that the in-service medical problems were incurred in the line of duty."[16] As to the standard of review, "[t]he Court reviews de novo a Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness, while giving deferential treatment to the Board's underlying factual findings and determinations of credibility."[17]

Here, it is undisputed that the presumption of soundness applies to appellant's claim because paruresis was not noted on his entrance examination. In addition, it is no longer in dispute that the Government has successfully rebutted the first prong of that presumption, namely that the condition at issue preexisted service. The Board so found,[18] and appellant has not challenged, that determination on appeal.[19] But things are different with respect to the second prong of the analysis, the lack of in-service aggravation. As to aggravation, the Board's decision is deficient.

The Board concluded that there was clear and unmistakable evidence of a lack of aggravation of appellant's paruresis during service.[20] The problem with this conclusion is that we can't tell why that is so, given the record. As with all of its material findings of fact and conclusions of law, "[t]he Board is required to provide a written statement of the reasons or bases for its

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[13] 370 F.3d 1089, 1097 (Fed. Cir. 2004) (emphasis added).

[14] *Id.* at 1096 (quoting 38 U.S.C. § 1153); *see Horn v. Shinseki*, 25 Vet.App. 231, 235 (2012) ("In *Wagner*, the [Federal Circuit] concluded that the term 'aggravation' has the same meaning in [38 U.S.C. §§] 1111 (presumption of soundness) and 1153 (presumption of aggravation).").

[15] *Vanerson v. West*, 12 Vet.App. 254, 258 (1999) (relying on the plain meaning of the phrase).

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

[17] *Id.* (citing *Miller v. West*, 11 Vet.App. 345, 347 (1998)).

[18] R. at 12-14.

[19] *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) (issue not raised on appeal is deemed abandoned).

[20] R. at 14-17.

findings and conclusions on all material issues of fact and law presented in the record."[21] This "statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[22] Here, the Board did not comply with this requirement.

When it determined that there was a clear and unmistakable evidence rebutting the second prong of the presumption of soundness, the Board principally relied on an October 2015 VA examination.[23] The October 2015 examiner had concluded that appellant's paruresis was not aggravated because any change in the condition in service was the result of "the environment becom[ing] less accommodating to his psychological condition."[24] The examiner then stated: "There is no aggravation/permanent worsening of the condition itself."[25]

There are at least 2 problems with the Board's explanation. First, as the Board itself recognized, the examiner did not state that he had applied the "clear and unmistakable evidence" standard when rendering his opinion.[26] The Board concluded this was not problematic because it was "obvious from the content of his opinion and the certainty in which it was expressed that such evidence existed."[27] It is not at all "obvious" to the Court why that is the case, especially given the importance of the heightened evidentiary burden on the Secretary when he attempts to rebut the presumption of soundness. The Board insufficiently explained why the conclusion was "obvious." To be clear, the Court is not requiring that an examiner use any "magic words" when rendering an opinion. But the Board must explain why it reads an examination report that does not use such words as implicitly doing so.

The second problem with the Board's discussion of the October 2015 examination report is that the Board does not adequately explain why it accepted the examiner's rationale. The force of a medical opinion is the rationale an examiner provides for a given conclusion.[28] The Board's

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[21] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1).

[22] *Allday*, 7 Vet.App. at 527.

[23] *See, e.g.*, R. at 14-15.

[24] R. at 140.

[25] *Id*.

[26] R. at 15.

[27] *Id*.

[28] *See, e.g., Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302-04 (2008).

assessment of the examiner's rationale for reaching his ultimate conclusion concerning aggravation is perfunctory at best.[29] Again, the lack of discussion of the examiner's reasoning is particularly important in this context given the Secretary's heightened evidentiary responsibility.

The deficiencies in the Board's discussion of the October 2015 examination are made worse because other evidence in the record that could support a conclusion that there was some aggravation of his paruresis during service. For example, a September 1953 report of medical history specifically stated that appellant's paruresis had "been markedly aggravated" since joining the Navy.[30] And there is postservice evidence from appellant,[31] his brother (a doctor),[32] and a private medical professional[33] that could support a conclusion that the condition was aggravated in service or at least that there is not clear and unmistakable evidence to the contrary. The Board discussed this evidence, but did so in the context of its deficient assessment of the October 2015 examination report. This deficiency taints the Board's assessment of the positive evidence in the record.

To be clear, the Court expresses no opinion on whether appellant's condition in fact worsened during service or whether the Secretary may sufficiently establish that he has rebutted by clear and unmistakable evidence that it did not. The Court holds today only that the Board's decision finding that the second prong of the presumption of soundness had been rebutted is inadequate to facilitate judicial review. This deficiency requires remand.[34]

Because the Court is remanding this matter to the Board for readjudication, the Court need not now address appellant's remaining arguments, and he may present them to the Board below.[35] On remand, appellant may submit additional evidence and argument and has 90 days to do so from

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[29] *See* R. at 14-15.

[30] R. at 331.

[31] R. at 1177.

[32] R. at 1136.

[33] R. at 823.

[34] *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[35] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

the date of VA's post-remand notice.[36] The Board must consider any such additional evidence or argument submitted.[37] The Board must also proceed expeditiously.[38]

II. CONCLUSION

The Board's June 7, 2017, decision denying service connection for paruresis is SET ASIDE and this matter is REMANDED for further proceedings consistent with this decision.

DATED: July 25, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

[36] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, No. 16-2826, 2018 WL 3357628 (U.S. Vet. App. July 10, 2018).

[37] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[38] 38 U.S.C. §§ 5109B, 7112.