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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1863

JAGUN OMO-OORUN, APPELLANT,

V.

ROBERT L. WILKIE,
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*: U.S. Army veteran Jagun Omo-Ooorun, who served as Henry Jackson,[1] was part of an airborne division located in Okinawa, Japan. In June 1962 he was injured in a parachuting accident. After the accident, Mr. Omo-Oorun underwent surgery in a military hospital for a right inguinal hernia. He is now service connected for residuals of the right-side hernia, with a noncompensable disability rating.

Mr. Omo-Oorun alleges that the Army physicians who treated him after the accident also discovered an incipient hernia on the left side. According to Mr. Omo-Oorun, these physicians recommended that he have surgery on both hernia conditions, but he declined surgery on the left side.[2]

In 2001 Mr. Omo-Oorun filed a claim for "internal injury,"[3] which apparently included an inguinal hernia on the left side.[4] A September 2002 rating decision denied service connection for the left inguinal hernia on the basis that "[s]ervice records do not show . . . either treatment for, or

[1] Record (R.) at 165.

[2] *See* R. at 785 (Aug. 2002 medical report—VA consult).

[3] R. at 808.

[4] *See* R. at 765 (Sept. 2002 rating decision).

a diagnosis of a left inguinal hernia."[5] Mr. Omo-Oorun did not appeal that decision and it became final.

Mr. Omo-Oorun now appeals a May 5, 2017, Board decision that declined to reopen his claim for service connection of the left inguinal hernia. He argues that the Board erred in failing to find that his post-2002 lay statements constituted new and material evidence. Additionally, he argues that he was prejudiced by the failure of the hearing officer at his Board hearing to discuss new and material evidence and suggest the submission of evidence on that issue. Because the Court agrees that the hearing officer's error deprived Mr. Omo-Oorun of an opportunity to submit potentially relevant evidence, the Court will set aside the portion of the Board decision declining to reopen the claim for left inguinal hernia and remand that claim for readjudication after an opportunity for Mr. Omo-Oorun to submit additional evidence.

I. ANALYSIS

A. Though Mr. Omo-Ooorun's lay statements pertain to an unestablished fact, they do not constitute new and material evidence that raises a reasonable possibility of substantiating the claim.

"If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim."[6] VA regulation defines "new and material evidence" as follows:

> New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.[7]

"[T]he determination of whether newly submitted evidence raises a reasonable possibility of substantiating the claim should be considered a component of the question of what is new and

[5] R. at 767.

[6] 38 U.S.C. § 5108.

[7] 38 C.F.R. § 3.156(a) (2018).

material evidence, rather than a separate determination to be made after the Board has found that evidence is new and material."[8]

In *Shade*, the veteran's claim for a skin condition was denied because the record lacked both a current diagnosis and a nexus opinion.[9] In an application to reopen the claim, the veteran submitted a medical report containing a current diagnosis, but no nexus opinion.[10] Because the record contained no nexus opinion, the Board declined to reopen the claim. The Court read the regulation in conjunction with the regulation pertaining to the Secretary's duty to assist and concluded that "it could not be said that the remaining element, a nexus between the current diagnosis and the in-service event, could not be established were he provided a VA medical examination."[11] The Court reversed the Board decision and directed that the claim be reopened.

In Mr. Omo-Oorun's case, the new evidence consists of lay statements in an October 2005 statement in support of claim, a November 2006 Notice of Disagreement (NOD), and testimony at a March 2017 Board hearing. Taken together, these statements give an account that physicians discovered two hernias after the parachute accident, "one that's out and the other that's eventually going to come out."[12] Mr. Omo-Oorun further stated that the military physicians advised him that the incipient left hernia would cause him trouble in the future.[13]

Mr. Omo-Ooorun underwent a VA medical examination in December 2011. Though the examiner confirmed the existence of a left inguinal hernia, he concluded that "[s]ince he had examination of the right inguinal hernia [in service] it is most likely that his left side was examined also. Since there is no documentation of left inguinal hernia in 1962, his left-sided inguinal hernia is less likely related to service condition."[14]

Mr. Omo-Oorun argues that these statements explain the absence of any record of a left inguinal hernia in the service medical records, and should have been evaluated together with the other evidence of record. But the Board correctly found that the account of declining surgery on

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[8] *Shade v. Shinseki*, 24 Vet.App. 110, 118 (2010).

[9] *Id.* at 111.

[10] *Id.* at 112.

[11] *Id.* at 120.

[12] R. at 99 (Board hearing testimony).

[13] R. at 111-12 (hearing testimony), 713 (NOD).

[14] R. at 443.

the incipient left inguinal hernia was previously of record, and therefore this evidence was not new and material, but was cumulative. These new statements offer no additional evidence to support an inference that declining surgery would likely prevent any mention of the condition in the service medical records.

Mr. Omo-Oorun suggests that the Board had no evidentiary foundation for treating the absence of medical records on the left inguinal hernia as substantive negative evidence.[15] The Court disagrees. The 2011 examiner stated that physicians would have examined both sides of the abdomen in assessing the injuries sustained in the parachute accident, and further stated that the absence of any mention of a left side hernia condition weighed against any link between the present left inguinal hernia and the in-service injuries. Though the examiner did not explicitly lay out his reasoning in this regard, the Board properly could have inferred that any left-sided hernia condition the physicians discovered in an abdominal examination would have been noted in the service medical records. An examiner is not required to "explicitly lay out the examiner's journey from the facts to a conclusion,"[16] if "the essential rationale for [the] opinion" is evident in the examination report.[17]

Generally, a claimant seeking service connection must establish (1) a current disability, (2) an in-service incurrence or aggravation of a disease or injury, and (3) a nexus or link between the claimed in-service disease or injury and the present disability.[18] Mr. Omo-Oorun further argues that the lay statements reporting that military physicians predicted trouble with the left side hernia pertain to the unestablished fact of nexus between the left inguinal hernia and the in-service injury.

The record shows that lack of nexus was an additional basis for denial of the claim for left inguinal hernia, and hence, an unestablished fact. In a 2012 Statement of the Case (SOC), VA denied service connection for the left inguinal hernia because there was "no evidence showing this [left inguinal hernia] condition is *linked* or related to your military service."[19] In the Board decision

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[15] *See Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) (and cases cited).

[16] *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (per curiam).

[17] *Id.* at 105.

[18] *Holton v. Shelton*, 557 F.3d 1362, 1366 (Fed. Cir. 2010); *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

[19] R. at 395 (emphasis added). It is not clear whether VA reopened the claim in the SOC, but in any event, in order to assess its jurisdiction over the merits of the claim, the Board has an independent duty to determine whether new and material evidence was submitted. *Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996).

here on appeal, the Board stated that "[t]he record is still absent evidence . . . of *a link* between his left inguinal hernia and his active service."[20] It is clear that the principal issue in this case is whether there was an in-service injury pertaining to the left inguinal hernia. But by employing the term "link," VA and the Board raised the issue of medical nexus. The Secretary also argued that the lay statements do not pertain to the nexus element, a requirement for substantiating the claim that he argues is missing.[21]

To the contrary, Mr. Omo-Oorun's lay statements are relevant to the issue of nexus. A lay statement is competent to report a contemporaneous diagnosis.[22] Further, the credibility of these statements is to be presumed when considering reopening.[23] Thus, the Court concludes that these lay statements relate to the unestablished fact of medical nexus.

But that conclusion does not end the analysis. In *Shade*, the Court required reopening because the new evidence of a current disability, when considered with the other evidence of record pertaining to an in-service skin condition, established, in a prima facie sense, two of the three requirements for service connection.[24] The Court further stated that because a VA medical examination, which was lacking in the record, could possibly establish the third element of nexus, the new evidence raised a reasonable possibility of substantiating the claim.[25]

This case is distinguishable from *Shade.* Consideration of the other evidence of record reveals no evidence of an in-service injury pertaining to the present left inguinal hernia. Moreover, VA has furnished a medical opinion concluding that the absence of a left-side injury in the service medical records makes it less likely than not that the present left inguinal hernia is related to service. Thus, there is no likelihood that further VA assistance could change the evaluation of the claim. The service medical records have been obtained, and Mr. Omo-Oorun suggests no further records that need to be obtained. Further, the VA medical examination has already reached a conclusion that encompasses both the in-service injury and nexus requirements. This is not a case

[20] R. at 8.

[21] Secretary's Brief (Br.) at 5-6.

[22] *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

[23] *Justus v. Principi*, 3 Vet.App. 510 (1992).

[24] *Shade*, 24 Vet.App. at 120.

[25] *Id.*

in which the duty to assist might potentially fill the evidentiary gap as to the in-service injury requirement.

Therefore, the Court is unable to say that the Board clearly erred in declining to reopen the claim for left inguinal hernia. In sum, Mr. Omo-Oorun has failed to carry his burden of demonstrating error in the Board decision denying a request to reopen the claim.[26]

B. By failing to discuss new and material evidence and suggest evidence that might be submitted, the Board hearing officer deprived Mr. Omo-Oorun of the opportunity to obtain and submit relevant evidence.

"It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position."[27] The Court has stated that this regulation imposes "two distinct duties" on hearing officers: The duty to fully explain the issues and the duty to suggest that a claimant submit evidence that may have been overlooked.[28]

Here, the Secretary concedes,[29] and the record confirms, that the Board hearing officer never discussed the issue of new and material evidence, much less suggest what sort of evidence might be submitted to fulfill that requirement. The Secretary nevertheless argues that the error was nonprejudicial in view of the December 2011 VA medical examination report.

But evidence pertaining to the issue of in-service injury is not confined to medical evidence. It is possible that Mr. Omo-Oorun could obtain buddy statements, or evidence of contemporaneous communications to friends or relatives relating the fact that he declined recommended surgery on an incipient left-side hernia. It is not even beyond the pale that he might remember the identity of his service physicians or nurses and obtain statements from them. The Board member should have suggested the submission of such evidence.

Though the Court cannot assess the likelihood that Mr. Omo-Oorun could obtain such evidence, or whether it might lead to reopening or substantiating the claim. But "the prejudice arises from . . . the lost additional opportunity to try [to] submit such evidence before the claim

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[26] *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc).

[27] 38 C.F.R. § 3.103(c)(2) (2018).

[28] *Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010).

[29] Secretary's Br. at 6.

was finally adjudicated."[30] Thus, the Court cannot conclude that the hearing officer's error did not prejudice Mr. Omo-Oorun.[31] So the Court will set aside the Board decision denying reopening of the claim for left inguinal hernia and remand the matter to furnish Mr. Omo-Oorun an opportunity to obtain additional evidence on the element of in-service injury pertaining to that condition.

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the portion of the May 5, 2017, Board decision that declined to reopen the claim for left inguinal hernia and REMANDS the matter for an opportunity for Mr. Omo-Oorun to obtain further evidence pertaining to an in-service injury as discussed herein.

DATED: September 7, 2018

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VA General Counsel (027)

[30] *Bryant*, 23 Vet.App. at 499.

[31] *See* 38 U.S.C. § 7261(b)(2) (Court must consider the effect of prejudicial error); *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (appellant has burden of demonstrating prejudice); *Moffitt v. Brown*, 10 Vet.App. 214, 228 (1997) (applying prejudicial-error analysis to an argument that a hearing officer failed to comply with § 3.103(c)(2)).