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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1481

JOHN W. DAVIS, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Veteran John W. Davis served in the Air Force from November 1984 to December 2004. He appeals a February 2017 Board decision that denied his claim for VA compensation for hepatic steatosis, otherwise known as fatty liver disease.¹ He argues that a February 2016 VA examination reasonably raised the theory of service connection for hepatic steatosis as secondary to obesity that was caused by service-connected disabilities, and that the Board erred by failing to address this issue. The Court agrees, vacates the Board decision, and remands the matter for readjudication.

While still in service, Mr. Davis was diagnosed with tuberculosis and treated with isoniazid, an antibiotic used to treat tuberculosis. Soon after he began that treatment, however, elevated liver enzymes were noted, and his use of the drug was discontinued. By November 2002, his liver enzymes were normal, but hepatic steatosis was noted on an abdominal ultrasound. Mr. Davis filed a claim for VA compensation for hepatic steatosis soon after his December 2004 separation from service, asserting that his treatment with isoniazid caused his liver disability. The claim was denied, and he appealed to the Board. Development of his appeal was particularly

¹ The Board decision also denied higher disability ratings for left hydrocele, hiatal hernia, migraine headaches, and asthma with bronchitis. As Mr. Davis does not challenge these determinations, the appeal as to these matters is dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281–86 (2015) (en banc).

prolonged, in part because the Board remanded the matter in 2011 and 2014. During the prolonged appeal period, service connection was established for back, knee, and respiratory disabilities. Mr. Davis also slowly but steadily gained weight, eventually becoming diagnosed with morbid obesity. Medical treatment records attributed his weight gain to a variety of factors, including difficulty exercising because of back and knee pain.²

A February 2016 VA examination found that Mr. Davis's hepatic steatosis was not the result of treatment with isoniazid. R. at 1101. Instead, the examiner attributed Mr. Davis's hepatic steatosis to his obesity. *Id.* The Board relied on that examination to deny VA benefits for the disease, pointing out that there was no probative evidence linking Mr. Davis's hepatic steatosis to isoniazid. R. at 12. The decision did not analyze the question of whether obesity itself could have been due to service or a service-connected condition; however, obesity itself is not a disability that can be compensated by VA. *See Marcelino v. Shulkin*, 29 Vet.App. 155, 156 (2018).

On appeal to this Court, Mr. Davis relies on VA General Counsel Precedent Opinion (VA Gen. Coun. Prec.) 1-2017 to argue that the examination report raised the issue of whether his hepatic steatosis is secondary to his service-connected back, knee, and respiratory disabilities, since they prevented him from exercising and contributed to the development of obesity. In that opinion, VA's General Counsel explained that obesity can be an "intermediate step" between a current disability and a service-connected disability only if the Board finds that (1) the service-connected disability caused the veteran to become obese; (2) the obesity was a substantial factor in causing the claimed secondary disability; and (3) the claimed secondary disability would not have occurred but for obesity caused by the service-connected disability. VA Gen. Coun. Prec. 1-2017, at 9–10. For his part, the Secretary argues that this theory of secondary service connection was not reasonably raised by the record because the evidence appears to show that the veteran developed obesity *after* he was diagnosed with hepatic steatosis and, therefore, the disorder couldn't have been *caused* by obesity.

The salient question, therefore, is whether the theory of secondary service connection for hepatic steatosis, using obesity as an intermediary between it and service-connected back, knee,

² Although Mr. Davis testified during his Board hearing that his respiratory condition contributes to his inability to exercise, R. at 2872, he points to no medical evidence that squarely addresses this allegation. The citations in his brief refer to a VA respiratory evaluation that documented the presence of a restrictive respiratory disorder but did not indicate that it prevents him from exercising. R. at 966-69.

and respiratory disabilities, was raised by the February 2016 examination report. The Court concludes that it was.

While there is no test that has been devised specifically to determine whether an issue has been reasonably raised, the Court has previously observed that if the evidence supporting the potentially raised issue would not meet even the low bar necessary to trigger the duty to obtain a medical opinion under *McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006), any failure by the Board to discuss the issue would not be prejudicial. *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008). In other words, if the evidence concerning the reasonably raised issue meets the low standard for obtaining a medical examination, the Board's failure to discuss the issue was likely prejudicial. *Id.* This provides a useful yardstick in this case.

The Board need only obtain a medical examination "where there is already some evidence in the record of a current disability and some evidence that 'indicates' that the disability 'may be associated' with the claimant's military service" or to a service-connected disability. *McLendon*, 20 Vet.App. at 83. Applying the evidence to the *McLendon* standard, there's no doubt that Mr. Davis has a current disability. There is also no dispute that he is presently service connected for back, knee, and respiratory disabilities. As to an "indication" that these disabilities may cause or aggravate his obesity, which in turn caused hepatic steatosis, the veteran cites several documents of record documenting the fact that his back and knee disabilities resulted in weight gain and that they severely impair or prevent his ability to exercise. Among these is a June 2005 treatment record showing that he gained 25 pounds after treatment for a service-connected knee disability. A May 2008 treatment record noted that he similarly gained weight when a service-connected back injury prevented him from exercising. R. at 2044. And in testimony before the Board, Mr. Davis stated that his back pain limited his ability to exercise. At the other end of the causative chain, the veteran notes that a 2016 VA examiner opined that hepatic steatosis was caused by obesity. R. at 1101. Because the low threshold necessary to obtain a medical examination is met, the Court concludes that the issue of entitlement to service connection for hepatic steatosis as secondary to service-connected disabilities, with obesity as an intermediary, was raised by the record and that the Board erred in failing to address it. *See Robinson*, 21 Vet.App. at 553.

The Secretary contends that Mr. Davis is making assumptions based on the record. For example, the Secretary asserts that obesity isn't an inevitable consequence of difficulty exercising, citing VA Gen. Coun. Prec. 1-2017. He also questions the causative connection between obesity

and the liver condition, based on what he says is the absence of evidence showing that the veteran was obese before hepatic steatosis was diagnosed. (Notably, the Secretary makes this last argument without acknowledging the 2016 VA opinion.) He is, however, conflating an assessment of the theory's merits with the inquiry into whether the issue has been reasonably raised. Perhaps the obesity theory of service connection will not be successful in the end. But right now, the evidence of record suffices to show that it was reasonably raised.

Accordingly, the February 7, 2017, Board decision as to hepatic steatosis is VACATED and the matter is REMANDED for additional development and readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: November 29, 2018

Copies to:

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VA General Counsel (027)