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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3008

DALE K. SNELL, APPELLANT,

V.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Dale K. Snell appeals through counsel a July 13, 2017, Board of Veterans' Appeals decision that denied compensation for a back condition because the condition preexisted service and was not aggravated by service.[1] This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate.[2]

We are asked to review the Board's determination that the presumption of soundness has been rebutted. The veteran argues that the Board erred in finding the Secretary had rebutted the presumption with clear and unmistakable evidence, and, in addition, provided inadequate reasons or bases for its decision. Because this Court finds that the evidence relied on by the Board was not sufficient to rebut the presumption and the Board's discussion is inadequate with respect to Mr. Snell's lay statements, we will reverse the Board's finding that the presumption of soundness had been rebutted and remand the matter for further adjudication.

[1] The Board also addressed service connection for a lung disability due to mustard gas exposure and chronic obstructive pulmonary disease. The veteran raises no contentions of error with respect to these aspects of the Board's decision, and the Court will not address them on appeal. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc) ("[T]his Court like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief.").

[2] 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

I. BACKGROUND

Mr. Snell served from 1975 to 1977.[3] Prior to entering military service, he injured his back on five different occasions.[4] He sought and received medical treatment for all but one of his back injuries, including treatment for back pain and a broken clavicle bone.[5] However, none of the medical records associated with these injuries indicates a preexisting or long-term back condition.[6] Mr. Snell's physical entrance examination noted a prior broken bone but found that he had a "normal" spine and did not record any back problems or recurrent back pain.[7]

During service, Mr. Snell did not seek treatment for any back conditions because an Army recruiter advised him "never to complain about back injuries that [he] sustained before service" and because he knew that doing so would make it "hard to get out on a Med[ical] Discharge."[8] Nevertheless, he states that he suffered back pain during service, including "a lot of pain in basic training" and while working as an auto mechanic.[9]

After service, Mr. Snell injured his back four more times.[10] During two independent medical evaluations for workers' compensation benefits in 1994 and 1998, the veteran detailed his prior medical history and indicated that he has "a longstanding history of a spinal condition dating back to a motor vehicle accident in 1972" after which he experienced low back pain, but that X-rays had shown no signs of a fracture.[11] Claiming that his back condition had continually deteriorated after service, he sought VA disability compensation.

In 2015, a VA examiner concluded that Mr. Snell's disability "clearly and unmistakably" preexisted and was not aggravated by service. The examiner concluded that the "[v]eteran's back problems most likely stem from the injuries he sustained prior to military enlistment."[12] The examiner also noted that "[t]rauma is one cause of degenerative joint changes," and that the veteran

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[3] Record (R.) at 399.

[4] R. at 70-71.

[5] See R. at 7-8.

[6] R. at 70-71.

[7] R. at 536.

[8] R. at 756; 803.

[9] R. at 803.

[10] *Id.*

[11] R. at 845.

[12] R. at 83.

"reported three motor vehicle crashes and one on-the-job fall that resulted in back injuries prior to military entry."[13] With respect to whether Mr. Snell's disability clearly and unmistakably was aggravated by service, the examiner offered that the "Veteran has had progression of his back pain, [Degenerative Joint Disease (DJD)] and [Degenerative Disc Disease (DDD)] which was most likely accelerated by his multiple traumas although one cannot rule out the role of natural progression."[14]

In the July 13, 2017, decision here on appeal, the Board found that the veteran is presumed to have entered service in sound condition because no preexisting conditions were noted on his entrance examination. However, the Board found the presumption had been rebutted because there was clear and unmistakable evidence that the back condition both preexisted and was not aggravated by service. Specifically, the Board concluded that the veteran's back disability clearly and unmistakably preexisted service because, although the veteran's 1975 entrance examination was normal and silent for back complaints, ample lay and medical evidence show that the veteran's back disability originated in 1972.[15] As to aggravation, the Board concluded that the veteran's back disorder was clearly and unmistakably not aggravated by service based upon a review of the veteran's service treatment notes and lack of treatment during service for back problems.[16] The veteran now appeals the Board's decision.

II. ANALYSIS

Mr. Snell's arguments require the Court to address whether the presumption of soundness has been rebutted. Title 38, U.S.C. § 1111 provides that,

> every veteran shall be taken to be 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 existed before acceptance and enrollment and was not aggravated by service.[17]

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[13] *Id.*

[14] *Id.*

[15] R. at 6-7.

[16] R. at 8.

[17] 38 U.S.C. § 1111.

Therefore, where, as here, no preexisting medical condition is noted upon entry into service, a veteran is presumed to have been sound in every respect.[18] This statutory provision is known as the "presumption of soundness."[19]

If the presumption of soundness applies, the Secretary may rebut it by showing clear and unmistakable evidence that an injury or disease was both preexisting and not aggravated by service.[20] Rebutting the presumption of soundness is difficult. Clear and unmistakable evidence means evidence that "cannot be misinterpreted and misunderstood, i.e., it is 'undebatable.'"[21] This is an onerous standard.[22]

Once the presumption of soundness attaches, "the burden of proof remains with the Secretary on both the preexistence and the aggravation prong; it never shifts back to the claimant." [23] Therefore, the Secretary must provide affirmative evidence that clearly and unmistakably shows that a disability both preexisted and was not aggravated by service.[24] With respect to aggravation, the Secretary can meet this burden by showing clear and unmistakable evidence that the disability did not increase in severity during service or that any increase was due to the natural progression of the disease.[25] In making this showing, the Secretary may not rest on the notion that the record contains insufficient evidence of aggravation. Rather, "VA must rely on affirmative evidence to prove that there was no aggravation."[26] The Court reviews "de novo a

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

[19] *Horn v. Shinseki*, 25 Vet.App. 231, 234 (2012).

[20] *See* 38 U.S.C. § 1111 (stating that a veteran will not be presumed to have entered service in sound condition "where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by service"); *see also Wagner*, 370 F.3d at 1096.

[21] *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (quoting *Vanerson v. West*, 12 Vet.App. 254, 258 (1998) (relying on the plain meaning of the phrase)).

[22] *Id*.

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

[24] *Id*.

[25] *Id*.

[26] *Id*. at 239-40 (explaining that, in the presumption of soundness context, the Board's reliance on the absence of evidence of worsening of a claimed disability in the SMRs "effects an impermissible burden shift" by "requir[ing] the appellant to generate postservice medical evidence to prove the aggravation that is to be presumed under section 1111").

Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness."[27]

The presumption of soundness ordinarily operates to satisfy the second element of service connection without further proof; that is, if the presumption is not rebutted, it "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."[28] However, failure to rebut the presumption of soundness does not automatically lead to a finding of service connection. Even when the presumption applies, the appellant must still demonstrate a current disability and a nexus between his current disability and the injury or disease in service.[29]

A. Preexistence

1. 2015 Medical Examination

Mr. Snell argues that the 2015 VA examination does not provide clear and unmistakable evidence sufficient to rebut the presumption of soundness because the examiner's rationale states only that the veteran's back problems "most likely stem from the injuries he sustained prior to military enlistment."[30] In *Kinnaman v. Principi*, the Court found that a physician's report finding it "probabl[e] that the [condition] began earlier" was too equivocal to provide clear and unmistakable evidence that the condition pre-existed service.[31] Similarly, in *Cotant v. Principi*, the Court found that a physician's use of the terms, "it is impossible to say," "could have," "more likely," and "not significantly aggravated" was far from the kind of unconditional evidence necessary to meet the very demanding clear-and-unmistakable evidence.[32] In *Horn*, the Court found that a bare conclusion, such as a checked box on a Medical Evaluation Board report, with no accompanying analysis or medical explanation does not provide enough information to rebut the presumption of soundness.[33]

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[27] *Id*. at 236 (citing *Miller v. West*, 11 Vet.App. 345, 347 (1998)).

[28] *Id*. at 236.

[29] *See Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009); *Dye v. Mansfield*, 504 F.3d 1289, 1292-93 (Fed. Cir. 2007) (affirming this Court's finding that the presumption of soundness does not eliminate the need to demonstrate a causal connection between a veteran's current condition and his in-service injury); *see also Horn*, 25 Vet. App. at 236-37.

[30] R. at 83.

[31] 4 Vet.App. 20, 27 (1993).

[32] 17 Vet.App. 116, 131 (2003).

[33] 25 Vet. App. at 240.

Here, the 2015 medical examiner concluded that "the veteran's back condition[] clearly and unmistakably preexisted service."[34] However, the remainder of the examination report does not support this bare conclusion. The examiner's rationale notes that Mr. Snell was involved in preservice accidents, observes that "[t]rauma is one cause of degenerative joint changes," and states that "back problems most likely stem from the injuries he sustained prior to military enlistment."[35] Under *Kinnaman* and *Cotant*, these equivocal statements do not rise to the level of clear and unmistakable evidence needed to rebut the presumption of soundness.[36] Furthermore, as in *Horn*, without an "analysis or medical explanation" that addressed clear and unmistakable evidence, the examination provides insufficient information for the Board to conclude that the preservice back injuries are evidence that Mr. Snell's current back condition clearly and unmistakably preexisted service.[37]

2. Lay Statements

Despite the Board's error in relying on the 2015 examination for clear and unmistakable evidence, the Court finds no error in the Board's determination that Mr. Snell's own statements demonstrated that his back disability clearly and unmistakably preexisted service. The Board explained that "[t]he record is replete with lay assertions and clinical evidence indicating that the . . . current back disability had its origins following a pre-military service 1972 motor vehicle accident."[38] The Board noted that "the veteran admitted to suffering back injuries from 1972 and 1973 motor vehicle accidents," and that preservice treatment records support the veteran's statements that he was in car accidents.[39]

The record supports the Board's determination. Mr. Snell informed an examiner in 1994 that he began suffering back pain after his 1972 accident. [40] He stated that he had a "longstanding

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[34] R. at 82.

[35] R. at 83.

[36] *See Cotant*, 17 Vet.App. at 131; *Kinnaman*, 4 Vet.App. at 27.

[37] *See Horn*, 25 Vet.App. at 240; *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) ("A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review,' nor in compliance with statutory requirements." (quoting *Int'l. Longshoremen's Assoc. v. Nat'l Mediation Bd*., 870 F.2d 733, 735 (D.C. Cir. 1989))).

[38] R. at 7.

[39] *Id*.

[40] R. at 807.

history of a spinal condition" that began before service.[41] The veteran also informed VA that his claim was for aggravation of a preexisting injury and that he had joined the military because he "couldn't maintain gainful employment" as a result of his preservice back problems.[42] Because "the presumption of soundness [may be] rebutted by clear and unmistakable evidence consisting of appellant's own admissions . . . of a preservice history of [medical] problems,"[43] and Mr. Snell is competent to relate the observable facts that his back pain began before service and was so great that he could not remain employed,[44] the Court finds that the Board did not err in finding the veteran's own statements provided clear and unmistakable evidence that his back disability preexisted service.[45]

B. Aggravation

1. 2015 Medical Examination

Mr. Snell argues that the 2015 VA examination does not provide clear and unmistakable evidence that his preexisting condition was not aggravated during service sufficient to rebut the presumption of soundness and that the Board therefore erred in relying on it for that purpose. The 2015 examiner provided the following explanation for finding that Mr. Snell's disability clearly and unmistakably was not aggravated by service: "Veteran has had progression of his back pain, DJD, and DDD which was most likely accelerated by his multiple traumas although one cannot rule out the role of natural progression."[46]

The Court agrees with Mr. Snell that the 2015 examination does not provide clear and unmistakable evidence of lack of aggravation. Although the examiner found that the veteran's back pain had most likely been accelerated by his post-service injuries, this does not preclude the possibility that his condition was also aggravated by service. Furthermore, the terms "most likely" and "cannot rule out" is the kind of language that the Court in *Kinnaman* and *Cotant* found too equivocal to constitute clear and unmistakable evidence.

2. Absence of In-Service Complaints of Back Pain

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[41] *Id*.

[42] R. at 756.

[43] *Doran v. Brown*, 6 Vet. App. 283, 286 (1994).

[44] *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (a veteran is competent to provide lay evidence regarding those matters which are within his personal knowledge and experience).

[45] *See Doran*, 6 Vet. App. at 286.

[46] R. at 83.

Mr. Snell correctly argues that the Board erred in finding that "[t]he absence of in-service complaints of back pain in the service treatment records demonstrates there was no increase in disability caused by service."[47] In the presumption of soundness context, the Board's reliance on the absence of evidence of worsening of a claimed disability in the service medical records "effects an impermissible burden shift" by "requir[ing] the appellant to generate postservice medical evidence to prove the aggravation that is to be presumed under section 1111," rather than requiring the Secretary to prove lack of aggravation by clear and unmistakable evidence.[48]

Furthermore, contrary to the Board's statement, there *is* evidence of back pain during service. Mr. Snell claims to have suffered "a lot of pain in basic training" and while working as an auto mechanic.[49] The Board did not specifically address this evidence or explain whether it was credible. Although the Board generally dismissed Mr. Snell's lay statements because he lacks the competency to opine as to medical matters, whether the veteran suffered pain is a matter within his personal knowledge and experience that he is able to communicate.[50] Because Mr. Snell is presumed to have entered service in sound condition, his account of suffering back pain during service is directly relevant to the Board's discussion of the presumption of soundness and the Board erred by not specifically addressing it.[51]

Although the Board also stated that private examination reports from 1994 and 1998 bolstered its conclusion that the veteran did not have back pain during service, it is not clear why either report supports the Board's conclusion. The Board noted that, in the 1994 report, Mr. Snell stated that "his spinal condition originated in 1973 and that he did not have flare-ups until the mid-1980s," but the 1994 examiner only records the 1973 accident and 1980s flare-ups.[52] The examiner does not, as the Board suggests, conclude that there was no back pain between these events, or that there was no pain during service. And, although the Board found that "the [v]eteran denied having been *treated* in the army for back problems" in the 1998 report, this finding does not conflict with

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[47] R. at 8.

[48] *Horn*, 25 Vet.App. at 239-40.

[49] R. at 803 ("Trying to do mechanic work really aggravated my back.").

[50] *Washington*, 19 Vet.App. at 368.

[51] *See Horn*, 25 Vet.App. at 236 (holding that "as a matter of law, . . . the presumption of soundness [could be] . . . rebutted by clear and unmistakable evidence consisting of [the] appellant's own admissions . . . of a preservice [disability]."; *Doran*, 6 Vet.App. at 286.

[52] R. at 8-9.

Mr. Snell's testimony that he began *suffering* back pain during service but chose not to seek treatment. Contrary to the Board's implication, neither report expressly finds that there was no back pain during service.[53]

Thus, in relying on the 1994 and 1998 private examination reports, the Board was not relying on affirmative evidence but on the absence of such evidence to show clearly and unmistakably that there was no increase in disability during service. "[T]he absence of an entry in a record may be evidence against the existence of a fact if it would ordinarily be recorded."[54] However, the Board cannot rely on the absence of evidence as substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact."[55] Rather, "the Board must first establish a proper foundation for drawing inferences against a claimant from an absence of documentation."[56]

Here, the Board provides no discussion why the lack of notation as to back pain during service in the 1994 and 1998 examiners' reports should be considered substantive negative evidence. It is not evident on the face of either report whether the examiner would have been expected to opine as to the presence of in-service back pain, because both reports were generated for purposes of workers' compensation benefits.[57] The 1994 report concludes that Mr. Snell's back pain was not related to a work injury.[58] The 1998 document is a report of medical treatment that addressed the then-current state of the veteran's back.[59] Neither examiner was asked to opine as to whether there were back problems during service, and it is not apparent from the record why either examiner would have had reason to address that topic. Before relying on the absence of evidence in these examinations as evidence that there were no back problems during service, the Board should have established a proper foundation. The Court therefore agrees with the appellant that the

[53] *See* R. at 807 (1994 examination report); 845 (1998 examination report).

[54] *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (citing Fed. R. Evid. 803(7)).

[55] *Horn*, 25 Vet.App. at 239.

[56] *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015).

[57] *See* R. at 807; 828-29.

[58] R. at 807.

[59] R. at 845.

Board erred in relying on the "absence of in-service complaints of back pain" to determine that his back disorder was clearly and unmistakably not aggravated by service.[60]

Because the Secretary did not provide clear and unmistakable evidence that Mr. Snell's disability both preexisted and was not aggravated by service, the Court finds that the Board erred in finding that the presumption of soundness had been rebutted. Although some of the Board's errors in this respect ordinarily would warrant remand, reversal is the appropriate remedy in this case because VA has had ample opportunity to develop his claim. As was explained in *Horn*, if, after having had the chance to develop the claim, VA has not produced enough evidence to rebut the presumption, "the Court's role is to basically assess whether the Secretary has succeeded in carrying his burden."[61] Because VA has had the chance to develop Mr. Snell's claim by obtaining a medical examination on multiple occasions and has failed to do so, the Secretary has not succeeded in obtaining clear and unmistakable evidence sufficient to rebut the claim.[62] Thus, the Court will reverse the Board's presumption of soundness determination and direct the Board to enter a finding that the presumption of soundness applies and has not been rebutted.

This does not end our inquiry, however, because, even when the presumption applies and has not been rebutted, the appellant still must demonstrate the existence of a current disability and a nexus between his current disability and the injury or disease in service.[63] The Board did not address whether there is a connection between service and any current back disability and did not make any findings of fact in this regard. Remand is warranted for the Board to do so in the first instance. [64]

II. CONCLUSION

On consideration of the foregoing, the determination in the July 13, 2017, Board decision that the presumption of soundness was rebutted is REVERSED. The remainder of the Board's July

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[60] Appellant's Brief (Br.) at 13.

[61] *Horn*, 25 Vet.App. at 243.

[62] *See* R. at 603.

[63] *See Holton*, 557 F.3d at 1367; *Dye*, 504 F.3d at, 1292-93(affirming this Court's finding that the presumption of soundness does not eliminate the need to demonstrate a causal connection between a veteran's current condition and his in-service injury); *see also Horn*, 25 Vet.App. at 236-37.

[64] *See Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (when a court of appeals reviews a lower court's decision, it may remand it if the previous adjudicator failed to make findings of fact essential to the decision).

2017 decision here on appeal is SET ASIDE and the matter is REMANDED for further adjudication.

DATED: December 11, 2018

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