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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3739

SCOTT F. NOVAK, APPELLANT,

v.

ROBERT L. WILKIE,
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 Scott F. Novak served the Nation in the United States Navy from December 1994 to April 1995.¹ He appeals an August 16, 2017, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for asthma.² The question in this appeal, which is timely and over which the Court has jurisdiction,³ is whether the Board erred in analyzing whether the presumption of soundness had been rebutted. Because the Board failed to provide an adequate statement of reasons or bases for its decision, the Court will set aside the Board's decision and remand the matter for further proceedings consistent with this decision.

¹ Record (R.) at 511.

² The Board remanded the issue of entitlement to service connection for a right knee disability. R. at 8-10. This matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

³ *See* 38 U.S.C. §§ 7266(a), 7252(a).

I. ANALYSIS

The Board denied service connection for appellant's asthma because it found that "the weight of the evidence is against a finding that the Veteran's preexisting asthma permanently worsened in service."⁴ Appellant argues that the Board failed to apply the correct standard for determining whether the presumption of soundness had been rebutted⁵ and failed to provide an adequate statement of reasons or bases for its decision.⁶

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.⁷ When no preexisting medical condition is noted upon entry into service, VA presumes the veteran was sound in every respect.⁸ This statutory provision of 38 U.S.C. § 1111 is referred to as the "presumption of soundness,"⁹ which ordinarily satisfies the second *Shedden* requirement without further proof when a disability is noted in service.¹⁰ However, this presumption may be rebutted.¹¹

If the presumption of soundness applies, the burden falls on VA to rebut the presumption with clear and unmistakable evidence that an injury or disease that manifested in service both preexisted service and was not aggravated by service.¹² Appellant concedes that his asthma existed before service,¹³ so the parties dispute only the second, aggravation prong. But this aggravation prong should not be confused with the presumption of aggravation as described in 38 U.S.C. § 1153 and its implementing regulation, 38 C.F.R. § 3.306.¹⁴ Although these provisions contain similar language, it is important to note that the presumption of soundness places the burden on

⁴ R. at 3, 8.

⁵ Appellant's Brief (Br.) at 7-11.

⁶ *Id.* at 13-17.

⁷ See *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); see also *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303(a) (2018).

⁸ *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).

⁹ *Horn v. Shinseki*, 25 Vet.App. 231, 234 (2012).

¹⁰ *Id.* at 236.

¹¹ *Id.*

¹² See 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b) (2018); see also *Wagner*, 370 F.3d at 1096.

¹³ Appellant's Br. at 5 (citing R. at 45).

¹⁴ *Horn*, 25 Vet.App. at 238.

the Secretary to prove no aggravation, while the presumption of aggravation places the burden on the veteran to prove aggravation.¹⁵ And this is where in this case the Board's decision becomes problematic.

To satisfy its burden of showing no aggravation under the second prong of the presumption of soundness test, VA must establish by clear, unmistakable, and affirmative evidence that the preexisting condition did not increase in disability during service or that any increase in disability came about because of the natural progression of the condition.¹⁶ The Court reviews de novo whether the Board applied the correct legal standard,¹⁷ as well as "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."¹⁸

But the thoroughness of the Board's decision controls the Court's ability to review these questions. The Board's findings and conclusions on material issues of fact and law require a written statement of its reasons or bases.¹⁹ 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."²⁰ If the Board fails to do so, remand is appropriate.²¹

Here, the Board did not provide an adequate statement of reasons or bases because it conflated (or at least it appears to have conflated) the presumption of soundness's aggravation prong and the presumption of aggravation. First and most notably, in its analysis, the Board explained the presumption of aggravation standard and directly cited section 1153, as well as two cases concerning the wrong provisions.²² The Board did not describe or cite the presumption of soundness, much less the aggravation prong, in its analysis. However, the Board cited both sections 1111 and 1153 and their respective implementing regulations in its conclusion of law,²³ which indicates possible conflation of the standards. Second, the Board found and mentioned twice that

¹⁵ *Id.* Compare 38 U.S.C. § 1111, and 38 C.F.R. § 3.304, with 38 U.S.C. § 1153, and 38 C.F.R. § 3.306 (2018).

¹⁶ *Horn*, 25 Vet.App. at 235; see 38 U.S.C. § 1153; *Wagner*, 370 F.3d at 1096.

¹⁷ 38 U.S.C. § 7261(a)(1), (a)(3)(A); see *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc).

¹⁸ *Horn*, 25 Vet.App. at 235.

¹⁹ 38 U.S.C. § 7104(d)(1); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order).

²⁰ *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

²¹ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

²² R. at 5.

²³ R. at 3.

"[t]he weight of the evidence is against a finding that the Veteran's preexisting asthma permanently worsened in service."²⁴ This phrasing in terms of not finding *aggravation*, as opposed to finding *no aggravation*, suggests to the Court that the Board may have improperly applied the presumption of aggravation and placed the burden on appellant instead of VA. Third, the Board stated that "[t]he Veteran asserts that his asthma was aggravated by service."²⁵ This statement also suggests the Board may have made its decision based on an understanding that appellant bore the burden of proving aggravation. Fourth, the Board uses the phrase "negative finding of aggravation."²⁶ Given the other confusing statements, the Court is unclear whether the Board meant this phrase to describe a finding of no aggravation (presumption of soundness) or a failure to find aggravation (presumption of aggravation). Fifth, the Board stated that "the examiner indicated that the Veteran's history of post-service asthma treatment [did] not support a finding of aggravation."²⁷ Once again, this ambiguous phrasing suggests the possible application of the wrong presumption.

Because the Court cannot say with certainty that the Board applied the correct standard in reaching its decision denying service connection for asthma, this ambiguity and possible conflation of relevant legal rules frustrate judicial review. Therefore, remand is appropriate in this case.²⁸

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.²⁹ On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.³⁰ The Board must consider any such additional evidence or argument submitted.³¹ The Board must also proceed expeditiously.³²

²⁴ R. at 3, 8.

²⁵ R. at 5.

²⁶ R. at 7.

²⁷ *Id.*

²⁸ *Tucker*, 11 Vet.App. at 374.

²⁹ *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

³⁰ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

³¹ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

³² 38 U.S.C. §§ 5109B, 7112.

II. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Court SETS ASIDE the August 16, 2017, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: December 20, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)