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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3564

DON A. HIX, 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*: Navy veteran Don A. Hix appeals through counsel an August 28, 2017, Board of Veterans' Appeals decision denying a compensable rating for service-connected cardiac arrhythmia,[1] including an abnormal electrocardiogram (EKG), and denying service connection for a heart disability separate and distinct from cardiac arrhythmia. Record (R.) at 2-12. The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in denying a compensable rating for cardiac arrhythmia and service connection for a heart disability separate and distinct from cardiac arrhythmia. Because the VA examinations on which the Board relied to deny these claims were inadequate and did not comply with a prior Board remand, the Court will set aside the August 2017 Board decision and remand the matters.

[1] Cardiac arrhythmia is a variation from the normal rhythm of a heartbeat. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 133 (32d ed. 2012).

I. FACTS

Mr. Hix served on active duty in the U.S. Navy from July 1964 to April 1970. R. at 293. A May 1966 service treatment record noted an undiagnosed heart disease; that an EKG showed bigeminy[2] and premature ventricular contractions with a supraventricular[3] focus; and recommended inpatient treatment. R. at 398. Later that month, the veteran was admitted to the hospital for cardiac arrhythmia and weight loss. R. at 402. The examiner noted that Mr. Hix remained asymptomatic during his stay and that repeated examination failed to reveal previously noted irregular heartbeats. R. at 403. Upon discharge in June 1966, his diagnosis was revised to "medical evaluation for specified problem; no disease found." *Id*. A July 1968 service treatment record noted irregular rhythm. R. at 396. His March 1970 separation examination indicated a normal heart. R. at 404.

In an April 1977 VA hospital record, a physician noted that an EKG showed some nonspecific abnormalities, that a diagnosis could not be determined, and that the veteran should be reevaluated in three months. R. at 957. In July 1977, a cardiac clinician found "dysrhythmia and atrial tachycardia, possibly, with no other findings."[4] R. at 1186.

In October 1977, a VA regional office (RO) granted service connection for cardiac arrhythmia and assigned a noncompensable rating under diagnostic code (DC) 7099 (abnormal EKG). R. at 1182-83. Mr. Hix did not appeal this decision and it became final.

In August 2011, the veteran filed a claim for service connection for an irregular heartbeat. R. at 868. In December 2011, the RO informed him that, because he was service connected for an abnormal EKG, it must consider his claim as an increased rating claim. R. at 801.

In December 2011, a VA examiner noted that, in service, Mr. Hix had an onset of sporadic episodes, such as his heart fluttering or beating too fast, but there was no etiology identified for these episodes and they would spontaneously resolve. R. at 810. The examiner noted the veteran's 1970s hospitalizations, stating that there were no cardiac interventions or surgeries and that he was discharged without medication. R. at 810-11. Mr. Hix reported that since the 1970s

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[2] A bigeminy is an arrhythmia. DORLAND'S at 214.

[3] Supraventricular means situated superior to, or above, the ventricles, which pertains to a cavity in the heart. *Id*. at 1806, 2048.

[4] Dysrhythmia is disturbance of heart rhythm. DORLAND'S at 582. Atrial tachycardia is a rapid heartbeat in the atrium (chamber) of the heart. *Id*. at 175, 1867.

hospitalizations, he had not had routine care from a cardiologist or generalist; any further hospitalizations; or chest pain, palpitations, or fluttering or rapid heartbeat. R. at 811. He denied any current cardiac conditions. *Id*. He stated that his wife, who is a nurse, checks his pulse and, at rest, it was 50 to 60 beats per minute.[5] *Id*.

The examiner noted that Mr. Hix had had intermittent cardiac arrhythmia, with no episodes in the past year. R. at 813-14. The examiner stated that these episodes were documented in his 1966 service treatment records (bigeminy) and 1977 VA hospitalization records (atrial tachycardia), but that no episodes were reported in recent years. R. at 815. During physical testing, the examiner noted that the veteran's heart rate was 60 beats per minute and the rhythm was irregular. R. at 818. After diagnostic testing, the examiner stated that a December 2011 EKG showed "sinus bradycardia rate 57 with left anterior fascicular block."[6] R. at 820.

The examiner concluded that Mr. Hix did not have acute, chronic, or current cardiac arrhythmia. R. at 823. She stated that the cardiac condition for which he required hospitalization in the 1970s had resolved without recurrence and that he reported being asymptomatic since that hospitalization. R. at 823-24. The examiner opined that what the veteran experienced in 1977 and prior hospitalizations—i.e., atrial tachycardia (rapid heartbeat) and bigeminy (arrhythmia)—and what was currently shown on his EKG—i.e., mild sinus bradycardia (slow heartbeat)—were separate and unrelated conditions. R. at 824. The examiner stated that the current EKG showed no evidence of the condition for which he was service connected. *Id*. She also concluded that "[c]urrent EKG findings represent a different/new diagnosis from the previous already service-connected diagnosis of 'abnormal EKG' . . . and these findings are not a continuation of natural progression of the previously diagnosed abnormal EKG/arrhythmia." *Id*.

In December 2011, the RO denied a compensable rating for service-connected abnormal EKG and denied service connection for cardiac arrhythmia. R. at 780. In July 2012, Mr. Hix filed a Notice of Disagreement as to this decision, R. at 759; in September 2012, the RO issued a

[5] The normal resting heart rate for an adult ranges from 60 to 100 beats per minute; individuals with better cardiovascular fitness may have a lower heart rate, such as 40 beats per minute. Mayo Clinic, https://www.mayoclinic.org/healthy-lifestyle/fitness/expert-answers/heart-rate/faq-20057979, last visited January 10, 2019.

[6] Bradycardia is a slow heartbeat. DORLAND'S at 245. A fasciculus is a small bundle of nerve, muscle, or tendon fibers. *Id*. at 682.

Statement of the Case continuing to deny the compensable rating and service connection, R. at 743; and in January 2013, the veteran perfected his appeal, R. at 626.

During a January 2013 decision review officer hearing, Mr. Hix testified that his heart rate had always been excessively low; that beginning in 1977, he began to experience a racing heart rate, but that it did not happen as much as it used to; and that currently he gets easily fatigued. R. at 601. He stated that when he was released from the hospital, both in 1966 and 1977, he was advised that he had an irregular heartbeat. R. at 602.

In an April 2015 decision, the Board recharacterized Mr. Hix's claims as a compensable rating for cardiac arrhythmia, including an abnormal EKG, and service connection for a heart disability separate and distinct from cardiac arrhythmia. R. at 466, 476; *see* R. at 2 (the appealed August 2017 Board decision also characterizes the claims in this manner). The Board remanded the heart condition claims for further development, finding that a new examination was warranted because, since the veteran's last examination in December 2011 for arrhythmia, he claimed that his disability had worsened and there were outstanding records to be obtained. R. at 472 (Board also noting that a heart disability separate and distinct from his service-connected condition may exist). Specifically, the Board instructed the VA examiner to:

> [I]dentify any heart disability separate and distinct from the [v]eteran's cardiac arrhythmia. The examiner is asked to opine as to whether it is at least as likely as not . . . that any heart disability identified [] was incurred or aggravated by his active duty service.
>
> For any negative opinion, the examiner must identify the medical reasons as to why the evidence does not provide sufficient proof of a relationship between the [v]eteran's current identified disabilities and his period of military service.

R. at 475. The Board further instructed the examiner to "determine the nature and severity of cardiac arrhythmia . . . [and] identify what symptoms, if any, the [v]eteran currently manifests that are attributable to his cardiac arrhythmia" and provide a complete rationale for all opinions. R. at 476.

During an October 2015 VA examination, Mr. Hix reported that his heart would "'run away' at times and at other times seem like it is going very slow." R. at 179. The examiner noted that the veteran had had intermittent cardiac arrhythmia, specifically supraventricular tachycardia documented by EKG, but that there were no episodes in the past year. R. at 180. During physical testing, the examiner noted that the veteran's heart rate was 58 beats per minutes and the rhythm

was regular. R. at 181. After diagnostic testing, the examiner noted that an October 2015 EKG showed an arrhythmia, specifically sinus bradycardia (slow heart beat) with left anterior fascicular block. R. at 182.

The examiner opined that the veteran had a diagnosis of a "heart disability separate and distinct from cardiac arrhythmia that is less than likely incurred in or caused by (the) cardiac arrhythmia to include an abnormal EKG during service." R. at 183. As rationale, the examiner stated that the December 2011 diagnosis of sinus bradycardia with left anterior fascicular block had not changed, as confirmed by the October 2015 EKG; the veteran had no other heart diagnosis; and he was not currently being seen by a primary care provider and had not been evaluated in the recent past by a cardiologist. R. at 183.

In the August 2017 decision on appeal, the Board denied service connection for a heart disability separate and distinct from cardiac arrhythmia and denied a compensable rating for cardiac arrhythmia. R. at 12.

II. ANALYSIS

Mr. Hix argues that the Board erred when it (1) denied service connection for a heart disability separate and distinct from cardiac arrhythmia, because it relied on VA examinations that were inadequate and that did not comply with the Board's prior remand order; and (2) denied a compensable rating for cardiac arrhythmia, because it violated its duty to assist and provided inadequate reasons or bases for its determination. Appellant's Brief (Br.) at 10-26. The Secretary disputes the veteran's arguments and urges the Court to affirm the August 2017 Board decision. Secretary's Br. at 9-23.

A VA medical examination or opinion is adequate when it "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012); *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Although a medical examination report does not need to "explicitly lay out the examiner's journey from the facts to a conclusion" to be adequate, the Court must be able to discern the examiner's reasoning to sanction the Board's reliance on it. *Monzingo*, 26 Vet.App. at 105; *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (the Court has repeatedly held that the Board cannot rely on an examination report unless it contains sufficient detail and rationale to permit the Board to make a fully informed decision on a claim). The Court reviews the Board's

finding that a VA medical examination was adequate for clear error. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

A remand by the Board confers on the claimant a legal right to compliance with the remand order. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Substantial compliance with the remand order, not strict compliance, is required. *Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010); *Dyment v. West*, 13 Vet.App. 141, 147 (1999).

The Court finds that the October 2015 VA examination was inadequate and did not comply with the Board's prior remand, and that the Board therefore erred in relying on it to deny service connection for a heart disability separate and distinct from cardiac arrhythmia. The April 2015 Board remand order instructed the VA examiner to:

> [O]pine as to whether it is at least as likely as not . . . that any heart disability identified [] was incurred or aggravated by his active duty service.
>
> For any negative opinion, the examiner must identify the medical reasons as to why the evidence does not provide sufficient proof of a relationship between the [v]eteran's current identified disabilities and his period of military service.

R at 475. The October 2015 VA examiner opined that the veteran had a diagnosis of a heart disability separate and distinct from cardiac arrhythmia that is less than likely incurred in or caused by cardiac arrhythmia, including an abnormal EKG in service. R. at 183. As rationale, the examiner stated that the December 2011 diagnosis of sinus bradycardia had not changed, as confirmed by the October 2015 EKG; the veteran had no other heart diagnosis; and he was not currently being seen by a primary care provider and had not been evaluated in the recent past by a cardiologist. *Id*.

The examiner provided inadequate rationale for her opinion. The examiner implied that Mr. Hix's current diagnosis of sinus bradycardia existed since at least December 2011, when he was initially diagnosed with that condition. However, she offers no explanation for why that condition was not related to service, either directly or secondarily. Rather, the examiner only notes that the veteran had no other heart diagnoses and was not recently seen by a cardiologist or generalist. R. at 183. She does not discuss how those facts weighed into, or support, her opinion.

Because the October 2015 opinion does not provide sufficient rationale for its conclusion, or properly inform the Board of the examiner's judgment on the issue of service connection, it is inadequate. *See Monzingo*, 26 Vet.App. at 105. Further, it does not comply with the April 2015 remand order, which instructed the examiner to identify the medical reasons why the evidence

does not provide sufficient proof of a relation between the current identified disability and service. R. at 475; *see Stegall*, 11 Vet.App. at 271. Accordingly, the Board was not permitted to rely on it. *See id*.; *Nieves-Rodriguez*, 22 Vet.App. at 304.

Nevertheless, the Board found that the October 2015 opinion, as well as the December 2011 VA opinion, had "adequate reasons and bases to bolster the conclusion," and relied on those opinions to deny service connection for sinus bradycardia. R. at 11. Given the discussion above, the Board clearly erred in relying on the October 2015 opinion. *See Monzingo*, 26 Vet.App. at 105; *D'Aries*, 22 Vet.App. at 104. In addition, the December 2011 VA opinion did not cure any deficiencies in the October 2015 opinion. In fact, in April 2015 the Board ordered a new VA examination, in part, because the December 2011 opinion indicated that there was a heart disability separate and distinct from service-connected cardiac arrhythmia, but did not opine whether any such condition was related to service. *See* R. at 472, 475 (Board noting that a condition separate from cardiac arrhythmia may exist and then instructing the VA examiner on remand to opine whether any identified heart disability was incurred in or aggravated by service).

The Court acknowledges the Secretary's argument that a new examination was warranted not because the December 2011 examiner's opinion was inadequate as to the issue of nexus, but rather because Mr. Hix reported that his condition had worsened and there were outstanding records. Secretary's Br. at 22. However, although the Board did not expressly state that the December 2011 opinion was inadequate as to nexus, it would not have instructed the examiner on remand to consider this matter if it had not implicitly found that the opinion did not sufficiently address the issue of nexus. This lack of nexus opinion thus necessitated a portion of the October 2015 examination and that opinion in turn failed to provide adequate rationale or comply with the prior remand. Therefore, the Board clearly erred in relying on these two opinions to deny service connection for a heart disability separate and distinct from cardiac arrhythmia. *See Monzingo*, 26 Vet.App. at 105; *D'Aries*, 22 Vet.App. at 104; *Stegall*, 11 Vet.App. at 271.

Accordingly, the Court will remand the claim for service connection for a heart disability separate and distinct from cardiac arrhythmia for the Board to obtain a new VA examination regarding this matter. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations or where the record is otherwise inadequate);

38 C.F.R. § 4.2 (2018) ("[I]f the [examination] report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").

Similarly, the Court finds that the October 2015 opinion did not adequately address the issue of cardiac arrhythmia. In the April 2015 remand, the Board instructed the examiner to "determine the nature and severity of cardiac arrhythmia . . . [and] identify what symptoms, if any, the [v]eteran currently manifests that are attributable to his cardiac arrhythmia" and provide a complete rationale for all opinions. R. at 476. As stated, the October 2015 examiner opined that Mr. Hix had a heart disability separate and distinct from cardiac arrhythmia that is less than likely incurred in or caused by cardiac arrhythmia, because, in part, he had no other heart diagnosis. R. at 183. It is unclear whether the examiner's conclusion conflated the issues of cardiac arrhythmia and a separate heart condition, or failed to address cardiac arrhythmia at all. Further, without an explanation, simply noting no other heart diagnosis does not provide a complete rationale for the examiner's opinion. Therefore, the October 2015 opinion does not comply with the April 2015 Board remand and is inadequate, and the Board erred in relying on it to deny a compensable rating for service-connected cardiac arrhythmia. *See Monzingo*, 26 Vet.App. at 105; *D'Aries*, 22 Vet.App. at 104; *Stegall*, 11 Vet.App. at 271. Accordingly, the Court will also remand this matter. *See Tucker*, 11 Vet.App. at 374.

Given this disposition, the Court need not address Mr. Hix's additional arguments that could not result in a remedy greater than remand. *See Best v. Principi*, 15 Vet.App. 18, 19 (2001). The veteran is free on remand to submit additional evidence and argument, including those raised in his briefs; he has 90 days from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also* 38 U.S.C. § 7112 (a remand must be performed in an expeditious manner); *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the foregoing, the August 28, 2017, Board decision is SET ASIDE and the matters are REMANDED.

DATED: January 23, 2019

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