

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3304

NICHELLE A. HUDSON, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Nichelle A. Hudson, through counsel appeals an August 15, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for a low back disability. Record (R.) at 1-18. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm that part of the Board's August 15, 2017, decision that denied entitlement to benefits for degenerative disc disease (DDD) of the low back. The Court will vacate the Board's decision with respect to entitlement to benefits for back pain secondary to a service-connected embedded needle fragment and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from August 1985 to August 1990, R. at 408, and then in the Air National Guard until August 1993, R. at 1114. There is no dispute that, during a June 1986 procedure to remove her wisdom teeth, the appellant was injected with Demerol in her hip, R. at 1119, and that the needle broke and lodged under her skin, R. at 45.

The record contains an August 1992 Air National Guard medical certificate, which the appellant signed indicating that, to the best of her knowledge, she had "no medical defect, disease[,] or disability that would disqualify [her] for full military duty." R. at 947. In September 1992, the appellant wrote to her superiors that she was making frequent trips to the doctor to evaluate the foreign object lodged in her back and that, due to the pain caused by the object, she was not as fit as service required. R. at 1113. Accordingly, she sought a medical leave of absence. *Id.* In November 1992, the appellant wrote to her superiors asking to resign from the Air National Guard for medical reasons. R. at 992. The appellant's commander excused her from future unit training assemblies rather than discharge her; she was discharged as scheduled upon the expiration of her service obligation in August 1993. R. at 990.

The appellant filed a claim for benefits for low back pain in September 2009. R. at 1582-92. At that time, she reported that she had experienced pain in her right lower back and hip since the in-service injection that left a fragmented needle behind. R. at 1563. A VA regional office (RO) denied the claim in April 2010. R. at 1515-19. The appellant filed a Notice of Disagreement (NOD) with that decision, R. at 1510-11, in which she stated that, in September 1992, a private x-ray revealed that the source of her pain was the needle fragment. R. at 1511. She further wrote that, although she had experienced intermittent pain since the injury in 1987, the pain became worse during her period of service in the Air National Guard until, ultimately, she felt she could no longer serve. *Id.* The appellant did not perfect her appeal of the April 2010 RO decision, and it became final. *See* R. at 1450.

In September 2011, the appellant sought to reopen her claim for benefits for a low back disability. R. at 1450. A December 2012 RO decision is unclear as to whether the claim was reopened and denied or whether the RO determined that reopening was not warranted. *See* R. at 1261-67. The appellant filed an NOD with that decision, R. at 1252-54, and ultimately appealed to the Board, R. at 1220-21. In May 2015, the Board determined that new and material evidence had been submitted to reopen the claim and remanded the matter for additional development. R. at 1100-10. The Board ordered VA to provide the appellant a medical examination and directed the examiner to consider the following evidence:

- (1) a service treatment record that documented oral surgery in June 1986; (2) a September 1992 request for medical leave; (3) a September 2011 treatment record that documented a broken needle in the buttock from the military; (4) a January 2012 private treatment record that documented low back pain since 1987 to 1988

when a needle broke while in service; (5) [November 2011 private x-ray examination findings; (6) the [appellant's] lay statements of pain that had its onset during service and continued thereafter; and (7) the [appellant's] statements regarding an injection that she received for pain after dental surgery in June 1986.

R. at 1108. The Board advised the examiner that the appellant was "competent to attest to all matters of which she has first-hand knowledge, including her observable symptoms." *Id.* In that regard, the Board stated: "If there is a medical basis to support or doubt the history provided by the [appellant], the examiner should provide a fully reasoned explanation." *Id.*

In December 2015, the appellant underwent a VA back and hip examination. R. at 92-104. The examiner indicated that he reviewed the appellant's service medical records, service personnel records, VA medical records, and private medical records. R. at 92-93. With respect to the appellant's back condition, the examiner opined that it was not related to service, explaining: "[She] has no associated radiculopathy, myelopathy, tenderness to palpation, or decrease in [range of motion]. Essentially the right buttock pain that she has is localized and there is no evidence that she had any injury to her back while in service." R. at 94. As for the appellant's hip condition, the examiner concluded that, although there was no documentation in the service medical records that a needle broke off under the appellant's skin, based on her report and "associated specific pain" in the right location, it was at least as likely as not that the embedded broken needle was the cause of the hip pain. R. at 95.

The appellant also underwent a VA muscle injuries examination in June 2016.¹ R. at 69-75. The examiner indicated that she had reviewed the appellant's claims file and VA's computerized records system. R. at 69-70. In the portion of the examination report labeled "Diagnosis," in response to the question, "Does the [v]eteran now have or has she/he ever been diagnosed with a muscle injury," the examiner checked "no." R. at 70. Later, in response to the question "Does the [v]eteran have any other pertinent physical findings, complications, conditions, signs[,] or symptoms related to any conditions listed in the Diagnosis Section above," the examiner checked "yes," and wrote: "Noticed tenderness towards right side lower part of sacrum. No tenderness over [the] right side il[i]ac crest." R. at 72. The examiner noted that a May 2014 x-ray of the appellant's hip revealed "[i]ncidental finding of needle fragment foreign body superior to

¹ The examination took place in late May but, perhaps because the "entry date" is listed as June 3, the Board and the parties refer to it as the June 2016 examination. R. at 69. For consistency's sake, the Court will follow suit.

the right il[i]ac crest." *Id.* She diagnosed the appellant with "lower back pain towards right sacral area secondary to degenerative arthritis." R. at 74. She then wrote: "Her gluteal muscle exam[ination] is unremarkable. No tenderness over [the] il[i]ac crest. Her subjective symptom of right buttock pain is less than likely as not caused by or a result of broken needle." *Id.* The examiner offered the following rationale:

1. Clinical exam[ination; the appellant's] expression of pain location and x[-]ray correlating with [DDD] of lumbosacral spine.
2. [Magnetic resonance image] of lumbosacral spine shows [DDD] and spondylosis [at the] L4-L5 and L5-S1 [vertebrae].
3. Location of needle fragment/metallic wire is superior to right iliac crest. Examination of this area is unremarkable.
4. Service records are silent for fragment of needle in right buttock area.

R. at 75. Later that month, the RO granted benefits for an "incidental needle fragment foreign body superior to the right iliac crest, claimed as a hip condition," and assigned a noncompensable disability rating. R. at 57; *see* R. at 57-61. The appellant did not appeal that decision and it became final.² *See* R. at 3.

In August 2017, the Board issued the decision on appeal, denying the appellant's claim for benefits for a low back disability. This appeal followed.

II. ANALYSIS

A. Parties' Arguments

On appeal, with respect to DDD, the appellant argues that the Board erred in failing to consider whether the embedded needle fragment aggravated that condition and in relying on medical examinations that did not address that question. Appellant's Brief (Br.) at 19, 22, 26-27. With respect to low back pain that is separate from DDD, she argues that the Board provided inadequate reasons or bases for rejecting her statements regarding the progression of her back condition. *Id.* at 8-16. She also contends that the Board erred in finding the VA medical examinations adequate because "the opinions failed to answer the relevant medical questions," *id.*

² In the decision on appeal, the Board determined that the appellant's hip disability claim was "no longer in appellate status" because she did not appeal either the disability rating or the effective date assigned. R. at 3. The appellant does not challenge this finding on appeal.

at 17, namely whether her low back pain was caused or aggravated by the service-connected embedded foreign object, *id.* at 17-21. Finally, the appellant asserts that the Board failed to "adequately consider whether the relevant low back disability was [her] *low back pain*, and whether that low back pain was caused by, or secondary to, an in-service injury." *Id.* at 22. In that regard, the appellant cites the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) recent decision in *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018), which held that "'pain alone, without an accompanying diagnosis or identifiable condition,' can constitute a 'disability' because 'pain in the absence of a presently-diagnosed condition can cause functional impairment.'" *Id.* at 23 (quoting *Saunders*, 886 F.3d at 1368). The Secretary disputes these arguments and urges the Court to affirm the Board decision. Secretary's Br. at 8-26.

B. Law

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2018). Service connection may be established on a secondary basis for a current disability that is either proximately caused by or aggravated by a service-connected disability. 38 C.F.R. § 3.310(a), (b) (2018); *see Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc). As the appellant notes, the Federal Circuit recently held that "'disability' in [section] 1110 refers to the functional impairment of earning capacity, not the underlying cause of said disability." *Saunders*, 886 F.3d at 1363.

The Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record, *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), and the Court has jurisdiction to review whether the Board erred in failing to consider such theories, *Barringer v. Peake*, 22 Vet.App. 242, 244 (2008).

It is the Board's responsibility as factfinder to determine the credibility and weight to be given to the evidence. *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Board must analyze the credibility and probative value of the material evidence, account for the evidence that it finds to be persuasive or unpersuasive,

and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

C. Discussion

1. Degenerative Disc Disease

The appellant asserts that the Board erred in finding the December 2015 and June 2016 VA medical opinions adequate because those opinions do not speak to whether her DDD was aggravated by the service-connected embedded needle fragment. Appellant's Br. at 19. She further asserts that the Board erred in failing to address the theory that the embedded needle aggravated her DDD. *Id.* at 22, 26-27. The Secretary counters that the Board was not required to address whether the embedded fragment aggravated DDD because that theory was not raised by the appellant or the evidence, Secretary's Br. at 25-26, and that the appellant has abandoned the issue of whether DDD is otherwise related to her service, *id.* at 10, 24.

Because the appellant, in her initial brief, did not argue that the issue of aggravation of DDD was explicitly raised below or provide any explanation for how the evidence of record reasonably raised that issue, *see Robinson*, 21 Vet.App. at 553, the Court concludes that she has not met her burden of demonstrating that the Board erred in failing to address this theory, *see Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion"); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Further, the Court declines to address the argument raised for the first time in the appellant's reply brief that a 2011 letter raised this theory. *See* Appellant's Reply Br. at 3; *see also Carbino v. Gober*, 10 Vet.App. 507, 511

(1997) (declining to review argument first raised in appellant's reply brief), *aff'd sub nom. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."); *Untalan v. Nicholson*, 20 Vet.App. 467, 471 (2006); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990).

Finally, because the appellant has not demonstrated that the Board was required to address the possibility of aggravation of her DDD, she also cannot show that she was prejudiced by the Board's reliance on examination reports that she asserts did not address aggravation. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). Given that these are the only arguments raised by the appellant with respect to DDD, the Court will affirm the Board's decision only as to its finding that benefits were not warranted for DDD.

2. Pain as a Disability

The appellant argues that the Board did not consider the possibility that her low back pain (separate from any pain due to DDD) is secondary to the service-connected embedded needle fragment, relied on examinations that did not address this theory of entitlement, and improperly discounted supportive lay statements. Appellant's Br. at 8-22. In light of the Federal Circuit's decision in *Saunders*, which overturned precedent that pain alone could not constitute a disability, the Court will exercise its discretion to remand for the Board to address these arguments in the first instance. *See Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000). The Court does not find error on the part of the Board in this respect, however, as *Saunders* had not been decided at the time of the Board decision on appeal. Nevertheless, *Saunders* interpreted the statutory term "disability" for the purposes of 38 U.S.C. § 1110, holding that pain may constitute a disability, even without an identifiable underlying pathology. 886 F.3d at 1368. "[T]o establish a disability, the veteran's pain must amount to a functional impairment," *id.* at 1367, which the Federal Circuit defined as the inability of the body or a constituent part of it "'to function under the ordinary conditions of daily life including employment,'" *id.* at 1363 (quoting 38 C.F.R. § 4.10 (emphasis omitted)). In other words, pain, alone, can qualify as a disability where it diminishes the body's ability to function, even where it is not diagnosed as connected to a current underlying condition. *Id.*

As the appellant argues, she first sought benefits for "pain in the right lower back area." Appellant's Br. at 23 (quoting R. at 1588). Although she has been diagnosed with DDD of the spine that the Board determined is not related to service, a finding that she does not challenge, the Board's summary of the evidence reflects that she has contended throughout her appeal that she has experienced *low back pain* since the in-service injury for which she is service connected, R. at 9-12; *see, e.g.*, R. at 801, 1113, 1511, 1563, and she contends that this pain is separate from the pain caused by her DDD, *see* Appellant's Br. at 19 (citing R. at 1312). The appellant also points to evidence of record reflecting that her low back pain causes her to walk with a limp and use a back brace, and causes difficulty in performing her daily activities, including her job. *See id.* at 24 (citing R. at 777, 1305, 1450).

Whether the appellant suffers from low back pain *other than as a result of her diagnosed disabilities*; if so, whether it rises to the level of a "disability"—that is, whether it amounts to a functional impairment of earning capacity, *Saunders*, 886 F.3d at 1367-68; and whether any such disability is related to the in-service injury—is a question for the Board to address in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"); *see also* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."). Although the Secretary argues that the Board addressed the possibility that the appellant's *back pain* is caused by the embedded needle fragment, *see* Secretary's Br. at 23-24 (citing R. at 17), it is not clear that the Board did so. *See* R. at 8-9 ("[T]he [appellant] has been diagnosed with . . . [DDD] and spondylosis. Consequently, the determinative issue is whether or not this disability is attributable to her military service."). Further, given that *Saunders* was decided after the Board issued the decision on appeal, remand is necessary to permit the Board to determine what effect, if any, that case has on the appellant's claim. *See George v. Wilkie*, __ Vet.App. __, __, 2019 WL 97237, at *6 (Jan. 4, 2019) ("[T]he application of judicial retroactivity in civil cases is bound by principles of res judicata and limited to those cases open on direct review."); *see also Disabled Am. Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000) ("The new interpretation of a statute can only retroactively effect decisions still open on direct review, not those decision[s] that are final." (citing *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993))).

As a final matter, the Court notes that the Secretary appears to concede error in the Board's finding regarding the appellant's credibility, but argues that it pertains only to the Board's discussion of entitlement to benefits for DDD. *See* Secretary's Br. at 6, *id.* at n.2, *id.* at 11-14. The Secretary acknowledges, however, that "[a] negative credibility determination can create a significant obstacle to a veteran seeking service connection. Not only should a Board's decision generally be read as a whole, . . . but one might reasonably suspect a credibility determination in one part could affect the whole decision." *Id.* at 14 (citation omitted). Thus, because the appellant has not demonstrated error in the Board's denial of benefits for DDD and the Court is remanding, for the Board to adjudicate in the first instance, only the matter of entitlement to benefits for back pain secondary to a service-connected embedded needle fragment, the Court does not reach the appellant's arguments regarding the adequacy of the Board's credibility determination. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). To the extent that the Board's credibility finding regarding DDD in the decision on appeal may have "affect[ed] the whole decision," Secretary's Br. at 14, the appellant is not bound by that finding and may present additional evidence and argument on that issue on remand of the matter of entitlement to benefits for back pain, along with any other additional evidence or argument necessary to present her case. The Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, that part of the Board's August 15, 2017, decision that denied entitlement to benefits for DDD of the low back is **AFFIRMED**. The Board's decision with respect to entitlement to benefits for back pain secondary

to a service-connected embedded needle fragment is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: February 21, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)