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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-0557

JOSE F. FRANQUI, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Army veteran Jose F. Franqui served on active duty from February 1971 to February 1973, from January 1991 to July 1991, from May 2000 to January 2001, and from January 2003 to June 2004, with additional service in the Army National Guard of Puerto Rico. He experiences recurring joint pain in his elbows, knees, and wrists, which he attributes to his Gulf War service in 2004. Since May 2006, he has received varying diagnoses for his conditions. In September 2015, the Board remanded Mr. Franqui's claims to obtain an examination that determined whether the claimed conditions may be an undiagnosed illness or a medically unexplained chronic multisymptom illness (MUCMI) warranting presumptive service-connection.¹

In the February 8, 2017, decision on appeal, the Board relied on a May 2016 VA examination to determine that Mr. Franqui's recurring joint pain was not due to an undiagnosed illness or MUCMI, and to deny service connection for bilateral elbow, knee, and wrist disabilities.² Mr. Franqui now contests the adequacy of the May 2016 VA examination and argues that the Board failed to ensure substantial compliance with its September 2015 remand order. Mr. Franqui

¹ 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a)(1)(i)-(ii) (2018).

² Record (R.) at 2-16.

also argues that the Board failed to consider whether the joint pain that he has experienced, in and of itself, can be attributed to an undiagnosed illness. Mr. Franqui does not challenge the Board's denial of entitlement to service connection for the aforementioned conditions on a direct basis; the Court thus deems the issue abandoned and will dismiss that portion of the appeal.³

Because the May 2016 VA examination did not substantially comply with the terms of the Board's September 2015 remand order, the Court will set aside the February 2017 Board decision denying presumptive service connection for a disability of the elbows, knees, and wrists and remand the matter for further consideration

I. ANALYSIS

Mr. Franqui argues that the May 2016 VA examination obtained after the Board's September 2015 remand is inadequate because the examiner failed to address the inconsistencies in the medical evidence of record. Among other things, he asserts that the examiner failed to reconcile his past diagnoses and instead gave him new diagnoses for his wrist, elbow, and knee conditions.⁴ As a result, he contends, the Board failed to ensure substantial compliance with its prior remand order and its decision denying his claims was not fully informed. The Secretary argues to the contrary, asserting that the May 2016 VA examiner was not instructed to discuss the prior examinations and urges the Court to affirm the Board's decision.

"[A] remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders."⁵ Although the Secretary is required to comply with remand orders, it is substantial compliance, not strict compliance, that is required.⁶ If an examination is obtained on remand, it must be adequate.⁷ A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations,"⁸ and "describes the disability, if any, in sufficient detail so that the Board's

³ See *Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal).

⁴ Appellant's Brief (Br.) at 6.

⁵ *Stegall v. West*, 11 Vet.App. 268, 271 (1998).

⁶ See *Dyment v. West*, 13 Vet.App. 141, 146-47 (1999), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002); *Evans v. West*, 12 Vet.App. 22, 31 (1998).

⁷ *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

⁸ *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

'evaluation of the claimed disability will be a fully informed one.'"⁹ The report must contain clear conclusions and supporting data, as well as "a reasoned medical explanation" connecting the data and conclusions.¹⁰

Whether a medical opinion is adequate is a finding of fact that the Court reviews under the "clearly erroneous" standard.¹¹ 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."¹² Further, a Board remand confers on the claimant a legal right to compliance with the remand order, and the Board errs when it fails to ensure such compliance.¹³

In its September 2015 remand order, the Board explained that the medical evidence of record reflected inconsistent diagnoses for Mr. Franqui's elbow, knee, and wrist conditions. Specifically, in May 2006 a VA examiner noted that x-rays revealed osteopenia¹⁴ in the wrists, degenerative spurring and mild degenerative joint disease (DJD) in the elbows, and degenerative enthesopathy¹⁵ in the knees but diagnosed each extremity as unremarkable.¹⁶ In January 2012, a VA examiner diagnosed arthralgia¹⁷ in the wrists, elbows, and knees.¹⁸ In August 2012, a VA examiner diagnosed mild DJD in the elbows and degenerative spurring in the knees and reported that there was no wrist condition.¹⁹ Thus, the September 2015 Board remand stated that "another examination [was] needed to clarify whether the claimed conditions should be considered as undiagnosed illnesses and/or medically unexplained chronic multisymptom illnesses."²⁰ More specifically, the Board directed VA to schedule Mr. Franqui for an examination that evaluated his

⁹ *Id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted).

¹⁰ *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

¹¹ *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008).

¹² *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¹³ *Stegall v. West*, 11 Vet.App. 268, 271 (1998).

¹⁴ "Osteopenia" is "any decrease in bone mass below the normal." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1347 (32d ed. 2012) [hereinafter DORLAND'S].

¹⁵ "Enthesopathy" is a "disorder of the muscular or tendinous attachment to bone." *Id.* at 627.

¹⁶ R. at 1284-85.

¹⁷ "Arthralgia" is "pain in a joint." DORLAND'S at 150.

¹⁸ R. at 867, 875, 885.

¹⁹ R. at 695, 707, 714.

²⁰ R. at 554.

knees, elbows, and wrists and it instructed the examiner to address (1) whether the symptoms for each condition are "attributable to a known clinical diagnosis or do they result from undiagnosed illnesses"; (2) [f]or each diagnosed condition, "is it at least as likely as not that it had its onset during [Mr. Franqui's] service" or is related to Mr. Franqui's service; and (3) [f]or each diagnosed condition "is it at least as likely as not that it is a [MUCMI] without conclusive pathophysiology or etiology, or is it a disease with a clear and specific etiology and diagnosis?"²¹

In May 2016, Mr. Franqui underwent the requested examination, during which he was diagnosed with osteoarthritis and DJD in his elbows and knees and a strained wrist with no pain.²² After an evaluation of Mr. Franqui's conditions, the examiner stated that he had reviewed the conflicting medical evidence and opined that the

conditions in [Mr. Franqui's] knees (degenerative joint disease), wrists (a strain), and elbow joints (degenerative joint disease) are not Gulf War related (not related to any environmental hazards). Conditions are of clear and specific known etiology, and cause. Actual mentioned conditions are due to repetitive use and due to aging.^[23]

In its decision on appeal, the Board explained that the May 2016 VA examination was adequate, substantially complied with its remand instructions, and resolved the inconsistencies within the record.²⁴ Proceeding to the merits of the decision, the Board recognized the discrepancy in the medical evidence about the differing diagnoses for the bilateral elbow and knee conditions but placed greater weight on the May 2016 VA examiner's opinion because the examiner provided his opinion after reviewing the conflicting medical evidence of record.²⁵ The Board also relied on the May 2016 VA examination, among other evidence of record, to find that the preponderance of the evidence established that Mr. Franqui's bilateral elbow and knee conditions have been attributed to DJD, a known diagnosis, since 2006 and concluded that service connection for either condition as an undiagnosed illness was therefore not warranted.²⁶ The Board then concluded that the weight of the evidence was against finding that Mr. Franqui had an undiagnosed illness before

²¹ R. at 555-56.

²² R. at 91, 101, 117, 132.

²³ R. at 132.

²⁴ R. at 3, 6.

²⁵ R. at 18.

²⁶ R. at 17.

2006 because any symptoms experienced during that time were due to the development of DJD.²⁷ Regarding the wrist condition, the Board relied on the May 2016 VA examiner's opinion that Mr. Franqui's complaints of wrist pain were attributed to a diagnosis of wrist strain.²⁸ The Board concluded that, because the weight of the evidence reflects that Mr. Franqui's conditions are specifically diagnosed and medically explained, he does not have an undiagnosed illness or MUCMI and, thus, presumptive service connection for those conditions is not warranted.

Although the May 2016 VA examiner answered the questions set forth in the September 2015 remand order and stated that he had reviewed the conflicting evidence of record, the examiner failed to provide any rationale for those answers or his ultimate opinion. The Court has held that an examiner may not merely list facts and conclusions with no reasoned explanation connecting the two,²⁹ but this is precisely what the examiner did here. The Board concluded that the May 2016 VA examiner's opinion resolves any inconsistencies of record, largely in part because the examiner stated that the purpose of his opinion was to resolve conflicting opinions, but, it is not clear from a review of the examinations or the Board's explanations that any inconsistencies have been resolved. For example, regarding the wrist conditions, the Board explained that the May 2016 VA opinion could be interpreted differently, but the "most reasonable interpretation . . . is that [Mr. Franqui's] prior complaints of wrist pain were due to strains rather than to any undiagnosed illness."³⁰ However, the May 2016 examiner does not explain why wrist strain is the likely diagnosis when the record does not reflect any history of wrist strain and the past medical examinations found osteopenia, arthralgia, and general pain in the wrists.

Moreover, regarding the elbows and knees, the Board stated that "the most natural reading and synthesis of the 2016 examiner's reports is that the diagnosed conditions existed throughout the appeal period and were first diagnosable with the first imaging studies."³¹ It is unclear from the examiner's opinion that this was the conclusion drawn. He merely provided diagnoses in parentheses next to each extremity without explaining how the past medical evidence of record could lead to the diagnoses he provided. Thus, it is unclear how the Board could be fully informed,

²⁷ R. at 19.

²⁸ R. at 23.

²⁹ *Nieves-Rodriguez*, 22 Vet.App. at 301.

³⁰ R. at 7.

³¹ R. at 18.

which frustrates judicial review. Additionally, the examiner fails to explain how he determined that each of the conditions at issue all have a clear and known etiology and why Mr. Franqui's conditions were most likely caused by repetitive use and aging. The Court therefore concludes that the Board clearly erred when it found that VA substantially complied with the terms of its September 2015 remand order and relied on the May 2016 VA examination to deny presumptive service connection.³²

The Court will not now address Mr. Franqui's remaining arguments.³³ But Mr. Franqui is free to submit those arguments, along with additional evidence and argument, on remand,³⁴ which the Board must consider.³⁵

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the February 8, 2017, Board decision and REMANDS the matter for readjudication consistent with this decision.

DATED: February 28, 2019

Copies to:

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³² See *D'Aries*, 22 Vet.App. at 104.

³³ See *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

³⁴ See *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

³⁵ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).