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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1449

CLARENCE HOPKINS, APPELLANT,

v.

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

Before HAGEL, *Senior Judge*.¹

MEMORANDUM DECISION

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

HAGEL, *Senior Judge*: Clarence Hopkins appeals through counsel a February 15, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to VA disability benefits for chronic kidney disease, claimed as secondary to service-connected bronchial asthma and allergic rhinitis. Mr. Hopkins's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties, who are both represented by counsel, neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Board provided adequate reasons or bases for its determination that the record contained no competent evidence supporting a nexus between Mr. Hopkins's kidney disease and his military service, Record (R.) at 7, the Court will affirm the Board's decision.

I. RELEVANT FACTS

Mr. Hopkins served on active duty in the U.S. Air Force from June 1965 to February 1968. R. at 1943, 2033. His service personnel records state that on June 26, 1967, a piece of luggage was

¹ Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 03-19 (Jan. 15, 2019).

lost that had been carrying his field personnel and health records. R. at 1022. Mr. Hopkins's service discharge document notes that all service records dated before June 26, 1967, were lost. R. at 1943.

The remaining service records show that, in September 1967, Mr. Hopkins was evaluated for fitness for duty due to asthma. R. at 1016-17. Testing completed during this medical examination showed that his lymphatic system was within normal limits. The treating physician also stated that the results of his urinalysis were also within normal limits. He was diagnosed as having allergic asthma.

At his October 1967 service discharge examination, results of a urinalysis revealed a specific gravity of 1.027, and the examiner found that his endocrine system was clinically normal. R. at 1018. A January 8, 1968, narrative summary report stated that results of a urinalysis revealed a specific gravity of 1.086, and the physician gave a diagnosis of asthma. R. at 1050. An undated urinalysis report from Lowry Air Force Base revealed a specific gravity of 1.031. R. at 1043. Additional treatment records from August 1967 to February 1968 do not contain any diagnoses related to Mr. Hopkins's kidneys.

In March 1968, a VA regional office granted VA disability benefits for asthma. The rating decision states that Mr. Hopkins's "service clinical records prior to August 1967 have been lost." R. at 1865

In December 1995, Mr. Hopkins was diagnosed with a kidney disability. In February 2011, he sought an increased disability rating for his asthma condition and VA benefits for a kidney condition and a nervous disorder, claiming that both were related to his asthma condition on a secondary basis. A March 2011 medical opinion noted that there were no findings of renal insufficiency during service, and the examiner opined that Mr. Hopkins's kidney disease was likely due to his hypertension. R. at 1508. The examiner opined that neither hypertension nor kidney disease had manifested during Mr. Hopkins's active service. *Id.*

In May 2011, the VA regional office denied Mr. Hopkins's claim for chronic kidney disease, and Mr. Hopkins appealed this decision to the Board. After further development, in February 2015 the Board remanded the issue of entitlement to VA disability benefits for chronic kidney disease, claimed as secondary to service-connected bronchial asthma and allergic rhinitis, for VA to obtain a supplemental medical opinion.

Pursuant to the Board's February 2015 remand, VA obtained another medical opinion in April 2017. R. at 607-08. The VA examiner opined that medical science does not link allergic

vasomotor rhinitis or asthma to chronic kidney disease or end stage renal disease. R. at 608. The examiner discussed Mr. Hopkins's kidney biopsy report, and she opined that the diagnosis was fibrillary glomerulopathy. *Id.* She opined that most cases of fibrillary glomerulopathy are idiopathic, although some are associated with chronic lymphocytic leukemia or B-cell lymphomas. *Id.* She opined that it is less likely than not that Mr. Hopkin's's chronic kidney disease is related to his bronchial asthma or allergic vasomotor rhinitis. *Id.*

In February 2018, the Board issued the decision on appeal finding that Mr. Hopkins's available service medical records are "entirely negative for complaints or findings of a kidney disability," and denying entitlement to VA disability benefits for chronic kidney disease. R. at 5, 7.

II. ANALYSIS

Mr. Hopkins argues that the Board failed to provide an adequate statement of reasons or bases to support its finding that he had no history of renal insufficiency during service. Appellant's Brief at 5. He notes that "[t]he medical records from January 1968 show evidence which is favorable to the [v]eteran's kidney abnormality manifesting during service" because the records document "specific gravity readings of 1.086 and 1.031[,] which show abnormality [was] present during the January 1968 admission." *Id.* at 11-12 (citing (R. at 1043, 1050). Mr. Hopkins asserts that specific gravity readings above 1.030 are considered "abnormal" for urinalysis and that readings above 1.010 indicate "renal insufficiency." *Id.* at 9-10.

To be entitled to receive VA disability benefits, Mr. Kelly must demonstrate that the record before VA contains medical or lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); 38 C.F.R. § 3.303 (2018). Continuity of symptoms provides an alternative method of establishing the second and third elements required to establish service connection. *See Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) ("Continuity of symptomatology may be established if a claimant can demonstrate (1) that a condition was 'noted' during service; (2) evidence of postservice continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the postservice symptomatology." (citing *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997))).

The Board's assessment of the credibility and weight to be given to evidence is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). A determination is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In addition, the Board must provide a statement of the reasons or bases for its determinations, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the 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); *Gilbert*, 1 Vet.App. at 57.

After review of the Board decision and the record on appeal, the Court does not find Mr. Hopkins's arguments convincing. The Board plausibly found that the medical evidence of record weighed against Mr. Hopkins's claim, and it provided adequate reasons or bases for its decision. First, the Board found that Mr. Hopkins's available service medical records are "entirely negative for complaints or findings of a kidney disability," and, in support, explained that

[i]n September 1967, the [v]eteran was hospitalized for evaluation of his fitness for duty in light of his asthma. At that time, he underwent a physical examination which was negative for findings of a kidney disability. His lymphatics were within normal limits as was laboratory testing. At his October 1967 military separation medical examination, all pertinent systems, including genitourinary and endocrine, were normal. Laboratory testing was also normal.

R. at 5. Indeed, a review of the service medical records cited by Mr. Hopkins that record specific gravities of 1.086 and 1.031 shows that the only diagnosed condition at that time was asthma. R. at 1043, 1050. There are no indications from the service records that Mr. Hopkins's treating physicians found that the specific gravity readings were an indication of renal insufficiency or of any other condition or disease of the kidney. *See* R. at 1028-50.

Next, the Board discussed the relevant medical examinations of record, which were conducted in 2011 and 2017, and found them "highly probative." R. at 8. The Board noted that both examiners reviewed Mr. Hopkins's claims file and medical history. *Id.* The Board then explained that the 2011 examiner diagnosed Mr. Hopkins with "chronic kidney disease, pre-dialysis, secondary to poorly controlled hypertension with need for mineral and hormonal/hematologic intervention." R. at 6. The Board further explained that the 2011 examiner "noted that the [v]eteran's nephrologist believed that his renal insufficiency was due to nephrosclerosis caused by a decade of untreated hypertension" and that "[t]he [v]eteran's blood pressure was not elevated in the service treatment records and the [v]eteran was never treated for hypertension or a kidney issue during service." *Id.* The Board then discussed the 2017 VA examination, noting that the examiner found that both the 2011 VA examiner and Mr. Hopkins's nephrology clinic notes indicated that Mr. Hopkins's chronic kidney disease was "secondary to poorly controlled hypertension" and therefore not related to service or a service-related disability. *Id.*

As a result, the Board concluded that Mr. Hopkins's kidney disease was not related to his military service because (1) kidney disease was not present during military service; (2) "the post-service record on appeal shows that kidney disease was not diagnosed until 1995, more than 25 years after service;" (3) both VA examination reports found that the veteran's kidney disease was less likely than not related to his active service or any incident therein; and (4) "[t]here is no competent evidence to the contrary." R. at 7.

The Court therefore concludes that the Board provided adequate reasons or bases for its determination. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. The Court notes that, in his reply brief, Mr. Hopkins cites to several medical articles from the Internet for support to his argument that the specific gravity readings from service were abnormal. Appellant's Reply Brief at 2-3. These articles were submitted for the first time on appeal and are not part of the record before the Board. The Court is precluded by law from considering the articles because they were not physically or constructively part of the record before the Board. *See* 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); *Bell v. Derwinski*, 2 Vet.App. 611, 612-13 (1992); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990); *see also Kyhn v. Shinseki*, 716 F.3d 572, 577 (Fed. Cir. 2013) (holding that section 7252(b) prohibits the Court from relying on extra-record evidence to decide disputed factual issues). Mr. Hopkins has pointed to no support in the record for his theory that his service records contain

urinalysis results demonstrating kidney disease or renal insufficiency. Without a factual predicate in the record, Mr. Hopkins's argument amounts to nothing more than impermissible lay hypothesizing, which the Court will not consider. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.").

Mr. Hopkins also argues in his reply brief that the Secretary wrongly characterized the service medical records recording the "abnormal" specific gravity readings as lay evidence. Appellant's Reply Brief at 2-5. But Mr. Hopkins misunderstands the Secretary's argument. The Secretary argues that Mr. Hopkins's theory is not supported by any evidence of record and therefore represents his attorney's unqualified theorizing regarding the evidence of record. *See* Secretary's Brief at 8. The Secretary does not argue, as Mr. Hopkins alleges, that the service records themselves are lay evidence.

Mr. Hopkins also argues that "[i]n cases where, as here, the appellant's [service medical records] are lost," the Board has a heightened duty to provide adequate reasons or bases for its rejection of any materially favorable evidence. Appellant's Brief at 8. He asserts that the Board failed to meet that heightened duty in its treatment of the service records documenting the specific gravity readings of 1.031 and 1.086. *Id.* at 8-9. Mr. Hopkins is correct that such a heightened duty exists. *See Washington v. Nicholson*, 19 Vet.App. 362, 371 (2005) (when veteran's records are presumed lost or destroyed, Board is "under a heightened duty to consider and discuss the evidence of record and supply well-reasoned bases for its decision"); *Kowalski v. Nicholson*, 19 Vet.App. 171, 179 (2005).

Although the Board did not address this issue, the Court concludes that any error on the part of the Board in failing to discuss the heightened duty in this case is not prejudicial. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to take due account of the rule of prejudicial error); *Sanders v. Shinseki*, 556 U.S. 396, 409 (2009) (holding that harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he suffered prejudice as a result of VA error). Because, as discussed above, Mr. Hopkins has pointed to no support in the record for his theory that his lost or present service records contain urinalysis results demonstrating kidney disease or renal insufficiency, remand for the Board to discuss the

heightened duty could not help Mr. Hopkins to establish his claim. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (remand is unnecessary when it "would result in this Court's unnecessarily imposing additional burdens on the [Board and the Secretary] with no benefit flowing to the veteran").

Finally, Mr. Hopkins asserts that "[t]he [e]xaminer[] failed to provide an adequate examination" because he "failed to consider evidence that was favorable to the [v]eteran." Appellant's Brief at 5. He argues that the VA examiner should have accounted for the specific gravity readings from January 1968 and that the failure to do so renders the examination report inadequate. *Id.* at 5, 9-10. This represents the entirety of Mr. Hopkins's argument that a VA examination of record was inadequate. Thus, the Court will decline to entertain it because it is undeveloped. *See Locklear*, 20 Vet.App. at 416. The Court cannot discern to which VA examination Mr. Hopkins is referring, and Mr. Hopkins provides no argument as to why he believes a VA examiner was required to specifically discuss the contested specific gravity readings from service. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

III. CONCLUSION

Upon consideration of the foregoing, the Board's February 15, 2018, decision is **AFFIRMED**.

DATED: March 12, 2019

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