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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3337

MARTIN S. GOMEZ, APPELLANT,

v.

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

Before SCOELEN, *Judge*.

MEMORANDUM DECISION

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

SCOELEN, *Judge*: The appellant, through counsel, appeals an August 10, 2017, Board of Veteran's Appeals (Board) decision in which the Board denied service connection for hypertension, to include as a result of exposure to herbicides or secondary to service-connected diabetes mellitus and post-traumatic stress disorder (PTSD). Record of Proceedings (R.) at 2-18. Because the Board failed to provide an adequate statement of reasons or bases, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. FACTS

The appellant served on active duty in the U.S. Army from June 1967 to June 1969. R. at 1908. The appellant served in Vietnam and received, among other decorations and medals, a Purple Heart and a Combat Infantry Badge. *Id.*

A January 1989 private treatment record shows that the appellant had been diagnosed with hypertension 2 ½ years prior. R. at 1459. An October 1997 private treatment record shows that he was assessed with "stable hypertension." R. at 1437.

A July 2008 rating decision denied service connection for hypertension. R. at 1210-19. The appellant appealed the decision to the Board and a February 2013 Board decision denied service connection for hypertension, to include as due to herbicide exposure and secondary to service-connected diabetes mellitus. R. at 1094-1109.

In November 2013, the parties filed a joint motion for remand, asserting that the Board's February 2013 decision must be vacated and the matter remanded because the Board provided an inadequate statement of reasons or bases. R. at 963-67. The parties stated that given the Secretary's acknowledgement that there was "limited or suggestive evidence of an association" between hypertension and exposure to herbicides in veterans, the Board "should have explained how VA fulfilled its duty to assist [the appellant] when the February 2008 VA examination did not opine [] whether there was any direct relationship between his hypertension and his conceded presumed exposure to herbicides." R. at 965. In December 2013, the Court granted the joint motion for remand, vacating the Board's denial of service connection for hypertension, to include as due to herbicide exposure and secondary to service-connected diabetes mellitus, and remanding the matter for action consistent with the joint motion for remand. R. at 968.

In June 2014, the Board remanded the appellant's claim for service connection for hypertension, and requested that the VA examiner opine whether it was at least as likely as not that the appellant's hypertension "incurred secondary to his presumed, conceded in-service herbicide exposure." R. at 801.

In June 2014, the examiner opined that the appellant's hypertension was "not incurred secondary to his presumed [. . .] herbicide exposure." R. at 91. The examiner stated that

the [appellant] states that he was [i]n Vietnam during the middle of his 2 years in service and returned to the states for 6 months before he was discharged. While in the service[,] he states [that] he was in areas which were sprayed with agent orange. While in the service[,] he did not develop [hypertension]. On his separation exam . . . , his [blood pressure] was 118/80. He did not develop [hypertension] until 1986, 17 years later. First of all[,] there is no correlation between agent orange and [hypertension]. Second of all, there is a 17 year gap before [hypertension] was diagnosed. He has essential [hypertension].

Id.

In February 2015, the examiner opined that the appellant's hypertension was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. R. at 82. The examiner stated that

the [appellant] states that he was in Vietnam during the middle of his 2 years in service and returned to the states for 6 months before he was discharged. While in the service[,] he did not develop [hypertension.] On his separation exam . . . , his [blood pressure reading] was 118/80[,] which is normal. He did not develop hypertension until 1986, 17 years later. Therefore[,] if service or herbicides were the cause, his hypertension would have occurred earlier than 17 years after leaving service.

R. at 82.

In September 2015, the Board remanded the appellant's claim for a VA medical opinion. R. at 524-29. The Board stated that the February 2015 VA examiner provided a negative opinion and stated, in part, that the appellant did not develop hypertension until 17 years after service. R. at 524. The Board explained that while the "rationale referenced a gap of time between service and the development of hypertension, no information or explanation was provided explaining why this gap of time supports the opinion that the [v]eteran's hypertension was not caused by his presumed in-service herbicide exposure." *Id.* Therefore, a new opinion was required. *Id.*

In December 2015, a VA examiner stated that in the National Academy of Sciences (NAS) Institute of Medicine's *Veterans and Agent Orange: Update 2012*, hypertension was categorized as having "limited or suggestive evidence" of association with herbicide exposure, but "that a firm conclusion is limited." R. at 77. Therefore, the examiner opined that there was no causal relationship between the appellant's hypertension and in-service herbicide exposure. *Id.*

In March 2016, the VA examiner provided a negative opinion concerning a relationship between the appellant's hypertension and his herbicide exposure. R. at 69. The examiner discussed the medical treatise evidence concerning PTSD and hypertension and the NAS report that noted that the evidence "SUGGESTS" an association between hypertension and herbicide exposure, but that there was no firm conclusion. *Id.* The examiner noted that the appellant had lead intoxication as an iron worker in 1993 and that symptoms of lead intoxication include high blood pressure. *Id.*

In September 2016, the Board remanded the appellant's claim for service connection for hypertension for an additional VA medical opinion. R. at 455-60. The Board stated that the June 2014 Board remand requested that a VA examiner consider the NAS report that categorized

hypertension as having "limited or suggestive evidence" of association with herbicide exposure and to address the medical treatise evidence cited by the appellant. R. at 457. The Board stated that the December 2015 and March 2016 VA examiners addressed some of the evidence, but determined that the opinions remained inadequate. *Id.* The Board stated that the March 2016 opinion briefly discussed the articles, but then provided "a negative opinion without a specific discussion of the specific facts of this case." *Id.* The appellant's claim was remanded for a VA examiner to opine whether the appellant's hypertension had its onset during service or was related to service, to include his exposure to herbicides. R. at 458-59.

In November 2016, the examiner opined that the appellant's hypertension was "less likely than not" incurred in or caused by the claimed in-service injury, event, or illness. R. at 60. The examiner stated that there did not seem to be a relationship between the appellant's hypertension and service. *Id.* The examiner stated that the appellant's separation examination report reflected a normal blood pressure reading of 118/60, and that he had developed hypertension more than a decade after leaving service. *Id.*

The August 2017 Board decision denied service connection for hypertension, to include as a result of exposure to herbicides and/or secondary to service-connected diabetes mellitus and post-traumatic stress disorder (PTSD). R. at 2-18. The Board found that the duty to assist the appellant had been satisfied and that the VA examinations and opinions, "as a whole," were adequate for appellate review. R. at 4. The Board discussed relevant portions of VA examinations completed in June 2014, February 2015, December 2015, and March 2016, and determined that there was "no probative evidence directly attributing hypertension to his service, including to his presumed exposure to Agent Orange in Vietnam." R. at 7-8. The Board also found that the "competent and credible medical evidence of record does not support finding that hypertension is related or attributable to the [v]eteran's active duty service." R. at 11. This appeal followed.

II. ANALYSIS

A remand by the Board "confers on the veteran . . . as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, it is substantial compliance, not absolute compliance, that is required. *See Dymont v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that

there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"). In making its determinations, the Court is required to take due account of the rule of prejudicial error. 38 U.S.C. § 7261(b); *Conway v. Principi*, 353 F.3d 1369, 1374-75 (Fed. Cir. 2004). As with all its material determinations of law or fact, the Board's determinations must be supported by an adequate statement of reasons or bases; the 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. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The appellant argues that the Board provided an inadequate statement for its reasons and bases when it determined that the competent and credible medical evidence did not support finding that the appellant's hypertension was related to his service. Appellant's Brief (Br.) at 16. The appellant stated that it was unclear what evidence the Board referred to "as it did not specify on which examinations it relied, and instead discussed numerous examinations that it had previously deemed inadequate during the course of its analysis." *Id.* The Secretary responds that the Board's decision should be affirmed because it provided an adequate statement of reasons or bases to support its finding and that the Board properly determined that the VA medical opinions "as a whole" were adequate to determine whether medical evidence supported the appellant's claim on a direct basis. Secretary's Br. at 4, 10. In the appellant's reply brief, he states that the Secretary failed to respond to his argument that the Board did not explain what evidence it found to be "competent and credible" because it previously found that same evidence inadequate. Reply Br. at 3.

Here, the Court finds that the Board provided an inadequate statement of reasons or bases for relying on the June 2014, February 2015, December 2015, and March 2016, VA opinions to deny the appellant's claim for service connection for hypertension on a direct basis. The Board relied on portions of the June 2014, February 2015, December 2015, and March 2016, VA medical opinions, without adequate explanation for relying on VA medical opinions that the Board previously found inadequate. In *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012), it was determined that "even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight." It was further noted that if the opinion merely lacked detail, then it could be given some weight based upon the amount of

information and analysis it contains. *See id.* Though the Board may give "some weight" to an inadequate medical opinion, the Board, in its August 2017 decision, relied on these VA opinions without explaining why they were now considered adequate. The Board did not discuss which portions of the medical opinions retained probative value or how the VA medical opinions otherwise complied with the Board's prior remands. *Allday*, 7 Vet.App. at 527 (Board's 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"). For future adjudication, the Board should provide an adequate statement of reasons or bases for relying on VA opinions that were previously found to be inadequate. *Id.* at 527.

Moreover, on remand, the Board should carefully review the adequacy of the VA medical opinions and consider that, in November 2018, NAS issued an update on Veterans and Agent Orange that moved hypertension from the "limited or suggestive evidence" category to the "sufficient evidence of an association" category. *Veterans and Agent Orange: Update 11 (2018)*, available at https://www.nap.edu/resource/25137/111318_VAO_2018_highlights.pdf.

Given this disposition, the Court need not, at this time, address any other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App.369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's August 10, 2017, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: March 20, 2019

Copies to:

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VA General Counsel (027)