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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3449

RONALD E. PARHAM, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Army veteran Ronald E. Parham appeals a denial of service connection for a left foot disability, which he attributed to metatarsalgia and plantar fasciitis. The question here is whether the Board should have considered a theory of entitlement that Mr. Parham didn't specifically identify, namely that his military service aggravated a preexisting condition, flat feet. Evidence in the record, specifically comments from a podiatrist who examined Mr. Parham, raised this exact issue. Because the Board has a duty to discuss all issues reasonably raised by the evidence of record, and because it failed to consider the evidence related to Mr. Parham's flat feet, the Court remands for further consideration.

I. BACKGROUND

Ronald E. Parham fractured his right heel several years before joining the Army. The injury healed and no related issues were identified when he entered service in 2000. The Army did note on his entrance examination, though, that he had asymptomatic pes planus (flat feet). As he transitioned out of the Army in 2005, he reported that he had developed foot problems during his deployment to Iraq. He filed a claim for residuals of a right foot injury that same year, which VA granted in early 2006.

Soon after establishing service connection for his right foot disability, Mr. Parham sought care from a VA podiatrist for foot pain in July 2006. The podiatrist evaluated Mr. Parham's gait and said that he lifted his heel too early, had notable pronation, and did not have much of an arch. The podiatrist opined that biomechanical instability seemed to be causing the pain, not his old heel injury. According to him, Mr. Parham had flat feet, severe pronation in both feet, painful feet, plantar fasciitis, and metatarsalgia.

The same provider conducted a follow-up in December 2006. The podiatrist elaborated on his previous notes from July, saying that Mr. Parham's "biggest problem seemed to be related to his significantly flat feet. He had plantar fasciitis and metatarsalgia, and it appeared that he had some early heel off which would indicate some equinus." R. at 4132 (cleaned up). (In general terms, this means that Mr. Parham raised his heel prematurely while walking and had an inability to flex his foot upward toward the shin.) The podiatrist reiterated that he didn't believe that Mr. Parham's old heel injury "was the cause of his foot problems and foot pain he was having. He talked about something that kind of popped out on his feet and starts to swell with the flat feet and he can barely walk." R. at 4132.

Mr. Parham saw the same specialist again in March 2007 to modify his orthotic shoe inserts. The podiatrist noted that the modifications helped stabilize his feet and added that the veteran "is going to need that to control his foot. He has a fairly significant pes planus-type foot and needs a special structural and functional support to hold him for any length of time." R. at 4016 (minor spelling alteration).

In June 2007, Mr. Parham filed a claim for a bilateral foot condition. The VA examiner who evaluated him stated that there was an indication that his bilateral plantar fasciitis and metatarsalgia were worsened by service, explaining that excessive training, faulty running shoes, and running on unyielding surfaces would have contributed to his conditions. For reasons unknown, however, he only provided an opinion as to service connection for the right foot. In its decision, VA treated Mr. Parham's claim as an increased rating claim for the right foot and a claim for service connection for the left foot. VA denied both and he appealed the left foot decision, specifically characterizing the appeal as "left plantar fasciitis and metatarsalgia." R. at 3896.

The July 2017 Board decision appealed here is the fifth in a series of related decisions, all dealing with the left foot. As it did in its past decisions, the Board focused exclusively on the conditions specifically highlighted by the veteran in his appeal, plantar fasciitis and metatarsalgia.

The issue here is whether the Board should have also discussed the possibility that his military service aggravated his preexisting flat feet.

II. ANALYSIS

The Board need not anticipate claims for disabilities yet to be "identified in the record by medical professionals or by competent lay evidence at the time a claimant files a claim or during its development." *Brokowski v. Shinseki*, 23 Vet.App. 79, 88 (2009). But it must discuss all issues raised by the evidence of record. *Harper v. Wilkie*, 30 Vet.App. 356, 362 (2018). For the evidence to raise an issue, it must be sufficient to at least trigger the duty to assist, *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), which generally means that some evidence indicates that the veteran's current disability may be associated with service, *DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011).

The Court has recognized this particular obligation because "the record might 'indicate' a theory of entitlement, but . . . a lay appellant might not be sophisticated enough to recognize the theory." *Robinson*, 21 Vet.App. at 553. Indeed, "there would be no need for the duty to sympathetically read pleadings if pro se claimants had encyclopedic knowledge of veterans law." *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007).

The specific theory of entitlement here has to do with instances where a veteran has a preexisting condition that worsens during service. Veterans can be compensated in such circumstances so long as the increase in severity isn't a natural progression of the disease or disability. *See* 38 U.S.C. § 1153; *Hill v. McDonald*, 28 Vet.App. 243, 254 (2016). A rebuttable presumption that a condition was aggravated by military service attaches if a claimant shows "a permanent worsening . . . during the relevant period of service." *Hill*, 28 Vet.App. at 252. The veteran doesn't have to "establish a causal link between his military service and the deterioration of his preservice disability." *Laposky v. Brown*, 4 Vet.App. 331, 334 (1993). But the evidence must show more than a mere recurrence of manifestations of the pre-service condition or temporary flare-ups. *See Davis v. Principi*, 276 F.3d 1341, 1345 (Fed. Cir. 2002).

There is no dispute that Mr. Parham had flat feet upon entering service. Nor is there a dispute as to whether he had any associated symptoms at the time he entered service—he didn't. As he left service, he reported foot problems that began during his deployment to Iraq. And those problems apparently worsened to the point that he could barely walk. The Secretary interprets the

podiatrist's statements as referring only to the right foot and thus not relevant because Mr. Parham only appealed as to his left foot. But that's a strained reading. The podiatrist made repeated references to Mr. Parham's flat feet (plural) as being related to or contributing to his foot condition. These circumstances amount to "some evidence" indicating that Mr. Parham's preexisting disability, flat feet, permanently worsened during service. *See DeLisio*, 25 Vet.App. at 53. Accordingly, the Board should have discussed whether Mr. Parham established a rebuttable presumption of aggravation under § 1153 or presented sufficient evidence entitling him to assistance in doing so. *See Harper*, 30 Vet.App. at 362; *see also Donnellan v. Shinseki*, 24 Vet.App. 167, 174 (2010) (A veteran "has the burden of presenting evidence supporting his or her claim, albeit with the statutorily mandated assistance of VA.").

III. CONCLUSION

Because the matter is being remanded for additional consideration, the Court will not address the veteran's remaining allegations of error. This will allow the veteran to raise these arguments before the Board and will preserve his right to appeal if he receives another adverse decision on remand. *See Harper*, 30 Vet.App. at 363. The July 20, 2017, Board decision is VACATED and the claim REMANDED for further consideration consistent with this opinion.

DATED: March 22, 2019

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