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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 17-4238

ROBERT BELCHER, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Judge*: Veteran Robert Belcher appeals through counsel a September 25, 2017, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for Paget's disease, including as secondary to exposure to Agent Orange or ionizing radiation, and a thoracolumbar spine disability. Record (R.) at 2-12.<sup>1</sup> For the reasons that follow, the Court will set aside the portions of the September 2017 Board decision on appeal and remand for further development and readjudication consistent with this decision. The balance of the appeal will be dismissed.

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<sup>1</sup> The Board also remanded the issues of entitlement to service connection for a bilateral leg disability and allergies. R. at 12. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider these matters at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2018). The Board also denied entitlement to service connection for erectile dysfunction and entitlement to increased evaluations for service-connected diabetes mellitus type II and residuals of prostate cancer. R. at 12. Because Mr. Belcher has not challenged these portions of the Board decision, the appeal as to those matters will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

## I. FACTS

Mr. Belcher served on active duty in the U.S. Navy from July 1963 to July 1967, including service in Vietnam. R. at 529. In May 1965, he served at the U.S. Naval Station on Midway Island, where he was assigned to duties involving nuclear weapons and nuclear weapons systems. R. at 526, 1755.

In October 1998, the veteran sought treatment for right flank pain radiating to the right leg and an x-ray report noted no significant abnormality in the lumbar spine. R. at 1561. In November 1999, Mr. Belcher reported chronic low back pain that had increased over the last week. R. at 1616. In May 2001, he fractured his right hip and underwent surgery. R. at 1574-75. An October 2001 bone scan revealed possible Paget's disease.<sup>2</sup> R. at 1550.

In May 2002, a private physician submitted a letter confirming a Paget's disease diagnosis and opining that this diagnosis is "surely supported by the chemical exposures" encountered by the veteran. R. at 1460. In August 2002, an endocrinology treatment note indicated that his relevant test results were "not reliable as a measure of Paget's disease activity." R. at 690.

In December 2002, Mr. Belcher filed a claim for service connection for "cancer" in both hips and lower back, R. at 1336-37; the VA regional office (RO) denied service connection for Paget's disease, muscle weakness, leg pain, and back pain, R. at 1265-73; and the veteran did not appeal this decision. In July 2005, a VA examiner determined that an x-ray examination revealed findings consistent with degenerative joint disease and possibly degenerative disc disease of the lower lumbosacral spine and Paget's disease. R. at 648-49.

In May 2007, Mr. Belcher filed a claim to reopen the issues of service connection for back pain and Paget's disease, claiming that the condition was due to Agent Orange and ionizing radiation exposure. R. at 1067. After further development, in October 2015 the Board issued a decision concluding that the veteran had submitted new and material evidence to warrant reopening his claims for service connection for Paget's disease and a back disorder and remanding the claims to obtain a new VA examination. R. at 406-28.

In May 2016, a VA examiner opined that Mr. Belcher's Paget's disease was less likely than not incurred in or caused by an in-service injury, event, or illness because "[t]here is no known

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<sup>2</sup> Paget's disease of the bone, also known as osteitis deformans, is "a disease of bone marked by repeated episodes of increased bone resorption followed by excessive attempts at repair, resulting in weakened deformed bones of increased mass." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1344 (32d ed. 2012).

causal relationship between Paget's disease of the bone and agent orange exposure." R. at 233. The same examiner further opined that the veteran's lumbosacral spine disorder was less likely than not incurred in or caused by an in-service, injury, event, or illness because "there is no evidence of" a back injury or condition incurred in service or continuum of care from his time of service to the present. *Id.* In April 2017, Mr. Belcher submitted a statement indicating that he reported back pain in service and "was given shots to ease the pain by the medics" and referencing 1963 service treatment records to support this contention. R. at 124-25.

In September 2017, the Board issued its decision on appeal denying entitlement to service connection for thoracolumbar spine disability and Paget's disease, including as secondary to exposure to Agent Orange or ionizing radiation. R. at 2-15. As to Paget's disease, the Board found that the weight of the evidence does not support that Mr. Belcher was exposed to ionizing radiation, R. at 8, and that the May 2016 examination was adequate and probative, R. at 9. As to thoracolumbar spine disability, the Board, because the veteran participated in combat activities and claimed in-service back pain, conceded an in-service event or injury. R. at 10. The Board determined that the May 2016 VA examination was adequate and probative and found that the veteran's back disability "was not factually shown during service" and that, because medical records from 1967 to 1980 "are either unavailable or nonexistent, there is also no evidence of continuity of symptomatology." R. at 11. This timely appeal followed.

## **II. JURISDICTION AND STANDARD OF REVIEW**

Mr. Belcher's appeal is timely and the Court has jurisdiction to review the September 2017 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Court reviews the Board's determination as to the adequacy of a medical examination or opinion under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "A factual finding '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)).

When VA provides a medical opinion, the Secretary must ensure that the opinion provided is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical opinion is adequate

"where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports.").

As with any finding on a material issue of fact and law presented on the record, the Board must support its factual determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

### III. ANALYSIS

As to Paget's disease, Mr. Belcher argues that the Board failed to ensure compliance with the duty to assist because the May 2016 VA examiner did not provide an adequate rationale to support his conclusions and based them on an inaccurate factual premise. Appellant's Brief (Br.) at 9-13. He further argues that the Board provided inadequate reasons or bases for its determination that he was not exposed to ionizing radiation in service. *Id.* at 14-16. The Secretary concedes that remand is necessary for the Board to obtain an adequate medical opinion and to provide adequate reasons or bases addressing favorable evidence that Mr. Belcher was exposed to nuclear weapons systems in service. Secretary's Br. at 7-9. The Court agrees as to both concessions related to his Paget's disease claim.

First, the Board failed to address favorable evidence that Mr. Belcher was exposed to ionizing radiation while stationed at U.S. Naval Station Midway Island. In its decision on appeal, the Board determined that, because the veteran's military personnel file did not include evidence

that he was trained to work with nuclear weapons systems, his list of duties for the relevant time period included guard duty and firefighting, and he failed to submit a radiation risk activity worksheet, the weight of the evidence did not support finding that he was exposed to ionizing radiation. R. at 8. However, the Board failed to address an April 7, 1965, administrative remark indicating that, while stationed at Midway Island, Mr. Belcher received briefing on the criteria and standards for personnel "assigned to duties involving nuclear weapons and nuclear weapons systems." R. at 526. The Court concludes that the Board's failure to address this favorable evidence renders inadequate its reasons or bases for denying service connection for Paget's disease due to ionizing radiation exposure. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App at 57; *see also Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order) (holding that the Board must address all potentially favorable evidence).

Second, the Court concludes that VA failed to provide an adequate medical opinion addressing whether Mr. Belcher's Paget's disease is related to service in several regards. The May 2016 VA examiner failed to provide an opinion regarding whether the veteran's condition is related to ionizing radiation exposure. R. at 233; *see Barr*, 21 Vet.App. at 311. Furthermore, the May 2016 VA examiner's conclusion that the veteran's Paget's disease is not related to service because the condition has "no known causal relationship" with Agent Orange exposure does not contain sufficient rationale. R. at 233. Because the examiner merely provides a general statement without providing analysis specific to Mr. Belcher's case and discussing individual risk factors, the Court holds that the May 2016 opinion is inadequate for adjudication purposes. *See Polovick v. Shinseki*, 23 Vet.App. 48, 52-53 (2009) (holding that "whether a medical professional finds studies persuasive, whether there are other risk factors that might be the cause of the condition for which benefits are sought, and whether the condition has manifested itself in an unusual manner" may affect the adequacy of a medical opinion); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) ("The Board must be able to conclude that a medical expert has applied medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion.").

As to thoracolumbar spine disability, Mr. Belcher argues that the May 2016 VA medical opinion is inadequate because the examiner failed to consider an in-service back injury and treatment. Appellant's Br. at 11-12. He further argues that the Board provided inadequate reasons or bases for its determination that his chronic back condition was not continuous. *Id.* at 13-14. The

Secretary responds that, although the Board made a favorable concession regarding an in-service occurrence, the examiner's opinion is adequate because it was based on the evidence of record at the time. Secretary's Br. at 10-11. He also contends that the Board provided adequate reasons or bases for its decision and urges the Court to affirm as to the spine disability. *Id.* at 11-13.

The Court agrees with Mr. Belcher that the Board, after conceding an in-service back injury, erred in not obtaining a new medical opinion to address whether the veteran's current back disability is related to that injury. In his May 2016 opinion, the VA examiner determined that, because there was no evidence of a back injury incurred in service and no evidence of a "continuum of care" as to the back, it was less likely than not that his current back condition was related to service. R. at 233. In April 2017, the veteran submitted a statement indicating that he reported back pain in service and "was given shots to ease the pain by the medics." R. at 124-25. In its September 2017 decision, the Board conceded an in-service back injury. R. at 10.

After the Board received the veteran's statement regarding in-service back pain, the Board correctly determined that, because Mr. Belcher's statement is presumed credible, he incurred an in-service back injury. *See* 38 U.S.C. § 1154(b); *Collette v. Brown*, 82 F.3d 389, 393 (Fed. Cir. 1996) (holding that "even if no official record of such incurrence exists," section 1154(b) requires that the Secretary accept the veteran's evidence "that would allow a reasonable fact-finder to conclude that the alleged injury or disease was incurred in or aggravated by the veteran's combat service"). This determination rendered the May 2016 opinion inadequate for adjudication purposes because, although the examiner based his opinion on the correct factual premise as it was known at the time, the Board lacked sufficient information to adjudicate the medical question of whether Mr. Belcher's current back disability is related to his now-conceded in-service back injury. *See Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293 ("an adequate medical report must rest on correct facts"); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) (a VA medical opinion "based upon an inaccurate factual premise has no probative value").

Finally, the Court finds that the Board provided inadequate reasons or bases for its determination that Mr. Belcher did not suffer continuing back-related symptoms after service. In the decision on appeal, the Board found that the veteran's thoracolumbar spine disability "was not factually shown during service" and that medical records from 1967 to 1980 "are either unavailable or nonexistent." R. at 11. Despite the Board's contradictory conclusion that the veteran lacked an in-service notation of a back condition, as noted above and as the Board conceded in the same

opinion, the veteran's lay statement regarding a back injury and treatment, R. at 124-25, constitutes a condition noted in service. *See Collette*, 82 F.3d at 393; 38 C.F.R. § 3.303(b) (2018). Furthermore, the Board erred in relying on the absence of contemporaneous medical evidence in rendering its continuity-of-symptoms determination. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (when assessing the credibility of lay evidence, the Board may "weigh the absence of contemporaneous medical evidence against the lay evidence of record," but "cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence").

Accordingly, remand is warranted for the Board to obtain new VA opinions that adequately address whether Mr. Belcher's Paget's disease is related to Agent Orange exposure or ionizing radiation exposure and the relationship between his current thoracolumbar spine disability and his in-service back condition. *See Barr*, 21 Vet.App. at 311. The veteran is free on remand to present additional arguments and evidence to the Board on remand in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). Further, "[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.

#### **IV. CONCLUSION**

Upon consideration of the foregoing, those portions of the September 25, 2017, Board decision that denied entitlement to service connection for Paget's disease, including as secondary to exposure to Agent Orange or ionizing radiation, and a thoracolumbar spine disability are SET ASIDE and REMANDED for further development and readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: March 26, 2019

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