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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3171

CONCETTA PACE, APPELLANT,

V.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Air Force veteran Joseph R. Pace applied for service connection for colon cancer due to ionizing radiation he was exposed to while serving in the Marshall Islands during Operation Ivy in November 1952. He died in April 1992 due to metastatic colon cancer. Concetta Pace, the appellant, is the veteran's surviving spouse. She appeals through counsel from an August 10, 2017, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than March 26, 2002, for service connection for the cause of the veteran's death. The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in relying on a June 2016 opinion by the Acting Director of VA's Compensation Service that found "no reasonable possibility" that the veteran's radiation exposure was related to his cause of death. The Court will set aside and remand the August 2017 Board decision because neither the Board nor the Director addressed the meaning of "reasonable possibility" and thus the Court's review is frustrated.

I. BACKGROUND

This matter has an extensive procedural history. This is unsurprising as this case stretches back to 1991. But the facts underlying our decision are few and undisputed. After the veteran died and while his 1991 cancer claim was still pending, Mrs. Pace applied for dependency and indemnity compensation ("DIC") in April 1992. R. at 1393-97. She asserted that exposure to ionizing radiation caused her husband's cancer. R. at 1396. Although VA first denied the claim, it eventually awarded service connection for the cause of the veteran's death with an effective date of March 26, 2002—the effective date of the liberalizing law that revised 38 C.F.R. § 3.309 by adding colon cancer as a presumptive disease based on radiation exposure. R. 743-47. This still left the issue of whether an effective date before March 26, 2002, was warranted, a question to be addressed without the benefit of the § 3.309 presumption.

Although the parties disagree about the proper effective date, they agree that the special development procedural framework for adjudicating claims for service connection based on ionizing radiation as laid out in 38 C.F.R. § 3.311 applies because the veteran was exposed to radiation. As part of this special development process, VA has produced several reports addressing the likelihood that radiation exposure caused Mr. Pace's cancer. However, through prior joint motions for remand (JMRs) and through remands by the Board, those reports have been found lacking. *See,* e.g., R. at 516-22 (September 2008 JMR); *see also* R. at 184-90, 102-11 (Board remands).

Following the most recent Board remand, the Acting Director of VA's Compensation Service requested an opinion from the Under Secretary for Health on "whether it is likely, unlikely, or as likely as not that the Veteran's colon cancer with metastasis to the lung and sacrum resulted from exposure to radiation in service." R. at 74-75. In June 2016, the Under Secretary issued an opinion indicating that the Interactive Radio Epidemiological Program (IREP) of the National Institute of Occupational Safety and Health (NIOSH) was used to calculate a 30.01% probability that exposure to ionizing radiation caused the veteran's cancer. R. at 64-67.

Based on this finding, the Director opined that there was "no reasonable possibility that the [v]eteran's colorectal cancer with metastases to the lung and sacrum [could] be attributed to ionizing radiation exposure while in military service." *Id*. at 65. In its August 2017 decision, the Board found that the Director's opinion was adequate and relied on it in determining that an earlier effective date was not warranted, because the veteran did not meet the requirements for service

connection under § 3.311. Mrs. Pace appeals from this decision, arguing that a 30.01% probability that radiation exposure caused the veteran's colon cancer precludes a finding that there was "no reasonable possibility" that his colorectal cancer could be attributed to ionizing radiation.

II. ANALYSIS

The principal question here is what does "no reasonably possibility" as used in 38 C.F.R. § 3.311 mean. Under paragraph § 3.311(b), when it is initially determined that a veteran was exposed to ionizing radiation and developed one of the listed radiogenic diseases, including colon cancer, the claim shall be referred to the Under Secretary for Benefits for further consideration under paragraph (c). Section 3.311(c) in turn governs the Under Secretary for Benefits's (or in this case the Director of Compensation Service's) review of the claim and permits a request for "an advisory medical opinion from the Under Secretary for Health." 38 C.F.R. § 3.311(c)(1)(2018).

Regardless of whether an opinion is obtained, paragraph (c) seemingly establishes a binary choice for the Under Secretary for Benefits in considering the claim. On the one hand, if, after considering the relevant evidence, the Under Secretary is convinced that "it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing." 38 C.F.R. § 3.311(c)(1)(i).

On the other hand, if "the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing, setting forth the rationale for this conclusion." 38 C.F.R. § 3.311(c)(1)(ii). Essentially, the Under Secretary for Benefits, or the Director, can either grant benefits if he or she finds it is at least as likely as not that radiation caused the disability, or deny them if there is "no reasonable possibility" that the disability was caused by radiation.

But the next subsection of § 3.311 appears to offer a third possibility. If the Under Secretary for Benefits, after seeking and considering the opinion of the Under Secretary for Health, "is unable to conclude whether it is at least as likely as not, or that there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall refer the matter to an outside consultant." 38 C.F.R. § 3.311(c)(2).

Here, the Acting Director for Compensation Service, acting for the Undersecretary for Benefits, after seeking an advisory opinion from the Undersecretary for Health, who found a

30.01% probability that exposure to ionizing radiation caused the veteran's cancer, found that there was no reasonable possibility that radiation caused Mr. Pace's cancer. The Board followed this determination. And the Secretary contends that this was the correct result. Mrs. Pace argues that the Director should have referred the matter to the outside consultant because of the Under Secretary for Health's estimate of a 30.01% probability of causation. She asserts that this probability finding should have precluded the Under Secretary from concluding that there was "no reasonable possibility" that radiation exposure caused the veteran's cancer. Essentially, she says that a 30.01% possibility cannot mean "no reasonable possibility."

The Secretary argues that the regulation provides only two options for the Under Secretary for Benefits. He or she can find that "it is at least as likely as not the veteran's disease resulted from exposure to radiation"—meaning a 50% chance or grater—or he or she can find "no reasonable possibility"; based on the Secretary's argument, "no reasonable possibility" means anything less than 50%.[1]

Although the parties disagree about what "no reasonable possibility" means, they agree that the Board failed to address Mrs. Pace's argument that the Under Secretary for Benefits should have sought an outside consultation. *See* Secretary's Brief (Br.) at 20 (conceding that the Board did not address the "no reasonable possibility" argument and noting that remand would be the appropriate remedy if the Court agreed). Although the Secretary nevertheless maintains that there was a plausible basis in the record for the Board's determination and that Mrs. Pace failed to demonstrate error, the Court cannot accept his post-hoc rationalization in place of a Board finding on this matter nor can it find this aspect of the Board decision harmless. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."); *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred.").

[1] Under the Secretary's interpretation, it is difficult to see when the Secretary's outside consultation provision in 38 C.F.R. § 3.311(c)(2) would ever apply. Presumably, if the Under Secretary for Benefits can *only* find there is a 50% or greater probability and grant, or less than a 50% probability and deny, the referral option could never be used.

The Board must "adjudicate all issues reasonably raised" by the record and, of course, those that are raised expressly. *Brannon v. West*, 12 Vet.App. 32, 35 (1998). Here, everyone agrees that the Board did not address the explicitly raised "no reasonable possibility" issue. And this failure is error. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008).

Without an adequate statement of reasons or bases, or in fact any fact finding from the Board addressing Mrs. Pace's argument about why the 30.01% probability finding does not preclude a finding of "no reasonable possibility," the Court cannot effectively review the instant appeal. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Thus, the Court will set aside the decision on appeal and remand for the Board to consider Mrs. Pace's argument about "no reasonable possibility" and the need for an outside opinion under § 3.311(c)(2).

Because the claim is being remanded, the Court need not address Mrs. Pace's additional arguments that would lead to no broader remedy than a remand. *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."). In pursuing her claim on remand, Mrs. Pace will be free to submit additional argument and evidence as to the remanded matter, and she has 90 days to do so from the date of the postremand notice VA provides. *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the foregoing, the Board's August 10, 2017, decision is SET ASIDE and the matter is REMANDED for further adjudication.

DATED: April 2, 2019

Copies to:

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