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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0224

PATRICIA BENETTI, 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*: In a November 2017 decision, the Board denied service connection for the cause of veteran Gregory P. Benetti's death. His widow, Patricia Benetti, appeals and primarily argues that the Board failed to address a nexus theory she raised regarding his malignant melanoma, i.e., skin cancer. Because the Board ignored Mrs. Benetti's contention that melanoma was caused by sun exposure during his service in Vietnam and elsewhere, the Court vacates the decision and remands the claim for further proceedings. However, the Court finds no error in the remainder of the Board's analysis.

I. BACKGROUND

The veteran served in the Army from 1965 to 1968. Between September 1965 and December 1966, he was stationed at various posts in Louisiana, Texas, Georgia, and North Carolina; thereafter, he was deployed to Vietnam. Immediately after service he sought treatment with VA for a skin rash on his chest and back, which appeared to be acne.

In January 2003, the veteran had a small melanoma lesion excised from his lower back. Other lesions were discovered in 2009 and he was diagnosed with recurrent stage IV melanoma, which had metastasized to other organs. The skin cancer progressed until the veteran's death on

May 26, 2011. The death certificate initially listed only metastatic malignant melanoma as the immediate cause of death. In an amended death certificate, prostate cancer, lung tumors, and brain metastases were added as underlying causes.

Shortly after the veteran's death, his surviving spouse sought dependency and indemnity compensation (DIC) based on service connection for the cause of his death. After the VA regional office initially denied the claim, Mrs. Benetti appealed and asserted, among other things, that the veteran was exposed to Agent Orange while stationed in Vietnam, which caused his malignant melanoma, as well as cancer of the brain, lungs, and prostate. R. at 462. She submitted a statement from a private oncologist that the veteran "also had prostate cancer and lung neoplasm, type unspecified," at the time of his death. R. at 460. This physician also requested the amendment to the veteran's death certificate noted above.

VA obtained a July 2013 opinion. After reviewing all relevant records, the physician concluded that cancer in the veteran's brain, lungs, and prostate had metastasized from his skin; in other words, those sites were not primary cancer locations. Per the examiner, there was "no documentation confirming primary lung [or] prostate cancer" and masses revealed by positron emission and computerized tomography "in the lung and other organs were stated by [the] veteran's oncologists and other specialists to be due to metastasis from the skin melanoma." R. at 490.

When the matter reached the Board in 2015, it remanded—in light of the amended death certificate—for an addendum opinion that addressed two questions: (1) was it at least as likely as not that prostate or lung cancers contributed to the veteran's death; and (2) if not, was melanoma at least as likely as not related to in-service Agent Orange exposure?

The resulting opinion answered both questions in the negative. As to the first question, the VA physician reasoned:

Although the death certificate was amended to read prostate cancer as a contributory cause of death, there is no definitive diagnosis of prostate cancer. In order to make a definitive diagnosis, there needs to be a tissue biopsy. An elevated PSA [prostate specific antigen¹] level, in and of itself, is NOT diagnostic of prostate cancer since other conditions can also cause a rise in the PSA level. The veteran did NOT have a diagnosis of primary lung cancer. The "lung tumors" were due to metastatic lesions from the melanoma skin cancer. Medical records clearly document that the multiple lung nodules were due to metastatic disease. There was

¹ "PSA is a protein produced by both cancerous and noncancerous tissue in the prostate." *PSA test*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/psa-test/about/pac-20384731>.

no separate diagnosis of prostate cancer or lung cancer contributing to the veteran's death.

R. at 148. With respect to melanoma, the physician stated that

exposure to occupational factors has been examined in a number of studies focusing on polychlorinated biphenyls, petroleum products, ionizing radiation, and selenium. Although initial analyses showed patterns of increased incidence, no statistically significant occupational risk factors were found after adjustment for known risk factors such as nevus count and sun exposure.

The literature was reviewed (including articles submitted by the claimant). Studies have reported an association between melanoma and herbicide exposure, however, some of the findings do not reach statistical significance. One study noted that the interpretation of the results should be cautious since sample sizes for most individual cancer sites were small.

Another study showed findings reaching statistical significance but reported that the study had several limitations including uncertainties regarding dioxin exposure. This study looked at the Vietnam veterans who had higher exposure, for a duration of two years (Ranch Hand Veterans) who were expected to have higher levels of cancer due to herbicide exposure. The study also noted that, although an association was found between melanoma and herbicide exposure, the National Academy of Sciences has concluded that there is inadequate or insufficient evidence to determine whether an association exists between exposures to herbicides and melanoma.

R. at 151-52 (citations omitted; some punctuation added). Instead, the VA physician opined that malignant melanoma more likely resulted from "intense, intermittent sun exposure and sunburns," noting that the veteran's residence in Las Vegas and Arizona, "which have significant sunlight," would have provided him with "ample opportunity to be exposed to sunlight on a regular basis."

R. at 151.

After reviewing these opinions, Mrs. Benetti demurred. Specifically, she disputed in a March 2017 letter that the veteran was regularly exposed to sunlight since service—he worked indoors and didn't play outdoor sports or engage in outdoor activities. Rather, she asserted that VA failed to address the "known fact" that the veteran was exposed to "ample sunlight" during Army training in Georgia and North Carolina and while stationed in Vietnam. R. at 57. These comments were reiterated in her 2017 brief to the Board. (Mrs. Benetti contended that VA had also ignored other relevant evidence regarding the veteran's skin rash and hepatitis, but she does not press those contentions on appeal.)

In the decision at issue here, the Board denied service connection for the cause of the veteran's death. It relied on the 2013 and 2016 VA opinions for two conclusions. First, it determined that melanoma was the primary cancer and that prostate and lung cancers were metastatic in nature. Second, it determined that melanoma was not likely caused by Agent Orange exposure. The Board's only explicit finding as to Mrs. Benetti's lay assertions was that she was "not competent to render an opinion relating the hepatitis or skin rash to the terminal cancer." R. at 10. This appeal followed.

II. ANALYSIS

DIC is payable to the surviving spouse of a veteran who died because of a service-connected disability. *Wise v. Shinseki*, 26 Vet.App. 517, 524 (2014). To establish service connection for the cause of a veteran's death, the evidence must show that a service-connected disability was either the primary or a contributory cause of death. 38 C.F.R. § 3.312(a) (2018). At issue in this appeal is whether the veteran died because of a service-connected disability. Because Mr. Benetti was a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, he is presumed to have been exposed to herbicides such as Agent Orange and, consequently, his surviving spouse may seek service connection for certain conditions on a presumptive basis. 38 U.S.C. § 1116(a); 38 C.F.R. § 3.307(a)(6)(i)-(iii) (2018). Prostate cancer and lung cancer are among those conditions; melanoma is not. *See* 38 C.F.R. § 3.309(e) (2018). "Presumptive service connection may not be established under 38 U.S.C. § 1116 and 38 C.F.R. § 3.307(a) for a cancer listed in 38 C.F.R. § 3.309(e) as being associated with herbicide exposure, if the cancer developed as the result of metastasis of a cancer which is not associated with herbicide exposure." VA Gen. Coun. Op. 18-97, at 5 (May 2, 1997); *see Darby v. Brown*, 10 Vet.App. 243, 246-47 (1997). In other words, *primary* prostate cancer is entitled to the presumption, but *metastatic* prostate cancer is not.

A. Expressly Raised Theory of Service Connection

The Board is obliged to address all theories of service connection either expressly raised by the claimant or reasonably raised by the record. *Fountain v. McDonald*, 27 Vet.App. 258, 275 (2015). Mrs. Benetti expressly raised the theory in a March 2017 letter that the veteran developed melanoma based on "extensive exposure to sunlight" while serving in Georgia, North Carolina, and Vietnam. R. at 57. Her informal brief to the Board prior to its issuance of the decision on

appeal highlighted this assertion. But the Board, although noting Mrs. Benetti's disagreement that the veteran was likely exposed to sunlight while living in Las Vegas and Arizona, did not acknowledge, much less address, her in-service sun-exposure theory.

Perhaps, as the Secretary contends, there are reasons for the Board to reject Mrs. Benetti's theory. "Whether lay evidence is competent and sufficient in a particular case," however, "is a fact issue to be addressed by the Board rather than a legal issue to be addressed by the . . . Court." *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). The Board did so when it found Mrs. Benetti incompetent to opine on a connection between hepatitis or skin rash and the veteran's terminal cancer. R. at 10. It did not do so with respect to her sun-exposure theory. In these circumstances, the Court will not assume that the Board's competency finding on one issue would apply equally in other areas.

Accordingly, the decision must be vacated and the matter remanded for the Board to consider and address Mrs. Benetti's theory. *See, e.g., Douglas v. Derwinski*, 2 Vet.App. 435, 440 (1992) (en banc) (remanding for the Board to address a similar lay theory in similar circumstances).

Because the Board did not address Mrs. Benetti's assertion, it did not undertake the analysis set out in *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006), for ascertaining whether the duty to provide a VA medical opinion was triggered. Given that this analysis turns on factual determinations that the Board must make in the first instance, *see, e.g., Waters v. Shinseki*, 601 F.3d 1274, 1276-79 (Fed. Cir. 2010), it is premature for the Court to decide whether a medical opinion is required here. The Board should resolve this issue when addressing the in-service sun-exposure theory.

B. Other Arguments

Mrs. Benetti argues that the Board clearly erred in finding the 2013 and 2016 VA opinions adequate to conclude that the veteran's death was not caused by primary prostate or lung cancers and that metastatic melanoma was not caused by Agent Orange exposure. She further asserts that the Board concluded that the veteran did not have prostate cancer but failed to explain this conclusion adequately. The Court addresses each argument in turn.

A VA medical opinion is adequate when it considers the pertinent medical history and provides enough information and supporting rationale to allow the Board to make a fully informed decision on the issue before it. *See Bailey v. O'Rourke*, 30 Vet.App. 54, 59 (2018). The Board's

determination that an opinion is adequate is a factual finding that the Court reviews for clear error. *See id.*

In undertaking this review, the Court is mindful that neither a single opinion, nor an excerpt of a single opinion, should be considered by itself. Rather, "medical reports are to be read as whole, taking into consideration the history, tests, and examinations upon which the report is based." *Monzingo v. Shinseki*, 26 Vet.App. 97, 109 (2012). And even if a portion of an opinion might seem problematic when read in isolation, "the Board is permitted to draw inferences based on the overall report." *Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012). Applying these principles, Mrs. Benetti has not shown clear error in the Board's finding that the VA opinions it relied upon were adequate.

The 2013 examiner reviewed the claims file, which included private treatment records; specifically cited tomography scans and the statements of private physicians indicating that the veteran's melanoma had metastasized; and concluded, consistent with the medical evidence of record, that lung and prostate cancers were not primary but metastatic in nature. Thus, this opinion considered the specific facts of Mr. Benetti's medical history and provided sufficient rationale for the question the Board needed answered: whether the lungs or prostate were the primary sites of the veteran's cancer. Reading the opinion holistically, there is no basis for thinking—as Mrs. Benetti suggests—that the examiner wasn't referring to the prostate when he referred to metastatic "masses . . . in the lung *and other organs*," R. at 490 (emphasis added).

Similarly, the 2016 examiner responded to the questions posed by the Board, explaining her conclusions in the context of the veteran's records and her medical knowledge. The appellant contends that the examiner must not have read or understood the veteran's claims file because she stated that "there is no definitive diagnosis of prostate cancer," R. at 148, even though the veteran's private oncologist provided such a diagnosis. Yet the examiner's opinion clearly reflects familiarity with the veteran's medical history. She spent two pages recounting salient medical records and events—including an August 2010 note from the veteran's private oncologist that his "lung and liver metastases are stable"—and noted the veteran's elevated PSA levels. R. at 145-48. What the examiner's opinion shows is not an ignorance of the record but a disagreement that the record shows that the veteran had prostate cancer. By itself, the fact that a later medical opinion differs from an earlier medical opinion is not a basis to find the later opinion inadequate.

Mrs. Benetti also challenges the adequacy of the 2016 examiner's negative opinion on a nexus between melanoma and Agent Orange exposure. Again, however, a reading of the entire

opinion doesn't show clear error in the Board's reliance on it. Although the examiner concluded that there was "no definitive evidence that herbicide exposure caused the veteran's melanoma," R. at 152, she prefaced her rationale by using the proper standard—"less likely as not," R. at 151. And that is how the Board read her opinion. *See* R. at 11. In short, the examiner did not employ an impermissibly higher standard than "as likely as not." *Cf. Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010).

Nor is any error apparent in the examiner's reliance on medical studies to form her conclusion in this case. While "it cannot be the sole basis for such a determination. . . . , a medical professional's opinion cannot be rejected simply because the opinion is based in part on statistical analysis." *Polovick v. Shinseki*, 23 Vet.App. 48, 54 (2009). Rather, as the Court has already noted, "it is the total analysis provided by the medical professional that must be weighed and considered by the Board." *Id.* Here, in addition to citing studies that she believed made a link between Agent Orange exposure and the veteran's melanoma less likely than not, the 2016 examiner identified a more likely cause of the melanoma based on the veteran's circumstances: sun exposure. True, there are important questions surrounding the sun-exposure theory of service connection that the Board must resolve on remand. But the fact that the 2016 examiner opined against a nexus between Agent Orange and melanoma based on statistical analyses *and* the "significant facts of the particular case" in front of her, *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304, (2008), belies this type of challenge to the opinion's adequacy.

Mrs. Benetti's last principal contention is that the Board did not adequately explain its conclusion that the veteran did not have a diagnosis of prostate cancer. The Board's statement of reasons or bases is adequate when it allows a claimant to understand the precise basis for the Board's determinations and facilitates review by this Court. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). Having reviewed the Board decision, the Court concludes that the Board satisfied this requirement. The Board did not make an explicit finding resolving whether the veteran had a diagnosis of prostate cancer. But it didn't need to, based on its determination that "the preponderance of the evidence is against a finding that the veteran . . . was diagnosed with *primary* prostate cancer or primary lung cancer." R. at 12 (emphasis added). As noted above, a diagnosis of primary, rather than metastatic, prostate cancer is necessary to establish service connection on a presumptive basis. *Darby*, 10 Vet.App. at 246-47; VA Gen. Coun. Op. 18-97, at 5. And Mrs. Benetti has not argued for service connection for the cause of the veteran's death on a theory other

than presumptive. Nor has she identified anything in the record before the Court that clearly contradicts the Board's finding that the veteran's prostate cancer was metastatic in nature.

In sum, the Court discerns no error based on the appellant's other arguments.

III. CONCLUSION

The November 27, 2017, Board decision is VACATED and the matter REMANDED for further proceedings consistent with this decision.

DATED: May 30, 2019

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