Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1195

DARIN HUDDY, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Darin Huddy, appeals through counsel a February 21, 2018, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for rheumatoid arthritis, fatigue, and sleep disturbances, all "as due to a qualifying chronic disability under 38 C.F.R. § 3.317." Record (R.) at 2-12. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matters on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from July 1990 until July 1993. R. at 1620. In March 2009, he filed a claim for entitlement to disability benefits for rheumatoid arthritis, fatigue, and "sleep disturbance." R. at 1603-13. In July 2010, the VA regional office denied his claims. R. at 1458-64.

In December 2016, the Board remanded the appellant's case for additional development. R. at 1180-96. The Board found that the appellant "does not have a clear diagnosis of rheumatoid arthritis, which would fully account for his symptomatology." R. at 1192.

In response to the Board's remand, the Secretary obtained a series of medical opinions in May 2017. R. at 192-328. The VA medical examiner diagnosed the appellant with rheumatoid arthritis and indicated that his disorder began in about 2007. R. at 192. The examiner generally concluded that the appellant's claimed disorders have an explainable etiology and are not related to his active service. *Id.*

On February 21, 2018, the Board issued the decision presently under review. R. at 2-12.

II. ANALYSIS

The appellant is attempting to establish entitlement to the benefits that he seeks by demonstrating that he has a medically unexplained chronic multisymptom illness (MUCMI). An "illness is a MUCMI where either the etiology or pathophysiology of the illness is inconclusive" but not "where *both* the etiology *and* the pathophysiology of the illness are partially understood." *Stewart v. Wilkie*, 30 Vet.App. 383, 390 (2018). The Board essentially found that all symptoms that the appellant has reported are traceable to his rheumatoid arthritis and that rheumatoid arthritis has a definite etiology.

The appellant asserts that the etiology of his rheumatoid arthritis is not nearly so clear as the Board supposed. Alternatively, he asserts that, by zeroing in on rheumatoid arthritis, the Board did not make the findings necessary to understand the contours of his potential MUCMI. Along the way, he challenges the adequacy of the 2017 VA examiner's opinion.

The Board's factual findings are not sufficient for the Court to fully evaluate these arguments. Indeed, given the complex record and the brevity of the Board's analysis, the Court cannot understand how it reached both its diagnostic and etiological conclusions and therefore cannot effectively review those findings.

First, the only evidence the Board cited that is potentially favorable to the appellant's claim is a December 2008 letter written by private physician Dr. Kenneth B. Wiesner that, in the Board's words, stated that the appellant "is diagnosed with rheumatoid arthritis, but his symptoms seemed more consistent with Gulf War Syndrome and recommended that the [appellant] should be evaluated for the syndrome." R. at 8. The Board reduced the probative effect of Dr. Wiesner's

diagnostic suspicions by noting that the 2017 VA examiner "confirmed the diagnosis of rheumatoid arthritis given by a private physician in 2007" and that Dr. Wiesner "provide[d] a diagnosis of rheumatoid arthritis without ruling it out as a diagnosis." R. at 9.

Those findings contradict a conclusion the Board reached in its 2016 remand decision. In that decision, the Board found that the appellant "does not have a clear diagnosis of rheumatoid arthritis, which would fully account for his symptomatology." R. at 1192. The Board did not mention this earlier conclusion. It is, therefore, unclear why the Board now rejects it. More importantly, the Board's present findings concerning Dr. Wiesner's 2008 notation do not capture the complexity of the private medical statements contained in the record. Those statements reveal that the appellant's care providers struggled to understand the appellant's presentation and form an appropriate diagnosis.

In June 2007, Dr. Wiesner (unlike the VA examiner, a rheumatologist) wrote that "[t]oday's exam was completely devoid of any evidence of inflammatory joint disease. The only thing remarkable on exam was the bluish-purplish blotchy discoloration of his feet." R. at 458. "On today's exam, I certainly did not find evidence of rheumatoid arthritis that may be suppressed by his Enbrel. However, despite having no evidence of synovitis, he is still having a lot of pain." *Id.*

In July 2007, Dr. Wiesner reported that "[t]oday examination is free of active synovitis . . . . Still in suspect regarding the RA diagnosis." R. at 1585. In October 2007, Dr. Douglas E. Roberts wrote that the appellant had polyarthralgia "without clear evidence for synovitis on exam today, foot exam suggests a component of dactylitis might have been present." R. at 766. He listed rheumatoid arthritis only as the appellant's "historical diagnosis." *Id.*

In December 2008, Dr. Wiesner wrote that the appellant came to him already on treatment prescribed "by another rheumatologist. . . . I have never found the degree of swelling one would usually expect in rheumatoid arthritis." R. at 1602.

In June 2009, Dr. Wiesner wrote that the appellant was "seen by Dr. Ehyal and he did not find any evidence to his observation of a definite neuropathy. He was not quite sure what was causing his symptoms. . . . Exam today failed to reveal any evidence of active rheumatoid synovitis. . . . We may be down to a point where this is all related to his Gulf War Syndrome and has nothing to do with definite neuropathy or rheumatoid arthritis." R. at 1525. In May 2015, Dr. Wiesner wrote that it was "most impressive" that the appellant presented with a "lot of pain, but not a lot of synovitis. Also, he has always had persistent and at times disabling paresthesias in his

feet. These paresthetic type symptoms we thought might be related to his Gulf War exposure." R. at 432. His examination was "free of synovitis." *Id.*

In lay statements that the Board did not consider, the appellant argued that the diagnoses given to his symptoms by private providers were a means to meet insurance company requirements for treatment authorization, rather that to identify his disorder, and that the treatment that he received – appropriate for rheumatoid arthritis – did not remedy his symptoms. R. at 1205, 1208. This and the other evidence that the Board did not discuss supports the appellant's assertion that it did not sufficiently account for the complexity of his disease process or ensure that the 2017 examiner had done so. It also reveals that the Board did not give his "unique symptoms" the attention required by law. *Stewart*, 30 Vet.App. at 391.

When it revisits this matter on remand, it may wish to take the following two paragraphs of this decision into account. The difficulty that the appellant's care providers had identifying synovitis seems to have been an important factor in their diagnostic uncertainty. The Board found that the VA examiner "applied the 2010 American College of Rheumatology (ACR)/European League Against Rheumatism (EULAR) classification criteria for rheumatoid arthritis and gave the diagnosis of rheumatoid arthritis." R. at 8. The examiner, however, did not discuss those criteria, and the Board did not question her findings.

The Court notes for the Board's benefit that the American College of Rheumatology stated in its recommended assessment for early rheumatoid arthritis that there should be "confirmed presence of synovitis in at least one joint." 2010 Rheumatoid Arthritis Classification Criteria, *Arthritis & Rheumatism* Vol. 62 No. 9 September 2010 at 2570; *see Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (holding that the Court "may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within [its] jurisdiction.'" (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988)). As repeatedly noted above, the appellant's physicians could not find evidence of synovitis even though he had other ongoing symptoms, a fact that the 2017 VA examiner does not seem to have noted or explained.

Second, the Board concluded that the 2017 VA examiner "opined that rheumatoid arthritis was a disease with a clear and specific etiology, and was a diagnosed disorder, i.e., not an undiagnosed illness." R. at 9. The examiner wrote that rheumatoid arthritis "is a diagnosable chronic illness with a partially explained etiologies, such as streptococcal infection, genetic factors,

idiopathic." R. at 281. Neither the examiner or the Board suggested that the appellant's disorder is linked to a streptococcal infection and neither identified "genetic factors" that suggest that the appellant suffered from a condition with a hereditary origin. The word "idiopathic" means "of unknown cause or spontaneous origin." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 912 (32d ed. 2012).

In *Stewart*, the Court concluded that "the determination of whether an illness is 'medically unexplained' is particular to the claimant in each case." 30 Vet.App. at 391. The examiner's conclusion plainly reveals that rheumatoid arthritis can develop from an unknown origin. On remand, the Board should review the appellant's medical history to determine whether it did in this case.

When it does so, the Board may wish to consider the following. The Board did little to police the 2017 examiner's reliance on treatise evidence and ensure that it is accurate and on point. *See McCray v. Wilkie*, ___ Vet.App. ___, ___, No. 17-1875, 2019 U.S. App. Vet. Claims LEXIS 1015 at *28 (June 18, 2019). In the decision presently on appeal, the Board, relying on the examiner's opinion, concluded that "the current literature, including many meta-analysis conducted by the Institute of Medicine [(IOM)], does not provide any substantive support for a causal relationship between environmental exposures experienced during the service in the Gulf and later development of autoimmune disorders such as rheumatoid arthritis." R. at 9. The examiner indicated that she relied on volume 8 of the IOM's report *Gulf War and Health*. Review of that document, which was published in 2010, does not immediately reveal language that matches the examiner's conclusion. The Court cannot find the words "rheumatoid arthritis" anywhere in its more than 300 pages. The phrase "autoimmune or inflammatory rheumatic diseases" appears once, in the form of a notation indicating that no participants in a study on musculoskeletal diseases reported "autoimmune or inflammatory rheumatic diseases." *Gulf War and Health* Volume 8 at 171.

More importantly, the examiner did not consult volume 10 of *Gulf War and Health*, which was published more than a year before she wrote her examination report, thus undermining the Board's conclusion that the literature that she reviewed was "current." That report discussed a study that specifically mentioned rheumatoid arthritis and seemed to suggest that it is related to "gene expression patterns" "significantly associated with Gulf War illness." *Gulf War and Health* Volume 10 at 79. The report further states that "rheumatic disorders such as rheumatoid arthritis

. . . have overlapping symptoms and in some cases may be distinguished from . . . related conditions such as chronic widespread pain . . . and Gulf War illness." *Id.* at 168. Another study "tested for differences in synovial fluid in veterans with Gulf War illness complaining of joint pain compared to patients with either osteoarthritis or rheumatoid arthritis." *Id.* at 174. "Neither found evidence of synovitis in veterans with Gulf War illness using tests that easily detected synovitis in the arthritis patients." *Id.*

The Court does not, indeed cannot, cite the IOM reports for their factual value. It cites them only to illustrate that the examiner made a definitive statement about the state of medical research that directly led to the Board denial in this case without consulting the latest IOM update and reviewing studies that plainly involved rheumatoid arthritis. Also, the Board has not, to date, investigated her use of those reports. The Court leaves it to the Board on remand to decide what, if anything, needs to be done.

Finally, the Board did not provide a statement of reasons or bases supporting its conclusion that the examiner's opinion is adequate and sufficiently responds to its remand instructions, frustrating judicial review and warranting, under the facts of this case, remand for additional analysis. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *Stegall v. West*, 11 Vet.App. 268, 271 (1998). To avoid a future remand, the Board may wish to address matters discussed above and the following.

The examiner concluded that the record indicates that the appellant was diagnosed with rheumatoid arthritis in 2007 (or in about 2008 – her report varied) and that the diagnosis was "well established," contradicting the Board's earlier finding that there was no definitive diagnosis prior to its 2016 remand. R. at 192, 199, 215. Those findings affected other decisions that she made. For example, she declined to order testing to investigate the source of the appellant's ankle pain because her assumptions about his rheumatoid arthritis convinced her that "no further useful information would be provided." R. at 199. It also plainly affected her opinions because it allowed her to trace essentially every symptom that the appellant has reported to rheumatoid arthritis and conclude that they could not represent a MUCMI. R. at 200,

The examiner referred to laboratory results from 2008 and 2016 that suggest that the appellant has rheumatoid arthritis. R. at 219. When asked whether the appellant has "had a joint aspiration or synovial fluid analysis," however, she provided "[n]o response." *Id.* Once again, it was the absence of synovitis that caused the appellant's care providers to question whether

rheumatoid arthritis was the appropriate diagnosis, and some of their statements came after the 2008 lab results to which the examiner refers.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's February 21, 2018, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: July 18, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)