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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0730

RICHARD A. HAAS, APPELLANT,

V.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Navy veteran Richard A. Haas served honorably from April 1962 to March 1965. He asserts that his duties aboard the U.S.S. *Helena* exposed him to asbestos. In July 2013 Mr. Haas filed a claim for "Lung Condition/Chronic COPD/Asbestosis."[1]

Mr. Haas now appeals a December 1, 2017, decision of the Board of Veterans' Appeals that denied service connection for "a lung condition, to include asbestosis[2] and chronic obstructive pulmonary disease[3] (COPD)."[4] Because the Board failed to ensure that VA fulfilled its duty to assist, relied on an inadequate VA examination report, and provided an inadequate statement of reasons or bases, the Court will set aside the December 2017 Board decision and remand the claim for a lung condition for further development and readjudication consistent with this decision.

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[1] Record (R.) at 6065.

[2] "Asbestosis" is "a form of pneumoconiosis (silicatosis) caused by inhaling fibers of asbestos, marked by interstitial fibrosis of the lung varying in form from minor involvement of the basal areas to extensive scarring; it is associated with mesothelioma and bronchogenic carcinoma." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 161-62 (32d ed. 2012) [hereinafter "DORLAND'S"].

[3] "Chronic obstructive pulmonary disease" is "any disorder characterized by persistent or recurring obstruction of bronchial air flow, such as chronic bronchitis, asthma, or pulmonary emphysema." DORLAND'S at 530.

[4] R. at 2.

I. ANALYSIS

Mr. Haas argues that the Board erred in multiple respects. He contends that the Board erred in finding that VA fulfilled the duty to assist because 1) the Board failed to obtain a medical opinion to evaluate radiographs of computed tomography (CT) scans that he submitted with his formal appeal,[5] and 2) in a September 2014 VA disability benefits questionnaire (DBQ) the examiner failed to provide a reasoned medical explanation to support the conclusions. Finally, he argues that the Board provided an inadequate statement of reasons and bases for finding his lay statements regarding the history of his symptoms not credible. The Court finds merit in these arguments.

Whether a medical opinion is adequate is generally a finding of fact that the Court reviews under the "clearly erroneous" standard of review,[6] as is the Board's conclusion that the duty to assist has been met.[7] A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."[8]

The Board must support its determinations with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court.[9] The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence,[10] discuss all issues raised by the claimant or the evidence of record,[11] and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."[12]

"Service connection . . . may be granted for a disability related to asbestos exposure during military service if evidence demonstrates that the veteran was actually exposed in service and that

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[5] In a related matter, he contends that the Board erred in failing to remand the case to the regional office (RO) to obtain a Supplemental Statement of the Case after VA received his CT scans. The Court need not reach this issue.

[6] *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

[7] *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

[8] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

[9] 38 U.S.C. § 7104(d)(1); *Gilbert* 1 Vet.App. at 57.

[10] *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

[11] *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

[12] *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

a disease usually associated with exposure resulted."[13] As to the first requirement, the RO conceded asbestos exposure,[14] but the Board found "no objective evidence the [v]eteran was exposed to asbestos in service."[15]

There is no requirement of "objective evidence" of asbestos exposure. Rather, service-connection claims are to be decided based on "all pertinent medical and lay evidence."[16] The Board made no negative credibility determination of Mr. Haas's statements that he had been assigned to paint asbestos-covered pipes, as well as scrape and clean them, as part of his duties.[17]

Furthermore, there is no indication in the record that VA sought ship's history or ship's logs or attempted to request documents to confirm the presence of asbestos on the U.S.S. *Helena* during the period of Mr. Haas's service.[18] If Mr. Haas's exposure to asbestos is relevant on remand, such additional development would be required to fulfill the duty to assist.

A. The Board clearly erred in failing to discuss or obtain independent medical evidence to evaluate the medical evidence submitted by Mr. Haas.

The September 2014 VA examination report diagnosed Mr. Haas with COPD, which the examiner stated was less likely than not incurred in or caused by military service. The examiner rejected a diagnosis of asbestosis, because there was "[n]o radiographic evidence of pleural plaques[19] consistent with asbestosis exposure [sic]."[20]

On his October 2017 VA Form 9, formalizing his appeal, Mr. Haas stated: "I have put in the mail 4 CDs from Fresno Community Hospital to support my case. Once you have received these CD[s] you will see that my COPD and asbestosis is related to the military and that I am currently diagnose[d] with the conditions."[21] These CDs were received at the RO on October 13,

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[13] R. at 5173 (Aug. 2017 Statement of the Case); *see also* VA ADJUDICATION PROCEDURES MANUAL, M21-1 pt. IV, subpt. ii, ch 1, § (1)(3)(a) (May 23, 2018).

[14] R. at 5173.

[15] R. at 3.

[16] 38 U.S.C. § 1154(a).

[17] *See* R. at 5445 (May 2015 Notice of Disagreement).

[18] *See* 38 C.F.R. § 3.159(c) (2019) ("VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim.").

[19] A "pleural plaque" is "an opaque white patch on the surface of the membrane lining the thoracic cavity," which is "visible radiologically in cases of asbestosis." DORLAND'S at 1456, 1460.

[20] R. at 5475.

[21] R. at 5109.

2017,[22] but the record does not contain any evaluation by VA of the CT radiographs that they contained. These CT scans were taken nearly 3 years after the scans on which the VA examiner based his analysis[23] and cannot be regarded as cumulative evidence.

Thus, the Board clearly erred in failing to discuss this medical evidence. Moreover, in the absence of a medical assessment of this evidence, the Board had no basis to evaluate it.[24]

Though the Secretary acknowledges that the Board did not discuss the evidence on the four CDs, he argues that any error is harmless.[25] He points to an August 2017 summary of the CT scans, noting that the report does not identify pleural plaques or diagnose asbestosis. The Secretary contends that "[t]he Court should find that the CT scan report does not show either a diagnosis of asbestosis or that Appellant's COPD is related to service and that consideration of this opinion would not change the outcome of the case."[26]

The Court notes that while this one-page summary of the CT scans does not diagnose asbestosis, neither does it reject or exclude such a diagnosis. It does, however, mention scarring in the right middle and right upper lobes, a "soft tissue density in the left lower lobe abutting the lateral pleural margin" and a "6 mm irregular modular density in the posterior right lower lobe."[27] The Court is no more able than the Board to relate these findings to the presence or absence of asbestosis. The Court is therefore unable to conclude that the Board's error in treatment of this evidence did not prejudice Mr. Haas.

B. Both the Board and the examiner's treatment of time elapsed since service is inconsistent with the delayed-onset characteristic of asbestos-related diseases.

The Board's statement of reasons or bases heavily emphasizes the absence of in-service complaints of a lung condition and the delay before Mr. Haas filed a claim:

> First, the [v]eteran's service treatment records do not reflect complaints of, treatment for[,] or a diagnosis related to a lung condition and/or asbestosis while in

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[22] *See* R. at 2633. The Court notes that it was unnecessary and an impediment to efficient review to include hundreds of pages of radiographs in the record of proceedings. The Court was in no position to interpret or otherwise evaluate these radiographs. The acknowledgment by the Secretary that these scans were received at the RO and not discussed by the Board should have sufficed.

[23] *See* R. at 5472-73.

[24] *See Colvin v. Derwinski*, 1 Vet.App. 171 (1991).

[25] *See* 38 U.S.C. § 7261(b)(2) (Court must "take due account of the rule of prejudicial error"); *Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007).

[26] Secretary's Brief at 12.

[27] R. at 5107; *see supra* note 2.

> service. Significantly, the [v]eteran's separation examination fails to document any complaints of, or observed symptoms related [to] a lung condition or asbestosis.
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> * * * *
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> The Board notes that the [v]eteran's first report of a lung condition was 25 years after he left active service, and he was not diagnosed with COPD until 42 years after he left service.[28]

The Board further cited this delay as a factor in finding Mr. Haas's statements on the history of his breathing problems not credible, stating that "the Board cannot ignore that there is a significant gap in time between when he left service and when he filed his claim for benefits."[29]

As a general matter, "the lack of contemporaneous medical records may be a fact that the Board can consider and weigh against a veteran's lay evidence."[30] To weigh such evidence, however, the Board must first establish a proper evidentiary foundation for drawing inferences against a claimant from the absence of documentation.[31] Further, the "solicitude for the claimant" in the veterans benefits system "argues against the use of evidence . . . when it has doubtful pertinence."[32]

"[E]vidence of a prolonged period without medical complaint" may also be a factor for the Board to consider in reaching its decision.[33] The Federal Circuit cautioned, however, that the "trier of fact should consider all of the evidence including . . . *the nature and course of the disease or disability*."[34]

Here the *VA Adjudication Procedures Manual* (M21-1) raises significant questions as to whether such an evidentiary foundation can be established in asbestos-related cases and as to what weight should be assigned to delay in filing a claim in such cases. The manual states that "[m]any people with asbestos-related diseases have only recently come to medical attention because the latent period for development of disease due to exposure related to asbestos ranges from 10 to 45 or more years between first exposure and development of disease."[35] The Board cited other

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[28] R. at 5.

[29] R. at 6.

[30] *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006).

[31] *Fountain v. McDonald*, 27 Vet.App. 258, 273 (2015); *Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012).

[32] *AZ v. Shinseki*, 731 F.3d 1313, 1322 (Fed. Cir. 2013).

[33] *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000).

[34] *Id.* (emphasis added).

[35] M21-1, pt. IV, subpt. ii, ch 2 § (c)(2)(f) (July 5, 2018).

provisions of the M21-1 regarding asbestos-related claims, but did not mention the foregoing passage.

The Court recognizes that M21-1 is binding on neither the Board nor this Court.[36] The Board did not explain, however, why it apparently disregarded what the Secretary has acknowledged as to the delayed onset typical of asbestos-related diseases in weighing the absence of evidence and in making its credibility determinations. "[T]he Board is required to discuss any relevant provision contained in the M21-1 as part of its duty to provide adequate reasons or bases."[37] Especially after having considered other M21-1 passages related to asbestos claims, the Board's omission of a passage that is pivotal to its analysis demands explanation.

The VA examiner similarly included the following factors in the rationale for his conclusion that the diagnosed COPD was not related to military service: "1. [Mr.Haas][l]eft service in 1965[;] 2. [w]orked in a physical capacity till 1998 . . . 3. states breathing problems [became] noticeable in 1990s."[38] In view of the Secretary's acknowledgment of delayed onset of asbestos-related diseases, it is not clear that the Board could fulfill its responsibility to assure that the examiner applied valid medical principles to arrive at his conclusion.[39]

C. The September 2014 VA medical examination report was inadequate.

"[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question."[40] "An opinion based on an inaccurate factual premise has no probative value."[41] Further, an examiner's opinion is entitled to weight in the service-connection context only if it includes a reasoned medical explanation for the conclusions reached.[42]

1. The examiner's analysis rests on questionable factual premises.

There is conflicting evidence in the record concerning the timing and extent of Mr. Haas's history of smoking. Referring to his time in service, Mr. Haas stated that "I rarely smoked

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[36] *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017).

[37] *Overton v. Wilkie*, 30 Vet.App. 257, 264 (2018).

[38] R. at 5475.

[39] *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008).

[40] *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

[41] *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993).

[42] *Nieves-Rodriguez*, 22 Vet.App. at 301.

cigarettes very little."[43] An August 2007 VA primary care note reported that he had quit using tobacco in 2005.[44] A medical report from a private physician summarizing a May 2005 visit reported that "[n]o one in the home smokes."[45] Yet, the September 2014 DBQ stated that Mr. Haas "started smoking at age 14 to date—at least 1 ppd [pack per day]."[46] The Board made no attempt to reconcile this evidence, or any finding as to which of Mr. Haas's reported statements it accepted.[47] The implications for the examiner's analysis, which mentioned an "impressive smoking history,"[48] are obvious.

The respiratory history section of the DBQ reported that Mr. Haas stated that his breathing problems "became *significant* in the 1990s."[49] In the rationale section of the DBQ, however, the examiner stated that the "[v]eteran states breathing problems [became] *noticeable* in [the] 1990s."[50] Assuming that the history of Mr. Haas's symptoms is significant in view of the delayed onset of asbestos-related diseases, the inconsistency in these statements is more than semantic.

The Board should have sought clarification to address these inconsistencies. Its failure to do so rendered it unable to fulfill its duty to ensure that the examiner's conclusions were based on sufficient facts.[51]

2. The examiner's conclusions are not supported by a reasoned medical explanation.

To the extent that the examiner may have attributed Mr. Haas's COPD to his smoking history, that conclusion is unexplained by any medical analysis. That is, the examiner did not state the medical principles and data enabling him to conclude that the COPD was more likely caused by smoking than by in-service exposure to asbestos.

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[43] R. at 5986 (Feb. 2014 statement in support of claim).

[44] *See* R. at 5400.

[45] R. at 5954.

[46] R. at 5472.

[47] *See* 38 C.F.R. § 4.2 (2019) ("reconciling the various reports into a consistent picture").

[48] R. at 5475.

[49] R. at 5472 (emphasis added).

[50] R. at 5475 (emphasis added).

[51] *See Nieves-Rodriguez*, 22 Vet.App. at 302 (the Board must first ask whether the examiner is informed of sufficient facts).

Furthermore, the examiner stated that "the *weight* of medical literature shows no relationship between COPD and asbestosis."[52] The statement implies that there is some medical literature supporting a connection between COPD and exposure to asbestos. The examiner describes neither the extent of literature on both sides of the question nor on what basis he accepts the literature leading to a negative conclusion.

Finally, the examiner did not state what significance he attached to the delayed onset of breathing symptoms or the nature of Mr. Haas's work history in determining the etiology of the diagnosed COPD. The examiner stated that Mr. Haas's work as a window glazer constituted "work in a physical capacity" [53] without stating a basis for that assessment or its significance in determining the etiology of COPD. Moreover, the examiner stated no medical principle making delayed onset significant in the context of possible asbestos-related diseases. Because the examiner did not provide a clear rationale for his opinion and based his analysis on questionable facts, the Board erred in relying on the September 2014 DBQ.[54]

For the foregoing reasons, the Court will reverse the Board's finding that the duty to assist was fulfilled, set aside the December 2017 Board decision, and remand the lung condition claim for further development and readjudication consistent with this decision. On remand, Mr. Haas may submit additional evidence and arguments,[55] which the Board must consider.[56]

II. CONCLUSION

On consideration of the foregoing, the Court REVERSES the Board's determination that the duty to assist was fulfilled, SETS ASIDE the Board's December 1, 2017, decision and REMANDS the lung condition claim for further development and readjudication consistent with this decision.

DATED: August 21, 2019

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[52] R. at 5475 (emphasis added).

[53] *Id.*

[54] *See McKinley v. McDonald*, 28 Vet.App. 15, 31 (2016).

[55] *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999).

[56] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

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