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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3536

GARY A. COLLINS, 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*: Veteran Gary A. Collins appeals a 2018 Board decision that denied service connection for major depressive disorder on both a direct basis and as secondary to varicose veins, a condition for which he is separately seeking service connection.[1] Mr. Collins attributed his depressive disorder to his varicose veins. The Board acknowledged that he was diagnosed with depressive disorder but concluded that no competent evidence connected this condition to service or any other claimed disability.

The veteran argues, among other things, that the Board failed to obtain treatment records from the VA medical center in Indianapolis, Indiana. The Secretary does not contest the fact that the Board made its decision without these records. His position is that the veteran failed to adequately identify when or where he received treatment and that he hasn't shown that these records are relevant to his claim.

VA regulations require the agency to assist veterans in gathering medical records if the veteran provides "enough information to identify and locate the existing records . . . ; the

[1] The Board remanded his claims for varicose veins and a total disability rating based on individual unemployability. Since remands are not final decisions of the Board, the Court has no jurisdiction over these matters. *See Young v. Wilkie*, 31 Vet.App. 51, 53 n.1 (2019).

approximate time frame covered by the records; and . . . the condition for which treatment was provided." 38 C.F.R. § 3.159(c)(3) (2019).

As to the Secretary's first point, there are various instances in the record, including testimony before the Board, where the veteran mentioned treatment for varicose veins received at the Indianapolis VA medical center. *See, e.g.*, R. at 72–75 (veteran testifying that he was treated between 1972 and 1973 in Indianapolis); R. at 94 (testimony mentioning Indianapolis); R. at 461 (VA clinician noting plans to obtain "VA file from Indianapolis VAMC"); R. at 1668 (medical record discussing varicose veins and noting that the veteran was "seen once at VAH Indianapolis in 1978"). This was sufficient information to identify and locate his existing records.

As to the Secretary's second point, the Federal Circuit held, in *Sullivan v. McDonald*, that § 3.159(c)(3) conditions assistance in obtaining various types of records on their relevance but does not do so for the agency's own records. 815 F.3d 786, 790–91 (Fed. Cir. 2016). Thus, despite the Secretary's attempt to do so here, "VA may not consider relevance when determining whether to assist in obtaining VA medical records." *Jones v. Wilkie*, 918 F.3d 922, 927 (Fed. Cir. 2019). The Board erred by failing to gather these records. And it is "not harmless error for the VA to base its decision on a subset of a veteran's medical records." *Id*.

Accordingly, the March 14, 2018, Board decision is VACATED and the matter REMANDED for readjudication consistent with this decision.

DATED: October 25, 2019

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