

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3628

JAMES A. BROOKS, 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. Marine Corps veteran James A. Brooks served honorably from October 1990 to October 1994.¹ In December 1990, while in basic training, Mr. Brooks was diagnosed with and treated for cellulitis.² The condition appeared to have resolved 2 days later,³ and service medical records (SMRs) contain no further reports of the condition.

Mr. Brooks now appeals that portion of a March 1, 2018, decision of the Board of Veterans' Appeals that denied service connection for cellulitis.⁴ Because the Board clearly erred in relying on an inadequate medical examination, the Court will set aside the March 2018 Board decision and remand the matter for additional development and readjudication consistent with this decision.

¹ Record (R.) at 7631. The Court notes that the Board misstated that Mr. Brooks had served through December 1994 (R. at 3). The discrepancy is not material to this decision.

² R. at 8250. "Cellulitis" is "an acute, diffuse, spreading, edematous, suppurative inflammation of the deep subcutaneous tissues and sometimes muscle, sometimes with abscess formation. It is usually caused by infection of a wound, burn, or other cutaneous lesion by various bacteria." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 325 (32d ed. 2012) [hereinafter DORLAND'S]. "Suppurative" means "characterized by suppuration," which is "the act of becoming converted into and discharging pus." *Id.* at 1805.

³ R. at 303.

⁴ The Board also remanded claims for an initial compensable disability rating for residuals of a stab wound and an increased rating for service-connected scars. R. at 3, 9. These matters are not presently before the Court. *See Breedon v. Principi*, 17 Vet.App. 475, 478 (2004).

I. ANALYSIS

To establish service connection for a disability, a claimant must generally demonstrate "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service."⁵ The Court has stated that a disability is compensable if it is present at filing or at any time during pendency of the claim, even if the disability later resolves.⁶ In the decision on appeal, the Board found no current disability for cellulitis.

Mr. Brooks argues, however, that the Board provided an inadequate statement of reasons or bases for discounting his lay statements that he has experienced recurrent episodes of cellulitis since service. The Board is required to support its determinations of fact and law with a written statement of reasons or bases that is understandable by the claimant and facilitates review by this Court.⁷ The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence,⁸ discuss all issues raised by the claimant or the evidence of record,⁹ and discuss all provisions of law and regulation that are made "potentially applicable through the assertions and issues raised in the record."¹⁰

Mr. Brooks stated that approximately four times a year,¹¹ especially during warm weather, he experiences a skin condition that he believes to be cellulitis, further testifying that he has self-medicated for this condition with a steroid cream.¹² He further distinguished the condition he believes to be cellulitis from dermatitis, for which he is presently service-connected, on the basis that the former condition affects only his legs while the latter condition affects more widespread areas of his body.¹³

⁵ *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166—67 Fed.Cir.2004).

⁶ *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007).

⁷ See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

⁸ *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

⁹ *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

¹⁰ *Schafraath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

¹¹ R. at 7951 (Sept. 2012 skin diseases disability benefits questionnaire (DBQ)).

¹² R. at 6720 (Mar. 2016 regional office hearing).

¹³ R. at 406-07 (testimony at Nov. 2017 Board hearing). Mr. Brooks is currently service connected for

Mr. Brooks is competent to describe the symptoms he experiences.¹⁴ He is also competent to testify that the skin conditions he experiences on his legs resemble that which he experienced in service.¹⁵

A. The September 2012 DBQ was inadequate.

The Board correctly found, however, that Mr. Brooks is not competent to render a diagnosis that the symptoms he observes establish cellulitis. To obtain a diagnosis, the Board relied on a September 2012 skin diseases VA DBQ.

Preliminarily, during the examination the examiner found "no acute lesion or rash".¹⁶ Noting Mr. Brooks's description of his symptoms, and the fact that he self-medicated with Lidex cream, which the examiner described as a steroid, the examiner concluded that the condition "is not cellulitis, but instead most likely a form of [d]ermatitis or eczema."¹⁷

Relying on this DBQ, the Board concluded that Mr. Brooks's lay statements "are outweighed by the medical evidence of record characterizing his current complaints as a manifestation of another disability, dermatitis/eczema, for which service connection is currently in effect."¹⁸ Thus, the adequacy of the Board's statement of reasons or bases turns largely on the adequacy of the September 2012 VA DBQ.

"Once the Secretary undertakes the effort to provide an examination when developing a service connection claim . . . he must provide an adequate one."¹⁹ Whether a medical opinion is adequate is generally a finding of fact that the Court reviews under the "clearly erroneous" standard of review.²⁰ 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."²¹

dermatitis. R. at 5121 (Aug. 2017 rating decision).

¹⁴ *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (lay evidence describing symptoms at the time can be competent and sufficient to establish a diagnosis of a condition if it supports a later diagnosis by a medical professional).

¹⁵ *See Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994) (holding that a lay witness is competent to testify to that which he has actually observed and is within the realm of his personal knowledge).

¹⁶ R. at 7951.

¹⁷ *Id.*

¹⁸ R. at 8.

¹⁹ *Barr*, 21 Vet.App. at 311.

²⁰ *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

²¹ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49,

An adequate medical examination must be "based upon consideration of the veteran's prior medical history and examinations and also describe[] the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'"²² Further, an adequate medical opinion contains not only data and conclusions, "but also a reasoned medical explanation connecting the two."²³ In this instance, the September 2012 VA DBQ is inadequate for at least two reasons.

First, if a condition is subject to flareups, as in this case, a medical examination should, if possible, evaluate the condition during a flareup.²⁴ There is nothing in the record to suggest that an examination during a flareup of Mr. Brooks's skin condition would be impossible or impractical.

Second, the examiner did not describe the medical principles by which he concluded that Mr. Brooks's recurring skin condition was more likely than not something other than cellulitis. Thus, the Board was unable to conclude that the medical opinion is the product of valid medical analysis.²⁵ A medical opinion is not entitled to any weight "if it contains only data and conclusions."²⁶ Therefore, the Board clearly erred in relying on the September 2012 VA DBQ to deny Mr. Brooks's claim.²⁷

B. The Court is unable to conclude that the error did not prejudice Mr. Brooks.

The record includes material from the Mayo Clinic generally describing the nature and cause of cellulitis: "People who previously had cellulitis, especially of the lower leg, may be more prone to develop it again."²⁸ As noted above, the September 2012 DBQ was inadequate for the Board to assess Mr. Brooks's lay statements that since service he observed recurrences of cellulitis,

52 (1990).

²² *Stefl v. Nicholson*, 21 Vet.App. 123, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted).

²³ *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

²⁴ *Compare Ardison*, 6 Vet.App. at 408 (finding an examination inadequate when administered during the inactive stage of the claimant's condition), *with Voerth v. West*, 13 Vet.App. 117, 123 (1999) (holding that the Board is not required to provide an examination during a flareup where flareups lasted "only for a few days out of a year").

²⁵ *Nieves-Rodriguez*, 22 Vet.App. at 304.

²⁶ *Id.*

²⁷ *McKinney v. McDonald*, 28 Vet.App. 15, 31 (2016).

²⁸ R. at 322.

which he treated with steroid creams. Thus, the Board's conclusion that the evidence fails to demonstrate a current cellulitis condition is an unsupported medical conclusion.²⁹

Further, there is nothing in the balance of the record that conclusively refutes those lay statements.³⁰ Therefore, the Court is unable to conclude that the Board's error in relying on the inadequate medical report did not prejudice Mr. Brooks.³¹

For the foregoing reasons, the Court will set aside the portion of the March 2018 Board decision denying service connection for cellulitis and remand that claim for further proceedings. On remand, Mr. Brooks may submit additional evidence and arguments,³² which the Board must consider.³³

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the portion of the Board's March 1, 2018, decision denying service connection for cellulitis and REMANDS that claim for additional medical evidence and readjudication consistent with this decision.

DATED: October 29, 2019

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)

²⁹ See *Colvin v. Derwinski*, 1 Vet.App. 191 (1991).

³⁰ See *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) (in assessing prejudicial error the Court is not confined to the findings of the Board but may examine the entire record).

³¹ See 38 U.S.C. § 7261(b)(2) (the Court must "take due account of the rule of prejudicial error").

³² See *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999).

³³ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).