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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-5082

SUSAN A. CASS, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Susan A. Cass, surviving spouse of veteran Cairl L. Cass, appeals through counsel a December 6, 2017, Board of Veterans' Appeals (Board) decision denying service connection for the cause of Mr. Cass's death. Record (R.) at 2-23. For the reasons that follow, the Court will set aside the December 2017 Board decision and remand the matter for further development and readjudication consistent with this decision.

I. FACTS

Mr. Cass served honorably in active duty service in the U.S. Navy from November 1961 to March 1966. R. at 2851. Service medical records (SMRs) reflect that he was treated on several occasions for colds, coughs, and other respiratory complaints. *See* R. at 3218 (Jan. 1962 and May 1962); 3219 (Dec. 1962); 3224 (Apr. 1963); 3225 (Nov. 1963 and Sept. 1963); 3229 (Oct. 1964); 3234 (May 1965); 3239 (June 1966).

In August 2003, based on biopsy results, Mr. Cass was diagnosed with hypersensitivity pneumonitis and chronic interstitial lung disease "likely due to exposure [to] asbestos and other chemicals while in the service." R. at 1032. He also had a history of chronic obstructive pulmonary disease (COPD), requiring oxygen therapy, and significant tobacco use. *See* R. at 808,

1031. Mr. Cass passed away on November 24, 2006, due to COPD. R. at 2874. His death certificate lists pulmonary fibrosis and tobacco abuse, among other conditions, as significant conditions contributing to his death. *Id.*

In September 2009, Ms. Cass filed for service connection for the cause of the veteran's death. R. at 2855-72. A VA medical opinion was obtained in March 2010, which found that there was no evidence of asbestos-related lung changes, that Mr. Cass's pulmonary fibrosis was due to pneumonitis, and that none of the respiratory conditions causing or contributing to death were associated with asbestos exposure. R. at 1819-21. In July 2010, the regional office (RO) denied service connection for the cause of Mr. Cass's death. R. at 1782-84. Ms. Cass timely filed a Notice of Disagreement. R. at 1758.

VA obtained a second medical opinion in March 2011, which found that "asbestos exposure did not substantially contribute to or hasten this veteran's death due to the conditions listed on the death certificate." R. at 1683. In April 2011, VA issued a Statement of the Case, continuing to deny the claim. R. at 1589-606. Ms. Cass timely appealed to the Board. R. at 1559.

In May 2012, Ms. Cass testified before the Board that she believed her husband's COPD was related to his in-service asbestos and chemicals exposure. R. at 752-82. In conjunction with her testimony, she submitted a medical examiner's letter, in which the examiner opined that Mr. Cass's pulmonary fibrosis and chronic interstitial lung disease were likely due to in-service asbestos and chemicals exposure. R. at 746.

In October 2013, the Board sought a Veterans Health Administration (VHA) medical opinion. R. at 713-19. The Board noted that Mr. Cass's SMRs "document complaints of a chronic cough in service," R. at 713, and asked the expert to opine as to whether any of the respiratory conditions that caused or contributed to Mr. Cass's death "manifested in or are otherwise related to his military service," particularly "as due to probable asbestos exposure." R. at 717. In December 2013, the responding expert opined that, despite the absence of asbestos fibers on lung biopsy, Mr. Cass's interstitial lung disease was at least as likely as not caused by in-service asbestos exposure. R. at 670. However, he opined that asbestos exposure did not cause Mr. Cass's pneumonitis "or contribute[] substantially or material to the production of his death." R. at 672. The examiner did not address the documented in-service respiratory events. *See* R. at 668-77.

In April 2014, the Board remanded the matter for VA to obtain Social Security Administration (SSA) records. R. at 457-63. In a December 2014 decision, the Board determined

that no SSA records were available and denied the claim. R. at 306-44. In May 2016, this Court granted a joint motion for remand (JMR), in which the parties agreed that remand was necessary to consider whether the respiratory conditions causing or contributing to Mr. Cass's death were related to mold and dust exposure during service. R. at 241-45.

When the matter was returned to the Board, the Board sought a second VHA expert opinion. R. at 76-81. The Board noted that Mr. Cass's SMRs "show complaints of a chronic cough . . . , as well as diagnoses of upper respiratory infection (URI) throughout service," R. at 77, and specifically asked the expert to opine as to whether any of the respiratory conditions causing or contributing to Mr. Cass's death were "related to his duties as a machinist's mate working on the ship's evaporators" and resulting exposure to dust and mold. R. at 80. In May 2017, the second expert disagreed with the December 2013 expert and opined that Mr. Cass's interstitial lung disease was not related to asbestos exposure. R. at 107. She further opined that, regardless, interstitial lung disease did not likely contribute substantially to Mr. Cass's death because there was no evidence showing "rapid or significant progression" of that condition before death. R. at 109. The expert also opined that pneumonitis was not related to asbestos or in-service mold exposure. R. at 107-09.

In the December 2017 decision on appeal, the Board acknowledged that Mr. Cass's SMRs "show respiratory complaints and diagnoses," but found that Mr. Cass did not have "a respiratory disorder at the time of separation from service." R. at 16. The Board further found that the earliest diagnosis of a condition eventually causing or contributing to death was "a diagnosis of COPD in the early 1990s." *Id.* The Board found that this evidence "weigh[ed] against a finding of onset during service or within close proximity thereto." *Id.* The Board also found that no condition causing or significantly contributing to death was caused by asbestos, chemical, or mold exposures during service. R. at 16-23. Consequently, the Board denied the claim. R. at 23. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Ms. Cass's appeal is timely and the Court has jurisdiction to review the December 2017 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Pursuant to 38 U.S.C. § 1310, dependency and indemnity compensation (DIC) is paid to a surviving spouse of a qualifying veteran who died from a service-connected disability, even if the veteran was not service connected for that disability at the time of death. *DeLaRosa v. Peake*, 515 F.3d 1319, 1323 (Fed. Cir. 2008); *Patricio v. Shulkin*, 29 Vet.App. 38, 44 (2017). To establish service connection for the cause of a veteran's death, the evidence must show that a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a) (2019). A service-connected disability is the principal cause if it was "the immediate or underlying cause of death or was etiologically related" to the death; it is a contributory cause if it "contributed substantially or materially" to the cause of death, "combined to cause death," or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(b), (c)(1).

The Secretary has a duty to assist claimants in developing their claims. 38 U.S.C. § 5103A. For DIC claims, that duty includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate" the claim, which may include providing a VA medical opinion. 38 U.S.C. § 5103A(a)(1); *see DeLaRosa*, 515 F.3d at 1322 (holding that the duty-to-assist provisions of section 5103A(a), rather than of 5103A(d), apply to DIC claims). When the Secretary undertakes to provide such an opinion, he must ensure that the opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

The Court reviews the Board's determination that a VA medical opinion is adequate and the duty to assist satisfied under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Nolen v. Gober*, 14 Vet.App.

183, 184 (2000). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its duty-to-assist determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Wise v. Shinseki*, 26 Vet.App. 517, 524 (2014); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

III. ANALYSIS

Ms. Cass argues that the Board erred in failing to obtain a medical opinion that addressed the reasonably raised theory that the conditions causing or contributing to Mr. Cass's death were related to his in-service colds, chronic cough, and URIs. Appellant's Brief (Br.) at 4-7. She further argues that, to the extent that the Board nonetheless considered that theory of entitlement, its statement of reasons or bases is inadequate because "the Board impermissibly relie[d] on its own medical conclusion" in finding no link between the in-service respiratory conditions and those causing or contributing to Mr. Cass's death. *Id.* at 8. The Secretary disputes those arguments and contends that the Board was not required to consider this theory of entitlement because it was not raised below. Secretary's Br. 5-8.

It is well established that the Board is required to consider all theories of entitlement to VA benefits that are *either* raised by the claimant *or* reasonably raised by the record. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 3 (2009) (per curiam order) (noting that the Court has "jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, with regard to a claim properly before the Court, but failed to do so"). Here, Mr. Cass's SMRs reflect

that he was treated on several occasions for colds, cough, and other respiratory complaints. *See* R. at 3218, 3219, 3224, 3225, 3229, 3234, 3239. Furthermore, in the October 2013 request for a VHA expert opinion, the Board both acknowledged "complaints of a chronic cough in service," R. at 713, and asked the expert to opine as to whether any of the pertinent conditions "manifested in or are otherwise related to his military service," R. at 717. Similarly, in its second request for a VHA expert opinion, the Board noted that Mr. Cass's SMRs "show complaints of a chronic cough . . . , as well as diagnoses of upper respiratory infection (URI) *throughout service*." R. at 77 (emphasis added). Therefore, the Court agrees with Ms. Cass that the documented respiratory events in service, combined with the Board's explicit reference to those events in requests for medical expert opinions, reasonably raised the theory that those in-service respiratory events were related to the respiratory events causing or contributing to Mr. Cass's death. *See Schroeder*, 212 F.3d at 1271; *Robinson*, 21 Vet.App. at 552.

Because the Court agrees with Ms. Cass that the record reasonably raised the theory that Mr. Cass's in-service respiratory events are related to those that caused or contributed to his death, the Court also agrees that the March 2010, March 2011, December 2013, and May 2017 VA medical and VHA expert opinions are collectively inadequate because none addressed that theory and, therefore, did not provide the Board with the information it needed to decide the claim. *See* Appellant's Br. at 5-6; *see also Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293; *Stefl*, 21 Vet.App. at 123; *Ardison*, 6 Vet.App. at 407. In addition, the Court agrees with Ms. Cass that, to the extent that it addressed the reasonably raised theory in its statement of reasons or bases, the Board impermissibly relied on its own nonexpert medical conclusion—because it did not obtain a medical opinion on the theory—to find no link to the in-service respiratory conditions. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991). Consequently, its reasons or bases for denying DIC are inadequate, *see Caluza*, 7 Vet.App. at 506, and judicial review is frustrated, *see Gilbert*, 1 Vet.App. at 57.

Accordingly, the Court concludes that remand is warranted for the Board to obtain an adequate medical opinion as to the cause of the Mr. Cass's death and to address all reasonably raised theories of entitlement to DIC. *See Barr*, 21 Vet.App. at 311; *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). Ms. Cass is free on remand to present any additional

arguments and evidence to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the December 6, 2017, Board decision is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: October 30, 2019

Copies to:

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