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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3290

BENJAMIN H. SUHR, APPELLANT,

v.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Benjamin H. Suhr appeals through counsel a May 23, 2018, Board of Veterans' Appeals decision denying service connection for hepatitis C, and for joint pain, chronic fatigue, dizziness, chronic abdominal pain, a right knee disability, a back disability, and an acquired psychiatric disorder, all secondary to hepatitis C. Record (R.) at 3-14.¹ The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to determine whether the Board erred by relying on inadequate medical examinations to conclude that Mr. Suhr was not entitled to service connection for hepatitis C. Because the Board failed to adequately explain its use of the April 2012 VA examination and relied on an inadequate May 2013 VA examination, the Court will set aside that portion of the Board decision concerning hepatitis C and remand that matter for readjudication. Additionally, because the Court agrees with the veteran that his joint pain, chronic fatigue, dizziness, chronic abdominal

¹ The Board also denied a disability rating for hemorrhoids in excess of 10%, R. at 3, but the veteran does not raise any contentions of error regarding this matter and the Court will not address it. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing the appeal of that issue); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

pain, right knee disability, back disability, and acquired psychiatric disorder are inextricably intertwined with his hepatitis C claim, we will set aside and remand those matters as well.

I. FACTS

Mr. Suhr served on active duty from 1969 to 1971. R. at 225. During service, he received several air gun inoculations. R. at 316.

A March 2003 VA medical record noted that Mr. Suhr's hepatitis C screening was positive and that he "affirmed that he had one risk factor" of hepatitis C. R. at 3422-23. Later that month, a VA doctor indicated that the veteran had a history of intravenous drug use 30 years prior. R. at 3419. The record contains numerous pieces of evidence highlighting Mr. Suhr's admission that he used intravenous drugs. *See* R. at 1149 (April 2004 notation that Mr. Suhr engaged in IV drug use); *see also* R. at 3194, 3172, 2185.

In November 2011, Mr. Suhr submitted a claim of service connection for hepatitis C on a direct basis, and for joint pain, chronic fatigue, dizziness, abdominal pain, back pain, and confusion/inability to concentrate, all as secondary to his hepatitis C. R. at 2530-31. He attested that he had never used a controlled substance before and alleged that his hepatitis C was a result of his in-service air gun inoculations. R. at 2531.

In April 2012, a VA examiner opined that Mr. Suhr's hepatitis C was not caused by or related to service. R. at 793. The examiner addressed and dismissed Mr. Suhr's allegations that his in-service air gun inoculations caused his hepatitis C, because the examiner could not find any "[medical] evidence of [h]epatitis C infection being caused by the [j]et [i]njector [g]un that was used in service." R. at 793.

In May 2012, a regional office denied Mr. Suhr's claim because it reasoned that there was no nexus between his hepatitis C and service. R. at 769. In July 2012, Mr. Suhr appealed this decision. R. at 736.

In May 2013, a VA examiner determined that Mr. Suhr's hepatitis C was not related to service. R. at 294. The examiner explained that, although Mr. Suhr claimed that service caused his hepatitis C, none of the in-service activities Mr. Suhr pointed to, including air gun inoculations, were the cause of his hepatitis. R. at 295. The examiner further explained that these in-service activities were "much less likely" the cause of the hepatitis C infection. *Id.*

Following a December 2013 Statement of the Case, which continued the denial of service connection, Mr. Suhr perfected his appeal to the Board in January 2014. R. at 248-72, 245. In May 2017, the veteran submitted a private medical opinion that found that it was as likely as not that his hepatitis C was caused by service. R. at 38-43. The private physician reasoned that it was impossible to determine whether Mr. Suhr contracted hepatitis C from his drug use or his in-service inoculations and thus it was equally plausible that either of these sources was the cause of the condition. *Id.*

In May 2018, the Board issued the decision on appeal, denying Mr. Suhr service connection for hepatitis C and, consequently, for his secondary conditions as well. R. at 4-14. The Board determined that Mr. Suhr was not credible because he had submitted conflicting evidence regarding his drug use and subsequently concluded that he had used intravenous drugs on several occasions. R. at 8. The Board then afforded diminished probative weight to the May 2017 private opinion because the Board reasoned that the examiner relied on Mr. Suhr's incredible statement that he only used intravenous drugs once. R. at 9-10. The Board then found that the April 2012 and May 2013 VA examinations carried significant probative weight because they were based on the understanding that Mr. Suhr used intravenous drugs on more than one occasion. R. at 10.

II. ANALYSIS

Mr. Suhr argues that the Board relied on inadequate medical examinations to deny service connection for hepatitis C. Appellant's Brief (Br.) at 9-18. He further argues that his secondary conditions are inextricably intertwined with his hepatitis C claim and that those conditions should be remanded as well. Appellant's Br. at 18-20. The Secretary disagrees and argues that the Board's decision should be affirmed in its entirety. Secretary's Br. at 6-15.

A. April 2012 VA Examination

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting 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).

Here, the Board provided an inadequate explanation as to why it relied on the April 2012 VA examination to deny service connection for hepatitis C. R. at 10. A review of the April 2012 opinion shows that the examiner based his negative nexus opinion on his belief that there is no evidence that in-service inoculations cause hepatitis C. R. at 793. It is unclear to the Court why the Board relied on this examination, given that VA has conceded that in-service air gun inoculations are a "biologically plausible" source for hepatitis C. *VA Adjudications Procedures Manual* (M21-1), part III, subpt. iv, Chap. 4, sec. H.2.j; *Relationship Between Immunization with Jet Injectors and Hepatitis C Infection as it Relates to Service Connection*, VA Fast Letter 04-13 (June 29, 2004), available at <https://www.hepatitis.va.gov/pdf/jet-injectors.pdf>. The Board should have explained why it relied on an examination that appears to conclude that hepatitis C infection through air gun injections is not possible, particularly where the Board acknowledged that Mr. Suhr was exposed to air gun inoculations in service. R. at 8; *see Allday*, 7 Vet.App. at 527. The Board's failure to discuss this discrepancy frustrates judicial review and remand is warranted to correct this deficiency. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate).

B. May 2013 Examination

A medical examination that merely lists facts and conclusions with no "reasoned medical explanation connecting the two" lacks probative value. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). However, statements on a medical examination must be read in the context of the examination "as a whole," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012), and an examiner is not required to discuss all evidence favorable to an appellant or to otherwise give his or her reasons for discounting favorable evidence, *Roberson v. Shinseki*, 22 Vet.App. 358, 367 (2009). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[T]here is no reasons or bases requirement imposed on examiners."). Further, we review for clear error the Board's determinations that an examination is adequate. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether medical examination is adequate is a finding of fact).

Here, the Court concludes that the Board clearly erred by relying on the May 2013 examination. Specifically, we find that the May 2013 examiner failed to explain *why* it was more likely that Mr. Suhr's drug use caused his hepatitis C, outside of his conclusory statement to that effect. *See* R. at 295 (May 2013 examiner summarily stating that none of the in-service activities

Mr. Suhr pointed to, including air gun inoculations, were the cause of his hepatitis); *see also Nieves-Rodriguez*, 22 Vet.App. at 301; *D'Aries*, 22 Vet.App. at 104. Thus, remand is required for the Board to order an additional examination that provides a reasoned medical explanation connecting the ultimate opinion with the facts surrounding Mr. Suhr's condition. *See Nieves-Rodriguez*, 22 Vet.App. at 301 (2008).

C. Secondary Conditions

Because the Court is remanding the hepatitis C claim, we find that Mr. Suhr's claims as to his secondary conditions must also be remanded. Appellant's Br. at 18-20; *see Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (for judicial review purposes, a matter is considered inextricably intertwined with another matter when a decision on one matter would have a significant effect on the other matter, such that separate judicial review of the second matter could be rendered "meaningless and a waste of judicial resources"); *see also Ephraim v. Brown*, 5 Vet.App. 549, 550 (1993) (inextricably intertwined claims should be remanded together).

On remand Mr. Suhr is free to submit additional argument and evidence as to the remanded matters, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

Upon consideration of the foregoing, the portions of the May 23, 2018, Board decision denying service connection for hepatitis C, and for joint pain, chronic fatigue, dizziness, chronic abdominal pain, a right knee disability, a back disability, and an acquired psychiatric disorder, all secondary to hepatitis C, are SET ASISDE and remanded for further proceedings. The remainder of the appeal is DISMISSED.

DATED: December 20, 2019

Copies to:

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