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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4330

LINDA E. KEHAGIAS, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Linda E. Kehagias, appeals through counsel an April 25, 2018, Board of Veterans' Appeals (Board) decision in which the Board denied her entitlement to benefits for the cause of death of her husband, veteran Peter G. Kehagias. Record (R.) at 2-9. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Kehagias served on active duty in the U.S. Marine Corps from March 1959 until October 1982. R. at 3. VA presumes that he was exposed to herbicides during his service. *Id.* He died in June 2009. R. at 675. Metastatic sarcomatoid renal cell cancer contributed to his death. *Id.*

In July 2009, the appellant filed a claim for entitlement to disability benefits for the cause of Mr. Kehagias's death. R. at 678-81. In February 2010, the VA regional office denied her claim. R. at 537-39.

In September 2016, the Board remanded the appellant's case for the Secretary to obtain a medical opinion discussing whether there was a link between Mr. Kehagias's in-service herbicide exposure and his cancer. R. at 39-42. In February 2017, a VA medical examiner opined that Mr. Kehagias's cancer was "less likely than not" related to herbicide exposure. R. at 33.

On April 25, 2018, the Board issued the decision presently under review. R. at 2-9.

II. ANALYSIS

The Board's decision is deficient for the following reasons. First, a few weeks before the Board issued the decision on appeal, the appellant submitted a statement contending that the February 2017 examination report is inadequate. R. at 12-13; *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). The statement included a detailed assertion about what a medical opinion must contain and what sources should be consulted to adequately respond to the medical issues raised by this case. R. at 13. The Board acknowledged the appellant's argument. It responded:

The Board finds the opinion adequate. In rendering the medical opinion, the examiner provided a thorough discussion of the relevant medical records and lay statements of record, and discussed medical literature relevant to [Mr. Kehagias's] terminal renal cancer. [His] diagnosed cause of death is not identified on the list of disabilities associated with Agent Orange exposure and the examiner found that an association between [his] cancer and herbicide was not proven. As such, the Board finds the VA opinion to be adequate and highly probative.

R. at 8-9.

This statement is a variation on the boilerplate that the Board routinely uses when a claimant challenges a VA medical opinion, and it is not responsive to the appellant's arguments. The Board did not answer the appellant's assertions that an examiner cannot produce an adequate medical opinion in this matter without engaging certain documents that she specifically identified and addressing other issues. On remand, the Board should directly respond to those arguments and support its decision with an adequate statement of reasons or bases.

Next, the Board did not sufficiently explain its determination that the explanation that the 2017 examiner gave for his conclusion that Mr. Kehagias's cancer was not linked to herbicide

exposure is adequate. *Nieves-Rodriguez*, 22 Vet.App. at 301; *Stefl*, 21 Vet.App. at 123. The examiner wrote that the "factors that increase the risk for kidney cancer include that of older age, smoking, obesity, hypertension, treatment for kidney failure and certain inherited syndromes, for example," and then noted that Mr. Kehagias had some of those risk factors. R. at 33. The only source that the examiner cited was a website created by the Mayo Clinic that apparently contained information about kidney cancer written for a general audience. The examiner's source list, paltry in both number and depth, should have caused the Board to more carefully consider whether the examiner availed himself of all materials necessary to answer the complicated questions raised by this case.¹

The Court notes for the Board's benefit that a visit to the Mayo Clinic's website reveals that the examiner either did not convey all information on that site or that the information has changed since he wrote his report.² See *Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (holding that the Court "'may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within [its] jurisdiction[]." (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988))). The risk factors for kidney cancer that the Mayo Clinic lists are the same and in the same order as those reported by the examiner. The examiner, however, did not list one risk factor now reported by the Mayo Clinic that certainly seems to be important to this case: "Exposure to certain substances in the workplaces. This might include, for example, exposure to cadmium or specific herbicides." See <https://www.mayoclinic.org/diseases-conditions/kidney-cancer/symptoms-causes/syc-20352664> (last visited Dec. 11, 2019) (emphasis added).

The examiner reported that the "cause for renal cell carcinoma is not known" and stated that a link between herbicide exposure and Mr. Kehagias's cancer "so far is only a theoretical consideration which has not been proven." *Id.* It is difficult to interpret what the examiner means (and the Board did not clearly do so in its decision). Does he mean that scientists have investigated the matter and found no proof of a link between herbicide exposure and renal cancer? Or does he mean that scientists have made no or only minimal investigative efforts, and the answer to the

¹ The Secretary in briefing suggests that the examiner's Mayo Clinic citation is a single representative example of "all the medical literature he consulted." Secretary's Brief at 12. Nothing in the examiner's report supports that assertion. There is no indication that the examiner's research went beyond a single website.

² The Mayo Clinic's renal cancer page is now located at a different web address than the one provided by the examiner.

question presented remains uncertain? The Board should make detailed factual findings about the examiner's remark on remand. It also should note that, in its 2016 remand decision, it expressed interest in learning whether there are "limits of scientific or medical knowledge." R. at 42.

The examiner's statements that the cause of renal cell cancer "is not known" and that a link between herbicide exposure and renal cell cancer "has not been proven" leave the Court unsure how the examiner felt able to state without resorting to speculation that it is less likely than not that the Mr. Kehagias's cancer was related to herbicide exposure. R. at 33; *see Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). The Board should thoroughly consider whether the examiner connected his data points to his conclusion with an explanation sufficient to allow it to confirm that, although the cause of Mr. Kehagias's cancer cannot be known, herbicide exposure likely had nothing to do with that cause. *Nieves-Rodriguez v. Peake*, 22 Vet.App. at 301 (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two").

The examiner did not explain whether sarcomatoid features of Mr. Kehagias's cancer alter the analysis. The record contains at least one piece of evidence that suggests that sarcomatoid renal cancer is unusual. R. at 588. The Secretary asserts that the examiner "presumably" did not address the matter because "the cause for the sarcomatoid features is unknown." Secretary's Brief at 13. Nothing in the examiner's report supports the Secretary's presumption. Even if he is correct, however, how can the examiner state with confidence that herbicide exposure and Mr. Kehagias's cancer are not linked if the cause of unusual sarcomatoid features is unknown? On remand, the Board should discuss whether a detailed statement concerning the potentially unusual nature of Mr. Kehagias's cancer is necessary to determine whether herbicide exposure affected its development. *See Stefl v. Nicholson*, 21 Vet.App. at 123 (holding that a medical opinion is adequate "where it . . . describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994))).

The examiner stated that the Mr. Kehagias's "known risk factors" for renal cancer "*could* have contributed to the development of his cancer." R. at 33 (emphasis added). The Board should have addressed whether the qualifier "could" indicates that the examiner's opinion is undermined by impermissible equivocation. *Hood v. Shinseki*, 23 Vet.App. 295, 298-99 (2009) (holding that an equivocating opinion is "speculative and of little probative value"); *see also Bloom v. West*,

12 Vet.App. 185, 187 (1999) ("By using the term 'could,' without supporting clinical data or other rationale, [the examiner's] opinion simply is too speculative in order to provide the degree of certainty required for medical nexus evidence."). For this and the other reasons discussed above, remand is warranted for the Board to reconsider and adequately discuss whether the 2017 examination report is adequate.

The Court need not address other arguments raised by the appellant at this time. *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]").

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's April 25, 2018, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: December 20, 2019

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