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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5990

PHILIP NOAH, APPELLANT,

v.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran Philip Noah appeals through counsel a July 9, 2019, Board of Veterans' Appeals (Board) decision denying service connection for diabetes mellitus, type 2. Record (R.) at 5-12.¹ For the reasons that follow, the Court will set aside the portion of the July 2019 Board decision denying service connection for diabetes and remand the matter for further development and readjudication consistent with this decision.

I. FACTS

Mr. Noah served on active duty in the U.S. Army from June 1966 to June 1969 as an engine equipment repairman and auto mechanic, including service in Thailand from March 1967 to February 1968. R. at 3210, 3288. Following service, he received treatment through the VA healthcare system for diabetes, with prescriptions for metformin and glyburide. R. at 2959-60. He filed a December 2016 claim for service connection for diabetes based on exposure to herbicides during his service in Thailand. R. at 3296, 3835. A VA regional office (RO) denied the claim in

¹ In the same decision, the Board remanded the claim for service connection for ischemic heart disease. R. at 10-12. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider that matter at this time. See *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2020).

August 2017, finding no service in Vietnam and no herbicide exposure during service. R. at 3058-61.

In September 2017, Mr. Noah appealed, arguing that herbicides were used in Thailand to kill vegetation during road construction and that he was exposed to herbicides while serving there. R. at 3023. In November 2017, he submitted a statement listing his in-service chemical exposures, including herbicides while working on the airfields in Thailand. R. at 2583. The RO responded with an April 2018 Statement of the Case (SOC), R. at 2209-36, and Mr. Noah perfected his appeal, R. at 2050.

In the July 2019 decision on appeal, the Board recognized Mr. Noah's service at the Korat Royal Thai Air Force Base (RTAFB) from March 1967 to February 1968 and his contention that he was exposed to herbicides there. R. at 6, 8. However, the Board also noted that Mr. Noah served in the Army as an engine equipment repairman and auto mechanic rather than in the Air Force as a security policeman, security patrol dog handler, member of a security police squadron, or other occupation that included service near the Korat RTAFB's perimeter. R. at 8. The Board rejected Mr. Noah's lay statements alleging herbicide exposure during service in Thailand and denied presumptive service connection because those statements were not specific enough to establish exposure. *Id.* The Board also denied direct service connection, finding no in-service complaint, diagnosis, or treatment for diabetes. R. at 8-10. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Noah's appeal is timely and the Court has jurisdiction to review the July 2019 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination regarding service connection is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "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)).

With any finding on a material issue of fact and law presented on the record, the Board must support its factual determinations 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); *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

Mr. Noah takes issue with two of the Board's findings — that he did not specifically allege exposure to herbicides in Thailand and that the record did not contain evidence showing that he worked on the perimeter of Korat RTAFB. Appellant's Brief (Br.) at 5. He asserts that his September 2017 Notice of Disagreement and November 2017 lay statements regarding his exposure to herbicides in Thailand as an engine repairman and auto mechanic working on the roads and airfields of Korat RTAFB were sufficiently specific to trigger VA's duty to assist him in obtaining records as to the location of those roads and airfields. *Id.* at 5-7; *see R.* at 2583, 3023. He therefore argues that the Board provided inadequate reasons or bases for those findings. *Id.* The Secretary responds that the Board's findings are not clearly erroneous, that the veteran was provided various notice letters explaining the evidence required to show herbicide exposure, that the veteran did not respond to these notice letters, and that VA has discretion to determine how much development is necessary for a particular claim. Secretary's Br. at 3-5. The Court agrees with Mr. Noah.

Special VA rules were issued governing adjudication of claims based on veterans' assertions that they were exposed to herbicides while serving at certain military bases in Thailand during the Vietnam Era. *See* M21-1, pt. IV, subpt. ii, ch. 1, sec. H.4.b; *see also New Procedures for Claims Based on Herbicide Exposure in Thailand and Korea*, VA Compensation Service Bulletin 3-4 (May 2010). The M21-1 states that, "to verify exposure to herbicides," VA should first determine whether a veteran served at one of seven RTAFB—among which is Korat—and whether the veteran served in the U.S. Air Force as a security police officer, security patrol dog handler, member of the security police squadron, or was "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." M21-1, pt. IV, subpt. ii, ch. 1, sec. H.4.b. For a veteran whose circumstances do not

meet those outlined above, or other enumerated circumstances not at issue here, VA must ask the veteran for the approximate dates, location, and nature of the alleged exposure; review this information; and determine based on this review whether "exposure to herbicides [can] be acknowledged on a direct or facts-found basis." *Id.* If not, the matter must be referred to the Joint Services Records Research Center "for verification of exposure to herbicides." *Id.*

Although the Board is not bound by the M21-1, *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102, 1108 (Fed. Cir. 2017); *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017), guidance in the M21-1 still has a role in the Board's adjudication of claims. As this Court explained in *Overton v. Wilkie*, 30 Vet.App. 257, 264 (2018), although not bound by the M21-1, the Board is still "required to discuss any relevant provisions contained in the M21-1 as part of its duty to provide adequate reasons or bases" and must make its own determination as to whether a particular provision applies to the case on appeal. *See Patton v. West*, 12 Vet.App. 272, 282 (1999) ("The [Board] cannot ignore provisions of the [M21-1] . . . that are favorable to a veteran when adjudicating that veteran's claim.").

The Board recognized that the M21-1 provision regarding service at RTAFBs applied here, characterizing the provision as providing "useful guidance" for Mr. Noah's claim. R. at 7. Yet, the Board ultimately declined to follow that provision, finding that Mr. Noah's assertions of herbicide exposure were not specific enough to trigger further development. R. at 8. But the Board, in making this finding, failed to discuss whether VA had contacted the veteran to ascertain the approximate dates, location, and nature of the alleged exposure, as this provision of the M21-1 references. *See* M21-1, pt. IV, subpt. ii, ch. 1, sec. H.4.b. Because the Board acknowledged the M21-1's "useful guidance" in this case and then ignored that guidance, the Court is persuaded that Board failed to provide adequate reasons or bases for its denial of service connection for diabetes. *See Overton*, 30 Vet.App. at 264.

Although the Secretary asserts that October 2017 and March 2019 notice letters adequately informed Mr. Noah of the evidence necessary to show herbicide exposure in Thailand, Secretary's Br. at 4, that is simply not true. The October 2017 notice letter did not mention herbicides, R. at 3012-14, and the March 2019 letter only states that presumptive service connection based on herbicide exposure is available, R. at 949-61. Neither notice letter appears to include the *VBMS AO – Exposure General Notice* paragraph referenced in the M21-1. *See* M21-1, pt. IV, subpt. ii, ch. 1, sec. H.4.b. Moreover, regardless of whether Mr. Noah responded to the March 2019 notice

letter, he was never contacted for information regarding the approximate dates, location, and nature of his alleged herbicide exposure, as mandated by the M21-1. *See id.* Because the Board expressly found that M21-1, part IV, subpart ii, chapter 1, section H.4.b applied here, the Board was required to follow that provision or, at a minimum, explain why it was not necessary to do so. The Board's failure to address this issue rendered inadequate its reasons or bases for denying service connection for diabetes, *see Gilbert*, 1 Vet.App. at 57, necessitating remand of that claim, *see 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").

IV. CONCLUSION

Upon consideration of the foregoing, the portion of the July 9, 2019, Board decision denying service connection for diabetes mellitus, type 2, is SET ASIDE, and that matter is REMANDED for further development and readjudication consistent with this decision.

DATED: November 25, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)