

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

**15-4408
Vet. App. No.**

HANS W. JACOBSON,

Appellant

v.

ROBERT A. MCDONALD,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

- A. Whether the Board of Veterans' Appeals Commits Remandable Error When, in Denying a Veteran's Claims for Service Connection for a Cervical Spine Disorder and Headaches / Migraines, it Relies upon an Examination Inadequate for Rating Purposes, Fails to Ensure Substantial Compliance with a Prior Remand, Ignores Favorable Evidence, and Provides Inadequate Reasons and Bases for its Decision.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Hans W. Jacobson (Jacobson) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2016).

B. Nature of the Case / Result Below

Jacobson appeals the September 25, 2015 Board of Veterans' Appeals (Board) decision that denied service connection for cervical spine degenerative joint disease and migraines.¹

C. Relevant Facts

Jacobson is an U.S. Navy veteran, with honorable service from May 1984 through November 1987, and he was awarded, *inter alia*, the Sea Service Deployment Ribbon and a Meritorious Unit Citation.² In 1987, while on active

¹ R 2 - 27 (September 25, 2015 Board Decision).

² R 3312 (DD-214). He is service-connected for lumbar spine (40%), adjustment disorder (30%), bilateral lower extremity radiculopathy (10% each) and tinnitus (10%).

duty, during a heavy roll of the U.S.S. Leftwich (DD984), boxes of frozen meat broke loose from their fastenings and fell on him, pinning him to the deck in the walk-in freezer.³ As a result, Jacobson was released early from his term of military service after it was adjudicated he was physically unable to perform the tasks of an able-bodied seaman.⁴

In July 2008, Jacobson sought service connection for cervical spine disorder, both directly, as a result of food stores falling on him when he was working as a cook aboard the U.S.S. Leftwich (DD984), and secondary to his service-connected lumbar spine disability. Further, Jacobson sought service connection from headaches / migraines, as secondary to his cervical spine degenerative disease and / or service-connected lumbar spine degenerative disease.⁵

In July 2014, the Board remanded Jacobson's cervical spine claim for an adequate examination, including a complete opinion considering direct and secondary causation / aggravation by Jacobson's service-connected lumbar

³ R 8; 6417 (6417 - 18) (October 1988 RD)

⁴ R 3339 - 44, 3479 - 83 (medical board records).

⁵ R 5320 (July 2008 VAF21-4138); 5225 - 30 (October 2008 RD); 4222 - 41 (February 2009 SOC); 4214 - 15 (February 2009 VAF9); 3866 - 72 (July 2012 SSOC); 3638 (March 2013 SSOC); 3553 - 54 (October 2013 SSOC); 3491 - 3502 (July 2014 BVA remand); 48 - 59 (March 2015 SSOC)

spine, and supported by a detailed rationale / complete medical explanation.⁶

Similarly, the Board also remanded Jacobson's headaches / migraines service-connection claim for an adequate examination.⁷

In a December 2014 examination, the examiner diagnosed cervical spondylosis DJD, but provided a negative nexus opinion, claiming Jacobson had not sustained the injuries (or even suffered the underlying event) in-service and concluding in-service back pain could not cause Jacobson's current degenerative spine conditions. In summation, the examiner provided a negative nexus opinion Jacobson's cervical spine disease was not and could not be related to Jacobson's in-service injuries as he did not suffer the in-service event. Further, Jacobson's in-service back pain was not and could not be related to Jacobson's degenerative spinal conditions. The examiner concluded the in-service event never happened and Jacobson's in-service back pain did not cause or contribute to his current day degenerative spine conditions.⁸ As a result, Jacobson's claim for service connection for headaches / migraines was also not supported by the examination.

In the September 2015 decision on appeal, the Board denied service

⁶ R 3491 - 3502 (July 2014 BVA remand).

⁷ R 3496 - 3501

⁸ R 2586 - 2612 (December 2014 spine / headaches exam).

connection for cervical spine degenerative joint disease and migraines.⁹ For the reasons set forward below, the Board erred.

III. ARGUMENTS & AUTHORITIES

A. **The Board Committed Remandable Error When, in Denying Jacobson's Claims for Service Connection for a Cervical Spine Disorder and Headaches / Migraines, it Relied upon an Examination Inadequate for Rating Purposes, Failed to Ensure Substantial Compliance with a Prior Remand, Ignored Favorable Evidence, and Provided Inadequate Reasons and Bases for its Decision.**

Once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one.¹⁰ A medical opinion is adequate when it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's "evaluation of the claimed disability will be a fully informed one."¹¹ A medical opinion should contain "such sufficient information that it does not require the Board to exercise independent medical judgment."¹² Further, a medical opinion should "support its conclusion with an analysis that the Board can consider and weigh against

⁹ R 2 - 27

¹⁰ *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

¹¹ *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)

¹² *Stefl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007)

contrary opinions."¹³ A medical opinion that is conclusory and lacks supporting analysis does not provide the Board with an adequate basis to make a decision.¹⁴ An opinion based upon an inaccurate factual premise has no probative value and is, by definition, inadequate.¹⁵

Furthermore, a veteran is entitled to substantial compliance with any and all remand instructions provided by the Board.¹⁶ While substantial compliance does not mean strict compliance, substantial compliance requires actual compliance with essential objectives.¹⁷ A remand is meant to entail a critical examination of the justification for the decision."¹⁸

Additionally, where facts underlying separate claims are "intimately connected," interests of judicial economy and avoidance of piecemeal litigation require that claims be adjudicated together.¹⁹

¹³ *Id.* at 124.

¹⁴ *See id.* at 125 (stating that the Board may not assess the probative value of "a mere conclusion by a medical doctor"); *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two").

¹⁵ *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993).

¹⁶ *Stegall v. West*, 11 Vet. App. 268, 270 - 71 (1998)

¹⁷ *Missouri Veterans Comm'n v. Peake*, 22 Vet.App. 123, 127 (2008)

¹⁸ *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991)

¹⁹ *Bagwell v. Brown*, 9 Vet.App. 337, 339-40 (1996)(remanding claim for increased rating because, *inter alia*, claim inextricably intertwined with remanded

Finally, the Board is required to provide a written statement of reasons or bases explaining its findings of fact and conclusions of law to enable a veteran to understand the basis for the decision and to facilitate judicial review.²⁰ To comply with this requirement, the Board must consider all applicable provisions of law and regulation, analyze the credibility and probative value of evidence, account for evidence it finds to be persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claim.²¹ The Board's failure to provide an adequate statement of reasons or bases precludes effective judicial review and warrants remand.²²

1. Service Connection for a Cervical Spine Disorder.

Jacobson seeks service connection for a cervical spine disorder claim on a direct basis and secondary to his service-connected lumbar spine disability. Further, the Secretary concedes Jacobson suffers from a diagnosed degenerative cervical spine disorder.

In the September 2015 Board decision on appeal, to deny the claim, the Board adopted the December 2014 medical examiner's opinions and concluded

extraschedular rating claim)

²⁰ 38 U.S.C. § 7104(d)(1) (2016)

²¹ *Tatum v. Shinseki*, 23 Vet.App. 152, 155 (2009); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 3.303(a) (2015)

²² *Quirin v. Shinseki*, 22 Vet.App. 390, 398 (2009)

there was an absence of nexus to service for the conceded cervical spine disorder.²³ For the reasons set forward below, the Board erred.

First, back in 1988 it was adjudicated Jacobson was injured in-service when, during a heavy roll of the U.S.S. Leftwich (DD984), boxes of frozen meat broke loose from their fastenings and fell on him, pinning him to the deck in the walk-in freezer.²⁴ In fact, Jacobson was released early from his term of military service based on a medical board's recognition Jacobson injured his back during the in-service event and was physically unable to perform the tasks of an able-bodied seaman.²⁵ Further, as a result of injury, Jacobson is also service-connected for "residuals of back strain, bilateral L5 lumbar spine spondylosis, degenerative changes at L2-3 and L3-4 with lumbar myofascial pain syndrome," rated as 40 percent and expressly includes degenerative changes to his lumbar spine (L2-3 & L3-4) as a residual of his in-service back pain, rated pursuant to 38 C.F.R. § 4.71a, DC 5242, a diagnostic code used to rate "degenerative arthritis of the spine."

To deny Jacobson's cervical spine claim, the Board adopted the negative opinion provided by the December 2014 examiner.²⁶ The examination was

²³ R 8 - 16

²⁴ R 8; 6417 (6417 - 18) (October 1988 RD)

²⁵ R 3339 - 44, 3479 - 83 (medical board records).

²⁶ R 12. The December 2014 was provided Jacobson on the remand of the claim. The Board's July 2014 decision had found the medical exam basis

inadequate for rating purposes.

More specifically, the relied-on December 2014 examiner opined Jacobson's diagnosed cervical spine DJD was not related on a direct basis to Jacobson's claimed in-service event (*i.e.* The falling boxes of frozen meat onto him in the ship's walk-in freezer during a significant roll of the ship.) Note, in explaining the rationale for his negative medical opinion, the December 2014 examiner opined there was no record of the in-service event, there were no contemporaneous medical treatment records, and the examiner went so far as to find the in-service event did not occur.²⁷ This was clearly erroneous. Further, the relied-on examiner additionally explained his negative opinion by finding Jacobson's in-service low back pain did not and could not "cause future development of degenerative arthritis, disc disease."²⁸ This is again erroneous as it serves the basis in which Jacobson's service-connected lumbar spine was service-connected.

The relied-on examiner's rationale, labeled a "medical explanation" by the Board's July 2014 remand, is contrary to the established adjudicated facts of record that control this appeal.²⁹ The in-service event is an adjudicated fact not

inadequate to decide the claim. R 3491 - 3502 (July 2014 BVA remand).

²⁷ R 2609 (2586 - 2612) (December 2014 spine / headaches exam).

²⁸ R 2610 (2586 - 2612) (December 2014 spine / headaches exam).

²⁹ R 3494 (3491 - 3502) (July 2014 BVA remand).

subject to debate. A reality contrary to the event in-service cannot serve as a valid rationale for a medical opinion, but it is a legally binding fact Jacobson experienced the in-service event.³⁰ It is favorably adjudicated Jacobson's spine was injured during the in-service event. The favorably adjudicated evidence goes so far as to show Jacobson was even released early from his military commitment (over his objection) because of the in-service event.

Additionally, the December 2014 examiner's explanation Jacobson's in-service back pain could not result in degenerative disc disease is opposite of both the medical record and the actual adjudicatory history of Jacobson's claims.³¹ The examiner's rationale / medical explanation is incapable of supporting a dispositive, negative medical opinion.³² Absent an adequate medical explanation, not only must the opinion fail, but Jacobson is denied the VA's substantial compliance with the Board's April 2014 remand, which guaranteed him an adequate exam, including an adequate opinion supporting by a complete medical

³⁰ *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) (“[A]n opinion based upon an inaccurate factual premise has no probative value.”)

³¹ One need look no farther than the label of Jacobson's lumbar disability to see the inherent fatal flaw in the examiner's basic understanding of the facts of Jacobson's disabilities. The lumbar spine disability is service-connected and rated as, “residuals of back strain, bilateral L5 lumbar spine spondylosis, degenerative changes at L2-3 and L3-4 with lumbar myofascial pain syndrome.” (Emphasis added)

³² *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008); *Steffl v. Nicholson*, 21 Vet. App. 120, 124 (2007).

explanation.³³

Second, in the October 2015 decision on appeal, the Board found “the remand instructions issued by the Board have been substantially complied.”³⁴ In finding the VA had substantially complied with the Board’s April 2014 remand (by providing the December 2014 exam, as discussed above), the Board discounted the favorable evidence which shows the relied-on examiner significantly misunderstood the underlying favorably adjudicated facts, which have controlled Jacobson’s interactions with the VA since October 1988 (when his lumbar spine was first service-connected).

More specifically, the Board ignored the favorable evidence showing the relied-on medical opinion is based on a factual reality which simply does not exist. The Board’s finding the December 2014 exam substantially complied with the Board’s April 2014 remand is clearly erroneous. The Board’s finding also is based on the unexplained discounting of favorable evidence which shows the finding is clearly erroneous. Absent adequate reasons and bases Jacobson and the Court are denied an opportunity for meaningful judicial review.³⁵

2. Service Connection for Headaches / Migraines

Jacobson claims he suffers from headaches / migraines as secondary to

³³ *Stegall v. West*, 11 Vet. App. 268 (1998); *Barr v. Nicholson*, 21 Vet. App. 303 (2007).

³⁴ R 5

³⁵ *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990)

his cervical spine degenerative disease and / or service-connected lumbar spine degenerative disease. The Board has conceded Jacobson suffers from headaches / migraines.³⁶

In denying the headaches / migraines claim, the Board relied upon the inadequate December 2014 examination. The Board reasoned, as it had denied Jacobson's cervical spine service-connection claim, it had to deny Jacobson's headaches / migraines service-connection, which was made as secondary to the cervical spine condition.

First, for the reasons set forward above, the examination was inadequate for rating purposes and the Board's reliance on it failed to ensure substantial compliance with its prior remand. The failure to provide Jacobson an adequate exam, and decide his service-connection claim on that adequate exam constitutes remandable error. Furthermore, the Board failed to provide adequate reasons and bases, as highlighted above, and the cervical spine claim must be remanded. As it must be remanded, the headaches / migraines must be remanded as intertwined.

CONCLUSION

Accordingly, Jacobson requests this honorable Court to reverse the Board's decision, or in the more likely alternative, remand the claims for further adjudication with the facts of record and the controlling law.

³⁶ R 3496 - 3501 (3491 - 3502) (July 2014 BVA remand).

Respectfully submitted,

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I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the party below:

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