REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3334

HARRY J. JOHNSON,

Appellant

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

The Board's decision denying Mr. Johnson's claim for service connection for depression should be vacated and remanded as it failed to properly interpret and apply the law in regard to its duty to assist.

A. The Board's failure to comply with the duty to assist.

The scope of duty to assist is a legal issue, not a factual one, which the Court reviews de novo. *See Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013) (Federal Circuit case holding that it has jurisdiction to address this issue); *but see McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006) (holding that the determination as to whether there is an indication that current disability may be associated with service is reviewed under for whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Mr. Johnson contends the Board misinterpreted the law when it failed to seek a medical opinion. Apa. Op. Br. at 5.

There is no dispute that Mr. Johnson has a current disability. *See e.g.* R-1651-55. He has stated that he experienced "mental pain" in service and began to use alcohol for relief. R-408. During military service, he was noted to be a "habitual troublemaker" and that he had "a defective attitude." R-617-18; R-628-29. Mr. Johnson has stated that he was the target of harassment in service. R-408. Thus, there are in-service events or injuries presented on the record. This evidence satisfies the first two elements of *McLendon*, 20 Vet.App. at 83. The Secretary makes no argument to the contrary. *See* Sec. Br. at 7.

The error in this case relates to the third element of *McLendon*, whether there is an indication that the current disability is related to the in-service event or injury. The Board relied on the lack of medical evidence relating the Veteran's depression to service as the basis to find no examination was needed. *See* R-6-7. However, medical evidence of nexus is not required in order to trigger the duty to assist. Such a requirement would undermine the purpose of 38 U.S.C. § 5103A.

Here, the Board relied on the lack of nexus evidence in the medical records to support its determination that a medical opinion was not warranted. *See* R-6-7; R-11-12. The error in the Board's analysis is that it fails to explain why the lack of nexus evidence in treatment records supports its conclusion that there is no possible relationship between the diagnosed depression and service. The Secretary misconstrues Mr. Johnson's argument as to this issue. He argues that Appellant "is asserting that the Board erred due to its compliance with its duty to review the relevant evidence of record." Sec. Br. at 6. This argument misses the mark. There is no error in the Board's review of the record, but where it draws an inference against the claim it must establish a proper basis for its determination. *See Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015). The Board provides no explanation as to why the lack of nexus evidence in treatment records is significant evidence against this claim, or how it has the requisite training or knowledge to interpret the medical records to rule out nexus. *See* R-11-12; *Colvin v. Derwinski*, 1Vet.App. 171, 175 (1991); Apa. Op. Br at 5.

The Secretary argues that "there is absolutely no evidence to indicate a connection between his current disorder and service." Sec. Br. at 7. He contends that unlike in *McLendon*, Mr. Johnson did not *submit* any evidence to the Board for its consideration. *Id.* His argument is premised on an assumption that lay evidence cannot be competent evidence to indicate a possible relationship between service and a current disability. *See* Sec. Br. at 8. He cites *Waters v. Shinseki*, 601 F.3d 1274, 1278-79 (Fed. Cir. 2010), for the proposition that "a claimant's mere allegation that a disability may be related to service is sufficient to invoke the Secretary's duty to provide an examination or opinion." Sec. Br. at 8. This reads the decision too broadly.

In *Waters*, the Federal Circuit found that "in the absence of *any* medical evidence, Waters' own conclusion statements regarding causation were insufficient to establish the necessary nexus between his in-service schizophrenia and his present ailments." *Id.* Relevant to this holding is the fact that Mr. Waters's claim was that his diabetes mellitus and hypertension were secondary this anti-psychotic medication administered to him during service. *Id.* at 1275.

However, in a later decision, the Federal Circuit clarified that "medically competent evidence *is not* required in every case to 'indicate' that a claimant's disability 'may be associated' with the claimant's service." *Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (Fed. Cir. 2010). There, the veteran claimed that his current back disability was

related to service but there was a lack of service medical records to corroborate an in-service injury. *Id.* at 1380.

This case is akin to *Colantonio* as the issue involves the Veteran's statements as to an in-service injury and their relevance to the current disability. Contrary to the Secretary's position, Mr. Johnson's lay statements can trigger the duty to assist even though he is not competent to opine on etiology. *See* Sec. Br.at 8. The Secretary's argument fails to address the Federal Circuit's decision in *Colantonio* and misinterprets the scope of its decision in *Waters*.

B. The Board's reasons or bases as to Mr. Johnson's credibility

The Board determined Mr. Johnson lacked credibility because of inconsistencies regarding when he first associated his depression with military service. *See* R-12. While the Secretary is correct that inconsistent statements are a factor that may affect credibility, Sec. Br. at 9, the error presented here is not that the Board looked to this issue. Rather, it is the lack of explanation as to *why* any such inconsistency would be relevant to the Veteran's credibility that he experienced symptoms similar to his present depression symptoms in service. In assessing the evidence of record the Board must account for its treatment of the evidence. *See Caluza v. Brown*, 7 Vet.App. 498, 511 (1995); *see also Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); 38 U.S.C. § 7104(d)(1). The Secretary does not make any argument regarding this allegation of error or cite to any relevant discussion provided by the Board to support its conclusion that Mr. Johnson is not credible. *See* Sec. Br.at 10.

CONCLUSIONS

For these reasons, along with those presented in his opening brief, Mr. Johnson respectfully requests the Court to vacate the Board's decision and remand his appeal for the Board to seek a medical opinion to adjudicate his claim and then provide adequate reasons or bases in support of its decision.

Respectfully submitted,

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