

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3647

JIMMY L. HENRY

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENT

The Board erred in denying the Veteran's claim for service-connection for a low back disability, because it relied on an inadequate VA examination, and failed to adequately discuss the Veteran's documented complaints of back pain throughout the 1990's.

The Secretary argues that the Veteran's argument should fail, because the Veteran's complaints of back pain throughout the 1990's did not include neurological components. Sec. Br. at 12-14. But it is completely unclear why evidence of neurological involvement is required for these notations of back pain to be relevant. The Veteran is diagnosed with lumbar spondylosis with herniated disc status post discectomy and degenerative disc disease. R-8; R-38. In concluding that the current back disability was not incurred in service, the December 2014 VA examiner relied on the fact that some of the treatment records during the 1990's did not note back pain. R-31; R-37. The December 2014 VA examiner relied on the Veteran's lack of back pain prior to 2000, to conclude that the current back disability was not incurred in 1989. *Id.*

By contrast, in his opening brief, the Veteran identified numerous instances of back pain prior to 2000, which were documented in the record. Apa. Open. Br. at 7-8 (*citing* R-326; R-367; R-477; R-479-81; R-483). The Secretary now seeks to discredit this evidence by stating that it is not relevant because it did not describe neurological components. Sec. Br. at 12-14. But neither the Board nor the VA examiner specified that the only relevant evidence was that which specifically referenced neurological

components. *See* R-8-9; R-31; R-35-45. They simply found that the Veteran had denied back pain at times during the 1990's, and thus, his 1989 injury did not continue during that time. *Id.* Because there is evidence of record directly contradicting a fact that the Board and VA examiner relied upon, and because neither one discussed why that evidence was less probative than the other evidence of record, remand is required. *Apa. Open. Br.* at 7; *see* 38 U.S.C. § 7104(d)(1); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

Similarly, the Secretary also argues that the Veteran's citation of these documented complaints of back pain in the 1990's is not probative, because they do not identify any underlying condition for the pain, and do not relate the pain to the in-service blood patch. *Sec. Br.* at 14. As support for this assertion, he cites *Sanchez-Benitez v. West*, 13 Vet.App. 282, 285 (1999) for the proposition that "pain alone, without a diagnosed or identified underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted." *Sec. Br.* at 14. But the Veteran is not seeking service-connection for pain alone. He seeks service connection for his diagnosed lumbar spondylosis with herniated disc status post discectomy and degenerative disc disease. R-2, 8; R-38.

The purpose of citing the complaints of back pain throughout the 1990's is not to suggest that he should be separately service-connected for a different disability that he suffered from back then, but rather, to show a continuation of symptoms between

the 1989 lumbar patch and the current diagnosis. *Apa. Open. Br.* at 7-8; *see* 38 C.F.R. § 3.303(b) (2016); *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997) (Continuity of symptomatology may be established by showing (1) that a condition was noted during service; (2) evidence of continuous symptoms after service; and (3) medical, or in certain circumstances, lay evidence of a nexus between the current disability and the postservice symptoms.) Indeed, the existence of such symptoms during the 1990's is clearly relevant, since both the Board and the VA examiner concluded that a *lack* of such symptoms meant service-connection was not warranted. R-8-9; R-31; R-36-37.

The Veteran understands the Secretary's point that it is unclear what was causing the back pain throughout the 1990's. *See* *Sec. Br.* at 14. But simply because there is an unanswered medical question does not mean that this evidence is entirely irrelevant. Rather, if the Board needs more information in order to determine the probative value of the reports of pain throughout the 1990's, it must remand the case for additional development on the nature of such pain, and how it relates to the 1989 injury, and/or the current diagnosis. *See* 38 C.F.R. § 4.2 (2016) (if a medical report "does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes").

Instead of answering this question, the VA examiner, and hence the Board, simply dismissed these reports of pain, relying instead on other occasions where the Veteran denied back pain. R-8-9; R-31; R-36-37; *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (concluding that a medical opinion is not entitled to any

weight “if it contains only data and conclusions”). And now, the Secretary seeks to justify this decision by suggesting that those notations of pain are not probative, because they did not specifically relate that pain to the 1989 injury, and did not provide a specific diagnosis. Sec. Br. at 14. This is post-hoc reasoning, and further, it rests on the incorrect assumption that the notations of pain throughout the 1990’s are only relevant if they mention a specific diagnosis. *See* 38 C.F.R. § 3.303(d) (2016) (“Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service.”); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel’s “post-hoc rationalizations” for agency action and are advanced for the first time on appeal); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg J., concurring) (stating that the “Court’s role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases”).

CONCLUSION

The Board’s decision denying service-connection for a low back disability was inadequate because it adopted an inadequate VA examination, and failed to reconcile its finding’s with contradictory evidence of record. The record contains numerous medical records documenting back pain throughout the 1990’s, and the Veteran has since stated that he had off-and-on pain throughout that time. Yet both the Board

and the VA examiner relied on the “pattern” of back complaints after 2000 compared to the “lack” of such complaints prior to that date. Remand is required.

Respectfully submitted,

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