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

NO. 15-3647

JIMMY L. HENRY, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Judge*: Jimmy L. Henry appeals through counsel an August 7, 2015, Board of Veterans' Appeals (Board) decision denying service connection for a low back disability. Record (R.) at 2-9. This appeal is timely and the Court has jurisdiction to review the 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). For the reasons that follow, the Court will set aside the August 7, 2015, Board decision and remand the matter for readjudication consistent with this decision.

**I. FACTS**

Mr. Henry served on active duty in the U.S. Air Force from January 1974 to September 1977 and from August 1987 to August 1990, with additional service in the Texas Air National Guard. R. at 59-60; *see* R. at 3. In February 1989, he underwent surgery for a right ankle ganglion cyst that required anesthesia, after which he experienced spinal headaches.<sup>1</sup> R. at 251. The headaches were

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<sup>1</sup> A spinal headache may occur after a spinal tap, spinal anesthesia, or epidural anesthesia and is caused by leakage of spinal fluid through a puncture hole in the membrane that surrounds the spinal cord. <http://www.mayoclinic.org/diseases-conditions/spinal-headaches/basics/causes/con-20025295> (last visited Nov. 21, 2016).

treated with a "blood patch," which caused pain in the lower lumbar spine that resolved overnight. *Id.* The service treatment record (STR) indicated that on the following day the veteran no longer had a headache and his lumber pain had markedly decreased. *Id.* February and March 1989 STRs do not indicate that the veteran reported headaches or back pain during follow-up visits. R. at 248.

A February 1991 National Guard treatment record (NGTR) noted that Mr. Henry had low back pain, with no previous history of trauma, and lumbosacral spine strained was assessed. R. at 326. That same month, a private physician indicated that the veteran developed back pain during his weekend military drills and diagnosed lumbar strain from overuse. R. at 474. An April 1991 examination report indicated that the veteran's spine was normal and that he denied recurrent back pain. R. at 335, 337. A December 1994 private physician note indicated that Mr. Henry reported a one- to two-month history of low back pain, severe at times. R. at 477. The same private physician treated the veteran four times in January and February 1995 for low back pain, recommending physical therapy. R. at 479-81. The physician noted that the veteran had "apparently hurt himself at work in early Dec[ember]" and that after physical therapy the back strain was almost completely resolved. R. at 480-81.

In September 1995, Mr. Henry completed a National Guard annual medical certificate and stated that he did not currently have medical problems but that he had experienced medical problems since his last certification. R. at 371. A September 1995 NGTR referenced back strain one year prior that was treated with therapy. R. at 367. The veteran completed an annual medical certificate in May 1996, indicating that he did not have current medical problems. R. at 380-83. The corresponding examination report noted a normal spine and that he denied recurrent back pain. An August 1998 private physician note indicated that Mr. Henry was treated for intermittent low back pain for the previous month, had pains off and on for several years, and had been more active lately and may have injured his back. R. at 483.

In September 2000, the veteran suffered a lumbar strain while changing an aircraft tire while on Guard duty, R. at 423-24, and a private physician noted mild anterior spondylosis, degenerative disc desiccation, and disc protrusion in the L3/L4 lumbosacral spine, R. at 421. In October 2000, the same physician diagnosed right L3/L4 radiculopathy secondary to disc herniation and surgery was recommended, which the veteran underwent in December 2000. R. at 407, 434. A month after

the discectomy, Mr. Henry reported low back pain radiating into the right leg, and a magnetic resonance imaging (MRI) of the spine showed L3/L4 scar tissue. R. at 453-54. A March 2001 private medical record indicated that the veteran was unable to return to his job because of the bending and lifting involved. R. at 455. A May 2001 NGTR noted current low back pain and a history of back pain since September 2000. R. at 457. A November 2001 private medical record indicated that Mr. Henry had radicular back pain and was unable to work. R. at 449. A January 2002 private physician letter stated that the veteran had been under the office's care for radicular back pain and degenerative disc disease (DDD) secondary to a work injury sustained in September 2000. R. at 162. A January 2002 private neurologist letter indicated that he had epidural scar tissue formation at L3/L4 with subsequent entrapment of local nerve roots that caused pain and muscle spasms in the low back and legs. R. at 164. In March 2002, the National Guard determined that the veteran was medically disqualified for duty. R. at 168.

In August 2002, Mr. Henry filed a claim for service connection for low back DDD, R. at 1280, which a VA regional office (RO) denied in November 2002, R. at 1018. In August 2003, he filed a Notice of Disagreement (NOD), R. at 988, and subsequently asserted that his back disability began during in-service ankle surgery when an anaesthesiologist punctured a hole in his spinal cord, and that this caused his lower back to become weak. R. at 981. A September 2004 Statement of the Case (SOC) continued the denial of service connection for a low back disability, R. at 978, and the veteran perfected his appeal the next month, R. at 958.

In November 2013, Mr. Henry stated that he had experienced low back pain since his in-service hospitalization, which was further aggravated by military service. R. at 534. During a March 2014 Board hearing, the veteran testified that, after his in-service surgery, his back ached when he lifted things, the pain began to linger in 1992 or 1993, he started seeing a doctor in 1994 because the pain worsened, and the pain subsided until 2000 when he injured his back at work. R. at 489, 492, 506. The Board member stated that the veteran should submit documents showing back complaints between 1990 and 2000. R. at 509 (noting that records dated 1994 and 1995 had been submitted). The veteran also testified that Guard members refrained from reporting pain or accidents for fear of losing their position. R. at 514. In October 2014, the Board remanded the claim for VA to obtain an examination and opinion to determine the etiology of the back disability. R. at 467.

A December 2014 VA examiner noted onset of low back symptoms beginning in 1989. R. at 38. The examiner noted the in-service surgery, that the veteran was provided a lumbar block as anesthesia, that the veteran subsequently suffered a pressure headache as a complication of receiving the anesthetic lumbar block, and that he was treated for the headaches with a "blood patch." R. at 36. The examiner explained that a blood patch is accomplished by injecting a small amount of the patient's own blood into the previous lumbar puncture site to aid in clotting. He indicated that such injections are generally done in the L2/L3 area and that generally any failure with the blood patch would be immediately apparent and other measures would be instituted. *Id.* He noted that no follow-up was required after Mr. Henry's blood patch and there were no reported complications. *Id.* In addition, the examiner noted that the veteran experienced an acute strain in the lumbosacral spine in February 1991, which had no neurological component. *Id.* The examiner indicated that 1991, 1995, and 1996 periodic examinations were silent as to back problems, and that this pattern changed in 2000 when the veteran underwent the L3/L4 discectomy. R. at 37. The examiner concluded that there was no evidence of a chronic or on-going back condition associated with or aggravated by service and opined that Mr. Henry's back disability, which he diagnosed as DDD and lumber spondylosis with herniated disc, status post discectomy, was less likely than not incurred in or caused by service. R. at 36, 38; *see* R. at 8.

A January 2015 addendum opinion from the December 2014 examiner stated that, in regard to the February 1989 "blood patch," there were no reported complications, such as back pain, and no reports of back problems during active service. R. at 31. The examiner stated that a separation examination was not available, noted the veteran's February 1991 spinal strain, and reiterated that periodic examinations from 1991, 1995, and 1996 were silent as to back problems. *Id.* The examiner stated that, after the December 2000 surgery, the veteran was diagnosed by a private neurosurgeon. *Id.* The examiner concluded that Mr. Henry's claim had no merit and any recommendation for service connection was not warranted because there was no competent medical evidence to support any linkage. *Id.*

In August 2015, the Board issued the decision on appeal, denying service connection for a low back disability. R. at 4. The Board found that the only competent medical evidence of record were the December 2014 and January 2015 VA opinions, stating that the examiner supported his

conclusion by noting no reported complications from the February 1989 lumbar patch, that the veteran denied recurrent back pain during periodic examinations in 1991, 1995, and 1996, and that this pattern changed following the September 2000 worker's compensation case. R. at 8. The Board concluded that the examiner's opinion was not contradicted by any other competent evidence of record, noting that, although Mr. Henry was competent to report back pain, "he is not shown to have the medical expertise necessary to opine as to the etiology of his back disorder." R. at 9. This appeal followed.

## II. ANALYSIS

Mr. Henry argues that the Board erred by providing inadequate reasons or bases for denying service connection for a low back condition and relying on an inadequate medical examination. Appellant's Brief (Br). at 5-11. Specifically, the veteran asserts that the Board failed to explain why it found his statements of continuing back pain since service not probative and that the Board and VA examiner did not reconcile their conclusions with medical records showing continuing back pain. *Id.* The Secretary disputes Mr. Henry's arguments and urges the Court to affirm the August 2015 Board decision. Secretary's Br. 9-14.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *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) (2016) ("Each disabling condition shown by a veteran's service records, or for which he or she seeks a service connection[,], must be considered on the basis of . . . all pertinent medical and lay evidence."); *see also* 38 U.S.C. § 1154(a) (requiring VA to include in its service connection regulations that due consideration must be given to "all pertinent medical and lay evidence"). The issue in Mr. Henry's case is the existence of a link between his current back disability—DDD and lumbar spondylosis—and his service. *See generally* R. at 8.

For chronic diseases listed in 38 C.F.R. § 3.309(a), service connection may be established by showing continuity of symptoms, which requires a claimant to demonstrate (1) that a condition

was "noted" during service; (2) evidence of postservice continuity of symptoms; and (3) medical or, in certain circumstances, lay evidence of a link between the present disability and the postservice symptoms. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331, 1340 (Fed. Cir. 2013) (only those chronic diseases listed in 38 C.F.R. § 3.309 are subject to service connection by continuity of symptoms described in § 3.303(b)); 38 C.F.R. § 3.309(a) (2016) (including "arthritis" as a chronic condition for which service connection may be established by continuity of symptoms); *see also Davidson*, 581 F.3d at 1313; *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (whether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board).

Here, Mr. Henry made several statements that his back problems first began in service and that he has experienced continuing back pain since service. R. at 981 (veteran's March 2004 statement that his current back disability began during service); R. at 534 (veteran's November 2013 statement that he has had low back pain and problems since service); R. at 492-93 (veteran's March 2014 Board testimony that from the time he had surgery while on active duty up until the present, he has been going to the doctor for back treatment and that after his in-service surgery his back ached when he lifted things, the pain began to linger in 1992 or 1993, he started seeing a doctor in 1994 because the pain worsened, and it worsened further in 2000).

The Board found Mr. Henry "competent to report back pain" and then stated that "he is not shown to have the medical expertise necessary to opine as to the etiology of his back disorder." R. at 9. However, to establish service connection under continuity of symptoms, Mr. Henry need not provide an opinion as to a medical diagnosis or a medical opinion link between his current back disability and his back problems in service. He need only provide evidence, which can include credible lay statements, that he has experienced observable symptoms, such as back pain, since service. *See* 38 C.F.R. § 3.303(b); 38 C.F.R. § 3.309(a); *see also Walker*, 708 F.3d at 1340. To the extent the Board decision can be interpreted as concluding that Mr. Henry was not competent to provide evidence as to continuing symptoms since service, *see* R. at 9 (Board's finding that the VA examiner's opinion was "not contradicted by *any other competent evidence of record*") (emphasis added), a lay person is ordinarily competent to report observable symptoms of a disability, including back pain, *see Davidson*, 581 F.3d at 1316 (rejecting Court's unqualified statement that medical

evidence is required to link a current condition to service). Contrary to the Board's suggestion, medical evidence is not required to establish that Mr. Henry experienced continuity of back pain symptoms since service, and the Board's failure to correctly analyze this matter constitutes error. *See* 38 C.F.R. §§ 3.303(b), 3.309(a); *see also* 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.").

Furthermore, as to the veteran's argument that the December 2014 and January 2015 VA opinions are inadequate, the Court notes that the examiner stated that periodic examinations from 1991, 1995, and 1996 were silent as to back problems, that this pattern changed after December 2000 when Mr. Henry underwent a discectomy, and that no competent medical records support linkage between the current back disability and service. R. at 31, 37-38. The Board found the examiner's opinion competent and probative because the examiner supported his conclusion by noting that, *inter alia*, the veteran denied recurrent back pain during 1991, 1995, and 1996 examinations and that this pattern changed following his September 2000 work injury. R. at 8. By stating that "this pattern"—i.e., the absence of back complaints in examinations—changed in 2000, both the examiner, and the Board, by accepting the examiner's opinion as probative, imply an absence of evidence of back pain between the veteran's discharge and his back problems in 2000.

However, medical records from the 1990s document back pain. R. at 477 (December 1994 private physician note indicating that Mr. Henry reported a one- to two-month history of low back pain); R. at 497-81 (the same private physician treated the veteran four times in January and February 1995 for low back pain); R. at 367, 371 (September 1995 National Guard medical certificate indicating that the veteran had medical problems since his last certification and a September 1995 NGTR referenced a back strain one year prior); R. at 483 (August 1998 private physician note indicating that Mr. Henry was treated for intermittent low back pain for the past month and had "pains off and on for several years."). Therefore, the VA examiner's opinion—that the veteran's back condition is not related to service because there is an absence of back complaints between discharge and the 2000 work injury—appears based on an inaccurate factual premise, *see Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) (an opinion based on an inaccurate factual premise has no probative value), and the Board should thus not have relied on it, *see Nieves-Rodriguez v. Peake*,

22 Vet.App. 295, 304 (2008) (the Board may not rely on an examination report unless it contains sufficient detail and rationale to permit the Board to make a fully informed decision on a claim).

In addition, although the Board noted that there were low back complaints documented in December 1994, February 1995, and August 1998, *see* R. at 8, the Board nevertheless held that the VA examiner's opinion was not contradicted by any evidence of record, R. at 9. The Board failed to explain why these medical records documenting complaints of back pain throughout the 1990s were of no probative value or why they do not support the veteran's claim of an on-going back condition since service. *See Caluza*, 7 Vet.App. at 506 (the Board must analyze the credibility and probative value of the evidence, account for its persuasiveness, and provide reasons for rejecting any material evidence favorable to the claimant); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law and this statement must be adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate informed review by this Court).

Because the Board failed to provide adequate reasons or bases for rejecting the aforementioned medical records and lay statements revealing continuity of symptoms, relied on a medical opinion that appears to be based on an inaccurate factual premise, and seemingly concluded that Mr. Henry was not competent to provide evidence as to continuing back pain since service, remand is appropriate. *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); *see also Davidson*, 581 F.3d at 1316; *Caluza*, 7 Vet.App. at 506; *Reonal*, 5 Vet.App. at 461.

The veteran is free on remand to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

### **III. CONCLUSION**

Upon consideration of the foregoing, the August 7, 2015, Board decision is SET ASIDE, and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: November 30, 2016

Copies to:

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