UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-0105

BRUCE R. HOOPLE,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee

APPELLANT'S BRIEF

John S. Berry,
Attorney for Appellant

Stephani Bennett,
Attorney for Appellant

Jerusha L. Hancock,
Attorney for Appellant

BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444

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B. Whether the Board erred in failing to provide an adequate statement of reasons or bases for discounting favorable evidence in the form of medical treatises and for failing to seek clarification for a medical notation in the record.

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant, Bruce E. Hoople (Appellant), invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252.

B. Nature of the Case / Result Below

Appellant is a United States Army veteran, with honorable service from December 1965 to November 1967. He has been awarded the National Defense Service Medal, Vietnam Campaign Medal and Vietnam Service Medal. [R 1745 (DD 214)] He timely appeals the Board's September 11, 2018, decision which denied his claim for service connection for penile shortening. [R 4 (4-13) (September 2018 Board Decision)]

C. Relevant Facts

Appellant underwent a radical prostatectomy on April 16, 2010 as part of his treatment for service-connected prostate cancer. [R 2103 (April 2010 Surgical Pathology Report)] After the radical prostatectomy, Appellant lost the ability to maintain an erection or achieve sexual intercourse. [R 2085 (VA Form 21-4138

Wife's Statement)] In February 2011, the VA granted special monthly compensation for loss of use of a creative organ. [R 1933-36 (February 2011 Rating Decision)] Veteran submitted a claim for penile shortening on November 16, 2015, secondary to his radical prostatectomy due to service-connected prostate cancer. [R 739 (November 2015 VA Form 21-526b)]

On March 11, 2016, Appellant underwent an examination which concluded that his penile shortening was "less likely as not... the result of prostate cancer post operative status radical prostatectomy..." [R 342 (338-42) (March 2016 C&P Exam) (capitalization removed)] The examiner provided the rationale that, "The removal of the prostate does not incur removal of the testes nor the adrenal gland and thus does not per se reduce the male hormones unless associated with hormonal or chemotherapy of which he was not subjected." *Id* (capitalization edited). Based on this examination, the VA denied Appellant's claim for a compensable evaluation for penile shortening. [R 269-70 (March 2016 Rating Decision)]

During a November 7, 2016 follow-up appointment for prostate cancer, an examiner noted that penile shortening was "a likely and somewhat expected outcome of radical prostatectomy." [R 50-51 (November 2016 Urology Note)] On January 6, 2017, Appellant submitted a Notice of Disagreement and attached two abstracts of medical studies showing reduced penile size as a side effect of prostate cancer treatment, specifically after a radical prostatectomy. [R 170-80

(January 2017 Notice of Disagreement)] Without addressing these additional pieces of evidence added to the record, the VA continued to deny service connection for penile shortening in a Statement of the Case dated January 22, 2018. [R 98-112 (January 2018 SOC)] The claim proceeded to the Board via a timely-submitted VA Form 9 on February 13, 2018. [R 70 (February 2018 VA Form 9)]

In its September 11, 2018 decision, the Board denied Appellant's claim for penile shortening because, "[a] preponderance of the evidence is against a finding that the Veteran's penile shortening was caused by his service-connected prostate cancer, status-post operative radical prostatectomy." [R 6-7 (4-13) (September 2018 Board Decision)] The Board specifically relied on the March 2016 VA examination and discounted the November 2016 urology opinion. [R 6 (4-13) (September 2018 Board Decision)] The Board did not reference the medical study abstracts submitted with the Notice of Disagreement.

III. SUMMARY OF THE ARGUMENT

The Board erred when it failed to ensure that the duty to assist was satisfied because it relied on an inadequate March 2016 medical opinion to deny Appellant's claim for penile shortening secondary to his service-connected prostate cancer. The examination and opinion provided by the March 2016 examiner was inadequate because it contained internal inconsistencies and did not provide a clear opinion. The examiner referenced "prostate shortening," a

term which appears to have been a typo as it does not make sense in the context of Appellant's medical status (i.e., since his prostate has been removed via radical prostatectomy). The examiner first stated that "prostate shortening" was a residual of Appellant's service-connected prostate cancer and radical prostatectomy, but then indicated that "prostate shortening" was not "per se" caused by a radical prostatectomy. The two notations contradict each other within the examination itself. It also appeared that the opinion was based on the inaccurate factual premise that a radical prostatectomy could not cause penile shortening.

In addition, the Board erred in failing to provide an adequate statement of reasons or bases for its finding regarding the probative weight of a VA medical opinion and medical treatise evidence. The Board failed to discuss medical treatises submitted by Appellant with his Notice of Disagreement at all. The Board assigned limited probative value to a VA medical opinion within Appellant's treatment records, which stated that penile shortening was a "likely and somewhat expected" outcome of a radical prostatectomy. The Board's decision to assign less probative weight to this opinion was because the opinion did not provide a rationale specific to the Veteran.

IV. ARGUMENTS & AUTHORITIES

A. The Board erred in relying on an inadequate medical opinion to deny service connection for penile shortening secondary to service-connected prostate cancer.

The Board failed to ensure that the duty to assist was satisfied when it relied on an inadequate March 2016 VA medical opinion to deny Appellant's claim for penile shortening as secondary to his service-connected prostate cancer. VA has a statutory duty to assist a claimant in substantiating his or her claim. 38 U.S.C. § 5103A(a). This duty encompasses a duty to obtain a medical opinion whenever such an opinion is necessary to substantiate the claim. *See* 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c). The duty to assist a veteran in the development of his or her claim applies to the Board as well as the Regional Office. *Holland v. Brown*, 6 Vet. App. 443, 448 (1994). This duty is "neither optional nor discretionary," and includes inter alia, the duty to "obtain a medical opinion when such an . . . opinion is necessary to make a decision on the claim." *Massey v. Brown*, 7 Vet. App. 204, 208 (1994); *see* 38 U.S.C. § 5103A(d)(1)(a). Once the Secretary endeavors to afford a medical examination, he must ensure that the examination is adequate. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

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.'" *Barr*, 21 Vet. App. at 311 (*citing Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) (*quoting Green v. Derwinski*, 1 Vet. App. 121, 124 (1991)). If, after reviewing an opinion, the Board finds that it is "incomplete or otherwise

insufficient, the Board must return [it] to VA." *Cox v. Nicholson*, 20 Vet. App. 563, 569 (2007) (*citing* 38 C.F.R. § 4.2) (emphasis added); *see also* 38 C.F.R. § 19.9(a). Whether a medical opinion is adequate is "a finding of fact" which this Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 261(a)(4); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A finding of fact is "clearly erroneous" when the "'reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id*. (*quoting United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948)).

Here, the March 2016 medical opinion is inadequate with respect to whether Appellant's penile shortening is related to his service-connected prostate cancer because the opinion is unclear and internally inconsistent. *See Hood v. Shinseki*, 23 Vet. App. 295, 299-300 (2009) (holding that the Board erred in relying on an equivocal medical opinion to deny a claim). As a preliminary matter, the examiner referred to Appellant's claimed condition as "shortened prostate" in the examination. [R 341 (338-42) (March 2016 C&P Exam) (capitalization removed)] Considering Appellant's prostate had been removed entirely and Appellant's claim was for *penile* shortening, the residual condition listed might be a typographical error. However, the notation of "shortened prostate," which does not make sense, signals a lack of clarity in the opinion, which renders the examination inadequate because it fails to sufficiently inform the Board of the medical expert's judgment on a medical question and the essential rationale for

that opinion. *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The Board also did not address the medical examiner's notation of a "shortened prostate" in order to clarify what the Board understood the diagnosis to mean, which constitutes a failure to provide an adequate statement of reasons or bases adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review by the court. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56–57.

Even under the hypothesis that the examiner's notation of "prostate shortening" was a transcription error or alternate name for penile shortening, the examination would still be inadequate. Presented with the question, "Does the Veteran currently have any residual conditions or complicationsdue to the neoplasm... or its treatment...?" the examiner answered "Yes." [R 341 (338-42) (March 2016 C&P Exam)] In the notes under the question, the examiner indicated "shortened prostate" as the residual condition due to the neoplasm. *Id.* This apparently was an admission by the examiner that Appellant's current penile shortening is a residual of his prostate cancer, the "neoplasm" in question. The examiner then went on to conclude that,

> The current prostate shortening... secondary to the radical prostatectomy is less likely as not... the result of prostate cancer post operative status radical prostatectomy... The removal of the prostate does not incur removal of the testes nor the adrenal gland and thus does not per se reduce the male hormones unless associated with hormonal or chemotherapy of which he was not subjected.

[R 342 (338-42) (March 2016 C&P Exam) (capitalization removed)]

The common definition of the term “per se” is “by, of, or in itself or oneself or themselves.” *Per Se*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/per%20se (last accessed August 23, 2019). The examiner’s opinion leaves open the possibility that Appellant’s prostate cancer, combined with some other factor, caused his penile shortening. If so, then service connection for penile shortening is in order because the prostate cancer was *a* cause of the penile shortening. *See* 38 U.S.C. § 1110; *El-Amin v. Shinseki*, 26 Vet. App. 136, 140 (2013) (holding that the examiner’s conclusion that the veteran’s alcoholism was “related to” factors other than PTSD was inadequate because it did not “rule out” the possibility that it was also caused by some degree of PTSD). The March 2016 examination is also inadequate because its conclusions are internally inconsistent. The examiner first stated that the “shortened prostate” was a residual condition after prostate cancer and then reached the opposite conclusion, that “prostate shortening” was not caused by Appellant’s prostate cancer. [R 341-42 (338-42) (March 2016 C&P Exam)] Because the examiner put forth two inconsistent opinions within the same examination report, vacatur and remand are required in order for the Board to obtain clarification of the inconsistencies in the medical opinion. 38 C.F.R. § 4.2.

In addition, the March 2016 medical opinion appears to be based on the inaccurate factual premise that there is no association between a radical

prostatectomy and penile shortening. *See Reonal v. Brown*, 5 Vet. App. 458, 461 (1995) ("An opinion based upon an inaccurate factual premise has no probative value."). While the examiner did not expressly state that there is no association between the two conditions, he stated, "The removal of the prostate does not incur removal of the testes nor the adrenal gland and thus does not per se reduce the male hormones unless associated with hormonal or chemotherapy of which he was not subjected." [R 342 (338-42) (March 2016 C&P Exam) (capitalization removed)] The examiner's statement indicates that his belief that prostate removal alone could not cause penile shortening.

With his Notice of Disagreement, Appellant submitted two abstracts from medical studies suggesting that individuals who have undergone a radical prostatectomy appeared to have an increased risk of developing penile shortening. [R 170-80 (January 2017 Notice of Disagreement)] One study stated, "The majority of men undergoing radical prostatectomy for prostate cancer have a measured loss of penile length..." [R 170 (170-80) (January 2017 Notice of Disagreement)] These studies undermine the factual basis of the March 2016 examiner's opinion by showing a connection between radical prostatectomy and penile shortening, and the Board erred in relying on a medical opinion which was based on inaccurate facts. *See Reonal*, 5 Vet. App. 461. At the very least, the Board should have returned the opinion to the June 2011 examiner for him to address the October 7, 2011 article. *See* 38 C.F.R. § 4.2.

B. The Board failed to provide an adequate statement of reasons or bases for discounting favorable evidence in the form of medical treatises and a medical notation in the record.

The Board is required to include in its decisions a statement of the reasons or bases for its findings and conclusions "on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "[T]hat statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court." *Woehlaert v. Nicholson*, 21 Vet. App. 456, 462 (2007). A remand "is appropriate when the statement of reasons or bases is inadequate." *Daves v. Nicholson*, 21 Vet. App. 46, 51 (2007); *see also Wise v. Shinseke*, 26 Vet. App. 517, 532 (2014). As the Court held in *Wise*, medical treatise evidence may establish the link between a claimed disability and service, and the Board is required to consider and discuss such evidence and apply the benefit-of-the-doubt standard of proof. 26 Vet. App. at 531-532.

Here, the Board failed to discuss or even acknowledge the medical articles that Appellant submitted with his Notice of Disagreement. The medical treatises suggest that a radical prostatectomy, such as the one performed on Appellant to treat his service-connected prostate cancer, can cause penile shortening. [R 170-80 (January 2017 Notice of Disagreement)] One of the abstracts specifically stated, "The majority of men undergoing radical prostatectomy for prostate cancer have a measured loss of penile length..." [R 170 (170-80) (January 2017

Notice of Disagreement)]

As the Court explained in *McCray v. Wilkie*, the Board has an obligation, as part of its evaluation of the evidence of record, "to consider and discuss potentially favorable medical text evidence," even when "unaccompanied by a medical opinion." 31 Vet.App. 243, 255, at (2019) (citing *Wise*, 26 Vet.App. at 531). In such a case, medical texts may "provide 'important support' for service connection," even if they would ordinarily be insufficient alone to support a finding of linkage. *Id*. at 255 (*quoting Sacks v. West*, 11 Vet.App. 314, 317 (1998)); see *Rucker v. Brown*, 10 Vet.App. 67, 73-74 (1997); *Bielby v. Brown*, 7 Vet.App. 260, 265-67 (1994). Because the submitted medical treatise evidence supports a link between the service-connected prostate cancer and the current penile shortening, the Board was required to address this favorable, material evidence, giving it whatever weight the Board found appropriate. *See McCray*, 31 Vet.App. at 255 ("If submitted on its own, *unaccompanied* by a medical opinion that applies the medical text to the facts of a case, medical text evidence is generally separately weighed by the Board and assigned an appropriate level of probative value." (emphasis in original)). The Board's failure to do so renders inadequate its reasons or bases for denying service connection for penile shortening. *See Wise*, 26 Vet.App. at 531-32.

The record also contains a favorable medical opinion, which the Board did address but discounted. The Board acknowledged a November 11, 2016, urology

note in which the VA provider notes that penile shortening is "a likely and somewhat expected outcome of a radical prostatectomy." [R 6 (4-13) (September 2018 Board Decision); 50-51 (November 2016 Urology Note)] The Board nevertheless decided to deny Appellant's claim, finding the November 2016 urology provider's opinion to be less probative than the March 2016 examiner because the November 2016 provider "did not discuss the underlying medical reason" and "did not explain why the procedure would cause shortening." [R 6 (4-13) (September 2018 Board Decision)]

The Court, in *Savage v. Shinseki*, has previously held that when an examination or other medical evidence is unclear, the Board's duty to assist requires the Board to make reasonable efforts to either seek clarification or explain why clarification was not needed.

> As statutory section 5103A makes clear, the Secretary is required to make "reasonable efforts" to assist a claimant in developing his claim, and regulatory § 19.9 makes clear that part of those "reasonable efforts" includes seeking clarification of unclear "evidence," which necessarily includes medical examination reports of all kinds. If the VA opts not to seek such clarification, but rather to develop new evidence *Tyrues* makes it plain that VA – either the regional office or the Board – must thoroughly explain why, a task the Board failed to undertake in this case.

Savage v. Shinseki, 24 Vet. App. 259, 264 (2011) (citing *Tyrues v. Shinseki*, 23 Vet. App. 166, 184 (2009)).

The Board has not sought clarification from the November 2016 urology

provider when clarification would likely supply the provider's basis for stating that penile shortening is a likely result of radical prostatectomy. If the Board declines to seek additional development, including clarification of the evidence, it must provide an adequate statement of reasons or bases for doing so. *See Savage*, 24 Vet.App. at 273 (remanding for the Board to "either seek clarification of [ ] private audiological examination reports or explain why such clarification is not necessary"). To be adequate, the Board's reasons or bases for its determination that clarification is not needed must enable the claimant to understand the precise basis for that finding and facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As the lack of basis for stating that penile shortening is a likely result of radical prostatectomy was the Board's stated reason for discounting the favorable evidence of the November 2016 urology note, failure to seek clarification without providing adequate reasons and bases for why such clarification was not needed constitutes remandable error.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court issue an order vacating that part of the Board's September 11, 2018 decision that denied entitlement to service connection for penile shortening secondary to prostate cancer status post radical prostatectomy and remanding the claim to the Board to comply with the duty to assist and provide an adequate statement of

reasons or bases for its findings.

Respectfully submitted,

BRUCE E. HOOPLE, Appellant

/s/ Stephani Bennett
Stephani Bennett, Esq.
BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
402-466-8444
402-466-1793 Fax
stephani@jsberrylaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

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 attorney of record for the party below:

Timothy G. Joseph, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on August 26, 2019.

/s/ Stephani Bennett
Stephani Bennett, Esq.