Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3502

RICHARD CARTNEY, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Richard Cartney served the Nation honorably in the United States Air Force from April 1987 to April 1991, including service in Southwest Asia.[1] In this appeal, which is timely and over which the Court has jurisdiction,[2] he challenges a February 1, 2019, decision of the Board of Veterans' Appeals that denied service connection for gastroesophageal reflux disease (GERD), including as due to an undiagnosed illness. Because the Board's decision is based on a correct understanding of the governing law, does not contain clearly erroneous factual determinations, and is supported by an adequate statement of reasons or bases, we will affirm.

I. ANALYSIS

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.[3] Presumptive service connection is available

[1] Record (R.) at 1581.

[2] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[3] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

for Persian Gulf War veterans who exhibit objective indications of qualifying chronic disabilities, provided that any such a disability manifests "during service on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War" or to a degree of 10% or more during the relevant presumptive period, and by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.[4] A qualifying chronic disability is a chronic disability that results from either an undiagnosed illness or a medically unexplained chronic multisymptom illness (MUCMI) such as chronic fatigue syndrome, fibromyalgia, or a functional gastrointestinal disorder (excluding structural gastrointestinal disease).[5]

The Court reviews the Board's findings regarding service connection for clear error.[6] We may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and the Court is "'left with the definite and firm conviction'" that the Board's decision was in error.[7] For all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.[8]

When VA provides a medical examination, it must make sure that examination is adequate.[9] A medical opinion is adequate when it is "based upon consideration of the veteran's . . . 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."[10] "It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."[11] We also review Board determinations about the adequacy of medical opinions for clear error.[12]

---

[4] 38 U.S.C. § 1117(a)(1); 38 C.F.R. § 3.317(a)(1) (2019); *see also Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004).

[5] 38 C.F.R. § 3.317(a)(2)(i); *see* 38 U.S.C. § 1117(a)(2).

[6] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999), *aff'd*, 287 F.3d 1377 (Fed. Cir. 2002).

[7] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[8] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

[9] *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

[10] *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

[11] *Nieves-Rodriguez*, 22 Vet.App. at 304; *see Miller v. Wilkie*, 32 Vet.App. 249, 254-55 (2020).

[12] *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008), *see Miller*, 32 Vet.App. at 254; *Gilbert*, 1 Vet.App. at 52.

Appellant argues broadly that the Board erred in relying on an inadequate VA examiner's opinion and provided an inadequate statement of its reasons or bases. Appellant bears the burden of establishing error in the Board's decision,[13] which means he must explain why relevant legal principles applied to the facts show the Board's decision is flawed. In other words, appellant must craft a nonconclusory, fully developed argument. Appellant's counsel has failed to do so here.[14] In appellant's brief, he cites only a handful of cases and provides a scattershot presentation of supposed errors in the Board's decision without providing any support for or analysis of those errors. Appellant presents little more than bare conclusory assertions with no explanation that could conceivably be deemed a fully articulated argument. He further does not provide a reply brief to clarify any of his allegations in response to the Secretary's brief. Given the underdeveloped nature of appellant's counsel's argument, we could affirm the Board's decision on this basis alone.[15] However, in recognition of the veteran's service, we will address appellant's assertions to the extent we understand them.

In its decision, the Board noted that appellant's service treatment records did not include any complaints, symptoms, or diagnoses of GERD, though he was treated on several occasions for acute gastroenteritis. The Board also noted postservice treatment records that revealed no GERD and noted that appellant specifically denied that he had GERD. Relying on a July 2016 VA examination report, the Board denied service connection for GERD, finding appellant did not have GERD in service and for several years after service. The Board also concluded there was no competent evidence relating appellant's GERD to his military service. Instead, the 2016 VA examiner concluded that his GERD was likely due to postservice obesity. The examiner also noted that appellant had a cough that was likely due to allergic rhinitis and not GERD. The Board acknowledged appellant's belief that his exposure to oil well fires contributed to his GERD but found that he was not competent to provide such evidence to establish a nexus. Finally, the Board found that appellant's GERD was not an undiagnosed illness and that the VA examiner noted a

[13] *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006).

[14] *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008); *see Locklear*, 20 Vet.App. at 416.

[15] *Locklear*, 20 Vet.App. at 416.

clear and specific etiology for GERD; thus, service connection pursuant to 38 C.F.R. § 3.317 was not warranted.

Appellant challenges the adequacy of the VA examiner's opinion, arguing that the examiner did not provide a cause of his GERD. However, the examiner specifically pointed to appellant's obesity as a risk factor for GERD, and appellant does not explain what more was required of the examiner.[16] Appellant also argues that the examiner ignored symptoms of GERD in his service treatment records. The examiner noted in her report that she reviewed appellant's service treatment records and specifically commented on several entries that showed allergic rhinitis and gastritis, but she found that those conditions unrelated to GERD or acid reflux.[17] Thus, appellant appears to be disagreeing with the examiner's findings, which is insufficient to render the opinion inadequate. He also states that the examiner incorrectly reported that he had said his GERD symptoms began 5 years after service; he states that his symptoms actually began 2 years after service. The examiner relied on appellant's reporting at the time of the examination, and appellant has not shown how this was error. He also fails to explain how he was prejudiced by any such error concerning the timing of the onset of GERD.

Appellant contends that the examiner failed to consider that he did not have any risk factors for GERD postservice, specifically, that he worked in an office environment and was a nonsmoker, as his March 2017 Notice of Disagreement noted. However, the VA examination took place in July 2016, well before appellant submitted this evidence. Thus, the examiner not only had no obligation to consider this later evidence but also could not possibly do so without a time machine. Appellant also argues that the examiner did not consider his lay statements that could have connected his GERD to his military service by establishing continuity of symptomatology. He does not, however, identify which lay statements were ignored, nor has he established that GERD is a disability listed in 38 C.F.R. § 3.309(a), such that service connection can be established by the continuity of symptomatology.[18]

Additionally, appellant asserts that the VA examiner failed to consider the fact that he was obese in service and thus that his GERD may be related to his military service. The examiner specifically noted that appellant's body mass index was 30 in 1991, while he was in service, and

---

[16] *Hilkert*, 12 Vet.App. at 151.

[17] R. at 1230.

[18] *See Walker v. Shinseki*, 708 F.3d 1331, 1339-40 (Fed. Cir. 2013).

that it had "risen gradually post separation" and was 45 at the time of the examination.[19] Thus, the examiner did in fact discuss appellant's in-service weight, and appellant fails to explain what more the examiner should have done. This is a prime example of how appellant presents arguments that require us to attempt to fill in blanks. Appellant also raises a VA General Counsel (GC) opinion related to obesity and secondary service connection in his brief. He contends that his case is similar to that discussed in the GC opinion but, as with so much else in his brief, does not explain why. It is unclear to the Court how the two situations are related, because appellant is not service connected for GERD or obesity. In fact, the GC opinion specifically found that obesity itself was not eligible for service connection,[20] and this Court held we lacked jurisdiction to consider a challenge to this determination, as it would entail impermissible judicial review of the rating schedule's content.[21] Although the GC opinion determined that "[o]besity may be an 'intermediate step' between a service-connected disability and a current disability that may be service connected on a secondary basis,"[22] here, there is no service-connected condition to which obesity could act as an intermediary to GERD. Appellant does not fill in those blanks and thus has not met his burden of demonstrating error.

Appellant also argues that both the VA examiner and the Board failed to consider his in-service exposure to oil well fires. Yet, both the VA examiner[23] and the Board[24] specifically recognized appellant's contentions. Thus, it is not clear what appellant is arguing in this regard.[25] We will not consider this argument further.

Moving on to presumptive service connection pursuant to 38 C.F.R. § 3.317, appellant argues that the VA examiner used the wrong test for determining that his GERD was not undiagnosed. He seems to argue that the examiner's finding that his GERD had "a clear and specific etiology" was not sufficient to rule GERD out as a MUCMI. However, this Court has held that GERD cannot be a qualifying chronic disability under § 3.317(a)(2)(i), because GERD is not an

[19] R. at 1231.

[20] VA Gen. Coun. Prec. 1-2017 (Jan. 6, 2017) [hereinafter G.C. Prec.1-2017].

[21] *Marcelino v. Shulkin*, 29 Vet.App. 155, 157-58 (2018).

[22] G.C. Prec. 1-2017.

[23] R. at 1227.

[24] R. at 6.

[25] *Locklear*, 20 Vet.App. at 416.

undiagnosed illness and is specifically excluded as a MUCMI because it is a structural gastrointestinal disease.[26] Furthermore, the Court held that GERD could not qualify as a MUCMI under § 3.317(a)(2)(ii), which defines "MUCMI," on which appellant bases his argument.[27] Thus, appellant again fails to show error in either the examiner's conclusion or the Board's reliance on it.

Finally, appellant asserts several errors related to VA's failure to consider a service-connection claim for allergic rhinitis, which he contends is related to his GERD. Most of his arguments appear to stem from his contention that a claim for allergic rhinitis was reasonably raised by the record. As the Secretary points out, however, appellant did not raise this issue before VA. When presented with an issue newly raised on appeal over which it otherwise has jurisdiction, the Court has discretion to hear the issue, decline to address it, or remand the matter as appropriate.[28] Exercising this discretion entails a case-by-case analysis that weighs prejudicial delay and other individual interests against institutional interests such as protecting the Agency's administrative authority and promoting judicial efficiency.[29] We will exercise our discretion to decline to hear appellant's arguments that an allergic rhinitis claim was reasonably raised. Appellant has been represented by his current counsel since he filed his NOD in March 2017. At that time, the July 2016 VA examination was of record, bearing the examiner's note that the cough that appellant reported was due to allergic rhinitis, and not GERD. Appellant could have informed VA at that time or at any point since that he wished to seek benefits for that condition. It is not clear why he did not do so or otherwise raise before VA the arguments he now makes with respect to the duty to develop a claim based on entitlement to service connection for allergic rhinitis. Thus, we determine it is not appropriate for us to address these arguments related to whether a claim for allergic rhinitis was reasonably raised for the first time on appeal.[30]

In sum, appellant has failed to meet his burden of demonstrating prejudicial error in the Board's decision. The Court, having reviewed the Board decision, can discern no error and can understand the reasons or bases supporting the Board's denial of service connection for GERD. Thus, we will affirm.

---

[26] *Atencio v. O'Rourke*, 30 Vet.App. 74, 83-84 (2018).

[27] *Id.* at 82-83.

[28] *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000); *see also* 38 U.S.C. § 7252(a).

[29] *Id.*

[30] *Id.*

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the February 1, 2019, Board decision.

DATED: April 30, 2020

Copies to:

Cameron Kroeger, Esq.

VA General Counsel (027)