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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3492

MICHAEL D. MCRAE, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Michael D. McRae, appeals through counsel an April 29, 2019, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for diabetes mellitus type II, a "vision condition," a "kidney condition," bilateral upper extremity peripheral neuropathy, bilateral lower extremity peripheral neuropathy, and an acquired psychiatric disorder. R. at 5-32. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matters on appeal for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from July 1987 until July 1990. R. at 1684. He spent part of his service at Fort McClellan, Alabama. R. at 12, 1650.

In January 2017, the appellant filed a claim for entitlement to disability benefits for diabetes mellitus, peripheral neuropathy in all extremities, a kidney disorder, and a vision disorder. R. at

1799-83. He asserted that exposure to "environmental toxins, including herbicide agents, while stationed at Fort McClellan" caused his disorders to develop. R. at 1799.

In June 2017, the Joint Services Records Research Center (JSRRC) Coordinator made a "[f]ormal [f]inding of lack of information required to corroborate exposure to herbicides." R. at 1248-49. The coordinator wrote that "[t]here has been no research that has proven that [Fort McClellan] was used to store herbicides during this Veteran's period of service." R. at 1249. In June 2017, the VA regional office (RO) denied the appellant's peripheral neuropathy, kidney, vision, and diabetes mellitus claims. R .at 1236-42.

In February 2018, the appellant filed a claim for entitlement to disability benefits for anxiety and depression. R. at 1197-1200. Within days, the RO denied him entitlement to disability benefits for "depression (also claimed as anxiety)." R. at 966.

On April 29, 2019, the Board issued the decision presently under review. R. at 5-32.

II. ANALYSIS

A. Psychiatric Disorder and Kidney Condition

The Secretary concedes that the Board erred "by finding Appellant's psychiatric disorder was due to quitting his job of 16 years, unsuccessfully transitioning to a new profession, and financial problems" and by providing an inadequate statement of reasons or bases for its conclusion that no medical opinion is necessary to properly adjudicate the appellant's claim. Secretary's Brief at 12. The Secretary further concedes that the Board erred by providing an inadequate statement of reasons or bases for its conclusion that the appellant does not have a current kidney disorder. The Court accepts the Secretary's concessions and will remand this case for the Board to correct the errors that he identifies.

The appellant argues that the Court should order the Board to obtain a medical opinion addressing his psychiatric symptoms. Because the Board has not properly analyzed that issue and provided the Court with a finding supported by a sufficient statement of reasons or bases, the Court is not positioned to provide the relief that the appellant requests. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand, rather than reversal, generally is appropriate where the Board has failed to provide an adequate statement of reasons or bases for its determinations). The Court leaves it to the Board to reconsider the matter on remand

and determine what remedy, if any, is necessary. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order).

The Secretary asserts that the Court should not find any error beyond those that he conceded. Because the Board considered whether the appellant's kidney disorder is linked to diabetes mellitus and herbicide exposure, the Court's discussion about the appellant's diabetes mellitus claim potentially will affect the Board's consideration of his kidney claim on remand. The Court otherwise takes no position on the parties' additional arguments, and nothing in this decision should be read as an endorsement of the Secretary's assertions.

B. Diabetes Mellitus

The appellant submitted many pages of evidence that suggest that, at least in the 1970s, Fort McClellan was awash in dangerous herbicides. The Board did not disagree. It instead found against the appellant because the "general nature" of his description about his service "in relationship to the also generalized scientific evidence he has presented in support of his claim" is not sufficient to support his allegation that he "was factually exposed" to toxins at Fort McClellan in 1987. R. at 16-17.

That statement and many others in the Board's decision are unmoored from the standard of proof that applies to the appellant's argument and unsupported by a searching analysis of all record evidence. The Board's decision is not amendable to judicial review, and remand is warranted. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Evidence submitted by the appellant includes a statement from a forester at Fort McClellan that suggests that "forestry staff used decontamination trucks to apply herbicides" and "maintained fire lanes" throughout the base with herbicides as late as 1987. R. at 155, 427. Soil samples collected in 1985 contained multiple toxins now "banned for pesticide use." R. at 450. A 1992 "pesticide/herbicide inventory list shows an approximate 40 gallons of 2,4-D" remained at Fort McClellan after the appellant's service and that personnel controlled vegetation with Tordon until 1991. R. at 427.

The appellant's evidence further suggests that in 1998 "soil samples from various locations around the base was contaminated with 2,4,5-T; 2,4,5-TP[;] 2,4-D[;] 4-DP[;] and TCDD" and, in 1999, "soil samples from various locations around the base were still contaminated with TCDD." R. at 434, 446, 1467. Dioxin and other contaminants reached groundwater in some areas. R. at 451, 1472-73.

The appellant cites this evidence and more for the proposition that dangerous toxins lingered in the soil and water – and perhaps were still in use – during his time at Fort McClellan. The appellant follows these assertions with a description of his service. In April 2017, he wrote that his training "involved being on the ground in the dirt and mud. . . . We marched everywhere on base; on the rights of way of the roads, in the fields, etc. . . . I remember being out in the field and there being a body of water that we drank from." R. at 1478.

The appellant concludes that his evidence shows that dangerous herbicides were used in large quantities all around Fort McClellan and that those herbicides remained in the soil years and perhaps decades after application. He ties those allegations to his own service by asserting that he traveled throughout the base and that his service regularly brought him into contact with soil and water. The Board should have begun by making a factual finding about whether the appellant has established that herbicides likely remained present in Fort McClellan's soil and water in 1987. If so, then the Board should have determined the likely location of those residual herbicides, and, given the appellant's competent and credible description of his service, whether there is a reasonable possibility that he came into contact with those herbicides.

The appellant need only raise a "reasonable doubt" to succeed. 38 C.F.R. § 3.102 (2020). A reasonable doubt is "one which exits because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Id.* Reasonable doubt is "one within the range of probability as distinguished from pure speculation or remote possibility." *Id.* Section 3.102 is "not a means of reconciling actual conflict or a contradiction in the evidence" and does not apply when a preponderance of the evidence shows the factual assertion to be incorrect. *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001).

The standard of proof shifts throughout the Board's analysis and often seems to be developed ad hoc based on the evidence that the Board is discussing. The Board seemed to demand that the appellant prove that he directly witnessed or had knowledge of the application of herbicides during his service, understood what they were, and then recognized that he had been exposed to them. In other words, the Board demanded that the appellant demonstrate beyond a shadow of a doubt that he had contact with herbicides during his service and knew that to be the case. It did explain the legal basis for its position. More importantly, it did not explain why, if the appellant succeeded in showing that herbicides were widely dispersed throughout the soil at Fort McClellan and he regularly contacted the soil, he has not also brought his contention that he was

exposed to herbicides within the "range of probability" necessary to establish reasonable doubt. 38 C.F.R. § 3.102.

Other problems abound. The Board found that the "evidence fails to establish that the [appellant's] training activities . . . in 1987 were conducted in specific locations of the 45,000 acres comprising Fort McClellan that were known to be contaminated, *if there were any*, by herbicide agents in 1987." R. at 17 (emphasis added). This statement shows that the Board did not make an initial determination about whether herbicides remained at Fort McClellan in 1987 and, if so, what parts of the base remained contaminated. Also, because the Board did not bother to determine whether parts of Fort McClellan were contaminated in 1987, its conclusion that the appellant did not serve in one of those areas is, at best, unsupported supposition.

As shown above by its repeated use of the word "general" as a rhetorical device, the Board spent much of its decision downplaying – at times almost ridiculing – the appellant's arguments.[1] The Board wrote that "he claims that he had to have been exposed to something because there is evidence that toxins were present in the area at one time or another but not necessarily when he was there." R. at 17. Again, the appellant extensively documented the presence of toxins on base before and after his service, asserted that those toxins remain in the soil for many years after application, and asserted that use was widespread. The Board should have engaged that evidence in detail.

Instead, the Board thought it noteworthy that "a quantum of data points" submitted by the appellant "have no relation to [his] experience" because they "pertain[] to activities that occurred years before or years after [he] was there." R. at 18. The Board did not recognize the thrust of the appellant's argument. The appellant seems to have shown that dangerous herbicides were applied at Fort McClellan until perhaps the mid-1980s. He then showed that soil samples collected many years later were contaminated with those chemicals. His argument, then, is that because application ended before his service and soil samples remained contaminated well after his service, the soil must have contained herbicides during his service. The Board should consider that argument on remand.

The Secretary asserts that the Board "properly rejected evidence of record because it was not specific to [the appellant]." Secretary's Brief at 20. The Secretary did not support that assertion

[1] In some paragraphs, the Board focused on debating the appellant's attorney rather than interrogating the evidence.

with any citation to law, and did not engage caselaw that suggests otherwise. *See McCray v. Wilkie*, 31 Vet.App. 243, 254-55 (2019).

As noted above, the Board concluded that the appellant could not establish that he served in "specific locations of the 45,000 acres comprising Fort McClellan" that were potentially contaminated, again without identifying the number, extent, and identity of those locations despite the extensive evidence that the appellant presented. R. at 17. The Secretary seized on the notion that, at 45,000 acres, Fort McClellan was too large for the appellant to have seen enough of it to establish that he was exposed to herbicides. Secretary's Brief at 17, 18, 19.

Evidence submitted by the appellant shows that Fort McClellan was split into two connected sections. The main post was barely 19,000 acres, and the appellant presented evidence that Tordon 101 "was known to be used around . . . main post." R. at 421, 146. Most of the remaining 26,000 acres belonged to Pelham Range, an area used for activities including "chemical, biological and radiological warfare and contamination training." R. at 422. It seems that whether the appellant served at the main post, Pelham Range, or both, he was, contrary to the Secretary's and Board's assumptions, within an area of about 20,000 acres that had been treated with herbicides or otherwise exposed to contaminants. It is hard to imagine that he wasn't much closer than that.

The Board also acknowledged that the appellant served in fields and on road rights of way, but then did not discuss whether that means that he traveled on or near fire lanes that the forester stated were maintained with herbicides as late as 1987. The Board also seemed at times to assume that applied herbicides quickly dissipate. Once again, the appellant has presented evidence showing otherwise. R. at 434.

Finally, the appellant specifically asked the Board to consider the persuasive value of other Board decisions finding that veterans who served at Fort McClellan were exposed to herbicides. R. at 36-37; *see* 38 C.F.R. § 20.1303 (2020) (the Board "strives for consistency"). One of those decisions apparently involved a veteran who served at Fort McClellan within a year of the appellant.[2] The Board should have considered that reasonably raised argument. *See Robinson v.*

[2] Over time, the Court has received reams of data that suggest that stateside herbicide use was much more widespread than the Government acknowledges. Along with that data have come allegations that the Board's disposition of herbicide cases is unusually inconsistent. No case offers more support for those allegations than *Malinowski v. Shulkin*, 2017 U.S. App. Vet. Claims LEXIS 1568 (Oct. 31, 2017) (mem. dec.). The Board cited by name an earlier remand decision issued by the Court to Mr. Malinowski to conclude that three other veterans were exposed to herbicides at a stateside military installation. The Board then concluded that Mr. Malinowski was not.

Peake, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

The appellant asks the Court to reverse the Board's decision. Because the Board's reasons-or-bases errors prevent the Court from conducting an effective clear-error review, the Court is not "'left with a definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 33 U.S. 364, 395 (1948)).

C. Vision Disorder

The Board concluded that the appellant has bilateral senile nuclear cataracts, presbyopia, astigmatism, and myopia. R. at 20. It did not, however, acknowledge that, in April 2018, the appellant's care provider diagnosed him with dry eye syndrome of bilateral lacrimal glands. R. at 597-98.

The Board concluded that the appellant's senile nuclear cataracts are the only eye disorders that are potentially compensable. Citing a medical dictionary, the Board found that the appellant's cataracts are age related and cannot be connected to his active service.

There are two problems with the Board's citation. First, the Board provided the definition for "senile nuclear *sclerotic* cataract." R. at 21 (emphasis added). The word "sclerotic" suggests that this is a type of cataract that produces hardening of the nuclear lens. DORLAND'S MEDICAL DICTIONARY ONLINE, https://www.dorlandsonline.com/dorland/definition?id=45030&searchterm=sclerosis (last visited Nov. 19, 2020). The record reveals that the appellant only has been diagnosed with "senile nuclear cataracts." It is not clear from the Board's decision whether there is a functional difference between the disorder that it defined and the one the appellant has developed.

Next, the Board's definition describes a senile nuclear sclerotic cataract and indicates that the condition usually begins, at earliest, in middle age, but it does not provide any specific information about causation and aggravating factors that might accelerate or worsen the disorder. The Board assumed, without necessary citation to medical authority, that age must be the only cause of a senile nuclear sclerotic cataract and that nothing aggravates that disorder. *Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011). The Board's error is not harmless. An online medical treatise that the Court routinely cites indicates that cataracts, including nuclear cataracts, may be caused by "aging or injury" and that diabetes and "[p]revious eye injury or inflammation" may "increase your risk of cataracts." Mayo Clinic, https://www.mayoclinic.org/diseases-

conditions/cataracts/symptoms-causes/syc-20353790 (last visited Nov. 19, 2020). The Board should review the matter on remand.

Finally, the Board noted that the appellant "was told historically that he had elevated ocular pressure indicating glaucoma," but found that "there is no medical evidence establishing that he currently has elevated ocular pressure or glaucoma." R. at 22. The Board found that the appellant "is not competent to make a diagnosis of glaucoma so his statement to that effect has no probative value." *Id*. The appellant is competent to report a diagnosis given to him by a medical provider. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). If, as it seems, a health care provider told the appellant that he had "elevated ocular pressure," then the Board should not have rejected his statement only because the appellant himself is not competent to diagnose glaucoma.

D. Peripheral Neuropathy

The Board's decision indicates that the appellant competently and credibly reported that he experiences pain and discomfort in his extremities and that his symptoms affect his ability to walk. R. at 25-26, 1478. The Board concluded, however, that the appellant does not have a current disability potentially subject to compensation and denied his claim on that basis.

The Board penalized the appellant for stating that he has "peripheral neuropathy," a diagnosis that he is not competent to make without medical assistance. The appellant, however, obviously has symptomatology, and the Board made no effort to determine the correct diagnosis for his symptoms or to determine whether they are attributable to another disorder such as diabetes mellitus, as the appellant claimed. *See Clemons v. Shinseki*, 23 Vet.App. 1, 4-5 (2009).

Instead, the Board immediately turned to *Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018). *Saunders*, however, applies when a claimant seeks compensation for "pain in the absence of a presently-diagnosed condition." 886 F.3d at 1368. Again, the Board assumed that the appellant's symptoms are not linked to any existing disorder without attempting to conduct any sort of reasoned analysis showing that to be the case, without citing medical authority, and without engaging the appellant's assertion that diabetes mellitus caused his symptoms to develop. *Kahana*, 24 Vet.App. at 435.

The Board's application of *Saunders* also is incomplete. The Board correctly concluded that, when *Saunders* applies, the claimed pain "must amount to functional impairment – i.e., diminish the body's ability to function." *Wait v. Wilkie*, 33 Vet.App. 8 (2020). The appellant specifically asserted that his disorder has affected his ability to walk. The Board rejected that

evidence without making a clear credibility determination because a medical care provider, in a "follow-up" primary care note, wrote, without explanation, "NO FUNCTIONAL LIMITATIONS." R. at 717. The Board did not determine the adequacy of this medical evidence and did not state why it warrants more probative value than the appellant's subjective report.

In any event, because the appellant has linked the symptoms that fall under his peripheral neuropathy claims to herbicide exposure and diabetes mellitus, his claims should be remanded to await further development of those matters. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that, where a decision on one issue would have a "significant impact" on another, and that impact in turn could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources," the two claims are inextricably intertwined).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's April 29, 2019, decision is VACATED and the matters on appeal are REMANDED for further proceedings consistent with this decision.

DATED: December 9, 2020

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