

Vet. App. No. 18-1449

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

CLARENCE HOPKINS,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Appellant,)	
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v.)	Vet. App. No. 18-1449
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ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

The Board of Veterans' Appeals (Board or BVA) issued a February 15, 2018, decision finding that Appellant is not entitled to service connection for chronic kidney disease, claimed as secondary to service-connected bronchial asthma and allergic rhinitis. Should the United States Court of Appeals for Veterans Claims (Court) affirm the Board's decision because Appellant has not shown prejudicial error?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Clarence Hopkins, appeals the Board's determination that he is not entitled to service connection for chronic kidney disease, claimed a secondary to his service-connected bronchial asthma and allergic rhinitis. Record Before the Agency [R. at 1-11].

C. Statement of Facts

Appellant served on active duty from June 1965 to February 1968. [R. at 1943]. His service personnel records state that on June 26, 1967, a piece of luggage carrying Appellant's field personnel and health records were lost. [R. at 1022]. Appellant's discharge document notes that records were lost. [R. at 1943].

A September 1967 medical examination report evaluated Appellant's fitness for duty due to asthma. [R. at 1016 (1016-17)]. His lymphatic system was within normal limits. *Id.* at 1016. His urinalysis was also within normal limits. *Id.* at 1017. The only diagnosis was allergic asthma. *Id.*

Appellant's October 1967 discharge examination states that his endocrine system was clinically normal. [R. at 1018 (1018-21)]. Treatment records from August 1967 to February 1968 do not contain any diagnoses related to Appellant's kidneys. [R. at 1029-45]. A January 1968 narrative summary again diagnosed Appellant with asthma. [R. at 1050 (1048-50)].

In March 1968, the Veterans Administration Regional Office (RO) granted service connection for asthma. [R. at 1865]. The rating decision states that Appellant's "service clinical records prior to August 1967 have been lost." *Id.*

Appellant was diagnosed with a kidney disability in December 1995. [R. at 1722-23 (1698-1753)].

A March 2011 medical opinion states that Appellant had no note of renal insufficiency during service. [R. at 1508 (1503-08)]. The examiner opined that Appellant's kidney disease was likely due to his hypertension. *Id.* The examiner opined that neither hypertension nor kidney disease were manifest during Appellant's active service. *Id.*

In May 2011, the RO denied Appellant's claim of entitlement to service connection for chronic kidney disease. [R. at 1340-50]. Appellant appealed this decision to the Board. [R. at 1320]; [R. at 1283-1311]; [R. at 1282].

VA obtained another medical opinion in April 2017. [R. at 607-08]. The examiner opined that medical science does not link either allergic vasomotor rhinitis or asthma to chronic kidney disease or end stage renal disease. *Id.* at 608. The examiner discussed Appellant's kidney biopsy report, and she opined that the diagnosis was fibrillary glomerulopathy. *Id.* She opined that most cases of fibrillary glomerulopathy are idiopathic, although some are associated with chronic lymphocytic leukemia or B-cell

lymphomas. *Id.* She opined that it is less likely than not that Appellant's chronic kidney disease is related to his bronchial asthma or allergic vasomotor rhinitis. *Id.*

III. SUMMARY OF THE ARGUMENT

Appellant has failed to show error. The Board found that his lay statements were not competent, and all the medical evidence weighs against the claim. Although some of Appellant's SMRs were lost during his active service, there is no assertion that those lost SMRs contain any treatment for kidney disease. Because the evidence is against the claim, the Court should affirm the Board's decision.

IV. ARGUMENT

A. The Standard of Review is the Clearly Erroneous Standard

The Court can set aside or reverse a "finding of material fact adverse to the claimant" if it is clearly erroneous. 38 U.S.C. § 7261(a)(4). The Board's determination of whether service connection is warranted is a finding of fact that the Court reviews under this standard. *Kahana v. Shinseki*, 24 Vet.App. 428, 433 (2011).

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the

record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). However, section 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

B. The Board Provided an Adequate Statement of Reasons or Bases

The Court should reject Appellant's argument that the Board did not provide an adequate statement of reasons or bases because the service department lost some of his medical records. (Appellant's Brief (App. Br.) at 7-9). "In cases where, as here, the appellant's SMRs [service medical records] have been lost or destroyed, the Board's obligation to provide well-reasoned findings and conclusions, to evaluate and discuss all of the evidence that may be favorable to the appellant, and to provide an adequate statement of reasons or bases for its rejection of such evidence is also heightened." *Washington v. Nicholson*, 19 Vet.App. 362, 371 (2005). The Board discussed the relevant existing SMRs, Appellant's treatment records, the medical opinion evidence, and the lay evidence.

[R. at 5-9 (1-11)]. The Court should find that the Board's discussion of this evidence meets the standard that the Court set forth in *Washington*.

The general rule for establishing entitlement to service-connected compensation is that the evidence must demonstrate: (1) a present disability, (2) "in-service incurrence or aggravation of a disease or injury," and (3) "a causal relationship between the present disability and the disease or injury incurred or aggravated during service," the "so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009), quoting in part *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004) (internal quotation marks omitted). Secondary service connection is warranted when a disability is proximately due to a service-connected disability. 38 C.F.R. § 3.310(a). In this case there is a present disability, but no in-service incurrence or nexus.

The only favorable evidence of record is Appellant's lay statements. *Daves v. Nicholson*, 21 Vet.App. 46, 51 (2007) (stating that the Board "cannot reject evidence favorable to the claimant without discussing that evidence"); *Washington*, 19 Vet.App. at 371 (heightened duty to discuss favorable evidence). Appellant has submitted general statements alleging that his kidney disease is secondary to either asthma or vasomotor rhinitis. [R. at 1278 (1277-78)]. The Board noted that lay evidence can be competent in certain situations, and that this competency can extend to the issue of medical nexus. [R. at 8-9 (1-11)], citing *Davidson v. Shinseki*, 581

F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Barr v. Nicholson*, 21 Vet.App. 303 (2007). The Board found that “the question of whether kidney disease is related to military service or a service-connected disability is a complex medical question that is not subject to lay observation alone.” [R. at 9 (1-11)]. This reasoning is consistent with controlling precedent because kidney disease is more akin to a complex condition like cancer than a simple condition like a broken leg. *Jandreau*, 492 F.3d at 1377, n.4. Therefore, the Court should find that the Board adequately explained its rejection of the favorable lay evidence.

The Board also found that the relevant medical evidence weighs against Appellant’s claim. [R. at 5 (1-11)]. The Board found that Appellant’s SMRs are “entirely negative for complaints or findings of a kidney disability,” and the record supports this finding. *Id.*; [R. at 1014-55]. Appellant’s September 1967 hospitalization records diagnose him with asthma, and the physical examination contains no findings of kidney disability, and the urinalysis was within normal limits. [R. at 1016-17]. In October 1967, Appellant’s endocrine system was clinically normal. [R. at 1018 (1018-19)]. This examination did not disclose a kidney disability. *Id.* Appellant’s 1995 to 1996 treatment records are the first records that diagnose him with a kidney disability. [R. at 1722-23 (1698-1753)]. The medical opinion evidence states that Appellant’s kidney disease was not

incurred in service and is not secondary to his service-connected disabilities. [R. at 1503-09]; [R. at 607-08]. Because the Board correctly found that Appellant's lay evidence was not competent and the medical evidence is against the claim, all the competent evidence of record weighs against Appellant's claim. [R. at 7-9 (1-11)]. The Board's discussion of this evidence is understandable, and the Court should find that it is sufficient for judicial review.

Appellant argues, without citing to any authority to support his argument, that Appellant's service records contain urinalysis results demonstrating kidney disease or renal insufficiency. (App. Br. at 9-11). There is no evidence in the record to support Appellant's theory, and Appellant's "attorney is not qualified to provide an explanation of the significance of the clinical evidence." *Kern v. Brown*, 4 Vet.App. 350, 353 (1993). The record also contains many treatment records contemporaneous to those urinalysis reports, and none of those records state that the urinalysis reports show evidence of a kidney condition. [R. at 1028-13 (1014-55)]. Therefore, the Court should reject Appellant's argument.

Lastly, the Court should reject Appellant's argument that the record is procedurally defective because VA did not inform him that his SMRs were incomplete. (App. Br. at 11). Appellant's records have been missing since prior to his discharge from active service, and VA informed him in a

March 1968 rating decision that his “clinical records prior to August 1967 have been lost.” [R. at 1865]. Appellant has not claimed that he received treatment for a kidney disorder prior to August 1967. See, e.g., [R. at 2036 (2035-38)] (noting treatment for asthma in July 1966). Because VA notified Appellant many years ago that his SMRs were lost and Appellant has not alleged that the SMRs contain any relevant treatment, the record does not reasonably raise any issues with respect to VA’s duty to obtain the SMRs or to re-notify Appellant of their absence. 38 C.F.R. § 3.159(c) (duty to assist); [R. at 3 (1-11)] (finding that the record raised no duty to assist issues), citing *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (the Board is not required to address procedural arguments not raised by the record); see *Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (applying *Scott* to duty to assist arguments). Therefore, the Court should reject Appellant’s argument.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board’s decision.

Respectfully submitted,

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