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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4053

ROY L. RUYLE, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Roy L. Ruyle challenges a September 2017 Board decision that denied entitlement to service connection for a back injury.¹ He alleges that he injured his back in an aircraft incident when he served in the Army from 1954 to 1955, and that he's experienced back pain ever since. The Board found the veteran's assertions not credible and relied on a VA negative linkage opinion to deny the claim. Mr. Ruyle contends that the Board did not adequately explain its credibility determination, relied on an inadequate VA examination report, and violated 38 C.F.R. § 3.103(d)(2) by refusing to permit him to present a private physician as a witness in a hearing. The decision is affirmed.

I. FACTS

In 1955, Mr. Ruyle was a passenger in a military aircraft that "succeeded in rising only about 20 feet from the runway before mechanical difficulties caused it to crash and slide several hundred yards along the ground before coming to a stop." R. at 713. No one was reported injured. *Id.* The veteran's separation exam showed a normal spine. For the next 50 years or so, there were

¹ Mr. Ruyle withdrew a claim for an increased rating for hearing loss, and the Board dismissed the appeal as to that issue. Accordingly, that claim is not before the Court. *See Kalman v. Principi*, 18 Vet.App. 522, 525 (2004).

no records documenting complaints or evidence of back problems. In March 2000, the veteran sought treatment from VA for back pain that arose while he was loading a truck. R. at 543. There's no further mention of back pain in the record for nine years. In 2009, Mr. Ruyle again sought VA medical treatment for his back and was diagnosed with spinal arthritis.

The veteran sought service connection for this disability in September 2010, alleging for the first time that it was caused by the 1955 aircraft accident. A few months later, his private physician, Dr. Sugang, indicated that he had treated the veteran for back pain since 2007 and that Mr. Ruyle had told him the pain began in 1955. The regional office (RO) denied the claim. The veteran disagreed and submitted another statement by Dr. Sugang opining that "it can be said that his aircraft crash during service *could have* in fact contributed to his current back conditions." R. at 879 (emphasis added).

The RO obtained VA examination reports in March 2012 and January 2014. The 2012 examiner noted that there was nothing in Mr. Ruyle's service treatment records that indicated he had been in an airplane crash. The 2014 examiner, who had access to all of Mr. Ruyle's records, concluded that he could not relate the veteran's current back disability to the in-service airplane crash without resorting to speculation. Mr. Ruyle submitted another opinion by Dr. Sugang, who reaffirmed his belief that the veteran's back pain was a direct result of the 1955 accident. The veteran pursued his appeal to the Board. He attended an April 2015 hearing in which the presiding Board member asked "what was the point when you realized you had a full-blown back problem and that you have issues? What date?" Mr. Ruyle testified that he first experienced back symptoms around 1990. R. at 598.

The Board remanded the claim, finding that the March 2012 and January 2014 VA examination reports were inadequate, and directed the RO to obtain another one. Consequently, a 2016 examiner reviewed the evidence, including the private opinions, and opined that Mr. Ruyle's condition was less likely than not related to service because it was caused by the aging process—i.e., that it was "medically expected" and "normal" for a person the veteran's age "to have the presence of degenerative arthritic changes of the spine." R. at 112. The examiner elaborated further that if the spine condition "were at least as likely as not due to previous remote trauma," then "premature early arthritis of the spine would have resulted at a significantly earlier time period." *Id.* He noted that there was no evidence of a "chronic" back condition until 50 years after service. *Id.* The matter returned to the Board.

During a February 2017 hearing, the Board member asked the veteran "when did you first get problems with your back . . . when [did] it present itself?" Mr. Ruyle testified that his back pain first started in the 1970s. R. at 46. The Board member also informed the veteran that, given the May 2016 VA negative linkage opinion of record, the claim could not be granted unless a favorable, adequate nexus opinion was added to the claims file. Mr. Ruyle's counsel requested 60 days to obtain an additional opinion from Dr. Suggang. The Board member advised that "equal weight can only be afforded to an equally well explained opinion, so please ensure that Dr. Suggang" provides an opinion with a thorough explanation. R. at 54. Mr. Ruyle asked if it would help his case to have Dr. Suggang personally attend a hearing. His representative said "[n]o, not needed." R. at 60. The Board member agreed that it made "no difference" and stressed that "what does make a difference is the explanation that Dr. Suggang gives" in his opinion. *Id.* In other words, the Board member stressed that the letter from the doctor would be equivalent to an oral statement provided that both addressed the "important question" of why he believed that the back disability was related to service. R. at 61. After the hearing, Mr. Ruyle did not submit additional evidence to the Board.

In September 2017, the Board issued the decision on appeal. It denied service connection for the back disability by relying on the May 2016 VA examination report. It assigned less probative weight to Dr. Suggang's opinions because they provided little rationale and did not explore the possibility that Mr. Ruyle's osteoarthritis was due to the aging process. The Board also found that Mr. Ruyle's assertions of back pain since the 1955 aircraft incident were not credible because he made inconsistent statements as to the onset of back pain; there was no corroborating medical evidence for nearly 50 years after service; the long passage of time made it difficult for the veteran to recall when exactly his back problems began; and the available medical evidence, including the normal separation exam and May 2016 VA medical opinion, went against his claim.

II. ANALYSIS

Mr. Ruyle first argues that the Board impermissibly relied on the absence of corroborating medical evidence in making its adverse credibility determination. This contention is contradicted by the Board's explanation for its finding.

The Board has a duty to provide a statement of reasons or bases that allows the claimant to understand the precise bases for its determinations and facilitates judicial review. 38 U.S.C. §

7104(d)(1). These determinations must be based on a plausible reading of the record. *Bowers v. Shinseki*, 26 Vet.App. 201, 205 (2013). Additionally, the Board must assess the credibility and probative value of the evidence and provide reasons for rejecting material evidence favorable to the veteran. *Urban v. Shulkin*, 29 Vet.App. 82, 92 (2017). Credibility determinations are specifically committed to the Board, *Buchanan v. Nicholson*, 451 F.3d 1331, 1336–37 (Fed. Cir. 2006), and can be made on several bases, including the long passage of time, inconsistent statements, and current medical evidence, see *Maxson v. Gover*, 230 F.3d 1330, 1333 (Fed. Cir. 2000); *Kahana v. Shinseki*, 24 Vet.App. 428, 439 (2011) (Lance, J., concurring). However, the Board may not dismiss lay evidence solely because it is not supported by contemporaneous medical records. *Buchanan*, 451 F.3d at 1336–37. A credibility determination is a factual finding reviewed for clear error. *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010). The Court can overturn a factual finding only when there is no plausible basis for it in the record. *Wood v. Nicholson*, 21 Vet.App. 105 (2006).

The Board's adverse credibility determination had several bases. It noted that Mr. Ruyle offered inconsistent accounts regarding the date his back pain first began. On one occasion, he asserted that his pain began in the 1970s and, on another, around 1990. R. at 46, 598. The Board also relied on objective medical evidence, including a separation exam showing a normal spine and the opinion of the May 2016 examiner. The May 2016 examiner explained that premature arthritis would have been noticed much earlier had the 1955 aircraft accident been the cause of his disorder and that the severity of his arthritis was consistent with old age. Furthermore, the Board found that the dearth of evidence or complaints of back pain during service or in the following 50 years undermined Mr. Ruyle's assertion that he had experienced back pain continuously since leaving the Army. It is clear from the Board's decision that it did not rely just on the absence of corroborating medical evidence to make its adverse credibility determination and that it had plausible bases in the record.

Mr. Ruyle also argues that the Board overlooked evidence supportive of his claim, namely the change in his physical profile of "A" upon entering service to "C" at the time of separation, and the fact that his separation examination under a section for "Notes" said "See Form #89." R. at 1338. This allegation of error does not affect the disposition of this case for three reasons. First, the Board is only under the obligation to discuss relevant evidence. *McBurney v. Shinseki*, 23 Vet.App. 136, 140 (2009). Here, there's no apparent reason to suspect that these notations were

germane to the Board's analysis; indeed, both the entrance and separation exams showed a normal spine. Second, a competent VA examiner reviewed these records and opined that they did not reflect complaints of or treatment for back pain, and the veteran does not explain why his present assertion to the contrary is entitled to greater weight. And, third, there's no explanation for how these notations demonstrate that the veteran complained about back pain in service. He merely asserts that the change in profile *could* be relevant. That isn't enough to show error. *See Simmons v. Wilkie*, 30 Vet.App. 267, 280 (2018) (the claimant has the burden of demonstrating how an alleged error harmed his case).

The veteran next contends that the May 2016 VA examination report was inadequate and that the Board insufficiently explained why it assigned it more probative weight than Dr. Sugang's opinions. He alleges that the May 2016 VA medical opinion was based on an inaccurate factual premise—that he didn't suffer from back problems after service until his 2009 diagnosis. He points to a March 2000 VA treatment note in which he complained about back pain caused by a truck-loading incident. A VA examination report is adequate when it considers the veteran's medical history and provides enough detail about the relevant medical issues to allow the Board to decide the matter. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). The report must be factually accurate and provide sound reasoning for its conclusions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008). The determination that an examination is adequate is a factual finding reviewed for clear error. *Sharp*, 29 Vet.App. at 31.

The May 2016 VA examination report was not based on an inaccurate factual premise. The examiner did not state that Mr. Ruyle's back pain first started in 2009; he said that the first recorded evidence of a "chronic" back problem was in 2009 when he was diagnosed with arthritis. R. at 112. This statement doesn't reflect unfamiliarity with the record but a discerned reading. The only prior record indicating back pain was in a March 2000 VA treatment record, but that record diagnosed back pain from a truck-loading incident—it did not diagnose a chronic back disorder. Regardless, the examiner not only indicated that he reviewed the claims file, which included the March 2000 VA treatment record, but also acknowledged that Dr. Sugang had treated the veteran since at least 2007 for complaints of back pain. Accordingly, the Court is not persuaded that the examiner had an inaccurate grasp of the evidence.

Furthermore, the Court doesn't discern error in the Board's explanation for preferring the examiner's opinion over Dr. Sugang's. The Board explained that Dr. Sugang merely accepted

the veteran's assertions and summarily concluded that his back pain was caused by the 1955 aircraft accident with no exploration of alternative causes, such as the aging process, a common cause of arthritis. R. at 112. On review, the Court concludes that this explanation was plausible. The examiner's opinion, on the other hand, reflected a considered review of the medical history, including Dr. Sugang's opinions; the lack of back treatment for pain for 50 years after the in-service accident; and an alternative, likelier explanation for the veteran's back pain. His explanation also made sense of the roughly 50-year period in which there were no recorded complaints or documentation of back pain: Mr. Ruyle's arthritis was caused by old age and premature arthritis would have been discovered if it was due to a 1955 traumatic injury.

Finally, the veteran alleges that the Board member conducting the February 2017 hearing denied his request to present Dr. Sugang as a witness in violation of § 3.103(d)(2). This regulation provides that claimants are "entitled to produce witnesses" and that the Board must inform claimants about the kind of evidence needed to substantiate their claims. 38 C.F.R. § 3.103(d)(2) (2018); *see Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010).

Overlooking the fact that Mr. Ruyle first inquired about whether he should produce Dr. Sugang as a witness *during* the Board hearing itself, the Court questions his characterization of what transpired there. The Board member informed Mr. Ruyle that he should provide additional medical evidence because of the May 2016 VA negative linkage opinion. She informed him that what was needed was an adequate, positive linkage opinion and that the explanation supporting it was the critical factor. When Mr. Ruyle asked whether it would be helpful to produce Dr. Sugang as a witness, the Board member (and Mr. Ruyle's representative) correctly advised him that the quality of his medical opinion was its most important feature and that, provided the explanation adequately explained Dr. Sugang's favorable linkage opinion, it did not matter whether this opinion was delivered orally or in writing. The veteran's representative requested an additional 60 days to obtain an additional opinion from Dr. Sugang. The Board obliged, but Mr. Ruyle failed to provide any additional evidence. It is clear from the transcript that the Board member did not *deny* the veteran the opportunity to present Dr. Sugang as a witness. Indeed, she provided the veteran additional time to gather more evidence and told him exactly what he needed to support his claim, in compliance with § 3.103(d)(2). In fact, the Board member here demonstrated a careful awareness of the record evidence and clearly explained to the veteran what sort of outstanding

evidence should be submitted to succeed on his claim. Mr. Ruyle's suggestion that the Board member improperly tried to refute or discredit his testimony has no foundation in the transcript.

III. CONCLUSION

The Court has fully reviewed the parties' briefs, the relevant law, and the record, and is not persuaded that any error of the type alleged occurred. Accordingly, the Court **AFFIRMS** the September 20, 2017, Board decision.

DATED: February 13, 2019

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