IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FRANCES A. HENSLEY,
Appellant,

v.

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

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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Appellant	)	
	)	
v.	)	Vet. App. 18-6681
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should vacate the Board of Veterans' Appeals (Board or BVA) March 28, 2018, decision denying entitlement to service connection for the cause of the Veteran's death, where the Board failed to address several reasonably raised material issues of fact.

Whether the Court should address the remaining issues raised by the parties' briefs, where doing so will provide the Board with valuable guidance, if not narrow the issues for consideration, on remand.

Whether the Court should reject Appellant's argument for reversal, where Board failed to address several reasonably raised issues, thus failing to provide the Court with the necessary factual findings for the Court to review for clear error.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Frances A. Hensley (Appellant) is the surviving spouse of deceased Veteran Bennie L. Hensley, Jr. (the Veteran). She appeals the March 23, 2018, decision of the Board, which denied entitlement to service connection for the cause of the Veteran's death. (Record (R.) at 1-15). She asks the Court to reverse, in part, the Board's decision and otherwise completely vacate the decision and remand for readjudication. (Appellant's Brief (App. Br.) at 2). The Secretary agrees that the Board's denial of service connection for the cause of death should be vacated and that matter remanded for readjudication. The Secretary, however, asks the Court to reject Appellant's argument seeking reversal. He also asks the Court to reject several other arguments Appellant raises.

C. Statement of Relevant Facts

The Veteran served in the United States Navy from May 1962 to July 1966. (R. at 214). In the early morning hours of July 26, 1962, he fractured his right foot in multiple places in an injury he sustained while on a tug boat. (R. at 164).[1] The Veteran was hospitalized until October 9, 2012, when he was returned to duty. (R. at 162). The records generated as a result of this injury do not mention any injury to the back or symptoms in the back. (R. at 102, 103, 109-10, 112, 122-43, 149-55, 161-64). Instead, in an October 9, 1962, discharge

[1] Some of the Veteran's medical records describe the injury as a strike injury from a "parted" line. (R. at 164, 1478). Others describe the Veteran striking his foot on a hatch cover. (R. at 137, 153). Regardless of precisely how the injury occurred, the records confirm that Appellant injured his right foot in the early morning hours of July 26, 1962.

narrative summary, the Veteran's treating physician noted that "[p]ertinent findings on admission physical were limited to the area of the right foot and ankle." (R. at 153); *see also* (R. at 140 (140-41) (July 26, 1962, admission examination report describing back as "no tenderness or deformity")).

A year and a half later, in January 1964, the Veteran reported to sick call with complaints of a sore back. (R. at 205). He stated that he injured it three to four days earlier, did not initially seek treatment, and injured it again that morning doing a physical fitness test. (R. at 205). Though the clinical records prepared as a result of this treatment are barely legible, the agency of original jurisdiction has reviewed them and determined that the Veteran had reported initially injuring his back from lifting an oxygen bottle, and that the Veteran reported experiencing pain in the lower back, and that the low back pain was assessed as a strain. (R. at 1728 (1726-28) (citing R. at 206)). The Veteran's service medical records contain no further evidence of this injury.

Twenty years after his release from active duty, in 1986, the Veteran injured himself in a motorcycle accident during which he fractured his thoracic spine in two places, fractured his jaw, and sustained a closed head injury. (R. at 1585-89). He was found unresponsive at the scene, taken to one hospital, and then airlifted to Humana Hospital University in Louisville, Kentucky. (R. at 1603, 1604). He did not begin to respond to simple commands until five days after the injury. (R. at 1585). He remained at Humana Hospital for an entire month until

his condition stabilized to the point that he could be transferred to a rehabilitation facility. (R. at 1588).

The Veteran sustained serious, permanent disability as a result of the motorcycle injury. In November 1999, a medical consultant described the Veteran's motorcycle injury and its residuals in a report prepared for the Disability Determination Division of the Social Security Administration. (R. at 1579-82). The medical consultant explained that the Veteran "is an unfortunate weak middle-aged man who sustained a devasting head injury in August 1986." (R. at 1582). In addition, the doctor explained, the Veteran fractured the T7 and T12 vertebrae, and "[b]ack pain and left-sided weakness have persisted over the succeeding years, and he has been unable to return to work." (R. at 1582). The doctor mentioned nothing of a back injury occurring before the motorcycle accident.

In the year 2000, the Veteran experienced two myocardial infarctions, the first in May and the second in November. (R. at 790, 841, 1048 (1048-50), 1737 (1737-38), 1741 (1740-41)). At some point in or around 2001, the Veteran was diagnosed with coronary artery disease (CAD). (R. at 1052-53, 1050).

Meanwhile, in June 2000, the Veteran filed an application for compensation for right foot and back disabilities, which he alleged he incurred in 1961. (R. at 1804 (1804-09)). He provided additional information in a statement submitted to the Department of Veterans Affairs (VA) several months later. (R. at 1758). In this statement, he recalled serving on a tugboat in 1961 when a cable

broke, hit him in his back, knocking him through three "houser" doors and slamming him against a wall. (R. at 1758). He was then taken to Portsmouth Naval Hospital, where, he stated, he was diagnosed with "severe back injuries and a broken foot and toes." (R. at 1758). He recalled being hospitalized for 91 days and that "[s]ince that time I have had serious back pain forcing chiropractic treatment." *Id.* His 1986 injury, he stated, "made the weakness in [his] back flare up." *Id.*

A VA regional office (RO) denied the Veteran's claims in January 2002. *Id.* The RO affirmatively rejected the Veteran's recollection of sustaining injury to the back during the tug accident, noting that "the records simply do not support that." (R. at 1728).

Several years later, on February 2, 2011, the Veteran was admitted to Lake Cumberland Regional Hospital after experiencing lower abdominal and epigastric pain two to three days earlier. (R. at 598 (598-99)). During his hospital course, he was taken to the operating room for exploratory surgery. (R. at 598). As a result of that surgery and pathological testing, the Veteran was confirmed to have ischemic ileocecum and an obstructing splenic flexure colon cancer. (R. at 598, 607 (607-09), 1158 (1156-58)). After the surgery, the Veteran was "maintained in abated state where he was taken to intensive care unit in a guarded serious condition . . . ." (R. at 609). He died on February 14, 2011, while still at Lake Cumberland. (R. at 598).

Dr. Tommy Shelton, who performed the surgery, completed the "cause of death" portion of the Veteran's death certificate. (R. at 1560). Dr. Shelton listed cardiac arrest as the immediate cause of death, and hypotension, sepsis, and intestinal ischemia as underlying causes of death. *Id.* He also listed "[s]evere COPD" as a significant condition contributing to death, but not resulting in the underlying cause of death. *Id*. He listed no other "significant conditions." *Id., see also* (R. at 335).

In March 2011, Appellant filed a claim for dependency and indemnity compensation (DIC). (R. at 1545-53, 1562). In September 2011, the RO granted service connection for CAD with history of myocardial infarction, effective September 1, 2000, to February 14, 2011, for accrued benefits purposes. (R. at 1444 (1442-49)). The RO, however, denied service connection for the cause of the Veteran's death. *Id.* Appellant initiated an appeal by filing a timely notice of disagreement. (R. at 1393).

After receiving numerous records detailing the circumstances of the Veteran's February 2011 hospitalization, which were not in the record when the RO issued its September 2011 rating decision, the RO obtained a medical opinion in August 2013. (R. at 594-97). In pertinent part, the medical expert stated that it was "less likely as not" that the Veteran's CAD with history of myocardial infarctions caused or substantially contributed to his death. (R. at 595). The expert explained that although there was "abnormal elevation" of the Veteran's cardiac enzymes on February 2 and 3, 2011, "another potential cause

for the Veteran's cardiac enzyme elevation, other than acute myocardial infarction, was sepsis." (R. at 595). "More importantly," the expert explained, the Veteran had an echocardiogram (ECG) on February 14, 2011, the day he passed away, and that ECG demonstrated that the Veteran's "Global LV systolic function appears grossly preserved." (R. at 595). The Veteran's hypotension, cardiopulmonary arrest, and asystole, the expert stated, were more likely "secondary to his sepsis (as stated in the Lake Cumberland Regional Hospital death summary and death certificate), secondary to peritonitis, as caused by intestinal ischemia secondary to his obstructive colon adenocarcinoma." (R. at 596).

In November 2013, Appellant submitted a copy of an amended death certificate. (R. at 473 (473-77)); *see also* (R. at 335). In the section reserved for "other significant conditions contributing to death, but not resulting in the underlying cause" of death, in addition to "[s]evere COPD," the death certificate also lists esophageal stricture, spinal neuropathy, and newly diagnosed stage III B colorectal carcinoma. (R. at 473). The RO prepared a statement of the case (SOC) and Appellant perfected her appeal to the Board. (R. at 342, 367-403).

In March 2016, the Board requested a medical opinion from another VA medical expert. (R. at 268-71). The Board posed 11 separate questions to the examiner, labeled "(a)" through "(k)." (R. at 269). The Board received a response in July 2016 (July 2016 VA opinion). (R. at 272-78). Upon receiving

that opinion, the Board remanded the case for another opinion. (R. at 250-52 (245-53)).

On remand, the RO obtained an opinion, dated in May 2017. (R. at 91-92). The medical expert addressed all conditions listed on the amended death certificate. *Id*. The RO asked the expert a few follow-up questions, which the expert provided shortly thereafter. (R. at 85-90).

On May 19, 2017, the RO prepared a supplemental statement of the case (SSOC) and gave Appellant 30 days to respond. (R. at 77-84). On June 28, 2017, the RO informed Appellant and her representative that it was returning her case to the Board for a decision. (R. at 58).

On September 20, 2017, the Board informed Appellant that her case had been returned to the Board and that she had the sooner of 90 days or the date on which the Board issued a decision to submit additional evidence. (R. at 57). On November 28, 2017, Appellant's representative submitted a brief to the Board in which the representative raised several arguments; the representative did not indicate that additional evidence was forthcoming. (R. at 50-53).

In a letter dated March 7, 2018, Appellant's representative asked the Board to advance her case on the docket, which the Board granted on March 15, 2018.[2] (R. at 37, 43-49).

[2] In its letter dated March 15, 2018, the Board stated that it received Appellant's motion to advance on docket on February 6, 2018. (R. at 37). But the motion itself was dated March 7, 2018.

At some point after the Board granted to motion to advance on docket but before March 23, 2018, the date on which it issued its decision, the Board received three documents. The first was a cover letter addressed to the Board and dated March 22, 2018. (R. at 16). In that letter, Appellant's representative informed the Board that they "had submitted additional evidence since the last SOC," which included a favorable medical opinion from a doctor who reviewed the Veteran's medical records. (R. at 16). The second was a March 20, 2018, letter from Appellant to her representative, indicating that she was submitting a statement from the Veteran's doctor "who last saw" the Veteran. (R. at 17). And the third was a letter from Dr. Shelton, dated March 18, 2018. (R. at 18).

In his letter, Dr. Shelton, briefly summarized the Veteran's hospital course in February 2011. (R. at 18). The doctor stated that the Veteran's "rapidity of decline of his status was most likely cardiac," and that his history of having two separate myocardial infarctions "are contributory to his cardiac history." (R. at 18). He concluded, stating, "Although it is difficult to know the exact chain of events leading to his death, it is my professional opinion that his cardiac status on admission had impact on his outcome during this episode of care." *Id.*

The Board issued its decision on March 23, 2018, just one day after Appellant's representative prepared the letter informing the Board of the new evidence. (R. at 1-13). In its decision, the Board did not mention the March 22, 2018, letter from the representative, the March 20, 2018, letter from Appellant to

her representative, or the March 18, 2018, letter from Dr. Shelton. This appeal followed.

III. SUMMARY OF ARGUMENT

The Secretary concedes that the Board erred, that the Board's decision should be vacated, and that the issue of entitlement to service connection for the cause of the Veteran's death should be remanded for readjudication.

The Board's statement of reasons or bases was inadequate for two reasons. First, the Board remanded the claim in 2016 for development of additional evidence on the CAD theory, yet in its decision on appeal here, it relied on only evidence of record at the time of the prior remand to address that theory. The Board failed to explain why it needed to remand the case in 2016 for additional medical evidence addressing that theory if it ultimately relied on that medical evidence, and no other medical evidence, to address the theory. Second, and relatedly, the Board failed to address the May 2017 VA opinion, which the RO obtained in response to the Board's remand. Because that opinion may be adequate to resolve the CAD issue, and because the Board failed to address that medical evidence when resolving that issue, the Board's statement of reasons or bases is insufficient for the Court to determine whether the Board erred in finding that the duty to assist was satisfied.

The Court should reject Appellant's remaining arguments. First, Appellant fails to demonstrate that the Court should reverse the Board's finding that the duty to assist was satisfied. Not only is this a high bar for her to meet, but

because the Board's decision does not address all questions needed to for the Court to review that finding, the Court cannot reverse it, at least as the finding relates to the CAD theory of causation.

The Court should, however, review the Board's decision to reject colon cancer as a theory of service connection. The colon cancer undoubtedly caused the Veteran's death, but the Board plausibly found that the cancer was not related to the Veteran's service. Also, the evidence before the Board was sufficient for the Board to resolve the medical questions presented when addressing that theory. The Court should reject Appellant's attempt to demonstrate error in that part of the Board's decision.

The Court should also reject "spinal neuropathy" as a theory of entitlement. The evidence overwhelmingly confirms that the Veteran's spinal neuropathy was caused by his post-service motorcycle accident during which he fractured his spine in two locations and suffered permanent left-sided paralysis. At the very least, the Board plausibly rejected this theory.

The Court should reject Appellant's remaining reasons-or-bases arguments because the Board furnished the Court with a discussion the permits effective judicial review of the remaining issues.

IV. ARGUMENT

A. The Court Should Vacate the Board's Denial of Service Connection for the Cause of the Veteran's Death and Remand that Matter for Readjudication

The Secretary concedes that the Court should vacate the Board's decision and remand the issue of entitlement to service connection for the cause of the Veteran's death for two reasons. First, the Board provided an inadequate statement of reasons or bases because it relied on only the August 2013 and July 2016 VA opinions to determine whether the Veteran's CAD caused or contributed to his death, where the Board previously remanded the case in July 2016 to obtain additional medical evidence addressing that issue. (R. at 10, 249). That is, because the Board remanded the issue to develop additional medical evidence in 2016, the record at the time of the Board's March 2018 decision raised an issue as to whether those examinations were adequate by themselves to resolve that issue. The Board's "reasons or bases" requirement extends to "material issues of fact or law presented on the record." 38 U.S.C. § 7104(d)(1). The Secretary agrees with Appellant that the Board "inexplicably overlooked" that it remanded the matter in 2016 for additional medical evidence. (App. Br. at 16). The failure to address this material issue of fact renders its statement of reasons or bases inadequate, which warrants vacatur and remand. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

To be clear, the Secretary does not concede that the August 2013 or July 2016 VA examination reports were inadequate or that the Board clearly erred in

relying on them. That matter is for the Board to resolve in light of its 2016 remand. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (holding that the adequacy of a medical opinion is a question of fact); *see also Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (holding that "appellate tribunals are not appropriate fora for initial fact finding."). And the Secretary makes no concessions concerning the adequacy of the May 2017 VA examination report and addendum for addressing whether the Veteran's CAD caused or contributed to his death, which is the evidence the RO obtained in response to the Board's 2016 remand. In fact, the Board inexplicably failed to address that newly obtained evidence when addressing the CAD theory. (R. at 10). The Board must do so in the first instance. *See Hensley*, 212 F.3d at 1263. If the Court accepts the Secretary's concession and remands the matter for readjudication, the Board will have the opportunity to address that evidence on remand.

Second, the Secretary concedes that the Court should vacate the Board's decision so that the Board can consider Dr. Shelton's March 18, 2018, letter in the first instance. As Appellant correctly notes, the Board did not address this evidence in its decision. (App. Br. at 20). The Board should have the opportunity to do so. *See Hensley*, 212 F.3d at 1263.

B. The Court Should Resolve the Remaining Issues, Even if the Court Accepts the Secretary's Concession that Vacatur and Remand are Warranted

The Court typically declines to resolve all issues raised by the parties where the Court remands the appeal for other reasons, given that addressing

those issues might result in an advisory opinion. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (declining to resolve all issues raised by the parties where the Court remanded the appeal for other reasons, given that the new adjudication would take place in a different factual and legal context, rendering a Court opinion on the remaining issues advisory). But the rule is not absolute. The Court has recognized that it may sometimes be appropriate to address additional arguments "in order to provide guidance to the lower tribunal." *Quirin v. Shinseki*, 22 Vet.App. 390, 395-96 (2009). The Secretary urges the Court to address the parties remaining arguments for two reasons. First, the Secretary disagrees that reversal is warranted. (*See* App. Br. at 10). Second, resolving the remaining issues will either narrow the issues to be resolved on remand or, at the very least, provide the Board with valuable guidance.

C. The Board Did Not Clearly Err in Finding that the Duty to Assist Was Satisfied to Resolve the Colorectal Cancer Theory of Service Connection

Appellant first argues that the Board clearly erred when it relied on the May 2017 VA medical opinion to reject a theory that the Veteran's colon cancer was related to the Veteran's presumed in-service herbicide exposure. (App. Br. at 12). The examiner, Appellant argues, provided no rationale other than that the National Institutes of Health (NIH) "does not designate any medical relationship of any of the above to herbicide . . . exposure." (App. Br. at 12 (citing R. at 91)). The examiner failed to cite to "any specific sources for this statement." (App. Br. at 12). She also argues that the examiner was required to explain "why a lack of

affirmative designation by the NIH as to such a medical relationship precludes the possibility that a medical relationship exists in the Veteran's case." (App. Br. at 12). The Secretary urges the Court to reject these arguments.

The adequacy of a medical opinion is a question of fact that this Court reviews under the "clearly erroneous" standard of review. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Prinkey v. Shinseki*, 735 F.3d 1375, 1383 (Fed. Cir. 2013); 38 U.S.C. § 7261(a)(4). To be adequate, an examination report need only "rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of that report against any contrary reports." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

Appellant's arguments fail to demonstrate that the Board clearly erred when relying on the May 2017 opinion to address the colorectal cancer and its possible relationship to service. First, Appellant fails to point to any authorities that would require the examiner to point to any "specific sources" for her statement. (App. Br. at 12). Absent any challenge to the examiner's competence raised below, the examiner is presumed to be up to date on current medical knowledge. *See Fears v. Wilkie*, 31 Vet.App. 308, 318 (2019) (finding Board's reliance on an expert's opinion not clearly erroneous where the appellant failed to challenge the expert's competence before the Board); *see also Monzingo v. Shinseki*, 26 Vet.App. 97, 106-07 (2012) (holding that the "general

presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies").

Second, the duty to assist does not shift the burden of establishing entitlement to VA adjudicators, or medical experts offering opinions in benefits claims; that burden remains the claimant's. *See Jones v. Shinseki*, 23 Vet.App. 382, 391 (2010) ("Notwithstanding the duty to assist, it remains the claimant's responsibility to submit evidence to support his claim."); *see also* 38 U.S.C. § 5107(a)).

Thus, it was not the examiner's duty to prove that a medical relationship between herbicide exposure and colorectal cancer was not possible. (*See* App. Br. at 12). It was Appellant's duty to present evidence supporting that theory, with the Secretary's assistance, of course, to the extent required by law. *See Skoczen v. Shinseki*, 564 F.3d 1319, 1323 (Fed. Cir. 2009) (noting that, "for a Veteran to 'support' his or her claim for benefits, the Veteran must . . . provide an evidentiary basis for the claim."). And that evidence had to rise to a "state of equipoise." *Skoczen*, 564 F.3d at 1324 (citing 38 U.S.C. § 5107(b)). This required presenting evidence establishing more than a "remote possibility" of a relationship between the Veteran's colorectal cancer and his military service. *See Fagan v. Shinseki*, 573 F.3d 1282, 1286 (Fed. Cir. 2009) (stating that the claimant has the burden to "present and support a claim for benefits" and noting that the benefit of the doubt standard in section 5107(b) is not applicable based on pure speculation or remote possibility); *see also* 38 C.F.R. § 3.102.

Appellant also argues that the VA examiner's "failure to cite to any supporting NIH sources prevents the Board from considering and weighing [the VA examiner's] opinion against [the August 2013 VA examiner's] statement that 'a few articles [in] the medical literature have suggested that toxin exposure may be risk factors for the potential development of colon cancer . . . .'" (App. Br. at 13 (misquoting R. at 597). This argument contains several flaws. First, she selectively quotes the August 2013 opinion to make it appear more favorable to her than it is. The August 2013 examiner's entire sentence reads,

> Additionally, although a few articles [in] the medical literature have suggested that asbestos and/or toxin exposure may be risk factors for the potential development of colon cancer, it is more likely as not that this Veteran's colon cancer was at least as likely as not caused by a combination of his age, weight, lifestyle, environment and heavy smoking history (References: http://www.webmd.com/colorectal-cancer/guide/understanding-colorectal-cancer-basics, and http://www.mayoclinic.com /health/colon-cancer/DS00035/DSECTION=risk-factors).

(R. at 597). Thus, although the August 2013 VA examiner raised "toxic exposure," which does not necessarily encompass a chemical found in an "herbicide agent" under 38 C.F.R. § 3.307(a)(6)(i), as a possible *risk factor* for developing colon cancer, his medical opinion was that the Veteran's colon cancer was at least as likely as not caused by any one of several other factors. (R. at 597). And even then, it does not necessarily follow that the August 2013 VA examiner felt that the "few articles" were strong enough to support a conclusion one way or another; he simply noted that some articles had "suggested" the possibility. *Id*. But Appellant needs to demonstrate more than a mere possibility

of a medical relationship. *See Fagan*, 573 F.3d at 1286. She needs to demonstrate that it was at least as likely as not. *See Jones*, 23 Vet.App. at 388 ("If the physician is able to state that a link between a disability and an in-service injury or disease is 'less likely than not,' or 'at least as likely as not,' he or she can and should give that opinion; there is no need to eliminate all lesser probabilities or ascertain greater probabilities."). Thus, Appellant fails to explain why the Board needed to weigh these two supposedly competing opinions against each other in the first place.

D. The Court Should Reject Appellant's Arguments that the Board Clearly Erred in Relying on the August 2013 and July 2016 Examinations to Determine Whether the Veteran's CAD Caused or Contributed to the Veteran's Death

Appellant next argues that the August 2013 and July 2016 VA opinions were inadequate for addressing whether Appellant's CAD with history of myocardial infarctions caused or contributed to the Veteran's death. (App. Br. at 13). The Court should reject these arguments because she fails to demonstrate clear error in the Board's decision. *See D'Aries*, 22 Vet.App. at 104.

Appellant argues that the August 2013 VA examiner's rationale fails to address the medical question raised, which was whether Appellant's CAD with history of myocardial infarctions caused or substantially contributed to his death. (App. Br. at 14). Appellant admits that the examiner furnished an opinion directly responsive to that inquiry. (App. Br. at 14 ("Though [the August 2013 VA examiner] stated that had with history of myocardia infarctions did not cause of substantially contribute to [the Veteran's] death . . . ."). But she is dissatisfied

with the examiner's explanation because the examiner identified sepsis as an alternative explanation for the Veteran's elevated cardiac enzymes during his February 2011 hospitalization other than "acute myocardial infarction." (R. at 595). Identifying an alternative source for the Veteran's elevated enzymes does not confirm that the examiner was uninformed or that he provided no explanation that the Board could not use to resolve the medical issue presented. *See Acevedo*, 25 Vet.App. at 293 (providing that an examination report must "rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of that report against any contrary reports").

Appellant also overlooks that the August 2013 VA examiner looked to the Veteran's ECG conducted the day of his death, which revealed that his "Global LV systolic function appears grossly preserved." (R. at 595-96). Thus, the examiner confirmed that he was familiar with Appellant's heart function in the days leading up to his death, which confirms that he rendered his opinion by applying his expertise to the correct facts. This was all the law requires. *See Acevedo*, 25 Vet.App. at 293. Appellant, however, would require the examiner to disprove her theory to render a valid opinion. Neither logic nor law imposes this requirement on a medical expert. *See Jones*, 23 Vet.App. at 388.

Appellant's attack on the July 2016 VHA opinion is confusing. She states that the examiner, in response to being asked whether Appellant's CAD caused or contributed to the Veteran's death, "erroneously restated the question as

asking whether the Veteran's in-service exposure to herbicide agents caused or contributed to any of the 'listed immediate, underlying, or contributory causes of death.'" (App. Br. at 15 (quoting R. at 272)). She misreads the opinion request and the opinion.

The Board asked the examiner to opine on 11 separate matters, which it labeled "(a)" through "(i)." (R. at 269-70). Pertinent here is the fifth of these, identified in the Board's opinion request as question "(e)." (R. at 269). In that question, the examiner was asked to provide an opinion as to whether it was at least as likely as not that the Veteran's service-connected CAD with a history of myocardial infarction caused or contributed to his death. (R. at 269). The Board also instructed the examiner, when answering that question, "to specifically state whether it is at least as likely as not that the Veteran's service-connected CAD with history of myocardial infarction caused or contributed to any of the listed immediate, underlying, or contributory causes of death" listed on the amended death certificate. *Id.* The examiner directly responded to that question by stating that it was "less likely as not that the Veteran's service-connected [CAD] with history of myocardial infarction caused or contributed to any of the listed immediate, underlying, or contributory causes of death." (R. at 275). The examiner explained that the Veteran's cardiac arrest—the immediate cause of death listed on the death certificate—was "less likely as not caused by ischemic heart disease," and "was at least as likely as not due caused [sic] by hypotension due to sepsis (due to intestinal ischemia)." *Id.* Also, the doctor explained, there

was no evidence of compromised cardiac function prior the Veteran's death, and he pointed to the Veteran's normal ejection fraction prior to surgery to support that medical conclusion. *Id*.

Though the doctor did address whether herbicide agents may have caused the Veteran's death, he did so when responding to question "(b)," which is the question in which the Board asked him to do so. (R. at 269, 272). Appellant appears to misread the opinion request and the opinion.

Appellant next argues that the 2016 examiner only addressed whether Appellant's cause of death was an acute cardiac event, and that he provided no information as to whether Appellant's CAD with history of myocardial infarctions had a material influence in accelerating death. (App. Br. at 15). Relatedly, he argues that the Board "inexplicably overlooked" that it remanded the matter in 2016 for that reason. (App. Br. at 16). As explained above, the Secretary generally agrees. The Board's 2016 remand raised an issue as to whether the examinations in the record at that time were adequate to determine whether the Veteran's CAD caused or contributed to his death. (R. at 249). The Board's error was that it failed to address whether the evidence it relied on was in fact adequate, given its prior remand.

Not only that, the Board did obtain a May 2017 opinion following its remand, which the Board failed to mention when addressing whether the Veteran's CAD caused his death. (R. at 9-11). Because the Board failed to address that evidence in the first instance (when addressing the CAD issue), the

Secretary cannot concede that the Board had inadequate medical evidence to resolve this medical question. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding that this Court, as part of its clear error review, "must *review* the Board's weighing of the evidence; it may not weigh any evidence itself") (emphasis in original).

And even if the August 2013 and July 2016 examination reports are inadequate by themselves to resolve the medical question, a point the Secretary does not concede, the Board would still be justified in relying on them given its responsibility to base its decision on all evidence of record and because even "inadequate" examination reports can carry some probative weight. *Monzingo*, 26 Vet.App. at 107; *see also* 38 U.S.C. § 7104(a).

"Reversal is the appropriate remedy when '[t]here is absolutely no plausible basis' for the BVA's decision and where that decision 'is clearly erroneous in light of the uncontroverted evidence in appellant's favor.'" *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996) (quoting *Hicks v. Brown*, 8 Vet.App. 417, 422 (1995)). "Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is generally the appropriate remedy." *Gutierrez*, 19 Vet.App. at 10 (2004) (citing *Falk v. West*, 12 Vet.App. 402, 405 (1999)).

As explained above, the Board committed two related "reasons or bases" errors. First, it failed to explain how the August 2013 and July 2016 VA

examination reports were sufficient to resolve the CAD issue where the Board previously remanded the issue for further development. Second, and relatedly, the Board failed to address the May 2017 VA examination report and addendum, which squarely addressed the medical issue presented. Because those questions are not yet resolved, vacatur and remand, rather than reversal, is the appropriate remedy. *See Gutierrez*, 19 Vet.App. at 10.

For those reasons, the Secretary does not agree that the Board must obtain additional medical evidence on remand. (*See* App. Br. at 17). The Board must first address the two reasonably raised issues identified above. Because the Board failed to address that evidence when resolving that question, it must do so in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("Appellant tribunals are not appropriate fora for initial fact finding.").

The Secretary disagrees with Appellant's argument that the August 2013 and July 2016 VA examiners were required to explain "why it was proper" for them to rely on the February 14, 2011, echocardiogram where it was described at the time as "technically limited by poor acoustic windows." (R. at 643); (App. Br. at 16).

The medical experts possess the competence to know whether the study was sufficient to determine the condition of the Veteran's heart shortly before death. *Monzingo*, 26 Vet.App. at 106-07. Appellant also overlooks the fact that the July 2016 examiner pointed to an ECG performed on February 3, 2011, the results of which were not described as "limited" in any way. (R. at 272); *see also*

(R. at 628 (627-29) (February 3, 2011, echocardiographic report), 601 (February 4, 2011, consultation relying on the February 3, 2011, echocardiogram to determine that the Veteran had "normal [left ventricle] systolic function with low pressures")).

E. The Court Should Reject Appellant's Argument that the Board Was Required to Obtain a Medical Opinion Addressing the "Spinal Neuropathy" Theory

In a claim for compensation for death benefits, the Secretary has a duty to furnish a medical opinion if "necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a); *see also DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008). Appellant argues that this standard was satisfied because she argued below that "the back disability present at death contributed to the Veteran's death, and that the back disability was related to the Veteran's documented back trouble in service." (App. Br. at 18).

The Board adequately addressed, and rejected, this theory and it needed no additional medical evidenced to do so. The Board acknowledged that Appellant's amended death certificate listed "spinal neuropathy," but it also stated that the Veteran's "post-service treatment records clearly indicate that he sustained a severe injury in an August 1968 motorcycle accident that resulted in persistent left-side paresthesias." (R. at 7). The Board also stated that there was "no indication of spinal neuropathy before that time period." *Id*. These are factual findings subject to the "clearly erroneous" standard of review. *See McLendon v. Nicholson*, 20 Vet.App. 79, 82-83 (2006) (holding that whether a

person experienced an event, injury, or disease is a factual question subject to the "clearly erroneous" standard of review); *see also* 38 U.S.C. § 7261(a)(4). These findings are plausibly supported by the evidence. *See, e.g.*, (R. at 1579-82, 1585-89, 1603-04).

The Board also stated that there was "no testimony provided [by the Veteran] that would serve to suggest a continuity of symptoms of the above disorders since military service." (R. at 7 (emphasis added)). By "above disorders," the Board was referring to those listed on the death certificate, which included "spinal neuropathy." (R. at 6-7). That is, the Board found, as fact, that the Veteran's lay statements did not indicate the presence of *spinal neuropathy* continuously since service.

F. The Court Should Reject Appellant's Remaining Reasons or Bases Arguments

Appellant presents several reasons or bases arguments. (App. Br. at 20). In addition to her argument that the Board erred by failing to address Dr. Shelton's March 18, 2018, letter, which the Secretary addresses above, Appellant argues that the Board provided an inadequate statement of reasons or bases for stating that there was "no testimony provided by [the Veteran] that would serve to suggest a continuity of symptoms of the above disorders since military service." (App. Br. at 20); (R. at 7). As explained above, the "above disorders" phrase is operative because it refers to spinal neuropathy. The Board found as that the Veteran's spinal neuropathy resulted from the 1986 motorcycle accident. (R. at 7).

The Court has identified two roles that the Board's statement of reasons or bases serves. First, the statement allows the appellant to understand the precise basis for the decision. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). Second, the statement facilitates judicial review. *Id.; see also Parrish v. Shinseki*, 24 Vet.App. 391, 399 (2011) (holding that the "overall 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." (citation and internal punctuation omitted)). Here, the Board's explanation was sufficient because it informs the reader why it rejected the "spinal neuropathy" theory: the evidence failed to indicate that the Veteran had spinal neuropathy before sustaining the spinal fractures and head trauma after service, which undoubtedly caused his spinal neuropathy.

Appellant also argues, in the alternative, that the Board provided an inadequate statement of reasons or bases for determining that the duty to assist was satisfied. For the colon cancer, Appellant argues that the Board "blindly adopted" the May 2017 medical opinion. (App. Br. at 22). She argues that the Board should have first discussed "whether [the examiner] provided a reasoned medical explanation connecting her general reference to the NIH and her conclusion that the Veteran's colorectal cancer was not related to herbicide exposure." (App. Br. at 22).

Appellant fails to explain why the Board needed to provide additional information for the Court to review the Board's reliance on the report under the

applicable "clearly erroneous" standard of review. The May 2017 VA examiner, by discussing the circumstances surrounding the Veteran's death, demonstrated an understanding of the correct facts. (R. at 91). She then observed that the NIH did not designate *any* medical relationship between colorectal cancer and herbicide exposure. *Id.* Appellant did not challenge that observation before the Board. Instead, she, through a representative, responded to the examiner's opinion by pointing to studies purportedly discussing an increased risk in colon cancer with consumption of drinking water containing arsenic. (R. at 51 (50-53)). The Board's "reasons or bases" requirement encompasses only *material* issues of fact and law. 38 U.S.C. § 7104(d)(1). A material fact is "'one upon which the outcome of litigation depends.'" *Gilbert*, 1 Vet.App. at 52 (quoting ***Black's Law Dictionary*** 881 (5th ed. 1979)). The examiner's unchallenged reference to the fact that NIH did not recognize herbicide exposure as a cause of colorectal cancer raised no material issues of fact for the Board to address. This is especially so given that neither the examiner nor the Board had the burden of disproving this or any other theories of causation.

For the CAD, Appellant similarly argues that the Board "blindly adopted" the August 2013 and July 2016 expert opinions. (App. Br. at 22). The Board, she essentially argues, was required to address whether these experts' opinions were adequate. (App. Br. at 22-23). The Secretary generally agrees, if for no reason other than that the Board's 2016 remand raised the issue.

For the spinal neuropathy, Appellant argues that the duty to assist required obtaining a medical opinion and the Board failed to explain why an opinion was not necessary in this case. (App. Br. at 23). The Secretary urges the Court to reject this argument. As discussed more fully above, the Board plausibly found that the Veteran's "post-service treatment records clearly indicate that he sustained a severe injury in an August 1968 motorcycle accident that resulted in persistent left-side paresthesias." (R. at 7); *see also* (R. at 1579-82, 1585-89, 1603-04). The Board also plausibly found that there was "no indication of spinal neuropathy before that time period." (R. at 7). Given these findings, the Board had no obligation to explain "why a VA medical opinion on this theory was not necessary in this case." (App. Br. at 23). Though not expressly stated, it is apparent from the Board's decision that it found no merit to this theory. *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974) ("While we may not supply a reasoned basis for the agency's action that the agency itself has not given . . . we will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned."). The Secretary's duty to assist does not extend to those situations. *See* 38 U.S.C. § 5103A(a)(2) ("The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim."); *see also* 38 C.F.R. § 3.159(d).

V. CONCLUSION

The Court should vacate the Board's denial of service connection for the cause of the Veteran's death and remand that claim for readjudication. The Court should reject Appellant's argument for reversal. The Court should also resolve the remaining issues the parties raise because doing so will narrow the issues for the Board on remand, or, at the very least, furnish the Board with valuable guidance.

Respectfully submitted,

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