UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CASE NO. 19-1871

DENNIS R. SENNE

Appellant,

V.

ROBERT L. WILKIE,

Secretary of Veteran Affairs

Appellee

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Appellant is seeking compensation under 38 U.S.C.A. § 1151 for service-connected claim of post-traumatic stress disorder and an acquired psychiatric disorder

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

This 79-year-old Veteran served under honorable conditions on active duty as a brakeman/hydraulics in the United States Navy from May 22, 1958, to February 27, 2015. (R.633) The Veteran's current claim on appeal is denial for service-connected right knee disability evaluated as noncompensable. (R. 5-9).

The claims on appeal are entitlement to service connection for a service connected right knee condition. The Veteran, Dennis R. Senne, appeals a February 21, 2019, Board of Veterans' Appeals (Board or BVA) decision. (R. 5-9). The Board determined as a conclusion of law that the Veteran had not met the criteria for service connection for a right knee condition. The Veteran timely filed a Notice of Appeal on March 15, 2019. The Court has jurisdiction over this appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

SUMMARY OF THE ARGUMENT

The BVA failed to properly assess the entirety of the private physician's opinion by discounting the tendonisis opinion. Additionally, the Board's statement that "The Veteran did not require any further treatment for his knees while in service," is a misstatement of the examiner's rationale and an illogical inference. The BVA also impermissably used the absence of certain evidence as substantive negative evidence. Lastly, the Board did not bother to explain why the fact that no condition was noted on the Veteran's separation physical examination was relevant. This court has held time and again that a veteran may establish service connection for a current

disability, even where there was no evidence of the veteran's disability until "many years" after separation from service.

I. THE BVA DECISION IMPROPERLY DISCOUNTED A PRIVATE PHYSICIAN'S OPINION

As the Board explained,

> In March 2015, the Veteran obtained a Disability Benefits Questionnaire (DBQ) from a private physician. The physician stated he did not review any of the Veteran's medical records. The Veteran reported that in 1959, his right knee was caught in a J-bar on a forklift, and that he has pain and difficulty ambulating. The physician diagnosed right knee tendonitis, but did not provide a nexus opinion. (R.6-7)

However, as the Board went on to say, "The March 2015 DBQ from the Veteran's private practitioner is afforded little probative weight. Not only did the physician fail to review the Veteran's medical record, he did not provide an opinion regarding the etiology of the diagnosis of right knee tendonitis." (R. 8). The Board then cited to *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008). *Id*. However, that case does not support the Board's rationale. To the contrary, the Court in *Nieves-Rodriguez* stated outright as part of its holding that the probative value of a private medical opinion does not depend on whether the examiner obtained an overview of the veteran's medical history. *Id*. at 303-04.

Worse, the Board's rationale on this point reveals that further development was needed, and thus the Board was required to remand the case for further development. See 38 C.F.R. § 4.2

provides, "[I]f the [medical examination] report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes;" see also 38 C.F.R. § 20.904(a) ("If further evidence, clarification of the evidence… or any other action is

essential for a proper appellate decision, [the Board] shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.") (emphasis added).

The Board also impermissibly "assign[ed] greater probative weight" to the VA medical opinion. (R.8) Most glaring is the fact that the VA examiner focused the entirety of his opinion on the condition of tendonitis. However, a review of the Record Before the Agency reveals that the private examiner diagnosed "Knee tendonitis/tendonosis." (R. 634). And although the private medical examiner did not explain the distinction between tendonitis and tendonosis — or clarify which condition substantiated the diagnosis — still, neither the VA examiner nor the Board addressed this issue. This failure alone renders inadequate the VA medical opinion and the Board's reasons and bases. After all, "It is the factually accurate, fully articulated, sound reasoning for the conclusion that contributes probative value to the medical opinion." *Nieves-Rodriguez*, 22 Vet. App. at 304 (emphasis added). The Court has made clear, however, that the Court does not have jurisdiction to review the medical analysis of VA medical opinions, only the reasons or bases contained in decisions of the Board. *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007). Still, "The Board must be able to conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion." *Nieves-Rodriguez*, 22 Vet. App. at 304 (emphasis added). The Board also stated that, according to the VA examiner, "The Veteran did not require any further treatment for his knees while in service, nor was a condition noted on his February 1961 service separation physical examination. The VA examiner found this further demonstrated the lack of a persistent service[-]related condition." R.7. There are several errors here.

First, the Board's statement that "The Veteran did not require any further treatment for his

knees while in service," is a misstatement of the examiner's rationale and an illogical inference. Contrary to the Board's characterization, the examiner said, "No evidence of skeletal injuries were noted [sic]. However [sic] there were no further visits seen for this episode after that date," and that "No persistent knee issues were noted during the time while the veteran was on active duty which affected his ability to perform his military duties." R. at 519 (emphasis added). It does not make sense why the Board went from the examiner's observation of no evidence, no further visits, and no issues noted to an inference that the Veteran did not require any further treatment.

Second, the passage also reveals that the examiner and the Board unduly used the absence of certain evidence as substantive negative evidence. This is impermissible. The Court has held time and again that the Board cannot use the absence of evidence as substantive negative evidence without having first set out the proper foundation that such silence tends to prove or disprove a relevant fact. See, e.g., *Chudy v. O'Rourke*, 30 Vet. App. 34, 41-42 (2018). Here, no evidence, no further visits, and no condition noted upon separation do not tend to show that the Veteran had not been experiencing symptoms. This point is especially important considering that the private examiner's opinion noted, in several places, that the Veteran experienced "functional loss during flare-ups or when the joint is used repeatedly over a period of time or otherwise." E.g., R. at 636. As a corollary point, the VA medical examiner did not address the issue of flares. This alone renders the opinion inadequate. See 38 C.F.R. § 4.40; see also *Ferraro v. Derwinski*, 1 Vet. App326, 330 (1991); *Mitchell v. Shinseki*, 25 Vet. App. 32, 37 (2011), and *DeLuca v. Brown*, 8 Vet. App. 202, 206-7 (1995).

Third, the Board did not bother to explain why the fact that no condition was noted on the Veteran's separation physical examination was relevant. The Court has held time and again that

a veteran may establish service connection for a current disability, even where there was no evidence of the veteran's disability until "many years" after separation from service. See *Hensley v. Brown*, 5 Vet. App. 155, 160 (1993) (citing *Godfrey v. Derwinski*, 2 Vet. App. 352, 356 (1992) (lamenting the Board's "flawed analysis" and noting that "the Board treated the lack of evidence that appellant experienced hearing loss during service as dispositive of his claim. The Board has evidently misinterpreted the law.")).

All of this is especially important considering that VA's reliance on an inadequate medical

opinion to deny a veteran's claim could constitute VA's failure of its duty to assist. See *Jones v. Shinseki*, 23 Vet. App. 382, 388-91 (2010). And just as an inadequate medical opinion may not suffice to affirm a nexus, so an inadequate medical opinion cannot suffice to negate a nexus. Id. ("although the Board correctly determined that the opinions . . . . were speculative and did not establish a medical nexus, the Board failed to recognize that these opinions also did not establish that there was no medical nexus."). Remand is warranted for further development and an adequate statement of reasons or bases. 38 U.S.C. § 7104(d)(1); see also *Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990) and *Hedgepeth v. Wilkie*, 30 Vet. App. 318, 325 (2018).

CONCLUSION

For the reasons stated above, the BVA decision should be remanded with instructions to further develop the Appellant's claim.

Respectfully Submitted,

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