Vet. App. No. 18-6735

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CLARK MCCARTNEY III,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the August 1, 2018, decision of the Board of Veterans' Appeals (Board), which denied service connection for ischemic heart disease, to include as due to exposure to ionizing radiation.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

This case is on appeal from the August 1, 2018, Board decision that denied service connection for ischemic heart disease, to include as due to exposure to ionizing radiation. The Board found that there is no current nexus linking Appellant's ischemic heart disease to his exposure to ionizing radiation in service. The issues presented are whether the Board provided adequate reasons or bases for: (1) its compliance with the duty to assist under 38 U.S.C. § 5103A when it relied on the November 2017 cardiologist opinion; (2) its substantial compliance with the previous remand order pursuant to *Stegall* when it obtained a medical opinion from a cardiologist; and (3) whether the 90-day period required by 38 C.F.R. § 20.1304(a) applies to appeals returned to the Board following a Board remand.

For the Secretary to prevail, the Court must conclude that the Board did not commit clear error when it relied on the cardiologist opinion and implicitly found that the November 2017 opinion from the cardiologist substantially complied with its remand. The Court must also agree that contrary to Appellant's argument, the Board was not required to comply with 38 C.F.R. § 20.1304 and *Kutscherousky* because neither are applicable to this case.

C. STATEMENT OF RELEVANT FACTS

Clark McCartney III, Appellant, served on active duty in the U.S. Air Force from August 1955 to November 1957. [R. at 1289, 1349].

Appellant filed his original claim seeking compensation for ischemic heart

disease (IHD)[1] in July 2013. [R. at 1293-1295].

On May 19, 2014, the regional office (RO) issued a rating decision that denied service connection for IHD. [R. at 498-500]. Appellant filed a Notice of Disagreement (NOD) with this decision in January 2015. [R. at 482 (482-82)].

The RO issued a Statement of the Case (SOC) on January 19, 2016, that continued the denial of the claim of entitlement to service connection for IHD (also claimed as a result of exposure to Ionizing Radiation and/or Agent Orange). [R. at 394 (362-95)]. Appellant filed a VA Form 9 in March 2016. [R. at 356]. Appellant testified in a Board hearing on April 24, 2017. [R. at 299-316].

The Board issued a decision on July 25, 2017, that remanded the claim of entitlement to service connection for IHD, to include as due to herbicide exposure or as due to exposure to ionizing radiation for further development. [R. at 294 (293-98)]. Following the Board's remand, Appellant underwent a VA examination on November 2, 2017. [R. at 218-23].

The RO issued a Supplemental Statement of the Case (SSOC) on March 7, 2018, that denied entitlement to service connection for IHD, to include as due to herbicide exposure or as due to exposure to ionizing radiation. [R. at 34-8]. In his April 2018 response to the SSOC, Appellant elected to and did submit additional evidence in support of his appeal. [R. at 16-17 (14-17)]. The Board notified

[1] Ischemia is a deficiency of blood in a part, usually due to functional constriction or actual obstruction of a blood vessel. Ischemia, *Dorland's Illustrated Medical Dictionary* 975 (31st ed. 2007).

Appellant on July 26, 2018, that his appeal was returned to the Board and resumed its place on the docket. [R. at 11 (11-13)].

The Board then issued the August 1, 2018, decision that denied service connection for IHD, to include as due to exposure to ionizing radiation. [R. at 3-10]. Appellant filed a timely appeal of the Board's decision on November 26, 2018.

III. SUMMARY OF THE ARGUMENT

The Board complied with the statutory and regulatory requirements regarding Appellant's claim of entitlement to service connection for ischemic heart disease (IHD), to include as due to exposure to ionizing radiation. The evidence of record supports the Board's finding that there is no nexus linking his IHD to his exposure to ionizing radiation in service. [R. at 6 (3-10)]. The Board also substantially complied with the prior remand order when it relied on the November 2017 examination opinion. The Board was not required to provide Appellant with a 90-day period because neither 38 C.F.R. § 20.1304 nor *Kutscherousky* apply to this appeal. Since Appellant has failed to show prejudicial error warranting remand, the Board's decision denying entitlement to service connection for IHD should be affirmed.

IV. ARGUMENT

The probative value and competence of evidence used to establish service connection are factual findings made by the Board. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). The Board's determination regarding the probative value of the evidence and the issue of causality are findings of fact subject to the "clearly

erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). A finding of material fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *Harvey v. Shulkin*, 30 Vet.App. 10, 17 (2018) (citing *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948))); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). If the Board's "account of the evidence is plausible in light of the record viewed in its entirety, the [Court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

A. The Board provided adequate reasons or bases for its decision which denied service connection for ischemic heart disease, to include as due to exposure to ionizing radiation

The Board must provide 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 in the record." 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. Pursuant to *Caluza v. Brown*, the Board's statement "must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence." 7 Vet.App. 498, 506 (1995). Appellant argues that the Board failed to provide an adequate statement of reasons or bases for: (1) its compliance with the duty to assist under 38 U.S.C. § 5103A(d); and (2) its substantial compliance with

the July 25, 2017, Board remand. *See generally* [Appellant Brief (AB) 1-29]. The Secretary disagrees for the reasons discussed below.

1. The Board complied with the duty to assist under 38 U.S.C. § 5103A when it relied on a cardiologist opinion

When "a claim is remanded to provide the claimant with a VA medical examination or opinion, the Secretary must ensure that the examination or opinion provided is adequate." *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017) (citing *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007)). "A VA medical examination or opinion is adequate 'where it is based on consideration of the veteran's prior medical history and examinations' and 'describes the disability . . . in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one.'" *Sharp*, 29 Vet.App. at 31 (citing *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994))); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1992) (holding that remand is appropriate where the Board relied on an inadequate medical examination report).

The Board's determination that a medical examination or opinion was adequate is a factual finding subject to the clearly erroneous standard discussed above. *Sharp*, 29 Vet.App. at 31 (citing *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008)); *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The November 2017 cardiologist concluded Appellant's coronary[2] artery disease (CAD) was less likely than not (less than 50% probability) incurred in or caused by his low-levels of radiation during service. [R. at 222 (218-23)]. This opinion is adequate because the cardiologist explained that he reviewed the available records, including the Board hearing transcript, the scientific articles Appellant submitted, and conducted his own independent search of current scientific literature pertaining to low-level ionizing radiation exposure and cardiovascular risk. [R. at 222 (218-23)]. The examiner then described CAD as a common disease in the western world attributable to one in every four deaths. [R. at 222 (218-23)]. He rationalized that Diabetes Mellitus is a major risk factor and close to 50% of all patients with diabetes die from heart disease. [R. at 222 (218-23)]. He further detailed that exposure to low-levels of ionizing radiation more than 50 years prior to the presentation of his disease is not likely to have been a significant contributing factor. [R. at 222 (218-23)]. As discussed above, the Court has held that an opinion is adequate where it describes the disability in sufficient detail so as to allow the Board to make a fully informed evaluation. *Stefl*, 21 Vet.App. at 123. The Court must affirm the Board's determination that a medical opinion is adequate absent clear error and provided the determination is supported by an adequate statement of reasons or bases. *D'Aries*, 22 Vet.App. at 104.

[2] Coronary is a term applied to vessels, nerves, ligaments, etc. The term usually denotes the arteries that supply the heart muscle and, by extension, a pathologic involvement of them. Coronary, *Dorland's Illustrated Medical Dictionary* 424 (31st ed. 2007).

Appellant disagrees with the Board's finding that the November 2017 opinion was adequate. He argues that the examiner "apparently dismissed or was not convinced by the medical evidence that [he] submitted to the VA which showed a link between low level radiation exposure and cardiovascular disease." [AB 16-17 (1-29)]; [R. at 317-22].

Contrary to Appellant's argument, the examiner did address the evidence he submitted. The examiner stated that not only did he review the "scientific articles [Appellant] brought to the hearing to support his claim," but also that his "own independent search of current scientific literature pertaining to low-level ionizing radiation exposure and cardiovascular risk[,]" led him to conclude that Appellant's CAD is not likely caused by his low-levels of radiation exposure. [R. at 221-22 (218-23)].

Appellant further argues that the examiner never specifically referenced his medical history, but the examiner clearly stated that he reviewed this history. [AB at 17 (1-29)]; [R. at 221-22 (218-23)]. Appellant contends that the examiner had a duty to explain why he disagreed with the literature Appellant submitted and failed to do so. [AB at 17 (1-29)]. However, Appellant seemingly misunderstands the examiner's statement regarding the literature on low levels of ionizing radiation and CAD. The examiner was simply drawing a distinction between the positive relationship between high levels of ionizing radiation and both CAD and cancer and the absence of such a relationship between low levels of ionizing radiation and CAD. [R. at 222 (218-23)]; [AB 16-17 (1-29)]. Irrespective of this discussion,

examiners do not have a reasons or bases requirement. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Rather, a medical opinion is adequate when an examiner bases his/her opinion on prior medical history and describes the disability in "sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *Sharp*, 29 Vet.App. at 31. Also contrary to Appellant's arguments, the examiner commented on the fact that Appellant had been diagnosed with diabetes. [R. at 222 (218-23)]; [AB at 17-18 (1-29)]. By detailing that, "close to 50% of all patients with diabetes die from heart disease[,]" the examiner was simply alluding to a relationship between heart disease and diabetes, which is supported by empirical medical data. [R. at 222 (218-23)]. Thus, this information further supports the notion that his decision was "fully informed." *Sharp*, 29 Vet.App. at 31.

The Board provided an adequate statement of reason or bases for its reliance on the cardiologist's opinion. The Board recounted the cardiologist's descriptions and conclusions regarding Appellant's CAD and noted the cardiologist's discussion of "the scientific literature pertaining to low-level ionizing radiation exposure and cardiovascular risk." [R. at 5 (3-10)]; [R. at 222 (218-23)]. The Board then discussed that the cardiologist's research and experience led him to conclude that exposure to high-dose-ionizing radiation is linked to a variety of cancers and occurrence of CAD, but the scientific literature regarding CAD and low-level-ionizing radiation is not convincing regarding a positive relationship. [R. at 5 (3-10)]; [R. at 222 (218-23)]. The Board also discussed that the cardiologist

indicated that a major risk factor for developing CAD was diabetes and that Appellant carried such a diagnosis. [R. at 5 (3-10)]; [R. at 222 (218-23)]. Ultimately, the Board concluded that the opinion was adequate for adjudicative purposes because the examiner: (1) reviewed Appellant's prior medical history, which included his claims file, hearing testimony, private treatment records, and relevant scientific literature; (2) described Appellant's disability with sufficient detail; and (3) supported his conclusion with a reasoned analysis. [R. at 6-7 (3-10) (citing *Stefl*, 21 Vet.App. at 124.)].

Accordingly, the Board's decision should be affirmed because it provided adequate reasons or bases to allow Appellant to understand the precise bases for its finding that the 2017 VA examination, conducted by a cardiologist, was adequate. *See Gilbert*, 1 Vet.App. at 52.

2. The Board substantially complied with the previous remand order pursuant to *Stegall* when it obtained a medical opinion from a qualified specialist

It is well known "that a remand by this Court or the Board imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand[.]" *Stegall v. West*, 11 Vet.App. 268, 271 (1998). According to *Donnellan v. Shinseki*, "[i]t is substantial compliance, not absolute compliance, that is required." 24 Vet.App. 167, 176 (2009) (citing *Dyment v. West*, 13 Vet.App. 141, 146-47 (1999).

Here, the remand instructions provided that the "claims file [be sent] to a radiologist—*or any other specialist qualified to discuss the effects of radiation on*

the human body—for the issuance of a medical opinion as to the nature and etiology of [Appellant's] ischemic heart disease." [R. at 296 (292-98) (emphasis added)].

Appellant argues that the cardiologist[3] opinion relied on did not substantially comply with the Board's prior remand because it "was not offered by a radiologist or other specialist qualified to discuss the effects of radiation on the human body." [Appellant's Brief (AB) at 11 (1-29)]. Appellant contests the examination in part because a nurse practioner electronically signed the cardiologist's opinion. [AB at 11 (1-29)]. However, this argument lacks merit since it is clear from the signature provided by Dr. Geir P. Frivold, MD, MDH, FACC[4] that he conducted the examination. [R. at 223 (218-23)].

Appellant also argues that he was prejudiced because "someone uniquely qualified" to opine on radiology issues "may have determined that it was at least as likely as not that [his] heart disease was due to his exposure to ionizing radiation[.]" [AB at 12 (1-29)]. However, Appellant does not explain why Dr. Frivold, a cardiologist and Fellow of the American College of Cardiology is not a specialist qualified to render a medical opinion addressing the effects of radiation

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[3] A cardiologist is a physician skilled in the prevention, diagnosis, and treatment of heart disease. Cardiologist, *Dorland's Illustrated Medical Dictionary* 298 (31st ed. 2007). The cardiologist here provided an opinion on Appellant's IHD, which includes coronary artery disease (CAD). [R. at 218-23].

[4] FACC is an acronym for Fellow of American College of Cardiology. *The Fellow of the American College of Cardiology (FACC) Designation*, ACC.ORG, https://www.acc.org/membership/join-us/facc (last visited November 18, 2019).

on the heart or cardiovascular system. *See* [AB at 1-29]. Moreover, *Stegall* requires substantial compliance with remand orders, not strict or absolute compliance. 11 Vet.App. at 271. Thus, Appellant fails to demonstrate that the Board erred when it relied on an examination opinion offered by a cardiologist, rather than a radiologist. [R. at 5 (3-10)]; *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that Appellant bears the burden of demonstrating error on appeal), *aff'd* 232 F.3d 908 (Fed. Cir. 2000).

Further, the Board was not required to explain the competence of the cardiologist because this was not an issue Appellant raised until the instant appeal. The Federal Circuit recently explained in *Francway v. Wilkie*, No. 16-3738, 2019 U.S. App. LEXIS 30633, at *1, *8 (Fed. Cir. Oct. 15, 2019) (en banc), that the veteran bears the burden of raising the issue of an examiner's competency. Appellant was notified in a March 2018 SSOC that his claim of service connection for IHD was denied based on the November 2017 medical opinion. [R. at 36-37 (34-39)]. Appellant was given the opportunity to respond to this decision and did by selecting the response indicating he had more information or evidence to submit in support of his appeal. [R. at 16 (14-17)]. Within his response, Appellant included a pre-cardiac angiogram patient instructions document along with a discharge note. [R. at 14-15 (14-17)]. Appellant did not, however, raise the issue of the November 2017 cardiologist's competency. [R. at 34 (34-39)]. Since the burden is placed on the claimant to raise an issue establishing prejudicial error, and Appellant failed to raise such an issue until this appeal, the Board did not err in

relying on the November 2017 medical opinion. *Francway v. Wilkie*, 2019 U.S. App. LEXIS 30633, at *9. The Board's decision should therefore be affirmed since Appellant has not shown that VA erred when it relied on a cardiologist's opinion to decide a claim of service connection for IHD. *See Francway v. Wilkie*, 2019 U.S. App. LEXIS 30633, at *8-9; *Wise*, 26 Vet.App. 517, 525 (2014); *see also Donnellan*, 24 Vet.App. at 176.

3. Neither 38 C.F.R. § 20.1304 nor *Kutscherousky* apply to this appeal that returned to the Board following its July 2017 remand

According to 38 C.F.R. § 20.1304(a), a claimant and his/her representative will be granted a period of 90 days following a receipt of an NOD, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a change in representation. However, the Court recently held that 38 C.F.R. § 20.1304 and its companion notice regulation 38 C.F.R. § 19.36 (2018) unequivocally apply "only 'following the mailing of notice to [Appellant and his or her representative] that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board." *Williams v. Wilkie*, No. 16-3988, 2019 U.S. App. Vet. Claims LEXIS 1637, at *1 (Sept. 13, 2019). Thus, the Board's July 2018 letter falls outside of the scope of § 20.1304(a). [R. at 11-13]; *Williams*, 2019 U.S. App. Vet. Claims LEXIS, at *12. Additionally, *Kutscherousky* is also inapplicable because the Court "did not actually apply § 20.1304(a) . . . as evidence by the fact that the Court mandated that the Board provide an appellant a full 90 days to

submit additional evidence and argument after mailing the post-Court-remand notice . . . instead of using the conditional period of '90 days . . . or until the date the appellate decision is promulgated by the Board[], whichever comes first,' set forth in §20.1304(a)." *Williams*, 2019 U.S. App. Vet. Claims LEXIS, at *15 (citing *Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018) (parenthetical omitted)).

Here, Appellant argues that the Board failed to afford him 90 days to submit additional evidence or argument, request a hearing, or request a change in representation. [R. at 22-28 (1-29)]. However, in addition to the above made point, this Court rejected this same argument in *Williams*. *See Williams*, 2019 U.S. App. Vet. Claims LEXIS, at *18. Because neither *Kutscherousky* nor 38 C.F.R. § 20.1304(a) apply to appeals returned to the Board following a Board remand, the Court should similarly reject Appellant's argument here. *Id.*

The Court should not address Appellant's constitutional and non-constitutional challenges to the validity of the inapplicable regulation and *Kutscherousky*. *Williams*, 2019 U.S. App. Vet. Claims LEXIS, at *20 (citing *Lyng v. NW. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.")); *Bucklinger v. Brown*, 5 Vet.App. 435, 441 (1993) (same); *see also Suguitan v. McDonald*, 27 Vet.App. 114, 118 n.4 (2014) (declining to address non-constitutional arguments premised on a statute that was not applicable to the

appellant's claim). Because *Kutscherousky* and 38 C.F.R. § 20.1304(a) are inapplicable to Appellant's appeal, the Board's decision should be affirmed.

V. CONCLUSION

In offering this response, the Secretary has limited himself to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. *See Norvell v. Peake,* 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant to have adequately raised and properly preserved, but which the Secretary did not address herein, and the Secretary requests the opportunity to address the same if the Court deems it to be necessary. Considering the foregoing, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, asks the Court to affirm the August 1, 2018, Board decision.

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