Vet. App. No. 19-0320

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DONALD R. FULTON,
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

DONALD R. FULTON,	)	
	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 19-0320
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the November 8, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for cardiac disorder, to include coronary artery disease, atrial fibrillation, and peripheral vascular disease, claimed as ischemic heart disease.

II. STATEMENT OF THE CASE

Nature of the Case

Appellant, Donald Fulton, appeals the November 8, 2018, decision of the Board that denied entitlement to service connection for cardiac disorder, to include coronary artery disease, atrial fibrillation, and peripheral vascular disease, claimed as ischemic heart disease. [Record Before the Agency (R.) at 9 (4-12)].

The Board also granted entitlement to a separate, compensable rating for left foot ulcer. [R. at 4]. This favorable finding cannot be disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

The Board also remanded Appellant's claim of entitlement to a total disability rating based on individual unemployability due to service-connected disability. [R. at 4]. The Court is without jurisdiction over this issue. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (stating that a Board remand decision is not a final decision over which this Court has jurisdiction); 38 U.S.C. §§ 7252(a), 7266(a).

Statement of Facts and Procedural History

Appellant served on active duty from August 1964 to August 1967, including service in the Republic of Vietnam. [R. at 1292].

Appellant's July 1964 entrance medical examination indicated a sitting blood pressure reading of 110/70. [R. at 2631 (2630-31)]. The examiner noted that Appellant's heart and vascular system were clinically normal. [R. at 2630].

Appellant's June 1967 separation medical examination indicated a sitting blood pressure reading of 122/82. [R. at 2629 (2628-29)]. The examiner noted that Appellant's heart and vascular system were clinically normal. [R. at 2628].

In December 2004, thirty-seven years after his separation from service, Appellant underwent a cardiolite stress test at the Armstrong County Memorial Hospital. [R. at 2332-33]. The test report indicated that Appellant was admitted to the hospital with atrial fibrillation but "no prior history of cardiac problems." [R. at 2332]. The report stated that Appellant had "no history of hypertension, diabetes mellitus, or hypercholesterolemia." [R. at 2332]. The report noted a resting blood pressure reading of 132/91 and "at peak stress" of 172/112. [R. at 2332]. The test results "did not show any changes suggestive of ischemia." [R. at 2333]. Appellant's VA medical records indicate an onset of benign hypertension in 2004. [R. at 2433 (2432-34)].

In July 2010, Appellant was granted service connection for posttraumatic stress disorder and type 2 diabetes mellitus associated with herbicide exposure. [R. at 2472 (2472-75)]. At that time, Appellant submitted a request for service connection for ischemic heart disease and bilateral neuropathy in feet due to diabetes. [R. at 2452-53]. In December 2010, Appellant was afforded a VA examination. [R. at 2407-09]. The examination listed diagnoses of atrial

fibrillation, hypertension, diet-controlled diabetes, and peripheral neuropathy. [R. at 2409]. The examination found "no signs of ischemic heart disease or history or ischemic heart disease." [R. at 2409].

In a January 2011 rating decision, Appellant was denied service connection for coronary artery disease. [R. at 2377-80]. The decision stated that the medical records do not show complaints or treatment for heart disease, nor does Appellant have a current diagnosis of coronary artery disease. [R. at 2378-79]. In February 2011, Appellant submitted a notice of disagreement that stated that "coronary artery disease is atrial fibrillation and vascular heart disease. My ischemic heart disease is approvable under AO new regulation." [R. at 2361-62]. In July 2012, the regional office issued a statement of the case continuing the denial of service connection for coronary artery disease as a result of exposure to herbicides. [R. at 1634-64]. In September 2012, Appellant appealed to the Board. [R. at 1616-17].

In January 2014, the Board remanded Appellant's claim for a cardiac disorder, claimed as ischemic heart disease due to in-service herbicide exposure, for a VA examination to determine the nature and etiology of the atrial fibrillation, to include whether the condition was related to Agent Orange exposure. [R. at 1446-49 (1433-53)]. In March 2014, Appellant was afforded another VA examination. [R. at 1184-88]. The examiner found that atrial fibrillation was not related to service because it is not a disability that is presumptively related herbicide exposure. [R. at 1188]. In October 2014, the regional office issued a

supplemental statement of the case that continued the denial of service connection for "a cardiac disorder, to include atrial fibrillation and valvular heart disease, claimed as ischemic heart disease due to in service herbicide exposure." [R. at 1118-33].

In January 2015, the Board again remanded Appellant's claim for a cardiac disorder, to include atrial fibrillation and valvular heart disease, claimed as ischemic heart disease due to in-service herbicide exposure, for a new examination to address whether atrial fibrillation is due to exposure to Agent Orange on a direct basis. [R. at 1100-03 (1090-1106)]. On December 10, 2015, a VA medical opinion was provided that found that the claimed condition was less likely than not incurred in or caused by the claimed in-service injury, event or illness. [R. at 887 (887-89)]. The examiner explained that (1) there is insufficient evidence that atrial fibrillation is caused by Agent Orange, (2) Appellant was diagnosed with atrial fibrillation approximately forty years after possible exposure, and (3) the most likely risk factor for atrial fibrillation in this case is the history of hypertension. [R. at 888]. In December 2016, the regional office issued a supplemental statement of the case that continued the denial of entitlement to service connection for a cardiac disorder, to include atrial fibrillation and valvular heart disorder, claimed as ischemic heart disease due to in-service herbicide exposure. [R. at 509-25]. In March 2018, the regional office issued another supplemental statement of the case that continued the denial of service connection for a cardiac disorder, to include atrial fibrillation and valvular heart disease,

claimed as ischemic heart disease due to in-service herbicide exposure. [R. at 29-36].

On November 8, 2018, the Board issued its decision denying service connection for cardiac disorder, to include coronary artery disease, atrial fibrillation, and peripheral vascular disease, claimed as ischemic heart disease. [R. at 4]. The Board noted that the 2015 examiner reported "that hypertension is the most likely risk factor for atrial fibrillation and that the Veteran has a history of hypertension." [R. at 9]. This appeal ensued.

III. SUMMARY OF ARGUMENT

The issue of entitlement to service connection for hypertension was not reasonably raised by the record because the medical evidence indicated that Appellant's heart and vascular system were clinically normal in service and Appellant's hypertension was first diagnosed thirty-seven years after his separation from service.

IV. ARGUMENT

A. Standard of Review.

"Whether an issue is reasonably raised by the record is essentially a question of fact, subject to the 'clearly erroneous' standard of review." *Lynch v. Wilkie*, 30 Vet.App. 296, 304 (2018) (citations omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (citation omitted).

If the factfinder's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing 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. *Id.* (citations omitted). Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Id.* (citations omitted).

B. The Board did not fail to address a reasonably raised theory.

The Board is required to consider all issues raised either by the claimant or by the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (citations omitted). However, this obligation "does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision." *Id.* at 553. "[T]he Board is not required to conjure up issues that were not raised by the appellant." *Brannon v. West*, 12 Vet.App. 32, 35 (1998) (citation omitted); *see also Sondel v. Brown*, 6 Vet.App. 218, 220 (1994) (when issue is not reasonably raised, Board is not required to "conduct an exercise in prognostication").

Appellant argues that the Board failed to address a claim for hypertension that was reasonably raised by the evidence in Appellant's case. [Appellant's Brief (App. Br.) at 8-15]. Appellant's argument is flawed for at least four reasons: (1) Appellant relies upon medical authorities that were not part of the record before the Board, (2) Appellant's theory is contrary to the medical evidence of record, (3) an isolated blood pressure reading is not clinically significant, and (4) the Board is

not required to analyze all medical test results in the record that might be elevated, but not abnormal, to conjure up issues that were not raised by a claimant.

First, Appellant improperly relies upon medical authorities that were not part of the record before the Board. Appellant's brief cites to the Merck Manual for threshold blood pressure readings indicative of normal blood pressure, prehypertension, and Stage 1 hypertension. [App. Br. at 3, 11]. Appellant's brief also relies on a report from the National Academy of Sciences (NAS) regarding veterans and Agent Orange. [App. Br. at 11-12]. The NAS report and the Merck Manual were not before the Board in November 2018. [R. at 4-12]. Therefore, this Court should decline to entertain Appellant's argument relying on these documents. *See Euzebio v. Wilkie*, __ Vet.App. __, No. 17-2879, 2019 U.S. App. Vet. Claims LEXIS 1476, at *9–14 (Aug. 22, 2019) (finding NAS reports were not constructively before the Board); 38 U.S.C. § 7252(b); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 19 (1990) (holding that review in this Court shall be on the record of proceedings before the Secretary and the Board); *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (holding that VA has constructive possession of documents "if they are within the Secretary's control and could reasonably be expected to be a part of the [record]").

Appellant's argument that hypertension was reasonably raised by the record depends on the premise that the NAS report and the Merck Manual were constructively before the Board. [App. Br. at 11-12]. However, following Appellant's brief, this Court held in *Euzebio* that a NAS report was not

constructively part of the record before the Board and reaffirmed that, "even if VA is aware of a report and the report contains general information about the type of disability on appeal, that is insufficient to trigger the constructive possession doctrine; there must also be a *direct relationship* to the claim on appeal." *Euzebio*, __ Vet.App. __, 2019 U.S. App. Vet. Claims LEXIS 1476, at *15–16 (citation omitted). *Euzebio* governs here, so neither the NAS report nor the Merck Manual were constructively before the Board in November 2018. "To hold otherwise would not only contravene [the] Court's caselaw but would undermine the Court's jurisdictional obligation to base its review on the record of proceedings before the Board, by allowing the Court to consider and find Board error based on any congressionally mandated reports submitted to VA in connection with its nationwide system for administrating disability benefits, when the Board was not requested to and did not address such evidence." *Id.* at *16 (citation omitted).

Second, Appellant's theory is contrary to the medical evidence of record. Appellant contends that a claim for service connection for hypertension was reasonably raised by the record. [App. Br. at 8-15]. The Board noted that Appellant has a history of hypertension. [R. at 9]. However, the Board did not analyze a service connection claim for hypertension because there was no assertion or record evidence that Appellant's hypertension was related to his service. The pertinent medical evidence of record indicated that Appellant's hypertension is not related to his service:

- Appellant's July 1964 entrance medical examination indicated that Appellant's heart and vascular system were clinically normal [R. at 2630];
- Appellant's June 1967 separation medical examination indicated that Appellant's heart and vascular system were clinically normal [R. at 2628];
- Appellant's private medical report from 2004 states that Appellant had no history of hypertension [R. at 2332]; and
- Appellant's VA medical records indicate an onset of benign hypertension in 2004, thirty-seven years after Appellant's separation from service [R. at 2433].

The evidence of record indicated that Appellant's heart and vascular system were clinically normal and that there was an onset of benign hypertension in 2004, thirty-seven years after Appellant's separation from service. The theory that Appellant's hypertension was service connected was not reasonably raised by the record.

Third, an isolated blood pressure reading is not clinically significant. It is VA's policy to accept a hypertension diagnosis only on the basis of "readings taken two or more times [per day] on at least three different days" so as to avoid prematurely diagnosing hypertension on the basis of lone, possibly unrepresentative measurements. *See* 38 C.F.R. § 4104, DC 7101, Note (1); *accord Gill v. Shinseki*, 26 Vet.App. 386, 390 (2013) ("Note (1) . . . states that hypertension must be confirmed by at least two blood pressure readings taken over several days"). This is consistent with the examiner's conclusion that Appellant's heart and vascular system were clinically normal in June 1967 and the

medical conclusion that the onset of Appellant's hypertension was in 2004, thirty-seven years after his separation from service. [R. at 2628].

Fourth, the Board is not required to analyze all medical test results in the record that might be elevated, but not abnormal, to conjure up issues that were not raised by a claimant. Appellant's argument would seem to place a requirement on the Board to scrutinize medical records as medical experts and to construe claims from elevated test results that fall within the normal range. This view of the function of the Board is incorrect. Although it was common in the past for the Board to use its own medical judgment provided by the medical member of the panel, this Court ended that practice in *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991), holding that Board "panels must consider only independent medical evidence to support their findings rather than provide their own medical judgment in the guise of a Board opinion." *Hime v. McDonald*, 28 Vet.App. 1, 5-6 (2016). In Appellant's case, the independent medical evidence indicated that Appellant's heart and vascular system were clinically normal upon separation and the onset of Appellant's hypertension was in 2004, thirty-seven years after his separation from service. [R. at 2433, 2628]. It would be improper for the Board to reject this medical judgment and conjure up an issue that was not raised by Appellant. *See Brannon*, 12 Vet.App. at 35 ("the Board is not required to conjure up issues that were not raised by the appellant").

Given the evidence before the Board in this case, a claim of service connection for hypertension was not reasonably raised by the record.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the November 8, 2018, decision of the Board that denied entitlement to service connection for cardiac disorder, to include coronary artery disease, atrial fibrillation and peripheral vascular disease, claimed as ischemic heart disease.

Respectfully submitted,

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