United States Court of Appeals for Veterans Claims

Vet.App. No. 18-5399

WILLIE HAIRSTON, JR.,

Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,

Appellee.

REPLY BRIEF FOR APPELLANT

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I. This Court Should Ignore the Secretary's *Post Hoc* Rationalizations

The Secretary's brief contains impermissible *post hoc* rationalizations which this Court should reject. *See Hickson v. Shinseki*, 23 Vet.App. 394, 400 (2010). The Secretary's attempt to prop up the Board's flawed opinion is no substitute for the Board's flawed reasons and bases. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991); *see also Webster v. Derwinski*, 1 Vet.App. 155, 159 (1991) ("not appropriate for [court of review] to make a *de novo* finding [of material fact], based on the evidence").

First, the Secretary's discussion of the STR noting back pain that came after the exit medical examination is entirely *post hoc* reasoning because the Board did not discuss this record at all, or issue a credibility finding. Sec. Br. at 17. Unfortunately, the Secretary also misstates Appellant's argument here. While the Secretary charges that Appellant asserted that there were records of physical therapy for Appellant's back in-service, the Secretary provides no citation to Appellant's brief where this alleged argument was made -likely because Appellant never made this argument. Sec. Br. at 17. In reality, Appellant noted that there is an STR dated after the exit medical examination that notes back pain. *See e.g.*, Apl. Br. at 5 (*citing* [R. 866] (Feb. 26, 1988 STR for physical therapy consult noting left knee pain and, on third line, low back pain)). While this record is a physical therapy consult, that is not why this record is material. Even if the Veteran did not undergo physical therapy for his back, there was still a record noting low back pain that came after the exit medical examination, which was the STR relied on by the C&P examiners for the conclusion that the back was normal at exit from service. Apl. Br. at 26 (*citing* [R. 43]); Apl. Br. at 30. We do not know what the significance of this record because the Board did not discuss it. If the Board finds it showed an issue at exit from service, then the C&P examinations are based on a factual inaccuracy, and not entitled to probative weight. Apl. Br. at 25 (*citing Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("[A]ny and all scientific testimony or evidence admitted must not only be relevant, but also reliable.") and *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993)). The

discrepancy is material and thus needed to be addressed by the Board. *See Fountain v. McDonald*, 27 Vet.App. 258, 273-75 (2015) (concluding that the Board erred in not adequately explaining putative discrepancies between evidence of record).

Second, the Secretary's assertion that Appellant's argument on whether the Board should have addressed that the C&P examiner incorporated an impermissible finding of fact in determining that the defect was congenital was merely a red herring is also *post hoc* reasoning. Sec. Br. at 18-19. The Secretary argues here that the Board did not incorporate this finding of fact into its reasons and bases and that therefore the error was harmless. Sec. Br. at 19. But, as Appellant noted, the Board incorporated evidence into its reasoning for rejecting the claim that was predicated on the idea that the condition pre-existed service, without first addressing the error or explaining why the C&P examination was adequate despite this finding of fact. Apl. Br. at 18-19. The Board failing to make a finding that the condition pre-existed service does not cure the defect in the C&P examination; instead, it further shows why it is inadequate and not entitled to probative weight. *See Coburn v. Nicholson*, 19 Vet.App. 427, 434 (2006) (Lance, J., dissenting) (when a medical opinion ignores the facts accepted by the Board it is not competent evidence); *West v. Brown*, 7 Vet.App. 70, 77-78 (1994) (*en banc*) (noting that a medical opinion based on an inaccurate history is inadequate for rating purposes); *Reonal*, 5 Vet.App. at 461 ("An opinion based upon an inaccurate factual premise has no probative value."). Further, when an examiner makes factual findings and legal determinations instead of medical opinions, a new medical examination may be necessary to "remove whatever taint there may be from [the examiner's] overreaching in his report." *Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004); *see also Colayong v. West*, 12 Vet. App. 524, 534–35 (1999) (finding that the Board erred when it relied on a medical opinion in which the examiner engaged in unwarranted factfinding). When "the Board fail[s] to acknowledge or discuss the fact that the [examiner] overstepped when he opined on purely factual matters that are the purview of VA or Board decisionmakers alone," this Court is "unable to assess whether the Board was aware of this problem with

the … opinion on which it relied and whether its findings and conclusions may have been influenced thereby." *Rogers v. McDonald*, No. 13–3039, 2015 WL 1939366, at *9 (CAVC Apr. 30, 2015) (non-precedential).[1] "This renders inadequate the Board's reasons or bases for finding the opinion adequate and relying on it to decide the claim," and "remand is required to correct the Board's errors." *Id.*

II. At no point did Appellant ask this Court to reweigh evidence; There cannot be reweighing if the Board did not weigh this evidence to begin with

Although the Secretary warns this Court against reweighing the evidence, this argument is misplaced. Sec. Br. at 15. At no point did Appellant ask this Court to reweigh evidence. In fact, this was expressly discussed in Appellant's principal brief. Apl. Br. at 20-21 ("Importantly, this is not a request to reweigh evidence, because the Board has not explicitly weighed these disorders despite its duty to so do. Remand is required for the Board to adequately address this evidence in the first instance"). Counter to the Secretary's implicit assertion, agency action is not shielded from a "thorough, probing, indepth review." *Wayne State University v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1978); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (court must evaluate "whether the agency took a hard look at information relevant to the decision"). The Board has a duty to explain its findings in a way that informs the veteran of the precise basis for the decision and facilitates review by the Court. *See English v. Wilkie*, 30 Vet.App. 347, 352 (2018). That duty includes the requirement to "provide reasons for rejecting material evidence favorable to the claimant" and, where necessary, to assess the credibility of the evidence, including lay statements. *Chudy v. O'Rourke*, 30 Vet.App. 34, 38 (2018). A Board conclusion must be adequately explained, grounded in an honest and accurate restatement of the record, with evidence that supports the agency's finding. *See Dickinson v. United States*, 346 U.S. 389, 396-97 (1953) ("[T]he courts may properly insist that there be some proof" that supports the agency's decision); *Guerrieri v. Brown*, 4 Vet.App. 467, 473 (1993) (reasoning must be supported by the record).

1 Under U.S. VET. APP. R. 30(a), this case is referenced not as precedential authority, but instead only for the persuasive value of its logic and reasoning to show how this Court has treated this issue.

This would be true even if the reasoning were the apogee of articulate prose; reasoning can be both articulate and fallacious. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 61 (1990) (Kramer, J. concurring) ("No amount of reasons or bases, no matter how articulately made, can justify that which is not justifiable"). In other words, determining if the evidence actually supports the Board's decision or whether the reasoning complied with legal requirements, is not reweighing the evidence. Here, Appellant noted that the evidence either does not support the Board's findings, that the Board did not issue credibility findings on certain evidence, that the Board did not resolve discrepancies between the evidence, or that the Board's reasons and bases did not comport with well-settled requirements this Court has developed through caselaw. That is not a request to reweigh evidence.

III. Precedent from this Court forecloses the Secretary's argument concerning the inadequate reasons and bases

In his principal brief, Appellant noted that the Board repeatedly discussed a single theory of service connection, namely the injury stemming from picking up the missile test system. Apl. Br. at 19 (citing [R. 6], [R. 5] ("The Veteran contends that he served as a missile systems technician in the Army and that he injured his back while picking up a missile test system while on active duty in 1984, more than 30 years ago."), and [R. 10] ("While the Veteran believes that his low back disability is related to an in-service injury, event, or disease, including picking up a missile test system while on active duty in 1984, he is not competent to provide a nexus opinion in this case.")). Appellant further noted that the Board adopted the C&P examiner's finding that this injury was self-limited and transitory. Apl. Br. at 19 (citing [R. 7]). As Appellant noted, beyond the injury picking up heavy equipment, the record, however, also showed other theories of service connection, including an in-service fall, [R. 1353 (1353-1364)] ("about 1985 states he was scaling a fence and came down on the knee and injured the knee. thinks [*sic*] that the back was injured as well"), in-service assaults, [R. 750 (743-753)]; [R. 814]; [R. 852], intermittent pain since an injury in Germany in 1984, [R. 825], and an in-service physical therapy consultation noting back pain, which was noted after the exit medical examination. [R. 866]. While the Board may have summarized

some -but certainly not all- of these injuries when it summarized the C&P examinations, the Board did not issue credibility findings on these in-service injuries. Apl. Br. at 20 (*citing Smith v. Derwinski*, 1 Vet.App. 267, 272 (1991) (Board must consider entire record)). Nor did the Board weigh the events or injuries raised by the record that were not discussed by the C&P examiners, versus whether the C&P examinations were based on a materially inaccurate factual predicate. It is the Board that must weigh and assess the credibility of the evidence in the first instance. Apl. Br. at 17 (*citing Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) and *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997)). As Appellant argued, because it did not, its statement of reasons and bases is inadequate. Apl. Br. at 18 (*citing Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases")). Appellant noted how this failure was prejudicial because it related to the probity of the C&P examinations. Apl. Br. at 20 (*citing Coburn*, 19 Vet.App. at 434 (Lance, J., dissenting) (when a medical opinion ignores the facts accepted by the Board it is not competent evidence)). Specifically, if the Board issues favorable credibility findings on these possible injuries, then the C&P examinations are inadequate because they either did not consider them or how they considered them would be contradicted by the positive Board finding. For example, neither C&P examiner discussed the notation after the exit medical examination of back pain. Accordingly, if the Board finds this credible, then a new C&P examination would be required because each C&P examination would then incorrectly be based on the belief that there was no evidence showing the Veteran had issues with his back at exit from service. Apl. Br. at 20.

The Secretary counters that the Board adequately discussed the Veteran's contentions that his disability "was caused by an injury he sustained in service, while he lifted heavy equipment." Sec. Br. at 16. The Secretary further argues that the Board was correct in determining that the August 1984 report is "the only record which directly addressed the low back." *Id*. The Secretary than alleges that Appellant

failed to show any relevant record that the Board did not discuss. *Id*. Finally, the Secretary asserts that the C&P examiners discussed some of these possible in-service injuries, but rejected them. *Id.* at 17.

The Secretary's argument is foreclosed by precedent from this Court. While it is true that the Board summarized the C&P examiners who in turn summarized some -but, again, not all of this evidence- the Board cannot abdicate its responsibility to discuss the material evidence and issue credibility findings to a medical examiner. Apl. Br. at 17 (*citing Owens v. Brown*, 7 Vet.App. 429, 433 (1995)). Simply because a medical examiner may have discussed, for example, the in-service assault, and simply because the Board summarized the discussion from the medical examiner, does not mean that the Board issued a credibility finding on that injury or offered adequate reasons and bases explaining why the medical examiner's speculative finding that the back pain noted after the assault was merely from sleeping was proper, in particular when the contemporaneous medical evidence does not make this same finding. Beyond the summary of the C&P examinations, the Secretary does not cite to a portion of the Board decision where it made findings regarding this other evidence. As this Court's past precedent counsels, merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases. Apl. Br. at 18 (*citing Dennis*, 21 Vet.App. at 22). Ignoring for a moment that the Appellant identified records the Board did not discuss even in its summary of the C&P examinations -for example the physical therapy consult- this is also why the Secretary's argument that Appellant "is unable to identify any relevant records of low back injury that the Board did not discuss" also must fail. Sec. Br. at 16.

Similarly, the Secretary's argument that some of the evidence discussing in service events or injuries came from post-service statements is also counter to precedent by this Court. Sec. Br. at 16. The Board's duty includes the requirement to "provide reasons for rejecting material evidence favorable to the claimant" and, where necessary, to assess the credibility of the evidence, including lay statements. *Chudy*, 30 Vet.App. at 38. A Veteran is competent to recall things that come to his sense, including, for

example, sustaining a fall. *See Washington v. Nicholson*, 19 Vet.App. 362, 368-69 (2005); *Swann v. Brown,* 5 Vet.App. 229, 233 (1993) (finding Board is not bound to accept uncorroborated account of veteran's medical history but must assess the credibility and weight of the evidence provided by the veteran in rejecting it). Absent a credibility finding by the Board, the fact that some of the evidence is in the form of a lay statement is accordingly irrelevant. While the Secretary asserts that the Board summarized medical evidence that may have discussed some of these lay statements, Sec. Br. at 17, that does not make up for the fact that the Board did not resolve the discrepancy between the medical evidence and the lay statements. See *Fountain*, 27 Vet.App. at 273-75. If the Board finds that the lay evidence was credible, then it must ensure that the factual basis of any obtained VA medical opinion is consistent with the Board's findings of fact. *See West*, 7 Vet.App. at 77-78 (noting that a medical opinion based on an inaccurate history is inadequate for rating purposes); *Reonal*, 5 Vet.App. at 461 ("An opinion based upon an inaccurate factual premise has no probative value.").

As an aside, it should also be noted that the Secretary's argument is, in part, based on a misreading of the facts in the record. Specifically, the Secretary's assertion that the pain did not begin until the mid-1990s, Sec. Br. at 25, and his assertion that an imaging study noting "Mild degenerative change in the lower lumbar spine" were of the right hip. Sec. Br. at 20-21. To begin with, the imaging noted a finding of "mild degenerative change in the lower lumbar spine." [R. 1726]. The Secretary's disagreement with that finding is both *post hoc* reasoning and impermissible medical speculation. *See Hyder v. Derwinski,* 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing ... serves no constructive purpose and cannot be considered by the Court"). Further, the Secretary's assertion that there was no evidence until the mid-1990s of back pain post service, fails to note the evidence that the lay statement is onset onset in 1986 and worsening in 1996. [R. 255 (255-258)]. Another statement that the Board failed to issue a credibility finding on.

In addition to the above issues, there were additional items of evidence in the record that the Board also did not discuss or issue credibility findings on. These included an alleged statement from the Chiropractor that the injury had to have happened a long time ago, Apl. Br. at 23 (citing [R. 2237]), and the notation on the imaging study that "[e]xtensive bony changes are consistent with long-standing process." Apl. Br. at 23 (citing [R. 1628]). The arguments that Secretary did not adequately respond to should be deemed waived by this Court. *See MacWhorter v. Derwinski,* 2 Vet.App. 133, 135 (1992) (the Secretary's failure to make an appropriate argument rebutting a legally sufficient position of an appellant may be treated as a concession); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. Fla. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it."); *Stubbs v. Austin*, 285 Ill. App. 535, 539 (Ill. App. Ct. 1936) ("A careful examination of defendants' brief and argument reveals that not only was no attempt made to answer the foregoing contentions but that other major errors pointed out and argued by plaintiff were entirely ignored. Such failure and refusal to meet and answer vital grounds for reversal urged by plaintiff confess the error of the proceedings"); *People v. Bouzas*, 53 Cal. 3d 467, 480 (Cal. 1991) ("The People apparently concede as much; although they respond to each of defendant's other arguments, they simply ignored this point in their brief and at oral argument"); Andrew J. Tuck, *Strategic Considerations for Appellees in the Federal Courts of Appeals*, The Federal Lawyer, at 42 (Mar. 2013) (an appellee waives any arguments not raised in its opening brief); *see also Locklear v. Nicholson,* 20 Vet.App. 410, 416–417 (2006) (terse or undeveloped argument does not warrant detailed analysis by Court and is considered waived).

IV. The Secretary misunderstands the "noted during service" requirement under 3.303(b)

With all do respect, the Secretary's argument for why the Board's continuity of symptomatology analysis was adequate is predicated on a misunderstanding of what "noted in service" means. Sec. Br. at 19. This Court already set this framework. To fulfill the "noted during service" requirement, a notation of

symptoms need not be made contemporaneous with service. *See Savage v. Gober,* 10 Vet.App. 488, 497 (1997). As this Court noted in *Savage, e*ven if the record did not contain service medical records showing treatment in service for a back problem, the noted during service requirement only requires that the evidence show that a condition was observed during service, "but does not require that such observation be recorded, either in special documentation or during the time of service or during the presumption period." *See Savage* at 497. While it is true that the Board may reject uncorroborated accounts of injury, *Swann*, 5 Vet.App. at 233, medical evidence of "noting" is not required if the condition is one as to which a lay person's observation is competent. *See Barr v. Nicholson,* 21 Vet.App. 303, 307 (2007).

The Secretary's argument that arthritis needed to be "noted in service" or within one year of service, Sec. Br. at 20 (The Board explained that diagnostic evidence demonstrating arthritis was not available until July 2004 […] Appellant's assertions fail to demonstrate prejudicial error because […] it is insufficient to establish a diagnosis of arthritis during the one-year presumptive period following separation from service […]), is counter to how this Court has previously decided this issue. *Cf. Hanson v. Shinseki*, No. 11-1707, 2012 WL 4356268, at 3 (Vet.App. Sept. 25, 2012)[2] (noting that the appellant's postservice admission that he suffered a neck injury in the October 1994 accident could serve to satisfy the "*noted* during service" requirement). In *Hanson*, this Court noted that the veteran's lay statement that he suffered a neck injury could satisfy the "noted during service" requirement. *Id.* The result should be no different here. Despite the Secretary's assertions, this Court should still remand this issue for the Board to issue credibility determinations on the other possible in-service injuries and then for it to determine whether new C&P examinations are warranted should the Board find them credible. *See Stefl v. Nicholson*, 21 Vet.App. 120 (2007) (Court held that, when evaluating a veteran's disability, VA medical examiners must consider both presumptive and direct theories of service connection).

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2 Under U.S. VET. APP. R. 30(a), this case is referenced not as precedential authority, but instead only for the persuasive value of its logic and reasoning to show how this Court has treated this issue.

While the Secretary asserts later in his brief that Appellant failed to show "that he had a chronic low back disability noted during service," Sec. Br. at 21, what the Secretary fails to appreciate is that the Board failed to make credibility determinations that spoke to this issue. For example, as noted in the principal brief, and above, the Board did not issue a credibility finding on the statement that the Veteran's Chiropractor told him the injury had to have happened a long time ago. Similarly, the Board did not make a credibility finding on the notation on the imaging study that the changes were part of a long standing process. Given these errors, it is premature to allege that the Veteran has not carried his burden, when the Board did not satisfy its reasons and bases requirements here. The Board, for example, did not explain why the Chiropractor's alleged statement could not serve to satisfy the noted during service requirement. Further, the Board did not issue a credibility finding on the Veteran's lay statements that there was onset in 1986 and worsening in 1996. [R. 255 (255-258)].

V. The Secretary's Red Herring aside, the notice concerning the transcript was defective

At the outset it should be noted that Appellant's principal brief contained a typo at page 13. While Appellant referenced 3.104(c), it should have read 3.103(c), which was the provision in effect at the time regarding hearings requests at the local RO. *See* 77 FR 23128 (Apr. 18, 2012). Appellant sincerely apologizes for this oversight. However, as the Secretary addressed the text of the actual provision here, this typo did not materially impact the Secretary's response.

The Secretary's focus is that the Veteran was informed that he could seek another hearing, that he could have requested a Board hearing, that he could have sought another hearing at any time, and that the Veteran opted to submit a statement. Sec. Br. at 11-14. The problem with this argument is that it ignores that there is a notice defect. Apl. Br. at 14.

As this Court has previously noted, the VA's nonadversarial claims system is predicated upon a structure which provides for, *inter alia*, notice. *See Thurber v. Brown*, 5 Vet.App. 119, 123 (1993). Here, while it is true generally that the Veteran could have requested another hearing at any time, that is not

what the notice he was actually given said. Apl. Br. at 14 (noting: "A reasonably veteran would not know this was a waiver given this notice letter, which merely presented three options with a warning that if VA did not "receive the information within 30 days [it] will make a decision based upon the evidence of record.""). Indeed, the notice he was given informed the Veteran that he had 30-days from the date of the letter to request another hearing, submit a statement, or have the hearing officer make a decision based on the notes taken during the first hearing. [R. 2239] (noting that the options, including a request for another hearing "must be submitted within **30 days from the date of this letter.**" (emphasis in original)). So, while the Secretary is correct that the legal framework allowed the Veteran to request another hearing at any time, the notice he was given informed him -with bolded and underlined text- that he merely had 30 days from the date of the letter to request another hearing. It is unclear from the letter, or the Secretary's argument, what gave the VA the authority to limit the request for a hearing to 30 days. The very fact that the Veteran was informed that he only had 30-days to request another hearing undermines the Secretary's *post hoc* argument here. Further, the three options presented would lead any reasonable Veteran to believe that if he opted for one, he could not also opt for the others. For example, if he went to another hearing, he could not submit a statement and the RO would not consider the notes form the first hearing. Or, if he submitted a statement, he could not request another hearing, and the RO would not consider the notes from the original hearing. Finally, the letter ambiguously states merely that a transcript cannot be provided. This could mean that a transcript cannot be provided to the Veteran and his representative, but otherwise the tape recording is part of the evidence of record.

At bottom, the Secretary's argument is based on the idea that the notice actually given was the only option available to the RO. However, the RO could have scheduled another hearing -after all the Veteran had already requested one- and within the notice explained why another hearing was required, while informing the Veteran that he could submit a request to withdraw the hearing. This would have been the simplest way for the VA to comply with the obligation to preserve a hearing transcript. Even if the

notice actually given was the only way to handle this issue, the VA still did not inform the Veteran that even if he submitted another statement he could still have requested another hearing at any time. Instead, the letter misinformed the Veteran that he only had 30 days to request another hearing and made it appear that the Veteran had one of three choices. The Veteran was not even presented with an option of requesting more time to decide on how to proceed.

The Secretary is also confusing the issue of notice with why the error here is prejudicial. Because the Veteran had already requested a hearing, certain legal requirements that were self-imposed by the Secretary were triggered, which included the obligation to preserve a transcript (which has evidentiary purposes) and the obligation to make certain informational statements during the hearing. Apl. Br. at 12-14. We know that the VA did not preserve the transcript. Because of that, we do not know if the VA complied with its other obligations. Apl. Br. at 15-17. That is why the error is prejudicial. The failure to give proper notice merely amplifies the other errors because any prejudice from failing to preserve the hearing transcript would have been cured through another hearing. Since the VA misled the Veteran through this defective notice, that issue was not cured even if the Veteran did not elect another hearing, given this defective and misleading notice.

Respectfully Submitted

/S/ Brandon A. Steele, Esq. November 27, 2019

Brandon A. Steele, Esq.