Vet.App. No. 19-2512

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

HYMAN HUMPHREY,
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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	)	
v.	)	Vet.App. No. 19-2512
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	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

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ISSUE PRESENTED

Whether the Board of Veterans' Appeals' (Board or BVA) decision should be remanded because it erred in determining that the duty to assist did not require that a Department of Veterans Affairs (VA) examination be provided.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Hyman Humphrey (Appellant) appeals the March 25, 2019, decision of the Board that denied entitlement to service connection for eczema. [Record (R.) at 2-13). In his brief, he argues that he is entitled to the benefit of the doubt and thus service connection should be awarded. [Appellant's Informal Brief (Br.) at 2].

In addition to denying service connection for eczema, the Board remanded the issues of entitlement to an evaluation in excess of 30% disabling for service-connected other specified trauma and stressor (previously denied as PTSD), and entitlement to a total disability evaluation based upon individual unemployability (TDIU). R. at 3 (2-13)]. As there is no final decision as to these claims, the Court lacks jurisdiction over them. *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (Court lacks jurisdiction over remanded claims).

The Secretary asks the Court to remand March 25, 2019, Board decision so that the Secretary can provide Appellant with an adequate medical examination.

C. Statement of Relevant Facts and Procedural History

The Appellant had honorable active duty service with the United States Army from February 1970 to September 1971. [R. at 1260]. Appellant's official military

occupation was listed as Military Police[1]. *Id*. Military personnel records show that Appellant served in Thailand. [R. at 843-951].

Service treatment records were silent for complaints of a skin condition or any related diagnosis. *See* [R. at 1072-1124]. On examination in February 1970, no skin conditions were observed at enlistment. [R. at 1089-90 (1072-1124)]. No complaints of skin diseases, active or otherwise, were noted in a report of medical history bearing the same date. [R. at 1091-92 (1072-1124)]. Similarly, the Appellant's separation examination, dated August 1971, was silent for complaints of a skin condition or related diagnosis at separation. [R. at 1105-06 (1072-1124)].

Post-service treatment records show sporadic complaints of a skin condition. In a family practice record, dated January 2006, a private physician observed dry eczematous patches on the Veteran's lateral thighs. [R. at 1057-58] During the physical examination, the Veteran reported itchy, dry skin "during this time of year," mostly impacting the lateral thighs and, sometimes, his torso. *Id*. No unusual lesions were reported. Aristocort topical cream was prescribed to treat his symptoms. *Id*.

In an Agent Orange program note, dated July 2015, Robert E. Osman, PA-C, MHS, acknowledged Appellant's participation in the VA Agent Orange Health Registry Program and, as part of an Agent Orange examination, noted that

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[1] As a Security Policemen, Appellant was responsible for patrolling the perimeter of these bases and therefore, exposure to herbicides is presumed. [R. at 7 (2-13)].

Agent Orange (AO) and other dioxin contaminated herbicides were sprayed around the perimeter of several Royal Thai Airforce bases, including Udorn during Appellant's period of service. [R. at 959-60]. Appellant submitted a claim for service connection for a skin condition in July 2015. [R. at 984-92]. A September 2015 rating decision denied claim for service connection for a skin condition. [R. at 816-21].

Appellant filed a new claim for service connection for eczema in August 2016. [R. at 780-83]. An October 2016 rating decision denied the claim. [R. at 776-79]. In November 2016, Appellant submitted a Notice of Disagreement with the rating decision and submitted an August 2016 statement from a private doctor. [R. at 738-45]. The private examiner's opinion states in its entirety:

> One cannot say exactly how long this condition existed prior to the date of diagnosis or definitively state its cause. However, it is as likely as not, that [Appellant's] Eczema is related to his exposure to Agent Orange while service in Thailand.

[R. at 745 (738-45)].

In February 2017, private treatment records from Triangle Family Practice reflecting periodic treatment for eczema from 2014 to 2017 were received. [R. at 605-688]. An April 2017 VA primary care outpatient treatment record noted that Appellant denied any skin rashes and the examiner noted Appellant's skin was intact with no rashes. [R. at 170-73]. A July 2017 Statement of the Case continued to deny service connection for a skin condition. [R. at 564-87]. Appellant appealed to the Board in September 2017. [R. at 562].

In the March 25, 2019, Board decision currently on appeal, the Board found that "[t]he evidence of record demonstrates that the Veteran's eczema, did not manifest in service or for many years thereafter and is not otherwise related to active service, to include as due to Agent Orange exposure." [R. at 3 (2-13)]. The Board afforded Appellant's private opinion "little probative value". [R. at 9 (2-13)]. While the Board conceded exposure to herbicides during service [R. at 7 (2-13)], and the Board recognized that the Appellant had not been afforded a VA examination, the Board found that the Appellant was not prejudiced by the lack of a VA examination. [R. at 8 (2-13)]. The Board reasoned that because Appellant's service medical records did not reveal any complaints of a skin condition during active service or for "decades after separation" that a "medical examination would serve no useful purpose in this case, since the requirement of an in-service disease or injury to establish a service connection claim cannot be met upon additional examination." *Id*.

SUMMARY OF THE ARGUMENT

The Court should set aside and remand the March 25, 2019, Board decision that denied entitlement to service connection for eczema because the Board failed to ensure that the Secretary complied with his duty to assist the Appellant in obtaining an adequate medical opinion.

ARGUMENT

THE BOARD ERRED BY FAILING TO PROVIDE APPELLANT WITH A MEDICAL EXAMINATION.

The Board failed to follow the guidelines used to determine whether a medical examination or opinion is necessary for the Secretary "to make a decision in a claim." 38 U.S.C. § 5103A(d)(2). As a result, a remand is necessary to assist the claimant in obtaining medical opinion.

Pursuant to 38 U.S.C. § 5103A(a), the Secretary must make reasonable efforts to assist a claimant in obtaining a medical opinion when such an opinion is necessary to substantiate the claimant's claim. *DeLaRosa v. Peake*, 515 F.3d 1319 (Fed. Cir. 2008); *see Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

In determining whether the duty to assist requires that a VA medical examination be provided, or medical opinion obtained with respect to a veteran's claim for benefits, this Court has held there are four factors for consideration: (1) whether there is competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) whether there is evidence establishing that an event, injury, or disease occurred in service, or evidence establishing certain diseases manifesting during an applicable presumption period; (3) whether there is an indication that the disability or symptoms may be associated with the veteran's service or with another service connected disability; and (4) whether there otherwise is sufficient competent medical evidence of record to make a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006).

The Court reviews the factual determinations prerequisite to *McLendon* under the "clearly erroneous" standard of review*. McLendon* 20 Vet.App. 83. The Court reviews the conclusion that the Board reaches when it applies those facts to the third step of *McLendon* under the far more deferential "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. *Id*.

Here, the Board erred in evaluating whether an examination was necessary. [R. at 8 (2-13)]. The Board found: "the evidence of record does not reveal any complaints of a skin condition during active service or for decades after separation. Therefore, a medical examination would serve no useful purpose in this case, since the requirement of an in-service disease or injury to establish a service connection claim cannot be met upon additional examination." *Id*. However, the Board overlooked the fact that it had conceded an in-service event in that it found that Appellant had been exposed to herbicides in service. [R. at 7 (2-13)]. Moreover, the record contains "an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service." *McLendon*, 20 Vet.App. at 81. Such an indication can be found in the August 2016 opinion from a private medical examiner. [R. at 745]. Initially, the Secretary asserts that the Board correctly determined that this opinion was inadequate upon which to grant service connection for two reasons, but the Board erred in that it did not evaluate whether this opinion was sufficient to meet the "low threshold" of indicating whether the disability may be associated with the Veteran's service.

First, the examiner's opinion is inadequate to reach a decision on the merits because the examiner declined to affirm that the opinion was based on review of Appellant's prior medical history. *Id*. *See Stefl*, 21 Vet.App. at 123 (An examination "is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'"(quoting *Ardison v. Brown*, 6 Vet.App. 405, 407-08 (1994)).

Second, the opinion is inadequate because "[n]o supportive rationale was provided for the conclusions reached." [R. at 8 (2-13)]. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2009) ("[An adequate] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." (citing *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007)). As a result, the Board correctly found that the private opinion had little probative value in analyzing the merits of the claim. [R. at 9 (2-13)]. However, this Court has held that "even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight. . . . Otherwise, a favorable medical opinion from a veteran's doctor that was unsupported by analysis would not be sufficient to trigger the Secretary's duty to assist." *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012). Although the August 2016 opinion may be inadequate, the third *McLendon* "element requires only that the evidence *indicates* that there *may* be a nexus

between the two. This is a low threshold." *McLendon*, 20 Vet.App. at 83. (internal citations omitted) (emphasis added).

The August 2016 opinion provides the indication necessary to fulfil the third *McLendon* factor. *See Monzingo*, supra. As a result, the Secretary must provide Appellant with an adequate examination. 38 U.S.C. § 5103A(d)(2); 38 C.F.R. § 3.326. Accordingly, a remand is necessary to assist the claimant in obtaining a medical opinion addressing whether it is at least as likely as not that Appellant's skin condition is related to his period of service.

Appellant's arguments regarding the benefit-of-the-doubt doctrine are unsupported, because he has not demonstrated that there "is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b). Like other parties, *pro se* appellants must raise specific arguments demonstrating perceived error in the Board's decision, and the appellant still carries the burden of persuasion on appeals to this Court. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), (requiring "that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments") *rev'd on other grounds sub nom*. *Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008); *Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Moreover, Appellant's argument is not

supported by law. "Because the Court is precluded from finding facts, it is not authorized to make the determination as to whether the evidence is in equipoise and apply the benefit of the doubt doctrine." *Roberson v. Principi*, 17 Vet.App. 135, 146 (2003). Here, there is insufficient "medical evidence of record" and thus remand is required before an adjudication on the merits may be accomplished. *See* 38 U.S.C. § 5107(b). As addressed above, the medical evidence is insufficient for adjudication and thus the Secretary asserts that remand is required to obtain an examination or opinion. *See also* 38 C.F.R. § 3.326.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee, Robert L. Wilkie, respectfully urges the Court to set aside and remand the Board's March 25, 2019, decision denying entitlement service connection for eczema and remand for the Board to procure an adequate medical examination or opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 5th day of December 2019 a copy of the foregoing was mailed, postage prepaid, to:

Hyman Humphrey
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Durham, NC 27713

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Lamar D. Winslow
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