IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MARGARET E. RATHKA,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-3419
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

1. Whether the Board's April 2, 2019, Decision lacked adequate reasons or bases when it failed to address Appellant's contention for direct service-connection due to hard parachute landings and contribution to Veteran's death?

2. Whether the October 2, 2017, VA examination (and thus the Board's decision) was inadequate because it failed to: a) address or consider the Veteran's treating physician's medical opinion dated August 2016; and b) address the relationship, if any, between the Veteran's service-connected disabilities and Veteran's contention for service-connection based on trauma?

STATEMENT OF THE CASE

Appellant submitted a claim for DIC benefits, under 38 U.S.C. § 1310, contending that the death of her husband, Jack A. Rathka (the "Veteran") was a result of: 1) service-connected traumatic brain injury ("TBI") and seizures which led to lack of mobility, thus contributing to the Veteran's portal vein thrombosis and subsequent death; and 2) the in-service injury that caused the TBI contributed to the Veteran's venous thromboembolism and ultimate death. (R. 96-100).

On October 13, 2017, the Department of Veteran's Affairs, denied service-connection for the cause of death, and denied entitlement to DIC compensation. (R. 23-51).

On November 11, 2017, Appellant appealed the denial, asserting that the Veteran's seizure disorder and TBI caused him to sit for long periods and left him unable to prevent

blood clots from forming in his legs. Additionally, Appellant asserted that the in-service injury that caused the TBI contributed to Veteran's venous thromboembolism. (R. 17).

On April 2, 2019, the Board issued its Decision ("Decision") denying entitlement to DIC benefits and denying service connection for the Veteran's cause of death. (R. 3 (3-10)). Appellant appeals this Decision.

STATEMENT OF THE FACTS

Appellant is the surviving spouse of veteran Jack A. Rathka (hereinafter referred to as the "Veteran"), who served on active duty in the United States Army from December 1964 to December 1967. (R. 4). The Veteran passed away in March 2016. The death certificate lists acute pulmonary embolism as the immediate cause of death. Chronic atrial fibrillation and coronary artery disease were listed as underlying causes of death, and hepatocellular carcinoma and portal vein thrombosis were listed as conditions contributing to death, but not resulting in the underlying causes of death. (R. at 4; 102).

In January 2016, the Veteran underwent a pre-surgery consultation for intervention of bilateral leg claudication. During the consultation, the Veteran stated that he had bilateral leg pain when walking greater than 100 yards. He stated that he is a very active individual, enjoys hunting, fishing, and household chores (lawn mowing, snow removal), *but the pain continues to interrupt his lifestyle*. (Emphasis added) (R. 160).

Prior to his passing, in March 2016, the Veteran filed a Notice of Disagreement to the VA's December 23, 2015 letter, awarding him 10% service-connection for seizure disorder and denying service-connection benefits for varicose veins, bilateral lower extremities, and bilateral leg condition. (R. 221). With respect to the VA assigning 10%

service-connection rating for his seizure disorder, the Veteran explained that he had one minor seizure per week where he would become dizzy, and would cause him to drop to his knees on the floor. He would have to stay in bed for 15 to 20 minutes following these seizures. He also described that his body and limbs contract, extend, and shake, followed by fatigue, severe headache, body aches, and speech and vision disturbances. The Veteran stated that he would have a major seizure every four to six weeks, where he would black out. The Veteran described an instance 1.5 years prior to March 2016, where he had a major seizure, fell and hit his head, knocking him unconscious. (R. 223)

At the time of his death, the Veteran was service connected for a traumatic brain injury (TBI) and a seizure disorder, rated at 10%. (R. 6; 231-233).

In August 2016, a private doctor, Dr. B.W.F., reviewed the Veteran's medical records, and opined that the Veteran's pulmonary emboli in his lower extremities was at least as likely as not caused by a very sedentary lifestyle due to his TBI and contributed to his death. (R. 7; 81)

On October 2, 2017, the VA staff physician opined that the Veteran's causes of death were not proximately due to or the result of the Veteran's service-connected seizure disorder, TBI, or the medication used to treat his service-connected conditions, either individually or combined. Instead, the physician found that it "is more likely any hypercoagulable blood condition leading to 'pulmonary embolism' would be the result of his liver cancer and congestive heart failure, common complications." (R. 52 (52-55)).

Appellant submitted a claim for DIC under 38 U.S.C. § 1310; 38 C.F.R. § 3.312. (R. 96-100). On October 13, 2017, the Department of Veteran's Affairs, denied service-

connection for the cause of death, and denied entitlement to DIC compensation. (R. 23-51).

Appellant filed her appeal on November 11, 2017, asserting that the Veteran's seizure disorder and TBI caused him to sit for long periods and left him unable to prevent blood clots from forming in his legs. Additionally, Appellant asserted that the in-service injury that caused the TBI contributed to Veteran's venous thromboembolism. (R. 17)

On April 2, 2019, the Board issued a Decision denying entitlement to DIC benefits and denying service connection for the Veteran's cause of death. (R. 3 (3-10)). The Board stated that the evidence establishes that the Veteran had no service-connected disabilities at the time he left service and that at the time of his death he had not been rated as totally disabled. (R. 4).

The Board also denied service-connection for the Veteran's cause of death, finding that "acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis did not manifest during service and are unrelated to service, and service-connected disabilities did not contribute substantially or materially to death." (R. 3 (3-10)).

The Board found that the October 2017 VA opinion held significant probative value pertaining to whether the Veteran's service-connected disabilities contributed to his death, and placed greater probative weight on this opinion, stating that it "is more consistent with the documentary medical evidence - including the Veteran's own statements made to medical professionals while receiving care." (R.9).

SUMMARY OF THE ARGUMENT

The Board's April 2, 2019, Decision lacked adequate reasons or bases for its denial of service connection for the Veteran's death.

First and foremost, the Board failed to address Appellant's contention that the in-service injury (which caused the service connected TBI) caused or contributed to causing the Veteran's venous thromboembolism in his leg, which contributed to Veteran's death. The record contains statements reflecting that the Veteran's service included hard parachute landings, but these statements were not discussed and/or addressed in the Board's Decision. Notably, the Veteran was already service connected for TBI and seizure disorder due to the trauma resulting from his MOS as a parachutist. (R. 563).

Lastly, the Board erred when it relied upon an inadequate medical opinion. Specifically, the VA medical examiner failed to address or consider the medical opinion of Dr. B.W.F, from August 2016, and did not address Appellant's contention that the trauma incurred in service cause or contributed to causing and/or hastening the Veteran's death.

ARGUMENT

I. Jurisdiction and Standard of Review

This Court has jurisdiction to review the Board's adverse decision(s) dated April 2, 2019, pursuant to 38 U.S.C. § 7252(a), which invests the Court with the "power to affirm, modify, or reverse [the Board's] decision, or to remand the matter as appropriate." The Court's power extends to reviewing a decision of the Board to ensure that all relevant provisions of law have been properly applied. *Horowitz v. Brown,* 5 Vet.App. 217, 223

(1993); *Gardner v. Derwinski,* 1 Vet.App. 584, 586 (1991), *aff'd sub nom. Gardner v. Brown,* 5 F.3d 1456 (Fed. Cir. 1993), *aff'd* 513 U.S. 115 (1994). The Court conducts its review of issues of law using the de novo standard of review, without deference to the Board's conclusions of law. 38 U.S.C. § 7261; *see also Horowitz,* 5 Vet.App. at 223; *Gardner,* 1 Vet.App. at 586. The Court conducts its review of factual conclusions using the clearly erroneous standard. 38 U.S.C. § 7261(a)(4); *See San Francisco v. Brown,* 7 Vet.App. 55, 57 (1994); *Gilbert v. Derwinski,* 1 Vet.App. 49, 53 (1990).

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the claimant to understand the precise basis for the Board decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski,* 1 Vet.App. 49, 52 (1990). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting material evidence favorable to claimant. *Caluza v. Brown,* 7 Vet.App. 489, 506 (1995), *aff'd per curiam,* 78 F.3d 604 (Fed. Cir. 1996) (table). The Board must also address all potentially favorable evidence. *See Thompson v. Gober,* 14 Vet.App 187, 188 (2000) (*per curiam order*).

II. Whether the Board failed to provide an adequate statement of reasons or bases when it failed to address Appellant's contention of direct service connection for cause of death due of the trauma caused by hard parachute landings?

The death of a veteran will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a). A contributory cause of death must be shown to have contributed substantially or materially to death, combined to cause death, or aided or lent assistance to the production of death. 38 C.F.R. § 3.312(c)(1). Service connection may be established for disability resulting from personal injury suffered in line of duty in active service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a).

Each disabling condition for which a veteran seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. 38 C.F.R. § 3.303. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case. *Id*.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki,* 26 Vet.App. 289, 293 (2013). Secondary service connection will be granted if a disability is proximately due to or the result of a service-connected disease or injury or aggravated by a service-connected disease or injury. *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc);

38 C.F.R. § 3.310(a)-(b) (2017). Additionally, the Board has a duty to consider all theories of entitlement that are reasonably raised by the claimant or that are reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 525-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

In this case, Appellant contends that the in-service injury (which caused the service connected TBI) also caused the Veteran's underlying venous thromboembolism, which may have contributed to the Veteran's death. This theory of entitlement was reasonably raised before the Board, both in the record and by Appellant.

In its April 2, 2019 Order, the Board concluded,

> There is no evidence or argument presented that acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis are directly related to active military service. There were no complaints, treatments, or manifestations of these conditions during service. The Board Finds that direct service connection for that (*sic*) acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis is not warranted. (R. 6 (3-10)).

However, the record does contain evidence and argument, presented by both the Veteran and Appellant, reflecting that the Veteran experienced hard parachute landings during service, which already resulted in direct service-connection for TBI and seizures. (R. 563; 571). Appellant submitted statements theorizing that the same injury, specifically the hard parachute landing(s), caused the underlying venous thromboembolism, which in turn contributed to directly to the development of the Veteran's death due to pulmonary embolism and contributed to the Veteran's sedentary lifestyle. (R. 81; 64-65). Notably, a service treatment record shows an ER examination

of the Veteran's right lower leg due to the possibility of a foreign body in the tissue, which may be evidence of in-service leg trauma. (R. 384).

Furthermore, the VA TBI Examination, dated November 2015, notes that the Veteran explained he landed "hard from a [parachute] jump," which bounced his body and caused his head to hit the ground. (R. 343). The record additionally reflects that in January 2016, the Veteran underwent a surgery for intervention of bilateral leg claudication [a condition that affects blood flow in the legs] due to continuous pain. (R. 160).

While the Decision acknowledges that Appellant "contends that the in-service injury which caused the TBI disability contributed to his venous thromboembolism" (R. 6 (3-10)), the Decision does not address this contention in any meaningful manner. The terms "parachute" or "hard landings" are not mentioned in the Decision. The Board concluded, "Upon review of the record, the Board finds that service connection for the Veteran's cause of death is not warranted," and thereafter only opined as to the "Veteran's service-connected disabilities as they pertain to the Veteran's death." (R. 6 (3-10)). The record does not contain a medical opinion on this specific theory of entitlement. Therefore, the Board improperly relied upon its own lay medical opinion to find that the in-service injury did not contribute to the Veteran's venous thromboembolism. *See, Colvin v. Derwinski,* 1 Vet.App. 171 (1991).

Although the Board is not required to specifically address all evidence of record, it is required to provide reasons for rejecting any evidence favorable to the Appellant. 38 U.S.C. § 1154(a), and *Thompson v. Gober,* 14 Vet.App. 187, 188 (2000). In determining

whether a nexus exists between military service and an impairment, evidence that tends to support an in-service onset would be favorable to a claimant. Here, the Board erred when it did not address Appellant's theory regarding hard parachute landings or provide any rationale for rejecting the contention. The Board cannot determine that lay evidence lacks credibility for the sole reason that it is unaccompanied by contemporaneous medical evidence. *Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (Fed. Cir. 2006). Furthermore, it is error for the Board to require medical evidence to support lay evidence regarding in-service symptoms. *Horowitz v. Brown,* 5 Vet.App. 217, 221-223 (1993).

Therefore, Appellant reasonably raised a theory of service connection for the Veteran's cause of death in the record. The Board's failure to address this theory constitutes an error of law. *Robinson v. Peake*, 21 Vet.App. 545, 525-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Furthermore, the Board erroneously mischaracterized the Veteran's statement regarding his "active lifestyle." In the Board's analysis of the October 2017 VA medical opinion, in conjunction with the Veteran's January 2016 statement, the Board mischaracterized the Veteran's quote. Specifically, the Board left out of the discussion, "but the pain continues to interrupt his lifestyle.'" (R. 160 [full statement] compared to R. 8 [Board's Order that leaves portion out). The Board mischaracterized this statement, in that it found that the Veteran was an active individual despite bilateral leg pain. In actuality, the Veteran stated that his "lifestyle" was interrupted by *the pain*. However, none of the activities listed in the January 2016 treatment note are physically active nor are they inconsistent with Appellant's assertion regarding the Veteran's sedentary

lifestyle. (R. 160). Notably, hunting and fishing are often performed as sedentary activities. Lawn mowing and snow removal are also regularly performed in a sedentary manner, using a riding tractor.

After finding that the Veteran led an active lifestyle, the Board did not address the Veteran's explanation and description of seizures which caused him to stay in bed for periods of time, and how the seizures affected his body. (R. 221-223).

Based on the above, the Board provided an inadequate statement of its reasons or bases for its decision when it mischaracterized the Veteran's statement regarding his active lifestyle.

III. Whether the Board erred when it relied upon an inadequate VA medical opinion?

A veteran [Appellant] has the initial burden of establishing that a claim is well grounded. See 38 U.S.C. 5107(a). In order for a claim to be well grounded, a veteran must show: (1) a medical diagnosis of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the in- service injury or disease and the current disability. *Summers v. Gober,* 225 F.3d 1293 (Fed. Cir. 2000). The duty to assist is raised once a claimant has established a well-grounded claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006).

Here, Appellant met all of the criteria. First, prior to and at the time of death, the Veteran had been medically diagnosed with TBI and portal vein thrombosis, among other diagnoses. Second, evidence was presented of the in-service injury resulting from hard

landings, which is the injury that caused the connected service TBI. Third, a medical note prepared in November 2015 indicates that the Veteran explained he landed "hard from a [parachute] jump," which bounced his body and caused his head to hit the ground. (R. 343). This medical evidence provides a nexus between the in-service injury and the diagnosed venous thromboembolism. Lastly, the record contains insufficient evidence to issue a decision on the claim.

Based on all of the above, the VA obtained a medical opinion. (R. 52-55). However, once the VA undertakes to duty to obtain a medical opinion, it must ensure that it is an adequate medical opinion. The examiner stated that the Veteran's liver cancer and congestive heart failure caused a hypercoagulable blood condition, rather than the Veteran's TBI and his TBI medications. (*Id.*). However, the examiner failed to provide any rationale for his opinion. The examiner failed to mention the treatment and surgery for his venous thromboembolism in 2016 and did not address whether a sedentary lifestyle would contribute to the Veteran's death. (*Id.*). Examination reports must be analyzed ". . .in light of the whole recorded history . . ." and ". . .if it does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate." 38 C.F.R. § 4.2. As noted in *Stefl v. Nicholson,* 21 Vet.App. 120, 124 (2007), "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion."

Appellant submitted a medical statement from Dr. B.W.F., "linking [her] late husband's service-connected TBI" to the Veteran's cause of death. (R. 81). The medical opinion, dated August 3, 2016, stated:

> I have had the opportunity to review the medical records of Mr. Jack Rathka, who recently died. He had a history of Traumatic Brain Injury (TBI) and a Seizure Disorder, secondary to injuries he received during his military service. His cause of death was Pulmonary Emboli, arising from his lower extremities which I feel is least as likely as not to be caused by a very sedentary lifestyle as a result of his TBI. (R. 82).

However, the VA examiner did not address this opinion or reference any records prior to January 2017. (R. 52-55). The examiner did not provide medical literature to support his findings and provided little more than a conclusory statement. (*Id*.). Despite the lack of an opinion regarding the impact of a sedentary lifestyle on the Veteran, the Board found that the Veteran's seizure disorder and TBI did not contribute to his death. (R. 7)

The Board supported its denial of DIC and service connection death in reliance on the October 2017 VA medical opinion. However, that opinion is inadequate because it failed to address Dr. B.W.F's (August 2016) opinion. Further, the August 2016 states a factual conclusion, which alone, is insufficient for the Board to make an informed decision as to what weight to assign to this doctor's opinion, specifically when the August 2016 opinion did not take into account or discuss the Veteran's January 2016 statement.

The Board mentions the August 2016 medical opinion but concludes that "[n]o further reasoning or rationale was provided" by Dr. B.W.F. This demonstrates that the Board reviewed the August 2016 medical statement and knew of its existence, acknowledged that there was no reasoning presented for the opinion, but accepted the VA staff's medical report similarly failed to provide adequate rationale. (R. 7). Therefore, the Board erred when it relied upon the inadequate October 2017 VA medical opinion that did not address or consider this medical opinion.

A VA examination is also inadequate when an examiner improperly relies on the absence of contemporaneous medical evidence and fails to consider lay evidence, when providing an opinion regarding the etiology of an impairment. *Dalton v. Nicholson,* 21 Vet.App. 23, 29 (2007). If the medical opinion does not clearly address the relevant facts and medical science, then the Board is left to rely on its own lay opinion, even though the Board may not substitute its own medical opinion in place of independent medical evidence. *Colvin v. Derwinski,* 1 Vet.App. 171 (1991).

In this case, the October 2017 VA opinion does not address lay evidence submitted by the Veteran prior to his passing, nor Appellant's argument for service-connection based on the trauma incurred in service. During an evaluation of Veteran's residuals of TBI to determine disability benefits, in November 2015, the Veteran provided information that he believed he suffered "a mild TBI when he was parachuting in the Army at Fort Campbell, Kentucky." (R. 343). The November 2015 notes indicate that the Veteran explained he landed "hard from a [parachute] jump," which bounced his body and caused his head to hit the ground. (*Id.*).

On August 15, 2016, Appellant submitted a Statement in Support of her Claim contending that the trauma of the hard parachute landing that caused the Veteran's TBI, also created a leg condition, which led to a sedentary lifestyle. (R. 81). Additionally, Appellant asserted that "it is a very well know *(sic)* fact that Venous thromboembolism is common after major trauma..." (*Id.*). Notably, the Board found that the Veteran's sedentary lifestyle was caused by his bilateral leg claudication but failed to address

Appellant's theory that the bilateral leg claudication was caused by the trauma of the hard parachute landings that caused the Veteran's TBI and seizure disorder. (R. 8).

The 2017 VA medical opinion does not address the above-described evidence and/or assertions. The opinion reflects that the author reviewed the VA e-folder, and the CPRS, but makes no mention of Veteran's explanation of trauma, or Appellant's assertion based upon that trauma. (R. 52). As such, the Board did not meaningfully address these issues, and instead, provided a conclusory finding when it relied on the VA examination, which did not address these issues. Therefore, the Board erred when it relied on its own medical opinion to find that the Appellant's assertion that in-service trauma (a hard parachute landing) created a leg condition, which led to a sedentary lifestyle, and failed to provide adequate reasons or bases for the denial of service-connection for the cause of death based on in-service trauma. *Colvin v. Derwinski*, 1 Vet.App. 171 (1991). Remand for a medical opinion on this issue is warranted. *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

CONCLUSION AND RELIEF REQUESTED

Therefore, the Board provided an inadequate statement of its reasons or bases for its decision when it failed to address Appellant's contention that the in-service injury (which caused the service-connected TBI) caused a leg condition contributing to Veteran's venous thromboembolism in his leg, which in turn, contributed to the Veteran's death. This error is not harmless, as the record contains sufficient evidence to warrant a new medical opinion addressing all of Appellant's contentions. The record raises a reasonable probability that had an adequate medical opinion been obtained, service

connection for the Veteran's death would have been granted. Therefore, the decision should be vacated and a new decision issued that assesses the credibility of Appellant and weighs all evidence pertinent to determine its value, accounting for evidence which it finds to be persuasive or unpersuasive and articulating reasons for its findings, and provides reasons for rejecting any evidence favorable to Appellant. *Tucker v. West,* 11 Vet.App. at 374 (1998); 38 U.S.C. § 1154(a); *Thompson v. Gober,* 14 Vet.App. 187, 188 (2000).

For the reasons stated above, the Court should vacate the Board's April 2, 2019 decision and the case should be remanded to the Board to: (1) provide an adequate statement of reasons or bases; and (2) to obtain a medical opinion regarding the interplay between hard parachute landings (direct service-connection based on trauma) and the cause of Veteran's death.

DATED: December 6, 2019

Respectfully submitted by:

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