

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

STEPHEN G. KHOURY,

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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Vet.App. No. 19-1072

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether remand is warranted for the November 27, 2018, decision of the Board of Veterans' Appeals (BVA or Board) that denied entitlement to service connection for a pinched nerve due to degenerative arthritis and disc disorder (also claimed as spinal stenosis), to include as secondary to exposure to contaminated water at Camp Lejeune.

II. STATEMENT OF 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

In this case, Appellant seeks service-connected benefits for a pinched nerve, which were denied in the Board decision now on appeal. [Record Before the Agency (R.) 1-14]. He argues the Board erred by not addressing the explicitly raised theory of entitlement to service connection for a pinched nerve due to exposure to contaminated water at Camp Lejeune and by failing to address whether a Department of Veterans Affairs (VA) medical opinion was required to address this theory of entitlement. He argues the September 2013 VA examiner's nexus opinion as to an in-service whiplash injury was inadequate. He argues the Board erred by finding his lay statements as to continuity of symptomatology were not credible. The Secretary agrees with Appellant that remand is warranted for a new VA medical opinion that addresses his explicitly raised theory of entitlement to service connection for a pinched nerve due to presumed exposure to contaminated water at Camp Lejeune; however, the Secretary disagrees that the Board did not address this issue in the instant decision. Furthermore, the Secretary disagrees that remand is warranted for other bases because the Board relied on an adequate September 2013 VA examination and provided an adequate

statement of reasons or bases for finding Appellant's lay statements as to continuity of symptomatology were not credible.

C. Statement of Facts and Procedural History

Appellant had active duty in the U.S. Marine Corps between April 1972 and November 1975. [R. at 3720].

Appellant's service treatment records (STR's) and service personnel records (SPR's) were associated with the claims file. [R. at 228-383]; [R. at 3040-3168]; [R. at 3575-3662]. During service, Appellant was stationed at Camp Lejeune between November 26, 1972, and April 11, 1973, and between April 18, 1973, and July 31, 1973. [R. at 3047]. In May 1973, Appellant complained of a sprained neck and was diagnosed with whiplash, c-spine. [R. at 3600]. X-rays of the c-spine were negative. *Id.* At Appellant's November 1975 separation examination, a clinical evaluation of Appellant's upper extremities, spine, and "other musculoskeletal" was normal. [R. at 3587 (3587-88)].

In December 1988, Appellant complained of left neck spasm after he reached over his head and pulled the left side of his neck the previous day. [R. at 318-20]. The assessment was an acute neck strain. [R. at 320 (318-20)].

In December 2002, Appellant reported that, for the past two months, he has had pain at the base of the neck, which goes up into head and feels like a squeezing pain. [R. at 1212 (1212-15)]. The resulting assessment was headache. [R. at 1214 (1212-15)].

In January 2013, Appellant filed a claim for benefits for headaches, which he characterized as migraines. [R. at 3438-45]. In August 2013, Appellant contacted the RO and requested to add a claim for benefits for a pinched nerve due to degenerative arthritis and disc disorder. [R. at 3436].

In July 2013, Appellant underwent an x-ray and MRI of the spine. [R. at 1685-87]; [R. at 1709-10]. He was diagnosed with degenerative joint disease of the spine and the MRI revealed cervical stenosis. [R. at 1687 (1685-87)]; [R. at 1690 (1687-91)].

In September 2013, Appellant underwent a VA examination to address his cervical spine condition. [R. at 3268-77 (3264-77)]. He reported that “his primary care provider told him that [he] could get bad neuolgical [sic] problem from drinking bad water while he was in service, and he thinks his neck DJD is stemming from drinking bad water.” [R. at 3269 (3264-77)]. The examiner diagnosed cervicalgia and noted a date of diagnosis of July 26, 2013. *Id.* The examiner opined Appellant’s pinched nerve was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. [R. at 3276 (3264-77)]. As part of the examiner’s rationale, the examiner noted the May 1973 in-service x-ray of the neck was negative and noted a diagnosis of whiplash at the time. *Id.* The examiner noted a legislative change in Australia had removed financial compensation for pain and suffering due to whiplash injuries, which was precipitated by “improvement in functional status and pain indices in patients with whiplash, compared to historical controls.” [R. at 3277 (3264-77)]. The examiner noted that

“DJD and spinal stenosis are parts of a wear and tear with aging process.” *Id.*

Finally, the examiner noted:

[Appellant] has moderate hyperkyphosis in thoracic spine which affect[s] the postural change of the cervical curvature resulting in cervical lordosis . . . with age, [intervertebral] discs can desiccate, lose height, and anterior wedging may occur. There is a significant association between degenerative disc disease and degree of kyphosisSubjects [sic] with thoracic hyperkyphosis are more likely to have cervical or lumbar lordosis.

Id.

In November 2013, Appellant underwent a VA peripheral nerves examination. [R. at 3254-63]. He reported: “[H]e started to notice pain in the left arm around the shoulder area, in the left upper arm, neck and at the base of his skull for the first time ever in March of 2013. There has been no pain before.” [R. at 3255 (3254-63)]. The examiner diagnosed DJD of the cervical spine with mild left-sided D5-6 radiculopathy (sensory). *Id.*

In December 2013, the RO denied service connection for a pinched nerve due to degenerative arthritis and disc disorder. [R. at 3211-14]; [R. at 3220-24].

In January 2014, Appellant filed a Notice of Disagreement. [R. at 3201-05]. He indicated his pinched nerve was due to contaminates at Camp Lejeune. [R. at 3201-02 (3201-05)].

In March 2016, the RO issued a Statement of the Case continuing to deny service connection for a pinched nerve due to degenerative arthritis and disc disorder. [R. at 2117-34].

In May 2016, Appellant perfected his appeal. [R. at 2109-11].

In November 2018, the Board issued the decision now on appeal. [R. at 1-14]. The Board noted current diagnoses for cervical and lumbar degenerative joint disease and spinal stenosis as well as left upper extremity radiculopathy. [R. at 9 (1-14)]. The Board found Appellant was stationed at Camp Lejeune during the relevant time period and is presumed to have been exposed to contaminated water. *Id.* The Board noted a May 1973 in-service whiplash injury to the cervical spine and Appellant's November 1975 separation examination that documented normal orthopedic and neurological examinations. *Id.* Based on the September 2013 VA examination, the Board found the preponderance of the evidence was against establishing nexus between Appellant's current disabilities and the in-service whiplash injury or exposure to contaminated water at Camp Lejeune. [R. at 10 (1-14)]. The Board noted there was no contrary medical opinion as to nexus. *Id.* The Board denied presumptive service connection for an arthritic condition because Appellant's condition did not have characteristic manifestations sufficient to identify the disease entity during service or within one year of separation and his lay statements as to continuity of symptomatology are inconsistent with the medical evidence. [R. at 11 (1-14)].

III. SUMMARY OF THE ARGUMENT

In this case, the Board denied service connection for a pinched nerve, to include as secondary to exposure to contaminated water at Camp LeJeune. The Secretary agrees with Appellant that remand is warranted for the Board to obtain a new VA medical opinion that addresses Appellant's explicitly raised theory of

entitlement to service connection for a pinched nerve due to presumed exposure to contaminated water at Camp LeJeune. However, remand is not warranted for other reasons because the Board addressed this explicitly raised theory of entitlement in the instant decision, relied on an adequate September 2013 VA examination as to direct service connection (other than as secondary to exposure to contaminated water at Camp LeJeune), and provided an adequate statement of reasons or bases for finding Appellant's lay statements as to continuity of symptomatology were not credible.

IV. ARGUMENT

- A. Remand is warranted for the Board to obtain a new VA medical opinion that addresses Appellant's explicitly raised theory of entitlement to service connection for a pinched nerve due to presumed exposure to contaminated water at Camp LeJeune

Under 38 U.S.C. § 5103A, the Secretary must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate" his or her claim for benefits. 38 U.S.C. § 5103A(a)(1). This duty, in appropriate cases, includes providing a comprehensive and detailed examination or opinion that is adequate for rating purposes. See 38 C.F.R. § 3.159(c)(4) (requiring VA to provide an examination or medical opinion "if VA determines it is necessary to decide the claim"); *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("[O]nce the Secretary undertakes the effort to provide an examination when developing a service connection claim, even if not statutorily obligated to do so, he must provide an adequate one or, at minimum, notify the claimant why one will not or cannot be

provided.”). An opinion is adequate where it is based upon consideration of the Veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

A veteran who had no less than 30 days of service at Camp Lejeune between August 1, 1953, and December 31, 1987, is presumed to have been exposed to contaminants in the water supply, unless there is affirmative evidence to the contrary. 38 C.F.R. § 3.307(a)(7)(iii) (2019). For certain conditions, service incurrence or aggravation will be presumed if the condition manifested to a compensable degree at any time after separation from service. 38 C.F.R. § 3.307(a); 38 C.F.R. § 3.309(f) (2019); see *Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed. Cir. 2013).

The Secretary agrees with Appellant that remand is warranted for the Board to obtain a new VA medical opinion that addresses Appellant's explicitly raised theory of entitlement to service connection for a pinched nerve due to exposure to contaminated water at Camp LeJeune. See Appellant's Brief (App.Br.) at 13-14. The Board noted the contention that Appellant's pinched nerve was due to exposure to contaminated water at Camp Lejeune. [R. at 7 (1-14)]. The Board found Appellant was stationed at Camp Lejeune during the relevant period in which VA has conceded the presence of contaminated water at the base and found “exposure to contaminated water is conceded.” [R. at 9 (1-14)]; [R. at 3047]; 38 C.F.R. § 3.307(a). The Board found that none of Appellant's disabilities are

presumed to be related to exposure to contaminated water at Camp Lejeune during service. [R. at 9 (1-14)]; 38 C.F.R. § 3.309(f). However, as the Board acknowledged, the fact Appellant's disability is not on the presumption list is not a bar to service connection. [R. at 9 (1-14)]; see *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994). In denying service connection based on nexus, the Board relied on the September 2013 VA examiner's opinion, finding the preponderance of the evidence was against a finding of nexus between Appellant's current disabilities and service. [R. at 10 (1-14)].

The Board erred by relying on the September 2013 VA examiner's opinion to deny service connection based on this theory of entitlement because the September 2013 VA examiner did not provide an opinion or supporting rationale addressing exposure to contaminated water at Camp Lejeune. The September 2013 VA examiner provided an opinion as to the following question: "Is [Appellant's] Pinched Nerve condition at least as not (50 percent or greater probability) incurred in or caused by neck sprain condition in-service injury event , [sic] or illness that occurred May 17, 1973." [R. at 3276 (3264-77)]. The examiner's opinion was: "The claimed condition was less likely than not (less than 50 percent probability) incurred in or caused by the claimed in-service injury, event, or illness." *Id.* Neither the examiner's opinion, nor the rationale that followed, addressed the presumed exposure to contaminated water at Camp Lejeune. See [R. At 3276-77 (3264-77)]. The Board erred by finding the September 2013 VA examiner's opinion was adequate to adjudicate this theory of entitlement. [R. at

10 (1-14)]; *D'Aries*, 22 Vet.App. at 104; see [R. At 3276-77 (3264-77)]. Therefore, remand is warranted for the Board to obtain a new VA medical opinion that addresses Appellant's explicitly raised theory of entitlement to service connection for a pinched nerve due to presumed exposure to contaminated water at Camp LeJeune. *Barr*, 21 Vet.App. at 311.

B. Remand is not warranted for other bases

1. The Board addressed Appellant's explicitly raised theory of entitlement in the instant decision

Appellant argues the Board erred by not addressing his explicitly raised theory of entitlement to service connection for a pinched nerve due to exposure to contaminated water at Camp LeJeune. App.Br. at 13-14. While the Secretary agrees with Appellant that remand is warranted for a new VA medical opinion to address this theory of entitlement, the Secretary disagrees that the Board did not address this theory of entitlement in the instant decision. The Board acknowledged the contention that Appellant's pinched nerve was due to exposure to contaminated water at Camp Lejeune. [R. at 7 (1-14)]; see [R. at 3269 (3264-77)]. The Board went on to adjudicate whether service connection was warranted based on this theory of entitlement. *Robinson v. Mansfield*, 21 Vet.App. 545, 552 (2008). Specifically, the Board found Appellant was stationed at Camp Lejeune during the relevant period in which VA has conceded the presence of contaminated water at the base and found "exposure to contaminated water is conceded;" it found Appellant's disabilities are not presumed to be related to exposure to contaminated

water at Camp Lejeune; and it went on to adjudicate entitlement to service connection based on nexus. [R. at 9-12 (1-14)]. While the Secretary agrees that remand is warranted for a new VA medical opinion, remand is not also warranted due to the Board not addressing this theory of entitlement in the instant decision.

2. The Board relied on an adequate September 2013 VA examination

Appellant argues the September 2013 VA examiner's nexus opinion is inadequate as to the in-service whiplash injury because "the VA examiner fails to provide a discernible rationale to support her conclusion." App.Br. at 8. The September 2013 VA examiner opined Appellant's pinched nerve was less likely than not incurred in or caused by the May 1973 in-service whiplash injury. [R. at 3276 (3264-77)]. As part of her rationale, the examiner noted the May 1973 in-service x-ray of the neck was negative and noted a diagnosis of whiplash at the time. *Id.*; [R. at 3600]. She noted that a legislative change in Australia had removed financial compensation for pain and suffering due to whiplash injuries, which was precipitated by "improvement in functional status and pain indices in patients with whiplash, compare to historical controls." [R. at 3277 (3264-77)]. She explained that "DJD and spinal stenosis are parts of a wear and tear with aging process." *Id.* Finally, she explained that Appellant had curvature of the spine related to aging, observing:

[Appellant] has moderate hyperkyphosis in thoracic spine which affect[s] the postural change of the cervical curvature resulting in cervical lordosis . . . with age, [intervertebral] discs can desiccate, lose height, and anterior wedging may occur. There is a significant association between degenerative disc disease and degree of

kyphosisSubjects [sic] with thoracic hyperkyphosis are more likely to have cervical or lumbar lordosis.

Id.

Contrary to Appellant's argument, the September 2013 VA examiner provided adequate rationale for her negative nexus opinion. Specifically, the examiner explained that Appellant's current disabilities were more likely due to wear and tear associated with the aging process and therefore were less likely than not due to the May 1973 in-service whiplash injury. [R. at 3277 (3264-77)]. While Appellant demands a more thorough rationale, App.Br. at 9-10, a VA examiner need only provide analysis such that "the Board can consider and weigh against contrary opinions." *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007); see *Monzingo v. Shinseki*, 26 Vet.App. 97, 108 (2012) (J. Kasold concurring) (noting that *Nieves-Rodriguez* and *Steffl* both dealt with the weighing of multiple medical opinions and the holdings of those cases must be read in context). In this case, there was no contrary nexus opinions; nor has Appellant cited a contrary opinion. [R. at 10 (1-14)]; *Overton v. Nicholson*, 20 Vet.App. 427, 435 (2006) ("The appellant carries the burden of persuasion regarding contentions of error."). The September 2013 VA examiner provided adequate rationale to support her negative nexus opinion. As this Court has held, "examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo*, 26 Vet.App. at

105; see *Stefl*, 21 Vet.App. at 124. This is precisely what the VA examiner did here.

Furthermore, the Board properly found the September 2013 VA examination was probative evidence against nexus. [R. at 10 (1-14)]. As the Board noted, the September 2013 VA examiner addressed Appellant's STR's, medical history, and conducted a medical examination. [R. at 10 (1-14)]; *D'Aries*, 22 Vet.App. at 104; see [R. at 3268-77 (3264-77)]. The examiner also reviewed medical literature in providing and supporting her negative nexus opinion. [R. at 10 (1-14)]; [R. at 3277 (3264-77)]. Contrary to Appellant's argument, the Board evaluated the adequacy and probative value of the September 2013 VA examiner's opinion and properly relied on an adequate September 2013 VA examination to find that Appellant's pinched nerve due to degenerative arthritis and disc disorder was not incurred in or attributable to his period of service. See App.Br. at 10; *Acevedo v. Shinseki*, 25 Vet.App. 286, 293-94 (2012) ("the Board is permitted to draw inferences based on the overall report so long as the inference does not result in a medical determination").

3. The Board provided an adequate statement of reasons or bases for finding Appellant's lay statements as to continuity of symptomatology were not credible

Appellant argues the Board erred by finding his lay statements as to continuity of symptomatology were not credible because it did not address two instances of complaints of neck pain during the 35 plus years between his separation from service and the filing of his claim for benefits. App.Br. at 11-12

(citing [R. at 318-20]; [R. at 1212-15]). In assessing the probative value of the September 2013 VA examiner's opinion, the Board noted that "the VA examiner's opinion is consistent with [Appellant's] documented medical history, which is absent any report of symptomatology consistent with a neurological, neck, or back disability for more than 35 years after active service." [R. at 10 (1-14)]. Furthermore, the Board found Appellant's lay statements as to continuity of symptomatology were not credible because:

[T]his lay evidence is inconsistent with the normal examinations of his spine and extremities upon separation from service. Further, the in-service examination is more credible and more probative than his after-the-fact lay assertions. We conclude that the objective findings are far more probative and credible than the lay evidence submitted in support of a claim for benefits.

[R. at 11 (1-14)]. Contrary to Appellant's assertions of continuous symptomatology, Appellant's November 1975 separation examination documented normal musculoskeletal and neurological examinations. [R. at 3587 (3587-88)]. Additionally, at the November 2013 VA peripheral nerves examination, Appellant reported: "[H]e started to notice pain in the left arm around the shoulder area, in the [l]eft upper arm, neck and at the base of his skull for the first time ever in March of 2013. There has been no pain before." [R. at 3255 (3254-63)]; *accord* [R. at 9 (1-14)]. Even at the December 2002 VA treatment visit, which Appellant cites, he reported the neck pain beginning only two months prior. [R. at 1212 (1212-15)]. Moreover, no musculoskeletal or nerve problem was diagnosed at that time. Rather, the examiner diagnosed headache. [R. at 1214 (1212-15)]. While

it did not reference the two records cited by Appellant, the Board, nonetheless, properly found Appellant's lay assertions as to continuity of symptomatology were inconsistent with the medical evidence. 38 C.F.R. § 20.1102 (2019); *Sabonis v. Brown*, 6 Vet.App. 426, 430 (1994); see App.Br. at 11.

Appellant's argument that an in-service diagnosis is not required to establish service connection, under 38 C.F.R. § 3.303(d), is misplaced. App.Br. at 12. The Board's reference to the normal separation examination was support for its finding that Appellant's lay statements as to continuity of symptomatology were not credible and not its basis for its denial of service connection. [R. at 11 (1-14)]. The Board did not run afoul of 38 C.F.R. § 3.303(d). Rather, the Board adjudicated entitlement to service connection based on nexus and properly found, based on the medical evidence of record, that service connection for a pinched nerve as due to an in-service whiplash injury was not warranted and that presumptive service connection for an arthritic condition was not warranted because Appellant's condition did not manifest during service or within one year following separation and because Appellant did not have continuous symptoms since service.

V. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully urges the Court vacate and remand the Board's February 23, 2017, decision, that denied entitlement to service connection for a pinched nerve due to degenerative arthritis and disc disorder (also claimed as spinal stenosis), to include as secondary to contaminated water at Camp Lejeune.

Respectfully submitted,

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