IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 18-6681

FRANCES A. HENSLEY,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary concedes that the Board's reasons or bases are inadequate and that remand of the matter of service connection for the veteran's cause of death is warranted; however, the Court should not narrow the issues to be resolved on remand.

First, Appellant appreciates the Secretary's candor in acknowledging that, for two reasons, the Board failed to provide adequate reasons or bases to support its denial of service connection for the veteran's cause of death, and that therefore remand of this matter is warranted. *See* Secretary's Brief ("Sec. Br.") at 12-13. First, the Secretary conceded that the Board erred when it failed to address the favorable March 2018 medical opinion by Dr. Tommy Shelton. *See* Sec. Br. at 13; *see also* Appellant's Brief ("App. Br.") at 20 (arguing the same). Second, the Secretary conceded that the Board erred when it failed to address why it remanded the matter in November 2016 for additional medical evidence, but then relied only on the August 2013 and July 2016 VA opinions to determine whether the veteran's coronary artery disease (CAD) caused or contributed to his death, given that "the record at the time of the Board's March 2018 decision[1] raised an issue as to whether those examinations were adequate by themselves to resolve that issue." *See* Sec. Br. at 12-13, 22-23; *see also* App. Br. at 21-23 (arguing that the Board failed to provide adequate reasons or bases for finding that the August 2013 and July 2016 VA medical opinions are adequate), App. Br. at 15-16 (noting that the Board had conceded deficiencies in the July 2016 VA opinion in its 2016 remand).

[1] Later in his brief, the Secretary stated that the Board's 2016 remand raised this issue. *See* Sec. Br. at 27.

However, in his response, the Secretary also urged the Court to address the parties' remaining arguments, in part so that the Court may "narrow" the issues to be resolved on remand. *See* Sec. Br. at 14. The Court should not affirmatively narrow the issues to be resolved on remand, and on remand, Appellant should be entitled to submit additional evidence and argument. *See Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). Appellant also notes the Secretary's concession that the "matter" of service connection for the veteran's death should be remanded, *see* Sec. Br. at 12. A "matter" is "[a] subject under consideration, esp[ecially] involving a dispute or litigation; case." *Hillyard v. Shinseki*, 24 Vet. App. 343, 355-56 (2011). Accordingly, the "matter" is the entire subject matter before the Court, which includes all theories and issues raised in support of the claim for service connection for the veteran's cause of death. *Id.* The Secretary has not asked the Court to dismiss or affirm any aspects of the Board's decision, and Appellant maintains that it should not.

Given the parties' above two agreements, Appellant requests the Court to vacate the Board's denial of service connection for the veteran's cause of death and remand the entire matter for readjudication at least based on these agreements.

Second, in his response, the Secretary also argued that because the Board inexplicably failed to address the May 2017 VA opinion and addendum opinion, thus "[t]he Board must do so in the first instance." Sec. Br. at 13, 23. However, Dr. Lavin's May 2017 VA medical opinion and addendum opinion is unfavorable to Appellant's theory that CAD caused or substantially contributed to the veteran's death. *See* App. Br. at 7; **R. at 91-92, 86-89**. There is no requirement for the Board to address every piece of evidence in

its decision in order to comply with the reasons or bases requirement. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Instead, "[t]o comply with [the reasons or bases] requirement, the Board must…account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *Wise v. Shinseki*, 26 Vet. App. 517, 524 (2014) (citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table)) (underline added). Because this evidence is unfavorable, contrary to the Secretary's argument, the remedy for the Board's reasons or bases deficiencies should not include any order for the Board to address the May 2017 VA medical opinion and addendum in the first instance.

II. The May 2017 VA medical opinion regarding colorectal cancer is inadequate; alternatively, the Board's reasons or bases are inadequate to support its finding that this opinion was adequate.

In the principal brief, Appellant argued that the May 2017 VA medical opinion by Dr. Lavin regarding colorectal cancer is inadequate because Dr. Lavin failed to provide any supporting data to support her conclusion, and she failed to provide a reasoned medical explanation connecting her general reference to the NIH and her conclusion that the veteran's colorectal cancer is not related to in-service herbicide exposure. *See* App. Br. at 12-13. Appellant also argued that Dr. Lavin's failure to do so also prevented the Board from weighing her opinion with Dr. Hankwitz's August 2013 statement, thus further rendering the May 2017 VA opinion inadequate. *See id.*

First, in response, the Secretary argues that Appellant fails to point to any authorities that would require the examiner to point to any "specific sources" for the statement that that the NIH does not designate any medical relationship between colorectal cancer and

herbicide exposure. *See* App. Br. at 15. To this, Appellant reiterates her argument in the principal brief that Dr. Lavin's general reference to the NIH as the only rationale for her opinion renders her opinion inadequate under *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008), which holds that an examiner must provide "not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *See* App. Br. at 11-12.

Second, the Secretary fails to respond to Appellant's argument to the extent Appellant relied upon *Polovick v. Shinseki*, 23 Vet. App. 48, 55 (2009), to argue that Dr. Lavin's opinion is inadequate, *see* App. Br. at 13. Appellant reiterates and clarifies her argument that Dr. Lavin's opinion is inadequate under *Polovick* given that Dr. Lavin's general reference to the NIH as her only rationale is analogous to the facts in *Polovick*, in which the Court found an unfavorable medical opinion based on nothing but the Agent Orange Update inadequate. *See Polovick*, at 55; App. Br. at 13.

Third, the Secretary responds that because Appellant did not challenge Dr. Lavin's competency, Dr. Lavin is presumed to be up to date on current medical knowledge. *See* Sec. Br. at 15. However, in the principal brief, Appellant made no argument that Dr. Lavin was not competent to render a medical opinion. Instead, Appellant maintains that Dr. Lavin's opinion is inadequate because she failed to provide an essential rationale to support her medical opinion in a manner consistent with controlling caselaw. *See* App. Br. at 12.

Fourth, in response, the Secretary states that it was Appellant's duty to present evidence to support her theory regarding colorectal cancer, with the Secretary's assistance, and that such evidence must establish more than a "remote possibility" of a relationship

between the veteran's colorectal cancer and service. *See* Sec. Br. at 16. The Secretary's statements here are salient to the issue of entitlement to service connection on the merits, and therefore the Secretary's statements are not pertinent to the salient legal issue in this case of whether Dr. Lavin's medical opinion is adequate. Here, VA obtained an opinion to determine whether the veteran's colorectal cancer was related to herbicide exposure. If an opinion is obtained, the Board must ensure that it is adequate for adjudication purposes (regardless of whether Appellant herself has submitted any favorable medical nexus evidence). *See* App. Br. at 11.

Fifth, the Secretary responds that Appellant selectively quoted Dr. Hankwitz's August 2013 VA opinion to make it appear more favorable than it is, and the Secretary argues essentially that Dr. Hankwitz's reference to the risk factors noted in "a few articles [in] the medical literature" does not necessarily constitute medical evidence that conflicts with Dr. Lavin's opinion. *See* Sec. Br. at 17-18. However, Appellant described the opinion in full in her principal brief's statement of facts, *see* App. Br. at 5, and acknowledged its ultimately unfavorable nature. *Id.* at 13, fn.1. Appellant made no argument that Dr. Hankwitz's unfavorable opinion regarding colorectal cancer was medical evidence that conflicted with Dr. Lavin's opinion, but rather that the quoted section regarding how medical literature shows that toxin exposure may be a risk factor for colorectal cancer is, by itself, medical evidence that competes against Dr. Lavin's general reference to NIH findings, which was the only rationale she provided to support her opinion. *See* App. Br. at 13. Appellant maintains that because Dr. Lavin's general reference to the NIH cannot constitute analysis that the Board could weigh against Dr. Hankwitz's statement that

articles in medical literature have suggested that toxin exposure may a risk factor for colorectal cancer, thus Dr. Lavin's May 2017 VA opinion is inadequate. *See* App. Br. at 13; *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (medical opinion must support its conclusion with analysis that the Board can weigh against other evidence in the record so that the Board will not have to rely on its own lay opinion to make a decision).

Also, Appellant notes that the Secretary's statement that the burden is on Appellant to submit her own medical evidence to rebut Dr. Lavin's (or Dr. Hankwitz's) negative nexus opinion, *see* Sec. Br. at 17-18, is again a red herring. Again, the Board relied on Dr. Lavin's May 2017 VA opinion, and it is the Board's duty to ensure that Dr. Lavin's opinion is adequate for adjudication purposes, regardless of whether Appellant herself has submitted any adequately detailed medical nexus evidence.

Finally, in the alternative, Appellant argued in the principal brief that the Board failed to provide an adequate statement of reasons or bases for its finding that the duty to assist was satisfied, because the Board blindly adopted Dr. Lavin's May 2017 VA medical opinion regarding colorectal cancer despite the opinion's identified deficiencies. *See* App. Br. at 21-23. To this, the Secretary presents an argument that because Appellant, through her representative, presented a different challenge to the adequacy of Dr. Lavin's opinion to the agency, therefore the deficiencies in Dr. Lavin's opinion identified in the principal brief and herein were never raised as a material issue of fact and law for the Board to address. *See* Sec. Br. at 26-27 (referencing **R. at 51 (50-53)**).

To this, Appellant notes that the Court has established that VA has a duty to develop claims to their optimum based on the record and that the Board is required to address all

potential issues, theories of entitlement, and other components within any type of claim, if reasonably raised by the evidence. *See Robinson v. Mansfield*, 21 Vet. App. 545, 553-54 (2008). In other words, the material issues of fact and law for the Board to address are not limited to Appellant's arguments expressly raised before the agency. *See Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014) (finding that "apparent shortcomings and discrepancies" in a medical opinion raised questions as to its adequacy, which "the Board was required to discuss [] before relying on that opinion") (citing *Trafter v. Shinseki*, 26 Vet. App. 267, 282-83 (2013)). Here, the Board was also required to address whether Dr. Lavin's opinion was inadequate because Appellant's representative raised to VA the issue of whether the duty to assist was satisfied.

Further, the Secretary's argument here is nonresponsive to Appellant's specific reasons or bases argument posed in the principal brief. Appellant maintains that the Board cannot itself evade the reasons-or-bases requirement by blindly adopting a medical opinion that "fails to discuss all the evidence which appears to support appellant's position." *See* App. Br. at 21-22. Here, Dr. Hankwitz's reference to medical literature suggesting that toxin exposure is a possible risk factor for colorectal cancer appears to support Appellant's position, and it calls into question Dr. Lavin's general reference to the NIH, which was the only rationale she provided. Thus, at minimum, the Board should have provided a statement of reasons or bases that discussed whether Dr. Lavin's opinion was rendered inadequate given the above deficiencies. *See* App. Br. at 21-22.

III. The August 2013 and July 2016 VA medical opinions regarding CAD are inadequate; alternatively, the Board's reasons or bases are inadequate to support its finding that these opinions were adequate.

In the principal brief, Appellant argued that the Board clearly erred when it relied on the August 2013 VA medical opinion by Dr. Hankwitz and on the July 2016 VHA opinion by Dr. Rubin to find that the veteran's CAD with history of myocardial infarctions did not cause or contribute to his death. *See* App. Br. at 13-17.

First, the Secretary responds that Dr. Hankwitz did provide an explanation that the Board could use to resolve the medical question at issue in his August 2013 VA opinion. *See* Sec. Br. at 19. However, the essential medical question at issue was whether Appellant's CAD (with history of myocardial infarctions) caused or contributed to his death. *See* App. Br. at 13-14. Appellant maintains that though Dr. Hankwitz provided a negative opinion as to the same, his explanation appears to only address whether a myocardial infarction caused Appellant's death, and he failed to provide an essential rationale for his opinion regarding CAD itself, rendering his opinion inadequate. *Id.* To the extent the Secretary contends that Appellant overlooks that the August 2013 VA examiner considered the veteran's ECG conducted on the day of his death, Sec. Br. at 19, Appellant notes that she acknowledged the examiner's consideration of this ECG, App. Br. at 5, 14, and Appellant maintains that nevertheless Dr. Hankwitz failed to provide a reasoned medical explanation to connect this ECG data with his conclusion that CAD did not cause or contribute to the veteran's death. *See* App. Br. at 14-15.

Further, to the extent that the Secretary claims that neither logic nor law requires an examiner to disprove Appellant's theory regarding CAD, *see* Sec. Br. at 19, Appellant

notes that established law does in fact require the Board to ensure VA examiners address expressly raised theories in support of a claim. *See DeLisio v. Shinseki*, 25 Vet. App. 45, 53 (2011) ("[. . .] the Secretary generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing."). Appellant also notes that the Secretary's reliance on *Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010), is misplaced, because *Jones* discusses how *McLendon* and applicable statutes require some assessment of probability from a VA examiner, as opposed to a definitive statement of the cause of a claimed disability. *See Jones*, at 388. Appellant fails to see how this caselaw supports the Secretary's position that Dr. Hankwitz was not required to address Appellant's theory regarding CAD.

Second, in the principal brief, Appellant argued that rather than answer the essential medical question of whether CAD caused or contributed to his death, Dr. Rubin instead opined as to whether the veteran's heart disability is a presumptively service-connected disability in his July 2016 VHA opinion. *See* App. Br. at 15. The Secretary responds with an argument that the July 2016 VHA opinion is adequate because Dr. Rubin directly responded to the question of whether CAD with history of myocardial infarction "caused or contributed to any of the listed immediate, underlying, or contributory causes of death[, which includes cardiac arrest]." *See* Sec. Br. at 20. Similarly, the Secretary references Dr. Rubin's explanation that the veteran's cardiac arrest, a listed cause of death, was not caused by the veteran's ischemic heart disease. *Id.* However, Appellant fails to see how these referenced portions of Dr. Rubin's VHA opinion somehow answer the essential medical

question at issue. The essential medical question here is not whether CAD caused or contributed to any of the listed causes of death on the death certificate, but rather whether CAD caused or contributed to his death, *with or without regard to the causes (such as cardiac arrest) that were actually listed on the death certificate*.

Ultimately, contrary to the Secretary's argument, the Board clearly erred by relying on the August 2013 and July 2016 VA opinions in order to find that the CAD with history of myocardial infarction did not have a material influence in accelerating death, because neither physician provided any information regarding this medical question; therefore, these opinions cannot carry any probative weight regarding this particular question. *Cf.* Sec. Br. at 22.

Third, the Secretary responds that Dr. Rubin's failure to provide any information as to whether the veteran's CAD had a material influence in accelerating death cannot render his opinion inadequate because the Board failed to address in the first instance the May 2017 opinion that did address this particular question. *See* Sec. Br. at 21-22. However, the Secretary cites to no applicable authority to support this position. The Board's failure to address the May 2017 opinion is not pertinent to the salient legal issue here of whether it was clearly erroneous for the Board to rely on the July 2016 VHA opinion. Ultimately, the Board relied on Dr. Rubin's July 2016 VHA opinion, not the May 2017 opinion, and the July 2016 VHA opinion is in and of itself inadequate for the reasons posited in the principal brief and herein.

Similarly, the Secretary responds with circular reasoning that duty-to-assist reversal is not warranted because there are two not yet resolved questions about which the Secretary

has conceded reasons or bases errors. *See* Sec. Br. at 22-23. However, the legal issue of whether the Board clearly erred by relying on inadequate VA medical opinions is distinct from the legal issue of whether the Board provided adequate reasons or bases to support its finding that the duty to assist was satisfied. Thus, the Secretary's argument here is without merit.

Fifth, to the extent Appellant argued that Dr. Hankwitz and Dr. Rubin each fail to provide any explanation as to why it was proper for them to rely on technically limited supporting data, App. Br. at 16, the Secretary responds that they are competent to know whether the study was sufficient to determine the condition of the veteran's heart shortly before death, and that Dr. Rubin did not describe the results of the February 3, 2011, ECG as limited in any way. *See* Sec. Br. at 23-24. However, absent any explanation by Dr. Hankwitz or Dr. Rubin regarding the fact that this ECG was noted as being "technically limited by poor acoustic windows", **R. at 643 (643-44)**, their medical opinions cannot be adequate because they failed to provide a reasoned medical explanation as to why a technically limited ECG at the time of death would support their conclusions that CAD was not clinically significant at the time of death and therefore did not hasten death. *Nieves-Rodriguez v. Peake*, 22 Vet. App. at 301; *see also Nieves-Rodriguez*, at 303-04 ("Critical pieces of information from a claimant's medical history can lend credence to the opinion of the medical expert who considers them and detract from the medical opinions of experts who do not.").

IV. The Board clearly erred when it failed to obtain a VA medical opinion regarding the back disability; alternatively, the Board's reasons or bases are inadequate to support its finding that the duty to obtain a medical opinion was not triggered.

Appellant also argued that the Board clearly erred when it failed to ensure that VA obtained a medical opinion regarding the veteran's back disability. *See* App. Br. at 17-18.

The Secretary responds that the Board's findings of fact that there was "no indication of spinal neuropathy before [an August 1968 motorcycle accident]" and that there was "no testimony…to suggest continuity of symptoms [of spinal neuropathy] since military service" are subject to the clearly erroneous standard of review, and that the Board's findings are plausibly supported by the evidence (and therefore cannot be clearly erroneous). *See* App. Br. at 24-25 (citing *McLendon v. Nicholson*, 20 Vet. App. 79, 82-83 (2006)). As a preliminary matter, Appellant notes that to the extent the Secretary relies on *McLendon* regarding the duty to provide a medical opinion, he is mistaken, because the *McLendon* criteria for triggering the duty to obtain a VA medical opinion do not apply to claims for dependency and indemnity compensation (DIC). *See DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008).

The Secretary's "plausible basis" argument against clear error is based on an outdated, and more onerous, standard. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). The courts have subsequently held that "[a] factual finding 'is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013); *see also* Sec. Br. at 22 (relying on

Deloach). The Court has the authority to correct how the Board weighed the evidence if it is definitely and firmly convinced that a mistake has been committed, as should be the case here. *See* 38 U.S.C. §§ 7261(a)(4), (b)(1); *Parrish v. Shinseki*, 24 Vet. App. 391, 399 (2011); *Van Valkenburg v. Shinseki*, 23 Vet. App. 113, 121 (2009).

To the extent the Secretary argues that the Board found that the reported continuing back symptoms since service are distinguishable from symptoms of *spinal neuropathy*, and therefore properly found that there was no evidence of continuing spinal neuropathy symptoms since service to warrant obtaining a VA opinion, *see* Sec. Br. at 24-25, such arguments are unpersuasive. The Board requires adequate, competent medical evidence to make a determination as to whether the veteran's reported back symptoms since service were manifestations of the spinal neuropathy that was noted at the time of death, and there is no such medical evidence here. *See Stefl v. Nicholson*, 21 Vet. App. 124. Thus, even if the Court were to accept the Secretary's argument that the Board did make a finding of fact that the reported continuing back symptoms were distinguishable from spinal neuropathy manifestations (an argument against which Appellant argues below), the Board nevertheless improperly exercised independent medical judgment in making any such finding. *See Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991). Given this, the Court should be left with the definite and firm conviction that the Board made a mistake when it found that there was no evidence of continuing spinal neuropathy symptoms since service to trigger the duty to obtain a VA medical opinion regarding Appellant's back disability theory. Ultimately, a medical opinion is necessary to substantiate the claimant's claim that the spinal neuropathy noted at death contributed to the veteran's death and that such spinal

neuropathy manifested in back symptoms that continued since service and are therefore related to service. *See* App. Br. at 18 (citing *DeLaRosa*, at 1322).

Finally, in the alternative, Appellant argued in the principal brief that the Board failed to provide an adequate statement of reasons or bases for finding that the duty to assist was satisfied because the Board failed to explain why a VA medical opinion regarding the back disability was not necessary. *See* App. Br. at 23. The Secretary responds that because the Board purportedly found that the reported continuing back symptoms were distinguishable from spinal neuropathy manifestations, the Board had no obligation to provide an explanation as to why a VA medical opinion was unnecessary, because the Board found no merit to this theory. *See* Sec. Br. at 28. However, because the Board improperly exercised independent medical judgment in making any such purported finding, its reasons or bases are inadequate. *See Colvin v. Derwinski*, 1 Vet. App. at 175.

V. The Board's reasons or bases are inadequate to support its denial of service connection for the veteran's cause of death based on the back disability theory.

In the principal brief, Appellant argued that the Board's reasons or bases are inadequate to support its denial of the claim on the merits, because it failed to provide any reasons for its apparent rejection of material favorable lay evidence from the veteran of continuing back symptoms since service. *See* App. Br. at 20-21 (citing *Caluza*, 7 Vet. App. at 506). To this, the Secretary responds by arguing that the Board did not overlook this lay evidence because the Board addressed it when it essentially found that the continuing back symptoms since service were distinguishable from symptoms of spinal neuropathy. *See* Sec. Br. at 25. It is unclear whether the Board did indeed make any such finding, so the

Secretary's argument here is at minimum an impermissible post hoc rationalization that should be rejected. *See Frost v. Shulkin*, 29 Vet. App. 131, 140 (2017) (citing *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'")); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). Further, even if the Board did make such a finding, the Board's reasons or bases are inadequate because it points to no medical authority to support any such finding, *see Colvin v. Derwinski*, 1 Vet. App. at 175, and because the Board's bare conclusory statement is neither helpful to the veteran, nor clear enough to permit effective judicial review, *see Simmons v. Principi*, 17 Vet. App. 104, 115 (2003).

CONCLUSION

For the reasons articulated in his principal brief and herein, Appellant respectfully requests that the March 23, 2018, decision on appeal be reversed in part and otherwise vacated and that this matter be remanded for readjudication.

Respectfully submitted,

/s/ Glenn R. Bergmann
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December 18, 2019

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