IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 18-6232

CHRISTOPHER L. FULKS,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary concedes that remand is warranted for the Board to obtain a new or clarifying medical opinion as to whether Appellant's migraines and tension headaches are a MUCMI.

In his principal brief, Appellant argued that the August 2013 and October 2013 VA opinions were inadequate, because neither of the medical examiners addressed the etiology or pathophysiology of Appellant's particular migraine condition, including multiple symptoms such as head pain and light sensitivity, in a manner sufficient for the Board to make a competent determination of eligibility for benefits under 38 C.F.R. § 3.317(a)(2). *See* Appellant's Brief ("App. Br.") at 10-11 (citing *Stewart v. Wilkie*, 30 Vet. App. 383, 390, 392 (2018) (holding that VA adjudicators "may consider evidence of medical expert opinions and all other facts of record to make the final determination of whether a claimant has proven, based on the claimant's unique symptoms, the existence of a MUCMI") (citing *Goodman v. Shulkin*, 870 F.3d 1383, 1388 (Fed. Cir. 2017))). In response, the Secretary agrees that remand is warranted as to the claim for service connection of migraines and tension headaches for the Board to obtain a new or clarifying medical opinion as to whether Appellant's migraines and tension headaches are a MUCMI. *See* Secretary's Brief ("Sec. Br.") at 9-12. Appellant therefore requests that the Court find error and remand for the Board to obtain this new or clarifying medical opinion.

II. The Secretary has not shown that the August 2013 and October 2013 VA opinions are otherwise adequate, or, in the alternative, that the Board provided an adequate statement of reasons or bases.

Appellant also argued in his principal brief that the Board clearly erred in finding the duty to assist satisfied, because the August and October 2013 VA GERD and headache opinions are inadequate as the examiners either rejected, for lack of corroborating medical evidence, or failed to at all consider the multiple lay statements concerning the onset and continuing symptomatology of Appellant's GERD. App. Br. at 8-10. Appellant noted his submission of numerous lay statements that speak to the onset of his GERD symptomatology shortly after service, his efforts to treat that condition himself with over the counter remedies, and continuing symptomatology until the time he did eventually seek formal medical treatment for that condition. App. Br. at 9. Appellant argued that it is apparent that the August and October 2013 VA examiners either rejected, for lack of corroborating medical evidence, or failed to at all consider the multiple lay statements concerning the onset and continuing symptomatology of Appellant's GERD condition, rendering the opinions inadequate. App. Br. at 9-10 (citing *McKinney v. McDonald*, 28 Vet. App. 15, 30 (2016) (finding that "VA examiner's failure to consider Mr. McKinney's testimony when formulating her opinion renders that opinion inadequate") (citing *Barr v. Nicholson*, 21 Vet. App. 303, 310-11 (2007) (finding that a medical examination that ignores lay assertions regarding continued symptomatology is inadequate because it fails to take into account the veteran's prior medical history))).

In response, the Secretary argued that the examiners specifically discussed the lay statements made by Appellant's father, mother, and sister, and that the October 2013 VA

examiner "specifically listed these lay statements as part of the evidence she reviewed." Sec. Br. at 18. However, the Secretary fails to demonstrate how the examiner's listing off of lay statements of record, when not further accounting *for* them in the rationale of the opinion itself, does anything to demonstrate what weight the examiner actually afforded the veteran's lay testimony in formulating the opinion, and why. *See McKinney*, *supra*. The examiner's opinion must contain a reasoned medical rationale, and failing to discuss in the opinion itself how that lay testimony was accounted for renders the opinions inadequate nonetheless. *See Nieves-Rodriguez v. Peake,* 22 Vet. App. 295, 301, 304 (2008). As Appellant argued in his principal brief, what the text of the opinions *do*, is demonstrate the examiners' focus on a need for objective, corroborating evidence of medical treatment. App. Br. at 9.

Appellant also argued in his principal brief that, in the alternative, the Board failed to provide an adequate statement of reasons or bases for finding the August and October 2013 VA opinions adequate, in failing to discuss the deficiencies noted above. App. Br. at 11 (citing **R. 10-12**, **15-17 (4-18)**; *see Daves v. Nicholson*, 21 Vet. App. 46, 51 (2007) (holding that the Board's reasons or bases concerning the duty to assist did not permit the Court to conduct proper review)). In response, the Secretary simply argued that the Board properly found that the medical evidence of record, to include the August and October 2013 VA examiners' negative nexus opinions, was more probative as to the issue of nexus. Sec. Br. at 20.

While the Secretary also notes in a footnote that some of the lay statements Appellant cites in his brief post-date the August and October 2013 VA examiners'

opinions, and therefore the examiners could not have considered these lay statements, *see* Sec. Br. at 17, fn. 1, this only serves to highlight how the duty to assist was not met here. The Board should have at least discussed whether the late addition of these additional lay statements warranted a new VA opinion, or if not, why not. *See Daves*, *supra*.

The Secretary has not shown that the August 2013 and October 2013 VA opinions are adequate. Appellant maintains that remand is thus warranted for the Board to instruct a new examiner or examiners accordingly in order to ensure that the resulting nexus opinions are adequate for purposes of adjudication. In the alternative, the Secretary has not shown that the Board provided an adequate statement of reasons or bases for finding the August and October 2013 VA opinions adequate, in failing to discuss the deficiencies noted here and in Appellant's principal brief. Appellant maintains that remand is thus necessary for the Board to, at the very least, provide an adequate statement of reasons or bases concerning the duty to assist. *See Daves*, *supra*; *Tucker v. West*, 11 Vet. App. 369, 374 (1998) (remand appropriate "where the Board has incorrectly applied the law, failed to provide adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

III. The Secretary has not shown that the Board otherwise provided an adequate statement of reasons or bases.

In his principal brief, Appellant also argued that the Board failed to provide an adequate statement of reasons or bases in failing to make a credibility determination as to the multiple lay statements and lay testimony of record, while finding the August and October 2013 VA opinions that fail to account for such lay evidence to be more probative

evidence. *See* App. Br. at 11-13. Appellant argued that the Board does not provide an adequate foundation for dismissing the lay evidence in favor of medical evidence of record, failing to explain why it is not believable that Appellant had GI symptoms since service but did not seek formal medical treatment for many years, or why it expected him to seek formal medical treatment during this time rather than treat himself, and failing to at all analyze Appellant's reported headache history, instead seemingly adopting the August 2013 examiner's credibility determination without analysis. App. Br. at 12-13 (citing *Floore v. Shinseki*, 26 Vet. App. 376, 381 (2013) (discussing "distinctive responsibilities of medical examiners and rating officials"); *Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004) (referring to an examining psychiatrist's opinion on whether the appellant's claimed in-service stressors had been substantiated as "overreaching" because "that is a matter for determination by the Board and not a medical matter")).

In response, the Secretary argued that the Board did not reject the lay statements for lack of credibility, but found only that they were not competent to establish nexus or rebut the August and October 2013 VA examiners' negative nexus opinions. *See* Sec. Br. at 13-14, 18-19. The Secretary's reasoning here is unclear, however. On the one hand, the Secretary offers an important concession, to the effect that the Board accepted the lay evidence as credible. Given that fact, the August 2013 VA headaches opinion cannot be adequate to satisfy the duty to assist, regardless of its additional deficiency under § 3.317, because the examiner rejected the lay history of monthly severe headaches. *See* **R. 955 (927-55)** (finding it impossible to reconcile that history with the medical records). Furthermore, given that lay evidence of continuity of pertinent and observable

symptomatology can trigger the duty to assist or be used to establish in-service incurrence or nexus for a grant of service connection, and such a showing can be made based on lay history as interpreted by a competent expert, there is no difference between finding the lay statements not credible or not competent to establish nexus. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) ("Lay evidence can be competent and sufficient to establish a diagnosis of a condition when . . . lay testimony describing symptoms at the time supports a later diagnosis by a medical professional."). Without establishing a foundation for such a finding, the result is the same.

The Secretary then argued that "[b]ecause the Board did not find the lay statements lacked credibility absent corroborating or contemporaneous medical records, the Board was not required to establish a foundation for its finding that the lay statements were not competent to establish nexus." Sec. Br. at 18-19. As shown above, this logic is flawed. Similarly, the Secretary argued that the Board "was not required to additionally establish a foundation for its notation that Appellant did not have manifestations of a gastrointestinal condition during active duty service, given his first documented treatment for the condition was in 2002." Sec. Br. at 19. Yet, Appellant's lay statements themselves establish that he did not seek formal medical treatment for many years, and while the Secretary cites to *Fountain v. McDonald* for support for his position, it is exactly that case law which requires the Board to explain why it expected him to seek formal medical treatment during this time rather than treat himself. *See Fountain v. McDonald*, 27 Vet. App. 258, 273 (2015) (finding error when the Board failed to analyze why the appellant would reasonably have been expected to report his symptoms to medical providers).

The Secretary therefore has not shown that the Board provided an adequate statement of reasons or bases. Appellant maintains that remand is warranted for the Board to provide an adequate statement of reasons or bases that provides a clear foundation for its assessment of the lay evidence, to include a direct credibility determination. *See Tucker*, *supra*.

IV. The Secretary has not shown that the Board satisfied the duty to assist in failing to obtain VistA scanning records.

In his principal brief, Appellant also argued that VA did not satisfy the duty to assist when VistA scanning records were not obtained. *See* App. Br. at 13-14. Appellant noted where the record contains notes that VistA scanning records exist, but were not included in the record, and argued that he was prejudiced by the Board's failure to obtain these records because their content, including any potential information relating to the existence of a MUCMI or nexus, cannot be known without obtaining and reviewing them. App. Br. at 14.

As an initial matter, Appellant notes that the Secretary, without obtaining Appellant's position on the matter, retrieved the cited missing VistA documents that were scanned into VistA, but never reviewed by the Board, and appended these documents to his brief. As the Court is precluded by statute from considering any material which was not contained in the record of proceedings before the Secretary of Veterans Affairs and the Board, Appellant has filed a motion to strike the appended report and all references to it from the Secretary's brief. 38 U.S.C. § 7252(b). If the Court grants that motion or otherwise

rejects the Secretary's tactic here, it should disregard his arguments based on the documents' content.

The Secretary contends that the Board had no duty to obtain the missing VistA records, as Appellant "has not demonstrated that these records relate to the claimed disabilities on appeal." Sec. Br. at 21. However, the Secretary is attempting to write in a relevance requirement where the Court and the Federal Circuit have specifically held there is not one, and in doing so, cites to no legal authority that would call into question these holdings. *See Jones v. Wilkie*, 918 F.3d 922, 927 (Fed. Cir. 2019) ("VA may not consider relevance when determining whether to assist in obtaining VA medical records."); *Sullivan v. McDonald*, 815 F.3d 786, 790-91 (Fed. Cir. 2016).

The only legal authority the Secretary cites to support the proposition that the Board's duty to assist is only triggered when a VA treatment record is relevant is *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992). However, *Bell* has nothing to do with the duty to assist or the Federal Circuit's holdings in *Jones* and *Sullivan*, as those cases were decided decades later by a higher court interpreting a regulation promulgated nine years after *Bell*. *See Sullivan*, 815 F.3d at 791 (citing 66 Fed. Reg. 17834, 17836 (Apr. 4, 2001)) (confirming section 3.159(c)(3) was proposed in 2001); *Bell*, 2 Vet. App. at 611 (decided in 1992). Furthermore, the Court in *Bell* never found that relevancy was required for the Board's duty to assist to be triggered because *Bell* does not discuss the duty to assist at all. The language in *Bell* on which the Secretary relies pertains to when the Court will remand for the Board to consider a document in the first instance, not the Board's duty-to-assist obligations either generally or that would not exist until nine years later. *See Sullivan*,

supra; *Bell*, 2 Vet. App. at 612-13. While the Secretary attempts to twist this into working in his favor, by arguing that the issue here is not the standard for triggering the duty to assist to obtain VA treatment records, as he concedes was addressed by *Sullivan* and *Jones*, but rather that "the issue is the standard required for remand to obtain VA treatment records", which requires Appellant to establish prejudice, "which is not required to trigger the duty to assist." Sec. Br. at 23. The Secretary concludes, therefore, that "the Court's holding in *Bell* controls and requires that the VA treatment records be, at least, related to the claimed disabilities on appeal and 'determinative of the claim.'" *Id*.

The Secretary's position is simply untenable. If this were the case, VA could simply ignore the duty to assist to obtain VA treatment records in *every* case, and then only agree to remand cases where the Appellant comes to this Court with the burden of establishing potential relevance and prejudice. *Sullivan* and *Jones* established duty-to-assist obligations for obtaining VA treatment records that were not met in this case. That failure to satisfy the duty to assist warrants remand to obtain records that were potentially relevant at the time of the Board decision, period.

The Secretary seeks to flip *Bell* on its head and avoid a remand by proving that records the Board should have obtained are not actually relevant. The Court should reject the Secretary's attempt to circumvent VA's failure and hold the Board to its duty to develop the record to its optimum *prior* to a final appellate decision. *See Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010) ("VA has a duty to assist veterans and is required to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits'") (quoting *McGee v. Peake*, 511 F.3d 1352, 1358 (Fed. Cir. 2008); *Hensley v. West*,

212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact-finding")).

Thus, the Secretary has identified no means by which the Court can hold that the duty to assist under 38 C.F.R. § 3.159(c) has been satisfied, and, accordingly, remand is warranted for the Board to satisfy the duty to assist in obtaining VistA imaging scans for these records, or at least to acknowledge that the record indicates the existence of additional VA treatment records and explain whether further assistance is required. *See Jones*, *Sullivan*, *Tucker*, all *supra*.

CONCLUSION

In light of the Board's errors, Appellant respectfully requests that the August 21, 2018, decision on appeal be reversed in part and otherwise vacated and that this matter be remanded for readjudication for the reasons and under the authorities discussed in his briefs.

Respectfully submitted,

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December 19, 2019

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