

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 18-4434

LOUIS P. KNIPP,

Appellant,

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

Appellee.

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INTRODUCTION

Mr. Knipp argues that the Court should remand his claims for service connection for his cervical spine disability and radiculopathy of his left arm because the Board failed to provide an adequate statement of reasons and bases, and because the Board relied on an inadequate medical opinion from July 2013. The Secretary concedes that the Board provided an inadequate statement of reasons and bases but asserts that the July 2013 exam was adequate. The Secretary's position is unsupported by both the law and the Record.

ARGUMENT

I. The Secretary Concedes that the Board Failed to Provide an Adequate Statement of Reasons and Bases.

The Secretary concedes that the 2018 Board decision failed to provide an adequate statement of reasons and bases when failing to address a buddy statement supporting Mr. Knipp's claim for service connection for his cervical spine disability and radiculopathy of his left upper extremity. Opposition Brief ("Opp. Br.") at 5-6; R. 2115 (2115) (2015 Statement in Support of Claim). Therefore, the issues of service connection for a cervical spine disability and service connection for radiculopathy of the left upper extremity should be remanded for an adequate decision addressing the corroborating statement.

II. The Secretary's Response Does Not Justify the Board's Improper Use of the Lack of Contemporaneous Medical Records and the Lapse of Time Against Mr. Knipp's Claim.

While the Secretary concedes that the Board failed to provide an adequate statement of reasons and bases because it did not address the 2015 buddy statement, he rejects Mr. Knipp's claims that the 2018 Board decision also contains error for improperly relying on the lack of contemporaneous medical records, and for improperly using the lapse of time without discussing other relevant factors as required by *Maxson v. Gober*. 230 F.3d 1330, 1333 (Fed. Cir. 2000). While the Secretary concedes that the Board's statement of reasons and bases is inadequate, Mr. Knipp briefly addresses the Secretary's response to these arguments below.

A. The Secretary's Response Fails to Show that the 2018 Board Decision Complied with *Buchanan v. Nicholson*.

Responding to Mr. Knipp's argument that the Board improperly relied on the lack of contemporaneous medical records, the Secretary argues that because the Board relied on some evidence to deny Mr. Knipp's claim there is no *Buchanan* error. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). However, a closer examination of the evidence relied upon by the Secretary and the Board shows that this response is unpersuasive.

The Secretary argues that the Board's reliance on: (1) a 2006 service treatment record ("STR"); (2) the 2013 VA exam; and (3) Mr. Knipp's alleged statement in a VA exam, excuse any possible *Buchanan* error. Opp. Br. at 7-8.

However, the problem with the Secretary's argument is that: (1) the 2006 STR did not perform an x-ray, or any other form of diagnostic testing, of his spine or neck; (2) the 2013 exam was inadequate; and (3) Mr. Knipp cannot be expected to diagnose the source of his disability.

First, the 2006 STR did not include an x-ray or any other kind of examination to determine if Mr. Knipp incurred an injury to his neck or spine. R. 4034 (4034) (2006 Statement of Medical Examination and Duty Status); *see also* R. 2115 (2115) (2015 Statement in Support of Claim) (describing that there was no x-ray equipment on the base). Simply put, the one-page STR is not evidence contradicting Mr. Knipp's assertion that he injured his neck during the fall. Instead, the Board used this STR and the inadequate 2013 exam to find that Mr. Knipp's fall "was limited to a cheek laceration without involvement of the neck or neurological system" — a conclusion that constitutes an improper medical opinion¹ as the 2013 C&P examiner never even mentioned Mr. Knipp's in-service fall or the impact it may have had on his neck. R. 9 (5-16) (2018 BVA Decision); *see infra* § III.; *see also Colvin v. Derwinski*, 1 Vet. App. 171, 172 (1991) (overruled on other grounds) (holding that when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence").

¹ The Secretary does not provide any argument in his response brief that this finding constitutes an improper medical opinion. *See* Opp. Br. at 5-10.

Second, as addressed further below, the 2013 VA exam was inadequate. Relying on an inadequate medical exam cannot insulate a Board decision from committing a *Buchanan* error. Third, Mr. Knipp's alleged statement during the exam is also not evidence against his claim because Mr. Knipp cannot diagnose the cause of his current disability. See *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (holding that a lay person generally is not qualified to offer competent testimony on matters that require medical expertise). Because Mr. Knipp is not qualified to diagnose the etiology of his disabilities, the Secretary cannot rely on the absence of such statements to justify the Board's *Buchanan* error. See *Horn v. Shinseki*, 25 Vet. App. 231, 248 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact."). Because the evidence on which the Board relied does not stand for the proposition it was used to support, the Secretary fails to show how the Board's reliance on such evidence insulates the decision from improperly relying on the absence of medical evidence.

B. The Secretary's Response Fails to Show that the 2018 Board Decision Complied with *Maxson v. Gober*.

Next, the Secretary labels Mr. Knipp's argument—using the exact words of the Administrative Law Judge ("ALJ") who decided the case—as merely a "straw man argument." Opp. Br. at 8-9. Other than a series of conclusory statements, the

Secretary does not provide a rationale why the ALJ's statement that "Um, it looks like the regional office denied this one because, um, I think due to that gap in time" is not problematic. R. 2126 (2116-31) (2015 Hearing Transcript). Furthermore, as argued in Mr. Knipp's opening brief, this problematic use of the passage of time continued into the Board decision when it stated, "[a]dditionally, the Veteran did not have an onset of symptoms until December 2012." Appellant's Brief (App. Br.) at 12-13; R. 9 (5-16) (2018 BVA Decision). Therefore, the Secretary's assertion that "there is no indication from either the hearing transcript or the Board's decision itself that it specifically relied on the passage in time" is directly contradicted by the ALJ's statements during the hearing as well as the Board's decision. Opp. Br. at 8 (internal citations omitted). Finally, the Secretary does not provide any argument that the Board's decision did provide a discussion of relevant factors as required by *Maxson*. See Opp. Br. at 8-9; 230 F.3d 1330, 1333 (Fed. Cir. 2000) (requiring that when the Board relies upon the passage of time to deny a claim it "should consider all of the evidence including the availability of medical records, the nature and course of the disease or disability, the amount of time that elapsed since military service, and any other relevant facts.").

III. The Evidence of Record and a Plain Reading of the 2013 Exam Show that the Exam Was Inadequate—Contrary to the Secretary’s Assertion Otherwise.

Finally, the Secretary’s argument that the 2013 exam was adequate: (1) fails to consider that there was evidence in the Record that Mr. Knipp fell and hit his head on a turret while in service *prior to the July 1, 2013 exam*; and (2) does not comport with a plain reading of the examiner’s rationale.

Contrary to the Secretary’s argument that Mr. Knipp is claiming the examiner should have addressed evidence that was not yet associated with the Record, Mr. Knipp argues that the 2013 examiner failed to provide an adequate rationale concerning the evidence showing that Mr. Knipp fell and hit his head on a turret—which was in the Record at the time of the 2013 exam. Opp. Br. at 9-10. Specifically, the 2006 STR reporting Mr. Knipp’s fall was in the record and stated:

Knipp fell and hit his head on a turret causing a laceration to his right cheek. He reported to the bas [sic] where *the wound was cleaned and stitched*. He was given medication for the pain.

R. 4034 (4034) (2006 Statement of Medical Examination and Duty Status) (emphasis added). Despite this report, the only possible mention of Mr. Knipp falling and hitting his head on a turret in the 2013 exam is the single word, “laceration” which appears on the first page of the exam report. R. 4052 (4052-65) (2013 C&P Exam). The examiner’s failure to consider this incident does not comply with 38 C.F.R. § 4.2. (stating “If diagnosis is not supported by the findings on the examination

report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.”) (emphasis added); see *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (“a medical examination must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two”); *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007) (“a mere conclusion by a medical doctor is insufficient to allow the [VA] to make an informed decision as to what weight to assign to the doctor’s opinion”).

Furthermore, the job of determining the etiology of Mr. Knipp’s current disabilities belongs to the VA examiner, not Mr. Knipp. See *Jandreau*, 492 F.3d at 1376-77. While the Secretary relies heavily on the fact that Mr. Knipp did not report a neck injury during the exam, this fact does not correct the examiner’s error of failing to consider whether the in-service fall may have caused the current disability. In fact, it is the examiner’s job to consider the evidence of record and determine whether an in-service event may have led to a current disability – something which the examiner did not do. *Id.*

In addition, the Secretary’s argument neglects the fact that an injury to Mr. Knipp’s spine may have taken place even if Mr. Knipp did not experience neck pain immediately following the injury – a fact that is even more plausible as no x-

ray or other diagnostic testing was performed in 2006 when the injury took place. *See* R. 4034 (4034) (2006 Statement of Medical Examination and Duty Status).

Next, a plain reading of the 2013 exam contradicts the Secretary's argument that "the examiner was clearly aware of the laceration caused by the in-service fall." Opp. Br. at 9. The Secretary's assertion that the 2013 examiner's notation of the single word "laceration" on the first page of the exam does not comport with her obligation to provide "clear conclusions with supporting data" and "a reasoned medical explanation connecting the two." *Nieves-Rodriguez*, 22 Vet. App. at 301. A review of the exam report shows that the examiner did not consider whether Mr. Knipp falling and striking his head on a turret during service may have caused his current disability. Based on the rationale provided by the examiner, it is apparent that she only considered the 2006 injury as a laceration and not a possible source for his current disabilities. This error requires remand for an adequate exam.

Lastly, to the extent the Court reads the Secretary's reliance on the Board's ability to issue a new exam on remand as a reason not to consider or find that the 2013 exam was inadequate, this suggestion does not justify the 2013 exam's error. Opp. Br. at 10. Whether or not the Board may issue a new exam does not reduce the need to correct an inadequate exam, that will remain uncorrected in the Record unless raised on appeal to the Court. Accepting the Secretary's suggestions would

allow VA to preserve inadequate examinations that may be used by the Board on remand as evidence against Mr. Knipp's claim. Simply stated, this suggestion is irrelevant to the issue of whether the 2013 exam is adequate.

CONCLUSION

For the reasons set forth above, the appellant, Mr. Louis P. Knipp, respectfully requests that the August 7, 2018 Board Decision be vacated, and this matter remanded to the Board of Veterans Appeals for readjudication in a manner consistent with the applicable law as set forth above.

Dated this 26th day of December, 2019.

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