

Vet. App. No. 19-1493

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

ROBERT P. WILLIAMSON,
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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II. STATEMENT OF THE CASE

A. Jurisdictional Statement

Pursuant to 38 U.S.C. § 7252(a), the United States Court of Appeals for Veterans Claims possesses exclusive jurisdiction to review final decisions from the Board of Veterans' Appeals (Board).

B. Nature of the Case

Appellant, Robert P. Williamson, Appeals the November 28, 2018, Board decision that denied entitlement to service connection for cervical and thoracolumbar spine disabilities. [Record Before the Agency [R.] at 4 (4-9)].

C. Statement of Relevant Facts

Appellant enlisted in the United States Army on March 28, 1984, as an 11B10 infantryman. [R. at 1828]. In February 1985, he states that he was choked to unconsciousness. [R. at 69]. Upon reporting to the Battalion Aid Station, he was diagnosed with laryngeal nerve palsy – an injury to the voice box – along with throat pain and mild edema. [R. at 3440]. During a medical exam in June of 1985, Appellant showed no signs of neck pain and no injuries to his spine. [R. at 3671 (3671-74)]. Medically speaking, Appellant's following year-and-a-half was uneventful, until November 1986, when he strained his lower back while riding a bike. [R. at 3643 (3643-45)]. The pain lasted approximately three days, and there were no further mentions in his service treatment record (STR) of further lower-back injuries. *Id.* Appellant was honorably discharged February 20, 1987. [R. at 1828].

After his military service, Appellant struggled with homelessness and unemployment, at one point losing his job as a mechanic. [R. at 1437 (1436-38)]. X-rays and an MRI were taken in 2008 while he was seeking medical treatment for a hip disability, revealing osteoarthritis in his lumbar spine. [R. at 246 (245-47)]. Four years later, and for the first time since his time in service, Appellant complained of neck pain, and he indicated that he had been experiencing it since his time in service. [R. at 479 (476-480)]. The medical report indicated that there were mild degenerative facet joint changes throughout the cervical spine. *Id.* A September 2013 VA examination report indicated that he had degenerative disc disease (DDD) in his cervical spine. [R. at 294 (287-302)]. The examiner determined that this condition was less likely than not related to the in-service choking incident. [R. at 301].

During a 2012 Board hearing, Appellant stated that he had been “bumped really hard” by a truck during a training exercise in 1986. [R. at 3755 (3752-3773)]. He indicated that he presented to the battalion aid station with a large bruise on his hip and was given a week of light duty. *Id.* But there is no mention, whatsoever, of this event, or its treatment, in Appellant’s STR. When Appellant sought care for his thoracolumbar spine disability in September 2013, he told the VA medical examiner that he did not have a complaint of chronic lumbar or thoracic pain, only cervical spine pain. [R. at 288]. While the doctor noted that Appellant was experiencing pain, she found that there was only mild degenerative arthritis. [R.

at 2421]. Akin to the cervical spine assessment, the medical examiner determined that this injury was less likely than not related to an in-service event. [R. at 301].

The Boston Regional Office (RO) rendered its decision, denying Appellant's entitlement to service connection in September 2013. [R. at 3553 (3553-55)]. He filed his Notice of Disagreement on March 4, 2014. [R. at 3537 (3537-38)]. The Board rendered its decision on November 28, 2018, finding that Appellant did not suffer from a cervical or thoracolumbar spine disability that was incurred in, manifested within one year of, or was otherwise related to service. [R. at 3 (3-9)]. Appellant perfected his appeal to this Court on March 3, 2019.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision because it provided an adequate statement of reasons or bases for denying entitlement to service connection for Appellant's cervical and thoracolumbar spine disabilities. Additionally, VA fulfilled its duty to assist in providing adequate medical exams.

In denying Appellant's claims for service connection for both cervical and thoracolumbar spine disabilities, the Board determined that there is no evidence of record of an in-service event connected to either disability. Appellant asserts that the Board misinterpreted the application of 38 C.F.R. § 3.303, relying upon a continuity of symptomatology to grant service connection under the presumptive theory of a chronic disease. But Appellant lacks the required medical expertise necessary to determine if there is a nexus between the in-service injury of being

choked or riding a bike and the present-day diagnosis of arthritis and degenerative joint disease (DJD) or DDD.

Furthermore, VA fulfilled its duty to assist in providing medical exams that were adequate because they were sufficient to inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion. They were based upon the veteran's prior medical history and examinations, and described the disabilities in sufficient detail so that the Board could provide a fully informed evaluation.

IV. ARGUMENT

A. Standard of review

The Court reviews the Board's findings of fact, including its service connection determinations, under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). Only when the Court, after reviewing the entire evidence, "is left with the definite firm conviction that a mistake has been committed," will a factual finding be "clearly erroneous." *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010).

The Court is not permitted replace the Board's judgment with its own on issues of material fact. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). The Court may not overturn a finding of material fact if there is a plausible basis for the Board's decision, even if this Court may have reached a different conclusion. *Id.* at 52. The Board must also support its decision with a written statement of reasons or bases for its factual findings and conclusions of law. 38 U.S.C. § 7104(d)(1).

B. The Board provided an adequate statement of reasons or bases in denying Appellant's claims of entitlement to service connection for a cervical spine disability and for a thoracolumbar spine disability

The Board provided an adequate statement of reasons or bases for denying Appellant's claims of entitlement to service connection for cervical spine and thoracolumbar disabilities because it addressed the material issues, explained its rejection of materially favorable evidence, discussed potentially applicable laws, and otherwise provided an explanation for its decision in a manner that was understandable and facilitative of judicial review. [R. at 6-7]; see *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995).

1. The Board correctly denied service connection under a presumptive theory for chronic disease because Appellant failed to experience a continuity of symptomatology

As Appellant fails to demonstrate continuity of his symptomatology, the Board did not err in its finding that service connection could not be granted under regulatory section 3.303(b).

A veteran can establish service connection for a chronic disease if evidence of the chronic condition is noted during service or during the presumptive period. 38 C.F.R. § 3.303(b). But, if "the chronic condition is not 'shown to be chronic, or where the diagnosis of chronicity may be legitimately questioned,' i.e., 'when the fact of chronicity in service is not adequately supported,' *then a showing of continuity of symptomatology after discharge is required to support a claim for disability compensation for the chronic disease.*" *Walker v. Shinseki*, 708 F.3d 1331, 1336 (Fed. Cir. 2013) (emphasis added); see also 38 C.F.R. § 3.303(b). If

there is a proven continuity of symptomatology, then a nexus can be established between the current disease and the in-service event, thus serving as the evidentiary impetus to confirm the existence of the chronic disease while in service. *Id.*

Appellant cites to *Walker* in an attempt to persuade this Court that any veteran suffering from a chronic condition is entitled to service connection based on continuity of symptomatology when the evidence demonstrates that symptoms of the condition have continuously manifested since service. See Appellant's Brief (App. Brf.) at 16, *citing Walker v. Shinseki*, 708 F.3d 1331, 1336 (Fed. Cir. 2013); see also 38 C.F.R. § 3.309(a). He further notes that a veteran suffering from a chronic condition listed in 38 C.F.R. § 3.309(a) should be entitled to service connection based on continuity of symptomatology, when the evidence demonstrates that symptoms of the condition have continuously manifested since service. See App. Brf. at 17, *citing Walker*, 708 F.3d at 1336. But Appellant neglects to mention the single, crucial element as prescribed above, that a veteran can only establish service connection through §3.303(b) for a chronic disease if evidence of the chronic condition is noted during service or during the presumptive period. See *Walker*, 708 F.3d at 1336.

Appellant's current multiple diagnoses of DJD, DDD, and/or arthritis in his cervical and thoracolumbar spine were never demonstrated in service or during the statutory grace period of one year thereafter. See 38 C.F.R. § 3.307(a)(3). As Appellant did not assert any chronic injuries within one year of service, and the

injuries sustained in service were not chronic, he must demonstrate an ongoing continuity of symptomatology in order to obtain service connection for his neck and back disabilities, which he fails to do. 38 C.F.R. § 3.303(b). Before the Court, Appellant avers that his pain has “always been the same,” and that the degenerative diseases of his neck and back began before he separated from service. App. Brf. at 20. However, there are periods in which the chain of continuity is extinguished. The clearest case where there is a break in continuity regarding his cervical spine disability occurs in June of 1985, only four months after the choking incident, where he listed “no” for the presence of arthritis, a bone or joint deformity, a painful or “trick” shoulder, and recurrent back pain. [R. at 3673]. Similarly, there is a break in continuity for his thoracolumbar spine. While Appellant asserted that he had experienced persistent chronic back pain since his time in service, when he was sent for a thoracolumbar spine examination, he stated that “he was not complaining of chronic lumbar or thoracic pain.” [R. at 288].

Given that Appellant does not describe any neck or back pain during or within a year of his service, and that the continuity for both claims are noticeably severed, it becomes clear that Appellant fails to meet the threshold established in *Walker*. As a result, the Board’s decision to deny service connection for a cervical and thoracolumbar spine disabilities should be affirmed.

2. The Board's analysis of 38 C.F.R. § 3.303 provided an adequate statement of reasons or bases by which to enable judicial review

In the instant case, the Board adequately addressed the evidence of record, including the February 1985 STR, the June 1985 periodic examination report, the September 2013 VA examination, and the February 2016 VA examination. See [R. at 3440]; *see also* [R. at 3673]; *see also* [R. at 293-300]; *see also* [R. at 726-735 (726-735)]. The Board clearly stated that the STRs did not reflect “an injury to the spine itself,” that pain is not noted in VA records until 2012, and that there is ultimately no evidence which suggests a nexus between Appellant’s current cervical spine disability and an in-service event or injury. [R. at 7].

The Board specifically addressed 38 C.F.R. § 3.303, mentioning that Appellant’s record neither reflects a diagnosis of a cervical spine disability within one year of service, nor shows that he experienced the requisite continuity of symptomatology to warrant service connection under the presumptive theory of a chronic disease, pursuant to subsection (b). *Id.* Furthermore, the Board acknowledged Appellant’s lay contentions regarding his cervical spine disability, but recognized that he may not submit competent testimony pertaining to the medically complex nature of its etiology. *Id.*; *see generally Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). Simply put, the Board clearly stated that the record reflects that Appellant did not have any arthritis-like condition during or immediately after his service, and that there was no relation to the incident in which he was choked.

Appellant argues that the Board “demonstrate[d] its own misunderstanding of the law” by not recognizing that the diagnoses of the conditions need not be identical in establishing a continuity of symptomatology. See App. Brf. at 17, *citing Hodges v. West*, 13 Vet.App. 287, 292 (2000) (holding “continuity of symptomatology does not require that a claimant be diagnosed with the same condition both in service and at the time of his claim for service connection . . .”). Appellant further argues that this Court determined that “claims for osteoarthritis are well grounded *when the record contains competent* evidence that the condition manifested following an incident in service” See App. Brf. at 17 (emphasis added), *citing Greyzck v. West*, 12 Vet.App. 288, 291, *dismissed*, 217 F. 3d 853 (Fed. Cir. 1999). But Appellant’s position conflicts with the case law in two ways.

First, *Hodges* governs well-grounded claims and not claims on the merits. Prior to the Veterans Claims Assistance Act of 2000, claimants had to submit well-grounded claims before the Agency would assist them in substantiating their claims by obtaining certain evidence, including the provision of VA examinations. See 38 U.S.C. § 5107(a) (1988). In determining whether a claim was well grounded, the rater could not weigh the evidence and had to presume the credibility of the claimant, similar to cases pending reopening based on new and material evidence. See *Elkins v. West*, 12 Vet.App. 209, 218-19 (1999) (discussing the distinctions between new and material evidence and well-grounded claims).

Second, the appellant in *Hodges* did not prevail, even with the easier threshold of well groundedness, because there was a lack of competent evidence to show that the condition that he had in service and after service was the same as his current disability.

Setting aside any distinction between the determination of well groundedness versus consideration of a claim on the merits, in *Hodges* the Court was confronted with two closely related, but not identical conditions – “reflux esophagitis” and “hiatal hernia with esophogastric reflux.” *Hodges*, 13 Vet.App. at 291-92. It is clear that Mr. Hodges’s conditions, while not diagnosed the same, addressed the same part of the body: the esophagus. However, Appellant’s in-service injury pertained to the neck muscles and throat, when he was choked in 1985, whereas now he is diagnosed with skeletal disorders: DDD, DJD, and arthritis. See [R. at 294]; see also [R. at 479].

Appellant fails to mention a crucial element in determining chronicity, which is “whether [or not] the disability is the type that requires medical expertise to demonstrate its existence. See *Savage v. Gober*, 10 Vet.App. 488, 495 (1997), citing *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997). The Board essentially addressed this question when it determined that the Veteran “may not submit competent testimony as to the medically complex question of the etiology of his cervical spine disability.” See [R. at 7]; see generally *Jandreau*, 492 F.3d 1375.

Ultimately, the Board correctly found that Appellant’s present day, chronic conditions, were not related to in-service injuries because the record does not

reflect a nexus between the in-service injuries sustained and the present-day diagnoses. Appellant's lack of expertise in diagnosing complex, medical conditions fails to demonstrate how the Board's findings were clearly erroneous.

3. The Board did not err when it determined that further examinations were not required, pursuant to the McLendon standard

The Board found insufficient evidence to warrant further examinations of Appellant's thoracolumbar spine disability, pursuant to *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), because there was insufficient evidence to relate the present thoracolumbar spine disability to an in-service injury. [R. at 8].

The Board noted that Appellant sought treatment in 1986 for what appeared to be a back sprain, sustained after riding his bike but there were no further mentions of back issues or a back disability. [R. at 3645]. As a result, the Board found the complaints from 1986 to have been *acute and transitory*, and not the result of a lasting disability. [R. at 8]. A 2013 September VA examination found no diagnoses of any thoracolumbar spine condition, and no complaint of any lower back pain. [R. at 288]. However, a May 2014 treatment record did reflect that there was "mild degenerative arthritis in the lumbosacral spine," but such an injury was not attributed to service. [R. at 2421].

For these reasons, the Board found that there was insufficient evidence to relate the thoracolumbar spine disability to service. [R. at 8]. Furthermore, the Board found insufficient evidence to warrant further examinations pursuant to *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), as the Board did not consider the

single service treatment record from 1986 regarding a short-term back sprain sufficient to indicate a relationship to Appellant's mild degenerative arthritis in the lumbosacral spine so many years after service. [R. at 8]. Similar to its assessment regarding the cervical spine, as symptoms did not appear within a year of service, there is no evidence of continuity of symptomatology to warrant a presumptive theory of chronic disease. *Id.*

For these reasons, the VA acted appropriately in not ordering further examinations pertaining to Appellant's thoracolumbar spine disability.

4. The Board's discussion of the evidence of record is sufficient to facilitate judicial review

The Board reasonably discussed the medical opinions found in the record and determined that the preponderance of the evidence did not support an entitlement to service connection for the cervical or thoracolumbar spinal disability. While the Board did not discuss every piece of evidence contained in the 4,061-page record, it discusses enough to facilitate judicial review.

The Board does not need to comment on every piece of evidence contained in the record, and even when the Board fails to provide an adequate statement of reasons or bases, remand is appropriate only if the inadequacy is preclusive of judicial review, because a remand for a reasons or bases error would be of no benefit to the Appellant and would therefore serve no useful purpose. See *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).; see also *Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005).

The Secretary does not deny that Appellant was diagnosed with laryngeal nerve palsy – an injury to the voice box – as a result of the trauma sustained when he was choked. [R. at 3440]. The Secretary also does not deny that Appellant’s lower back was sprained for three days after riding a bike. [R. at 3645]. However, the foundation of the Board’s rationale is that the process of being choked unconscious and riding a bike was less likely than not related to Appellant’s present-day diagnoses of arthritis or any form of DJD or DDD almost three decades later, especially when, less than six months after the injury, Appellant showed no signs of neck pain, and there were no further mentions in the STRs of back pain. [R. at 3673].

Appellant contends that the Board improperly relied upon the September 2013 and February 2016 VA examinations. App. Brf. at 23. However, this is not the case. For example, Appellant states that the VA examiner failed to provide a diagnosis for Appellant’s thoracolumbar spine condition in the September 2013 thoracolumbar examination report. App. Brf. at 24. But “[Appellant] state[d] that his problem has been with the cervical spine. [Appellant] is not complaining of chronic lumbar or thoracic pain.” [R. at 288]. Appellant cannot tell a medical examiner that he is not experiencing pain, and then cry foul when the Board relies upon a medical examiners assessment that “there is a note in his service records[,] November 26 1986[,] of 3 days of central lower back pain but there have been no further significant lumbar back problems.” [R. at 301]. Appellant’s critique of the February 2016 cervical spine examination report is unpersuasive, because he

mistakenly asserts that a rationale or etiology was not provided for the DDD within his cervical spine injury, even though one was provided. See App. Brf. at 25; see *also* [R. at 735].

Appellant's assertion that the Board failed to consider favorable evidence is unpersuasive, because the records he provides are either unrelated to the issues on appeal or were already considered. He states that the Board should have discussed an incident where he fell out of a tree (the chief complaint was a turned ankle), discussed an event where he felt like his back was pinched (this was considered by the Board as this part of the medical report pertaining to his initial back disability, which was injured while riding a bike), and a lay statement from an October 2012 Board hearing (where he avers he was struck in the hip by a vehicle during a training exercise in late 1986, sustained a large bruise, and was provided a week of light duty, although no such record of medical treatment exists in his STR). See App. Brf. at 26-7; see *also* [R. at 3408]; see *also* [R. at 3643-45]; see *also* [R. at 3755].

Appellant dismisses the medical examiner's opinions, stating, "[t]he September 2013 and February 2016 VA medical opinions are only that, opinions." He does not recognize that these are the competent opinions of medical professionals, whose probative value far outweighs that of Appellant's lay opinions. See App. Brf. at 28; see *generally Nieves-Rodriguez*, 22 Vet.App. 295, 302 (2008); *Jandreau v. Nicholson*, 492 F.3d 1372. Contrary to Appellant's dismissal of the Board's findings, the Board reasonably discussed the medical opinions found in

the record and determined that the preponderance of the evidence did not support an entitlement to service connection for the cervical or thoracolumbar spinal disability.

C. The Board fulfilled its duty to assist in providing Appellant with adequate examinations for his cervical and thoracolumbar spine disabilities

Medical 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 v. Shinseki*, 26 Vet.App. 97, 106 (2012), *citing Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). They must be “based upon consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one.” *See Stef v. Nicholson*, 21 Vet. App. 120, 123 (2007) (*citing Ardison v. Brown*, 6 Vet.App. at 407).

In both 2013 and 2016, VA medical examiners thoroughly reported on Appellant’s cervical spine disabilities, and in 2013, thoroughly reported on Appellant’s thoracolumbar spine disabilities, clearly referencing relevant elements of Appellant’s medical history, both during his time in service and afterwards, to include noting discrepancies in Appellant’s assertions of long-term injuries. *See* [R. at 294]; *see also* [R. at 726], *see also* [R. at 288].

Appellate asserts that the September 2013 and February 2016 medical opinions are inadequate because they are based upon a misunderstanding of the law. App. Brf. at 31. But Appellant is mistaken because the information reported

was not based upon legal theory, but upon the facts present in the record. Appellant continues to rely upon the premise that, because Appellant did not receive the “same diagnoses in service as his current diagnoses,” that the Board erred. App. Brf. at 33. But, as more fully argued in section IV.A.1 of the Secretary’s brief, the Board essentially determined that only a competent, medical opinion may find that there is a nexus between the continuous symptomatology and the current disability. See *Savage v. Gober*, 10 Vet.App. at 495.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board’s November 28, 2018, decision should be affirmed.

Respectfully submitted,

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