Vet. App. No. 19-0697

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CHARLES R. BARWICK,
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-0697
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

Whether the Court should affirm the November 21, 2018, decision of the Board of Veterans' Appeals (Board) that denied Appellant's claims for entitlement to service connection for a low back disorder, left wrist carpal tunnel syndrome (CTS), and right wrist CTS.

II. STATEMENT OF THE CASE

Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

Nature of the Case

Charles R. Barwick, (Appellant), appeals the November 21, 2018, decision of the Board that denied his claims for entitlement to service connection for a low back disorder, left wrist CTS, and right wrist CTS.

Statement of Relevant Facts

Appellant served on active military duty from December 1957 to December 1960. [R. at 1081]. A February 1959 service treatment record reveals Appellant complained of back pain of one-week duration. [R. at 890]. His November 1960 separation examination noted a normal spine and other musculoskeletal systems. [R. at 888, (888-889)]. Appellant's service treatment records are negative for any treatment, complaints or diagnosis of CTS.

In November 2012, over 50 years after service, Appellant filed a Department of Veterans Affairs (VA) application for entitlement to service connection for a low back disability and bilateral wrist CTS. [R. at 1092-1110]. A September 2013 rating decision denied the claims. [R. at 704-713]. In October 2013, Appellant filed a Notice of Disagreement (NOD). [R. at 680-681]. A Statement of the Case (SOC) was issued in September 2014, [R. at 641-662], and in October 2014, Appellant perfected his appeal. [R. at 638-640]. Appellant stated his CTS could have resulted from his duties as a radio intelligence operator where he typed his entire shift. [R. at 638]. He further stated he hurt his back and had to go to sick bay many times. *Id.* A Supplemental SOC (SSOC) was issued in October 2016. [R. at 342-347].

Appellant was provided a Board hearing in February 2017. [R. at 272-299]. He testified that while in service, he served as a communications technician and typed all the time. [R. at 274]. Appellant reported he began to experience numbness in his hands about 20-25 years ago. *Id.* He stated that for the last 35

years, he served as a postmaster for a small post office and sorted mail in a repetitive manner. [R. at 275-276].

Regarding his back, Appellant testified that in March 1959, while diving and swimming in a pool, his back started hurting. [R. at 279]. Appellant stated the pain worsened until he went to sick bay where he was treated with a heat lamp several times a day until it got better. *Id.*

In November 2017, the Board remanded Appellant's low back and CTS claims to provide Appellant an examination. [R. at 240, (231-242)]. In January 2018, Appellant was provided VA examinations. [R. at 199-217]. At the back examination, the examiner diagnosed degenerative arthritis of the spine. [R. at 199]. The examiner noted Appellant's report of in-service injury to his back, going to sick bay and being treated with a heat lamp, and going to a chiropractor after service. [R. at 200]. The examiner also noted Appellant's separation physical was normal, and medical records from a chiropractor dated from November 1998. *Id*.

The examiner opined it was less likely than not that Appellant's current back condition was related to service. [R. at 208]. The examiner acknowledged Appellant's one in-service medical treatment record notating back pain as well as his normal separation physical with no evidence of continued back problems until almost 40 years later. [R. at 207]. The examiner explained degenerative disc disease is usually caused by wear and tear of everyday life and common among men as they age. [R. at 208]. He explained there was no evidence of trauma or chronic back disease during service, that Appellant could have experienced back pain for many

years as reported, and survey results show that more than a quarter of adults reported experiencing back pain within the past 3 months and that it was acute, or short term and lasted a few days to a few weeks and tended to resolve on its own. *Id.* The examiner opined that without emergency room or clinical visits imaging or other evidence to suggest chronic lumbar spine condition until 1998, he could not find a nexus to service. *Id.*

Regarding CTS, the examiner diagnosed CTS. [R. at 211]. Appellant reported that about 30 years ago he began experiencing numbness in his hands after driving for long periods of time. *Id.* The examiner opined that it was less likely that Appellant's CTS was related to his military service. [R. at 209]. The examiner noted that service treatment records did not show treatment or diagnosis of CTS. *Id.* The examiner explained that CTS was caused by compression of the median nerve and typing by itself does not cause CTS. *Id.* The examiner opined that given the few years that Appellant was required to type and the many years of labor afterward that Appellant's CTS was less likely due to typing in service. [R. at 209-210]. SSOCs were issued in June and August 2018. [R. at 95-118; 144-169].

The Board issued the decision on appeal on in November 2018, determining that the preponderance of the evidence was against finding a nexus between Appellant's low back disability and bilateral CTS and his military service. [R. at 8; 10 (2-12)]. This appeal ensued.

III. SUMMARY OF ARGUMENTS

The Court should affirm the November 21, 2018, decision of the Board that denied Appellant's claim for entitlement to service connection for a low back disability, left wrist CTS and right wrist CTS. The Board provided an adequate statement of reasons or bases for its determinations, plausibly based its determination on the facts and application of the law as well as adequate examinations, and Appellant has not demonstrated that the Board's decision was clearly erroneous or the result of prejudicial error.

IV. ARGUMENT

A. The 2018 VA Examination is Adequate and the Board Provided an Adequate Statement of Reasons or Bases for Its Denial of Appellant's Claim of Entitlement to Service Connection for a Low Back

Appellant contends the January 2018 VA examination is inadequate. [Appellant's Brief (App. Br.) at 10]. An adequate examination is based on the veteran's prior medical history and the examiner must describe the disability in sufficient detail so that the Board can provide a fully informed evaluation of the claimed disability. *Stefl v. Nicholson,* 21 Vet.App. 120, 123 (2007). The Board's determination as to whether a medical examination is adequate and its determination as to the proper disability rating are findings of fact, which the Court reviews under the "clearly erroneous" standard. *D'Aries v. Peake,* 22 Vet.App. 97, 104 (2008) (per curiam).

Appellant first contends the VA examiner based his opinion on an inaccurate factual premise. [App. Br. at 10]. He asserts his lay statements of continued back problems contradict the examiner's rationale. [App. Br. at 11]. But review of the examination report reveals the opinion is based in fact because the examiner considered lay statements of back problems. The VA examiner considered Appellant's in-service report of injury, including Appellant's assertions of going to sick bay and receiving heat lamp treatment, and that after service he was treated by a chiropractor for his back pain. [R. at 200]. Indeed, Appellant later contradicts himself and concedes that the examiner did consider his lay testimony. [App. Br. at 12]. So, contrary to Appellant's contentions, the examiner specifically considered lay statements that he sought chiropractic treatment after discharge in full compliance with the law. [App. Br. at 11].

Moreover, medical examiners do not have a reasons or bases requirement. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012); *see also Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) ("The medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability."), *rev'd on other grounds sub nom Moore v. Shinseki*, 555 F. 3d 1369 (Fed. Cir. 2009). However, after considering this lay evidence, one episode of back pain in 1959, and a normal separation physical, the examiner opined that there was no evidence of back trauma or chronic back disease during service. [R. at 208]. The examiner stated Appellant could have experienced episodes of back pain for many years as he reported, but still opined

against a link to service because of a variety of factors. Specifically, the examiner's opinion was based on there being 1. a lack of evidence in service of trauma to the back or of chronic back disease during service, 2. a normal separation examination, 3. the medical fact that wear and tear of everyday life and gender are more likely risk factors, 4. the lack of any radiographic evidence showing old injury or trauma; and 5. the gap in time of nearly 40 years of no complaints or visits or imaging until chiropractor notes in 1998. [R. at 208]. Thus, contrary to Appellant's assertions, the examiner's opinion was clearly not simply based on lack of contemporaneous medical evidence as the examiner also considered the normal separation examination, gap in time, other more likely risk factors, and lack of radiographic evidence showing old injury or trauma. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 n.1 (Fed. Cir. 2006); *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007) (both finding medical opinions inadequate due to the examiner's reliance solely on the absence of objective documentation without consideration of a claimant's lay statements). As such, Appellant's contention is not persuasive.

To the extent Appellant asserts the examination report did not comply with the November 2017 Board remand instructions to acknowledge and consider his report of symptoms, [*see* R. at 241], his contentions are also without merit. [App. Br. at 13]. The evidence shows the VA examiner acknowledged and considered his reports of symptoms, in full and substantial compliance with the remand order. [R. at 208]*; Stegall v. West*, 11 Vet.App. 268, 271 (1998). Therefore,

because the January 2018 examination and opinion are adequate regarding Appellant's low back in accordance with the November 2017 Board remand instructions, Appellant's arguments otherwise are unpersuasive.

Appellant next contends the Board did not provide adequate reasons or bases for its determinations. [App. Br. at 15]. He specifically argues the Board did not adequately address continuity of symptomatology. *Id.* The Board must provide a statement of the reasons or bases for its determinations that are adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Moody v. Wilkie,* 30 Vet.App. 329, 339 (2018). To accomplish this, the Board is required to assess the credibility, probative value, and persuasiveness of the evidence and to provide reasons for rejecting material evidence that is favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F. 3d 604 (Fed. Cir. 1996) (table).

For chronic diseases listed in 38 C.F.R. § 3.309(a) such as arthritis, service connection may be established by showing continuity of symptoms. 38 C.F.R. §§ 3.303(b), 3.309(a). A claimant must demonstrate (1) that a condition was "noted" during service; (2) evidence of post-service continuity of symptoms; and (3) medical or, in certain circumstances, lay evidence of a link between present disability and post-service symptoms. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331, 1340 (Fed. Cir. 2013).

Here, the Board acknowledged Appellant's current diagnosis of degenerative arthritis of the lower spine. [R. at 6]. The Board further acknowledged arthritis is a chronic disease under 38 C.F.R. § 3.309(a) and that service connection could be awarded solely based upon continuity of symptomatology. [R. at 7-8]. However, the Board acknowledged Appellant's back complaints and subsequent treatment, but noted that the medical evidence still could not show a link. [R. at 8]. The Board explained therefore there was no bases for an award based on continuity of symptoms as Appellant's arthritis diagnosis could not be attributed to any earlier back complaints. [R. at 8]. Thus, the Board considered § 3.303(b), but did not need to further discuss the application of § 3.303(b) because arthritis was not diagnosed in service or an applicable presumptive period, and the VA examiner attributed Appellant's current diagnosis to normal wear and tear and aging. [R. at 8; 208]. This conclusion is supported by an adequate statement of reasons or bases and is plausibly based on the evidence of record. Therefore, the Board's decision should be affirmed.

B. The Board Provided an Adequate Statement of Reasons or Bases for its Denial of Appellant's Claim for Entitlement to Service Connection for Bilateral Wrist CTS Because it Was Plausibly Based on the Facts and the Law, and Appellant has not Demonstrated the Board's Decision is Clearly Erroneous or the Result of Prejudicial Error.

The Court should affirm the Board's decision that denied Appellant's claims for entitlement to service connection for left wrist CTS and right wrist CTS

because there is a plausible basis for the Board's determinations, and Appellant has not demonstrated the Board's decision contained prejudicial error. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009), 129 S. Ct. 1696, 173 L.ED. 2d 532 (2009) (Appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (noting that the appellant bears the burden of persuasion on appeals to the Court) *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The Board acknowledged Appellant's current diagnosis of CTS. [R. at 8]. It weighed Appellant's in-service typing, his 39-year post-service sorting mail, the absence of in-service complaints of wrist or hand injury, and the VA examiner's negative nexus opinion and concluded that the preponderance of the evidence weighed against a finding that Appellant's CTS began in service or is related to service. [R. at 10].

Appellant argues the Board failed to provide adequate reasons or bases for finding the VA examination adequate. [App. Br. at 17]. Specifically, he asserts the examiner noted that typing was not a major risk factor for CTS, but he should address whether it played a "minor" role in developing his CTS. *Id.* Appellant's contentions are without merit.

After reviewing the medical evidence, including Appellant's report that he began experiencing numbness in his hands after driving for long periods of time about 30 years ago, [R. at 211], the examiner opined that it was less likely that Appellant's CTS was related to his military service. [R. at 209]. The examiner noted

that Appellant's service treatment records did not show treatment or diagnosis of CTS and explained that CTS was caused by compression of the median nerve, which typing, by itself, does not cause. *Id.* The examiner further explained that given the few years that Appellant was required to type in service compared to the many years of labor afterward, that Appellant's CTS was less likely due to typing in service. [R. at 209-210]. Contrary to Appellant's contentions, the issue is not whether typing played any role in the development of his CTS, [App. Br. at 18], but whether it is more likely than not that his current CTS is related to his military service, to include typing. The examiner opined that it was not and provided adequate rationale explaining why. While Appellant disagrees with the examiner's opinion and the Board determination, this is not error. *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (holding that the "[a]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence"). This is because it is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence. *Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). As explained above, the Board made plausible factual findings based on the evidence of record. Thus, Appellant's argument amounts to nothing more than a mere disagreement with the Board's conclusions, which cannot constitute error warranting remand.

Additionally, despite not raising this before the Board, Appellant also now argues that the February 2017 Board Veteran's Law Judge (VLJ), failed to comply with his duties to assist regarding his CTS claim. [App. Br. at 19]. The Court "has discretion as to whether it will entertain arguments raised for the first time on appeal" and may "decline to consider them on the ground that the veteran did not exhaust his or her administrative remedies prior to appealing to the Court." *Massie v. Shinseki*, 25 Vet.App. 123, 126 (2011). To the extent the Court considers Appellant's argument, the Secretary maintains that the VLJ fulfilled his duty to assist.

In *Bryant v. Shinseki*, the Court held that "a hearing officer has a duty to fully explain the issues still outstanding that are relevant and material to substantiating the claim." 23 Vet.App. 488, 496 (2010); *see Procopio v. Shinseki,* 26 Vet.App. 76, 82 (2012); 38 C.F.R. § 3.103(c)(2) ("It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would of advantage of the claimant's position."). The Court emphasized that "[b]ecause there is no requirement to preadjudicate an issue or weigh the evidence, the hearing officer's review of the record in preparation for the hearing is one that should focus on the issues that remain outstanding, and whether evidence has been gathered as to those issues." *Bryant*, 23 Vet.App. 488 at 496. The Court found that such error in identifying and raising outstanding claims on appeal was harmless where there was no indication that the veteran had any additional information to submit. *Id.* at 499.

Appellant contends the VLJ did not inform him of why the RO denied his CTS claims. [App. Br. at 19]. The VLJ did not explain what evidence Appellant needed to provide evidence in order to substantiate his claims. [R. at 272-299]. But Appellant failed to show prejudicial error where he was subsequently provided a medical examination addressing the outstanding issues of a current disability and in-service incurrence injury. *See Bryant*, 23 Vet.App. at 498-99 (holding that the Board member's failure to explicitly lay out material issues was harmless where the record included medical examination reports addressing current disability and medical nexus). The Board accepted his testimony of an in-service event of typing and then compared it to and weighed it against his 39-year post-service sorting mail, the absence of in-service complaints of wrist of hand injury, and the VA examiner's negative nexus opinion, to determine that the preponderance of the evidence was against his claims. [R. at 10]. Appellant fails to demonstrate prejudicial error. *Shinseki v. Sanders*, 556 U.S. at 409; *Hilkert v. West,* 12 Vet.App. at 151. Therefore, his argument is unpersuasive.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the November 2018 Board's denial of Appellant's claims.

Respectfully submitted,

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