Vet. App. No. 19-570

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

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**FLOYD B. SULLIVAN,**
Appellant,

**v.**

**ROBERT L. WILKIE,**
**Secretary of Veterans Affairs,**
Appellee.

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**ON APPEAL FROM THE**
**BOARD OF VETERANS' APPEALS**

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# BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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**ON APPEAL FROM**
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# BRIEF OF APPELLEE
# SECRETARY OF VETERANS AFFAIRS

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## I. ISSUE PRESENTED

Whether the Court should remand the October 19, 2018, decision of the Board of Veterans' Appeals (Board) that denied service connection for a low back disability.

## II. STATEMENT OF THE CASE

### Nature of the Case

Appellant, Floyd Sullivan, appeals the October 19, 2018, decision of the Board that denied service connection for a low back disability. [Record Before the Agency (R.) at 4 (4-11)].

## Statement of Facts and Procedural History

Appellant served on active duty from September 1969 to December 1972. [R. at 1609].

Appellant's entrance medical examination showed a normal spine upon clinical evaluation. [R. at 952-53, 962-63]. A November 1970 periodic examination showed a normal spine on clinical evaluation. [R. at 968-69]. In August 1971, Appellant was seen three times for muscle aches and general aches and pains. [R. at 938-39]. However, he was diagnosed with either the viral flu or mild gastroenteritis at those visits and not a back condition. [R. at 938-39]. While stationed on the U.S.S. Ticonderoga, Appellant was seen for complaints of a cyst on his right thigh, for asthma, and for a rash, but there were no records for complaints of or treatment for a back condition. [R. at 956-57]. The Veteran's separation examination showed a normal spine upon clinical evaluation. [R. at 958-59].

In March 1996, Appellant received treatment for low back tightness from a private physician, Dr. Lohmeier. [R. at 1080 (1048-83)]. A treatment note indicated that the onset of the low back tightness was in March 1996. [R. at 1080]. An April 1997 treatment record indicated that Appellant's back started hurting after he got out of his pickup truck. [R. at 1064-65]. The private treatment records obtained from Dr. Lohmeier did not include an etiology opinion. [R. at 1048-83].

From 1997 to 1998, Appellant received treatment from another private physician, Dr. Resler. [R. at 1026-42]. Dr. Resler provided a diagnosis of L-5

lumbar spondylolisthesis. [R. at 1028, 1036]. The private treatment records obtained from Dr. Resler did not include an etiology opinion. [R. at 1026-42].

From 2000 to 2003, Appellant received treatment from a chiropractor, Dr. DeLong. [R. at 1106-14]. Appellant reported lower back pain. [R. at 1108]. The private treatment records obtained from Dr. DeLong did not include an etiology opinion. [R. at 1106-14].

In 2008, Appellant received treatment for lower back pain from another private physician, Dr. Norris. [R. at 1001-11]. Dr. Norris reported that Appellant had the back pain "for about the last 4-5 years." [R. at 1010]. Dr. Norris diagnosed Appellant with "lumbosacral somatic dysfunction, DDD, left sciatic neuralgia." [R. at 1010]. Dr. Norris stated: "I think the patient's symptoms are due to degenerative disc disease resulting in slight nerve root irritation, and this is complicated by his diabetes." [R. at 1010].

VA treatment records show treatment for low back pain. [R. at 1258-59]. An April 2002 physical therapy note showed that Appellant reported having back pain all his life, but pain going down his legs only for the past two to three months. [R. at 1258]. The clinician noted that Appellant had posture-increased lumbar lordosis with a protruding abdomen, and anterior pelvic tilt. [R. at 1258]. An April 2004 VA treatment record showed that he denied having back pain. [R. at 1257 (1257-58)]. An October 2007 note indicated that the Veteran hurt his low back playing golf one month earlier. [R. at 1336 (1335-37)].

In July 2009, Appellant filed an application for compensation for a back disability. [R. at 1293-1301]. Appellant claimed that his back disability resulted from work in the Navy as a stock clerk, which routinely required him to lift heavy objects. [R. at 1295]. In September 2009, the regional office issued a rating decision that denied service connection for a lower back condition. [R. at 1267-69]. Appellant subsequently submitted additional evidence, including medical records and lay statements. [R. at 1001-11, 1026-42, 1048-83, 1106-14, 1157-68].

A statement from Dr. William Eamis indicated that he had known Appellant since 1961 and that Appellant began having trouble with his back following active service. [R. at 1157-58]. A statement from Eddie Aday indicated that he has known Appellant for over forty years and noticed that Appellant has had back and leg problems over the years. [R. at 1159-60]. A statement from Mike Collier indicated that he has known Appellant most of his life and reported witnessing the rapid deterioration in Appellant' back and legs for several years. [R. at 1161-62]. A statement from Appellant's daughter indicated that she noticed Appellant's back pain when she was a child. [R. at 1163-64]. A statement from Appellant's wife indicated that she has known Appellant since 1972 and she witnessed him suffering from back pain since separation from service. [R. at 1165-66]. A statement from Appellant's daughter-in-law indicated that she had known Appellant for a few years and has noticed his back problems. [R. at 1167-68].

In February 2010, the regional office issued a new rating decision. [R. at 990-94]. The regional office reconsidered Appellant's claim along with the additional evidence submitted. [R. at 994]. The regional office continued and confirmed the previous denial of service connection for a lower back condition. [R. at 994]. In February 2011, Appellant submitted a notice of disagreement. [R. at 921-22]. In November 2011, the regional office issued a statement of the case that continued the denial of service connection for a lower back condition. [R. at 871-90]. In December 2011, Appellant appealed to the Board. [R. at 844]. On October 24, 2013, the Board issued a decision remanding Appellant's claim for additional development. [R. at 742-46].

In December 2015, Appellant was afforded a VA examination. [R. at 691-703]. According to the examination report, Appellant indicated that his symptoms began in 1972. [R. at 692]. Appellant stated that, during service, he was climbing a ladder and carrying heavy helicopter parts when he fell and the parts fell on him. [R. at 692]. The examiner provided a nexus opinion, finding it less likely than not that Appellant's condition was caused by the claimed in-service event. [R. at 702]. In January 2015, a supplemental statement of the case was issued that continued the denial of service connection for a low back disability. [R. at 584-88].

In July 2016, the Board issued a decision finding the VA medical opinion inadequate and remanding for a new examination and opinion. [R. at 360-63]. In December 2016, Appellant was afforded a second VA examination. [R. at 288-97]. The examiner provided a nexus opinion, finding it less likely than not that

Appellant's condition was caused by the claimed in-service event. [R. at 296]. In January 2017, the regional office issued another supplemental statement of the case that continued the denial of service connection for a low back disability. [R. at 264-76].

In September 2017, the Board issued a decision finding the second VA medical opinion inadequate and remanding for a new nexus opinion. [R. at 172-76]. The Board provided the following specific instructions:

> In reaching his/her opinion, the examiner **MUST** presume that the Veteran is a reliable historian with regard to his reports of the onset of his back pain, the continuity of his symptoms since separation from active service, and his assertions regarding heavy lifting during active service. The examiner **MUST** also consider the multiple buddy statements of record regarding observations of the Veteran experiencing back pain since separation from service.
>
> The examiner must provide a **THOROUGH** rationale for any opinion expressed and reconcile it with the pertinent evidence of record, notably, the Veteran's lay assertions regarding his symptoms, as well as the statement from Dr. W.E. from September 2009 recalling the Veteran's reports of back pain dating back to 1961.
>
> If the examiner rejects the lay assertions concerning continuity of symptomatology, the examiner should explicitly state the reasoning as to why they are being rejected and why those statements are medically consistent or inconsistent with the findings of the examination.

[R. at 175]. In October 2017, the examiner provided an addendum opinion, finding it less like than not that any current low back disability had its onset during Appellant's active service or was otherwise etiologically related to such service.

[R. at 64-67]. The examiner analyzed the evidence in support of Appellant's claim as follows:

> The above evidence does not support that a low back injury occurred while on active duty nor is there evidence of symptomatology or objective findings of a diagnosis of chronic low back condition while on active duty. The medical records are then silent between 1972 and 1996 without evidence of complaints or objective findings of a low back condition. This is a twenty four year period of silent medical records. If a disabling low back condition occurred as the result of the Veteran's period of active duty one would have expected to have seen objective documentation of low back complaints while on active duty and/or in the years soon following active duty. Instead there were no complaints documented while on active duty and none documented following separation until March of 1996. The March of 1996 notes indicate that "March of 1996 was the onset of symptoms reported." His buddy statements do not support a low back disability during the years in between active duty and 1996 and instead indicate that the Veteran was able to golf, hunt, travel and play ball. This is also supported in October of 2007 in his primary care notes when he indicates low back pain after golfing. The letter from Dr. WE indicates that he has known the Veteran since 1961 but does [not] indicate that he was his treating provider. There [are] no supportive objective findings from his practice provided to support his findings in the letter.

[R. at 66-67].

In December 2017, the regional office issued another supplemental statement of the case that continued the denial of service connection for a low back disability. [R. at 46-63]. On October 19, 2018, the Board issued its decision that denied service connection for a low back disability. [R. at 4]. The Board found

the October 2017 VA opinion to be adequate and "highly persuasive." [R. at 10]. This appeal ensued.

## III. SUMMARY OF ARGUMENT

The examiner complied with the Board's instructions by presuming that Appellant was a reliable historian and by considering the multiple buddy statements of record. The examiner was not required to treat the presumption as an irrefutable fact.

The Secretary concedes that the VA examination was otherwise inadequate because it misstated a material fact. An adequate medical examination must rest on correct facts. Remand is warranted on this basis.

## IV. ARGUMENT

### A. Standard of Review.

"Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). It is relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

### B. The examiner complied with the Board's instructions.

Appellant argues that the 2017 VA examiner "refused to accept" that Appellant is a reliable historian and "failed to comply with the Board's instruction

[to consider] the buddy statements." [Appellant's Brief (App. Br.) at 6-8]. These arguments are misplaced; the examiner fully complied with the Board's instructions.

The Secretary agrees that compliance is required with the Board's remand instructions. A remand by the Board "confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). While this imposes on the Secretary an obligation to ensure compliance with the terms of a remand order, it is substantial compliance, not strict or absolute compliance that is required. *D'Aires v. Peake*, 22 Vet.App. 97, 105 (2008).

Here, the Board instructed the examiner to (1) "presume that the Veteran is a reliable historian with regard to his reports of the onset of his back pain, the continuity of his symptoms since separation from active service, and his assertions regarding heavy lifting during active service;" (2) "consider the multiple buddy statements of record regarding observations of [Appellant] experiencing back pain since separation from service;" and (3) provide a thorough rationale for any opinion expressed and reconcile it with the pertinent evidence of record. [R. at 175]. The Board further instructed that "[i]f the examiner rejects the lay assertions concerning continuity of symptomatology, the examiner should explicitly state the reasoning as to why they are being rejected and why those statements are medically consistent or inconsistent with the findings of the examination." [R. at 175].

In the October 2017 VA opinion, the examiner directly addressed the presumption:

> The VBA, per review of remand/2507 has determined that the veteran is a reliable historian with regard to reports of the onset of his back pain, continuity of his symptoms since separation and his assertions regarding heavy lifting during active service. Though these reports by the Veteran were reviewed and considered the examiner notes that the presumption made by the VBA of reliability is consistent with administrative legal issue but is not consistent with the objective medical documentation available in this case. Legal and administrative determination is not the expertise of this examiner and instead the medical basis for the opinion will be provided.

[R. at 65]. Thus, the examiner acknowledged the presumption and noted that the presumption that the veteran is a reliable historian is "not consistent with the objective medical documentation available in this case." [R. at 65]. The examiner then outlined the pertinent medical evidence of record and explained:

> The above evidence does not support that a low back injury occurred while on active duty nor is there evidence of symptomatology or objective findings of a diagnosis of chronic low back condition while on active duty. The medical records are then silent between 1972 and 1996 without evidence of complaints or objective findings of a low back condition. This is a twenty four year period of silent medical records. If a disabling low back condition occurred as the result of the Veteran's period of active duty one would have expected to have seen objective documentation of low back complaints while on active duty and/or in the years soon following active duty. Instead there were no complaints documented while on active duty and none documented following separation until March of 1996. The March of 1996 notes indicate that "March of 1996 was the onset of symptoms reported." His buddy statements do not support a low

> back disability during the years in between active duty and 1996 and instead indicate that the Veteran was able to golf, hunt, travel and play ball. This is also supported in October of 2007 in his primary care notes when he indicates low back pain after golfing. The letter from Dr. WE indicates that he has known the Veteran since 1961 but does indicate that he was his treating provider. There is no supportive objective findings from his practice provided to support his findings in the letter.

[R. at 66-67].

Appellant misunderstands how a presumption works, complaining that the examiner "refused to accept that [Appellant] is a reliable historian" which was "[e]ssentially thumbing her nose at the Board's instruction." [App. Br. at 6]. However, the Board did not instruct the examiner to accept this fact as true. Making a presumption is different from accepting a fact as true. To presume means "to suppose to be true without proof" as in "*presumed* innocent until proved guilty." *Presume*, Merriam-Webster Online Dictionary (2020), https://www.merriam-webster.com/dictionary/presume (last accessed Jan. 19, 2020). In other words, the presumption is merely a starting point that lasts until the presumed fact is rebutted by other evidence.

The Board's remand decision indicates that the examiner was free to reject the lay assertions. The Board stated that "[i]f the examiner rejects the lay assertions concerning continuity of symptomatology, the examiner should explicitly state the reasoning as to why they are being rejected and why those statements are medically consistent or inconsistent with the findings of the examination." [R.

at 175]. This paragraph shows that the presumption could be rebutted by other evidence.

Appellant is mistaken as to the import of the Board's overall language. Appellant asserts that:

> the Board's language here establishes that it found Mr. Sullivan competent and credible regarding his ability to report the onset of his back pain, the continuity of his symptoms since separation from service, and his assertions regarding heavy lifting during service. It also establishes that it found the authors of the buddy statements competent to describe their observations of Mr. Sullivan experiencing back pain.

[App. Br. at 6]. The Board's language does not convey that the Board made credibility findings. The Board's language merely instructed the examiner to presume credibility to facilitate a decision on Appellant's claim. Requiring examiners to make such presumptions facilitates Board decisions because the Board is responsible for making the ultimate findings on credibility and the Board might disagree with evaluations of credibility, especially when the Board considers evidence not considered by the examiner. It frustrates a Board's decision when an examiner's evaluation is based on a negative credibility determination which the Board does not agree with. Thus, such presumptions serve a practical function for the Board and do not signal that the Board has already made favorable credibility determinations. *See Miller v. Wilkie*, __ Vet.App. __, No. 18-2796, 2020 U.S. App. Vet. Claims LEXIS 64, at *25 (Jan. 16, 2020) ("a medical opinion may inform the Board about credibility").

As for the requirement for the examiner to "consider the multiple buddy statements of record," the record shows compliance. The examiner specifically acknowledged this instruction and stated "[t]hese statements were reviewed and considered." [R. at 65]. Although Appellant complains that this requirement was not met because the examiner did not address specific lay statements [App. Br. at 8-9], examiners do not have a duty to discuss favorable evidence in a statement of reasons or bases. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) ("There is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file.").

To the extent that Appellant argues that the examiner failed to address Appellant's lay testimony as instructed, Appellant's reliance is misplaced on language that pertained to a prior remand. Appellant argues that the Board noted that "the opinion must contain consideration of 'the Veteran's reports regarding onset of symptoms in service and his description of lifting heavy objects during service.'" [App. Br. at 7]. For this quoted language, Appellant cites to page 173 of the record. [App. Br. at 7]. However, on this page of the record, this quoted language pertained to instructions from the July 2016 remand that were not followed by the December 2016 VA examiner. [R. at 173]. In the September 2017 Board decision, the instructions for the examiner begin on page 174 and were more specific than the instructions from the July 2016 remand decision. [R. at 174-76, 362-63]. Nonetheless, the examiner did consider and address these statements by stating that "these reports by the Veteran were reviewed and

considered" and explaining that the reports are "not consistent with the objective medical evidence in this case" because "one would have expected to have seen objective documentation of low back complaints while on active duty and/or in the years soon fallowing active duty." [R. at 65-67]. Furthermore, there was likewise no error in the failure of the examiner to address specific lay statements of Appellant. *See Monzingo*, 26 Vet.App. at 106.

The examiner fully complied with the specific instructions of the Board's remand order. Therefore, there was substantial compliance with the Board's order. *See D'Aries*, 22 Vet.App. at 105 (stating that substantial compliance, rather than strict compliance, is required).

**C. The examiner did not assume the role of adjudicator.**

The Secretary disagrees that the examiner improperly assumed the role of adjudicator. The examiner merely noted that Appellant's lay statements were not consistent with the objective medical documentation. [R. at 65]. This was a proper determination for a medical examiner to make. *See Miller*, No. 18-2796 at *19 ("If an examiner explains that the veteran's assertions are generally inconsistent with medical knowledge or implausible, the Board can weigh that when addressing the veteran's credibility.").

**D. Remand is otherwise warranted.**

The Secretary agrees that the examiner misstated a material fact. In addressing the buddy statements, the examiner stated: "His buddy statements do not support a low back disability during the years in between active duty and 1996

and instead indicate that the Veteran was able to golf, hunt, travel and play ball." [R. at 67]. However, the lay statement from Appellant's wife states that "[Appellant] has suffered from back pain ever since he was released from active duty. He has been limited to what he has been able to lift and also the activities in which he participates." [R. at 1165]. Contrary to the examiner's statement, Appellant's wife's statement does "support a low back disability during the years in between active duty and 1996." Therefore, the exam is inadequate and remand is warranted. *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("an adequate medical report must rest on correct facts").

To the extent that Appellant argues that the Board's reasons or bases were inadequate, the Secretary can agree that the reasons or bases were inadequate for failing to address the adequacy of the 2017 VA examination in light of the misstatement of a material fact.

## V. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court remand the October 19, 2018, decision of the Board that denied service connection for a low back disability.

Respectfully submitted,

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