IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1079

STEVEN L. LANKFORD,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The Secretary has failed to show that VA satisfied its duty to assist where no medical examination was obtained to address the nature of Appellant's dental disability.

Appellant argued that the Board of Veterans' Appeals (Board) failed to ensure that the duty to assist was satisfied because no VA medical examination or opinion was provided under 38 U.S.C. § 5103A(d) and the holding of *McLendon v. Nicholson*, 20 Vet. App. 79 (2006). **Appellant's Brief ("App. Br.") at 7-12**.

As an initial matter, the Secretary appears to misunderstand Appellant's argument as seeking reversal of the Board's denial of service connection for compensation purposes for the dental disability. *See* **Secretary's Brief ("Sec. Br.") at 5-8** ("Absent a current compensable dental disability, the Board did not clearly err in denying the claim.") (citing *Hickson v. West*, 12 Vet. App. 247, 252 (1999)). To be clear, Appellant's argument is that the evidence of record does not address the nature and etiology of Appellant's identified dental condition, including whether it is "due to loss of substance of body of maxilla or mandible" from in-service trauma, and therefore, the Board was without sufficient information to determine service connection. **App. Br. at 8-11**; *see* 38 U.S.C. § 5103A(d)(2)(C) (the claims file "does not contain sufficient medical evidence for the Secretary to make a decision on the claim."). The underlying nature of the dental condition is a medical question and the Secretary does not point to any medical evidence showing Appellant did not have bone-loss from the in-service trauma. *See* **R. 10-11** (Appellant's specific request for a medical examination to determine the current condition of his teeth in reference to the mandible). The Secretary faults Appellant for not presenting something

that he should have assisted him in obtaining, which creates "a self-fulfilling prophesy as long as the duty to assist is not carried out." *Schroeder v. Brown*, 6 Vet. App. 220, 225 (1994).

In response to the argument that VA failed to satisfy its duty to assist, the Secretary reasons that Appellant's dental condition falls into the non-compensable category of 38 C.F.R. § 4.150, Diagnostic Code (DC) 9913, and therefore, in the absence of a current disability, an examination was not required. **Sec. Br. at 5-12**. The Secretary does not quote any portion of the Board's statement of *reasons or bases* to support his assertion that the Board found that Appellant does not have a current disability. *See* **Sec. Br. at 6** (quoting **R. 4 (4-9)**). In fact, the Board's decision reflects that it *did* find that Appellant has a current disability, namely, edentulous, and then turned to the question of nexus to decide the merits of the claim. *See* **R. 5 (4-9)** ("there is no competent evidence in either VA records or any private record that the claimant's *current* edentulous state *was due to* the in[-]service accident.") (emphasis added). Put differently, if the Board did not find the presence of "current edentulous," *id.*, it would not have reached the "nexus" question of the sequential analysis. *See Hickson*, 12 Vet. App. at 252. Furthermore, "[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court." *Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005).

The Secretary also relies on the Board's finding that STRs and dental records did not show evidence of bone trauma or "loss of substance of either the maxilla or the mandible body." **Sec. Br. at 6-7**. However, the Secretary fails to perceive the Board's error in basing its adverse finding on the absence of evidence. *See Fountain v. McDonald*,

27 Vet. App. 258 (2015) (noting that Board must "establish a proper foundation for drawing inferences against a claimant from an absence of documentation") (citing *Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012) (holding that the absence of evidence cannot be substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact"). Because the STRs and dental records did not address this medical question, they cannot constitute *negative* evidence on the issue. Critically, the Secretary's emphasis on the Board's reasoning highlights why a medical examination is needed here; without medical evidence addressing the nature of Appellant's edentulous, the Board was without competent evidence to determine service connection. *See McLendon*, *supra*; *see also Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991) (concluding Board may consider only independent medical evidence to support findings and may not rely on its own medical judgment); *Chotta v. Peake*, 22 Vet. App. 80, 85 (2008) (holding that the duty to provide medical opinions "applies only once the evidence has met the minimal threshold of indicating the existence of a medical question. It does not require a 'fishing expedition' to substantiate a completely unsupported claim.").

In this regard, the Secretary first cited to *Hickson v. West*, 12 Vet. App. 247, 252 (1999) requiring that in order to substantiate a service-connection claim, the law requires that there is evidence of a current disability. **Sec. Br at 5-8**. Here, the Secretary's reliance on *Hickson* is misplaced. Rather, Appellant's reliance on 38 U.S.C. § 5103A(d) and *McLendon* is more applicable because, as Appellant is seeking service connection for compensation purposes, the determination of whether Appellant's in-service accident caused loss of maxilla or mandible is a medical question.

Indeed, the legal standard for *McLendon* is less onerous than that of *Hickson*. Under *Hickson*, competent evidence of a current disability is required. *Hickson*, 12 Vet. App. at 252. Rather, *McLendon* only requires is that "there is competent evidence of a current disability *or* persistent or recurrent symptoms of a disability. As stated, this element requires only (1) an assessment of whether there is evidence of a current disability *or* persistent or recurrent symptoms thereof and (2) an assessment that such evidence is competent." *Compare* 20 Vet. App. at 81 (emphasis added); *Hickson*, 12 Vet. App. at 252; **Sec. Br at 5-8**. On this note, the claims file contains evidence of recurrent symptoms of a disability, namely, edentulous, and Appellant asserted that he rebroke the same teeth as the ones broken in-service due to the accident. **App. Br. at 7-12, R. 240-41**. Furthermore, Appellant is competent to report that the teeth that rebroke are the same that broke in-service. *See Layno v. Brown*, 6 Vet. App. 465, 469-70 (1994). This evidence should satisfy the lower threshold of 38 U.S.C. § 5103A(d) and *McLendon* rather than the Secretary's misplaced reliance on *Hickson*.

The Secretary also argued that competent VA and private treatment records did not *show* that Appellant's edentulous is a result of service or that the claims file contains any evidence of anatomical loss or mandibular injury in order to qualify for compensation under 38 C.F.R. § 4.150, DC 9913. **Sec. Br. at 6-7**. Once again, the Secretary's argument focuses on the absence of evidence regarding a medical question that needs to be addressed in order to determine entitlement to service connection. *See Chotta*, at 85. On this note, the Secretary's argument, like the Board's statement of reasons or bases for finding no loss of substance of the body of either the maxilla or the mandible, reads more into the June

2016 VA Gastroenterology Pre-Procedure Note than this treatment record actually shows. *See* **R. 56 (55-56)**. The only information regarding Appellant's dental condition included in that medical record is the notation: "Dental Condition: edentulous (may have full dentures)." *Id*. There is simply no basis in the June 2016 record on which the Board may conclude that Appellant's edentulous is not "due to loss of substance of body of maxilla or mandible without loss of continuity[.]" 38 C.F.R. § 4.150, DC 9913; *see Fountain*, *Colvin*, *supra*.

Here, the Secretary and Board also noted that their finding of no loss of substance of either the maxilla or mandible was through the absence of evidence. *See Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) (holding that the Board may not consider the absence of evidence as substantive negative evidence); **R. 5-6 (4-9)** ("there is no competent evidence in either VA records or any private record that the claimant's current edentulous state was due to the in[-]service event.").

Furthermore, the Secretary argued that "Notably, Appellant does not contend that the record contains evidence showing the requisite loss of substance of the body of the maxilla or mandible, and instead appears to concede that the medical and lay evidence of record shows only that he has broken and missing teeth." **Sec. Br. at 7-8**. In this regard, the Secretary is correct; the evidence does not *show* loss of substance of the body of the maxilla or mandible because it does not *address* whether Appellant's current dental disability manifests from such loss. Thus, the Secretary implicitly acknowledges that a medical examination is needed to make a fully informed decision in this case.

Appellant is prejudiced by the Board's failure to ensure that VA provided a medical examination or opinion to satisfy the duty to assist. *See Arneson v. Shinseki*, 24 Vet. App. 379, 388–89 (2011) (finding of prejudice is warranted where an error "could have made [a] difference in [the] outcome" of the claim); *Mayfield v. Nicholson*, 19 Vet. App. 103, 116 (2005) (holding that an error below, whether procedural or substantive, is prejudicial when the error affects a substantial right so as to injure an interest that the statutory or regulatory provision involved was designed to protect such that the error affects "the essential fairness of the [adjudication]").

II. The Secretary has failed to show that the Board provided an adequate statement of reasons or bases.

A. Duty to assist finding

Appellant also argued that the Board failed to provide adequate reasons or bases to support its finding, *sub silentio*, that VA satisfied its duty to assist. **App. Br. at 12-13**. The Board noted that "the Veteran underwent a VA examination in June 2016," (**R. 6 (4-9)**), and the Secretary conceded that "Perhaps the Board was inartful in referring to the ENT examination as a 'VA examination[.]'" **Sec. Br at 12**. Again, to the extent that the Board construed the June 2016 VA gastroenterology procedure note as a medical examination provided pursuant to VA's duty to assist, the Board's reasons or bases are inadequate. *See* **R. at 6 (4-9)** ("In this case, the Veteran underwent a VA examination in June 2016."); *Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014).

Likewise, with respect to the Secretary's assertion that the June 2016 medical record, "along with the other evidence of record, supports the Board's finding that there is

no evidence of a current compensable dental condition[,]" (**Sec. Br. at 12-13**), Appellant reiterates that the June 2016 record does not address the medical question at issue, and the Secretary fails to point to any "other evidence of record" that would support a finding that there is no current disability.

The Secretary argued that because Appellant does not have the requisite condition for a compensable disability under 38 C.F.R. § 4.150, DC 9913, the Board's reasons or bases are adequate. **Sec. Br. at 8-12**. Here, the Secretary cited to *Golz v. Shinseki*, 590 F.3d 1317, 1320 (Fed. Cir. 2010) noting that the duty to assist "is not boundless in its scope." **Sec. Br. at 8**. The Secretary's argument attempts to circumvent the Board's statutory obligation to provide reasons or bases for its findings of fact and conclusions of law. *See* 38 U.S.C. § 7104(d)(1). The Board failed to address whether there the duty to assist obligated VA to provide an examination, and the Secretary's explanation amounts to a *post-hoc* rationalization. *See Doty v. United States*, 53 F.3d 1244, 1251 (Fed. Cir. 1995) ("'Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *Evans v. Shinseki*, 25 Vet.App. 7, 16-17 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

The Board's errors are prejudicial, first, because Appellant argued that his recurrent condition satisfied the current disability or persistent symptoms of a disability requirement of 38 U.S.C. § 5103A(d)(2)(A). Secondly, Appellant's disability requires further medical

evidence to establish that the rebroken teeth may be due to loss of maxilla or mandible, as required under 38 C.F.R. § 4.150, DC 9913. As support, 38 U.S.C. § 5103A(d) contains the statutory language of when to provide a medical examination or opinion. As the Court made clear in *McLendon*, "It is the Secretary who is required to provide the medical examination when the first three elements of section 5103A(d)(2) are satisfied, and the evidence of record otherwise lacks a competent medical opinion regarding the likelihood of medical nexus between the in-service event and a current disability. The Board is not competent to provide that opinion." 20 Vet. App. at 85-86.

The Secretary further noted that "Appellant does not dispute the Board's finding that the record contains no evidence of loss of substance of the maxilla or mandible, which is necessary to support his claim." **Sec. Br. at 10**. Appellant concedes that this is a medical determination, one which the Board is not permitted to make without citing to independent medical evidence, and one which the evidence of record does not address. *See Colvin*, at 175. However, the Secretary is placing the cart before the horse because Appellant's argument is predicated on satisfying the elements of 38 U.S.C. § 5103A(d) and *McLendon* for VA to provide an etiological opinion as the claims file is without sufficient medical evidence in which to decide whether the in-service disability cause loss to the maxilla or mandible.

The Secretary next relied on *Waters v. Shinseki*, 601 F.3d 1274 (Fed. Cir. 2010) as support for the Board's explanation that "as a lay person untrained in the fields of either dentistry or medicine [Appellant] is not competent to offer an opinion linking his current condition to service." **R. 6 (4-9)**. Yet, Appellant is not offering his lay opinion as to

etiology, but he remains competent to report symptoms that are capable of lay observation, which, in this case, is that the same teeth rebroke after service. **App. Br. at 9**; **R. 240-41**.

B. Failure to respond to issues raised by Appellant

Additionally, the Secretary failed to respond to Appellant's argument that the issue of whether an examination was necessary was properly presented to, but left unaddressed, by the Board. **App. Br. at 15-16**; **R. 11 (10-11)**. Appellant specifically requested for a VA dental examination to determine the current condition of his teeth. **App. Br. at 15-16**; **R. 11 (10-11)**; *see also MacWhorter v. Derwinski*, 2 Vet. App. 655, 657 (1992) (holding that the Secretary's failure to address an argument presented by an appellant "may result in the Court interpreting such failure to respond as a concession of error[.]"). As a result of not addressing Appellant's request for a VA dental examination, judicial review is frustrated. *See Deloach v. Shinseki*, 704 F.3d 1370, 1374 (Fed. Cir. 2013) (holding that the lack of an adequate statement of reasons or bases frustrates judicial review). On this point, neither the Board nor the Secretary addressed Appellant's argument that the October 2018 Written Brief Presentation specifically requested a dental examination. **R. 10-11**. Appellant argued that due to the current condition of the mandible, service connection for compensation purposes is left unresolved by the Board's failure to address this assertion. *See Robinson v. Mansfield*, 21 Vet. App. 545, 552 (2008) (holding that the Board must address issues raised by claimant or reasonably raised by the record).

CONCLUSION

For the reasons articulated above and in his May 20, 2019 principal brief, Appellant respectfully requests that the Court set aside the Board's decision of December 4, 2018,

and remand this matter for readjudication consistent with the authorities discussed in his submitted briefs.

Respectfully submitted,

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February 3, 2020

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