IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1072

STEPHEN G. KHOURY,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The parties agree remand is warranted to obtain a new medical opinion, but not regarding the scope of the opinion that should be obtained.

The Secretary concedes that remand is warranted for VA to obtain a new medical opinion that addresses Appellant's explicitly raised theory of entitlement to service connection for a pinched nerve due to exposure to contaminated water at Camp LeJeune. Secretary's Brief (Sec. Br.) at 7-10. Appellant appreciates the Secretary's concession of error, agrees that the Board erred in relying on the September 2013 VA medical opinion, Appellant's Brief (App. Br.) at 12-15, and asks that the Court accept the Secretary's concession.

In addition to this remand basis, however, Appellant respectfully urges the Court to address the additional arguments regarding 1) the September 2013 VA medical opinion's shortcomings with respect to the relationship between his current neck condition and his in-service whiplash injury, and 2) the Board's failure to discuss favorable evidence. *See* App. Br. at 6-12; *see also Quirin v. Shinseki*, 22 Vet. App. 390, 395 (2009) (noting the Federal Circuit's recognition of the need to address additional arguments, after the court determines that remand is necessary, in order to provide guidance to the lower tribunal) (citing *Xerox Corp. v. 3Com Corp.*, 458 F.3d 1310, 1314-15 (Fed. Cir. 2006)). As Appellant's arguments concern an entirely separate theory of service connection for his neck condition, judicial efficiency would be best served by resolving the remaining arguments and avoiding a return to this Court. This is particularly true where, as here, the Board is likely to continue to rely on the September 2013 VA medical opinion in denying

a relationship between Appellant's neck condition and his documented in-service whiplash injury and Appellant is unlikely to abandon his principal arguments regarding that opinion's insufficiencies.

II. The Secretary fails to persuasively defend the September 2013 VA examiner's disjointed rationale.

In his principal brief, Appellant argued that the Board clearly erred in finding the duty to assist satisfied because the September 2013 VA examination for neck conditions lacked a discernible rationale and was thus inadequate. App. Br. at 6-10. The September 2013 VA examiner offered multiple disjointed statements that, when considered together or separately, do not provide adequate support for the examiner's conclusions. *Id.* She opined that a legislative change in Australia appears to have undermined the credibility of many patients who suffered whiplash injuries, implied that Appellant's current neck disability was more likely due to "wear and tear with [the] aging process," and observed that Appellant has kyphosis and "[t]here is a significant association between degenerative disc disease and degree of kyphosis." App. Br. at 8-9 (citing **R. 838 (829-38)** (September 2013 VA opinion)).

The Secretary responds that the VA examination at issue was adequate because "the examiner explained that Appellant's current disabilities were more likely due to wear and tear associated with the aging process and therefore was less likely than not due to the May 1973 in-service whiplash injury." Sec. Br. at 12. According to the Secretary, the examiner sufficiently informed the Board of his judgment on the medical question at issue. *Id.*

The Secretary's perfunctory defense of the September 2013 VA examiner's opinion is unpersuasive. Despite quoting extensively from the examiner's opinion, the Secretary's paraphrasing of the "essential rationale" relies on inferences that are simply not substantiated by the text of the examiner's opinion. Sec. Br. at 11-12. Nowhere does the examiner conclude that Appellant's neck disabilities are more likely due to wear and tear and aging. The examiner's statement, as quoted by the Secretary, is as general as they come and provides no insight into the particular facts of Appellant's medical history. *See* **R. 838 (829-38)** ("DJD & spinal stenosis are parts of a wear and tear with aging process."). This broad generalization leaves more questions than answers; without any further explanation, it is not clear whether *Appellant's* neck conditions were caused by wear and tear and aging, especially given his in-service whiplash injury. *See* App. Br. at 8-9; *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2009) (Board must be able to find "medical expert has applied valid medical analysis to ***the significant facts*** of the particular case in order to reach the conclusion." (citing *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007)) (emphasis added)). Certainly, there are patients who develop similar neck conditions due to the normal wear and tear of aging, but the only relevant question here is whether Appellant's documented in-service whiplash injury is related to his current neck conditions. The examiner's opinion plainly does not answer this question, and the Secretary's attempt to infer a coherent rationale from this single statement is unavailing.

The Secretary's attempt to gloss over the details of the remainder of the VA examiner's disjointed opinion is telling. Again, the Secretary quoted extensively from the examiner's report regarding Appellant's "moderate hyperkyphosis" and the association

between degenerative disc disease and "degree of kyphosis," Sec. Br. at 11-12, but did not specifically respond to the opinion's shortcomings as laid out in Appellant's principal brief. The examiner's discussion of hyperkyphosis again is devoid of any explicit relation to Appellant's current conditions or his in-service injury, rendering this opinion inadequate for rating purposes. App. Br. at 9; *see Nieves-Rodriguez*, 22 Vet. App. at 304 ("Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service connection or rating context if it contains only data and conclusions."); *see also Bailey v. O'Rourke*, 30 Vet. App. 54, 60 (2018) (finding VA medical opinion inadequate as to the issue of direct service connection because its rationale was based solely on general articles and did not discuss any facts pertaining to the claimant's condition or individual circumstances).

Finally, it is not surprising that the Secretary's discussion of the VA examiner's opinion lacks specificity and does not entertain any discussion of the examiner's apparent reliance on a legislative change regarding compensation for whiplash injuries in Australia. *See* Sec. Br. at 11-13; **R. 837-38 (829-38)**. The mere fact that the examiner considered this information relevant to Appellant's claim should have given the Board and the Secretary pause, yet they found it pertinent enough to quote alongside the examiner's other unsupported points.

For the aforementioned reasons, the September 2013 VA examination and opinion are inadequate and the Secretary's defenses are unavailing. As such, Appellant asks the Court to remand his claim for further adjudication that includes a new VA medical examination and opinion. If the Court finds the examination and opinion was adequate,

Appellant asks in the alternative that it remand his claim for the Board to critically analyze the VA examination and address the aforementioned deficiencies rather than merely provide a superficial recitation of the evidence the examiner considered. *See* App. Br. at 9-10 (citing *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Polovick v. Shinseki*, 23 Vet. App. 48, 53 (2009)).

III. Remand is also required for the Board to discuss favorable evidence.

Appellant further argued in his principal brief that the Board's statement of reasons or bases was inadequate because it failed to discuss favorable evidence of documented complaints and treatment for neck pain in the years between separation from service and his September 2013 VA examination. App. Br. at 10-12; *see* **R. 318-20** (December 1988 treatment notes concerning treatment for "Pain and spasm [of the] paravertebral muscles," describing "pain radiating down both arms to hands"); **R. 1212 (1212-14)** (December 2002 VA treatment record noting treatment after "2 months getting pain at base of neck which goes up into head and feels like a squeezing pain"). This evidence of documented neck pain undermines the Board's conclusion that Appellant's documented medical history "is absent any report of symptomatology consistent with a neurological, neck, or back disability for more than 35 years after active service." **R. 10 (5-12)**.

The Secretary argues that the Board's reasons or bases were adequate because "[w]hile it did not reference the two records cited by Appellant" it "properly found Appellant's lay assertions as to continuity of symptomatology were inconsistent with the medical evidence." Sec. Br. at 14-15.

The Secretary agrees that these two records of documented neck pain were not discussed or cited by the Board, and the Court's jurisprudence is clear that remand is thus warranted for the Board to "provide the reasons for its rejection of any material evidence favorable to the claimant." *Wise v. Shinseki*, 26 Vet. App. 517, 524 (2014) (citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table)); *see also Thompson v. Gober*, 14 Vet. App. 187, 188 (2000). To the extent that the Secretary finds the Board's failure to discuss this evidence non-prejudicial because he believes the Board's decision about whether service connection is warranted based on continuity of symptomatology was correct, Sec. Br. at 15, this constitutes *post hoc* rationalization. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'courts may not accept appellate counsel's post hoc rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011) ("[. . .] it 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."); *Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005) ("it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

Moreover, the Secretary cannot and does not attempt to dispute that these two records constitute "material evidence favorable to the claimant," and remand is proper remedy to ensure that the Board addresses them in the first instance. "To find the Board's reasons or bases error harmless, the Court (perhaps the first to do so) would have to independently weight the veteran's lay statements against the medical evidence of record and then ultimately determine how all that evidence affected the metaphorical scales of

justice on which that evidence was placed." *English v. Wilkie*, 30 Vet. App. 347, 354 (2018). Appellant agrees that "[t]his is a task best left to the Board in the first instance," *id.*, and thus remand is necessary.

CONCLUSION

Appellant respectfully requests that the Board's November 27, 2018, decision be vacated and remanded for readjudication consistent with the factual and legal points in his briefs.

Respectfully submitted,

/s/ Glenn R. Bergmann
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February 13, 2020

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