United States Court of Appeals for Veterans Claims

Vet. App. No. 19-746

HUGH J. DAVIS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

Byron M. Moore
Barton F. Stichman
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, D.C. 20006-2833
(202) 621-5721

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PRELIMINARY STATEMENT

The Appellant, Mr. Hugh J. Davis ("Mr. Davis" or the "Veteran"), appeals the October 12, 2018, decision by the Board of Veterans' Appeals ("Board") that denied his claim of entitlement to service connection for sleep apnea. Record Before the Agency ("R.") at 4–12. Mr. Davis filed his initial brief on September 9, 2019 ("App. Br."). The Secretary of Veterans Affairs ("Secretary") filed a brief in this case on December 19, 2019 ("Sec. Br."). Pursuant to U.S. Vet. App. R. 28(c), Mr. Davis files this reply brief.

In the decision on appeal, the Board failed to provide adequate reasons or bases for its dependence on the December 2015 VA Medical Opinion, including the portions of the opinion that relied on "studies," or general acceptance in the medical community, to support its denial of Mr. Davis' claim. *See* R. at 7 (4–12); App. Br. at 9–11. The Board also failed to address the absence of substantive negative evidence in the December 2015 VA Medical opinion. *Id*. And the Board further failed to address whether VA had satisfied its duty to obtain relevant private medical records. *See* App. Br. at 12.

Moreover, the Board erred in finding that Mr. Davis did not suffer from sleep apnea as a result of his service because an absence of evidence, including as discussed in the December 2015 VA Medical Opinion, suggested that his sleep apnea was not etiologically related to his service. *See*. App. Br. at 1–5. The Board also erred in denying Mr. Davis' claim under a standard in-excess of "benefit of the doubt." *Wise v. Shinseki*, 26 Vet. App. 517, 532 (2014). Given these errors, remand is warranted for the Board to provide Mr. Davis with an addendum medical opinion to determine the etiology of his sleep apnea, as well as for the Board to provide adequate reasons and bases.

ARGUMENT

I. THE COURT SHOULD REJECT THE SECRETARY'S POST HOC RATIONALIZATION OF THE BOARD'S DUTY TO ASSIST ERRORS, INCLUDING ITS ACCEPTANCE OF THE DEFICIENT DECEMBER 2015 VA MEDICAL OPINION WHICH DID NOT CONTAIN AN ADEQUATE RATIONALE FOR THE OPINION EXPRESSED.

As stated by the Court on numerous occasions, the probative value of a VA examination report relies on the extent to which an examiner provides an opinion that contains "clear conclusions with supporting data, and a reasoned explanation that connects the two." *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (citing *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007)). Absent these characteristics, a medical opinion is speculative at best. *See Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010).

At issue before the Court is whether the December 2015 VA Medical Opinion was sufficient to decide Mr. Davis' appeal. The Secretary avers that the medical opinion at issue was sufficient because the examiner relied on more than an absence of evidence to support the opinion rendered, including by acknowledging "[Mr. Davis'] reports that he suffered from snoring, pauses in breathing, and gasping during service, [finding] that that these were not 'diagnostic of' sleep apnea," and by explaining "that his in-service symptoms did not establish chronicity of sleep apnea which was not diagnosed until the early 2000s, over a decade post-separation." Sec. Br. at 10. But upon inspection, the December 2015 VA Medical Opinion does not address whether it is at least as likely as not that Mr. Davis suffers from sleep apnea as a result of his service.

> The December 2015 VA Medical Opinion begins:
>
> [T]he signs and symptoms reported by the veteran, his wife and fellow service member as occurring during the veteran's period of active duty are not diagnostic of obstructive sleep apnea (OSA) and lack causation.

R. at 435 (433–35). But the inquiry in this case is not whether Mr. Davis' symptoms are "diagnostic of obstructive sleep apnea," or whether his symptoms caused his sleep apnea; rather, the issue is whether Mr. Davis' symptoms indicate that he has suffered from sleep apnea since his service or as a result of his service. *See Jones v. Shinseki*, 23 Vet. App. 382, 388 (2010) (noting that a VA medical opinion requires "some assessment of probability, as opposed to a definitive statement of the cause of the disabilities"); App. Br. at 9–10.

Importantly, the Board did not find the lay statements indicating that Mr. Davis has suffered from symptoms of snoring and gasping since his service to lack credibility. R. at 7–8 (4–12). The examiner noted that "[s]tudies have shown that patients with diagnosed OSA can have periods of snoring, pauses in their breathing and gasping," and that "these particular signs and symptoms are sensitive for OSA[.]" R. 435 (433–35). But the thrust of the examiner's opinion was that Mr. Davis' continuous symptoms were irrelevant to determining the origin of his sleep apnea because studies have "shown poor specificity of these signs and symptoms in *diagnosing* OSA[.]" *Id*. (emphasis added). The examiner did not state that the evidence indicates that Mr. Davis has not suffered from symptoms of sleep apnea since his service, or that his symptoms showed *no* "specificity" in diagnosing sleep apnea. *Id*. Rather, the examiner merely found that the scientific community has generally accepted that snoring, pauses in breathing, and

gasping for air during sleep, are of "poor specificity" in providing a diagnosis sleep apnea. *Id*. But here there is no question that Mr. Davis has been diagnosed with this disability. *See* App. Br. at 2–3; Sec. Br. at 3.

Thus, aside from its reliance on the date of Mr. Davis' formal sleep apnea diagnosis, the examiner's rationale addressing Mr. Davis' symptoms may be summed as:

- Mr. Davis suffers from snoring, pauses in his breathing and gasping.
- Studies have shown that individuals with sleep apnea "can have periods of snoring, pauses in their breathing and gasping[.]"
- These symptoms "are sensitive for OSA."
- But Mr. Davis' sleep apnea is less likely than not related to his service because studies have also shown that his symptoms are of "poor specificity" for diagnosing sleep apnea.

R. at 435 (433–35). Read in its basic components, the December 2015 VA Medical Opinion failed to address whether Mr. Davis' symptoms indicated that he has suffered from sleep apnea since his service. *See id*. Put differently, if Mr. Davis' current snoring, pauses in his breathing and gasping for air during his sleep are the result of his diagnosed obstructive sleep apnea, then the question before the examiner was whether those current symptoms differ or have a separate etiology from the symptoms he has experienced since his service.[1] Nothing in the December 2015 VA Medical Opinion suggests that Mr. Davis' current symptoms of snoring, pauses in his breathing and gasping for air during

[1] For example, the December 2008 private sleep study that diagnosed Mr. Davis with sleep apnea noted that his snoring resolved on use of a CPAP machine. R. at 826–28.

his sleep—which individuals "can" suffer from as a result of sleep apnea—differ from the symptoms he continued to experience following his service. R. at 435 (433–35). Given that the examiner failed to address this vital inquiry, the medical opinion was deficient. *Nieves-Rodriguez*, 22 Vet. App. at 301.

The Secretary attempts to characterize the above arguments as an attempt by Appellant to render his own medical opinion and opine on the "medical literature in order to second-guess the examiner's professional judgment." Sec. Br. at 9. Specifically, the Secretary takes issue with the following:

> "[The examiner] relie[d] on the distinction between 'sensitivity' and 'specificity' for the proposition that correlation does not equal causation."

Sec. Br. at 9. But nowhere in his brief did he explain what medical literature Mr. Davis has attempted to "to second-guess," or what medical opinion Appellant's counsel attempted to provide. *See* Sec. Br, at 1–23.

The December 2015 VA Medical Opinion suggests that because Mr. Davis' current symptoms— which by the examiner's own admission are sensitive to sleep apnea— show "poor specificity" for diagnosing sleep apnea, he likely did not suffer from sleep apnea prior to the date he was formally diagnosed with that disability. App. Br. at 10–11. If Mr. Davis' symptoms were deemed irrelevant to determining the etiology of his sleep apnea, then, contrary to the Secretary's argument, the examiner relied solely on the fact that Mr. Davis was not diagnosed with sleep apnea via sleep study "until fifteen years after [his] separation from service." R. at 435 (433–35); *see* App. Br at 10–11. The examiner did not state that Mr. Davis' continuous symptoms were evidence against the

proposition that he suffered from sleep apnea since his service, only that the symptoms showed "poor specificity" for diagnosing sleep apnea or were "not diagnostic." R. at 435 (433–35). The Secretary has not cited a shred of actual negative evidence that may be derived from the December 2015 VA Medical Opinion. *See* Sec. Br. at 10–11. And the Secretary's recitation of the law makes Appellant's point: "Negative evidence, actual evidence which weighs against a party, must not be equated with the absence of substantive evidence." *Forshey v. Principi*, 284 F.3d 1335, 1363 (Fed. Cir. 2002); Sec. Br. at 10–11. Given the flaws inherent in the December 2015 VA Medical Opinion, the Board erred in relying on the opinion to support its denial of Mr. Davis' claim.[2]

As to Mr. Davis' argument that the Board failed to obtain relevant private medical records from the Ochsner Clinic, *see* App. Br. at 12, the Secretary's response focuses solely on an Ochsner Clinic record that described Mr. Davis as suffering from "[n]asal [o]bstruction/[s]noring/OSA[.]" R. at 1254 (1254–55); *see* Sec. Br. at 12–13. The

[2] As persuasive authority, the Appellant also cites *Carbonel v. Wilkie, No. 18-2594, 2019 U.S. App. Vet. Claims LEXIS 1673 (Vet. App. Sep. 23, 2019)*. Pursuant to U.S. Vet. App. Rule 30(a), this decision is cited not for its precedential value, but for the "persuasive value of [its] logic and reasoning." In *Carbonel*, the Court addressed the Board's reliance on a VA medical opinion in which an examiner found that complaints of "snoring, apnea, tiredness or other symptoms that may be associated with obstructive sleep apnea during military service is not sufficient and not diagnostic of sleep apnea." *Id*. at *7. Discussing the opinion, the Court reasoned that "[t]he examiner surely cannot have meant that the appellant's obstructive sleep apnea reached diagnosable levels the moment that he received the results of his sleep study." *Id*. at *8. The Court reasoned that "[t]he examiner must have meant that he cannot say when the appellant first developed diagnosable obstructive sleep apnea because care providers did not collect diagnostic data prior to [the date of diagnosis] and the evidence discussing events before that date is purely anecdotal." *Id*. The Court concluded that "[i]f that is so, it is unclear why he felt confident reporting to the Board that the appellant did not have obstructive sleep apnea during his active service." *Id*.

Secretary avers that because this private treatment record "does not specifically identify sleep apnea as a condition for which Appellant received treatment at the Ochsner Clinic," VA did not have constructive notice of potentially relevant private treatment records. Sec. Br. at 13. But this argument ignores Mr. Davis' statement, provided *during* the October 2013 VA Examination (and subsequent to the 2006 records request from the clinic), that he was diagnosed with sleep apnea in 2005 at Ochsner Clinic. *See* R. at 817 (817–21); App. Br. at 12. Mr. Davis' statement, combined with a contemporaneous medical record noting "[n]asal [o]bstruction/[s]noring/OSA," provided constructive notice of outstanding, and potentially relevant, private evidence. *See Solomon v. Brown*, 6 Vet. App. 396, 401 (1994) (outlining VA's duties to obtain non-federal records); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) ("Lay evidence can be competent and sufficient to establish a diagnosis of a condition when . . . the layperson is reporting a contemporaneous medical diagnosis, or [] lay testimony describing symptoms at the time supports a later diagnosis by a medical professional."). VA failed to satisfy the duty to assist when it did not take additional steps to determine whether relevant private treatment records remained outstanding. Given both duty-to-assist errors, remand and vacatur are warranted so that the Board may comply with that duty. 38 U.S.C. §5103A.

II. THE BOARD ALSO FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF MR. DAVIS' CLAIM OF SERVICE CONNECTION FOR SLEEP APNEA WHEN IT ACCEPTED THE DECEMBER 2015 VA MEDICAL OPINION AS ADEQUATE AND HELD MR. DAVIS' CLAIM TO A LEGALLY IMPERMISSIBLE STANDARD.

Aside from stating that the Board was correct in relying on the December 2015 VA Medical Opinion, the Secretary contends that the Board provided adequate reasons

and bases, and that the Board was permitted to "demand a level of acceptance in the scientific community greater than the level of proof required by the benefit of the doubt rule" by merely concluding that the preponderance of the evidence weighed against Mr. Davis' claim. *See* Sec. Br. at 15–16; *Wise*, 26 Vet. App. at 532; *McCray v. Wilkie*, 31 Vet. App. 243, 258 (2019) ("[T]he Secretary's impermissible post-hoc rationale cannot make up for shortcomings in the Board's assessment of the medical opinion."). But the Board relied on the December 2015 VA Medical Opinion—including the portions of the opinion referencing "studies"— in concluding that the lay statements of record were "insufficient to establish causal nexus," and in finding that the preponderance of the evidence stood against Mr. Davis' claim. R. at 8 (4–12). Thus, it is unclear how the Board could both rely on a medical opinion that depended on the standard of "general acceptance in the medical community" for its conclusions and assess the evidence under the benefit-of-the-doubt standard applicable in this case. *Wise*, 26 Vet. App. at 531-532.

The Secretary also argues that the Board was correct in discounting the lay evidence of record because the proponents of the lay evidence were not competent to provide a nexus opinion. Sec. Br. at 16–17. But the Secretary misunderstands the utility of the lay evidence in this case. As discussed, if Mr. Davis suffers from current symptoms of snoring, pauses in his breathing and gasping for air during his sleep due to his diagnosed sleep apnea, and the lay evidence indicates that he has continued to suffer from these symptoms since his service, then the Board was obligated to address whether it was at least as likely as not that this evidence demonstrates that his current sleep apnea symptoms and post-service symptoms share a common etiology. *See* App. Br. at 8–11.

The Board was also obligated to address whether the VA medical opinion at issue actually addressed this question. *Allday v. Brown*, 7 Vet. App. 517, 527 (1995). The Secretary's argument that the Board was correct in finding that the lay statements of record had no evidentiary value because the proponents were not qualified to render medical opinions is a post-hoc rationalization the Court should not countenance. *McCray*, 31 Vet. App. at 258.

The Secretary also notes that the Board relied on the fact that Mr. Davis denied "frequent trouble sleeping" and "shortness of breath" following his service. Sec. Br. at 17–18. But the Board failed to explain why Mr. Davis would have been inclined to report frequent trouble sleeping if he did not believe it was an issue worth seeking medical attention for, as noted by his wife. *See* R. at 831. To the extent that the Secretary notes that Mr. Davis did not report sleep apnea after "his commission as an officer in the Army," the Secretary ignores the written statement provided by N.B.: "Being an infantry soldier, the last thing you want to do is complaint about a medical condition." R. at 833. To the extent that the Secretary notes that Mr. Davis did not report his symptoms "after his separation from active duty service," the Secretary relies on an Army National Guard Report of Medical History produced during a period in which he continued to serve as an officer subject to active duty recall. *See* R. at 373.

And insofar as the Secretary notes that Mr. Davis denied "shortness of breath," it is unclear how either the Board or the Secretary determined that "shortness of breath" was a catch-all that equated to snoring, pauses in breathing, gasping for air during sleep, daytime fatigue, or other symptoms typical of sleep apnea. *See Horn v. Shinseki*, 25 Vet.

App. 231, 240 n.7 (2012) (before the Board may weigh the absence of medical records against a claim, there must first be "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact"); *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011) (when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited").

CONCLUSION

Mr. Davis requests that this Court vacate the Board's decision and remand it in order for the Board to provide an adequate VA medical opinion. Mr. Davis also requests that this Court vacate the Board's decision and remand it in order for the Board to provide an adequate statement of reasons and bases.

Respectfully submitted,

/s/ Byron M. Moore
Byron M. Moore
Barton F. Stichman
National Veterans Legal Services Program
1600 K Street NW, Suite 500
Washington, DC 20006
(202) 621-5721