IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-1741

KENNEDY K. DECREE,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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Argument

I. The Secretary Incorrectly States that a Medical Examiner is Not Required to Consider Lay Statements in Forming His Opinion.

Mr. Decree identified a clear error by the Board where the Board found VA's duty to assist had been satisfied despite the November 2014 VA examination being inadequate. Appellant's Brief ("App. Br.") at 5-7. The Secretary argues that "the medical examiner is not required to" address Mr. Decree's lay statements in the rationale of the opinion because "there is no reasons or bases requirement imposed on a medical examiner." Secretary's Brief ("Sec. Br.") at 8. Although a medical examiner is indeed not bound by the Board's reasons or bases requirement, the examiner *is* required to provide an opinion with clear conclusions with supporting data, including data from lay statements when pertinent to the opinion. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008); *see also Miller v. Wilkie*, __ Vet. App. ___, slip op. at 13-14, No. 18-2796 (Jan. 16, 2020); *McKinney v. McDonald*, 28 Vet. App. 15, 30 (2016); *Dalton v. Nicholson*, 21 Vet. App. 23, 39 (2007) (finding a VA examination inadequate when "the medical examiner impermissibly ignored the appellant's lay assertions that he had sustained a back injury during service.").

Because the November 2014 VA examiner did not address Mr. Decree's lay statements when forming his opinion, the examination is inadequate. *See* App. Br. at 6-7; **R. at 427 (417-28)**. The Secretary has provided no basis on which to reject this argument, as this argument is rooted in the examiner's failure to discuss lay testimony, not the examiner's failure to provide reasons or bases for his opinion. This is true notwithstanding that the examiner, as Mr. Decree acknowledged, referenced his lay statements in reciting

the medical history in a separate section of the examination report. *See* App. Br. at 6. Contrary to the Secretary's argument, Sec. Br. at 8, the examiner considering the statements in some form does not equate to addressing their pertinent content in explaining the medical opinion.

II. The Secretary's Argument Regarding the Internal Inconsistencies in the November 2014 VA Examination is Non-Responsive.

Mr. Decree identified a clear error by the Board where the Board found VA's duty to assist had been satisfied where the November 2014 VA examination contained internal inconsistencies that were not reconciled by an adequate rationale. App. Br. at 7. Specifically, the examiner provided a diagnosis of "chronic/recurrent" deltoid ligament sprain of the left ankle since August 1998, *see* **R. at 418 (417-28)**, but then opined that this "chronic/recurrent" condition that began in service is not related to service. **R. at 427 (417-28)**. The Secretary argues that the examiner's opinion was adequate because the examiner stated that Mr. Decree's in-service ankle sprains had resolved. Sec. Br. at 9. This is non-responsive, because it does not provide, and is incapable of providing, a competent explanation of how they had resolved if they were identified as *chronic* and recurrent when diagnosed. As the Secretary observes with respect to Mr. Decree and his counsel, neither he nor his counsel are competent to provide such an explanation. *See* Sec. Br. at 9-10.

Simply stating that the examiner's rationale was adequate because he had "a proper rationale", Sec. Br. at 7, does not cure the inadequacies identified by Mr. Decree. Consequently, the Secretary has provided no basis to reject Mr. Decree's argument that the

November 2014 VA examination is inadequate and that the Board clearly erred by finding the duty to assist satisfied.

III. The Secretary's Prejudice Argument Regarding the Missing 2014 X-Ray Report Is Inconsistent with the Court's Holding in *Simmons v. Wilkie*.

Mr. Decree identified a missing 2014 x-ray report upon which the November 2014 VA examiner relied and argued the Board erred by finding the duty to assist had been satisfied despite not obtaining this report. App. Br. at 7-9. The Secretary does not dispute that the report was not obtained or that it is a type of record the duty to assist compels VA to obtain, *see* Sec. Br. at 10-11, but asserts that Mr. Decree's "argument is not persuasive because Appellant only suggests prejudice and does not show actual prejudice." Sec. Br. at 10. The Secretary overlooks that "prejudice is established by . . . demonstrating that the error (1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected ***or could have affected the outcome of the determination***." *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018) (emphasis added). Because the missing x-ray report ***could have affected the outcome*** as Mr. Decree described in his principal brief, prejudice has been established. Additionally counseling against the Secretary's argument is that "for the Court to determine that the appellant was not prejudiced by the Board's error may require findings of fact that the Board should make in the first instance." *Clark v. O'Rourke,* 30 Vet. App. 92, 99 (2018).

Further, the Secretary argues that Mr. Decree was not prejudiced by the missing 2014 x-ray report "because the November 2014 VA examiner, did fully review and consider it. . . ." Sec. Br. at 11. Simply because the November 2014 examiner states he

reviewed it does not mean that Mr. Decree is not prejudiced by the report not being in the record. There is no way to ensure that the report "reviewed and considered" by the November 2014 examiner is, in fact, Mr. Decree's record, or to verify the contents of the report. In response to the Secretary's argument that Mr. Decree is not competent to interpret this report, *see* Sec. Br. at 9-10, the purpose of the report being in the record is not to interpret it, but for the Board to verify that its content was fully and accurately described by the VA examiner. Mr. Decree was prejudiced because this evidence was used in support of the Board's denial of his claim. *See Simmons* and *Clark*, both *supra*.

For these reasons, the Court should reject the Secretary's arguments that Mr. Decree was not prejudiced by Board errors regarding the missing 2014 x-ray report.

IV. The Secretary Identifies No Foundation for the Board to Find That the In-Service DJD Diagnosis Was Not Based on X-ray Findings.

Mr. Decree argued that the Board's reasons or bases are inadequate because it did not provide an adequate explanation for finding the in-service degenerative joint disease ("DJD") diagnosis not probative to support a finding of an in-service injury related to Mr. Decree's current ankle pain. App. Br. at 9. The Secretary argues that Mr. Decree's "argument is not persuasive because the Board's determination is plausible, as an x-ray of the ankle, if one had been taken, would have been contained in, or at last [sic] noted, in the record." Sec. Br. at 12.

The Secretary's argument is non-responsive. Mr. Decree cited to law that supports the argument that a "negative inference cannot be drawn from the absence of reference to x-rays unless the Board provides a proper foundation for such an inference", and argued

that the Board's failure to address that evidence renders its reasons or bases inadequate. App. Br. at 10. The Secretary does not provide a directly responsive argument or identify authority demonstrating that the Board provided an adequate foundation to make such an inference. Sec. Br. at 12. Instead, he proclaims that "an x-ray of the ankle, if one had been taken, would have been contained in, or at last [sic] noted, in the record." Sec. Br. at 12.

Further, the Secretary's statement that "an x-ray of the ankle, if one had been taken, would have been contained in, or at last [sic] noted, in the record", Sec. Br. at 12, is an impermissible *post hoc* rationalization for the Board's failure to provide the requisite foundation for its inference, which the Court should reject. *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."). The Board provided no reasons or bases for finding the in-service DJD diagnosis was not probative but for the lack of in-service x-rays.

Consequently, the Secretary provides no basis for the Court to hold that the Board provided adequate reasons or bases for its probative value determination regarding the in-service DJD diagnosis.

V. The Secretary Fails to Directly Respond to Mr. Decree's Argument that The Board Failed to Provide Reasons or Bases for Finding the Duty to Assist Satisfied.

The Secretary fails to directly respond to Mr. Decree's argument that the Board failed to provide adequate reasons or bases for finding the duty to assist satisfied despite the inadequate November 2014 VA examination report. *See* App. Br. at 7. He does not identify any reason why this issue was not reasonably raised, or why the Board could permissibly not address it. Although he does make blanket proclamations that the Board's reasons or bases are adequate, *see* Sec. Br. at 7-8, 12-13, his unwillingness or inability to directly respond to Mr. Decree's argument reflects its strength.

Because the Secretary has provided no basis to support the Board's failure to provide reasons or bases for finding the duty to assist satisfied, the Court should hold that the Board erred by failing to do so.

CONCLUSION

For the reasons articulated above and in his principal brief, Mr. Decree respectfully requests that the Court reverse in part and otherwise vacate the Board's decision of December 11, 2018, and remand this matter for readjudication.

Respectfully submitted,

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February 19, 2020

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