IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MARGARET E. RATHKA,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-3419
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The Secretary contends that the Court should affirm the Board's decision to deny Appellant's claim for service connection for the Veteran's cause of death because (1) the Board's decision contains an adequate statement of reasons or bases and (2) the October 2017 VA examination relied upon by the Board was adequate. (Secretary's Brief at 5). Appellant respectfully disagrees.

ARGUMENT

A. Appellant continues to contend that the Board's decision lacked adequate reasons or bases because it did not adequately address Appellant's contention that the Veteran's in-service trauma caused or contributed to causing his venous thromboembolism, which in turn contributed to his death. In addition, the Board failed to provide adequate reasons or bases for finding that Appellant led an "active lifestyle" and, therefore, a sedentary lifestyle did not contribute to his development of thromboembolism and subsequent death.

The Secretary concedes that the Board only "focused on any possible connection between the Veteran's service-connected disabilities (TBI and a seizure disorder) and his death." (Secretary's Brief at 10.) The Secretary explains that the Board noted Appellant's argument regarding the association between the in-service trauma and the subsequent venous thromboembolism. (Secretary's Brief at 12.). However, the Secretary contends that simply noting the argument is enough. (Id.) He goes on to explain that the record does not contain any competent evidence to sustain Appellant's theory because she is not a doctor. (Secretary's Brief at 12-13.) Yet, the Board failed to request a medical opinion

on this issue during the VA examiner's October 2017 review, despite the theory being explicitly raised by Appellant. (R. at 54-55.)

The Secretary supports his argument with *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007), contending that the Board is not required to use "terms of art." However, the issue here is a failure to provide adequate reasons or bases. *Gilbert* makes clear that the Board must provide adequate reasons or bases, so that the claimant can understand the Board's response to the arguments advanced by the claimant. *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Appellant does not argue, like in *Jennings*, that the Board failed to address specific terms of art, such as "clear and unmistakable error." Rather, Appellant contends that the Board failed to provide a clear, complete, and succinct response to Appellant's explicitly raised theories of service connection for the Veteran's cause of death. In this case, the failure of the Board to mention Veteran's in-service trauma due to hard parachute landings causing in-service trauma demonstrates the absence of any meaningful rational or analysis of Appellant's theory. Furthermore, the Board failed to ask the VA examiner whether his service-connected impairments contributed to his "weak and minimally ambulatory" state. (R. at 54).

The Board states: "There is no evidence or argument presented that acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis are directly related to active military service." (R. at 6.) The Board continues that there were no complaints for these issues while the Veteran was in service and direct service connection is not warranted. The Board

concluded: “Given the above, the ensuing analysis will focus on the Veteran’s service-connected disabilities as they pertain to the Veteran’s death. (R. at Id.) That is the end of the analysis. The failure to address Appellant’s argument is an error of law.

The Board’s weighing of the evidence is reviewed under the clearly erroneous standard. However, the finding that Appellant led an “active lifestyle” based on one statement to his doctor in the context of pain, served as the basis for denying the entire claim. (R. at 6-7). The issue with the Board’s finding is that it did not adequately define the term active lifestyle, such that Appellant, the Secretary, and the Board all understand what that term means in the context of Appellant’s life and what exactly he intended to describe to his doctor during that appointment in 2016 regarding his level of activity. (R. at 160.)

The Secretary’s circular logic explains that the Board did consider that Appellant’s seizure disorder left him minimally ambulatory, but that the Board found that the evidence did not support that the seizure disorder contributed to the Veteran’s passing because the October 2017 VA examiner found that other non-service connected impairments caused his death. (Secretary’s Brief at 15.) However, a positive medical nexus for the pulmonary embolism resulting from liver cancer and congestive heart failure is not sufficient to provide a negative nexus for the impact of a sedentary lifestyle nor does it provide a negative nexus for the issue regarding whether in-service trauma caused or contributed to causing his venous thromboembolism. (R. at 54.)

Furthermore, the Secretary misconstrues Appellant's argument that her theory of service connection was "well-grounded" and that the duty to assist required the Board to obtain a medical opinion on the issue. Instead, the Secretary dismisses the evidence used by Appellant to support her contention that her theory was "well-grounded" because Appellant is not competent to opine on the nexus between the in-service trauma and the Veteran's venous thromboembolism. (Secretary's Brief at 12-13.) However, this reasoning would require a claimant to fully prove a claim on the merits prior to the duty to assist attaching to the claim. Such a standard would negate the need for the VA to obtain a medical nexus opinion in most cases because the veteran would have already been required to provide a medical nexus opinion in order to trigger the VA's duty to assist. The standard argued by the Secretary is in direct conflict with *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006).

Notably, the Board implicitly found Appellant's claim to be well-grounded when it obtained the October 2018 VA medical opinion, limited solely to addressing the link between Appellant's service-connected disabilities and his cause of death. Once a claimant has established a well-grounded claim the duty to assist attaches to all possible in-service causes of that particular disability. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000). In this case, Appellant explicitly raised her theory regarding in-service trauma to the Board. Therefore, Appellant was entitled to a VA medical nexus opinion on the issue of whether the Veteran's in-service trauma caused, or contributed to causing, his thromboembolism and contributed to his passing.

B. Appellant continues to contend that the October 2017 VA examination is inadequate.

The Secretary argues that the VA examiner is presumed to have considered all evidence due to the doctrine of regularity, which applies to public officials during the discharge of the official duties. *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011). He further argues that VA examiners are not required to provide adequate reasons or bases for their opinions. (Secretary's Brief at 17.) Thus, the Secretary asserts that Appellant's arguments regarding the adequacy of the VA examination should be rejected by this Court because the VA examiner is a public official who is presumed to have fulfilled her duties and is not required to provide sufficient reasons for her medical opinion. (R. at Id.)

Appellant has not argued that the VA examiner lacked competency to render an opinion or failed to understand the Board's examination instructions, which was the issue in *Sickels. Sickels v. Shinseki*, 643 F.3d at 1366. Furthermore, *Sickels* does not allow the Board to presume the adequacy of a VA medical examiner's opinion. *See, Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); 38 C.F.R. § 4.2.

The Secretary references numerous cases, including *Espiritu v. Derwinski*, 2 Vet. App. 492, 495 (1992), *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). (Secretary's Brief at 18.) However, *Espiritu* explains the use of expert witnesses when more than

common knowledge or experience is required. *Espiritu v. Derwinski*, 2 Vet. App. at 495. However, the issue in this case is the adequacy of the VA medical opinion, not the qualifications of the examiner. *Monzingo* clarifies that the VA examiner is not required to provide a detailed review of the veteran's entire medical history. *Monzingo v. Shinseki*, 26 Vet.App. at 105. However, *Monzingo* states that although the law does not impose a reasons or bases requirement on the examiner, the examiner's opinion must contain clear conclusions, with supporting data and essential rationale. *Monzingo v. Shinseki*, 26 Vet.App. at 106. None of these cases excuse the VA examiner from failing to address Dr. B.W.F.'s August 2016 medical opinion regarding the Veteran's cause of death. (R. at 52-55 and 82.)

The Secretary contends that the VA examiner is not obliged to comment upon other medical opinions in the record. The Secretary argues that the doctrine of regularity applies, and we should assume that the examiner reviewed the medical opinion and lay evidence, even if she did not feel the need to address it. The Secretary continues that, since the Board ultimately gave no probative value to the favorable medical nexus opinion, the VA examiner did not need to consider it. (Secretary's Brief at 17.)

Since Appellant's Brief, this Court addressed this issue in *Miller v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 64. In *Miller*, the Court explained that the VA medical examiner must address the Veteran's lay statements. *Miller v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 64 at 15. In this case, the examiner failed to address the Veteran and Appellant's lay statements regarding his sedentary lifestyle and its impact on his

mobility. Furthermore, the Board did not make a finding that Appellant was not credible. (R. at 8.) Therefore, the examiner was required to consider these lay statements. A such, the case should be sent back for an adequate medical opinion that addresses the lay statements of Appellant and the Veteran, regarding the Veteran's symptoms and functional limitations.

RELIEF REQUESTED

Appellant respectfully requests that the Court vacate the April 2, 2019, decision of the Board and remand the case for an adequate medical opinion that addresses: (1) the lay statements on record discussing sedentary lifestyle; (2) whether Appellant's medical conditions would lead to a sedentary lifestyle; (3) whether Appellant's service connected impairments contributed to his sedentary lifestyle at the time of his passing; and (4) whether the Veteran's in-service trauma caused or contributed to causing the venous thromboembolism, which in turn contributed to his death. After obtaining the updated examination, the Board should issue a new decision containing an adequate statement of reasons or bases for the Board's findings.

Respectfully submitted

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