IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0697

CHARLES R. BARWICK,

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 in providing an adequate medical opinion for Appellant's low back disability.

Appellant argued that the Board of Veterans' Appeals (Board) clearly erred in determining that the duty to assist was satisfied because the January 2018 VA medical opinion was inadequate. **Appellant's Brief ("App. Br.") at 10-14**. The Secretary argued that the January 2018 VA medical opinion was adequate to satisfy the duty to assist. **Secretary's Brief ("Sec. Br.") at 5-8**.

The Secretary first argued that the VA examiner considered Appellant's lay statements attesting to back problems in service and being treated by a chiropractor for his back pain shortly after service. **Sec. Br. at 6** (citing **R. 200 (199-205)**); *see also* (**R. 183 (182-87)**. He points only to an earlier part of the examination report where the examiner objectively restated Appellant's contentions. *Id.* However, in the examiner's later analysis, the most important part of the report, it is clear that the examiner ignored the importance of or tactfully dismissed the earlier statements. *See* **App. Br. at 11-12**. On this note, the Secretary overlooks that the VA examiner stated that "there is *not evidence of* continued back problems until almost 40 years later, at which time he has had fairly consistent back pain and radiographic evidence of degenerative disc disease which has gotten progressively worse." *See* **R. 189-90 (188-90)** (emphasis added). However, as argued in the principal brief, there *was* evidence of continued back problems for 40 years, in the form of lay evidence. **App. Br. at 10-14**; *see also Barr v. Nicholson*, 21 Vet. App. 303, 310-11 (2007) (finding that a medical examination that ignores lay assertions

regarding continued symptomatology is inadequate because it fails to take into account the veteran's prior medical history), *Miller v. Wilkie*, __ Vet. App. __, __, slip. op. at 9, 18-2796 (Jan. 16, 2020) (holding that "And so, we read *Barr* and [*McKinney v. McDonald*, 28 Vet. App. 15 (2016)] to say that an examiner must address the veteran's relevant statements and, if the examiner fails to address the veteran's reports of his or her medical history and the Board is silent about the credibility of the veteran's lay statements, the Court will order a new examination absent an indication that the Board did not reach credibility.").

Furthermore, the Secretary goes on to argue that there were other facets the examiner relied upon to support the opinion, such as "the gap in time of nearly 40 years of *no complaints or visits* or imaging until chiropractor notes in 1998." **Sec. Br. at 6** (citing **R. 208 (206-08)**) (emphasis added); *see also* **R. 190 (188-90)**. Once again, there *were* credible complaints of back pain and visits prior to 1998, in the form of lay evidence. The Secretary provides no explanation as to how the examiner could maintain these two divergent positions, except to otherwise reject the lay evidence based on a lack of corroborating medical evidence. *See* **R. 62 (61-62)**, **329**, **638 (638-39)**, *Buchanan v. Nicholson*, 415 F.3d 1331, 1337 (Fed. Cir. 2006) (holding that the Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence). Even if the examiner relied upon other evidence, an opinion based upon an inaccurate factual premise has no probative value. *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993).

The Secretary next argued that Appellant contradicted himself by conceding that the VA examiner considered his lay testimony. **Sec. Br. at 6** (responding to **App. Br. at 12**). The Secretary misunderstands Appellant's argument. The VA examination and nexus opinion relied on inconsistent and incongruent recitations of medical history that should render this medical opinion inadequate, or at the minimum, the VA examiner should have used facts in the medical history that are most beneficial to Appellant as the Board did not question Appellant's credibility. *See* 38 U.S.C. § 5107(b); *Miller, supra*; **App. Br. at 12** (discussing the various and inconsistent medical histories that are presented at the time of the January 2018 VA medical examination and opinion). Furthermore, the Secretary did not explain the discrepancy between the VA medical opinion, "The veteran had an episode of back pain in 1959 but no followup[,]" (**R. 189 (188-90)**) and Appellant's recitation of medical history which noted repeated visits to the base sick bay, as well as further pain in his 20s to his 70s. **App. Br. at 11-12**; *see also* **R. 62 (61-62)**, **267**, **638 (638-39)**.

The Secretary next relied on *Acevedo v. Shinseki*, 25 Vet. App. 286, 293 (2012), that medical examiners do not have a reasons or bases requirement. While Appellant is not attempting to force a reasons or bases requirement on this VA medical examiner, VA medical professionals are required to provide the Board with a fully informed evaluation of Appellant's disability. *See Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007) (holding that a medical opinion is adequate when it is based on consideration of the veteran's prior medical history and examinations and describes the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one). In this respect, the Secretary's argument that the VA medical examiner considered Appellant's

medical history is not well-explained by the Secretary since the VA examination and medical opinion have diverging statements of medical history.

Furthermore, the Secretary's reliance on the VA medical examiner's recitation of medical history that Appellant "could have experienced episodes of back pain for many years as he reported," (**Sec. Br. at 6**) incorrectly attempts to place a credibility determination on Appellant by the VA examiner. This is in violation of *Owens v. Brown*, 7 Vet. App. 429, 433 (1995) (holding that it is the province of the Board to assess the credibility and weight given to evidence), *Goodsell v. Brown*, 5 Vet. App. 36, 42 (1993) (holding that the Board must analyze the credibility and probative value of evidence when making its factual findings), and *Buchanan*, at 1337 (holding that the Board, as fact finder, is obligated to, and fully justified in, determining whether lay evidence is credible in and of itself).

The Secretary also argued that the examiner provided five points of rationale which clearly support that Appellant's back disability is not connected to service. **Sec. Br. at 7**. However, the Secretary's argument that the examiner relied on these five points of rationale were, in fact, only data points. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) (holding that 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). Rather, it is the rationale which provides probative value to the opinion. *See Nieves-Rodriguez*, at 304 (holding that it is the factually accurate, fully articulated, sound reasoning for the conclusion that contributes probative value to the medical opinion). The Secretary's argument is unpersuasive on this account. The Secretary did not address

the medical examiner's lack of connecting rationale between the data and the conclusions in the VA medical opinion as well as fail to explain why the lay evidence was not sufficient to connect the current back disability to service.

Next the Secretary argues that the examination and medical opinion complied with remand instructions as provided in *Stegall v. West*, 11 Vet.App. 268, 271 (1998). **Sec. Br. at 7-8**. Remand instructions required the examiner to be supported by clear rationale. *See* **R. 241 (231-44)**. Here, the Secretary argued that the VA examiner acknowledged and considered Appellant's medical history. Merely acknowledging and considering Appellant's recitation of medical history is not adequate according to the most recent Court jurisprudence. Examiners are required *to address Appellant's relevant lay statements*. *See Miller*, at 14 (holding that "where the examiner failed to address the veteran's lay evidence and the Board fails to find the veteran not credible or not competent to offer that lay evidence, the proper remedy is for VA to obtain a new examination."). Therefore, the Secretary's explanation that the VA medical opinion complied with governing jurisprudence is insufficient and Appellant's claim should be remanded.

II. In the alternative (for the back claim), the Secretary has failed to show that the Board provided an adequate statement of reasons or bases for its findings of fact and conclusions of law.

A. Back Disability

Appellant also argued that the Board failed to provide adequate reasons or bases to support its findings of fact and conclusions of law for Appellant's back disability, specifically that the Board did not address continuity of symptomatology under 38 C.F.R.

§ 3.303(b). **App. Br. at 15-17**. The Secretary argued that the Board's statements of reasons or bases were adequate to enable judicial review of the claim. **Sec. Br. at 8-9**.

The Secretary's argument here is unmeritorious. The Secretary noted that the Board properly acknowledged Appellant's current diagnosis and that spinal arthritis is a disease that under 38 C.F.R. § 3.309(a) is capable of being service connected as a chronic disorder or through continuity of symptomatology as provided in 38 C.F.R. § 3.303(b). **Sec. Br. at 9**. However, the Secretary's explanation that the medical evidence still could not show a link between the in-service disability and the current disability was not supported by adequate reasons or bases. The Secretary did not explain why the medical evidence was more probative than lay evidence. *See English v. Wilkie*, 30 Vet. App. 347, 353 (2018) (holding that the Board did not explain on what basis it may have implicitly concluded that, on the question of [a back disability], medical evidence is categorically more probative than lay evidence or that lay evidence is not competent at all. If the Board decides that lay evidence is not competent on this question, it must do so clearly and with an appropriate supporting rationale).

Furthermore, there is nothing in a continuity analysis that requires that the nexus has to be entirely based *exclusively* on medical evidence. *See Savage v. Gober*, 10 Vet. App. 488, 497 (1997) (holding that if the continuity of symptomatology provision of § 3.303(b) requires that there be medical-nexus evidence relating the veteran's present disability to service, the continuity of symptomatology provision would simply be a nullity. Thus, the Court holds that no such medical-nexus evidence is required). The Secretary failed to explain why the VA examiner opinion required medical documentation to support

the lay evidence. **Sec. Br. at 9**. This is an incorrect analysis to support a theory of continuity under 3.303(b); s*ee also Savage*, *supra*, at 497.

At any rate, any attempt by the Secretary to relieve the Board from its statutory obligation to provide adequate reasons or bases to support its findings of fact and conclusions of law under 38 U.S.C. § 7104(d)(1) would result in 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.").

B. Carpal Tunnel Disability

Appellant argued that the Board failed to provide adequate reasons or bases that the carpal tunnel examination and medical opinion was adequate to decide the relevant nexus question. **App. Br. at 17-18**. The Secretary argued that the Court should affirm the carpal tunnel claims because the examiner ultimately opined that the condition was not due to service. **Sec. Br. at 9-11**.

Here, the Secretary misunderstands Appellant's argument. Appellant is not disagreeing with the VA examiner's medical determination that typing by itself is not a "major" risk factor for the development of CTS. Rather, Appellant's argument is that the Board has provided inadequate reasons or bases to support that the medical examination

was adequate because it did not address whether the examiner adequately addressed if the in-service typing can be a "minor" but still a *causal* risk factor for the development of CTS; *See* 38 C.F.R..§§ 3.303(a), (b); *Savage*, at 497 (noting that as long as the condition is noted at the time the veteran was in service, such noting need not be reflected in any written documentation). *See* **App. Br. at 18**. The Secretary explained here that "CTS [is] caused by compression of the median nerve, which typing, by itself, does not cause[.]" **Sec. Br. at 11**. First, the Secretary's explanation miscited the VA medical opinion. The examiner's opinion actually acknowledges that "One of the risk factors is the use of the hand, particularly repetition, forceful exertion, and vibration[,]" which may well encompass typing. **R. 209 (208-10)**.

Furthermore, the Secretary's explanation of the effects of typing in-service are not meritorious. While the VA examiner is not ruling out typing as a risk factor, the Secretary's explanation misconstrues the issue as whether or not typing was connected to service, as opposed to typing as a causal risk factor as an in-service disability. Here, the Secretary's argument attempts to place the proverbial cart before the horse as he erroneously argued that the nexus issue was correctly decided before Appellant has had the opportunity to submit further evidence of hand and wrist disabilities in-service. **Sec. Br. at 11**; *see also infra*, at III.

III. The Secretary has failed to show that the Board hearing complied with the requirements of a Veteran's Law Judge.

Appellant argued that the Veteran's Law Judge failed to comply with the holdings in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010) and *Procopio v. Shinseki*, 26 Vet. App. 76

(2012). **App. Br. at 19-20**. The Secretary argued that even if the Veteran's Law Judge did not discharge the obligations of a Judge conducting hearings, Appellant failed to demonstrate prejudicial error. **Sec. Br. at 12-13**.

The Secretary first cited *Massie v. Shinseki*, 25 Vet. App. 123, 126 (2011) noting the Court's discretion to entertain arguments for the first time on appeal. The Secretary's reliance on this facet of law is incompletely cited. Here, the Court in *Massie* (citing *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000) held that "[t]he test is whether the interests of the individual weigh heavily against the institutional interests the [exhaustion of administrative remedies] doctrine exists to serve," the primary interests being "to protect agency administrative authority and to promote judicial efficiency." While Appellant's claims are properly before this distinguished Court, in the interests of judicial efficiency, Appellant respectfully requests this distinguished Court to address arguments submitted in his brief. *See* 38 U.S.C. § 7252(a).

Next, the Secretary cited the holding in *Bryant* that the duties of the Judge in the hearing are to explain fully the issues as well as to suggest the submission of evidence which may have been overlooked and which would be of advantage to the claimant's position. **Sec. Br. at 12**. While the current disability element is not in question, the issue of whether Appellant had an in-service disability is relevant to Appellant's claims. **R. 9-10 (4-12)**; *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999) (holding that establishing service connection generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation

of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disability).

On this note, the Court in *Bryant* cited *Sizemore v. Principi*, 18 Vet. App. 264, 274 (2004) (holding that Appellant was not advised adequately by VA as to the types of information that may help to verify his claimed in-service disability…at the hearing, VA failed to advise Appellant that he could submit "buddy statements" to corroborate the disability); *see also Bryant*, at 496 (holding that caselaw supports a finding that the hearing officer must suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record). Similarly, in *Procopio v. Shinseki*, 26 Vet. App. 76, 80 (2012), the Court held that the Judge should have explained that the claims could only be substantiated by submitting evidence of an in-service disability and a nexus between that the in-service disability and his current disabilities (the missing elements in his claims).

The Secretary's explanation here that the VA medical examination made up for the omissions of the Veteran's Law Judge is also unpersuasive. **Sec. Br. at 13**. Additional evidence as suggested by the Veteran's Law Judge which detail Appellant's carpal tunnel or revealing in-service hand or wrist injuries may well have changed the results of the VA medical opinion. *See Clark v. O'Rourke*, 30 Vet. App. 92, 99 (2018) (holding that the "assertion [in his brief] that the appellant may have submitted evidence to the Board" had he been given the opportunity was sufficient demonstration of prejudice to require remand) (citing *Pelegrini v. Principi*, 18 Vet. App. 112, 121-22 (2004), and *Daniels v. Brown*, 9

Vet. App. 348, 353 (1996) ("[The] Court cannot conclude that [notice] error was not prejudicial where 'it is possible that the appellant would have sought and obtained additional...evidence....' on disputed question of fact")).

As in *Procopio,* Appellant lost the opportunity to try and submit such evidence in this case and the claimant never demonstrated any actual knowledge by attempting to submit relevant additional evidence after the hearing. *See Procopio*, 26 Vet. App. at 79 n.3 (explaining that the purpose of the duties is a "critical and sometimes marginalized component of a claimant's right to a fair and full adjudication before VA") (citing 38 C.F.R. § 3.103(c)(2) and *Bryant*, *supra*). Ultimately, had the VLJ properly informed Appellant about the lack of evidence pertaining to an in-service disability, Appellant would have been in a better position to understand that he was required to obtain more evidence in order to substantiate his claims. *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) (emphasis added); *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018) ("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.") (emphasis added).

CONCLUSION

For the reasons articulated above and in his September 30, 2019 principal brief, Appellant respectfully requests that the Court set aside the Board's decision of November

21, 2018, and remand this matter for readjudication consistent with the authorities discussed in his submitted briefs.

Respectfully submitted,

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March 12, 2020

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