
United States Court of Appeals for Veterans Claims

Vet. App. No. 19-1788

RAUL V. CARDENAS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Appellant, Raul V. Cardenas, appeals the November 20, 2018 decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for hepatitis C. Record Before the Agency (R.) at 4 (3-11). On October 28, 2019, Mr. Cardenas filed an initial brief (App. Br.). The Secretary filed a responsive brief on February 13, 2020 (Sec. Br.). Pursuant to U.S. Vet. App. Rule 28(c), Mr. Cardenas files this reply brief.

ARGUMENT

As stated in the initial brief, vacatur and remand of the Board's November 20, 2018 decision are warranted because the Board erred by failing to address the favorable service record establishing exposure to hepatitis in service or provide an adequate rationale for disregarding it. 38 U.S.C. § 7104(d)(1); *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000); App. Br. at 6-12.

Alternatively, to the extent the Board relied on the August 2017 VA examiner's opinion to disregard the favorable service record, the Board erred as the examiner's rationale for rendering factual findings regarding the contents and probative nature of a military service record was inadequate and based on an inaccurate factual premise. 38 U.S.C. § 5103A; *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993); App. Br. at 12-17.

In his responsive brief, the Secretary focuses the Court's attention on the adequacy of the August 2017 VA examiner's rationale first and the adequacy of the Board's statement of reasons and bases second. Sec. Br. at 7-18. However, as detailed below, there are two glaring errors that remain unrebutted by the Secretary's response.

First, there is no support or rationale in the record to validate the 2017 VA examiner's inferences (or competence to make those non-medical inferences) made to reach the non-medical factual findings required to support her medical opinion. Second, even assuming the Board relied on the 2017 VA examiner's factual findings regarding the favorable in-service hepatitis exposure—and it is not clear whether Board relied on any factual findings regarding the in-service record of exposure—the Board is still required to (1) analyze the probative value of the evidence, (2) account for that which it finds persuasive or unpersuasive, and (3) explain why it rejected evidence materially favorable to the claimant—and the Board failed to do so here. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Put another way, despite the 2017 VA examiner's findings regarding the record of hepatitis exposure, and the Secretary's arguments about the adequacy of that opinion, the fact still remains that nowhere in the decision on appeal did the Board provide a rationale for disregarding the favorable service record of hepatitis exposure. 38 U.S.C. § 7104(d)(1); *Thompson*, 14 Vet. App. at 188; R. at 3-11. Thus, vacatur and remand are required.

I. THE SECRETARY FAILED TO REBUT MR. CARDENAS' SHOWING THAT THE BOARD CLEARLY ERRED IN FAILING TO ADDRESS THE FAVORABLE EVIDENCE OF RECORD.

Although the Secretary's brief focuses first and foremost on the adequacy of the August 2017 VA opinion, the most glaring error in the decision on appeal is the Board's failure to provide an adequate statement of reasons and bases for its decision to disregard the favorable evidence of record—namely, the April 1981 service record of exposure to hepatitis and Mr. Cardenas' September 2017 substantive appeal (VA Form 9) providing

further details of hepatitis exposure in service. R. at 814, 75, 3-11; App. Br. at 6-12. Thus, we will first address the Secretary's arguments related to this error.

In the responsive brief, the Secretary correctly recounted that the Board "noted" the April 1981 service record detailing exposure to hepatitis in service and Mr. Cardenas' receipt of gamma globulin intramuscularly as a prophylactic measure, but then argued further that the Board "discussed the record's vague findings." Sec. Br. at 6, 14; R. at 5-6 (3-11). The Secretary listed the following as "the Board's analysis of the April 1981 record": (1) "[t]he Board noted that the STR only showed exposure to 'hepatitis' but did not specify which type"; (2) the Board "relied on the fact that the record does not show any treatment or complaints of symptoms of hepatitis C that would indicate incurrence in service of the disability"; and (3) "[t]he Board also noted that a reenlistment exam after the exposure indicated that Appellant was healthy and was not presenting any symptoms that would indicate hepatitis C." Sec. Br. at 15.

First, *nowhere* in the decision on appeal did the Board "discuss[] the record's vague findings," or that the service record did not specify the type of hepatitis to which Mr. Cardenas was exposed or the relevance of that fact. Sec. Br. at 6, 15. As stated, the Board only *noted* the existence of the favorable April 1981 service record but did not further address or analyze this record. R. at 5-6 (3-11). Thus, the Secretary's argument that the Board's analysis included a discussion about the content of the favorable service record or the type of hepatitis he was exposed to in service is unsupported. Sec. Br. at 6, 15; *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

As stated, the Secretary also argued that the Board disregarded the favorable service record because Mr. Cardenas did not seek treatment for hepatitis during service or for years after separation from service. Sec. Br. at 15. As detailed in the initial brief, the Board did not provide any analysis regarding the probative nature of any delayed onset. App. Br. at 11. The Secretary argued that a prolonged period without complaint can be considered as evidence by the Board. Sec. Br. at 16. However, the Board may only consider the lack of evidence as evidence if such a notation would normally be expected and otherwise, “the Board may not consider the absence of evidence as substantive negative evidence.” *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011); *see also Horn v. Shinseki*, 25 Vet. App. 231, 239 n.7 (2012) (holding that the absence of evidence cannot be substantive negative evidence without “a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact”); Sec. Br. at 16 (*citing Buczynski*, 24 Vet. App. at 224). Here, the Board failed to provide any foundation for relying on the lack of evidence of hepatitis symptoms in or after service. Thus, the Board’s “analysis” of the April 1981 in-service evidence of exposure to hepatitis was inadequate and the Secretary has failed to establish otherwise. 38 U.S.C. § 7104(d)(1).

Moreover, Mr. Cardenas explained in the record that he was told he may have delayed onset hepatitis symptoms, and neither the Board nor the VA examiner addressed this testimony. App. Br. at 9-10; *see Southall-Norman v. McDonald*, 28 Vet. App. 346, 356 (2016) (*citing Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006)); *Parseeya-Picchione v. McDonald*, 28 Vet. App. 171, 175-76 (2016); *Caluza*, 7 Vet. App. at 511 (1995). Specifically, in Mr. Cardenas’ September 2017 substantive appeal (VA

Form 9), he reported that “[w]hile I served onboard the USS Constellation we traveled to Mombasa, Kenya where I was exposed to Hepatitis C. In my service medical records, it indicates that my exposure may not have affected me during the time that I served, *but may affect me later in life*. I am currently diagnosed with Hepatitis C.” R. at 75 (emphasis added). Mr. Cardenas’ testimony that he was told the exposure may lead to hepatitis later in life was corroborated by the actual service record that indicated exposure and that hepatitis symptoms could arise at a later date. R. at 75, 814.

The Secretary disregarded Mr. Cardenas’ 2017 statement by arguing “Appellant’s general reports that the exposure occurred while in Mombasa, Kenya, are neither complimentary nor provide enough detail to establish exposure to hepatitis C.” Sec. Br. at 16. However, the Board neither made this finding, nor addressed Mr. Cardenas’ 2017 statement describing the details of his in-service exposure at all.¹ *Barr*, 21 Vet. App. at 311 (“Litigation positions are not entitled to deference when they are merely . . . counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court.”). Again, the Board is required to address the favorable evidence of record and the Board failed to do so here.

¹ Notably, to the extent the Board addressed Mr. Cardenas’ statements in the decision on appeal, the Board only did so in the context of whether those statements established a nexus and not whether those statements supported an in-service incurrence of a condition. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); R. at 6 (3-11) (“the Board determines that his reported history of symptoms while competent, is nonetheless not probative in establishing the nexus element”); 8 (3-11) (“the Veteran is not competent to provide testimony regarding the etiology of his hepatitis C”). At no point in the decision, did the Board address the credibility and competency of Mr. Cardenas’ statements explaining his in-service hepatitis exposure, including the September 2017 substantive appeal. R. at 75.

The Secretary also argued that the Board’s statement of reasons and bases for its decision was adequate because “the Board properly relied on the adequate August 2017 VA medical opinion.” Sec. Br. at 16-17, R. at 109-26. However, as detailed in the initial brief and below, the 2017 VA medical opinion was inadequate for several reasons. App. Br. at 12-16. Additionally, as detailed in the initial brief, although the Board did afford the 2017 VA opinion “significant probative weight,” R. at 7 (3-11), the 2017 VA examiner’s rationale does not cure the Board’s duty to provide reasons and bases for its findings and conclusions such that an appellant can understand the precise basis for the Board’s decision and the Court can conduct an informed review. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990); App. Br. at 7-8; Sec. Br. at 13. The Board’s obligation to provide an adequate reasons and bases for its decision—including addressing all the material and favorable evidence of record—is particularly acute here, where evidence regarding the nature of Mr. Cardenas’ exposure to hepatitis in service was received after the examiner rendered the opinion subsequently relied upon, and contradicts that examiner’s initial assumptions underlying the opinion proffered. R. at 75.

Turning directly to the decision on appeal, in addressing the August 2017 VA opinion, the Board relied on three findings by the examiner, none of which cure the Board’s failure to address the favorable in-service evidence of hepatitis exposure. R. at 7 (3-11). Namely, the Board noted that the examiner: (1) “explained that she did not find that the Veteran had risk factors for hepatitis C during service”; (2) found that records did not include documented symptoms, diagnosis, or treatment of hepatitis C until 2010; and (3)

found that Mr. Cardenas was exposed to risk factors for hepatitis C post-service. *Id.* The only one of these rationales related to the favorable in-service record is the examiner's finding that Mr. Cardenas did not have risk factors for hepatitis C during service, but the Board failed to rectify this with the clear in-service evidence of exposure to hepatitis. *Id.* While the Board is required to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant, this analysis is precisely what is missing from the Board decision on appeal. *Caluza*, 7 Vet. App. at 506.

The Secretary argued further that “to the extent Appellant challenges the August 2017 VA medical opinion through the Board’s reliance on it, his arguments fail because the opinion carefully considers the evidence of record against medical research and principles.” Sec. Br. at 17; App. Br. at 13. However, this argument conflates two separate duties—that of the Board and that of the VA examiner—and impermissibly implies that the Board’s rationale subsumed wholesale the examiner’s rationale.

A medical opinion, no matter how well drafted, is merely a piece of evidence from an expert witness in their particular field and the Board cannot turn over its adjudicatory power to an examiner. *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994) (noting that a medical opinion is “only that, an opinion” providing medical evidence); 38 C.F.R. § 4.2 (“[i]t is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present”); *Moore v. Nicholson*, 21 Vet. App. 211, 218 (2007), (“regulations impose specific duties on

medical examiners and rating specialists. The medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability”).

For the Secretary’s argument to stand, we must assume that the examiner’s rationale regarding Mr. Cardenas’ service locations, military occupational specialty (MOS), exposure type, etc., were within the examiner’s expertise and all part of the Board’s analysis of the favorable in-service record. R. at 113-14 (109-26). However, the Board did not address this rationale or these assumptions regarding the in-service record at all. As stated, the Board noted only that the VA examiner “explained that she did not find that the Veteran had risk factors for hepatitis C during service.” R. at 7 (3-11). Moreover, the Board had the benefit of evidence submitted subsequent to the opinion rendered, underscoring why it must be the Board that addresses the adequacy of the opinion in light of all the evidence of record.

To review, the VA examiner found that because the April 1981 record did not note the type of hepatitis, the exact date of exposure, or the route of exposure, and based on Mr. Cardenas’ MOS and service *on a ship* during the exposure, “the circumstances lend support that Mr. Cardenas was exposed to hepatitis A”:

Mr. Cardenas’ active duty job in administration was unlikely to result in exposure to blood or other body fluids routinely. If the Veteran were to have an accidental exposure to blood from an infected individual, it is highly likely that there would be documentation of the exposure event and f/u serology testing while he was in service. There is no evidence of this in the records. In contrast, the STR available regarding exposure shows the Veteran was exposed during a specified date range, while on a ship, which would be associated with confinement and/or crowded conditions that increase risk of Hepatitis A transmission. The inability to specify a date of transmission

would be consistent with transmission of the Hepatitis A virus while the infected individual(s) were asymptomatic.

R. at 114-15 (109-26) (emphasis added).

Thus, for the Board to have adequately addressed the favorable evidence of record and relied on the August 2017 VA examiner to disregard it—as the Secretary proffers it did—the Board would have had to have analyzed the relevance of the type of hepatitis and determined: (1) which hepatitis he was exposed to in service; (2) the relevance of the date range of exposure listed on the service record; (3) the nature of Mr. Cardenas’ MOS and whether his position would have resulted in exposure to blood or body fluids; (4) which ships he served on and whether they were confined or crowded; and (5) whether accidental exposure to blood from an infected individual and follow-up serology testing are the types of information that would be in the service records. The Board did not address *any* of these inferences or whether the examiner was competent to make these inferences, an issue detailed further in Section II below. Instead, the Board recounted that the 2017 VA examiner “explained that she did not find that the Veteran had risk factors for hepatitis C during service” and ended the analysis there. R. at 7 (3-11).

As it stands, the Court cannot address the basis on which the Board relied to disregard the favorable service record because the Board did not make any findings regarding this record and, to the extent the Board relied on the August 2017 VA examiner’s reasoning, its reasons for that reliance are not readily apparent. Thus, the Court’s review is frustrated by the Board’s failure to make the necessary factual findings in the first

instance and vacatur and remand are required. *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (“[A]ppellate tribunals are not appropriate fora for initial fact finding.”).

II. THE SECRETARY FAILED TO ESTABLISH THAT THE BOARD RELIED ON THE AUGUST 2017 VA EXAMINER’S ANALYSIS OF THE FAVORABLE SERVICE RECORD AND THAT ANY SUCH RELIANCE WAS PROPER WHERE THE VA EXAMINER IMPROPERLY MADE FACTUAL FINDINGS AND BASED THE OPINION ON AN INACCURATE FACTUAL FINDING.

Despite the Board’s aforementioned failure to satisfy its duty to provide an adequate statement of reasons and bases for its decision, the Secretary’s brief also addresses the adequacy of the August 2017 VA medical opinion. Sec. Br. at 7-13; 38 U.S.C. § 7104(d)(1). The Secretary argued that the August 2017 VA medical opinion “was based on a review of the relevant medical evidence,” including the in-service record of hepatitis exposure, and “was supported by thorough rationale.” Sec. Br. at 8-9; 38 U.S.C. § 5103A.

Before addressing the adequacy of the August 2017 opinion, it bears repeating that the adequacy of a medical opinion of record does not excuse the Board of its duties or cure the Board’s failure to provide an adequate statement of reasons and bases for its decision. App. Br. at 13; 38 C.F.R. § 4.2; 38 C.F.R. § 3.100(a); *see also* *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) (adequate medical opinion is one that is based on consideration of veteran’s prior medical history and describes the condition with a level of detail sufficient *to allow the Board to make a fully informed decision* on the relevant medical question); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (holding that an examiner is required to support any conclusions “with an analysis that *the Board can consider and weigh* against contrary opinions” (emphasis added)). A medical opinion, no matter how well drafted, is

merely a piece of evidence from an expert witness in their particular field and the Board cannot turn over its adjudicatory power to an examiner. *Gabrielson*, 7 Vet. App. at 40.

The Board did not consider and weigh, or make a decision on, the nature and relevance of the favorable 1981 service record or the VA examiner's analysis of such. R. at 3-11. Tellingly, absent from the Secretary's argument about the adequacy of the 2017 VA medical opinion is a citation to the Board's finding and analysis on this point. Sec. Br. at 7-13. Despite factual findings by the VA examiner, at no point did *the Board* address, interpret, or reach a conclusion about the favorable service record. *Thompson*, 14 Vet. App. 187.

The Secretary also argued that "Appellant concedes that the examiner was a physician assistant, and offers no challenge to her qualifications. As such the examiner's competence is not challenged." Sec. Br. at 17. However, in the initial brief, Mr. Cardenas expressly argued that "the VA examiner rendered an opinion on evidence outside her scope of knowledge." App. Br. at 14, *see also* App. Br. at 14-15 ("the examiner provided no explanation for why she was competent to make assumptions about a military service record or Mr. Cardenas' military service or MOS."). Thus, the issue of her competence regarding factual findings outside her scope of medical knowledge was certainly raised and the Secretary failed to address this error or support the Board's reliance on the 2017 VA opinion in light of the examiner's non-medical findings.

Specifically, in the initial brief, Mr. Cardenas noted that the examiner based her entire opinion on the factual premise that Mr. Cardenas' in-service exposure to hepatitis was to hepatitis A and provided as rationale that "Mr. Cardenas' active duty job in

administration was unlikely to result in exposure to blood or other body fluids routinely”; the service record of exposure included a date range for the exposure because the in-service doctor was “[unable] to specify a date of transmission”; and the in-service record of hepatitis exposure shows a “date range, while on a ship, which would be associated with confinement and/or crowded conditions.” App. Br. at 14; R. at 114-15 (109-26). The Secretary argues that the examiner’s assumptions were “inferences from the objective medical evidence, which she was well within her authority to make.” Sec. Br. at 9-10. However, nowhere in the examiner’s opinion or the Board’s decision is there support for the assertion that the VA examiner, a nurse practitioner, was within her authority to assess Mr. Cardenas’ active duty position, the nature of his service, and the type of ship on which he served. The Secretary hails these assumptions as “logical conclusions,” but provides no support for such an assertion. Sec. Br. at 9.

Finally, turning to the adequacy of the 2017 VA medical opinion, as detailed in the initial brief, the examiner’s assumptions and factual findings are also problematic as they are based on the inaccurate factual premise about the nature of Mr. Cardenas’ service and that he was only exposed to hepatitis A in service. *Reonal*, 5 Vet. App. at 461; App. Br. at 16. Specifically, although the VA examiner relied on the premise that Mr. Cardenas was exposed to hepatitis A, was exposed during a larger date range, and served in confined conditions; Mr. Cardenas’ report that “[w]hile I served onboard the USS Constellation we traveled to Mombasa, Kenya where I was exposed to Hepatitis C,” contradicts these findings. R. at 114-15 (109-26); 75. The Secretary argued that Mr. Cardenas’ statements contradicted, rather than complemented, the service records and did “not add sufficient

detail as to call into question the examiner's inferences or otherwise substantiate his claim." Sec. Br. at 11.

To begin with, as detailed above, the question at hand is the adequacy of the Board's decision on appeal. In the decision, the Board did not address Mr. Cardenas' statements regarding exposure in service, not to mention compare Mr. Cardenas' statements about his service to the VA examiner's assumptions about his service. Any rationale about the probative nature of Mr. Cardenas' 2017 statements has been offered by the Secretary in the first instance on appeal. *Barr*, 21 Vet. App. at 311; R. at 75. Additionally, to the extent the Secretary attempted to cure the VA examiner's reliance on an inaccurate factual premise by arguing that "the opinion nonetheless contained a thorough analysis of the evidence that did not solely rely on confined quarters on the ship when Appellant was exposed to hepatitis," such an opinion is another impermissible *post hoc* rationalization for the Board's reliance on the 2017 VA opinion. Sec. Br. at 11; *Barr*, 21 Vet. App. at 311; *Reonal*, 5 Vet. App. at 461.

In summary, the Board erred by failing to address the favorable evidence of exposure to hepatitis in service when evaluating whether Mr. Cardenas' hepatitis is service-connected. 38 U.S.C. § 7104(d)(1). Alternatively, assuming *arguendo* the Board adopted the VA examiner's rationale regarding Mr. Cardenas' MOS, service, and exposure, the Board erred as the opinion was inadequate, unsupported, and based on an inaccurate factual premise. 38 U.S.C. § 5103A. Thus, vacatur and remand are required. App. Br. at 6-17.

CONCLUSION

For the foregoing reasons, and those detailed in the initial brief, Mr. Cardenas respectfully requests that this Court vacate the Board's November 20, 2018 decision and remand it for the Board to fulfill its duty to assist and provide an adequate statement of reasons or bases regarding whether Mr. Cardenas is entitled to service connection for hepatitis—particularly in light of evidence of exposure to hepatitis during military service.

Respectfully submitted,

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