

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-0098

LINDA K. BUTLER, APPELLANT,

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

BARTLEY, *Chief Judge*: Veteran Linda K. Butler appeals through counsel a September 11, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for a gynecologic disorder, described as residuals of an in-service bilateral tubal ligation and postservice total hysterectomy with history of endometriosis, and for a hysterectomy scar. Record (R.) at 4-13.<sup>1</sup> For the reasons that follow, the Court will set aside and remand the portion of the September 2018 Board decision that denied service connection for a gynecologic disorder and related scar. The balance of the appeal will be dismissed.

**I. FACTS**

Ms. Butler served on active duty in the U.S. Army from April 1977 to January 1983. R. at 2522. Her service medical records (SMRs) reflect that she sought treatment on several occasions

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<sup>1</sup> In the same decision, the Board also denied service connection for gastroesophageal reflux disease and a related scar. R. at 7, 10. Because Ms. Butler has not challenged those portions of the Board decision, the appeal as to those matters will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc) (declining to review the merits of an issue not argued and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same). In addition, the Board remanded the issues of service connection for a right knee injury and a stomach disability. R. at 11-13. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider these issues at this time. *See Howard v. Gober*, 220 F.3d 1341, 1334 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2019).

for pelvic or abdominal pain and abnormal vaginal bleeding or discharge. *See* R. at 482, 489, 532, 534, 586-90, 592, 614, 2240, 2243, 2257-58, 2266-69. She also underwent several annual pelvic examinations that did not identify any abnormalities. *See* R. at 2249, 2328-29, 2331. In August 1982, following the birth of a child, Ms. Butler underwent a bilateral tubal ligation. R. at 2470, 2519.

After separation from active service, Ms. Butler continued to seek treatment for her pelvic and abdominal symptoms. *See, e.g.*, R. at 2429 (Nov. 1984 report of long-term right-sided pain). In December 1989, a clinician could not, on physical examination, "identify a gynecologic cause" for Ms. Butler's pain. R. at 2059. However, in January 1992, her uterus was noted to be "[n]ormal in size but irregular in contour with apparent small fibroids." R. at 1691. Subsequent examinations also documented the likely present of fibroids. *See* R. at 2142, 2149, 2221. In August 2001, Ms. Butler underwent a total hysterectomy to treat symptomatic uterine fibroids. R. at 1489-90, 1553-55, 1586-89. The pathology report confirmed the presence of three fibroids, ranging in size from 0.7 to 2 cm. R. at 1489.

Ms. Butler first sought service connection for a gynecologic disorder in August 1990. R. at 2102. She underwent a VA examination in July 1993. R. at 1963-68. The examiner concluded that there was "[n]o medical explanation for the right-sided pain." R. at 1968. In a March 1998 decision, the Board denied Ms. Butler's claim. R. at 1641-67.

In July 2008, Ms. Butler filed a new service-connection claim for her hysterectomy scar and sought to reopen her gynecologic disorder claim. R. at 1398. In a January 2009 statement, she explained that she had experienced abdominal pain since undergoing the tubal ligation in 1982. R. at 1042. She stated that her doctor suggested that a hysterectomy could resolve her pain. *Id.* She further stated that the surgeon who performed her hysterectomy told her that her pain was related to the way the tubal ligation was performed. *Id.* In a June 2009 rating decision, a VA regional office (RO) denied the claims. R. at 1018-26. Ms. Butler did not appeal, and the decision became final.

In January 2011, Ms. Butler sought to, among other things, reopen her claims for service connection for a gynecologic disorder and a hysterectomy scar. R. at 992. In September 2011, the RO determined that she had not submitted new and material evidence sufficient to reopen her previously denied claims. R. at 844-50. Ms. Butler submitted a timely Notice of Disagreement, R. at 787.

In December 2011, Ms. Butler submitted an additional statement in support of her claim. R. at 760-67. She reported that she felt abnormal immediately following her 1982 tubal ligation, but that her concerns were disregarded by the medical staff. R. at 760. She reiterated her assertions that her symptoms had continued ever since her tubal ligation, *id.*, and that her hysterectomy surgeon associated her pain with the manner in which the tubal ligation was performed, R. at 761. In a March 2012 Statement of the Case, the RO determined that the December 2011 statement was new and material evidence sufficient to reopen Ms. Butler's claims, but denied the claims on the merits. R. at 734-59.

Ms. Butler filed her Substantive Appeal in May 2012. R. at 728. In an accompanying statement, she reiterated the contentions made in her December 2011 statement. R. at 716, 718. In March 2013 and April 2014 statements, she repeated her assertion that her hysterectomy surgeon said that her pain was related to her tubal ligation. R. at 657, 685. In a September 2014 statement, Ms. Butler's non-attorney representative raised an additional theory of entitlement: that Ms. Butler's in-service complaints of pelvic and abdominal symptoms were "early signs of endometriosis and fibroids while on active duty." R. at 650.

In a February 2015 decision, the Board agreed that Ms. Butler's lay statements were new and material evidence sufficient to reopen her claims. R. at 639-41. The Board remanded the reopened claims for VA to obtain a gynecologic medical opinion. R. at 644-46. The examiner was directed to consider whether Ms. Butler's claimed gynecologic disorder was related to her 1982 tubal ligation or whether her in-service symptoms represented early signs of later diagnosed conditions, including fibroids. R. at 645-46. The examiner was further instructed that Ms. Butler was "competent to report injuries and symptoms and that her reports must be considered in formulating the requested opinion." R. at 646 (emphasis omitted).

Ms. Butler underwent the ordered VA examination in April 2015. R. at 431-37. The examiner, Dr. Sara E. Perez-Torres, noted a historical diagnosis of fibroid uterus, R. at 431, treated with a total hysterectomy, R. at 433; *see also* R. at 435. Dr. Perez-Torres stated that the "diagnosis of fibroids . . . is not causally related to service or to the tubal ligation." R. at 437. She further opined that "[t]here was no[] evidence of fibroids during [Ms. Butler's] service." *Id.* After VA requested that Dr. Perez-Torres provide a rationale for her opinion, R. at 409, Beverly A. Gilraine, a nurse practitioner, opined the following month that a tubal ligation "would in no way cause an

enlarged uterus," R. at 406. Ms. Gilraine further opined that Ms. Butler's condition did not first manifest during active service because "1992 is the first mention of an apparent small fibroid." *Id.*

In a June 2017 decision, the Board determined that the April and May 2015 opinions lacked adequate rationales. R. at 371. The Board remanded the claims for an additional VA medical opinion and instructed the examiner to opine as to whether Ms. Butler's claimed gynecologic disorder "*originated during active service* or is otherwise etiologically related to active service," to include consideration of the symptoms described in Ms. Butler's lay statements. R. at 372 (emphasis added). The examiner was directed to "assume that [Ms. Butler] is a reliable historian" and cautioned that he or she "must not ignore [Ms. Butler's] competent reports . . . of symptoms experienced during active service and since." R. at 373.

Dr. Perez-Torres provided an addendum medical opinion in July 2017. R. at 96-97. She stated that she accepted Ms. Butler's "historical claim of symptoms" and opined that the condition leading to Ms. Butler's hysterectomy was unrelated to the tubal ligation. R. at 97. As rationale, she explained that "[t]ubal ligation . . . prevents pregnancy by permanently closing or blocking the fallopian tubes," while a fibroid "is a benign smooth muscle tumor." *Id.*

In the September 2018 decision on appeal, the Board considered Ms. Butler's theory "that her in-service tubal ligation in August 1982 caused pain and her enlarged uterus[,] which resulted in a hysterectomy." R. at 8. The Board found that, taken together, the VA medical opinions were probative evidence that Ms. Butler's hysterectomy was unrelated to her tubal ligation. R. at 8-9. The Board acknowledged Ms. Butler's belief that her gynecologic disorder is related to service, but found her not competent to link her symptoms to service. R. at 9. Consequently, the Board denied the claim for a gynecologic disorder and for a hysterectomy scar. R. at 4. This appeal followed.

## **II. JURISDICTION AND STANDARD OF REVIEW**

Ms. Butler's appeal is timely, and the Court has jurisdiction to review the September 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

A remand by the Board or Court confers on the claimant a legal right to substantial compliance with the remand order. *Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010); *Dyment v. West*, 13 Vet.App. 141, 147 (1999); *Stegall v. West*, 11 Vet.App. 268, 271 (1998). When a claim

is remanded to provide the claimant with a VA medical examination or opinion, the Secretary must ensure that the opinion provided is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one'," *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). The Board's failure to ensure substantial compliance with a remand order, including its failure to ensure that an ordered medical examination or opinion is adequate, constitutes a basis for remand by this Court. *See Donnellan*, 24 Vet.App. at 176.

The adequacy of a medical examination is a finding of fact that the Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *see Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Davis v. West*, 13 Vet.App. 178, 184 (1999). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In rendering its decision, the Board is required to provide a written statement of reasons or bases for its "findings and conclusions[ ] on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision and to facilitate review in this court. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for rejecting any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). It must also discuss all provisions of law and regulation that are made "potentially

applicable through the assertions and issues raised in the record." *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (requiring the Board to address all issues explicitly raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

### III. ANALYSIS

Ms. Butler argues, among other things, that the Board relied on inadequate medical opinions and, in so doing, failed to ensure substantial compliance with its remand orders. Appellant's Brief (Br.) at 12-20. Specifically, she notes that, in September 2014, her then-representative argued that her in-service pelvic and abdominal symptoms were early signs of her later-diagnosed fibroids. *Id.* at 12. She argues that Dr. Perez-Torres's and Ms. Gilraine's April and May 2015 opinions that there was no evidence of fibroids during service or before 1992 failed to account for the possibility, based on her lay report of symptoms, that she had undiagnosed fibroids before 1992. *See id.* at 13-15. She further notes that Dr. Perez-Torres's June 2017 opinion did not address this theory of entitlement and, thus, did not cure the inadequacies inherent in the 2015 opinions. *Id.* at 15-16. The Secretary disputes these contentions. Secretary's Br. at 6-12. The Court agrees with Ms. Butler.

As noted above, Ms. Butler's then-representative explicitly raised before the Board the theory that Ms. Butler's in-service pelvic and abdominal symptoms were early manifestations of her later-diagnosed fibroids. R. at 650. Additionally, in both its February 2015 and June 2017 remand decisions, the Board directed the VA examiner to consider whether Ms. Butler's claimed gynecologic disorder had its onset during service. R. at 372, 645-46.

In April 2015, Dr. Perez-Torres opined that there was no evidence of fibroids during service. R. at 437. However, she did not discuss the contents of Ms. Butler's SMRs or lay testimony of a continuity of symptoms. *See Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293; *Nieves-Rodriguez*, 22 Vet.App. at 301. Ms. Gilraine's May 2015 opinion adds no clarity, as she provides no explanation as to why a 1992 fibroid *diagnosis* is evidence that Ms. Butler had no fibroid *symptoms* during active service. *See R.* at 406. In her July 2017 opinion, Dr. Perez-Torres again opined that Ms. Butler's gynecologic disorder was unrelated to service, but her opinion is inadequate because she provided a rationale only as to Ms. Butler's theory that her claimed disorder is related to the tubal ligation. R. at 97; *see Monzingo*, 26 Vet.App. at 105.

Consequently, the Board erred in relying on the VA opinions, which are inadequate for rating purposes. *See Barr*, 21 Vet.App. at 311.

To the extent that the Secretary argues that the in-service complaints of pelvic and abdominal pain are not relevant to Ms. Butler's gynecologic claim, Secretary's Br. at 8-9, the Secretary's attempt to make up for the Board's deficient analysis and development is nothing more than a post-hoc rationalization that the Court will not accept. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's post-hoc rationalizations 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) ("[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."). Moreover, the Secretary lacks the necessary expertise to opine as to the medical relevance of these records. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.").

Because neither Dr. Perez-Torres nor Ms. Gilraine provided adequate rationales explaining their conclusions that Ms. Butler's fibroids did not have their onset during active service, their medical opinions are inadequate, *see Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293; *Nieves-Rodriguez*, 22 Vet.App. at 301, and the Board erred in relying up on them to deny Ms. Butler's gynecologic disorder claim, *see Barr*, 21 Vet.App. at 311. Furthermore, because the medical opinions are inadequate, they cannot be considered substantially compliant with the Board's remand orders. *See Donnellan*, 24 Vet.App. at 176; *Dyment*, 13 Vet.App. at 147; *Stegall*, 11 Vet.App. at 271. Accordingly, remand is necessary for the Board to obtain a new medical opinion that is adequate. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the record is otherwise inadequate, a remand is the appropriate remedy.").

As for Ms. Butler's claim for service connection for a hysterectomy scar, the Court concludes that the matter is inextricably intertwined with the gynecologic condition and must also be remanded. *See Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (explaining that, "in the interests of judicial economy and avoidance of piecemeal litigation," claims that are "intimately connected" should be adjudicated together); *Henderson v. West*, 12 Vet.App. 11, 20 (1998) ("[W]here a decision on one issue would have a significant impact upon another, and that impact in turn could render any review by this Court of the decision on the other [issue] meaningless and

a waste of judicial resources, the two [issues] are inextricably intertwined." (internal quotations and alterations omitted)).

In accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), Ms. Butler is free to submit any additional arguments and evidence on remand, including any additional arguments she made to this Court; the Board must consider any such evidence or argument submitted. See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

#### **IV. CONCLUSION**

Upon consideration of the foregoing, the portions of the September 11, 2018, Board decision that denied service connection for a gynecologic disorder and a hysterectomy scar are SET ASIDE and the matters are REMANDED for further development, if necessary, and readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: April 28, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)