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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1083

JUAN PENA MEDINA, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Juan Pena Medina served the Nation honorably in the United States Army. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a February 5, 2019, decision of the Board of Veterans' Appeals that denied (1) service connection for a low back disability and (2) entitlement to a total disability rating based on individual unemployability (TDIU).[2] Because the Board's statement of its reasons or bases for relying on a November 2018 VA medical opinion to deny service connection for appellant's back condition is inadequate to enable meaningful judicial review, we will set aside the decision on that claim and remand the matter for further proceedings. We will also set aside the Board's denial of TDIU because that matter is inextricably intertwined with appellant's back claim and remand that issue as well.

I. BACKGROUND

In September 2010, appellant sought service connection for a back disability and 2 months later added a request for TDIU. For almost a decade, the claims have bounced back and forth

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[2] Record (R.) 3-14. The Board also denied an initial disability rating greater than 30% for PTSD. Appellant expressly disclaims any appeal as to this matter, *see* Appellant's Brief at 1 n.1, so we deem any such appeal abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

between VA regional offices and the Board as in a kind of strange game of ping pong. Also of significance, appellant's service records were destroyed in the 1973 fire at the National Personnel Records Center in St. Louis.[3]

VA afforded appellant his first examination for his back condition in October 2012.[4] However, in an April 2016 decision, the Board determined that this examination was inadequate because the examiner did not address appellant's lay statements and was generally too vague in terms of rationale.[5] The Board remanded the issue for a new medical opinion.[6]

VA afforded appellant his second back disorder examination in August 2016.[7] But the Board determined that this examination was also inadequate.[8] Specifically and to the Court rather inexplicably, the Board concluded that the examiner had based her opinion in part on a review of appellant's service treatment records (STRs).[9] But that could not have been true because appellant's service records were destroyed in the 1973 fire.[10] So, the Board remanded the matter for yet another examination to correct this problem.[11]

VA provided a third back examination (actually an addendum opinion) in January 2017.[12] Incredible as it may seem, the Board had to find this opinion inadequate as well.[13] The reason was that this examiner too stated that she relied on appellant's STRs – the records that did not exist.[14] We pause to note that it is truly astounding that two opinions purported to base negative nexus opinions on the review of records that everyone agrees do not exist. In any event, yet again, the Board remanded the matter for an examination that – in the Court's words – complied with reality.[15]

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[3] R. at 564.

[4] R. at 509-21.

[5] R. at 402-03.

[6] R. at 404-06.

[7] R. at 282-90.

[8] R. at 240.

[9] *Id*.

[10] R. at 564.

[11] R. at 242-43.

[12] R. at 206-08.

[13] R. at 135.

[14] *Id*.

[15] R. at 137-38.

This latest remand led to a November 2018 back disability examination that provided yielded a negative nexus opinion.[16] The Board relied on that medical opinion to deny appellant's claim.[17] This appeal followed.

II. ANALYSIS

Appellant asserts that the Board erred when it relied on a November 2018 VA medical opinion to deny his claim for service connection for a back condition because he asserts that that opinion was inadequate for adjudication purposes. He asks us to remand that matter. He also asserts that his TDIU claim is so related to back disorder claim that it is inextricably entwined with the back disorder claim and should therefore be remanded as well. The Secretary defends the Board's decision in full and urges that we affirm.

A. Service Connection for a Back Disability

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.[18] The Court reviews the Board's findings regarding service connection for clear error.[19] We may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and the Court is "'left with the definite and firm conviction'" that the Board's decision was in error.[20]

The Court also reviews Board determinations about the adequacy of medical opinions for clear error.[21] A medical opinion is adequate when it's "based upon consideration of the veteran's . . . medical history and examinations and also describes the disability in sufficient detail" so that the Board's "evaluation of the claimed disability will be a fully informed one."[22] "It is the

[16] R. at 99-108.

[17] R. at 7.

[18] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

[19] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[20] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[21] *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see Gilbert*, 1 Vet.App. at 52.

[22] *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."[23]

Finally, and importantly for this appeal, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court.[24] Moreover, that obligation is heightened here because appellant's service records are not available.[25]

The Board's statement of reasons or bases for relying on the November 2018 VA medical opinion to deny appellant service connection for a back disorder is inadequate. First, the Board does not explain how the November 2018 opinion cured the defects in the earlier opinions that relied on STRs that did not exist. To be sure, the November 2018 examiner did not explicitly state that she had reviewed records that did not exist, as the earlier examiners had (amazingly) done. However, the November 2018 examiner supported her negative nexus conclusion in part with her assessment that "[t]here is no evidence in VBMS [Veterans Benefits Management System] of any back injuries so as to cause actual condition."[26] But no records can possibly exist in VBMS for appellant's time in service because a fire destroyed them. The examiner never acknowledges that fact, and given what had happened before November 2018, we can't lightly assume she was proceeding on the true state of affairs. And if one assumes appellant's lay statements about an in-service injury are correct, the fact that the postservice records show no *additional* injury actually supports appellant's claim. And to top it off, immediately after the November 2018 examiner says VBMS contains no evidence of appellant's back injuries, the examiner expressly agrees with the conclusions of the examiners who relied on STRs that did not exist.[27] In other words, she seems to adopt the assessments that were rendered supposedly after the earlier examiner had reviewed records that no longer existed. The Board addressed none of this, appearing to be satisfied that this examiner did not use the "STR" term. That is not sufficient.

In addition, the Board did not discuss a questionable conclusion the November 2018 examiner reached about a private medical opinion appellant submitted in September 2010. The

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[23] *Nieves-Rodriguez*, 22 Vet.App. at 304.

[24] 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

[25] *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005).

[26] R. at 99.

[27] *Id*.

VA examiner stated that the private physician "apparently did not have or did not take a look at all medical records to achieve her assessment."[28] The VA examiner provides absolutely no support for that statement – literally none at all. We have no idea why the VA examiner reached that conclusion nor why the Board simply accepted it as true.[29] The Board can't so uncritically accept such statements.

The bottom line is that the Board did not sufficiently explain why the November 2018 VA medical opinion was adequate, especially given all that preceded it. On remand, the Board must ensure that it critically assesses the evidence before it, cognizant of the fact that appellant's service records are not available through no fault of his own.

B. Entitlement to TDIU

Appellant argues that his request for TDIU should be remanded because it is inextricably intertwined with his back claim. The Secretary does not contest this assertion. As we have explained, "where 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 issue [on the other claim] meaningless and a waste of judicial resources,' the two claims are inextricably intertwined."[30] We conclude that the TDIU claim could be affected by the decision on service connection for the back condition. So, we will remand the issue of TDIU as well.

C. Appellant's Rights on Remand

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[31] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[32] The Board must consider any such additional evidence or argument submitted.[33] The Board must also proceed expeditiously.[34]

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[28] *Id*.

[29] R. at 7-8.

[30] *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)); *see also Parseeya-Picchione v. McDonald*, 28 Vet.App. 171, 177 (2016).

[31] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

[32] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[33] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[34] 38 U.S.C. §§ 5109B, 7112.

III. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the February 5, 2019, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: April 29, 2020

Copies to:

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