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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6735

CLARK MCCARTNEY III, APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Clark McCartney III appeals an August 2018 Board decision that denied his claim for service connection for ischemic heart disease. He argues that the Board did not ensure substantial compliance with a prior remand order and did not rely on an adequate VA medical opinion, adding that the Board's reasons or bases are also deficient. In addition, he raises several challenges to 38 C.F.R. § 20.1304, asserting that this regulation improperly allowed the Board to issue a decision only 6 days into the 90-day period he was told he had to submit additional evidence and argument. For the following reasons, the Court affirms.

I. BACKGROUND

From 1956 to 1958, Mr. McCartney served in the Air Force as a combat crew member. His job duties—including inspecting, loading, equipping, and manning aircraft for missions—exposed him to ionizing radiation. More than 50 years after discharge, in July 2013, he requested service connection for ischemic heart disease, claiming that it was related to his radiation exposure. In support of his claim, he submitted two medical articles, asserting that they showed an association between cardiovascular disease and radiation exposure. VA denied the claim, and he appealed to the Board.

In July 2017, the Board remanded so VA could procure a medical nexus opinion from a "radiologist—or any other specialist qualified to discuss the effects of radiation on the human body." R. at 296.

A medical opinion was obtained in November 2017. The examiner noted review of the record, explicitly mentioning the medical records and copies of scientific articles that Mr. McCartney submitted. The examiner also conducted an "independent search of current scientific literature pertaining to low-level ionizing radiation exposure and cardiovascular risk." R. at 222. However, the medical literature did not suggest that Mr. McCartney's coronary artery disease was caused by his radiation exposure, with the examiner reasoning that coronary artery disease is "a common medical condition in aging males" and is even more common in males with diabetes, like Mr. McCartney. *Id*. Given that the veteran had a known risk factor for coronary artery disease, the examiner concluded that his exposure "to low-level ionizing radiation more than 50 years prior to the presentation of his disease . . . [was] not likely to have been a significant contributing factor." *Id*.

Thereafter, on July 26, 2018, (the exact date is important) the Board notified Mr. McCartney that his appeal "resumed its place on the docket." R. at 18. The July 2018 letter further informed him that he had "90 days from the date of this letter or until the Board issue[d] a decision in [his] appeal (whichever [came] first) to request a change in representation or to submit additional argument or evidence." *Id*. The letter cited § 20.1304 and advised the veteran to send any submissions directly to the Board.

Six days later, on August 1, 2018, the Board issued a decision denying Mr. McCartney's claim. The Board relied on the November 2017 medical opinion, finding it adequate because the examiner "(1) fully considered the veteran's prior medical history, including the veteran's claims file, his Board hearing testimony, private treatment records, and a review of relevant scientific literature; (2) described the veteran's disability with sufficient detail; and (3) supported [the] conclusion with a reasoned analysis." R. at 7 (some capitalization altered).

II. ANALYSIS

On appeal, Mr. McCartney first argues that the Board failed to ensure substantial compliance with the terms of the July 2017 remand when a medical opinion was not obtained from a radiologist. He also argues that the Board clearly erred in relying on the inadequate November

2017 VA medical opinion. In addition, he contends that the Board didn't sufficiently explain why the VA opinion was adequate or substantially compliant. Finally, he argues that the Board erred in issuing a decision 6 days after notifying him that he had 90 days to submit evidence and argument. Specifically, he asserts that the regulation allowing the mailing of a decision prior to the expiration of the 90-day period—38 C.F.R. § 20.1304—is unconstitutional, constitutes an arbitrary and capricious interpretation of various governing statutes, and violates *Kutscherousky v. West*, 12 Vet.App. 369 (1999).

A. *Remand Compliance*

The Board errs if it fails to ensure substantial compliance with a prior remand. *Mathews v. McDonald*, 28 Vet.App. 309, 315 (2016). The Board's determination as to whether there was substantial compliance with a remand is a finding of fact that is reviewed for clear error. *Gill v. Shinseki*, 26 Vet.App. 386, 391-92 (2013). "As with any finding on a material issue . . . the Board must support its substantial compliance determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis of that finding and facilitates review in this Court." *Mathews*, 28 Vet.App. at 315.

Mr. McCartney argues that the Board did not ensure substantial compliance with its July 2017 remand because VA did not obtain an opinion from a "radiologist—or any other specialist qualified to discuss the effect of radiation on the human body." R. at 296. Essentially, the veteran contends that the VA examiner was not competent to discuss radiation's effect on the human body.

As an initial matter, it's not entirely clear to whom the critical nexus opinion should be attributed. The electronic signature at the bottom of the examination report belongs to a VA nurse practitioner. Within the report, however, the negative linkage opinion is electronically signed by a VA cardiologist. The Board attributed the examination report and opinion to the cardiologist. Ultimately, the issue is irrelevant because Mr. McCartney's argument does not turn on whether the examiner was a cardiologist or a nurse practitioner. Because neither is a radiologist or similar medical professional, he contends the resulting opinion was not competent.

Francway v. Wilkie, 940 F.3d 1304 (Fed. Cir. 2019), forecloses this argument. There, the Federal Circuit held that the Board need not affirmatively establish an examiner's competency absent a challenge from the claimant. *Id.* at 1308. The Board "must satisfy its burden of persuasion as to the examiner's qualifications" only when the issue is raised before it. *Id*. Notably, the competency challenge in *Francway* arose in the context of a remand order requiring an opinion

from a specialist. Yet, the Federal Circuit explicitly rejected the argument that the presumption of competence operated any differently in situations where a specialist's opinion is requested. *Id.* at 1309.

Here, because Mr. McCartney did not raise the issue of competency before the Board, the Board didn't err in accepting the examiner as qualified. Although the veteran now asserts that the Board needed to establish competency as part of its requirement to support its substantial compliance determination with an adequate statement of reasons or bases, *Francway* specifically dealt with an opinion obtained in the remand context. *Id.* There is no basis for the distinction the veteran tries to make. Also unavailing is the veteran's assertion that he should have been "alerted . . . to the specifics of his VA examiner." Appellant's Reply Br. at 7-8. The presumption does not burden VA with the task of alerting veterans to information about an examiner's qualifications; rather, it places on the veteran the "burden to request" the examiner's qualifications. *Francway*, 940 F.3d at 1308.

Last, the veteran relies on *Wise v. Shinseki*, 26 Vet.App. 517 (2014), to argue that the examiner's competency was apparently irregular and that the Board was, therefore, required to address the examiner's competency even though he didn't challenge it. *Wise* held that an apparently irregular medical opinion may prevent the presumption of competence from attaching, even if the veteran hasn't raised a challenge. *Id.* at 526; *see also Francway*, 940 F.3d at 1308 n.2 (declining to address the applicability of the presumption of competence where "the record independently demonstrates an irregularity"). In *Wise*, however, the examiner explicitly called her own competence into question. That didn't happen here. Further, the veteran did not cite evidence or raise an argument as to how the cardiologist's opinion is apparently irregular, such that the issue of competence was independently raised. *See Bankhead v. Shulkin*, 29 Vet.App. 10, 24 (2017) (the appellant has the burden of demonstrating error on appeal). Thus, the Court discerns no error in the Board's lack of discussion regarding the cardiologist's competence.

B. *Adequacy of Medical Opinion*

Mr. McCartney also argues that the Board clearly erred in relying on an inadequate medical opinion. The veteran contends that the examiner didn't explain why the medical literature he submitted was not convincing. He also argues that the examiner didn't base the opinion on his specific medical history and instead opined on generalities regarding risk factors for coronary artery disease.

A medical opinion is adequate if it "rest[s] on the 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." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). But "there is no reasons or bases requirement imposed on examiners." *Id.* The Court reviews the Board's determination that an examination was adequate for clear error. *Sharp v. Shulkin*, 29 Vet.App. 26, 31 (2017). Under this standard, the Court must affirm the Board's conclusions of facts unless firmly convinced a mistake has been made; the Court cannot substitute its judgment of the evidence for that of the Board. *Id*.

The November 2017 examiner reviewed the veteran's medical history and medical literature he submitted, as well as conducted independent research on the medical issue. Ultimately, the medical literature did not indicate to the examiner that a relationship existed between coronary artery disease and exposure to low levels of ionizing radiation. Thus, the examiner attributed the cause of the veteran's coronary artery disease to his age and diabetes mellitus.

The Court is unpersuaded by the veteran's argument that remand is necessary so that the examiner can further explain why the medical articles the veteran submitted did not establish a link between radiation exposure and heart disease. Though disclaiming such an intention, the veteran is simply arguing that the examiner failed to provide an adequate statement of reasons or bases. But examiners are not obliged to provide that level of discussion in their opinions. *Acevedo*, 25 Vet.App. at 293. Examiners are tasked with describing the disability in sufficient detail to fully inform the Board's evaluation of the disability. *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). Here, when the opinion is read as a whole, the examiner's explanation fully informed the Board that the veteran's coronary artery disease could not be attributed to his radiation exposure based on the medical literature and the fact that he has diabetes. This opinion, which was supported by reasoned medical judgment, also rested on a comprehensive review of the record and the correct facts. *See Acevedo*, 25 Vet.App. at 293. Moreover, the veteran did not identify an error in the examiner's recitation of the medical articles. *See McCray v. Wilkie*, 31 Vet.App. 243, 249 (2019) (holding that "a medical text's qualifying or contradictory aspects may affect the probative value and adequacy of any ensuing medical opinion that relies on the text"); *see also Bankhead*, 29 Vet.App. at 24.

Similarly, the Court is not convinced that the examiner failed to base the etiology opinion on the full medical history and instead relied on generalities regarding cardiac risk factors. In reviewing the claims file and discussing the history of the veteran's cardiac disease, the examiner noted that the veteran's medical history included diabetes, which placed him at risk for coronary artery disease. R. at 222. (noting that 50% of patients with diabetes die from heart disease). Although the examiner cited general medical statistics, it was to explain the conclusion that Mr. McCartney's known risk factor made it unlikely that his coronary artery disease was caused by exposure "to low-level ionizing radiation more than 50 years prior to the presentation of his disease." *Id*. This was not improper. And Mr. McCartney has not otherwise identified any inaccuracy in the examiner's discussion of his medical history or what more the examiner should have discussed.

In sum, the veteran has not pointed to any error in the examination report. *See Bankhead*, 29 Vet.App. at 24. Moreover, the Board's statement of reasons or bases need only enable the Court and the veteran to understand the precise basis for its decision. The Board's explanation here met that standard. *See Mathews*, 28 Vet.App. at 315.

C. *38 C.F.R. § 20.1304*

Finally, the veteran argues that the Board erred in issuing a decision 6 days after notifying him that he had 90 days, or until the Board issued a decision, to submit evidence and argument. These arguments are resolved by *Williams v. Wilkie,* 32 Vet.App. 46 (2019). In both Mr. McCartney's and Mr. Williams's cases, the Board notified the veterans that their appeals had returned to the docket after a remand and, citing to § 20.1304, that they had 90 days to submit evidence or argument, unless the Board issued a decision first. And, in both cases, the veterans argue that the Board erred in relying on § 20.1304(a) because the regulation is unconstitutional on its face and as applied, constitutes an arbitrary and capricious interpretation of governing statutes, and conflicts with caselaw. *See Williams*, 32 Vet.App. at 50; Appellant's Br. at 20-28.

In *Williams*, the Court held that § 20.1304 does not apply to appeals returned to the Board after a remand and thus declined to address challenges to the regulation. 32 Vet.App. at 50. The Court also found that any erroneous citation to the regulation in the Board's notification letter was harmless because it accurately notified the veteran that a decision could be issued before 90 days expired. *Id.* at 57. The same logic applies here. Mr. McCartney challenges the Board's citation to § 20.1304 in its notification letter. But because his appeal had returned to the Board after the 2017

remand, § 20.1304 did not apply. Thus, the Court similarly declines to address the challenges to the regulation. *See id*. at 50. Furthermore, any citation to the regulation is harmless, as it accurately notified the veteran that the Board could issue a decision at any time.

III. CONCLUSION

Accordingly, the Court AFFIRMS the August 1, 2018, Board decision.

DATED: April 29, 2020

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