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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0697

CHARLES R. BARWICK, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Charles R. Barwick, through counsel appeals a November 21, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to disability benefits for a lower back disorder and bilateral carpal tunnel syndrome (CTS). Record (R.) at 3-12. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision denying entitlement to disability benefits for bilateral CTS, vacate the Board's decision denying benefits for a lower back disorder, and remand the vacated matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from December 1957 to December 1960; his military occupational specialty was radio intelligence operator. R. at 1081. A service treatment record from February 1959 reflects that he "[h]urt [his] back about 1 w[ee]k ago [and experienced p]ain in certain positions – [l]eaning backward"; he received heat treatment. R. at 890.

His separation examination revealed a clinically normal spine and other musculoskeletal systems. R. at 888-89.

In December 1998, he sought treatment from a private physician for neck and back problems, which he indicated had lasted for 4 days, R. at 257-58, and he continued to receive treatment from that physician until March 2016, R. at 259-64. He filed a claim for entitlement to disability benefits for a lower back condition and bilateral CTS in March 2012. R. at 1092-109. A VA regional office (RO) denied his claims in September 2013, R. at 704-13; he filed a Notice of Disagreement, R. at 680-81; the RO continued the denial in a September 2014 Statement of the Case, R. at 641-62; and he perfected his appeal to the Board, R. at 638-39. The RO issued a Supplemental Statement of the Case (SSOC) in October 2016. R. at 342-47.

The appellant submitted a statement in November 2016 in which he stated that he injured his back while in service, he received treatment at the base several times a day for the injury, he began receiving treatment from a chiropractor "[w]hen [he] got out of the Navy," but the chiropractor "died in 1998, and his records are not available," and he started seeing another chiropractor thereafter. R. at 267. The appellant testified before the Board in February 2017. R. at 272-99. With regard to CTS, he reported that he served as a communications technician in service and "typ[ed] all the time," R. at 274, he began to experience numbness in his hands about 20 to 25 years ago, R. at 275, and he worked in a post office for the last 35 years where he would sort mail repetitively with his hands, R. at 275-76. Regarding his back condition, he repeated the circumstances and history of his back injury similar to what he reported in his November 2016 statement. R. at 279.

The Board remanded his claims in November 2017 for VA examinations and opinions regarding the etiology of his disabilities, which he underwent in January 2018, R. at 231-42; the Board noted in the remand order that the appellant is competent to report his medical history and symptoms, and such reports must be specifically acknowledged and considered in formulating any opinions, R. at 241. The January 2018 VA examiners confirmed a diagnosis of both degenerative arthritis of the spine and bilateral CTS, R. at 199, 211, but the examiners opined that it was less likely than not that his back disability or CTS were related to service, R. at 207, 209.

Regarding his back disability, the examiner summarized his medical history, including his report of an in-service injury, further in-service treatment, and treatment by a chiropractor following service. R. at 200. However, to support his negative nexus opinion, the examiner stated,

in part, that the appellant "had an episode of back pain in 1959 but no follow[-]up," his separation examination was normal, and "there is not evidence of continued back problems until almost 40 years later." R. at 207. He further noted that degenerative disc disease is common among men as they age, no evidence existed of trauma or chronic back disease during service, and the appellant could have experienced back pain for many years as he reported, but opined that, "without [emergency room] or clinic visits, imaging or other evidence to suggest a chronic lumbar spine condition until . . . 1998," he "could not use the reported symptoms" to find a nexus to service. R. at 208.

With regard to CTS, the examiner found no "evidence of a diagnosis of CTS or of wrist or hand symptoms" in service, acknowledged the appellant's suggestion that his typing in service "may have caused the disease," but cited a medical article indicating that "[t]yping by itself does not appear . . . to be a major risk factor [for CTS]," and found that, "[g]iven the few years the [appellant] was required to type and the many years of labor afterwards," no nexus existed between CTS and typing in service. R. at 209-10.

The RO issued an SSOC in August 2018 continuing the denial. R. at 98-118. The same month, the spouse of the appellant's private chiropractor submitted a letter stating that the appellant was a patient of her husband from 1969 until the chiropractor's death, and an employee of the chiropractic clinic submitted a statement the following month that the appellant underwent treatment for his neck and lower back from 1991 to 1997. R. at 57, 59. A private physician opined in September 2018 that "[i]t is certainly possible that [the appellant's] duties while in service may have contributed to [his lower back disability]." R. at 56.

In November 2018, the Board denied his claim for a back disorder, on theories of direct service connection and continuity of symptomatology, and bilateral CTS, relying on the negative nexus opinions from the January 2018 VA examiners. R. at 3-12. This appeal followed.

II. ANALYSIS

The appellant first argues that the Board erred by relying on an inadequate January 2018 VA examination to deny entitlement to disability benefits for a back disorder. Appellant's Brief (Br.) at 10-14. He further contends that the Board's reasons or bases are inadequate because the Board did not explain why it found the VA examiner's opinion more probative than his lay testimony with regard to continuity of symptomatology, *id.* at 15-17, and, with regard to his

bilateral CTS, why the VA examiner's opinion was adequate, *id.* at 17-18. Finally, the appellant avers that the February 2017 Board hearing officer failed to comply with the duties of a hearing officer under *Bryant v. Shinseki*, 23 Vet.App. 488, 497 (2010) (per curiam). Appellant's Br. at 19-20. The Secretary disputes these arguments and urges the Court to affirm the Board's decision. Secretary's Br. at 5-13.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). For chronic diseases included in the provisions of 38 U.S.C. § 1101(3) and 38 C.F.R. § 3.309(a), there are two alternative methods of establishing service connection—chronicity and continuity of symptomatology. *See Walker v. Shinseki*, 708 F.3d 1331, 1335-36, 1340 (Fed. Cir. 2013).

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion,] . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or 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, if any, 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)) (internal quotation marks omitted), 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) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

The Board's determinations of whether a medical examination or opinion is adequate and whether the record establishes entitlement to service connection are findings of fact, which the Court reviews under the clearly erroneous standard. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364,

395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

A. Back Disability

The appellant avers that the January 2018 VA opinion is inadequate because the examiner relied on an inaccurate factual premise—that there was no evidence of continued back problems for almost 40 years after service—because he presented competent and credible evidence of continued back problems and treatment following service. Appellant's Br. at 10-12. The appellant acknowledges that the examiner generally noted his reports of symptoms and treatment when recording his medical history but contends that the examiner, in his analysis, dismissed those statements and took divergent positions throughout his report. *Id.* at 12-14; Reply Br. at 2-3. He further contends that the examiner failed to adequately explain why he could not provide a nexus opinion based on the appellant's lay observations. Appellant's Br. at 14 (citing *Jones v. Shinseki*, 23 Vet.App. 382, 391 (2010)). The Secretary argues that the examiner considered the appellant's lay statements and based his opinion on several factors, not merely the absence of corroborating evidence. Secretary's Br. at 5-8.

The Court, however, cannot address whether the Board erred when it relied on the January 2018 VA examination to deny the appellant's claim for a back disorder because the Board made no findings regarding the adequacy of that examination. *See* R. at 6-8; *see also D'Aries*, 22 Vet.App. at 104. Although the parties make competing arguments as to whether the VA examination was adequate, *see* Appellant's Br. at 10-14; Secretary's Br. at 5-8, the Court's review is frustrated by the Board's failure to make the necessary factual findings in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."); *see also* 38 U.S.C. § 7261(c). For example, resolving this matter would require the Court in the first instance to assess whether the 2018 examiner adequately considered the appellant's lay testimony regarding continuous symptoms and treatment following service, *compare* R. at 200 (noting that the appellant started going to a chiropractor for back pain after service), *with* R. at 207 (stating that "there is not evidence of continued back problems until almost 40 years" after service), and whether he adequately explained why he cannot relate the

appellant's current condition to service without medical evidence, *see* R. at 208. The Court, however, may not weigh the medical evidence at issue in the first instance or evaluate its potential effect on the Board's findings. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("[T]he evaluation and weighing of evidence are factual determinations committed to the discretion of the factfinder—in this case, the Board."); *see also Hensley*, 212 F.3d at 1263. Accordingly, remand is necessary for the issue of entitlement to disability benefits for his back disorder. *See Allday*, 7 Vet.App. at 527; *see also* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

B. Carpal Tunnel Syndrome

In the decision on appeal, the Board summarized the January 2018 VA examiner's negative nexus opinion and noted that the examiner relied on a medical journal for his opinion that "'typing by itself does not appear to be a major risk factor . . . [and g]iven the few years the [appellant] was required to type and the many years of labor afterwards[,] it is less likely than not that the [appellant's] CTS was due to typing during the service.'" R. at 9 (quoting R. at 191-92). The Board went on to "[w]eigh[] the testimony of the [appellant] regarding his active service typing" and his occupation as a postmaster, "the absence of in-service complaints of wrist or hand injury, and the examiner's [negative nexus] opinion," before ultimately denying his CTS claim. R. at 10.

The appellant asserts that the Board provided inadequate reasons or bases for denying his claim because it did not explain why the 2018 opinion was adequate, given that the examiner noted that typing, by itself, is not a major risk factor in the development of CTS, but that "the question remains whether, as a 'minor' risk factor, typing played any role into the onset of CTS." Appellant's Br. at 18; *see id.* at 17-18. Further, the appellant contends that the February 2017 Board member violated *Bryant* because the Board member did not inform him about the reasons the RO denied his claim or suggest that he submit a nexus opinion. Appellant's Br. at 19-20; *see* 38 C.F.R. § 3.103(c)(2) (2019); *see also Thomas v. Nicholson*, 423 F.3d 1279, 1285 (Fed. Cir. 2005) (noting that the requirements of § 3.103(c)(2) are designed "'[t]o assure clarity and completeness of the hearing record'") (quoting 38 C.F.R. § 3.103(c)(2) (2005)).

Neither argument is persuasive. First, regarding the Board's reasons or bases, the appellant, in his opening brief, merely raises the issue that the question remains whether typing might have been a "minor" risk factor in the development of CTS, Appellant's Br. at 18, without explaining why the Board was required to address it in the first place. The Court thus finds his argument not sufficiently developed to warrant consideration. *See Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (rejecting an argument that "counsel for the appellant fail[ed] to adequately develop in his or her opening brief"); *see also Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (Court unable to find error when arguments are undeveloped); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

With regard to the *Bryant* issue, the appellant fails in his opening brief to support his contention that the alleged error was prejudicial. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). In that regard, he states only that the hearing officer's omissions "are prejudicial to [the a]ppellant on the precept that VA claims are processed in a non-adversarial way." Appellant's

Br. at 19. He does not allege that he would have submitted additional evidence had the hearing officer explained the evidence needed or explain how it would have made a difference in the outcome of the issue on appeal. *See id.* at 19-20. Although the effect of an error may sometimes be obvious and an appellant may not need to do more than point to the error for the Court to conclude that the error was prejudicial, *see Sanders*, 556 U.S. at 410, this is not such a case, *see id.* ("[T]he party seeking reversal normally must explain why the erroneous ruling caused harm[,] . . . by marshaling the facts and evidence."). Accordingly, the Court will affirm the Board's decision denying entitlement to disability benefits for bilateral CTS.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's November 21, 2018, decision denying entitlement to disability benefits for bilateral CTS is AFFIRMED. The Board's decision denying entitlement to benefits for a lower back disability is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: April 29, 2020

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