

*Designated for electronic publication only*

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

No. 19-1493

ROBERT P. WILLIAMSON, 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 Robert P. Williamson appeals through counsel a November 28, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for cervical and thoracolumbar spine disabilities. Record (R.) at 4-9. For the reasons that follow, the Court will set aside the November 2018 Board decision and remand the matter for further development and readjudication consistent with this decision.

**I. FACTS**

Mr. Williamson served honorably in the U.S. Army from March 1984 to February 1987. R. at 1828. A February 1985 service medical record reflects that he sought treatment after being strangled in an altercation, resulting in hoarseness, pain, and difficulty swallowing. R. at 3630-31, 3668. At that time, a laryngeal nerve injury was suspected. R. at 3668.

A November 1986 service medical record reflects that Mr. Williamson sought treatment for complaints of central lower back pain lasting three days after riding his bike. R. at 3645; *see* R. at 3643. The service clinician noted muscle spasm and prescribed a muscle relaxant and a non-steroidal anti-inflammatory medication. R. at 3645.

In September 2012, Mr. Williamson filed for disability compensation, indicating that he sought service connection for: "neck [and] upper spine to include facet joint, cervical spine [] injury." R. at 3782.

In September 2013, Mr. Williamson underwent VA examinations addressing both cervical and thoracolumbar spine conditions. R. at 3589-604. Upon cervical spine examination, the examiner diagnosed degenerative disc disease (DDD), R. at 3596, and noted that degenerative joint disease (DJD) was present upon x-ray findings, R. at 3601. Upon thoracolumbar spine examination, the examiner did not diagnose a thoracolumbar condition, noting that Mr. Williamson did not currently complain of thoracic or lumbar pain. R. at 3590. In making this determination, the examiner specifically noted that no x-ray testing had been performed. R. at 1394.

In a single opinion, addressing "the [v]eteran's neck, upper spine and back condition," [sic]<sup>1</sup> the examiner noted Mr. Williamson's report of the in-service altercation, R. at 3596, but said that this was a choking injury with no associated spinal injury, R. at 3603. The examiner additionally noted no documentation of neck pain until 2012 and, "[t]herefore, there is no evidence to connect [Mr. Williamson's] current neck condition with his military service." *Id.* The examiner also noted the in-service treatment for lower back pain, but noted "there have been no further significant lumbar back problems." *Id.*

Also in September 2013, a VA regional office (RO) issued a decision that, as relevant, denied two separate claims: one for service connection for cervical spine DDD and the other for an "upper spine condition." R. at 3558-60. Later that month, Mr. Williamson filed a Notice of Disagreement. R. at 3537-38. At that time, he indicated that he disagreed with the RO's decision denying service connection for "upper spin[e], neck condition." R. at 3538. He also objected to the professionalism of the September 2013 VA examiner, indicating that "he did not seem to care" and "did not seem to [hear] any" of Mr. Williamson's indications that his condition began during service. *Id.*

Upon VA cervical spine examination in February 2016, the examiner diagnosed cervical spine osteoarthritis, R. at 727, and noted the presence of intervertebral disc syndrome, R. at 733. The examiner noted the in-service altercation resulting in a choking injury, R. at 727-28, but opined

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<sup>1</sup> It is unclear from the examiner's opinion if he considered the "upper spine and back condition" as a single condition or separate conditions.

that it was "less likely than not that Mr. Williamson's current[] neck/cervical spine condition is related to his military service including the anterior neck injury he sustained in 1985," R. at 735.

In February 2016, the RO issued a Statement of the Case continuing the denials of service connection for cervical spine DDD and an "upper spine condition." R. at 74-99. In March 2016, Mr. Williamson perfected an appeal to the Board. R. at 69. At that time, he stated that his "range of motion and pain in [his] neck is continually getting worse." *Id.* He additionally urged that the blunt trauma to the front of his neck could have resulted in his decreased range of motion and increased pain throughout the years. *Id.*

In the November 2018 decision on appeal, the Board denied service connection for cervical and thoracolumbar spine disabilities. R. at 4-9. The Board noted Mr. Williamson's concerns about the professionalism and bias of the September 2013 examiner, but stated that, although it discerned no evidence of bias or inadequate conduct, Mr. Williamson was afforded a second examination by a different examiner who "essentially corroborate[d] the September 2013 [examiner's] findings." R. at 5. Regarding the cervical spine disability, the Board found that the two VA examiners' negative linkage opinions were competent evidence against entitlement to service connection on a direct basis and that the record did not demonstrate that Mr. Williamson experienced continuity of symptoms to warrant service connection on a presumptive basis. R. at 6-7.

Regarding the thoracolumbar disability, the Board, although noting that Mr. Williamson asserted "an upper spine disability due to service," "characterized this issue as concerning the thoracolumbar spine to encompass portions of the spine besides the cervical spine." R. at 8. The Board stated that, although a May 2014 VA x-ray report established a diagnosis of degenerative arthritis, *see* R. at 2421,<sup>2</sup> there was "insufficient evidence of record to establish that any current thoracolumbar spine disability relates to service." R. at 8. The Board additionally stated that it did not consider the evidence of record as sufficiently indicating that any disability might be related to service to warrant further examination. *Id.* This appeal followed.

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<sup>2</sup> The May 2014 VA x-ray report reflects the presence of degenerative arthritis in the lower lumbosacral spine and right sacroiliac joint. R. at 2421.

## II. JURISDICTION AND STANDARD OF REVIEW

Mr. Williamson's appeal is timely and the Court has jurisdiction to review the November 2018 Board 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).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013).

The Board's determinations regarding service connection, whether the duty to assist has been satisfied, and the adequacy of a medical examination or opinion are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *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)).

When VA seeks to obtain a medical 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 must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

### III. ANALYSIS

Mr. Williamson argues that the Board erred in denying service connection for cervical and thoracolumbar spine disabilities when it relied on the September 2013 and February 2016 examinations, which he argues are inadequate to adjudicate the claims. Appellant's Brief (Br.) at 23-27. He additionally argues that the Board failed to address favorable evidence and otherwise failed to provide adequate reasons or bases for its decision. *Id.* at 9-23. The Secretary urges the Court to affirm the Board decision, arguing that the examinations were adequate and that the Board provided adequate reasons or bases for its determinations that service connection was not warranted. Secretary's Br. at 6-17.

#### A. Cervical Spine Disability

In its decision, the Board denied service connection for a cervical spine disability under two theories of entitlement. Regarding service connection on a direct basis, the Board found that the September 2013 and February 2016 examiners provided competent, probative evidence against the claim. R. at 7. Regarding service connection on a presumptive basis, the Board found that, although Mr. Williamson had a "chronic disease" listed under 38 C.F.R. § 3.309(a), service connection was not warranted because the record did not reflect that he demonstrated continuity of symptoms. *Id.* The Court concludes that the examinations are inadequate to adjudicate the claim and additionally that the Board failed to provide adequate reasons or bases for its decision.

An adequate medical opinion must be based on an accurate factual premise and on consideration of the veteran's prior medical history and examinations. *Ardison*, 6 Vet.App. at 407. Although an examiner is not required to consider every piece of favorable evidence, the examiner must rely on an accurate factual history. *Monzingo*, 26 Vet.App. at 106 ("There is no requirement

that a medical examiner comment on every favorable piece of evidence in a claims file."); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) ("An opinion based upon an inaccurate factual premise has no probative value."). Additionally, VA examiners should consider a veteran's description of symptoms during and after service, *Barr*, 21 Vet.App. at 311, and a medical opinion that fails to consider a veteran's lay statements and relies on the absence of contemporaneous medical evidence to conclude that there is no link between a veteran's in-service injury and current disability may be inadequate, *Miller v. Wilkie*, No. 18-2796, 2020 WL 236755, at \*5 (Vet. App. Jan. 16, 2020); *McKinney v. McDonald*, 28 Vet.App. 15, 30 (2016); *Dalton v. Nicholson*, 21 Vet.App. 23, 40 (2007).

The September 2013 examiner overlooked favorable evidence of record suggesting that Mr. Williamson has experienced continuity of symptoms since service. Although the examiner noted that Mr. Williamson reported neck discomfort since the in-service choking incident, R. at 3596, his rationale is based entirely on the lack of documentation of symptoms, R. at 3603 (noting no mention of neck pain until 2012 and concluding that "[t]here is *no evidence* to connect his current neck condition with his military service") (emphasis added). Not only did the examiner neglect to consider Mr. Williamson's reports of continued pain since service made during the examination, he overlooked other VA medical records that similarly reflect Mr. Williamson's reports of continuity of symptoms. *See, e.g.*, R. at 3721 (August 2012 VA treatment record reflecting that Mr. Williamson reported a 30-year history of symptoms).

Similarly, the February 2016 examiner also neglected to address Mr. Williamson's reports of chronic neck pain made during the examination, R. at 727-28, and other VA medical records reflecting similar reports, *see* R. at 3721, 776 (September 2015 VA treatment record reflecting that Mr. Williamson reported chronic pain since service). R. at 735. Moreover, the examiner did not provide a reasoned rationale for his opinion that Mr. Williamson's neck disability was not related to military service. Although a medical opinion need not "explicitly lay out the examiner's journey from the facts to a conclusion" to be adequate, the Court must be able to discern the examiner's reasoning. *Monzingo*, 26 Vet.App. at 105; *see Stefl*, 21 Vet.App. at 123 (holding that a "mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to a doctor's opinion"). The examiner's opinion consisted only of a recitation of Mr. Williamson's in-service symptoms, a description of the medical records, and

findings from the examination. R. at 735. The Court is unable to discern the connection between the examiner's conclusion and the information recited in the rationale. *See Nieves-Rodriguez*, 22 Vet.App. at 304 ("Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection . . . context if it contains only data and conclusions."); *Stefl*, 21 Vet.App. at 124 ("[A] medical opinion . . . must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions.").

In the same vein, the Board similarly overlooked Mr. Williamson's statements regarding the continuity of his neck symptoms in its determination that service connection based on continuity of symptoms was not warranted. To establish service connection for chronic diseases listed in 38 C.F.R. § 3.309(a), service connection may be established by showing continuity of symptoms, which requires a claimant to demonstrate (1) that a condition was "noted" during service; (2) evidence of post-service continuity of symptoms; and (3) medical, or in some certain circumstances, lay evidence of a link between the present disability and the continuity of symptoms. 38 C.F.R. §§ 3.303(b) (2019), 3.309(a) (2019); *see Walker v. Shinseki*, 708 F.3d 1331, 1340 (Fed. Cir. 2013) (only those chronic diseases listed in § 3.309 are subject to service connection by continuity of symptoms described in § 3.303(b)); *Savage v. Gober*, 10 Vet.App. 488, 496 (finding that "symptoms, not treatment, are the essence of any evidence of continuity of symptom[s]").

The Board noted that Mr. Williamson experienced neck pain in service associated with the choking incident and current neck pain associated with the diagnosed DDD, R. at 7; *see* R. at 727 & 3601 (VA examiners' notation of cervical spine arthritis); however, it failed to consider whether his statements regarding the continuity of his neck pain were sufficient to warrant service connection based on continuity of symptoms. Although the Board found him not competent to opine on the etiology of the cervical spine disability, R. at 7, it did not find his statements describing pain as not competent or not credible. Instead, it concluded that "[t]he record does not reflect . . . that he experienced a continuity of symptom[s] since service" without discussing extant evidence reflecting his statements asserting such continuity. *See* R. at 776, 3596, 3721; *see also* R. at 69, 3538. The Board's lack of analysis frustrates judicial review. Absent sufficient analysis, the Court concludes that the Board erred by not providing adequate reasons or bases for its determination that service connection was not warranted.

## B. Thoracolumbar Spine Disability

In its decision, the Board denied service connection for a thoracolumbar disability also based on two theories of entitlement. Regarding service connection on a direct basis, the Board determined that there was "insufficient evidence of record to establish that any current thoracolumbar spine disability relates to service." R. at 8. Regarding service connection on a presumptive basis, the Board found that, although Mr. Williamson had a "chronic disease" listed in § 3.309(a), service connection was not warranted because the record did not reflect that he demonstrated continuity of symptoms. *Id.* The Court concludes that the Board erred in its decision for several reasons.

First, the Board found the presence of a current thoracolumbar disability—degenerative arthritis—despite the September 2013 examiner providing no diagnosis upon examination and his notation that Mr. Williamson had never been diagnosed with a thoracolumbar spine disability. R. at 8; *see* R. at 3590.<sup>3</sup> The Board's analysis, therefore, acknowledges, albeit implicitly, that the September 2013 examiner's opinion was inadequate as it was based on an inaccurate factual premise. *See Reonal*, 5 Vet.App. at 460-61. Yet, the Board determined that an additional examination was not warranted because it found that the evidence of record did not "sufficiently indicate[] that any thoracolumbar spine disability might relate to service." R. at 8 (citing *McLendon v. Nicholson*, 20 Vet.App. 79 (2006)).

The Board fails to appreciate that VA already afforded Mr. Williamson an examination addressing the claimed thoracolumbar spine disability. In this respect, the Board's reliance on *McLendon* is misplaced, because *McLendon* addressed the circumstances under which VA is required to afford a claimant an examination. *See* 20 Vet.App. at 81-86. As VA already afforded Mr. Williamson an examination, VA's duty to assist instead requires VA to ensure that the examination is adequate. *See Barr*, 21 Vet.App. at 311. Although the Board found the presence of a current disability, notwithstanding the September 2013 examiner's conclusion otherwise,<sup>4</sup> it

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<sup>3</sup> The Board also relied on the February 2016 examiner's lack of discussion of any thoracolumbar spine condition as supportive of the September 2013 examiner's opinion of a lack of disability. R. at 8. The February 2016 examination, however, only addressed the cervical spine, R. at 726-35, so its relevance to the claim for a thoracolumbar disability is unclear to the Court.

<sup>4</sup> The Court notes that the Board relied on a May 2014 VA x-ray report as demonstrative of a current thoracolumbar spine disability, R. at 8; *see* R. at 2421, which post-dates the September 2013 examination. However, the May 2014 x-ray report specifically refers to a December 2006 VA x-ray report and states that the progression of



failed to ensure that VA's duty to assist was met with respect to ensuring the examination was adequate. Moreover, its attempt to explain why another examination was not warranted—because the Board does not consider an "isolated" notation of back pain in service to "sufficiently indicate a potential relationship" to the current arthritis—amounts to impermissible medical judgment without sufficient basis found in the record. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] medical judgment in the guide of a Board opinion").

Second, although the Board adjudicated the claim for service connection based on direct and presumptive theories of entitlement, it failed to address the expressly raised theory of entitlement as secondary to a service-connected left hip condition. The Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). As noted above, the Board acknowledged that the May 2014 VA x-ray report reflected the presence of lumbar spine degenerative arthritis. R. at 8; *see* R. at 2421. However, the Board failed to recognize that Mr. Williamson submitted a copy of the May 2014 x-ray report in conjunction with his claims for disability compensation with an arrow drawn from the notation of lumbosacral pain to the handwritten notation: "Brought on by left hip walking wrong!" R. at 3366; *see* R. at 770-73 (January 2016 RO decision granting service connection for a left hip disability); *see also* R. at 3766 (October 2012 Board hearing testimony wherein Mr. Williamson described an antalgic gait associated with his left hip disability). This notation clearly raised the theory that the thoracolumbar disability was secondary to the service-connected left hip disability and, therefore, the Board erred in failing to address this theory of entitlement.

Accordingly, the Court concludes that the September 2013 and February 2016 medical opinions are inadequate to adjudicate the claims for service connection for cervical and thoracolumbar spine disabilities. *See D'Aries*, 22 Vet.App. at 104. The Board therefore clearly erred in relying on the opinions to deny the claims. *See Ardison*, 6 Vet.App. at 407. In addition, the Court concludes that the Board failed to address the reasonably raised theory of service

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Mr. Williamson's arthritis had not significantly changed compared to the previous x-ray report, suggesting the presence of degenerative arthritis at least since 2006. R. at 2421; *see* R. at 1437 (March 2008 VA treatment record providing a diagnosis of DJD of the lumbar spine).

connection for the thoracolumbar spine disability as secondary to the service-connected left hip disability. Therefore, remand is warranted for the Board to address this theory of entitlement and to obtain new medical opinions in conjunction with both claims, *see Barr*, 21 Vet.App. at 311; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, Mr. Williamson is free to submit additional arguments and evidence, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and 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 November 28, 2018, Board decision is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: April 30, 2020

Copies to:

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