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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1072

STEPHEN G. KHOURY, APPELLANT,

v.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: U.S. Marine Corps veteran Stephen G. Khoury appeals through counsel a November 27, 2018, Board of Veterans' Appeals (Board) decision denying service connection for a pinched nerve, due to degenerative arthritis and disc disorder (also claimed as spinal stenosis), including as secondary to contaminated water at Camp Lejeune. Record (R.) at 6-12. The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board provided adequate reasons or bases for its determination. Because the Secretary concedes that the Board did not sufficiently address whether the veteran was entitled to service connection based on his exposure to contaminated water at Camp Lejeune, we will set aside the decision and remand the matter for readjudication.

I. FACTS

Mr. Khoury served on active duty from 1972 to 1975, R. at 3715, including service at Camp Lejeune, R. at 3047. During service, he suffered a "whiplash" injury and was diagnosed with a sprained neck. R. at 3600. X-rays taken of his neck after the injury were negative. *Id.*

In December 1988, Mr. Khoury injured his neck and complained of neck spasms; he was diagnosed with an acute neck strain. R. at 318-20.

A December 2002 VA medical record noted that Mr. Khoury complained of persistent neck pain for two months. R. at 1212. A VA examiner diagnosed him with headaches and provided medication to address his pain. R. at 1212, 1214.

In July 2013, after undergoing an x-ray and magnetic resonance imaging of his spine, Mr. Khoury was noted to have chronic neck pain and was diagnosed with cervical stenosis. R. at 1687.

In August 2013, the veteran filed a claim for service connection for a pinched nerve caused by degenerative arthritis and a disc disorder. R. at 3436.

During a September 2013 VA examination, the veteran stated that he suffered from "chronic neck pain" that radiates down his left arm and wrist. R. at 3269. He also stated that he believed his condition was caused by drinking contaminated water. *Id.* The examiner opined that the veteran's condition was not related to service, and instead was the result of normal wear and tear and the aging process. R. at 3276-77. The examiner also discussed Mr. Khoury's whiplash injury in service and noted that x-rays at the time were negative. *Id.* Additionally, the examiner provided an excerpt from a medical source as rationale for her determination. R. at 3277. The excerpt explained that a "legislative change in Australia, removing financial compensation for pain and suffering from whiplash injuries, was associated with improvement in functional status and pain indices in patients with whiplash, compared to historical controls." *Id.*

In December 2013, a regional office (RO) denied Mr. Khoury's claim. R. at 3211-14. The veteran appealed this decision, explaining that he believed his condition was related to his service at Camp Lejeune. R. at 3201-02. Following a March 2016 Statement of the Case (SOC), which continued the denial of service connection, Mr. Khoury perfected his appeal to the Board in May 2016. R. at 2117-34, 2109-11.

In November 2018, the Board issued the decision on appeal, denying Mr. Khoury service connection for a pinched nerve due to arthritis and disc disease. R. at 4-14. The Board found that Mr. Khoury was exposed to contaminated water while stationed at Camp Lejeune and noted his contention that this exposure caused his current condition. R. at 7, 9. Nevertheless, the Board determined that he was not entitled to presumptive service connection based on this exposure. R. at 9. Additionally, the Board relied on the September 2013 VA examination to discount the impact of the veteran's in-service whiplash injury. R. at 10. Specifically, the Board explained that the VA

examiner "not[ed] that the x-ray report was negative [and] reviewed medical literature which did not indicate a relationship" between whiplash and the current condition. R. at 10.

II. ANALYSIS

Mr. Khoury argues that the Board erred by not addressing whether his exposure to contaminated water entitled him to service connection. Appellant's Brief (Br.) at 6-10. He further argues that the Board relied on an inadequate medical examination to deny service connection. *Id.* at 12-15. The Secretary concedes that remand is warranted for the Board to order a new examination that addresses whether Mr. Khoury should be entitled to service connection based on his exposure to contaminated water at Camp LeJeune. Secretary's Br. at 7-10. The Secretary, however, disagrees with Mr. Khoury's contentions regarding the Board's reliance on the September 2013 VA examination and argues that by relying on this exam the Board addressed all theories of entitlement, including direct service connection. *Id.* at 10-13.

We review for clear error the Board's determinations that an examination is adequate and the duty to assist has been met. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether a medical examination is adequate is a finding of fact); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000) (the Board's determination whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews under the "clearly erroneous" standard of review). "A 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." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Additionally, every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting 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).

Further, a medical examination that merely lists facts and conclusions with no "reasoned medical explanation connecting the two" lacks probative value. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). However, statements on a medical examination must be read in the context of the examination "as a whole," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012), and an examiner is not required to discuss all evidence favorable to an appellant or to otherwise give his or her reasons for discounting favorable evidence, *Roberson v. Shinseki*, 22 Vet.App. 358, 367 (2009). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[T]here is no reasons or bases requirement imposed on examiners.").

Here, the Board clearly erred by not ensuring that the duty to assist was satisfied. *See* 38 U.S.C. § 5103A. As the Secretary concedes, because no examination of record addresses whether the veteran's exposure to contaminated water while stationed at Camp Lejeune entitled him to direct service connection, the Board should have ordered a medical opinion on that issue. Secretary's Br. at 8-10. Thus, the Court will remand the matter so that the Board can order an examination addressing this theory of entitlement for service connection. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate).

Relatedly, the Board also provided inadequate reasons or bases for why it denied service connection. Despite the Secretary's contentions, Secretary's Br. at 10-13, the Board did not address whether Mr. Khoury was entitled to direct service connection due to his exposure to contaminated water while stationed at Camp Lejeune. It is particularly unclear why the Board failed to discuss this potential theory of entitlement, given that it found that the veteran was exposed to contaminated water while stationed at Camp Lejeune, and further discussed whether he was entitled to presumptive service connection based on this exposure. R. at 9; *see Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (A veteran who is not entitled to presumptive service connection may be entitled to direct service connection). Although the veteran may not suffer from a disability entitling him to presumptive service connection based on his exposure, his exposure may nevertheless allow for service connection on a direct basis. The Board's failure to discuss direct service connection based on this exposure must also be corrected on remand. *See Tucker*, 11 Vet. App. at 374.

The Board also clearly erred here by relying on the September 2013 examination. Specifically, we find that the examiner failed to provide an adequate rationale as to why Mr. Khoury's in-service whiplash injury did not contribute to his current degenerative cervical condition. *See* R. at 3276-277. It is particularly unclear why the examiner cited to the legislative intent underlying a statutory change in Australia as a rationale for her medical conclusion. *Id.*; *see also Nieves-Rodriguez*, 22 Vet.App. at 301; *D'Aries*, 22 Vet.App. at 104. Thus, on remand the Board should ensure that any additional examination that it orders provides a reasoned medical explanation connecting the ultimate opinion with the facts surrounding Mr. Khoury's condition. *See Nieves-Rodriguez* 22 Vet.App. at 301 (2008).

Because the claim is being remanded, the Court need not address his remaining argument, as it would not result in a broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

On remand, Mr. Khoury is free to submit additional arguments and evidence, including those raised in his briefs, and he has 90 days to do so from the date of the post-remand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

Upon consideration of the foregoing, the November 27, 2018, Board decision denying service connection for a pinched nerve, due to degenerative arthritis and disc disorder, including as secondary to contaminated water at Camp Lejeune, is SET ASIDE and REMANDED for further proceedings.

DATED: April 30, 2020

Copies to:

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