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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5433

JO L. HAUGH, 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*: Air Force veteran Jo L. Haugh appeals through counsel a June 4, 2018, Board of Veterans' Appeals decision denying service connection for a partial hysterectomy, including as secondary to a service-connected post-operative corpus luteum cyst. 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 failed to ensure substantial compliance with its request for an advisory medical opinion from the Veterans Health Administration (VHA); whether the Board failed to adjudicate reasonably raised claims and alternative theories of service connection; and whether the veterans law judge (VLJ) conducting the Board hearing satisfied his duty to suggest the submission of evidence. We affirm the Board decision because the requested medical opinion substantially complies with the Board's request; the Board addressed all reasonably raised theories of service connection; and the VLJ explained to the appellant that she could submit a private opinion with a more robust rationale. In short, we affirm because the appellant fails to show prejudicial error.

I. ANALYSIS

A. Substantial Compliance

The appellant argues that the Board erred by failing to ensure substantial compliance with its request for a VHA medical opinion. A remand order by the Board or the Court imposes on the Secretary a duty to ensure compliance with the terms of the remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998); *but see Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (no *Stegall* violation when the examiner "substantially complied with the Board's remand order"). Substantial compliance with the terms of a remand is shown when the Secretary's actions "resolve the issue that required the remand order." *D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008).

It remains an open question, however, whether this substantial compliance requirement applies when the Board obtains an advisory VHA opinion. *Id*. We have not had to answer this question because, whenever it has come up, we could find substantial compliance when assuming that the requirement applied. *Id.*; *see also Taylor v. Shinseki*, No. 11-2223, 2012 WL 5869385, at *5 (Vet. App. Nov. 20, 2012) (finding that the "case is no vehicle for the resolution of such issue because, even assuming *Stegall* controls, the VHA opinion substantially complies with the requirements of the Board's engagement letter"). Once again, we will not resolve this question.

This is because the 2018 VHA opinion substantially complies with the Board's engagement letter. The Board sought "to clarify whether the [v]eteran's 2006 hysterectomy was related to service, or in the alternative, was caused or aggravated by her now service-connected post-operative luteum cyst." R. at 173. Thus, it asked the doctor to "review the entire record, to include the [v]eteran's service treatment records, her post-service treatment records, and furnish opinions with supporting rationale" for two questions: (1) whether "[t]he [v]eteran's hysterectomy was due to or the result of an in-service gynecological condition(s) and/or treatment"; and whether (2) "[t]he [v]eteran's service-connected bilateral post-operative corpus luteum cyst caused or permanently aggravated a condition leading to her hysterectomy." *Id*. In response, the doctor provided a multipage opinion explaining why the veteran's hysterectomy was not the result of her in-service gynecological conditions, treatment, or post-operative corpus luteum cyst. R. 167-69.

The appellant doesn't have a problem with what's in the VHA opinion. Her quarrel is with what's *not* in it. She argues that the "opinion failed to include a discussion or analysis of *all* of [a]ppellant's in-service and post-service gynecological symptoms, conditions and treatments." Appellant's Brief (Br.) at 9. The problem with this argument is that the Board didn't ask for a

discussion or analysis of all the gynecological conditions, symptoms, or treatments. The Board asked whether the veteran's hysterectomy was related to service or the service-connected corpus luteum cyst. R. at 173. The examiner answered the Board's question and provided a rationale. This "resolve[d] the issue that required the [VHA] order." *D'Aries*, 22 Vet.App. at 105.

To be sure, the doctor did not talk about every condition noted in the medical record. But the Board did not ask the doctor to do so. And "[a] medical examiner need not discuss all evidence favorable to an appellant's claim when rendering an opinion." *Roberson v. Shinseki*, 22 Vet.App. 358, 366 (2009). Instead, "a medical opinion must be based on a consideration of the veteran's prior history and examinations and describe the veteran's condition in sufficient detail so that the Board's evaluation of the claim may be fully informed." *Id*. The 2018 VHA opinion meets this standard. The appellant's argument amounts to seeking to impose a reasons-or-bases requirement on VA medical examiners, something we have already rejected. *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2010).

Even if the appellant is correct that the VHA request and the depth of the expert's opinion are the same as in *D'Aries*, this does not help her. In *D'Aries* we held that there was substantial compliance with the VHA request and affirmed the Board decision. 22 Vet.App. at 106 (holding that "the standard of compliance required by [*Stegall*] has been demonstrated here and there could be no error."). The bottom line is that the VHA opinion here was adequate and supported by a clear rationale and the opinion shows substantial compliance with the Board's request. *See Dyment*, 13 Vet.App. at 146-47; *Stegall*, 11 Vet.App. at 271.

B. Reasonably Raised Claims

The appellant also argues that the Board failed to adjudicate many reasonably raised claims and theories. Generally, the Board need not anticipate claims for disabilities yet to be "identified in the record by medical professionals or by competent lay evidence at the time a claimant files a claim or during its development." *Brokowski v. Shinseki*, 23 Vet.App. 79, 88 (2009). But the Board must consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). "Whether an issue is reasonably raised by the record is essentially a question of fact, subject to the 'clearly erroneous' standard of review." *Lynch v. Wilkie*, 30 Vet.App. 296, 304 (2018) (citing 38 U.S.C. § 7261(a)(4). We find that the Board did not clearly err by not addressing the issues claimed by the appellant.

To start, the appellant fails to show that the Board clearly erred in not addressing whether her in-service symptoms were "indicia of uterine prolapse or otherwise contributed to her uterine prolapse which in turn necessitated removal of her uterus." Appellant's Br. at 10. The VHA expert reviewed the appellant's medical records and explained why her prolapse—the cause of her hysterectomy—did not result from any in-service gynecological conditions or treatment. R. at 168. The appellant relies on a WebMD article listing general symptoms of pelvic organ prolapse, but she only identifies a single symptom that she had in service—incontinence. But the VHA expert reviewed her records, including the notation of incontinence, and relied on her numerous normal pelvic exams during service. Thus, we do not find that the Board clearly erred in not discussing this theory when relying on a medical opinion that concluded that "the [veteran's] hysterectomy for uterine prolapse with traction cystocele was not the result of her in-service gynecological conditions and treatment." R. at 169.

As for the medical conditions that the appellant argues should have formed independent claims for service connection, VA had adjudicated and denied some of them in 2009. *See, e.g.*, R. at 1090 (July 2009 decision denying a bladder condition secondary to detached uterus). For the rest, the appellant fails to establish that she currently suffers from those conditions—a required element for service connection. *See* 38 C.F.R. § 3.303(a) (2019). Without an indication that the appellant now suffers from the ailments she argues gave rise to her claims, we fail to see why the Board would have addressed them.

In the end, the appellant argues that the Board failed to address many conditions that were documented in her medical records. But she does not explain why the Board would address claims denied nearly a decade ago, or why it would deal with conditions the appellant never claimed to presently suffer from. Thus, we find her arguments on this issue too vague and unsupported to permit judicial review. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Evans v. West*, 12 Vet.App. 22, 31 (1998) ("Absent evidence and argument, the Court will give no further consideration to this unsupported contention.").

C. VLJ Duties

In her final argument, the appellant argues that the VLJ who presided over her hearing failed to fulfill his duty to suggest that she submit evidence in support of her claim. She relies on our decision in *Bryant v. Shinseki*, where we addressed the duties imposed by 38 C.F.R.

§ 3.103(c)(2), which requires the VA representative conducting the hearing to explain fully the issues and suggest the submission of evidence that the claimant may have overlooked and that would support the claimant's position. 23 Vet. App.488, 498 (2010). The problem with the appellant's hearing argument is that there is a transcript that refutes it.

The appellant argues that the VLJ did not suggest that she submit a medical opinion with an adequate rationale to support her claim. Although her argument is difficult to follow, simply reading the transcript excerpts in her brief, we see that the VLJ held a model hearing. He addressed the private opinion in the record and explained that "it pretty much implies that the hysterectomy is because of the bleeding in service. But what it doesn't do is tell me why." R. at 282. The VLJ then suggested that "if you could have him maybe supplement that opinion and give a couple of reasons why he believes the hysterectomy is [ ] because of the breakthrough bleeding, that would be helpful." R. at 283. To be clear, this is an excellent example of what a VLJ should do.

The VLJ had reviewed the evidence—whether beforehand or by pulling up the medical opinion during the hearing, and without pre-adjudicating the issue, *see Bryant*, 23 Vet.App. at 496-97, --and noted that there was missing evidence. Although he had the medical opinion with a conclusion before him, what was lacking is foundational evidence—here the basis for the medical conclusion—and the VLJ appropriately suggested that the veteran submit that evidence.[1] The appellant cuts her quotations of the hearing short and skips the next 10 pages. But this ignores that right after explaining what was missing, the VLJ told the veteran that "if [she] wanted to get a medical opinion, [he] could hold the record open and [she] could try and [ ] maybe get that one supplemented or get a different one." R. at 284.

Rather than acknowledge this instruction, the appellant focuses on a question she asked at the end of her hearing. After the veteran, her representative, and the VLJ spoke at length of the evidence in her case—including the VLJ explaining that he may obtain a VHA opinion--, the veteran asked "are you guys saying that I should see someone else and [ ] hold the record open, or should I go with [the VHA opinion?]." R. at 293. In response, her representative explained that in

[1] We have held that the Federal Rules of Evidence are instructive for the Board when considering medical opinions. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008). Here these rules support the VLJ's inquiry. To be admissible, an expert witness's testimony needs to be based on sufficient facts or data and be the product of reliable principles and methods that are reliably applied to the facts of the case. *See* Fed. R. Evid. 702. And for lay individuals, Rule 602 requires that a witness have personal knowledge of the facts offered into evidence. The rules reflect foundational elements that need to be present. And when they are missing, the VLJ should suggest that this issue be remedied by the submission of additional evidence. *See Bryant*, 23 Vet. App.at 498.

his opinion, "they're going to come up with the same type of statement, unless you know the doctor real well, and I don't know if they're going to want to do that for you, as far as provide that medical opinion." *Id.* Thus, he concluded that she could go with her own doctor … "[o]r you can go [ ] his route. He'll review everything, and if an exam is warranted, then he can request it. It's up to you." *Id*. The veteran then said that she'd "like to just leave it with [the VLJ] and that [he] read the evidence and [ ] make [his] decision." *Id*.

In the end, the VLJ did exactly as the veteran requested. He reviewed the evidence, determined that a VHA opinion was necessary, and got that opinion. The appellant has not challenged the adequacy of that VHA opinion. Instead, she seems to have buyer's remorse. But just because she decided not to submit an opinion from a private provider—despite the VLJ explaining what the opinion would need to show and offering to leave the record open—does not mean that the VLJ did not fulfill his hearing duties.

On review of the entire record, we find no clear error in the Board's weighing of the evidence, *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013), and its explanation for the weighing of the evidence is understandable and facilitates judicial review, *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995). We also find that the appellant has not met her burden of proving error in the Board's decision. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

II. CONCLUSION

On consideration of the above and our review of the record, the Board's June 4, 2018, decision is AFFIRMED.

DATED: May 4, 2020

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