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

No. 19-2033

JOHN R. SHEFFIELD, APPELLANT,

V.

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

Before ALLEN, *Judge*.

**MEMORANDUM DECISION**

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

ALLEN, *Judge*: Appellant John Sheffield served the Nation honorably in the United States Air Force. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a January 9, 2019, decision of the Board of Veterans' Appeals that denied service connection for a back disability.[2] Because the Board erred when assessing whether the presumption of soundness had been rebutted, we will reverse the Board's determination that it had been. We will also reverse the Board's implicit finding that VA had complied with its duty to assist appellant in obtaining his service medical records (SMRs). We will remand the matter for the Board to consider appellant's service-connection claim with the presumption of soundness in place and with the benefit of appellant's missing SMRs.

## I. ANALYSIS

The Board denied appellant's claim seeking service connection for a back disability. The Secretary agrees that the Board erred. The dispute between the parties largely concerns the scope

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[2] Record (R.) at 5-15. The Board also granted appellant service connection for a neck disability. This is a favorable finding we may not review. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). We also lack jurisdiction to review the Board's decision to remand appellant's claim seeking service connection for a right knee disability. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

of the remedy the Court should provide on remand. We will first consider the Board's assessment of VA's compliance with the duty to assist appellant and then discuss the Board's decision that the presumption of soundness had been rebutted by clear and unmistakable evidence.

*A. Compliance with the Duty to Assist*

The Secretary has a duty to assist a claimant in obtaining evidence necessary to substantiate claims.[3] That duty includes making "reasonable efforts to obtain relevant records . . . that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain."[4] If the records are maintained by a Federal department or agency, "efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile."[5] The Board's determination about whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews for clear error.[6] The Court may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and we are "left with the definite and firm conviction that" the Board's decision was in error.[7]

The Secretary concedes that the Board failed to ensure that VA complied with the duty to assist.[8] The Court agrees with the parties that the Board's implicit determination that VA had satisfied its duty to assist is clearly wrong. So, we will reverse that determination.

Appellant testified that after an in-service automobile accident in December 1977, he received treatment and physical therapy for almost one year at Landstuhl Army Hospital in Germany.[9] And appellant stated that none of the records of this treatment were in his records.[10] Despite this information, there is no indication that VA made any attempts to obtain these records. On remand, the Board must ensure that VA attempts to obtain these records that appellant has adequately identified.

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[3] 38 U.S.C. § 5103A(a)(1).

[4] 38 U.S.C. § 5103A(b)(1); *see Moore v. Shinseki*, 555 F.3d 1369, 1372-75 (Fed. Cir. 2009).

[5] 38 U.S.C. § 5103A(b)(3); 38 C.F.R. § 3.159(e) (2019).

[6] *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009).

[7] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

[8] *See* Secretary's Brief (Br.) at 4-6.

[9] R. at 49.

[10] *Id*.

*B. The Presumption of Soundness*

Key to the Board's denial of service connection for a back disability is the statutory presumption of soundness. That presumption provides that:

> [E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service. [11]

VA's implementing regulation further states that "[o]nly such conditions as are recorded in examination reports are to be considered as noted." [12] Here, the Board concluded that the presumption applied because appellant's back condition had not been noted on his entrance examination.[13]

Having determined that the presumption applied, the Board then considered whether it had been rebutted. "[T]he correct standard for rebutting the presumption of soundness under section 1111 requires the government to show by clear and unmistakable evidence that (1) the veteran's disability existed prior to service and (2) that the pre-existing disability was not aggravated during service."[14] This standard is an "onerous" one to satisfy.[15] Moreover, "[o]nce the presumption of soundness applies, the burden of proof remains with the Secretary on both the preexistence and aggravation prongs; it never shifts back to the claimant."[16]

To qualify as "clear and unmistakable," evidence "cannot be misinterpreted and misunderstood, i.e., it [must be] undebatable."[17] "The Court reviews de novo a Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness, while giving deferential treatment to the Board's underlying factual findings and determinations of credibility."[18]

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[11] 38 U.S.C. § 1111.

[12] 38 C.F.R. § 3.304(b) (2019).

[13] R. at 9-10. This is a favorable determination we may not review. *See Medrano*, 21 Vet.App. at 170.

[14] *Warner v. Principi*, 370 F.3d 1089, 1097 (Fed. Cir. 2004).

[15] *Horn v. Shinseki*, 25 Vet.App. 231, 235 (2012) (quoting *Laposky v. Brown*, 4 Vet.App. 331, 334 (1993)).

[16] *Id.*

[17] *Vanerson v. West*, 12 Vet.App. 254, 258 (1999).

[18] *Horn*, 25 Vet.App. at 236 (2012).

The Board concluded that both prongs necessary to rebut the presumption had been satisfied under the demanding standard we have described.[19] The Board based much of its reasoning concerning the aggravation prong of the analysis on a May 2015 VA medical opinion.[20] The Secretary concedes "that the Board erred by relying on the May 2015 VA examiner's opinion to conclude that there is clear and unmistakable evidence of no aggravation."[21]

We agree with the parties that the Board erred when it relied on the May 2015 examiner's opinion. Specifically, the examiner stated that it is "less likely than not that veteran's preexisting low back condition, though painful, was chronically aggravated beyond normal progression."[22] The Board relied on that opinion to conclude that there was "clear and unmistakable evidence of . . . lack of aggravation" of appellant's back condition.[23] But, as the Secretary again concedes,[24] the examiner used the far less demanding standard of "less likely than not" in place of the onerous "clear and unmistakable" evidentiary threshold the law requires.

The Board's determination that the May 2015 opinion provided the support necessary to rebut the presumption of soundness by clear and unmistakable evidence is clearly erroneous. Even though he has conceded that the May 2015 examiner used the incorrect standard and the Board relied on that opinion to rebut the presumption, the Secretary urges that we remand for the Board to attempt (again) to explain how it could reach the conclusion it did about "clear and unmistakable evidence" of no aggravation based on an opinion that did not employ that standard.[25] Essentially, he asks us to let the Government try again to meet its onerous burden to rebut the presumption. That's not how this process works.

We have noted before that "it would be improper to remand [a] case in the face of medical evidence that is plainly insufficient to rebut the presumption of soundness."[26] And while in a nonprecedential decision, the Federal Circuit made a similar point, reasoning that "it is error for

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[19] R. at 10-13.

[20] *Id.*

[21] Secretary's Br. at 6.

[22] R. at 196.

[23] R. at 12.

[24] *See* Secretary's Br. at 7.

[25] *See id*. at 8-9.

[26] *Horn*, 25 Vet.App. at 244.

the Veterans Court to suggest that the Secretary may expand the record with additional medical testimony if the current record is inadequate to meet the Secretary's burden."[27] All of this is so because doing what the Secretary suggests here provides VA with another opportunity to meet its burden by "generat[ing] more evidence to make up [its] shortfall."[28] Fundamentally, we recognized what can be said more colloquially: that what is good for the goose is good for the gander:

> [T]here is a certain uniformity of treatment of similarly situated parties before the Court that is necessary to the appearance of fairness. The Court would not remand a case when a veteran fails to carry a point on which he or she has the burden of proof. It would be unseemly to so accommodate VA and the Board as to matters on which the Government has the burden of proof.[29]

The resolution of this appeal is simple. Appellant was entitled to a presumption Congress created. VA had the "onerous" burden to rebut that presumption. It assembled evidence in an attempt to do so. The evidentiary record before the Board was insufficient. The Government had its shot and it failed to meet its congressionally mandated burden. So, we will reverse the Board's conclusion that the presumption of soundness was rebutted and remand this matter for VA to adjudicate appellant's claim for service connection for a back condition with the presumption of soundness in place.

### *C. Appellant's Rights on Remand*

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[30] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[31] The Board must consider any such additional evidence or argument submitted.[32] The Board must also proceed expeditiously.[33]

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[27] *Worley v. Wilkie*, 756 Fed. App'x 996, 997 (Fed. Cir. 2019).

[28] *Horn*, 25 Vet.App. at 244.

[29] *Id*.

[30] *See Best v. Principi*, 15 Vet.App. 18, 20 (2001).

[31] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[32] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[33] 38 U.S.C. §§ 5109B, 7112.

## II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court REVERSES the January 9, 2019, Board decision to the extent that it found (1) that the presumption of soundness had been rebutted and (2) that VA had complied with its duty to assist appellant by obtaining his service medical records. We REMAND this matter for the Board to adjudicate appellant's claim based on these determinations.

DATED: May 6, 2020

Copies to:

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