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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0416

DONALD F. CALDWELL, 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 Donald F. Caldwell appeals a November 8, 2018, Board of Veterans' Appeals decision that declined to reopen a previously denied claim for benefits based on left knee osteoarthritis. This appeal is timely, the Court has jurisdiction to review the Board's 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 erred in finding that new and material evidence had not been submitted to reopen the veteran's left knee claim. As explained below, we find that the Board clearly erred in so finding. Thus, we will reverse the Board's decision regarding new and material evidence and remand the matter for the Board to reopen the veteran's claim and address it on the merits.

I. ANALYSIS

Mr. Caldwell argues that the Board should have addressed his lay statements and found that they were new and material evidence sufficient to reopen his claim. During this claim, the law required that VA reopen a finally disallowed claim when "new and material evidence" was presented or secured. 38 U.S.C. §§ 5108, 7104(b), 7105(c); 38 C.F.R. § 3.156(a) (2018). In general,

evidence is "new" if it was not already submitted to agency adjudicators, and it is "material" if it "relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a) (2018). The "material evidence" requirement sets a "low threshold" that does "not require new and material evidence as to each previously unproven element of a claim." *Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010). Instead, reopening is required whenever a claimant submits new and material evidence "as to an unestablished fact from the previously denied claim." *Id*. The veteran did that here.

The Board stated that new and material evidence had not been presented because Mr. Caldwell had "not put forth any additional evidence beyond the general conclusory statements that the [v]eteran's left knee disability is service connected, to include as secondary to [his] service[]connected right knee [disability]." Record (R.) at 8. But Mr. Caldwell stated that his left knee disability worsened when his service-connected right knee condition caused his knees to give way. R. at 158. He told an April 2014 examiner that his "right knee gave way while only partial weight bearing on the left knee . . . with increased pain and weakness." R. at 238. This testimony lends itself to establishing a nexus between the veteran's service-connected disability and his left knee. And because VA originally denied the veteran's claim due to a lack of such nexus evidence, this new testimony constitutes new and material evidence.

Laypersons are competent to relate those matters within their personal experience, including describing their symptoms. *See Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005). And at this stage, VA must "presume the credibility of the evidence and may not decline to reopen a claim . . . merely because the proffered evidence is found to lack credibility." *Fortuck v. Principi*, 17 Vet.App. 173, 179 (2003). Although Mr. Caldwell's testimony may not be enough to establish that his right knee aggravates his left knee, we have rejected any requirement for a full-blown medical opinion addressing a nexus when considering the "low standard" needed to reopen a claim. *See Shade*, 24 Vet.App. at 118. As we explained in *Shade*, requiring a medical opinion to reopen "would make the promise of assistance in obtaining a medical opinion illusory if new and material evidence were presented, since assistance could never be delivered unless the veteran first obtained such an opinion on his own." *Id.*

Here, although VA may need more evidence to establish service connection, the veteran's statements regarding aggravation meet the low threshold necessary to reopen the claim. *See id.* at 121. The Board's determination to the contrary is clearly erroneous and, thus, we will reverse the

Board's decision and remand with directions for the Board to reopen the left knee claim. *See Fortuck*, 17 Vet.App. at 178-79.

Additionally, because the matter is being remanded, the Court need not address Mr. Caldwell's additional arguments that would result in no 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."). In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, including his assertion that VA should provide him with a reasonable location for a hearing, and he has 90 days to do so from the date of the postremand 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.").

II. CONCLUSION

Based on the above, the Board's November 8, 2018, decision is REVERSED, and the matter is REMANDED with instructions to reopen the previously denied claim.

DATED: May 8, 2020

Copies to:

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