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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6681

FRANCES A. HENSLEY, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Frances A. Hensley, appeals through counsel a March 23, 2018, Board of Veterans' Appeals (Board) decision in which the Board concluded that the cause of death of her husband, veteran Bennie L. Hensley, Jr., is not linked to his active service. Record (R.) at 2-13. This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's decision and remand the matter on appeal for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Hensley served on active duty in the U.S. Navy from January 1961 until September 1961 and from May 1962 until July 1966. R. at 214, 1769. He died on February 14, 2011. R. at 335. The record contains two death certificates. Both agree that his death was caused by cardiac arrest "due to or as a consequence of" hypotension, "due to or as a consequence of" sepsis, "due to or as a consequence of" ischemia. R. at 1560. They also agree that "severe" chronic obstructive

pulmonary disorder undermined his health. *Id.* One, however, indicates that spinal neuropathy and colorectal carcinoma also undermined his health. R. at 335.

In April 2011, the appellant asserted that the cause of Mr. Hensley's death is related to his active service and sought entitlement to compensation on that basis. R. at 1545-53. In September 2011, the VA regional office (RO) concluded that Mr. Hensley suffered from coronary artery disease that was service connected. R. at 1433-43. It also found, however, that the cause of Mr. Hensley's death was not related to his active service. *Id.*

In August 2013, a VA medical examiner opined that Mr. Hensley's service-connected coronary artery disease is not linked to the cause of his death. R. at 595-97. In July 2016, a medical expert reviewed the appellant's case and opined that there is no link between Mr. Hensley's service and the cause of his death. R. at 272-78. In November 2016, the Board remanded the appellant's claim for additional development. R. at 245-53. The Board found the 2016 examination report to be inadequate for several reasons and sought additional expert review. R. at 248-50.

In May 2017, a VA medical examiner stated that the National Institutes of Health (NIH) "does not recognize herbicide or asbestos exposure as causes" of colorectal carcinoma and opined that it is "less likely as not" that Mr. Hensley's herbicide exposure "caused or contributed to his death from colorectal cancer." R. at 91-92. The examiner also concluded that it is not likely that Mr. Hensley's coronary artery disease or any other disorder related to service caused or contributed to his death. *Id.*

On March 18, 2018, Dr. Tommy Shelton wrote that Mr. Hensley's health rapidly declined after surgery performed to treat his colon cancer. R. at 18. Dr. Shelton opined that the "rapidity of decline of his status was most likely cardiac. . . . Although it is difficult to know the exact chain of events leading to his death, it is my professional opinion that his cardiac status on admission had impact on his outcome during this episode." *Id.*

On March 23, 2018, the Board issued the decision presently under review. R. at 2-13.

II. ANALYSIS

The Secretary concedes that the Board committed two errors. First, he notes that the Board did not discuss Dr. Shelton's statement. He acknowledges that remand is necessary for the Board to consider that evidence in the first instance.

Next, in its 2016 remand decision, the Board explained that the portion of the 2016 examination report addressing the link between Mr. Hensley's coronary artery disease and his death does not provide medical evidence sufficient to decide this case and implied the same about the 2013 examination report. The Secretary obtained a new medical opinion in 2017 to correct the shortcomings that the Board identified. As the Secretary acknowledges, the Board did not mention either its 2016 remand or the portion of the 2017 examiner's opinion addressing Mr. Hensley's coronary artery disease in the decision presently on appeal and instead relied on the 2013 and 2016 reports that it had found insufficient in its remand decision. The Secretary concedes that remand is warranted for the Board to provide a more thorough analysis. The Court accepts the Secretary's concessions. The Board should correct the errors that he identified on remand.

In addition to reviewing the Secretary's concessions, the Board should address the following matters on remand. First, the Board supported its conclusion that "service connection is not warranted for any disorder listed on [Mr. Hensley's] death certificate or hospital report" by noting that "service treatment records do not reflect complaints of, treatment for, or a diagnosis related to the disorders while in service" and that Mr. Hensley's "separation physical examination in July 1966 fails to document any complaints of or observed symptoms related to the disorders." R. at 6-7. Those findings are clearly medical in nature, and the Board did not support them with citations to medical authority. The Board is not competent either to reach unsupported medical determinations about whether in-service symptoms are "related to" disorders diagnosed later or to say that if a disorder began in service, symptoms would appear in service treatment records. *See Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011).

Second, the Board noted that "the post-service evidence does not reflect symptoms related to the disorders for many years after the [Mr. Hensley] left active duty service." R. at 7. The Board did not establish the factual predicate necessary to use a gap between service and treatment as evidence against the appellant's claim. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000); *see also Horn v. Shinseki*, 25 Vet.App. 231, 240 n.7 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be "'a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact.'" (quoting *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (Lance J., dissenting))).

Third, as the appellant notes, the Board concluded that Mr. Hensley provided "no testimony . . . that would serve to suggest" that the spinal neuropathy that he experienced later in life is linked

to active service without discussing certain statements that Mr. Hensley submitted. In August 2000, Mr. Hensley wrote that he "had serious back pain forcing chiropractic treatment" since an in-service injury. R. at 1678. The Board should directly address that statement and any others like it on remand.¹ See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

Finally, the Board supported its conclusion that in-service herbicide exposure did not cause Mr. Hensley's colorectal cancer by citing the May 2017 VA examiner's notation that the NIH "does not recognize herbicide or asbestos exposure as a cause of colorectal cancer." R. at 9. This statement is ambiguous and requires additional explanation. It could mean that NIH has thoroughly investigated the question and determined that medical evidence weighs against concluding that herbicide exposure and colorectal cancer are linked. In that case, the NIH conclusion clearly supports the examiner's opinion. Or, it could mean that the NIH has, based on current scientific evidence, been unable to determine, one way or the other, whether there is a link between herbicide exposure and colorectal cancer. If that is the case, then the examiner's opinion is inadequate because the NIH report does support his conclusion that there likely is no link between Mr. Hensley's colorectal cancer and his service. The Board should carefully review the matter on remand.

The Court need not address other arguments raised by the appellant at this time. See *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]").

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's March 23, 2018, decision is VACATED and the matter on appeal is REMANDED for further proceedings consistent with this decision.

DATED: May 11, 2020

¹ The Secretary asserts that the Board already did. According to the Secretary, the Board reviewed Mr. Hensley's statement and concluded that the symptoms he described do not indicate that he had spinal neuropathy prior to a 1986 motorcycle accident. The Board made no such finding. Even if it did, it is not the least bit competent to reach a medical conclusion about whether certain back symptomology indicates that spinal neuropathy is present. See *Kahana*, 24 Vet.App. at 435.

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