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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5399

WILLIE HAIRSTON, JR., APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Two errors occurred in the June 2018 Board decision that denied veteran Willie Hairston, Jr., service connection for a back disability. Although the Board never questioned Mr. Hairston's credibility, it relied on two medical opinions provided by an examiner who refused to accept that the veteran had experienced intermittent back pain during and since service. Examiners aren't free to make credibility determinations and ignore lay evidence as they please. Among the various reasons for this rule is that doing so runs the risk of basing an opinion on an inaccurate factual predicate, as happened here. Such opinions are entitled to no weight. The Board's reliance on these opinions is the first error.

The second arises from the same lay evidence of continuous back pain symptoms. If a chronic condition like arthritis is noted in service, a showing of continuous symptoms after service may support a claim for that condition. 38 C.F.R. § 3.303(b) (2019). The Board's single sentence rejecting this theory of service connection was enough to show that it recognized the theory's relevance to the case but not enough to convey the precise basis for its decision. The claim is remanded.

I. BACKGROUND

Mr. Hairston served in the Army from August 1980 to May 1988. He applied for service connection in July 2009 for lower back pain, attributing his condition to a 1984 in-service injury sustained while lifting heavy equipment. His claim was denied, and he appealed.

As part of his appeal, a VA examiner offered two opinions, the first in 2012 and the second in 2017. He began the 2012 opinion by noting that the veteran reported an injury to his back in 1984 while lifting heavy equipment as well as various other undocumented injuries that occurred during service. Per the examiner, the veteran also reported that he did not see a doctor while on active duty for intermittent back pain and that, after service, the pain continued.

Then came an encyclopedic recitation of the veteran's medical history. This production need not be recounted except to say that the examiner took every opportunity to highlight past statements by the veteran about his back pain's origin and, equally important, any time the veteran failed to complain about his back.

The examiner ultimately diagnosed Mr. Hairston with a low back disability.[1] He discussed the 1984 injury from lifting a heavy piece of equipment, noting that it caused transient muscle spasms in the right lumbar area and that the veteran responded to muscle relaxants and a week of "limited lifting." R. at 1362. He also mentioned that the veteran had "absolutely no back complaints" during a routine physical in 1986 but complained during his separation examination in 1988 that "he sometimes had low back pain after bending then straightening." *Id*.

Nevertheless, the examiner struggled to reconcile the veteran's assertions with the fact that there was "no actual diagnosis of a back condition" at discharge and that, prior to 2009 when he filed for service connection, the veteran had been "very clear" that his back pain "began about 1995." R. at 1362 (referring to various records of post-service treatment).

He found no clinical evidence that the veteran's current back complaints were related to the injury in service and thus opined that "the previous denial of service connection was appropriate." He said that

> there is nothing in the chart to suggest that the current back problems are related to the transient and self-limited back spasm at the right lower lumbar area that occurred on active duty. The back spasm was transient and acute and there is no evidence of recurrence. He was without any apparent back problem documented

[1] Specifically, the diagnoses were degeneration of the lumbar spine, spondylolisthesis, and spinal stenosis in the lumbar region without neurogenic claudication.

> until 1995. There is no nexus connecting the initial muscle spasm of the right lower back with the development of degenerative arthritis, or spondylosis, or any other condition he currently has.

R. at 1363 (some capitalization altered). Accordingly, it was "significantly less likely" than not that the veteran's current back pains were incurred in or caused by service. *Id*.

In 2017, the Board asked the same examiner whether records showing that the veteran suffered an injury to his back during a 1983 in-service altercation impacted his opinion. The opinion he provided was even more comprehensive than the 2012 one.

At every turn, the examiner ensured that inconsistencies in the veteran's statements were brought to light. *See, e.g.*, R. at 35 ("complains of laceration to face and right knee [NOTE NO BACK COMPLAINTS]"; "small laceration lateral left eyebrow; NO BACK TENDERNESS; abdomen soft"); R. at 36 ("[1984, NOT 1983]"; "3 year history of right hip, NOT BACK, pain"); R. at 37 ("10 years ago (AFTER leaving the military)").[2]

The examiner's opinion was unchanged. He reasoned that, immediately after the altercation, the veteran had a normal back examination with no complaints or tenderness on physical examination. And, although he complained of back pain 24 hours later, it was "more likely than not related to his sleep rather than to the trauma," given the "normal back exam the day prior." R. at 42. He added that, after 1984, there was no evidence of any back pains or problems until three and a half years later. And he found it telling that, during his exit exam, the veteran attributed his back pain to his 1984 injury, not the 1983 assault.

He emphasized that there was "no finding of any real-time documentation of back pain for well over 12 years" after the veteran left the military and that the first mention of back pain after service was in 2002, when Mr. Hairston visited a chiropractor. R. at 43. Moreover, the examiner opined, even if the veteran "actually had intermittent back pain that dated from 1996, that is still 8 years after he left military. That period of time without any back pain still clearly demonstrates there is no nexus." *Id*. The examiner closed by saying that the veteran had,

> at worst[,] only acute and self-limited muscle spasm in the military. Muscle spasm does not involve the vertebral bodies or discs, and does not cause damage to them. Muscle spasm is a typically self-limited injury to paraspinous soft tissues. There was no evidence of degenerative arthritis (osteoarthritis, spondylosis) or degeneration of lumbosacral intervertebral disc in service. Degenerative arthritis (osteoarthritis, spondylosis) and degeneration of lumbosacral intervertebral disc is

[2] The list goes on. *See generally* R. at 34–45.

> exceedingly common in the population at large, and typically advances slowly with age and over many years. There is no medical evidence to suggest that muscle spasm causes, predisposes to, or accelerates the development of degenerative arthritis (osteoarthritis, spondylosis) or degeneration of lumbosacral intervertebral disc. There is no evidence he had degenerative arthritis (osteoarthritis, spondylosis) or degeneration of lumbosacral intervertebral disc in service. As such any degenerative arthritis (osteoarthritis, spondylosis) or degeneration of lumbosacral intervertebral disc is not service related. The degenerative changes currently noted on lumbar spine films are unrelated to service. Note that degeneration of intervertebral disc includes disc space narrowing, disc bulges, disc prolapse, disc protrusion, disc herniation, and annular tears. Facet arthrosis is a type of arthritis, and involves the facets rather than the vertebral bodies. Authorities do not consider facet arthropathy [facet arthrosis/arthropathy] to be the same as spondylosis, which is defined as vertebral body arthritis.

R. at 45 (some capitalization altered).

In the June 2018 decision on appeal, the Board considered the 2012 and 2017 opinions probative and decided that service connection for a low back disability was not warranted on a direct basis. Notably, the Board found that, although the veteran was competent to report having experienced symptoms of back pain since service and believes that his low back disability is related to picking up a missile test system while on active duty in 1984, he was not competent to opine on medical nexus.

The Board also determined that service connection on a presumptive basis could not be awarded for arthritis because he wasn't diagnosed until July 2004 when x-rays showed evidence of degenerative disc disease. This appeal followed.

II. ANALYSIS

A. *Direct Service Connection*

The veteran argues that the medical examiner impermissibly ignored his assertions that he experienced intermittent back pain continuously since service. For that reason, he contends, both opinions were inadequate because they were based on a factual premise that was inconsistent with credible lay evidence. The Court agrees.

Medical "examiners provide evidence." *Withers v. Wilkie*, 30 Vet.App. 139, 146 (2018). Specifically, they supply the medical information necessary to decide a claim. *See* 38 C.F.R. § 4.1 (2019) (noting the need for "fully descriptive medical examinations"). An examiner's opinion is considered adequate if "it is based upon consideration of the veteran's prior medical history and .

. . describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *McKinney v. McDonald*, 28 Vet.App. 15, 30 (2016) (quotes omitted).

It is not an examiner's function, however, to substantiate the veteran's assertions or conduct fact-finding. *Delrio v. Wilkie*, 32 Vet.App. 232, 242 (2019). Nor are they "permitted to opine on legal or adjudicative matters." *Withers*, 30 Vet.App. at 146. These tasks are the Board's alone.

It follows then that an examiner may not ignore a veteran's statements about the onset of symptoms in service, even if unaccompanied by contemporaneous medical records. *See Miller v. Wilkie*, 32 Vet.App. 249, 257 (2020) (finding that "an examination is inadequate if the medical professional fails to consider the veteran's own lay reports of symptoms"). Yet it's clear that in this case the respective roles the examiner and the Board play were mixed up.

The lay evidence indicated that the veteran's back pain began in service, continued after service, and worsened at some point. The Board's silence on the topic of credibility implies that it found Mr. Hairston credible. *See id*. at 260 ("If something as fundamental as the veteran's credibility were an issue, we would expect the Board to say something."). It also considered him "competent to report having experienced symptoms of back pain since service." R. at 10. But he could not, per the Board, diagnose a back condition or opine that his symptoms were "manifestations of a low back disability caused by the 1984 injury." *Id*. In simpler terms, the Board accepted that Mr. Hairston experienced continuous symptoms since service but decided it was better to let a medical professional figure out whether those symptoms were tied to the injury he experienced in service.

The problem here is that the Board decided the case without actually having that question answered. Although only portions of the opinions are recited above, the Court's full review of the record unearthed no sign that the examiner considered whether the veteran's continuous intermittent back pain might indicate that his current condition is related to the in-service injury or injuries. Quite the contrary. Both medical opinions read as if the goal were instead to disprove this possibility.

He wrote pages upon pages, pointing out instances in the medical record where the veteran said his pain started sometime other than 1984. This did nothing to help the Board understand the question it posed: could the veteran's continuous symptoms indicate that his current disability was related to service? It furthered only the examiner's ideas about the veteran's credibility, which are apparently contrary to the Board's.

The rationales of each opinion make it even more obvious that the examiner was beholden to the idea that Mr. Hairston was lying. Both rely solely on documented evidence. Neither mentions the veteran experiencing intermittent symptoms since service. Right up front, for example, the examiner began his rationale by stating that the veteran had, "at worst[,] only acute and self-limited muscle spasm in the military," which is consistent with an absence of documented complaints but clearly at odds with the veteran's assertions of having continuous subjective symptoms. R. at 45.

The examiner did not account for the lay statements of record and thus did not base his opinion on all the medical evidence. That led to a failure to answer the relevant question of whether the veteran's continuous symptoms demonstrated a nexus between his in-service injury and his current condition. How then could the Board consider itself "fully informed" on that question if the examiner rejected the premise? *McKinney*, 28 Vet.App. at 30. It couldn't. Remand for a new medical examination is necessary.[3]

B. *Service Connection Under § 3.303(b)*

VA regulation 38 C.F.R. § 3.303(b) offers two paths for claimants to establish service connection for chronic conditions listed under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331, 1336 (Fed. Cir. 2013). First, if evidence shows that a claimant had a chronic disease in service (or within an applicable presumptive period), then all subsequent manifestations of that disease at any later date, however remote from service, will be service connected unless they are clearly attributable to intercurrent causes. 38 C.F.R. § 3.303(b) (2019). Alternatively, when evidence of a chronic condition is noted during service, but that condition is not "shown to be chronic or where the diagnosis of chronicity may be legitimately questioned," that is, "when the fact of chronicity in service is not adequately supported," then a showing of continuity of symptomatology after service may support a disability compensation claim for that chronic condition. *Id.*

The veteran, referring to the same lay evidence discussed at length above, argues that the Board in this case failed to fully address whether he was entitled to service connection under § 3.303(b) for the arthritis in his back. The Secretary counters that this theory of service connection wasn't supported because the veteran did not have a chronic condition "noted" in service. *See*

[3] The examiner's efforts to undermine the veteran's credibility in this case, not once but twice, can't be ignored. As the Board decides whether to return the report to the same examiner for clarification or to solicit a fresh opinion elsewhere, it must remember that "basic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner." *Austin v. Brown*, 6 Vet.App. 547, 552 (1994).

Savage v. Gober, 10 Vet.App. 488, 495 (1997) (continuity of symptomatology may be demonstrated if, among other things, a claimant can show a condition "noted" during service).

The Secretary's argument is a post-hoc rationalization that doesn't save the Board's decision. *See Atencio v. O'Rourke*, 30 Vet.App. 74, 90 n.15 (2018) (rejecting such attempts to "relieve the Board of its obligation to provide an adequate statement of reasons or bases for its decision"). The Board determined that service connection "on a presumptive basis" could not be awarded for the veteran's arthritis because he was "not diagnosed with any form of arthritis until July 2004 when x-rays showed evidence of degenerative disc disease." R. at 10. This was the Board's analysis. It failed to even reference § 3.303(b), let alone provide any discussion as to whether the veteran's arthritis was "noted" in service.

What is more, the Board's discussion, brief as it was, indicated that it understood the "noted" requirement to mean that arthritis needed to be diagnosed in service. This is not correct. If the condition was one "as to which a lay person's observation is competent," medical evidence of "noting" is not necessarily required. *Savage*, 10 Vet.App. at 497. And the veteran's lay observations here were expressly deemed competent on the matter.

The veteran makes other allegations of error in his brief. But given the disposition of this case, the Court declines to address them at this time, as he may raise these issues before the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009).

III. CONCLUSION

For the foregoing reasons, the Court VACATES the June 11, 2018, Board decision and REMANDS for further proceedings consistent with this opinion.

DATED: May 12, 2020

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