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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3155

JOHN I. RUTCHICK, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, John I. Rutchick, through counsel appeals a March 7, 2019, Board of Veterans' Appeals (Board) decision denying entitlement to compensation pursuant to 38 U.S.C. § 1151 for the residuals of an extended spinal epidural abscess, including bilateral upper and lower extremity weakness, fatigue, neurogenic bladder and bowel, loss of range of motion of the neck, low back disability, depression, and erectile dysfunction. Record (R.) at 4-21. The Board reopened the claim for compensation pursuant to section 1151; that is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part and dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). The appellant does not raise any arguments concerning the Board's finding that his additional disabilities were not the result of VA's carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault, *see* 38 U.S.C. § 1151(a)(1)(A); therefore, the Court finds that he has abandoned any challenge to the Board's findings on that theory. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision denying entitlement to compensation pursuant to 38 U.S.C. § 1151(a)(1)(B) for the residuals of an extended spinal epidural abscess as due to an event not reasonably foreseeable and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from August 1964 to August 1967. R. at 2528. On March 4, 2010, he was fitted for a partial upper denture, which required an occlusal adjustment (reduction) of tooth #31. R. at 510, 579, 1011-12, 1300-01. The dental record reflects that no adjustments were needed to the partial denture, a periodic oral examination was conducted, and, although "there [wa]s still concern about [the] condition of tooth #31, . . . [an] original plan to extract [wa]s on hold—the tooth d[id] not appear to be jeopardizing [the] adjacent area, and [the] p[atien]t want[ed] to keep the tooth for as long as possible." R. at 1011-12.

On March 26, 2010, the appellant presented at the emergency room with complaints of back, neck, leg, and hip pain; difficulty using his legs; and weakness. R. at 358. Diagnostic testing revealed extensive cervical, thoracic, and lumbar spinal epidural abscesses (SEA), R. at 361; the abscesses were drained, and he was treated with extensive antibiotic therapy, R. at 368-69. His treating physician opined that, "[g]iven the extensive lesion, likely partially due to the polymyalgia rheumatica and possibly related to [a] remote fall [in October 2009] or, more likely, the dental cleaning approximately [1] month ago, the patient has extensive epidural collection." R. at 362. Lab results revealed Streptococcus viridans in the spinal fluid. R. at 366-67. In April 2010, he returned to the VA dental facility and had tooth #18 extracted. R. at 478. He subsequently developed quadriplegia with physical manifestations of upper and lower extremity weakness, neurogenic bowel and bladder, impotence, susceptibility to autonomic dysreflexia, intolerance of heat and cold, and episodes of blacking out and falls. R. at 33, 669.

In June 2010, the appellant filed a claim for benefits, asserting that on March 4, 2010, he had undergone a fitting for a partial denture during which the VA dentist had ground down his left lower molar; on March 26, 2010, he experienced excruciating back pain and had to undergo emergency surgery for an extended SEA; in April 2010, the same tooth that had been ground down

in March 2010 was fractured and had to be removed; and he continued to have weakness, trouble walking, tingling in his upper extremities, difficulty concentrating, problems with fine motor coordination, pain between his shoulder blades, and lower back pain. R. at 1316-17. The appellant submitted letters from his private physician, Dr. Doherty, dated in December 2010 and July 2011, noting that Streptococcus viridans is a bacteria consistent with oral flora, and opining that the March 4, 2010, dental procedure caused the SEA. R. at 668-69, 704.

A VA regional office (RO) construed the appellant's claim as one for compensation for a low back condition with associated neurological residuals, extended SEA, depression, fatigue, and a cervical spine condition with associated neurological residuals pursuant to 38 U.S.C. § 1151 and denied entitlement in July 2011. R. at 722-26. The appellant filed a Notice of Disagreement, indicating in part that he believed his VA dentist had been negligent in not providing antibiotics prior to the March 4, 2010, dental treatment. R. at 1304-08. In December 2011, the RO obtained a medical opinion from Dr. F. McPhail; he noted that the delivery of an upper partial denture and occlusal adjustment done on March 4, 2010, were not invasive and were "no more likely to cause systemic infection than normal daily routine including brushing, flossing, and eating." R. at 579. Dr. McPhail explained that the latest guidelines for prevention of infective endocarditis recommended against using prophylactic antibiotics, noting in part that "there is no more risk for [infective endocarditis] that is more likely to occur as a result of these everyday activities such as brushing and flossing than from a dental procedure." *Id*.

In March 2013, a VA physician, Dr. Korwin, opined that the Streptococcus viridans infection, though considered a rare incident, was not a negligent act caused by the dental treatment and explained that antibiotic therapy is not routinely provided to a dental patient unless there is a heart condition. R. at 518. The RO issued a Statement of the Case (SOC) in May 2013 denying the section 1151 claims, R. at 1319-38[1], and VA received the appellant's Substantive Appeal more than 60 days later, on August 16, 2013, R. at 504-10.

The appellant subsequently submitted a medical article reflecting that "Streptococcus species are the second most common isolates and often are the organisms cultured in patients with concomitant pneumonia or who have recently undergone dental procedures." R. at 439; *see* R. at

[1] The SOC cover letter is dated May 10, 2010; however, the SOC is dated May 10, 2013. *Compare* R. at 1319 *with* R. at 1321-38. The parties agree that VA issued the SOC in May 2013. Appellant's Brief (Br.) at 6; Secretary's Br. at 4.

433-47. Another article indicated that "[m]ost posterior [SEAs] are thought to originate from a distant focus such as a skin infection, pharyngitis, or dental abscess." R. at 421; *see* R. at 417-28; *see also* R. at 414-16.

VA obtained a medical opinion from Dr. Z. Rajnay in July 2014; he opined that, "[e]ven though the bacteria species cultured from the spinal abscess can be readily found in the oral cavity, to say that the extraction of the molar tooth #19 or cleaning caused the spinal abscess is mere speculation." R. at 332 (emphasis omitted). Dr. Rajnay explained that, according to his research, "[a]pproximately one-third of patients with SEA have no identifiable source for the infection," and for the remaining two-thirds for whom a portal of infection entry can be identified, the most common sites of origin are skin infections and complications of invasive procedures. R. at 331 (emphasis omitted). Dr. Rajnay also noted that, although tooth extraction and dental cleanings can cause a mild transient bacteremia, "a bacteremia is also created when individuals brush their teeth, floss their teeth, chew their food or get some minor intra-oral injury." *Id.* Dr. Rajnay further reported that the American Dental Association website reflects that data is mixed whether prophylactic antibiotics before a dental procedure prevent infective endocarditis; "recommendations note that people who are at risk for [infective endocarditis] are regularly exposed to oral bacteria during basic daily activities such as brushing and flossing, suggesting that [infective endocarditis] is more likely to occur as a result of these everyday activities than from a dental procedure"; and, because there was no reason to provide the appellant with antibiotics, there was no evidence of negligence by his VA dentist. R. at 331-32.

In August 2014, the RO reopened and denied the section 1151 claims. R. at 301-10. The RO requested an additional opinion from Dr. Rajnay in March 2015, R. at 250-52. The RO noted that "[t]his issue has already been addressed as due to negligence, however, please address as the result of event(s) not reasonably foreseeable." R. at 251. That month, Dr. Rajnay provided the same opinion that he provided in July 2014. R. at 247-48. The following month, an email exchange between an RO adjudicator and Dr. Rajnay reflects that the RO sought an additional opinion whether the SEA was an event not reasonably foreseeable. R. at 240-44. Following Dr. Rajnay's affirmative response, the RO adjudicator sought clarification "regarding [his] prior speculation statement" and explained that it must first be established that the dental procedure at least as likely as not led to the development of the SEA. R. at 240-41. Dr. Rajnay replied: "I think I see what you mean. I do not think the case can be made that the tooth extraction le[]d to the spinal abscess"; and

that "[t]he development of the [SEA] was an unforeseeable event that may or may not have any ties to the tooth extraction, in fact one could say that the [SEA] could have developed from the mere brushing of the teeth by the patient at home." R. at 240. He thus opined that the SEA was "less likely as not (less than a 50/50 probability) caused by or a result of the extraction or dental cleaning." *Id*. (emphasis omitted). The appellant subsequently appealed, and the RO continued the denial in an SOC. R. at 116-42; *see* R. at 119.

In the March 2019 decision on appeal, the Board reopened the section 1151 claims but found that the SEA was not actually or proximately caused by the March 4, 2010, VA dental treatment. R. at 4-21. This appeal followed.

II. ANALYSIS

The parties agree that the dispositive question before the Board was whether the appellant's March 4, 2010, dental treatment caused SEA, which eventually led to his current disabilities.[2] Appellant's Br. at 13; Secretary's Br. at 10. In that regard, the appellant argues that the Board incorrectly evaluated the medical evidence of record and improperly applied the law regarding the question of proximate cause. Appellant's Br. at 13-24. Alternatively, he argues that the Board imposed an incorrect burden of proof by finding that the occlusal adjustment did not likely cause the infection that led to the SEA. *Id.* at 24-29. He seeks reversal of the Board's decision and an award of benefits pursuant to section 1151. *Id.* at 29. Alternatively, he requests that the Court "remand with instructions to readjudicate the claim within the parameters that Dr. Doherty and Dr. McPhail's opinions are both favorable evidence and that Dr. Rajnay's opinions lack any probative value." *Id.* at 29-30. The Secretary argues that, in section 1151 claims, the burden is on the claimant to establish actual causation by a preponderance of the evidence, and otherwise disputes the appellant's arguments and urges the Court to affirm the Board's decision. Secretary's Br. at 10-20.

A veteran who sustains additional disability as a result of VA medical care or treatment is entitled to compensation "in the same manner as if such additional disability . . . were service-connected" if the additional disability was not the result of the veteran's willful misconduct and was proximately caused by "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of [VA] in furnishing" that treatment or by "an event not

[2] Although there was no finding by the Board, there appears to be no dispute between the parties that the SEA caused the nerve damage leading to the appellant's current disabilities.

reasonably foreseeable." 38 U.S.C. § 1151(a)(1)(A)-(B); *Viegas v. Shinseki*, 705 F.3d 1374, 1377-78 (Fed. Cir. 2013). The claimant must first show that the medical care is the but-for cause of any additional disability. *Ollis v. Shulkin*, 857 F.3d 1338, 1343 (Fed. Cir. 2017). "Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause." 38 C.F.R. § 3.361(c)(1) (2019). Proximate cause "is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause." 38 C.F.R. § 3.361(d).

The Board's determination regarding entitlement to compensation under section 1151 is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Look v. Derwinski*, 2 Vet.App. 157, 162-63 (1992). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

It is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence. *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). The Board must analyze the credibility and probative value of the material evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In the decision on appeal, the Board concluded that the appellant's SEA residuals, caused by a Streptoccocus viridans infection, "were not actually or proximately caused by" the VA dental treatment. R. at 15; *see* R. at 11-19. The Board found that Dr. McPhail's opinion was "persuasive that the treatment provided was noninvasive and did not likely cause the infection that led to a spinal abscess." R. at 15-16. The Board also found the opinion to be consistent with Dr. Korwin's and Dr. Rajnay's opinions. R. at 16. With respect to Dr. Rajnay's opinions, the Board acknowledged that he "erroneously identified the [appellant's] treatment on March 4, 2010, as involving tooth extraction and cleaning," but found the opinion "as to an actual or proximate causal relationship . . . valid and not inconsistent with the other medical and scientific study evidence of record." *Id*.

As to Dr. Doherty's opinion and the medical literature submitted by the appellant, the Board found them less probative than the VA medical opinions, specifically those of Dr. McPhail and Dr. Rajnay. R. at 17-18. The Board further found that, in light of the determination that the dental treatment was not the actual or proximate cause of the SEA residuals, the appellant's claims that the SEA was an event not reasonably foreseeable were moot. R. at 17. The Board also found that the appellant's additional disabilities were not the result of VA's carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault in furnishing the March 4, 2010, dental treatment. R. at 16-17. Accordingly, the Board concluded that the preponderance of the evidence was against the claim. R. at 19.

The appellant does not challenge the adequacy of the VA medical opinions; rather, he solely challenges the Board's reliance on those opinions. The appellant first argues that the Board improperly relied on Dr. McPhail's opinion because it erroneously focused on the noninvasive nature of the occlusal adjustment and misinterpreted the dentist's statement. Appellant's Br. at 13-16. He further argues that it was improper for VA to request and rely on the March and April 2015 opinions from Dr. Rajnay because VA had sufficient evidence regarding causation, his opinion was based on an incorrect factual foundation, and it was biased. *Id.* at 18-23. Last, he contends that the Board improperly dismissed Dr. Doherty's opinion, because the physician had provided an adequate rationale. *Id.* at 16-18. He argues that, when properly evaluated, the evidence warrants reversal of the Board's decision. *Id.* at 23.

The Secretary counters that, when read as a whole, Dr. McPhail's opinion supports the Board's finding that the dental treatment did not likely cause the SEA. Secretary's Br. at 13-15. Specifically, the Secretary avers that, although the VA dentist's opinion was provided in response to the appellant's allegation that his infection was the result of negligence, the takeaway from that opinion is that noninvasive procedures, such as the appellant underwent on March 4, 2010, are as harmless as everyday routine activities. *Id*. at 13-14. With respect to Dr. Rajnay's opinion, the Secretary argues that any error in the Board's reliance on that opinion is harmless because the Board limited its reliance to finding it consistent with Dr. McPhail's opinion. *Id*. at 17-18. He further argues that there is no indication that the RO sought to develop negative evidence by obtaining Dr. Rajnay's opinion. *Id*. at 19.

The Court concludes that the Board provided inadequate reasons or bases for relying on Dr. McPhail's and Dr. Rajnay's opinions. *See* R. at 15-16. Although the Board noted in its recitation

of the facts Dr. McPhail's statement that it was "*no more likely* the [dental] treatment caused systemic infection than the normal daily routines including brushing, flossing, and eating," R. at 13 (emphasis added); *see* R. at 579, the Board did not explain why it interpreted that statement to indicate that the dental procedure "did not likely cause" the SEA—i.e., a negative actual and proximate cause finding. *See* R. at 16. Although the Secretary argues that the Board properly interpreted Dr. McPhail's opinion, because the dentist's statement indicates that "non[]invasive procedures are as harmless as everyday routine activities," and, thus, "[i]t follows that because the March 4, 2010, dental treatment was non[]invasive that it was less likely than not to have caused the significant systemic infection that [the a]ppellant later presented with," the Board failed to provide any such explanation for its finding. Secretary's Br. at 14. Accordingly, the Secretary's argument amounts to a post hoc rationalization, which the Court cannot accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

Further, although the Board found Dr. Rajnay's opinion consistent with Dr. McPhail's as to the absence of actual causation, the parties make competing arguments regarding whether VA improperly developed negative evidence against the claim and whether the Board erred by relying on that opinion. *See* Appellant's Br. at 18-23; Secretary's Br. at 17-20. The Court's review is frustrated by the Board's failure to make the necessary factual findings in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."); *see also* 38 U.S.C. § 7261(c). For example, resolving this matter would require the Court in the first instance to assess whether the record contained sufficient evidence regarding actual causation at the time the RO requested the addendum opinion and whether Dr. Rajnay understood the questions posed to him by the RO. The Court may not weigh this evidence in the first instance or evaluate its potential effect on the Board's findings. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding "that the evaluation and weighing of evidence are factual determinations committed to the discretion of the factfinder—in this case, the Board").

The Court notes that the appellant also argues for reversal of the Board's decision. Appellant's Br. at 23, 29-30. However, "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). On the other hand, remand is the appropriate remedy where the Board failed to provide adequate reasons or bases. *See Pond v. West*, 12 Vet.App. 341, 346 (1999); *Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of the Board's March 7, 2019, decision denying entitlement pursuant to 38 U.S.C. § 1151(a)(1)(A) for the residuals of an extended spinal epidural abscess as due to VA's carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault is DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision denying entitlement to compensation pursuant to 38 U.S.C. § 1151(a)(1)(B) for the

residuals of an extended spinal epidural abscess as due to an event not reasonably foreseeable is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 13, 2020

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