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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6798

MARVIN H. JOHNSON, 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, Marvin H. Johnson, through counsel appeals a September 6, 2018, Board of Veterans' Appeals (Board) decision that dismissed his appeal regarding entitlement to disability compensation for a left shoulder disability and denied entitlement to disability compensation for hypertension. Record (R.) at 3-16. The Board remanded the matters of entitlement to disability compensation for an acquired psychiatric disorder, including post-traumatic stress disorder; disability compensation for right ear hearing loss; and a total disability rating based on individual unemployability. The remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). Additionally, the Board awarded disability compensation for an ear condition, including tinnitus. This 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.").

On November 7, 2019, the Court dismissed the appeal as to entitlement to disability compensation for a left shoulder disability and affirmed the Board's decision denying disability compensation for hypertension. *Johnson v. Wilkie*, No. 18-6798, 2019 WL 5791000 (Vet. App. Nov. 7, 2019). In that decision, the Court concluded that the appellant did not demonstrate prejudicial error in the Board's failure to adjudicate entitlement to hypertension based on the allegedly reasonably raised theory that hypertension was related to the veteran's exposure to herbicides in Vietnam. *Id.* at *3-4. As relevant here, the Court noted that the appellant unambiguously responded to VA's request for information regarding dioxin exposure that his condition "is 'not associated with exposure to dioxin,'" *id.* at *3 (quoting R. at 553), and that he had not pointed to any authority demonstrating that the Secretary was required to override his decision or develop a theory of entitlement that he expressly disavowed, *id.*

The appellant filed a timely motion for a panel decision on December 2, 2019. In his motion, the appellant first contends, contrary to what he averred in his opening brief, that "he explicitly claimed that his hypertension was caused by *herbicide* exposure." Motion at 1 (citing R. at 633); *cf.* Appellant's Brief (Br.) at 17 (maintaining that, although he "did not explicitly raise the theory of entitlement to service connection based on herbicide exposure, VA's duty to fully develop and adjudicate a claim is not limited to explicitly raised theories"). He further asserts that the Court's reading of his later statement, that his hypertension claim was not based on dioxin exposure, *see* R. at 553, effectively imposes a burden of scientific knowledge on a layperson, and that the Court's decision raises a question as to what is necessary to limit the scope of a claim or withdraw a claim in writing. Motion at 2-6.

Pursuant to the Court's Internal Operating Procedures, the motion was forwarded to the single judge for possible sua sponte reconsideration. *See* U.S. Vet. App. Int. Op. Proc. III(a)(2). After reviewing the motion, the Court will grant sua sponte single judge reconsideration and dismiss the motion for panel review as moot. *See id.* ("If sua sponte reconsideration is granted, the request for panel decision is mooted."). Upon reconsideration, the Court will withdraw the November 7, 2019, decision and issue this decision in its stead.

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). Because the appellant does not raise any argument concerning the Board's dismissal of his appeal regarding entitlement to disability compensation

for a left shoulder disability, the Court finds that he has abandoned his appeal of this issue and will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). For the following reasons, the Court will vacate the Board's decision denying disability compensation for hypertension 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 September 1968 to September 1970, including service in Vietnam. R. at 109. In October 2009, he submitted a claim for disability compensation for high blood pressure and checked a box reflecting that he was claiming in-service exposure to herbicides; he also submitted a private treatment record from March 2006 reflecting a history of hypertension. R. at 628-42, 662. The following month, VA advised him that it was working on his claim and requested information "showing that [his] claimed condition is medically associated with dioxin exposures." R. at 588. The appellant responded that his claimed condition is "not associated with exposure to dioxin." R. at 553.

A VA regional office subsequently denied entitlement to disability compensation for hypertension on the basis that there was no evidence that it "occurred in or was caused by" military service or developed within 1 year of discharge, R. at 472-82; the appellant appealed, R. at 460; *see* R. at 259-61, 421-47. In April 2018, he testified before the Board that he was diagnosed with hypertension approximately 2 years after separation from service and he has "had that problem ever since." R. at 43-44; *see* R. at 27-51.

In September 2018, the Board denied disability compensation for hypertension. R. at 3-16. This appeal followed.

II. ANALYSIS

The appellant argues that the Board failed to satisfy the duty to assist because it did not obtain a medical opinion addressing the possible relationship between his hypertension and in-service exposure to herbicides. Appellant's Br. at 6-18. Specifically, he contends that the National Academies of Sciences, Engineering & Medicine's (NAS) *Veterans and Agent Orange: Update 2006* (7th Biennial Update 2006), and subsequent NAS reports, provide the indication of a link between hypertension and herbicide exposure necessary to trigger VA's duty to provide an

examination and that VA had actual or constructive knowledge of the NAS reports. *Id.* He further asserts that, because he is presumed to have been exposed to herbicides and the NAS reports suggest an association between hypertension and herbicide exposure, the Board was required to consider that theory of entitlement. *Id.* at 17.

The Secretary counters that the Court does not have jurisdiction to consider the NAS reports because they were not actually or constructively before the Board and that, because there is no evidence of record suggesting a link between hypertension and herbicide exposure, the theory of entitlement to disability compensation based on herbicide exposure was not reasonably raised. Secretary's Br. at 5-26. Alternatively, he contends that, if the Court finds that theory of entitlement reasonably raised, remand is required for the Board to address that theory in the first instance. *Id.* at 26-29.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, are presumed to have been exposed to herbicide agents, such as Agent Orange, unless there is affirmative evidence to the contrary. 38 U.S.C. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6)(iii) (2019). Although hypertension is not among the conditions subject to presumptive service connection based on herbicide exposure, *see* 38 C.F.R. § 3.309(e) (2019), a claimant may establish entitlement to service connection on a direct basis by showing that a disorder was caused by exposure to herbicides in service, *see Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("Proof of direct service connection . . . entails proof that exposure during service caused the malady that appears many years later.").

Here, the Board found that the appellant has a current hypertension disability but that there is no evidence of an in-service injury, disease, or event to meet the second *Shedden* element. R. at 8. In that regard, the Board noted that there was no evidence of complaints, diagnoses, or treatment for hypertension during service or within 1 year after service. R. at 7-8. Although the Board acknowledged, in its adjudication of a separate claim, that the appellant served in Vietnam from March 1969 to March 1970, *see* R. at 9, it did not address entitlement to service connection

for hypertension based on exposure to herbicides or whether VA had satisfied its duty to assist, *see* R. at 7-8. Instead, the Board concluded that there was no evidence that hypertension had its onset in service or within the presumptive period for chronic conditions and denied the claim. R. at 8.

The Court concludes that it need not address the appellant's contentions that the NAS reports were constructively before the Board or whether the Board's alleged actual or constructive knowledge of those reports reasonably raised a theory of entitlement based on Agent Orange exposure because, as noted above, the appellant has now persuasively argued that he expressly raised this theory of entitlement in his October 2009 application for benefits. R. at 633. Yet, the Board did not adjudicate this theory or explain why adjudication was not necessary. This failure was error, *see Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) (holding that the Board errs when it fails to discuss a theory of entitlement to VA benefits that was either raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009), and the Court will remand the matter for consideration by the Board in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding").

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

After consideration of the parties' pleadings, including the appellant's motion for a panel decision, the Court sua sponte grants reconsideration; dismisses the motion for panel decision as moot; withdraws the November 7, 2019, memorandum decision; and issues this decision in its stead. The appeal of the Board's September 6, 2018, decision dismissing the appellant's appeal as to the denial of entitlement to disability compensation for a left shoulder disability is **DISMISSED**. The Board's decision denying entitlement to disability compensation for hypertension is **VACATED** and the matter is **REMANDED** for further proceedings consistent with this decision.

DATED: May 14, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)