Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1788

RAUL V. CARDENAS, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Raul V. Cardenas served the Nation honorably in the United States Navy from January 1980 to January 1983.[1] In this appeal, which is timely and over which the Court has jurisdiction,[2] he challenges a November 20, 2018, decision of the Board of Veterans' Appeals that denied service connection for hepatitis C. Because the Board failed to provide an adequate statement of its reasons or bases, we will set aside the November 2018 decision and remand the matter for further proceedings consistent with this decision.

I. ANALYSIS

Appellant argues, in part, that the Board erred in relying on an August 2017 VA examiner's opinion, which he maintains is inadequate. Specifically, he contends that the examiner made inferences based on an absence of evidence in his service treatment records that he was exposed to hepatitis A, and not hepatitis C, in service and that it was not for the examiner as a medical professional to make factual findings about his military service. Additionally, appellant asserts that

[1] Record (R.) at 823.

[2] *See* 38 U.S.C. §§ 7252(a), 7266(a).

the Board failed to sufficiently consider his lay statements related to his hepatitis exposure in service. The Secretary defends the Board's decision in full and urges that we affirm.

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.[3] The Court reviews the Board's findings regarding service connection for clear error.[4] We may overturn the Board's factual findings only if there is no plausible basis in the record for the Board's decision and the Court is "'left with the definite and firm conviction'" that the Board's decision was in error.[5] For all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.[6]

In its decision, the Board noted an April 1981 service treatment record that showed appellant was exposed to hepatitis in service.[7] However, the Board found that the service treatment records noted no treatment or symptoms for any type of hepatitis in service.[8] The Board relied on the August 2017 VA examiner's opinion that appellant's hepatitis C was not related to service because he had no risk factors for hepatitis C during service but instead numerous risk factors after service.[9] The Board concluded the August 2017 VA examiner's opinion was the most probative evidence of record and thus denied service connection for hepatitis C.

The Board failed to provide an adequate statement of its reasons or bases in two related respects. First, the Board failed to consider appellant's statements in his September 2017 Substantive Appeal about his potential hepatitis exposure in service. Specifically, he noted that he had traveled to Kenya and was exposed to hepatitis C there.[10] The Board did not address this potentially favorable evidence. Although the Board found that appellant was not competent to

---

[3] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

[4] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999), *aff'd*, 287 F.3d 1377 (Fed. Cir. 2002).

[5] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[6] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

[7] R. at 5.

[8] R. at 6.

[9] R. at 7.

[10] R. at 75.

connect his current diagnosis to his military service, it said nothing about him reporting on the circumstances of his service. Thus, remand is warranted for the Board to discuss this evidence.[11]

The Board's failure to consider appellant's statements about potential hepatitis exposure in service is especially problematic given its reliance on the August 2017 VA examiner's opinion. The examiner concluded that it was more likely that appellant was exposed to hepatitis A, rather than hepatitis C, in service because of his service aboard a ship. The examiner found that hepatitis A is "more likely to occur in crowded conditions."[12] She also relied on appellant's "active duty job in administration" to find it unlikely that he was exposed to blood or other body fluids routinely, making exposure to hepatitis C unlikely.[13] The problem is that the Board said nothing about the circumstances of appellant's service and simply relied on the examiner's reports of such matters.

Medical examiners and VA adjudicators have distinct and separate roles in the veterans benefits system, based on the differing types of expertise each possesses: the medical examiner provides an opinion on medical matters and the adjudicator makes findings of fact and law to determine a veteran's entitlement to disability benefits.[14] It is the Board's prerogative as factfinder to assess the evidence and determine the weight to be assigned to it.[15] When an examiner makes factual findings and legal determinations, a new medical examination may be necessary to "remove whatever taint there may be from [the examiner's] overreaching."[16] The Board errs where it relies on a medical opinion in which the examiner engages in unwarranted factfinding.[17]

Here, the Court is left to wonder about the weight, if any, the Board attributed to appellant and the examiner's statements about appellant's military service. It is not clear that the examiner had the expertise to report on the circumstances of appellant's service, and the Board was silent on the matter. The Board's failure to discuss this evidence regarding appellant's in-service hepatitis exposure frustrates the Court's review of this matter, warranting remand.

---

[11] *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[12] R. at 114.

[13] *Id.*

[14] *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009).

[15] *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[16] *Sizemore v. Principi*, 18 Vet.App. 264, 275 (2004).

[17] *See id.*

The Secretary crafts several arguments attempting to explain why the Board sufficiently discussed appellant's statement and appropriately relied the August 2017 VA examination report. However, the Board only briefly mentioned the service treatment record and provided no analysis for accepting or rejecting it. Furthermore, the Board said nothing about the examiner's determinations concerning appellant's military service. Thus, the Secretary's attempts to correct the Board's decision fail. It is not the Secretary's prerogative to correct errors in the Board's decision after the fact.[18] We have made clear that "[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."[19]

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[20] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[21] The Board must consider any such additional evidence and argument submitted.[22] The Board must also proceed expeditiously.[23]

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the November 20, 2018, Board decision and REMANDS that matter for proceedings consistent with this decision.

DATED: May 14, 2020

Copies to:

Caitlin M. Milo, Esq.

VA General Counsel (027)

---

[18] *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action.'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2015).

[19] *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011).

[20] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

[21] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018).

[22] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[23] 38 U.S.C. §§ 5109B, 7112.