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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0320

DONALD R. FULTON, 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*: Donald R. Fulton challenges a November 2018 Board decision denying service connection for a cardiac disorder, including ischemic heart disease/coronary artery disease, atrial fibrillation, and peripheral vascular disease. Mr. Fulton argues that the Board should have liberally construed his disability compensation claim for a cardiac disorder as also encompassing a claim for hypertension, given that he had, he contends, one slightly elevated blood pressure reading on separation from service. However, because Mr. Fulton's blood pressure reading on separation came nowhere near the minimum blood pressure requirements for hypertension under VA regulations and for the additional reasons outlined below, the Court affirms the Board's decision.[1]

Mr. Fulton served from August 1964 to August 1967 and spent part of his service in Vietnam. His entrance examination showed a blood pressure reading of 110/70. The examining physician noted that his heart and vascular system were clinically normal. The separation examination showed a blood pressure reading of 122/82, and again the examiner noted that his

[1] The Board remanded the issue of TDIU. As the Court only has jurisdiction over final determinations, and a Board remand is not a final decision, the Court cannot review this issue. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

heart and vascular system were clinically normal. There were no heart-related complaints or treatment reflected in the service treatment records.

More than 30 years after his service, Mr. Fulton underwent a nuclear stress test in 2005. The results indicated that Mr. Fulton had atrial fibrillation (irregular heartbeat of the heart's upper two chambers) with "no prior history of hypertension, diabetes mellitus, or hypercholesterolemia." R. at 2332.[2] The report recorded blood pressure readings of 132/92 at rest and 172/112 at peak stress. Later VA treatment records showed no signs of ischemia, R. at 2333, but a diagnosis of benign hypertension, R. at 2433.

Around five years later, in July 2010, Mr. Fulton filed a service-connection claim for ischemic heart disease. VA ordered an examination, which took place in December 2010, during which the examiner diagnosed atrial fibrillation, hypertension, and diabetes. The examiner found that there were no signs or history of ischemic heart disease. Thereafter, VA denied the claim.

Mr. Fulton disagreed with this determination, arguing that ischemic heart disease was the same as atrial fibrillation and valvular heart disease (damage or defect in one of the four heart valves) and contending that his heart conditions were caused by herbicide exposure.[3] He did not mention his hypertension. After extensive proceedings, VA obtained March 2014 and December 2015 examination reports. The former determined that Mr. Fulton did not have ischemic or valvular heart disease but had atrial fibrillation; the latter opined that Mr. Fulton's history of non-service-connected hypertension, rather than herbicide exposure, most likely caused his atrial fibrillation.

In the decision on appeal, the Board denied service connection for ischemic heart disease, atrial fibrillation, and valvular heart disease. To make its determinations, the Board relied on the VA examiners' adverse findings, in particular, that Mr. Fulton did not have any signs of ischemic or valvular heart disease and that his atrial fibrillation was due to non-service-connected hypertension. The veteran appealed.

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[2] "Atrial fibrillation is an irregular and often rapid heart rate that can increase your risk of strokes, heart failure and other heart-related complications." *Atrial Fibrillation*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/atrial-fibrillation/symptoms-causes/syc-20350624.

[3] "Valvular heart disease is characterized by damage to or a defect in one of the four heart valves: the mitral, aortic, tricuspid or pulmonary." *Valvular Heart Disease*, JOHN HOPKINS MEDICINE, https://www.hopkinsmedicine.org/heart_vascular_institute/conditions_treatments/conditions/valvular_heart_disease.html.

Mr. Fulton does not challenge any of the Board's explicit findings. Instead, he argues that the Board failed to adjudicate a reasonably raised claim for hypertension.

The Board is required to consider theories of entitlement to benefits that are either raised by the claimant or reasonably raised by the record. *Lynch v. Wilkie*, 30 Vet.App. 296, 304 (2018). If the Board determines that a claimed condition was caused by an unclaimed condition, the Secretary must investigate service connection for the unclaimed condition if there is evidence suggesting that it may be associated with service. *DeLisio v. Shinseki*, 25 Vet.App. 45, 54 (2011). This is because pro se claimants may not have the medical or legal expertise to identify the precise disability for which they are seeking compensation, and VA has a duty to liberally construe their filings. *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009).

However, the Board does not have a duty to invent and reject every conceivable argument to produce a valid decision. *Lynch*, 30 Vet.App. at 304. And where a fully developed record is presented to the Board with no evidentiary support for a particular theory of recovery, there is no reason for the Board to consider that theory. *Id.*

Mr. Fulton makes several arguments to support his contention that a claim for hypertension was reasonably raised by the evidence. But not one is persuasive. First, he contends that, because the December 2015 VA examiner opined that hypertension rather than herbicide exposure caused Mr. Fulton's atrial fibrillation, the record reasonably raised a claim for hypertension. This contention misconstrues the law. The Court has held that the Secretary has a duty to investigate secondary service connection for a claimed disability (in this case, cardiac disorders) when the evidence "reasonably indicates that the claimed condition is caused by a disease or other disability that may be associated with service." *DeLisio*, 25 Vet.App. at 55. The fact that an examiner attributes a claimed condition to a cause other than service does not in itself constitute evidence that the non-service cause may be associated with service. Here, none of the VA examiners commented one way or another on the cause of Mr. Fulton's hypertension.

Perhaps realizing this, Mr. Fulton also contends that there was additional record evidence suggesting that his hypertension might be associated with service. The only evidence he adduces, however, to support this argument is a single blood pressure reading from 1967. Specifically, the separation examination's notation that Mr. Fulton had blood pressure of 122/82. He argues that, since his blood pressure was 110/70 on entry, the separation examination showed that he might have begun to develop hypertension during service.

Entitlement to service connection for hypertension requires, at minimum, diastolic pressure "predominantly 90mm or greater," "confirmed by readings taken two or more times on at least three different days." 38 C.F.R. § 4.104, Diagnostic Code 7101, Note (1) (2019). Because the separation examination's notation of a normal cardiovascular system and blood pressure reading of 122/82 came nowhere near VA's definition, this evidence provides no reasonable basis for inferring incipient hypertension.

Furthermore, it's unclear why these blood pressure readings should be considered evidence of an association, since both the entrance and separation examiners indicated that Mr. Fulton had a normal cardiovascular system. *See Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011) (the Board must rely on independent medical evidence to support its determinations). And 2004–2005 treatment records reflected that Mr. Fulton had "no history" of "cardiac problems" or "hypertension, diabetes mellitus, or hypercholesterolemia." R. at 2332. It wasn't until 2004 that medical personnel diagnosed Mr. Fulton with hypertension, specifically benign hypertension, with a resting blood pressure of 132/91 and a reading of 172/112 at "peak stress." *Id.* None of the medical evidence ever linked his hypertension to service, and Mr. Fulton doesn't contend that even his current hypertension meets VA's definition for a current disability. In view of this, the Board did not overlook a reasonably raised claim for hypertension. *See Lynch*, 30 Vet.App. at 304.

To overcome the absence of evidence in the record, Mr. Fulton argues that the Court should take judicial notice of, or consider constructively part of the record, certain medical authorities. He first argues that, because the current version of *The Merck Manual* defines systolic blood pressure readings of 120 to 139 with diastolic readings of 80 to 89 as "prehypertension," the separation exam's blood pressure reading reasonably raised the issue of hypertension. Appellant's Br. at 11. The same reasoning as above discounts this argument. The separation examiner found Mr. Fulton's cardiovascular system normal. There were no reports or treatment of blood pressure problems in service. There were no blood pressure problems for over 30 years. Mr. Fulton only identified heart-specific problems in his statements to VA. And most importantly, VA isn't bound to *The Merck Manual*'s definitions—it has its own regulation defining hypertension, and a blood pressure reading of 122/82 is not in that vicinity. In any event, judicial notice is only appropriate when the fact being proffered is of universal notoriety and not subject to reasonable dispute. *Tagupa v. McDonald*, 27 Vet.App. 95, 100 (2014). An extra-record treatise's definition of hypertension that departs from VA's definition does not meet that standard.

Next, Mr. Fulton points to the 2014 update by the National Academy of Sciences (NAS) to its report, *Veterans and Agent Orange*, and the Secretary's comments in the Federal Register regarding the 2006 update. He argues that the NAS update's conclusion—that there was limited or suggestive evidence of an association between herbicide exposure and hypertension—was constructively before the Board and thus reasonably raised a claim. Alternatively, he contends that, even if this wasn't part of the record, the NAS's identical conclusion in its 2006 update was, because the Secretary cited it in a 2010 Federal Register entry. Appellant's Br. at 12–13. The initial problem with this argument is that the Court has held that NAS reports are not constructively part of the record. *Euzebio v. Wilkie*, 31 Vet.App. 394, 402 (2019), *appeal docketed*, No. 20-1072 (Fed. Cir. Oct. 23, 2019).[4]

But even assuming that the Court recognized that there was limited or suggestive evidence of an association between hypertension and herbicide exposure, the evidence at hand still did not reasonably raise a claim for hypertension. And this again is for all the reasons listed above. Moreover, a claim must be reasonably raised by the record before the merits of a service-connection claim can be investigated. Here, Mr. Fulton would have the Court effectively presume that herbicide exposure causes blood pressure variations. But hypertension does not benefit from presumptive service connection, so the fact that Mr. Fulton was exposed to herbicides in service does not automatically mean that VA must treat varying blood pressures or hypertension as herbicide-related. *See* 38 C.F.R. § 3.309(e) (2019). The Court declines Mr. Fulton's invitation to treat it as such.

Accordingly, the Court AFFIRMS the November 8, 2018, Board decision.

DATED: May 14, 2020

Copies to:

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VA General Counsel (027)

[4] In a footnote, Mr. Fulton notes that the 2018 update to the NAS report concerning herbicides concluded that there was "sufficient evidence of an association" between hypertension and Agent Orange. Appellant's Br. at 12. However, he does not argue that it was constructively part of the record or that the Court should take judicial notice of it. For this reason, the Court will not discuss this matter further. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (the Court doesn't entertain underdeveloped arguments).