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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0570

FLOYD B. SULLIVAN, 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, Floyd B. Sullivan, through counsel appeals an October 19, 2018, Board of Veterans' Appeals (Board) decision denying entitlement to disability compensation for a low back disability. Record (R.) at 4-11. 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 and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from September 1969 to December 1972. R. at 1609. His post-service medical records reflect that he received treatment for back pain from private physicians from 1996 to 1999, from 2000 to 2003, and in 2008. R. at 1001-11, 1026-42, 1048-83, 1106-14. He also received VA treatment for low back pain in April 2002 and October 2007. R. at 1258-59, 1335-37.

In July 2009, the appellant filed a claim for disability compensation for "severe lower back problems," stating that his lower back disability was the result of heavy lifting of aviation parts

while stationed aboard the U.S.S. *Ticonderoga* and that he has routinely had severe back pain since leaving active duty service. R. at 1293-301. Following a VA regional office (RO) denial of the claim, R. at 1267-69, he asserted that he injured his back while serving on the U.S.S. *Ticonderoga* and was treated with aspirin and rest, noted that he had "been seeking treatment for the last 37 years," and attributed his back problems to "climbing up and down ladders on the ship with heavy parts and stocking heavy items." R. at 1171. He also submitted several buddy statements reflecting that friends and family members witnessed the appellant experiencing back problems since military service. R. at 1157, 1159, 1161, 1163, 1165, 1167, 1169. Among those statements was a letter from the appellant's wife asserting that "[he] has suffered from back pain ever since he was released from active duty [and] has been limited to what he has been able to lift and also the activities in which he participates." R. at 1165. The RO continued the denial of the claim in February 2010. R. at 990-94. The appellant filed a Notice of Disagreement, R. at 921, and perfected an appeal to the Board, R. at 844; *see* R. at 871-90. The Board subsequently remanded the claim to obtain a VA medical examination. R. at 742-46.

The appellant underwent a VA examination in December 2015. R. at 691-703. The Board subsequently determined that the medical opinion was inadequate and remanded the claim to obtain an adequate medical opinion. R. at 360-63. The appellant underwent a second examination in December 2016. R. at 288-97. The Board later found that medical opinion also inadequate and remanded the claim for an addendum medical opinion. R. at 172-76. Specifically, the Board directed that the examiner must presume that the appellant was a reliable historian regarding his reports of onset and continuity of his back pain, the examiner must consider the buddy statements of record, and, if the examiner rejected the lay assertions of continuity of symptomatology, he or she should explain why. R. at 175.

The RO obtained an addendum opinion in October 2017; the examiner opined that "it is less likely than not that any current low back disability had its onset during the [appellant's] active service or is otherwise etiologically related to such service." R. at 67; *see* R. at 64-67. She acknowledged VA's determination that the appellant was a reliable historian with respect to his reports of onset and continuity of his back pain and opined that the statements were "not consistent with the objective medical documentation available in this case." R. at 65. She also noted that she had considered the buddy statements of record, but opined that those "statements do not support a

low back disability during the years in between active duty and 1996 and instead indicate that the [appellant] was able to golf, hunt, travel and play ball." R. at 65, 67.

On October 19, 2018, the Board denied entitlement to disability compensation for a low back disability. R. at 4-11. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred in finding that the October 2017 examination substantially complied with the September 2017 remand directives and that the medical opinion was adequate because, he avers, the examiner refused to accept him as a credible historian, did not adequately address his lay testimony, failed to adequately address the buddy statements, and improperly assumed the role of an adjudicator by making a credibility determination. Appellant's Brief (Br.) at 5-13.[1] In the alternative, he maintains that the Board provided inadequate reasons or bases for its substantial compliance and duty to assist findings. *Id*. at 5, 13-15. He requests that the Court vacate the Board decision and remand for readjudication. *Id*. at 2, 15, 16.

The Secretary concedes that the October 2017 examiner's opinion is inadequate, and therefore remand is warranted, because the examiner misstated that the buddy statements did not support a low back disability for the years between service and 1996, given that, "[c]ontrary to the examiner's statement, [the a]ppellant's wife's statement does 'support a low back disability'" during those years. Secretary's Br. at 14-15. He further agrees that the Board's reasons or bases as to the adequacy of the examination were inadequate. *Id*. at 15. However, the Secretary argues that the medical opinion was otherwise adequate and substantially complied with the Board's September 2017 remand directives. Secretary's Br. at 8-14.

A remand by the Board or this Court "confers on the [appellant] . . . , as a matter of law, the right to compliance with the remand orders," and the Board errs when it fails to ensure

[1] The Court acknowledges that the appellant requests partial reversal for the first time in the conclusion of his reply brief. Reply Br. at 6. The Court has consistently discouraged parties from raising new arguments after the initial briefing. *See Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief), *aff'd sub nom. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[I]mproper or late presentation of an issue or argument . . . ordinarily should not be considered."); *see also Untalan v. Nicholson*, 20 Vet.App. 467, 471 (2006); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990). And, in any event, the appellant provides no specific argument for reversal. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). Thus, the Court will limit its consideration to the appellant's arguments for remand.

substantial compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see Dyment v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall* violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002). Further, "once the Secretary undertakes the effort to provide an examination [or opinion], . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

The Board's determinations that VA complied with a remand order and whether a medical examination or opinion is adequate are findings of fact, which the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Gill v. Shinseki*, 26 Vet.App. 386, 391-92 (2013), *aff'd per curiam sub nom. Gill v. McDonald*, 589 F. App'x 535 (Fed. Cir. 2015); *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). 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*, 1 Vet.App. at 56-57.

The Board, in the decision on appeal, initially acknowledged that the appellant has a current disability and that whether it is related to service was the pertinent question. R. at 6. In addressing that question, the Board did not make any findings regarding substantial compliance with its September 2017 remand directives, other than noting that the ordered development "has . . . been completed," nor did the Board make any specific findings as to the adequacy of the October 2017 medical opinion. R. at 5; *see* R. at 4-11. However, the Board found the October 2017 negative

nexus opinion "highly probative" and found that "[t]here is no competent evidence to the contrary." R. at 10. The Board thus concluded that the preponderance of the evidence was against the claim and ultimately denied entitlement to disability compensation. R. at 10-11.

As noted above, the Secretary concedes that the appellant's wife's statement constitutes evidence that the appellant suffered from a back condition since his release from active duty and, therefore, the October 2017 VA medical opinion that found to the contrary is inadequate. Secretary's Br. at 14-15. The Court will accept the Secretary's concession and, because the Board relied on the October 2017 negative nexus opinion in denying the appellant's claim, will remand the matter for the Board to obtain a new examination or opinion. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, 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

After consideration of the parties' pleadings and a review of the record, the Board's October 19, 2018, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 15, 2020

Copies to:

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