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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5567

WILLIE M. RICHARDSON, JR., 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 self-represented appellant, Willie M. Richardson, Jr., appeals a May 28, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for bilateral knee disabilities, a back disability, an eye disability, and gout, all including as secondary to exposure to contaminated water at Camp Lejeune, North Carolina. Record (R.) at 2-11.¹ 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 affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from October 1977 to October 1981, including service at Camp Lejeune. *See* R. at 5. Service medical records reflect that he complained of back pain of one month's duration in November 1980, which he reported was the result of carrying radios on his back; the examiner's impression was possible muscle strain. R. at 8757. He also complained of dry eye and photophobia several times during service. R. at 8751, 8754, 8762.

¹ All references to the record in this case are to the substitute record of proceedings filed on May 11, 2020.

The appellant filed claims for benefits for back and eye disabilities in October 2007, R. at 8908-22, 8934, which a VA regional office (RO) denied in October 2008, R. at 8660-67. He filed a Notice of Disagreement (NOD) with that decision, R. at 8647, and ultimately appealed to the Board, R. at 8470-75.

In June 2009, the appellant underwent a VA back examination. R. at 8539-41. The examiner reviewed his claims file, noting his in-service complaint of back pain in November 1980 and a December 2004 diagnosis of gouty arthritis. R. at 8539. X-rays revealed lumbar spine degenerative disc disease (DDD) without radiculopathy or spondylosis. R. at 8540. The examiner stated that DDD was less likely than not related to service because, although the appellant complained of back pain of one month's duration in service, no chronic back condition was noted in service, R. at 8540, and there was no finding of a chronic condition or evidence of a permanent condition until the present examination, R. at 8539-40; *see* R. at 8502.

In a June 2010 addendum opinion to a May 2010 VA eye examination report,² an examiner stated that he had reviewed the appellant's claims file as well as the May 2010 examination report. R. at 8065. He wrote:

Previous [VA] examination 05/10/10 no diagnosis was made of current dry eye, blepharitis[,] or conjunctivitis[;] however, the examiner did note the [appellant] had superficial punctate keratitis bilaterally. [He] also had lower lid papillae seen which, again, is common with allergic conjunctivitis[, for] which the patient is currently using [medication]. [He] also has conjunctival melanosis and trace conjunctival injection. Based on the [May 2010] examination . . . , it is not at least as likely as not that the [appellant's] current dry eye condition is related to [his] history of service-related blepharitis [or] conjunctivitis. Rationale is [that] blepharitis [and] conjunctivitis are . . . very common conditions [and] also can be related with increase with age[,] which is consistent with the [appellant's] age of approximately 51.

R. at 8065.

In September 2011, the appellant filed a claim for benefits for gout in his feet and knees that he asserted was related to his service-connected flat feet.³ R. at 7474-75. He underwent a VA foot examination in December 2012. R. at 7258-83. Imaging studies revealed degenerative or traumatic arthritis in multiple joints in the left foot. R. at 7266. The examiner concluded that the

² *See* R. at 8088-90.

³ The RO granted the appellant benefits for pes planus with plantar fasciitis in July 2010. R. at 7993-99.

appellant's gout was unrelated to his service-connected pes planus or plantar fasciitis because those conditions do not cause gout. R. at 7267. The examiner diagnosed gout bilaterally in the appellant's knees and lower legs, as well as a left knee lateral meniscus tear and tendinosis. R. at 7268-69. The appellant stated that he did not suffer a discrete injury to his knees, but that he began experiencing knee pain approximately 20 years earlier that he believed was related to his flat feet because he did not walk normally. R. at 7269. The examiner again explained that gout is not caused by pes planus or plantar fasciitis and opined that it was at least as likely as not that the appellant's left knee tendinosis was due to an abnormal gait as a result of his pes planus or plantar fasciitis. R. at 7282.

A different VA examiner in February 2013 stated that the appellant's left knee tendinosis was not the result of his flat feet. R. at 7244. He noted the appellant's report that he had sustained a left meniscal tear 2 years earlier and opined that his left knee pain resulted from that injury. R. at 7244. He further opined that the appellant's knee pain was due to his non-service-connected gout. R. at 7244.

In March 2013, a VA examiner opined that it was less likely than not that the appellant's bilateral knee condition was related to his service-connected pes planus or plantar fasciitis, R. at 7193, explaining that the appellant did not have "osteoarthritis involving the left knee, which one would expect to see if a gait change from pes planus was so significant as to cause knee pain," R. at 7193-94. The examiner further stated: "Gout is not caused by pes planus or plantar fasciitis. It has no relation to any of [the appellant's] service[-]connected disabilities." R. at 7194. Finally, the examiner determined that the appellant's left knee pain and tendinosis were "directly related" to his non-service-connected meniscal tear. R. at 7194.

The RO denied the appellant's claims for benefits for gout of the feet and knees and for bilateral knee tendonitis in June 2013. R. at 6178-86. The appellant filed an NOD with that decision, R. at 4694-99, and later appealed to the Board, R. at 4597-601. At a November 2015 hearing before a Board member, the appellant testified that each of his disabilities was due to exposure to contaminated water at Camp Lejeune. R. at 3336-37. The appellant's wife⁴ stated that his back disability resulted from carrying 15- to 20-pound radios on his back at Camp Lejeune, R. at 3343, 3346, and the appellant reported that he was hit in the eye on the rifle range with a "hot

⁴ The Board member indicated that the appellant's wife was "acting as, . . . in a sense, [his] representative in this case." R. at 3329.

round," R. at 3348-49. He also indicated his belief that his knee disabilities were caused by his service-connected foot disability. R. at 3359.

After a February 2016 remand by the Board,⁵ R. at 3256-86, the appellant underwent a series of VA examinations in May 2017, R. at 2180-206. The examiner reviewed the appellant's claims file and noted his exposure to contaminated water at Camp Lejeune. R. at 2180. The examiner determined that it was less likely than not that the appellant's gout was the result of such exposure. R. at 2180. He explained that the appellant had several risk factors for gout, particularly obesity and a family history of the condition. R. at 2180.

With respect to DDD, the examiner wrote: "In reviewing the specifics of the [appellant's] claim[,] to include the duration of exposure, age, gender[, and] risk factors evident," it was less likely than not that DDD was caused by exposure to contaminated water. R. at 2199. He explained:

The known contaminants of water at Camp Lejeune are not considered to be an etiology of the cause of degenerative arthritis. The etiology of this condition is more often unknown[,] although associated factors include smoking, obesity, age, female gender, physically strenuous work, sedentary work, psychologically strenuous work, low educational attainment, Workers' Compensation insurance, job dissatisfaction, and psychologic factors such as somatization disorder, anxiety, and depression. Exposure to the contaminants in the water at Camp Lejeune are not considered to be a cause by the predominance of peer reviewed literature.

R. at 2199. The examiner offered a similar opinion and explanation for his conclusion that the appellant's knee disabilities other than gout were less likely than not the result of exposure to contaminated water at Camp Lejeune. R. at 2201-02. Finally, the examiner noted that a refractive error of the eye was noted at a February 2017 VA optometry evaluation but that no diagnosis was established. R. at 2206. Because there was no disability found, the examiner stated that "no nexus can be generated." R. at 2206.

Later that month, the appellant underwent a VA eye disabilities examination. R. at 2151-56. The examiner diagnosed cataracts and noted previous diagnoses of corneal scars and infiltrative keratitis. R. at 2151. She noted the appellant's reports of an eye injury in service, R. at 2151, and examined him, R. at 2152-54. In her remarks, the examiner stated that she found no indication of an eye injury in the appellant's service medical records, but noted in-service diagnoses

⁵ The copy of this Board decision in the record of proceedings is undated. See R. at 3256. However, there is no dispute as to the date of the Board decision.

of blepharitis, allergic conjunctivitis, and conjunctival abrasions. R. at 2155. She also noted that "[t]hese issues resolved without sequelae" and that his "vision was 20/20 throughout" all of his service medical records. R. at 2155. She explained that the appellant's cataracts were age- rather than service-related. R. at 2155. She acknowledged additional current eye-related conditions, but determined that none of them was related to service. R. at 2155. She concluded that the appellant did not have "any current eye condition that would be secondary to the reported trauma to the right eye or any other incident or disease in service." R. at 2155-56.

The appellant underwent a VA orthopedic examination related to his back and knees in May 2017. R. at 2100-27. The examiner opined that it was less likely than not that either the appellant's gout, R. at 2117, or his back disability, R. at 2118, were related to service. With respect to the appellant's back, the examination report contains the following remarks from the examiner: "There had been 28 years after separation from service without continuous care for a back condition[. There] is no nexus, and the condition claimed is less likely than not (less than 50% probability) incurred in or caused by the claimed in-service injury, event or illness." R. at 2119. Regarding a knee disability other than gout, the examiner stated: "Th[e appellant] has no medical documentation of a knee condition/injury/degenerative joint disease that started in service[,] and the condition claimed is less likely than not (less than 50% probability) incurred in or caused by the claimed in-service injury, event or illness." R. at 2119.

In the May 2019 decision on appeal, the Board denied the appellant's claims for benefits for bilateral knee disabilities, a back disability, an eye disability, and gout, all including as secondary to his conceded exposure to contaminated water at Camp Lejeune. R. at 2-11. This appeal followed.

II. ANALYSIS

In an informal brief, which the Court liberally construes, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), the appellant raises two issues: (1) Whether the RO considered all his service medical records in reaching its decisions to deny his claims for benefits for eye and back disabilities, and (2) whether the RO erred by overlooking his service medical records. Appellant's Informal Brief (Br.) at 2-5. He also essentially asserts that his lay statements are competent to relate his conditions to service. Appellant's Informal Br. at 4. He further argues that his service medical records demonstrate that his claimed conditions began in service. Appellant's Informal

Br. at 2-4. He asks the Court to reverse the Board's decision and grant his claims for benefits. Appellant's Informal Br. at 5. The Secretary argues that the Board's decision is not clearly erroneous and is supported by adequate reasons or bases. Secretary's Br. at 10-16. Accordingly, he asks the Court to affirm the Board's decision. Secretary's Br. at 16.

VA has recognized that certain contaminants—including trichloroethylene (TCE), perchloroethylene (PCE), vinyl chloride (VC), and benzene—were "present in the base water supply" at Camp Lejeune, North Carolina, between August 1, 1953, and December 31, 1987. 81 Fed. Reg. 62,419-01, 62,419 (Sept. 9, 2016). VA has determined that "service connection on a presumptive basis is warranted for claimants who served at Camp Lejeune during the relevant period and for the requisite amount of time and later develop certain diseases," specifically kidney cancer, non-Hodgkin's lymphoma, adult leukemia, liver cancer, bladder cancer, multiple myeloma, Parkinson's disease, and aplastic anemia and other myelodysplastic syndromes. *Id.* at 62,422; *see* 38 C.F.R. § 3.309(f) (2019). A claimant may also establish entitlement to service connection on a direct basis by showing that a disorder was caused by exposure to contaminants 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.").

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). Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). 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.

Here, the Board noted that the appellant's service medical records do not reflect complaints of, treatment for, or diagnoses of gout, a chronic knee condition, or a chronic back condition. R. at 5-6. The Board acknowledged that the service medical records reveal complaints of eye problems, including photophobia and dry eye. R. at 5-6. The Board reviewed the medical evidence of record, including the June 2009, June 2010, December 2012, January 2013, March 2013, and May 2017 VA medical examination reports. R. at 6-8. The Board found those examinations adequate "because the examiners were able to review the [appellant's] files, see [him] in person when necessary, and offered explanations and rationales for the opinions offered." R. at 8. Ultimately, the Board found that the objective evidence of record did not support a conclusion that the appellant's claimed disabilities were related to service. R. at 8. The Board also noted that the appellant did not have any of the conditions presumed caused by exposure to contaminated water at Camp Lejeune and therefore denied benefits on a presumptive basis. R. at 9. Additionally, relying heavily on the May 2017 VA examinations, the Board concluded that none of the appellant's conditions were caused by or related to his exposure to contaminated water and therefore denied his claims on direct and secondary bases. R. at 9-10.

Although the Board acknowledged the appellant's lay statements regarding the relationship between his conditions and service, the Board found that he is "not competent to opine on complex medical questions, such as a causal connection between his current disabilities and his time in service, his other service[-]connected disabilities, or his exposure to contaminated water." R. at 10. Finally, the Board stated that "[i]t is important for the [appellant] to understand that the medical findings provide highly probative evidence against these claims that the Board cannot, unfortunately, ignore, outweighing [his] belief that his problems are the result of service." R. at 10.

As an initial matter, the Court notes that it does not review RO decisions; its jurisdiction is limited to review of final Board decisions. *See* 38 U.S.C. § 7252(a) (providing that the Court's jurisdiction is generally limited to review of final Board decisions). Moreover, the Board reviews decisions of the RO de novo—that is, without deference to the RO's findings. *See* 38 U.S.C. § 7104 (an appellant is entitled to "one review on appeal to the Secretary"); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005) ("[T]he Board conducts de novo review of [RO] proceedings based on the record."). Accordingly, to the extent that the appellant

raises arguments regarding the RO's findings and conclusions in its October 2008 and June 2013 decisions, the Court may not address them.

Further, the appellant does not challenge the Board's determination that he is not entitled to benefits on a presumptive basis under § 3.309(f) based on exposure to contaminated water at Camp Lejeune because his disabilities are not on the list of presumptive diseases. Accordingly, the Court cannot conclude that he has demonstrated error in that regard. *See* R. at 9; 38 C.F.R. § 3.309(f).

The Court additionally concludes that the appellant has not otherwise carried his burden of demonstrating error in the Board decision. On appeal to this Court, the appellant "always bears the burden of persuasion." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The appellant's arguments primarily turn on the relative probative value the Board afforded the medical evidence and the lay statements of record. *See* Appellant's Informal Br. at 2-4. A disagreement with the way in which the Board weighed the evidence, however, is not sufficient to establish clear error on the part of the Board. *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *see also 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).

Moreover, to the extent that the appellant cites *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007), for the proposition that lay evidence may be competent in some circumstances to establish nexus, he has not explained how, or pointed to any evidence demonstrating that, the Board's determination that he is "not competent to opine on complex medical questions, such as a causal connection between his current disabilities and his time in service, his other service[-]connected disabilities, or his exposure to contaminated water" is clearly erroneous. R. at 10; *see Jandreau*, 492 F.3d at 1377 ("Whether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed by the Board."); *see also* 38 U.S.C. § 7261(a)(4).

Finally, to the extent that the appellant asserts that the Board relied on an inadequate VA examination to deny his claims, Appellant's Informal Br. at 4, he has not identified the examination that he believes is inadequate, nor has he explained how such examination is inadequate. The Court is therefore unable to address this argument. *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); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's May 28, 2019, decision is AFFIRMED.

DATED: May 15, 2020

Copies to:

Willie M. Richardson, Jr.

VA General Counsel (027)