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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-1615

TYRONE HARTMAN, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The self-represented appellant, Tyrone Hartman, appeals a December 17, 2019, Board of Veterans' Appeals (Board) decision in which the Board reopened and denied a claim for service connection for left knee degenerative joint disease (DJD) claimed as chondromalacia. Record (R.) at 5-9. The Board's decision to reopen the claim is favorable to the appellant and the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the part of the December 17, 2019, decision that denied service connection for left knee DJD claimed as chondromalacia and will remand the matter for readjudication consistent with this decision.

I. BACKGROUND

Mr. Hartman served on active duty in the U.S. Air Force from October 1969 to August 1979. R. at 921-23. In September 1973 he injured his left knee playing basketball. R. at 1872. In June 1974, he reported continued left knee pain, especially on bending, and he had a small effusion

in the left knee. *Id.* A physician prescribed medication and rest and advised Mr. Hartman to avoid bending or kneeling. *Id.* In October 1974, Mr. Hartman reported continued left knee pain that did not respond to therapy. R. at 1872. Some crepitus was noted on patellar movement, and the physician's impression was chondromalacia. *Id.* In April 1975, Mr. Hartman again sought treatment for his left knee and was prescribed an ace wrap and crutches for 7 to 10 days. R. at 1867. In August 1975, Mr. Hartman received a permanent physical profile that prohibited any "deep bending of knees or crawling on knees." R. at 2982. In September 1978, Mr. Hartman continued to seek treatment for left knee pain and was diagnosed with chondromalacia patella. R. at 2968. An arthrogram was ordered to rule out a torn medial meniscus. R. at 2968. The report of a November 1978 arthrogram of the left knee is illegible in parts but appears to show either "no" or "nonsignificant" abnormalities. R. at 2976. In June 1979, Mr. Hartman reported the left knee locking and giving way frequently, with examination showing occasional crepitus and tenderness on percussion of the patella. R. at 2970. The physician gave an impression of patellofemoral arthritis and again ordered an arthrogram to rule out a meniscus injury. *Id.* A June 1979 radiographic report showed normal left knee—"no change since 3 Nov 1978." R. at 2973. In July 1979, Mr. Hartman complained of continued left knee pain for several years and was prescribed medication. R. at 2979.

In October 2001, Mr. Hartman requested service connection for left knee chondromalacia, asserting that he was in constant pain and that he had "decreased physical ability" as a result of the condition. R. at 2998. In a January 2002 rating decision, a VA regional office (RO) denied service connection for left knee chondromalacia, finding that his in-service complaints were not shown to have resulted in a permanent residual or chronic disability. R. at 2894. In January 2003, Mr. Hartman sought medical treatment for left knee pain. R. at 849-50.

Mr. Hartman attempted to reopen his claim in May 2009, R. at 2348, and the RO provided a medical examination and opinion in September 2009. R. at 2266-70. During the examination, Mr. Hartman reported that left knee pain began during active duty, and the physician noted that service records documented several evaluations for left knee pain with conservative treatment and a diagnosis of chondromalacia patella. R. at 2266-67. Mr. Hartman described left knee symptoms including pain, stiffness, weakness, incoordination, decreased speed of joint motion, and giving way. R. at 2267. He reported being able to walk 1 to 3 miles but being able to stand for less than 5 minutes. *Id.* On examination, Mr. Hartman displayed an antalgic gait with pain with active

motion on the left side and flexion limited to 80 degrees, compared to no pain on motion on the right side with flexion limited to 120 degrees. R. at 2268. The left knee was tender to palpation, and pain started and ended at 80 degrees. *Id.* X-rays showed minimal DJD in both knees, with the right knee worse than the left. *Id.* The examiner was asked to opine on whether Mr. Hartman's "DJD, left knee [is] due to or a result of in-service event, injury or illness?" R. at 2270. The examiner opined: "The bilateral nature and mild severity of the DJD indicate the condition is due to the aging process and/or his years of labor after leaving active duty." *Id.* The RO denied the claim in a September 2009 rating decision. R. at 2264-65. After Mr. Hartman requested reconsideration of his claim, the RO continued to deny service connection for chondromalacia in a March 2010 rating decision. R. at 2154-56.

In August 2011, Mr. Hartman again sought to reopen his claim for service connection for a left knee condition, noting that his service treatment records showed that he had arthritis in the left knee. R. at 2136. In a May 2013 rating decision, the RO denied the claim because Mr. Hartman missed a scheduled examination. R. at 2045-53. In March 2014, Mr. Hartman disagreed with the denial, explaining that he had good cause for missing the examination and was willing to report to a new examination. R. at 2013.

In August 2014, Mr. Hartman underwent a new examination, reporting that he had been experiencing left knee pain since his military service. He stated that he experienced pain daily but did not take medication. R. at 1987. Left knee flexion was 140 degrees or greater with pain on movement, which the examiner described as functional loss. R. at 1988, 1990. The examiner was asked to opine on whether "DJD left knee is due to or a result of military service." R. at 1993. The examiner opined that although Mr. Hartman was seen in service for left knee pain, his service medical records contained no evidence of chronic knee pain, nor was there evidence Mr. Hartman suffered chronic knee pain after active duty. R. at 1994. The examiner opined that Mr. Hartman suffered chronic knee pain only recently, attributing Mr. Hartman's bilateral knee arthritis to aging and genetics. *Id.* In a September 2014 rating decision, the RO continued to deny service connection for left knee chondromalacia. R. at 1929-31. Mr. Hartman disagreed with the decision, R. at 1681-82, and in a January 2018 Statement of the Case, the RO continued to deny service connection for left knee chondromalacia. R. at 1576-1613. Mr. Hartman appealed to the Board. R. at 1572.

In the December 2019 decision on appeal, the Board denied service connection for left knee DJD, finding that the condition did not manifest during service or within 1 year of service.

R. at 8. The Board found that Mr. Hartman had met the requirement of a current disability since September 2009, R. at 7, but that his DJD was not related to service. R. at 9. The Board acknowledged that in 2009 and 2014, Mr. Hartman had reported that he suffered left knee pain since service, but that when he sought VA treatment for left knee pain in 2003, he reported having experienced left knee pain only for the past several months. *Id.* The Board found that Mr. Hartman was not competent to diagnose DJD or to opine as to its origin, and the Board assigned more probative value to the September 2009 and August 2014 VA examiners' opinions that Mr. Hartman's left knee DJD was less likely than not due to military service and more likely due to aging, years of labor-intensive work since service, and genetics. *Id.*

On appeal, Mr. Hartman argues that the Board erred by only addressing DJD and failing to construe his claim to include the condition he specifically claimed, chondromalacia, which he believed caused permanent knee impairment. Appellant's Brief (Br.) at 6-7. He also argues that the Board erred in failing to discuss whether he was entitled to presumptive service connection for a chronic disease under 38 C.F.R. § 3.303(b). *Id.* at 4. The Secretary responds that the Board did not err in failing to address chondromalacia because the Board was required to sympathetically develop his claim, and the Secretary asserts that "the information obtained in developing [Mr. Hartman's] claim revealed that [his] only current knee condition was DJD." Secretary's Br. at 7-9. The Secretary alternatively asserts that any error in not addressing chondromalacia was not prejudicial because there was no current diagnosis of chondromalacia. *Id.* at 9-12. The Secretary also responds that the Board did not need to discuss presumptive service connection under § 3.303(b) for chondromalacia because the presumption is limited to chronic conditions recognized by the Secretary under § 3.309(a), and chondromalacia is not one of those conditions. *Id.* at 12-15.

II. ANALYSIS

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). The Board's determinations regarding service connection are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Davis v. West*, 13 Vet.App. 178, 184 (1999). "A factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). However, VA has a duty to "give a sympathetic reading to the veteran's filings by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (citing *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). This includes "investigat[ing] the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by a sympathetic reading of the claimant's filing" *Delisio v. Shinseki*, 25 Vet.App. 45, 53 (2011). A claim for service connection may be expanded beyond a veteran's lay description of a disability, to any disability "that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (per curiam order).

As with any finding on a material issue of fact and law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide its reasons for rejecting material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Mr. Hartman argues that the Board erred by only addressing DJD and failing to construe his claim to include the condition he specifically claimed, chondromalacia, which he believed caused permanent knee impairment. Appellant's Brief (Br.) at 6-7. In the claim on appeal, Mr. Hartman sought service connection for left knee chondromalacia, R. at 1681, and generally for a left knee condition, R. at 2136; Secretary's Br. at 9. The RO described his claim as a reopened claim for service connection for left knee chondromalacia throughout the appeal. R. at 2046 (May 2013 rating decision), 1912 (Sept. 2014 rating decision), 1612 (Statement of the Case). Without

the Board explaining why it was considering his claim for chondromalacia or a left knee condition as only a claim for left knee DJD, it is unclear how Mr. Hartman could understand the basis for the Board's decision. *See Gilbert*, 1 Vet.App. at 56-57. The Board erred in not addressing Mr. Hartman's explicit claim for chondromalacia. *See Robinson*, 21 Vet.App. at 553 (holding that the Board errs when it fails to discuss a theory of entitlement to VA benefits that was raised by the claimant).

The Secretary attempts to explain that DJD was the only left knee diagnosis revealed during the development of Mr. Hartman's claim, citing an August 2014 diagnosis of left knee DJD with onset in 1979. Secretary's Br. at 9 (referencing R. at 1987). But it does not appear that the Board relied on this finding, as the Board found that while there was a single diagnosis of arthritis in 1979, the orthopedist making this diagnosis ordered an arthrogram that stated that Mr. Hartman's left knee was normal. R. at 8. And the Board did not find that DJD was the only diagnosis of a left knee condition; rather, while assessing whether new and material evidence had been submitted, the Board explained that Mr. Hartman's original claim for service connection was denied based on a lack of a diagnosis, but that x-rays were required to establish a diagnosis of arthritis. R. at 7. The Board found that Mr. Hartman had submitted new and material evidence because x-rays supported an arthritis diagnosis as of September 2009. R. at 7. The Court cannot accept the Secretary's post hoc rationalizations to make up for the Board's inadequate reasons and bases. *See Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018).

The Court must take due account of prejudicial error. 38 U.S.C. § 7261(b); *Conway v. Principi*, 353 F.3d 1369, 1374-75 (Fed. Cir. 2004). As the Secretary points out, Mr. Hartman has not provided evidence of a current left knee chondromalacia diagnosis. Secretary's Br. at 9. However, Mr. Hartman argues that he is seeking service connection for "permanent impairment" of the left knee caused by chondromalacia that he was diagnosed with during service. Appellant's Br. at 6.¹ The Court discerns that he is asserting that he has current disability of the left knee caused by chondromalacia that is separate from DJD. This Court has held that when a claimant files a claim for compensation, it is not "to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, caused him." *Clemons*, 23 Vet.App. at 5. In *Saunders*

¹ Just after Mr. Hartman's counsel filed Mr. Hartman's opening brief, the Court approved counsel's request to withdraw as Mr. Hartman's representative on October 7, 2020, as a result of counsel's suspension from this Court's bar. The appellant is now self-represented.

v. Wilkie, 886 F.3d 1356, 1368 (Fed. Cir. 2018), the U.S. Court of Appeals for the Federal Circuit overruled nearly 20 years of precedent when it held that "pain in the absence of a presently-diagnosed condition can cause functional impairment," which may qualify as a "disability" under 38 U.S.C. § 1110. 886 F.3d at 1368, *overruling Sanchez-Benitez v. West*, 13 Vet.App. 282, 285 (1999), *appeal dismissed in part and vacated in part on other grounds sub nom. Sanchez-Benitez v. Principi*, 259 F.3d 1356 (Fed. Cir. 2001). The Federal Circuit held that pain alone may constitute a disability if it causes functional impairment, even without an identifiable underlying pathology. *Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018). The Federal Circuit's decision provides a means of establishing service connection without an explicitly diagnosed condition.

Although the Court is not making any determinations regarding whether Mr. Hartman has a current disability other than DJD, we are permitted to review the record for prejudicial error. *See Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) (finding that this Court is permitted to look beyond the Board's decision to review the record of proceedings when identifying prejudicial error). In Mr. Hartman's September 2009 and August 2014 VA examinations, the examiners described functional impairment of the left knee with pain. R. at 2268 (observing left knee antalgic gait, pain on palpation, and pain with 80 degrees of flexion), 1998-90 (finding left knee pain with flexion resulting in functional loss). The Board's error was prejudicial, because if the Board had considered Mr. Hartman's claim more broadly it may have found a current left knee disability other than DJD and may have made different findings as to whether any current disability was related to in-service chondromalacia. Accordingly, the Court finds the Board's decision lacks adequate reasons or bases. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where 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").

Because the Court finds that remand is warranted, the Court will decline to address Mr. Hartman's remaining arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, Mr. Hartman is free to submit additional evidence and argument on the remanded matter, including the arguments raised in his brief, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002);

Kutscherousky v. West, 12 Vet.App. 369, 372 (1999) (per curiam order). The Court has held 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).

III. CONCLUSION

After considering the foregoing analysis and the parties' briefs, and after reviewing the record, the Court VACATES the part of the Board's December 17, 2019, decision that denied service connection for left knee DJD claimed as chondromalacia and REMANDS the matter for further proceedings consistent with this decision.

DATED: July 7, 2021

Copies to:

Tyrone Hartman

VA General Counsel (027)