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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5584

MICHAEL C. BOETJER, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Michael C. Boetjer, through counsel, appeals a September 25, 2018, Board of Veterans' Appeals decision that denied service connection for ischemic heart disease, including as due to herbicide exposure. This case was scheduled to be heard by a panel of judges and then was stayed pending a decision by the Federal Circuit in *Hayes v. McDonough*, No. 2020-1892, 2021 WL 4824142 (Fed. Cir. Oct. 18, 2021) (nonprecedential per curiam judgment); the stay has now been lifted and the matter returned to a single judge for decision. This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate. *See* U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board should have provided the veteran with a medical examination. Because the Board did not address the veteran's expressly raised request for an examination, we will set aside the Board's September 2018 decision and remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Boetjer served on active duty from July 1972 until June 1975. Record (R.) at 1140. Beginning in February 1973, he was stationed in the Korean Demilitarized Zone (DMZ). R. at

1144. He performed artillery work there, placing guns and cleaning out firing points in areas void of vegetation. R. at 422, 1136. Many years later, he developed ischemic heart disease. R. at 1136.

In 2015, the veteran filed a claim for VA disability compensation based on a heart condition. R. at 1136-37. On his application for benefits, he requested a VA examination. R. at 1136. He also submitted an article from the Aspen Institute, stating that, depending on location, Agent Orange may last in the soil for several years. R. at 396. He told VA that he thought his condition was related to service because he served only 3 to 5 years after the spraying of herbicides in Korea and has no other risk factors for ischemic heart disease. R. at 397. After VA denied his claim and the veteran started an appeal to the Board, R. at 400, he hired an attorney. R. at 279. His attorney submitted letters and excerpts from scientific studies about the half-life of Agent Orange chemicals, and he argued that it was likely that the herbicide was still present in the DMZ during the veteran's period of service. R. at 21, 33. In Mr. Boetjer's Substantive Appeal (SA), he checked a box noting that he wished to appeal all issues to the Board and emphasized that he had been exposed to herbicides during service. R. at 77.

In the September 25, 2018, decision here on appeal, the Board denied service connection for ischemic heart disease. R. at 5-9. The Board addressed the veteran's allegation of exposure to Agent Orange "residue that remained in the air and soil, and on machines and buildings, during the time that he served in Korea." R. at 8. The Board explained that "neither the article nor the study the [v]eteran has cited provide any information specific to the persistence of herbicide agents under the conditions present in Korea proximate to the time that the [v]eteran served there." *Id*. Moreover, "there is no allegation that the [v]eteran's work involved manipulation or excavation of surface or sub[]surface soil," and "no medical [nexus] opinion establishing a possible or plausible relationship between the [v]eteran's ischemic heart disease and the attenuated sort of exposure he now alleges." *Id*. Finding no other allegation or evidence of in-service herbicide exposure, the Board concluded that "the preponderance of the evidence is against the veteran's claim." R. at 9. The veteran now appeals the Board's decision.

II. ANALYSIS

Mr. Boetjer argues that the Board should not have decided his claim without first obtaining a medical examination. According to the veteran, we should find that a medical examination was needed because he "served just after the presumptive period," he submitted a study "showing that

the medical half-life of Agent Orange is approximately 7.1 years," "there is evidence that dioxin will last on leaf and soil surfaces for 1 to 3 years," and the Board granted service connection, based on a theory of direct herbicide exposure, to another veteran who served in the DMZ in 1976. Appellant's Brief (Br.) at 6-7. The Secretary argues that we should either find that a medical examination was not needed, Secretary's Br. at 7-9, or decline to address the veteran's argument because he purportedly failed to raise it below, *id*. at 6.

The duty to assist includes the duty to conduct an adequate medical examination. 38 U.S.C. § 5103A; *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). The Secretary must provide a medical examination when there is

> (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

McLendon v. Nicholson, 20 Vet.App. 79, 81 (2006) (citing 38 U.S.C. § 5103A(d)(2)).

Whether a treatise or other medical evidence "is sufficient to satisfy *McLendon* is a question for the Board." *Euzebio v. McDonough*, 989 F.3d 1305, 1324 (Fed. Cir. 2021). The Board must answer that question, supporting its answer with an adequate statement of reasons or bases, when the matter is raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009); *see also Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991) (stating that the Board must discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record"). The Board's statement of reasons or bases is adequate when it is understandable by the claimant and facilitates judicial review. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Here, we find that remand is warranted for the Board to address the need for a medical examination. In his claim for benefits, the veteran specifically asked for VA to provide him with a compensation and pension examination "to substantiate [his] claims." R. at 1136. He also submitted evidence that he had no other risk factors for ischemic heart disease and he sent VA medical evidence and articles that he contended were favorable evidence in support of his claim. R. at 21, 33, 396-97. But the Board did not acknowledge his request for a medical examination or

explain whether the evidence he submitted met the criteria of subsection 5103A(d)(2). The Board's failure to address the veteran's argument renders its statement of reasons or bases inadequate and warrants remand. *See Robinson*, 21 Vet.App. at 552; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remanding "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").

Although the parties ask us to address in the first instance the need for a medical examination, "appellate tribunals are not appropriate fora for initial fact finding." *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). "'[I]f the agency has not considered all relevant factors, or if the [Veterans] [C]ourt simply cannot evaluate the challenged agency action on the basis of the record before it,' remand to the Board for 'additional investigation or explanation' is appropriate." *Euzebio*, 989 F.3d at 1323 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (alterations in original)). Because the Board here must make the requisite findings of fact and apply the law to the facts in the first instance, we will remand the matter. *See id.*; *see also* 38 U.S.C. § 7252(a) (explaining that the Court has the "power to . . . reverse a decision of the Board or to remand the matter, as appropriate"); *Thompson v. Gober*, 14 Vet.App. 187 (2000) (stating that the Court "may remand if it believes the [Board] failed to make findings of fact essential to the decision").

We acknowledge the Secretary's argument that we should decline to hear the veteran's contentions about a medical examination because they are being raised for the first time on appeal. *See* Secretary's Br. at 6. When presented with an issue raised for the first time on appeal, we may hear the issue, decline to address it, or remand the matter as appropriate. *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000). But here, the issue—whether a medical examination should be provided—is not being raised for the first time on appeal. Mr. Boetjer raised that issue below when he asked VA to provide him with a compensation and pension examination to help him substantiate his claim. R. at 1136. And, though his attorney focused on other issues when the matter was appealed to the Board, he did not withdraw his request for a medical examination. What's more, his SA indicates that he wished to appeal all issues to the Board. R. at 77. Thus, the issue of a medical examination was before the Board and, as we have explained, the Board's failure to address that issue warrants remand.

Because the claim is being remanded, the Court need not address Mr. Boetjer's additional arguments that would lead to no broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

Based on the above, the Board's September 25, 2018, decision is SET ASIDE, and the matter is REMANDED for further proceedings.

DATED: November 19, 2021

Copies to:

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