
**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 20-4372

SHERRY CRAIG-DAVIDSON,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

I. Whether the Board erred by failing to weigh the credibility and probative value of the Veteran's lay testimony concerning his service-related exposure to ionizing radiation.

II. Whether the Board erred by denying the Veteran a medical examination.

STATEMENT OF THE CASE

Appellant Sherry Craig-Davidson, acting as accrued-benefits claimant for her deceased spouse Virgil Davidson, submits this Opening Brief appealing the denial of Mr. Davidson's claim for service-connected disability benefits.

Mr. Davidson sought benefits from the Department of Veterans Affairs ("VA") for lung cancer. In his claim, Mr. Davidson asserted that he was exposed to ionizing radiation during his military training. Notwithstanding this uncontroverted assertion, the Board of Veterans' Appeals ("Board") denied Mr. Davidson's claim after concluding that there was no competent evidence of his exposure to ionizing radiation. In doing so, it erred in two respects. First, the Board erred by failing to weigh the credibility and probative value of Mr. Davidson's testimony, which is required by statute, regulation, and controlling law. Second, the Board erred by refusing to provide a VA medical examination.

FACTUAL BACKGROUND

Mr. Davidson enlisted in the U.S. Marine Corps in November 1955. Record Before the Agency ("R.") at 5 (4-8). During his service, Mr. Davidson received training at the Camp Pendleton ABW (Atomic Biology Warfare) School. *Id.* at 6, 972 (972-973). Mr. Davidson was honorably discharged on November 27, 1961. R. at 1095. Mr. Davidson

was diagnosed with non-small cell lung cancer in August 2010. R. at 610 (607-611), and at 972 (972-973).

In February 2019, Mr. Davidson filed a benefits claim for his lung cancer. R. at 28 (28-30). The VA Regional Office denied his claim in August 2019. R. at 5 (4-8). Mr. Davidson appealed the decision to the Board in October 2019. In his appeal, Mr. Davidson asserted that he developed lung cancer after being exposed to ionizing radiation during his training at Camp Pendleton's ABW School. R. at 972 (972-973). Specifically, Mr. Davidson asserted that he was required as part of his training "to locate packages of radiation" using a Geiger counter and "hold the packages of radiation and move [them] from one spot to another" without wearing protective equipment. *Id.*

In evaluating Mr. Davidson's claim, the Board requested records from the Naval Dosimetry Center reflecting any reported exposures during the term of Mr. Davidson's service. R. at 6-7 (4-8). The Naval Dosimetry Center was unable to locate any such records. *Id.* at 7. Relying only on this absence of contemporaneous records, the Board concluded that Mr. Davidson had failed to establish any exposure to ionizing radiation and denied his appeal. *Id.* at 6-8. The Board also refused to provide a VA medical examination on the basis that such "procedural advantages" are only "triggered by competent evidence of exposure." *Id.* at 7. In reaching both of these conclusions, the Board made no effort to assess the credibility of Mr. Davidson's statements or to weigh the probative value of his testimony against the evidence in the record. *See id.* at 5-8.

ARGUMENT

A. The Board erred by failing to weigh the credibility and probative value of the Veteran's lay testimony.

The Board denied Mr. Davidson's claim for disability benefits on the basis that there was "no competent evidence that the Veteran was exposed to ionizing radiation" and that the "criteria for service connection for residuals of lung cancer" were thus not met. R. at 5 (4-8). The Board appeared to rely exclusively on the fact that no retrievable personnel records or records from the Naval Dosimetry Center reflected that Mr. Davidson had been exposed to radiation. *Id.* at 6-7. Although the Board acknowledged Mr. Davidson's representation that he had been required to handle radioactive materials during his training, *id.*, it made no attempt to evaluate Mr. Davidson's credibility, weigh the probative value of his testimony against the lack of contemporaneous medical records, or explain the reasons for its rejection of his testimony. This is reversible error.

"[I]n all cases, a non-combat veteran's lay statements must be weighed against other evidence, including the absence of military records supporting the veteran's lay statements." *Bardwell v. Shinseki*, 24 Vet. App. 36, 38 (2010). In assessing lay testimony, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995). This requirement that the Board weigh lay testimony should be of no surprise—indeed, the statutes and regulations that govern the VA's claim review process demand that due consideration be given to a Veteran's testimony. For example, 38 U.S.C. § 1154(a)

requires that VA regulations concerning service-connection claims include provisions “requiring that in each case where a veteran is seeking service-connection for any disability[,] due consideration shall be given to . . . all pertinent medical and *lay evidence*” (emphasis added). 38 U.S.C. § 5107(b) further provides that:

[t]he Secretary shall consider all information and *lay* and medical *evidence of record* in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

(emphases added). Applicable VA regulations promulgated pursuant to these statutes implement this requirement. For example, 38 U.S.C. § 3.303(a) makes clear that each disabling condition for which a Veteran “seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and *all pertinent* medical and *lay evidence*.” (emphases added).

The Board failed to assess the credibility or probative value of Mr. Davidson’s testimony. The Board’s decision is devoid of any such discussion. Instead, the Board couched its decision on the absence of contemporaneous medical records and declined to weigh or otherwise consider Mr. Davidson’s lay testimony concerning his exposure, which it characterized as “not competent.” R. at 7 (4-8). The Board’s unsupported conclusion that Mr. Davidson’s testimony concerning exposure is not competent is contrary to federal

statutes, VA regulations, and controlling precedents, all of which make clear that such evidence is not only competent, but central to the evidentiary analysis the Board must undertake.

And regardless of how the Board chooses to frame its analysis, its decision “does not reflect a determination on the competency of the lay statements. Rather, it reveals that the Board improperly determined that the lay statements lacked credibility merely because they were not corroborated by contemporaneous medical records.” *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). Where, as here, the Board rejects lay testimony “merely because it is unaccompanied by contemporaneous medical evidence,” the Board must be reversed. *Id.*

B. The Board erred in refusing to provide a VA medical examination.

The Board concluded that Mr. Davidson was not entitled to a VA medical examination. R. at 7 (4-8). According to the Board, a medical examination was not required because “the additional development procedures under the provisions of 38 C.F.R. § 3.311,” which “include obtaining a dose estimate and medical opinion as to whether lung cancer is related to ionizing radiation,” are only triggered with “competent evidence of exposure.” *Id.* This conclusion, which cites the wrong regulation and misconstrues the standard, is erroneous. The Board’s decision should be vacated and remanded on this basis alone.

First, 38 U.S.C. § 5103A and 38 C.F.R. § 3.159—not 38 C.F.R. § 3.311—supply the standard for when the VA must conduct a medical examination in connection with a disability compensation claim. Under these authorities, “the Secretary must provide a VA

medical examination when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, (2) evidence establishing that an event, injury, or disease occurred in service . . . , 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) and 38 C.F.R. § 3.159(c)(4)(i)).

The Board’s failure to apply the correct standard is reason alone for vacatur and remand. *See Bardwell*, 24 Vet. App. at 38 (“[W]hen the Board considers whether a medical examination or opinion is necessary under section 5103A(d) and § 3.159(c)(4), it must provide a written statement of the reasons or bases for its conclusion, pursuant to 38 U.S.C. § 7104(d)(1), and . . . *vacatur and remand is warranted where it fails to do so.*”) (emphasis added).¹

Putting aside the Board’s failure to apply the correct standard, a cursory review of the record makes clear that a medical examination was mandatory in this case. First, there

¹ Given this well-settled law, the Board’s reliance on 38 C.F.R. § 3.311 is puzzling. Indeed, the Board’s position that a medical examination is only required if the record contains “competent medical evidence of exposure” appears to result from a misunderstanding of 38 C.F.R. § 3.311(b)(4), which provides that a claim based on a disease other than the radiogenic diseases recognized in the regulation may “nevertheless” be considered by the VA “provided that the claimant has cited or submitted *competent scientific or medical evidence* that the claimed condition is a radiogenic disease.” (emphasis added). This provision is irrelevant here because lung cancer is a recognized radiogenic disease. *See id.* at (b)(2).

is no dispute that the record contains competent evidence of a disability; the Board acknowledged that Mr. Davidson was diagnosed with lung cancer. R. at 7 (4-8), at 470 (467-471); *see Charles v. Principi*, 16 Vet. App. 370, 374 (2002) (holding that a Board's acknowledgment of a diagnosis in the record was sufficient to establish “competent evidence that [the claimant] has a current disability” (quoting 38 U.S.C. § 5103A(d)(2)(A))). Second, the *only* relevant evidence in the record—Mr. Davidson’s uncontroverted representation that he handled radioactive materials during his military training—suggests that an event resulting in radiation exposure occurred during his service. As noted above, the Board simply ignored this testimony. Third, Mr. Davidson’s testimony that he handled radioactive materials indicates that there may be a nexus between his radiogenic disease and his service.² Fourth, the record lacks sufficient medical evidence to determine the claim. No medical opinion exists concerning the nexus between Mr. Davidson’s lung cancer diagnosis and his exposure to ionizing radiation during his service.

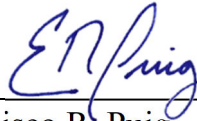
In reaching its conclusion, the Board relied on an irrelevant regulation and failed to apply the correct legal standard. A remand is warranted to correct this clear error. And, in light of the record, the Board should order a medical assessment on remand.

² The third factor is “whether evidence indicates that a disability . . . may be associated with the claimant’s service.” *McLendon*, 20 Vet. App. at 83 (cleaned up). “In contrast to the second element, which requires evidence to establish an in-service injury, this element requires only that the evidence ‘indicates’ that there ‘may’ be a nexus between the two. This is a low threshold.” *Id.*

CONCLUSION

For the reasons stated above, Ms. Craig-Davidson respectfully requests that this Court vacate the Board's decision and remand with instructions to properly weigh the Veteran's testimony concerning his exposure and to conduct a VA medical assessment.

Respectfully submitted this 21st day of November, 2022.



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