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 CORRECTED REPLY BRIEF

(corrected only as to TOC pagination and Record citations pursuant to Rule 28(a)(2))

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Record Citations

INTRODUCTION

The Board of Veterans' Appeals ("Board") erred when it denied Virgil Davidson's claim. Mr. Davidson testified under oath that he was exposed to ionizing radiation during his military service. The few records available to the Board did not reflect any exposure to radiation. The Board denied the claim on the basis that there was no "competent evidence" in the record to establish exposure to ionizing radiation. The Board made no effort to weigh the probative value of Mr. Davidson's testimony against the lack of contemporaneous records or to assess his credibility. The Board also refused to order a medical examination that could have established a link between Mr. Davidson's cancer and exposure to ionizing radiation on the basis that such "procedural advantages" are only "triggered by competent evidence of exposure." R. at 7 (4-8). The Board's decisions to dismiss Mr. Davidson's testimony without weighing its probative value or assessing his credibility and to deny Mr. Davidson a medical examination are reversable errors that require remand.

The Secretary's arguments are unpersuasive and contrary to established law and precedent. First, the Secretary's response brief is premised on the erroneous notion that a veteran's testimony cannot constitute competent evidence of exposure to ionizing radiation in a benefits claim. Relevant statutes and implementing regulations establish that the opposite is true.[1] Second, VA regulations require that veterans be provided a medical examination to develop facts about the etiology of their diseases when certain conditions are met. The Board cited the wrong regulation and failed to apply the test required under

[1] These statutes and regulations were cited in Appellant's Opening Brief and were ignored by the Secretary in his Response Brief.

the law in its decision. The Secretary has tried to paper over this deficiency by applying the correct standard. The Secretary cannot cure the Board's error in an appellate brief, and it is beyond reasonable dispute that the circumstances of this case warranted a medical examination.

ARGUMENT

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

The Secretary argues that a veteran's lay testimony concerning exposure is incompetent evidence as a matter of law. Resp. Brief at 7-8. The Secretary does not cite any authority for the proposition that the Board can disregard lay evidence of exposure. In fact, relevant statutes, implementing regulations, and controlling decisions from the Federal Circuit and this Court make clear that the consideration of lay evidence is not only allowed, but required in every case where a veteran is seeking benefits.[2]

[2] For example, 38 U.S.C. § 1154(a) mandates 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). The foregoing statutes and regulations were discussed in Appellant's Opening Brief at pages 3-4.

In an effort to paper over the Board's failure to consider Mr. Davidson's sworn testimony, the Secretary asserts that the Board's finding is supported by the record. A cursory review of the Board's decision makes clear that that is not the case. In its decision, the Board acknowledged in a single sentence Mr. Davidson's sworn statement that he was exposed to ionizing radiation during his service. R. at 6-8 (4-8). After referencing Mr. Davidson's testimony, the decision then catalogued Mr. Davidson's service treatment records, service personnel records, and records retrieved from the Naval Dosimetry Center, none of which documented any incidents of radiation exposure. *Id.* Immediately following its discussion of these records, the Board concluded without any further explanation that there was no competent evidence of radiation exposure in the record. *Id.*

The Board's disregard for Mr. Davidson's lay testimony is error. It is well-settled that the Board "is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record." *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), aff'd, 78 F.3d 604 (Fed. Cir. 1996). "To comply with this requirement, the Board's statement of reasons or bases must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence." *Id.* The Secretary does not attempt to argue that the Board's decision satisfied this evidentiary requirement. The reason why is clear. No effort was made to weigh the probative value of Mr. Davidson's testimony in light of his service records or to assess his credibility. The Board's decision thus lacks the evidentiary analysis and explanation required under the law.

As the Federal Circuit explained in analogous circumstances, merely noting the absence of contemporaneous records that support a veteran's testimony "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 the Board rejects lay testimony "merely because it is unaccompanied by contemporaneous" records, the Board must be reversed. *Id.*

The Secretary argues that this Court's decision in *Bardwell v. Shinseki*, 24 Vet. App. 36 (2010) supports his position in this appeal. What the Secretary fails to appreciate is that in *Bardwell* the Board performed the required analysis of the veteran's credibility when it weighed his lay testimony. The *Bardwell* Board rejected the veteran's testimony only after explaining that it was "incredible that the veteran would undergo undocumented chemical or gas testing or other exposure during his less than two-month tour of duty and his statements to the contrary are not convincing." *Id.* at 38. In other words, the *Bardwell* Board engaged in the evidentiary analysis required under the law by weighing the probative value of the lay testimony and assessing the credibility of the veteran; the very analysis the Board failed to perform in this case.

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

The Board refused to order a medical examination. 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." R. at 7 (4-8). The Board's conclusion cites the wrong regulation and misconstrues the relevant standard.

As a preliminary matter, 38 C.F.R. § 3.311 does not supply the standard for when the VA must provide a medical examination to a veteran. Rather, the regulation prescribes an additional procedure for conducting a dose assessment in all claims arising from a radiogenic disease. Under the procedure, certain forms, service medical records, and "other records which may contain information pertaining to the veteran's radiation dose in service" are forwarded to the Under Secretary for Health, who is responsible for preparing a dose estimate based on available methodologies. *See* 38 C.F.R. § 3.311(2)(iii). The reference to "competent evidence of exposure" that appears in the Board's decision is found in 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). Putting aside that the assessment required by 38 C.F.R. § 3.311 is an additional procedure that is unrelated to the VA's separate duty to provide a medical examination, the Board's reference to "competent evidence of exposure" is additionally inapposite because lung cancer is a recognized radiogenic disease under the regulation. *See id*. at (b)(2).

In fact, 38 U.S.C. § 5103A and 38 C.F.R. § 3.159 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)). Although the Board's decision concluded that Mr. Davidson's was not entitled to a "VA examination" or "medical examination," R. at 7 (4-8), it did so by reference to 38 C.F.R. § 3.311, not the applicable authorities recited above. This 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).

The Secretary apparently concurs with this assessment. The Secretary does not argue that the Board applied the correct standard. Instead, the Secretary argues that had the correct standard been applied, no medical examination would have been ordered. This *ex post facto* argument is both improper and incorrect.

First, the Secretary cannot correct a mistake by the Board in an appellate brief. *See In re Lee*, 277 F.3d 1338, 1345–46 (Fed.Cir.2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet.App. 7, 16

(2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

Second, even if the Secretary was allowed to rehabilitate deficiencies in the Board's decision on appeal, the *McLendon* test makes clear that a medical examination was warranted in this case. The Secretary argues that only the second factor of the *McLendon* test was not satisfied. Resp. Brief at 11. That factor requires evidence establishing that an event, injury, or disease occurred in service. In support of this new argument, the Secretary recycles its argument that Mr. Davidson's testimony concerning his exposure to radiation during his service is not competent. For the reasons set forth above and in Appellant's Opening Brief, neither the Secretary nor the Board are entitled to disregard Mr. Davidson's uncontroverted testimony concerning his own exposure without weighing the probative value of the testimony against other evidence in the record and assessing Mr. Davidson's credibility.

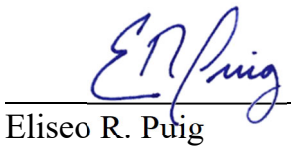
CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, 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.[3]

[3] It is worth noting that, had the Board complied with its obligations, it could have assessed Mr. Davidson's credibility and ordered a medical examination while the veteran was still

Footnote continued on next page

Respectfully submitted this 21st day of March, 2023.



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living. Now that Mr. Davidson's has died, an assessment of Mr. Davidson's credibility and medical examination will necessarily be limited to the available records and documentary evidence.