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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-4372

SHERRY CRAIG-DAVIDSON, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LAURER, *Judge*.

MEMORANDUM DECISION

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

LAURER, *Judge*: Sherry Craig-Davidson, the surviving spouse of United States Marine Corps veteran Virgil Davidson, appeals, through counsel, a December 3, 2019, Board of Veterans' Appeals (Board) decision denying service connection for residuals of lung cancer.¹ After the veteran's death, appellant submitted her Notice of Appeal (NOA) after the 120-day filing deadline, and the Secretary moved to dismiss the case. On May 16, 2022, a panel of Judges established by this Court held that appellant, as an eligible accrued-benefits claimant, has statutory and constitutional standing to bring this appeal because the veteran died during the time he was permitted to file an NOA; the veteran's terminal illness was an extraordinary circumstance, and the Court equitably tolled the 120-day appeal period.² The panel denied the Secretary's motion to dismiss,³ and the Court dissolved the panel.⁴ The Court ordered the appeal to proceed in the normal course of business.

¹ Record (R.) at 5-8.

² *Craig-Davidson v. McDonough*, 35 Vet.App. 281, 283 (2022) (per curiam order).

³ *Id.* at 294.

⁴ *Craig-Davidson v. McDonough*, U.S. Vet. App. No. 20-4372 (May 16, 2022) (unpublished order).

Turning to the merits of the appeal, appellant argues that the Board didn't properly consider Mr. Davidson's lay statements when it found that he wasn't exposed to radiation in service.⁵ And appellant asserts that VA should've provided a compensation and pension (C&P) exam.⁶ The Secretary argues that the evidence didn't trigger VA's duty to provide an exam.⁷ And he defends the Board's finding that Mr. Davidson wasn't exposed to radiation, because the other evidence of record outweighed the lay statements.⁸ But the Board didn't explain how it weighed the conflicting evidence, so the Court can't say that the Board met its duty to give adequate reasons or bases for its decision. As explained below, the Court remands the claim.

I. ANALYSIS

A. Legal Landscape

The Board is the initial factfinder, and it must weigh and analyze the record.⁹ The Court applies the "clearly erroneous" standard¹⁰ to review the Board's denial of service connection.¹¹ Under this standard of review, the Court must affirm the Board's findings so long as there's plausible support for them in the record.¹² In short, the Court reviews the Board's factual findings and doesn't weigh the evidence itself.¹³

In all decisions, the Board must support its legal conclusions and factual determinations with adequate reasons or bases that enable appellant to understand the precise bases for its decision and facilitate this Court's review.¹⁴ To satisfy this requirement, the Board must analyze the

⁵ Appellant's Brief (Br.) at 3-5.

⁶ Appellant's Br. at 5-7.

⁷ Secretary's Br. at 11-12.

⁸ Secretary's Br. at 9-10.

⁹ 38 U.S.C. § 7261; *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013).

¹⁰ 38 U.S.C. § 7261(a)(4); *see also Shinseki v. Sanders*, 556 U.S. 396, 406-07 (2009) (holding that under 38 U.S.C. § 7261(b)(2), the Court's review of the Board's decision must "take due account of the rule of prejudicial error").

¹¹ Generally, to establish service connection for a disability, a veteran must show (1) a current disability, (2) an in-service incurrence or aggravation of a disease or injury, and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

¹² *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹³ *Deloach*, 704 F.3d at 1380.

¹⁴ 38 U.S.C. § 7104(d)(1); *Washington v. Nicholson*, 19 Vet.App. 362, 366-67 (2005).

credibility and probative value of relevant evidence, account for the evidence it finds persuasive or unpersuasive, and provide reasons for rejecting any evidence favorable to appellant.¹⁵ When the Board fails to provide adequate reasons or bases, remand is appropriate.¹⁶

B. Inadequate Reasons or Bases

Appellant's primary contention is that the Board didn't properly consider Mr. Davidson's lay statements.¹⁷ The Board acknowledged that Mr. Davidson reported that he was exposed to radiation during his noncommissioned officer training.¹⁸ But the Board said that "the Veteran's statements alone are not competent evidence of any ionizing radiation exposure."¹⁹ The Board cited *Bardwell v. Shinseki* as its only authority.²⁰ But the Board's reliance on *Bardwell* for this proposition is misguided. The Court in *Bardwell* instructed VA to weigh "lay statements . . . against other evidence" when determining whether any event occurred in service.²¹ Here, the Board never explained why Mr. Davidson's reports—that he used a Geiger counter²² to identify packages of radioactive material and then transported those packages by hand—didn't constitute competent evidence proving that he was exposed to radiation.²³ Since the Board didn't analyze key evidence, it's unclear to the Court why the Board didn't accept that he was exposed to radiation. So the Board failed to provide adequate reasons or bases for its conclusion that there wasn't any competent evidence of in-service exposure to radiation.

The Secretary defends the Board's decision given its power as the factfinder to weigh the evidence, and he contends that appellant is merely disagreeing with the Board's conclusion.²⁴ He

¹⁵ *Washington*, 19 Vet.App. at 366-67.

¹⁶ *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (stating that remand is appropriate "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").

¹⁷ See Appellant's Br. at 3-5; Appellant's Amended Reply Br. at 2-4.

¹⁸ R. at 6.

¹⁹ R. at 8.

²⁰ R. at 7 (citing *Bardwell v. Shinseki*, 24 Vet.App. 36, 40 (2010)).

²¹ *Bardwell*, 24 Vet.App. at 40.

²² A Geiger counter is "an instrument for detecting the presence and intensity of radiations (as cosmic rays or particles from a radioactive substance) by means of the ionizing effect on an enclosed gas which results in a pulse that is amplified and fed to a device giving a visible or audible indication." MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/Geiger%20counter> (last visited Sept. 7, 2023).

²³ See R. at 18, 972.

²⁴ Secretary's Br. at 5, 9, 12.

also cites *Bardwell v. Shinseki* to argue that the Board didn't have to accept Mr. Davidson's lay evidence as dispositive proof of an in-service event.²⁵ While perhaps correct in theory, what's missing here is the Board's analysis that weighs the conflicting evidence.²⁶ Instead, the Board simply discounted the relevant lay evidence without providing adequate reasons or bases for its decision.²⁷ Because the Court holds that the Board failed to adequately discuss favorable evidence that affects a major element necessary for service connection, the Secretary's argument is essentially an effort to rehabilitate the Board's opinion, which can't cure the Board's decision.²⁸ The Secretary's view of the record can't replace the Board's statutory responsibility—that is, to support its decision with an adequate statement of reasons or bases to facilitate the Court's review.²⁹

Appellant also asserts that the Board erred because it didn't order a C&P exam.³⁰ But it would be premature for the Court to consider this argument because “the evidence must, in fact, establish that an injury or event occurred in service” to trigger VA's obligation to provide an exam.³¹ And whether Mr. Davidson was exposed to radiation in service is the factual question that the Board must review again on remand. So the Court won't address appellant's duty-to-assist argument for now.³² The Board must undertake a thorough and critical review of the evidence on remand and must do so in an expeditious manner, in accordance with 38 U.S.C. § 7112.³³

²⁵ Secretary's Br. at 10 (citing *Bardwell*, 24 Vet.App. at 40).

²⁶ See *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.”).

²⁷ See R. at 7.

²⁸ *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) (declining to consider alternative grounds in support of the Board's decision because “‘courts may not accept appellate counsel's post hoc rationalization for agency action’” (emphasis omitted) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156 (1991) (“‘[L]itigating positions’ are not entitled to deference when they are merely appellate counsel's ‘post hoc rationalizations’ for agency action advanced for the first time in the reviewing court.”).

²⁹ See *Evans v. Shinseki*, 25 Vet.App. at 16 (“[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.”).

³⁰ Appellant's Br. at 5-6; Appellant's Amended Reply Br. at 4-7.

³¹ *Bardwell*, 24 Vet.App. at 39.

³² See *Best v. Principi*, 15 Vet.App. 18, 19-20 (2001) (per curiam order) (stating that a narrow decision preserves for appellant a chance to argue those claimed errors before the Board upon readjudication); *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (“[T]here is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.”).

³³ See *Andrews v. McDonough*, 34 Vet.App. 151, 153 (2021) (clarifying that, on remand, the Court expects the Board “to critically examine the justification for the [Board] decision, reexamine the evidence of record, and issue

II. CONCLUSION

For these reasons, the Court SETS ASIDE the Board's December 3, 2019, decision denying service connection for residuals of lung cancer, and the Court REMANDS the matter.

DATED: September 13, 2023

Copies to:

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VA General Counsel (027)

a timely, well-supported decision").