United States Court of Appeals for Veterans Claims

Vet. App. No. 22-7150

DELORES E. HARRISON,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RECORD BEFORE THE AGENCY

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether the Board of Veterans' Appeals erred in failing to return the VA's January 18, 2018 medical opinion following the VA's December 14, 2017 medical examination as inadequate for evaluation purposes as required by 38 C.F.R. § 4.2, given that it did not address the Veteran's in-service injury, did not address each of the three diagnosed disabilities independently, and did not address any issue other than probability of aggravation.

2. Whether the Board erred in failing to return the VA's September 14, 2018 medical opinion as inadequate for evaluation purposes as required by 38 C.F.R. § 4.2, given that it contained factual errors regarding the Veteran's medical history, did not evaluate whether the VA's February 10, 2015 glaucoma surgery comported with the degree of care that would be expected of a reasonable health care provider, and concluded that his post-surgical care was timely and proper without any analysis or consideration of the Veteran's complaints of pain and vision problems prior to September 10, 2015.

3. Whether the Board committed clear error in denying the Veteran's service connection claim by requiring proof of in-service diagnosis of his later-confirmed disabilities in contravention of 38 C.F.R. § 3.303, by equating the absence of evidence with substantive negative evidence, and by failing to include the reasons and bases on all material issues of fact and law to support its denial as required by 38 U.S.C. § 7104(d)(1).

4. Whether the Board committed clear error in denying the Veteran's 38 U.S.C. § 1151 compensation claim by failing to articulate the reasons and bases to support its denial as required by 38 U.S.C. § 7104(d)(1), in addition to failing to consider probative evidence such as fact witness testimony regarding observable facts and symptoms with respect to the VA's negligence in performing glaucoma surgery and providing necessary post-surgical care.

STATEMENT OF THE CASE

Appellant Delores E. Harrison, surviving spouse and substitute claimant of deceased U.S. Navy Veteran Jerry Harrison, appeals the September 27, 2022 decision of the Board of Veterans' Appeals denying 1) the Veteran's service connection claim for left-eye open angle glaucoma, retinal detachment, and cataract; and 2) the Veteran's compensation claim under 38 U.S.C. § 1151 for loss of eyesight proximately caused by the VA's failure to exercise the degree of care that would be expected of a reasonable health care provider in performing the February 15, 2015 glaucoma surgery and administering appropriate post-surgical treatment prior to September 10, 2015. *See* Am. Rec. Before Agency (R.) at 6-12.

This Court has jurisdiction pursuant to 38 U.S.C. §§ 7252 and 7261.

STATEMENT OF FACTS

Veteran Jerry Harrison was honorably discharged in 1966 after serving in the United States Navy from 1961. *See* R. at 1224. During his naval service, Mr. Harrison was treated for exposure to black oil in his eyes in 1964. *Id.* at 1213 (1213-14). From 2012 to 2015, he received VA treatments for various eye conditions, including several

surgeries for cataract, pterygium, and glaucoma performed by VA physicians. *See* R. at 478-86 (pterygium surgery), 452-63 (cataract surgery), 368-73 (glaucoma surgery).

On February 10, 2015, a VA physician performed a Selective Laser Trabeculoplasty (SLT) surgery to treat glaucoma. *Id.* at 371-73 (368-73). Two months after the glaucoma surgery, the VA performed a post-surgery exam, during which Mr. Harrison reported that he was still experiencing pain in his left eye. *See* R. at 370-71 (368-73). Although his wife and son each testified about Mr. Harrison's post-surgical complaints,[1] the VA physicians did not note any of his repeated complaints about post-surgical pain and left eye vision issues. *Compare* R. at 20 (17-23) ("he called and called. We'd go there and call, back and forth"), 24, 513 ("he reported this to those treating him at the Asheville VAMC, and he believes that they did not listen to him"), 526 (525-26) ("I kept being told that everything was fine until the day I totally lost my eyesight"), 980 *with id.* at 368 (368-73) ("reports no problems").

Five months after the VA's post-surgery exam, Mr. Harrison reported floaters and sudden blurs/haziness in his left eye. *See* R. at 351-53. Another month later without further treatment, Mr. Harrison reported worsening floaters, and on October 15, 2015, he was diagnosed with retinal detachment. *Id.* at 333-34, 328-29, 318-22. The VA physician who examined Mr. Harrison at that time identified the "need for urgent surgical intervention" but expected "poor visual prognosis even with surgery" due, in part, to the

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[1] Mr. Harrison's surviving spouse and son mistakenly referred to this surgery as "retina repair" or cataract surgery. *See* R. at 20 (17-23), 24, 25.

"chronicity" of the detachment. *Id.* at 321 (318-22). Mr. Harrison was thereafter referred to a private specialist, where he received further treatments and several additional corrective surgeries. *See* R. at 941-48, 976-79. As the last examining VA physician expected, the private specialist's subsequent efforts were unsuccessful. *Id.* at 225-26.

On October 5, 2017, Mr. Harrison filed a disability claim for "Loss of Sight – Left Eye." *See* R. at 1496-99 (VA Form 21-526EZ). On December 14, 2017, he underwent a VA medical examination ("Dec. 2017 Exam"), in which he was diagnosed with bilateral primary open angle glaucoma, left eye retinal detachment, and no light perception in his left eye. *See* R. at 1056-73. On January 18, 2018, the VA examiner issued a medical opinion ("Jan. 2018 Opinion"), stating that "[i]t is less likely than not (50% or lesser probability) that the Veteran's left eye condition was aggravated beyond its natural progression during service." *See* R. at 1074-75. On January 29, 2018, the VA Regional Office issued a rating decision denying "[s]ervice connection for open angle glaucoma, retinal detachment, [and] cataract." *See* R. at 1049-55. On February 5, 2018, Mr. Harrison filed a request for reconsideration of the denial of his disability claim. *See* R. at 980 (VA Form 21-4138).

On March 26, 2018, Mr. Harrison filed a second disability claim for "1151 Claim Loss of Sight – Left Eye." *See* R. at 921-25 (VA Form 21-526EZ). In response, the VA conducted a C&P Exam Inquiry on August 27, 2018. *See* R. at 553-55. On September 14, 2018, a VA examiner provided a medical opinion ("Sept. 2018 Opinion") that "it is less likely than not (<50%) that the disability of Loss of Sight of Left Eye was caused by or became worse as of result of the VA treatment at issue." *Id.* at 559-61. On September

20, 2018, the VA Regional Office issued a rating decision that "[t]he previous denial of compensation for open angle glaucoma, retinal detachment, cataract (claimed as loss of sight left eye) now claimed under 38 USC 1151 is confirmed and continued." *See* R. at 531-33. Following Mr. Harrison's Notice of Disagreement filed on October 23, 2018, *see* R. at 525-26 (VA Form 21-0958), the VA Regional Office issued a Statement of the Case on December 3, 2019 ("Dec. 2019 SOC"), affirming the denial of his disability claim under 38 U.S.C. § 1151. *Id.* at 148 (123-53).

Less than a year after appealing the denial of his disability claims to the Board of Veterans' Appeals on December 16, 2019, *see* R. at 118-19 (VA Form 9), 111-12 (VA Form 8), Mr. Harrison passed away on June 21, 2020. *See* R. at 94. The VA granted the request of his surviving wife, Delores E. Harrison, to proceed as substitute claimant, *see* R. at 42-44, and conducted a hearing on March 2, 2022. *Id.* at 17-23. On September 27, 2022, the Board denied the § 1151 claim for compensation, relying on the Sept. 2018 Opinion as "the only competent evidence." *See* R. at 9-12 (6-12). The Board further denied the service connection claim on the grounds that there was no nexus between Mr. Harrison's in-service eye injury and his subsequent eye problems and eventual left-eye blindness. *See* R. at 7 (6-12) ("The Board concludes that … the Veteran had a current diagnosis of an eye disability, to include open angle glaucoma, retinal detachment, and cataract, and evidence shows that the he was treated for oil in his eye during service"). Without any supporting medical opinion citations, the Board dismissed the potential effect of the oil exposure during the Veteran's service, stating that "his separation examination was negative for any eye disability." *See* R. at 8 (6-12).

SUMMARY OF THE ARGUMENT

With respect to the Veteran's service connection claim, the Board failed to comply with its duty under 38 C.F.R. § 4.2 to return the VA's Jan. 2018 Opinion following the Dec. 2017 Exam for failing to address the Veteran's in-service eye injury of black oil exposure, failing to address each of the three later-diagnosed eye disabilities independently, and failing to address any issue other than probability of aggravation, in contravention of the requirements of 38 U.S.C. §§ 5103A(a)(1), 5103A(d)(1) and 38 C.F.R. § 3.159(c)(4). By failing to include the reasons and bases for its findings and conclusions as required by 38 U.S.C. § 7104(d)(1), requiring proof of in-service diagnosis of his later-developed disability, and by equating the absence of evidence with substantive negative evidence, the Board committed clear error in denying the Veteran's service connection claim.

The Board likewise failed to comply with its duty under 38 C.F.R. § 4.2 to return the VA's Sept. 2018 Opinion in connection with the Veteran's § 1151 claim, even though that opinion did not address the complaints expressly raised by the Veteran such as whether the VA physicians were negligent in performing the February 10, 2015 glaucoma surgery and in failing to consider the Veteran's post-surgical complaints of pain and vision problems before September 10, 2015. By failing to include the reasons and bases on all material issues of fact and law presented on the record and relying on the VA's inadequate opinion as the only competent evidence while dismissing lay witness testimony attesting to the Veteran's pain and observable facts about the VA's treatments, the Board committed clear error in denying the Veteran's § 1151 claim.

ARGUMENT

I. For Both the Veteran's Service Connection Claim and § 1151 Claim, the Board Perpetuated the VA's Failure To Discharge Its Duty To Assist by Failing To Return the VA's Inadequate Medical Opinions

The Board disregarded its duty under 38 C.F.R. § 4.2 in failing to return the VA's medical opinions as inadequate for evaluation purposes. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) ("Without a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing.").

It is undisputed that the VA has a duty to "assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit," including a duty to provide a medical examination and opinion when necessary. *See* 38 U.S.C. §§ 5103A(a)(1), 5103A(d)(1). In performing the Dec. 2017 Exam, *see* R. at 1056-73, and rendering the Jan. 2018 Opinion, *see* R. at 1074-75, with respect to the Veteran's service connection claim, the VA examiner failed to meet that duty. *See Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) ("A medical opinion is adequate when it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one"); *DeLisio v. Sinseki*, 25 Vet. App. 45, 53 (2011) (duty to assist triggered when "some evidence" indicates that disability may be associated with service). The VA examiner likewise failed to satisfy that duty in issuing its incomplete and conclusory Sept. 2018 Opinion, *see* R. at 559-61, in connection with the Veteran's § 1151 claim.

A. The Medical Examination and Opinion on Which the Board Based Its Denial of the Service Connection Claim Were Deficient

A service connection claim may be established by proving either a direct causative link between an in-service injury and a current disability, *i.e.*, "direct service connection," or that a pre-service disability/condition was aggravated during service, *i.e.*, "aggravation." *See* 38 C.F.R. §§ 3.305, 3.306(a). The VA's Jan. 2018 Opinion was limited to "aggravation" only without any explanation. *See* R. at 1074 (1074-75). The medical profession has long recognized that chemical exposure in the eyes can directly lead to glaucoma and cataract.[2] *See Healey v. McDonough*, 33 Vet. App. 312, 318-19 (2021) (VA's duty to provide a medical opinion on direct service connection was triggered when "evidence 'indicates' that disability 'may be associated' with service"). There is no dispute that the Veteran suffered black oil exposure in his eyes during service for which he received in-service treatment, *see* R. at 1213 (1213-14), and that he received post-service treatment for both glaucoma and cataract. *See* R. at 1056-73.

In the Jan. 2018 Opinion, the VA examiner noted only the Veteran's visual acuity at his enlistment and separation exams and failed to analyze his in-service black oil exposure or post-discharge VA eye treatments and surgeries. *See* R. at 1074-75. The Jan. 2018 Opinion contains no explanation as to why a direct causative link between the

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[2] *See e.g.*, Terri-Diann Pickering, *Glaucoma Associated With Chemical Burns*, GLAUCOMA TODAY 45-46 (May/June 2012); D. Deschamps et al., *Toxicity of Ethylene Oxide on the Lens and on Leukocrytes: An Epidemiological Study in Hospital Sterilisation Installations*, 47 BRITISH J. INDUS. MED. 308-13 (1990); Stefan Cornel et al., *Glaucoma After Chemical Burns and Radiation*, ROMANIAN J. OPHTHALMOLOGY, Vol. 60, Issue 4, 209-15 (Oct.-Dec. 2016).

in-service exposure of black oil and the later diagnosed disabilities was ruled out and does not offer any medical opinion on a possible direct service connection. *Id.* The VA examiner did not even examine or consider the relevant in-service injury/event, *i.e.*, the black oil exposure to the Veteran's eyes. *See Mariano v. Principi*, 17 Vet. App. 305, 312, 317 (2003) (probative value of medical opinion questionable where examiner failed to consider relevant facts). Instead, the Dec. 2017 Exam report merely confirmed Mr. Harrison's current eye condition and disabilities without evaluating or acknowledging his VA service treatment record or prior medical history. *See* R. at 1056-73.

In addition, the Veteran had been diagnosed with at least three distinct disabilities under the applicable Rating Schedule in the course of his VA treatments. *See* 38 C.F.R. § 4.79, Diagnostic Codes 6013 (open-angle glaucoma), 6008 (detachment of retina), 6027 (cataract). Even though these disabilities involve different pathophysiologies, clinical manifestations, diagnoses, and treatments,[3] the Jan. 2018 Opinion did not address each disability as required by regulation. *See* 38 C.F.R. § 4.1 ("It is thus essential, both in the examination and in evaluation of disability, that each disability be viewed in relation to its history"), § 4.2 ("Each disability must be considered from the point of view of the veteran working or seeking work"). Instead, the Jan. 2018 Opinion summarily referenced the "Veteran's left eye condition," without specifying any particular ailment. *See* R. at 1074 (1074-75). The only eye condition that the VA examiner specifically discussed in

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[3] *See, e.g.*, Jahangir Moini et al., FUNCTIONAL AND CLINICAL NEUROANATOMY 443-46, 448-51 (2020).

the Jan. 2018 Opinion was the impairment to the Veteran's visual acuity, which is a separate disability defined in 38 C.F.R. § 4.79 (Diagnostic Codes 6061-6066), and the Jan. 2018 Opinion contained no explanation of how that condition may be related to glaucoma, retinal detachment, cataract, or any of the Veteran's other disabilities. *See* R. at 1074 (1074-75). Such an oversimplified and generalized opinion does not "describe[] the disability … in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *See Stefl*, 21 Vet. App. at 123 (vacating and remanding decision because Board relied on inadequate medical examination).

In view of these shortcomings in the Dec. 2017 Exam and Jan. 2018 Opinion, the Board had a duty to return the report for failing to include sufficient detail. *See* 38 C.F.R. § 4.2; *Bowling v. Principi*, 15 Vet. App. 1, 12 (2001) ("At a minimum,… the Board had a duty to return the [conflicting] report as inadequate for evaluation purposes").

B. The Board Failed To Satisfy Its Duty Under 28 C.F.R. § 4.2 in Accepting an Inadequate Medical Opinion To Deny the Veteran's § 1151 Claim

The VA's duty to assist, including a duty to provide an adequate medical examination and opinion, applies equally to a § 1151 compensation claim. *See Trafter v. Shineki*, 26 Vet. App. 267, 275 (2013) ("section 5103A(d)(1) applies to a section 1151 disability compensation claim"). In providing assistance, the VA "must investigate the reasonably apparent and potential causes of the veteran's condition and theories … based on a sympathetic assessment of the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the [VA] obtains in support of the claim, i.e., the information gathered upon investigation." *See DeLisio*, 25

Vet. App. at 53 (duty to assist applies to entire claim, which might require assistance in developing more than one theory in support of that claim).

Here, the VA examiner failed to meet its duty as the Sept. 2018 Opinion does not address whether the VA physicians may have been negligent in performing the February 2015 glaucoma surgery and assumes there was an "appropriately timed follow up appointment scheduled," *see* R. at 560 (559-61), without any evaluation of the Veteran's reports of pain and vision problems prior to September 10, 2015 or the potential significance of the delay of at least five months transpired before the VA addressed the Veteran's post-surgical complaints and symptoms. *See id.* ("The Veteran presented to the Asheville VA on 9/10/15 with symptom of floaters and associated blurred vision of the left eye…. When the Veteran contacted the VA with increasing symptoms -- prior to his follow up appointment date -- he was appropriately triaged and brought in for an eye exam. At that visit [on October 15, 2015], the left eye's retinal detachment was correctly diagnosed and the patient was promptly referred to the community retinal specialist.").

The medical profession has long recognized that glaucoma treatment may cause retinal detachment,[4] and the Veteran specifically complained about the February 2015 glaucoma surgery leading up to his retinal detachment and loss of eyesight. *See* R. at 526 (525-26) ("I told the VA that I was losing sight in my left eye after having eye surgery a

[4] *See, e.g.*, Stamper et al., BECKER-SHAFFER'S DIAGNOSIS AND THERAPY OF THE GLAUCOMA 280-81 (8th ed. 2009); Sahoo et al., *Retina and Glaucoma: Surgical Complications*, 4 INT. J. RETINA VITREOUS 29 (2018).

few months prior"). According to his surviving spouse,[5] the Veteran reported that this surgery "went wrong" and specifically "told [the VA physician] that it was hurting his eyes, you know, hurt – you're hurting me real bad," *see* R. at 20 (17-23), which was further confirmed by their son's testimony. *See* R. at 24 ("On the way home my dad told me that they had hurt him and he told them that it hurt bad").

In the Sept. 2018 Opinion, the VA examiner failed to acknowledge these complaints and only made a passing reference to the February 2015 glaucoma surgery in the "Background" section without any related analysis. *Compare* R. at 559 (559-61) (Background section stating "He was being treated with eye drops for glaucoma and had received laser for glaucoma to help lower the eye pressure long term") *with id.* at 560 (559-61) (no analysis of any surgery in "OPINIONS REQUESTED" section). The Sept. 2018 Opinion further concluded that the Veteran was diagnosed and properly treated in a timely manner, *see* R. at 560-61, without any evaluation of whether sufficient steps were taken before, during, and immediately after the February 2015 surgery or whether the degree of post-surgical care and delay until September 10, 2015 comports with the degree of care that would be expected of a reasonable health care provider. Accordingly, the

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[5] Notwithstanding descriptions by lay witnesses mislabeling glaucoma surgery as "retina repair" or "cataract" surgery, *see* R. at 20 (17-23), 24, 25, the record remains clear that of the three VA surgeries Mr. Harrison received prior to his retinal detachment diagnosis in late 2015, two had been performed three years earlier, and the SLT procedure to treat glaucoma was performed just prior to his complaints about pain resulting from a surgical procedure, months before the retinal detachment was diagnosed. *Id.* at 478-86 (2012 pterygium surgery), 452-63 (2012 cataract surgery), 368-73 (2015 glaucoma surgery), 576-78 (eye treatment records from January 1, 2014 to October 1, 2015).

Sept. 2018 Opinion is inadequate as it fails to address questions necessary for deciding the Veteran's § 1151 claim, such as (1) whether the SLT surgery recommended by the VA physician was appropriate in light of the Veteran's conditions and symptoms, (2) what standard of care applies to such a surgical procedure, and (3) whether the VA physician met the appropriate standard of care in performing the February 2015 SLT surgery to treat glaucoma. *See Gibbs v. McDonald*, No. 15-2151, 2016 WL 4073225, at *3 (Vet. App. July 29, 2016) ("Specifically, the Board adopted the finding of the … VA opinion that 'VA took the appropriate steps to both prevent and treat the post-operative infection' even though it is not clear from the examiner's opinion what the appropriate steps to prevent and treat infection were under the standard of 'the degree of care that would be expected of a reasonable health care provider,' 38 C.F.R. § 3.361(d)(1)").

The Veteran also reported that the VA refused to consider his post-surgery complaints for months, until his eye condition had worsened to the point that surgical intervention could no longer restore light perception, rendering him completely blind in his left eye. *See* R. at 526 (525-26) ("I kept being told that everything was fine until the day I totally lost my eyesight"), 20 (17-23), 513, 980. Despite receiving reports of pain from the Veteran during his February 2015 surgery, *see* R. at 20 (17-23), 24, the VA did not even conduct a routine follow-up exam until two months later on April 18, 2015, and even then, the Veteran's complaints of continuing pain were dismissed by the attending VA physician. *Compare* R. at 370-71 (368-73) (VA record reporting "os [left eye] hurts") *with id.* at 368 (368-73) (doctor notes suggesting that Mr. Harrison "reports no problems. Doing well"). The Veteran received no further treatment for another five

months until his September 10, 2015 exam, when he reported floaters and blur/haziness in his left eye, later confirmed to be retinal detachment. *See* R. at 351-53, 333-34, 328-29, 318-22. The record reflects that even when the VA physician finally recognized the need for "urgent surgical intervention," it was too late given the "chronicity" of the detachment condition. *Id.* at 321 (318-22).

The Sept. 2018 Opinion failed to address whether the delay in treatment between the February 2015 surgery and September 10, 2015 visit was reasonable or whether the VA's disregard of the Veteran's complaints of pain were appropriate even though "chronicity" was eventually recognized by the last VA physician as a likely obstacle preventing success of the "urgent" care proscribed. *Id.* To the contrary, in the Sept. 2018 Opinion, the VA examiner improperly assumed that only the VA care on or after the September 10, 2015 visit was relevant, ignoring the patient's reports of pain or the absence of any care beyond a routine eye exam before that visit. *See* R. at 560 (559-61) ("The Veteran presented to the Asheville VA on 9/10/15 … The Veteran received a full eye exam … the Veteran was given appropriate education … the Veteran had an appropriately timed follow up appointment scheduled"). The Sept. 2018 Opinion also contained obvious errors in the dates for the Veteran's complaints about floaters and blurred vision ("October 13, 2018") and subsequent treatments (10/18/2018, 10/27/2018), further confirming lack of attention in its preparation. *See* R. at 559 (559-61) ("DATE OF NOTE: SEP 14, 2018@11:50:46 ENTRY DATE: SEP 14, 2018@11:50:46 … Printed on: Sep 14, 2018 11:50:48 am"). Thus, the Sept. 2018 Opinion was not properly supported by a valid rationale and/or the evidence of record. *See Mathis v. McDonald*,

834 F.3d 1347, 1351 (Fed. Cir. 2016) (medical opinion must rest on an examination, whether of the veteran or of the medical records, adequate to support the opinion offered).

The VA's failure to meet its duty to assist is further reflected in Dec. 2019 SOC, which omits the February 2015 surgery, post-surgery complaints, and absence of care. *See* R. at 149-53 (123-53). In light of these deficiencies, the Board failed to meet its duty to return Sept. 2018 Opinion as inadequate for evaluation purposes. *See* 38 C.F.R. § 4.2; *Bowling*, 15 Vet. App. at 12 (Board improperly discounted evidence in support of veteran's claim and failed to consider favorable evidence).

II. The Board Erred in Denying the Veteran's Service Connection and § 1151 Compensation Claims Without Including Sufficient Reasons and Bases

A. The Board Did Not Provide Adequate Reasons and Bases for Denying the Veteran's Service Connection Claim

The Board is statutorily required to articulate adequate reasons and bases for its findings and conclusions on all material issues of fact and law presented in the record to enable a claimant to understand the precise reasons for the disposition of the claim, as well as to facilitate this Court's review. *See* 38 U.S.C. § 7104(d)(1); *Norris v. West*, 11 Vet. App. 219, 224-25 (1998) ("Where the Board fails to fulfill this duty [to provide an adequate statement of reasons and bases], the Court is precluded from effectively reviewing the adjudication"). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide for its rejection of evidence favorable to the claimant's position. *See Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992) (vacating

Board decision where Board only accounted for VA medical exam and neglected all other evidence).

In denying the service connection claim, the Board found the Jan. 2018 Opinion "probative" but included only a boilerplate recitation of the relevant legal standard without any explanation. *See* R. at 8 (6-12). The Board failed to explain why the Jan. 2018 Opinion addressing the possibility of an "aggravation" causal link was probative for the Board's decision to deny a direct service claim. *Compare* R. at 7 (6-12) (decision denying a "Direct Service Claim") *with* R. at 1074 (1074-75) (medical opinion "based on aggravation" only). The Board's decision also does not discuss the VA examiner's failure to address the relevant in-service injury or each current disability individually under either of the two service connection theories. *See, e.g.*, *Sanders v. McDonough*, No. 21-5980, 2023 WL 128968, at *5 (Vet. App. Jan. 9, 2023) ("Because the [VA examiner] did not consider the history of the veteran's vision disability, it is unclear how the examiner fully informed the Board on the medical question at hand").

The Board further cited to the fact that the Veteran's "separation examination was negative for any eye disability" as a reason for denying his service connection claim. *See* R. at 8 (6-12). The Board's reasoning is legally erroneous as "[s]ervice connection may be granted for any disease diagnosed after discharge." *See* 38 C.F.R. § 3.303; *Cosman v. Principi*, 3 Vet. App. 503, 505 (1992) ("[E]ven though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established.").

While concluding that the "evidence of record" weighed against a nexus between

the present disabilities and the in-service injury/event, *see* R. at 7-8 (6-12), the Board did not specify any such evidence. *See Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) ("When assessing a claim, the Board may not consider the absence of evidence as substantive negative evidence"). Since any purported absence of nexus evidence is due to the VA's failure to comply with its duty to assist the Veteran to obtain adequate medical examinations and opinions and the Board's failure to return the inadequate Dec. 2017 Exam report and Jan. 2018 Opinion, the Board's decision is clearly erroneous.

B. The Board Did Not Provide Adequate Reasons and Bases for Denying the Veteran's § 1151 Claim

The Board's obligation to provide an adequate statement of reasons and bases for its decisions for relying on a medical opinion also extends to a § 1151 claim. *See* 38 U.S.C. § 7104(d)(1); *Gibbs*, 2016 WL 4073225, at *3 (remanding Board decision that simply adopted finding of medical opinion that "VA undertook the appropriate steps … but unfortunately the end result was blindness"). The Board acknowledged that "[t]he Appellant asserts that following his eye surgery, the Veteran reported pain in his eye and that ultimately, the detachment of his retina was diagnosed," *see* R. at 10 (6-12), yet the Board's decision addresses neither the surgery nor the reported post-surgical pain. Such critical omissions warrant vacating Board's denial of the § 1151 claim. *See Robinson v. Peake*, 21 Vet. App. 545, 553 (2008) *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) ("[T]he Board is required to consider all issues raised either by the claimant … or by the evidence of record."); *Williams v. McDonough*, No. 22-0702, 2023 WL 3049345, at *3-4 (Vet. App. Ap. 24, 2023) (vacating Board decision where "the

Board did not address Appellant's expressly raised contention" regarding performance of surgery).

In denying the § 1151 claim, the Board found the Sept. 2018 Opinion to be "the only competent evidence," and simply regurgitates the deficient Sept. 2018 Opinion in place of its analysis. *See* R. at 11-12 (6-12). The Board's decision provides no explanation as to why the Sept. 2018 Opinion is probative even though that opinion failed to evaluate whether the February 2015 glaucoma surgery was negligently performed and ignored the VA's delay in administering post-surgical care for at least five months despite the Veteran's reports of post-surgical pain and vision issues. *See e.g.*, *Gibbs*, 2016 WL 4073225, at *3 (vacating Board decision for failing to articulate bases for relying VA medical opinion where medical opinion was unclear as to "whether sufficient steps were taken before, during, and immediately after … surgery").

The Board also improperly dismissed lay witness testimony regarding observable facts provided by the deceased Veteran himself, his wife, and his son as incompetent "medical opinion," *see* R. at 11-12 (6-12), even though such evidence was never offered as medical opinions. *See, e.g.*, *Lockett v. Shinseki*, No. 07-2936, 2009 WL 2634893, at *5 (Vet. App. Aug. 27, 2009) ("It is incomprehensible why the Board would summarily reject the appellant's and his wife's 'opinion' as not competent on the issue of diagnosis or causation, when the evidence was not provided for that purpose"). The lay witness testimony establishes the symptoms personally experienced by the Veteran and observable factual events, including (1) the pain experienced during and after the February 2015 glaucoma surgery, (2) the Veteran's repeated reports of pain and vision

problems to the VA physicians prior to September 10, 2015, and (3) the VA's continuing dismissal of the Veteran's complaints until it was too late to treat his retinal detachment and permanent loss of sight in his left eye. *See Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005) (lay persons are qualified to provide testimony on their own symptoms and observable factual events); *Bruce v. West*, 11 Vet. App. 405, 410-11 (1998) (same). Had the Board properly considered percipient fact witness testimony, instead of erroneously dismissing such evidence as improper medical opinions, the Board would have recognized the VA examiner's failure to address the absence of care from February to September 2015 in the Sept. 2018 Opinion and returned the report as inadequate.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

In light of the inadequate VA examinations and medical opinions, as well as the Board's failure to provide an adequate statement of reasons or bases to support its denials, remand is appropriate. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (remand proper "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"). On remand, the Appellant should be allowed to submit additional evidence and arguments regarding the service connection and § 1151 claims. *See Kay v. Principi*, 16 Vet. App. 529, 534 (2002) (on remand Board must consider additional evidence and arguments in assessing entitlement to benefits sought).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing document has been served on September 25, 2023 via the Court's CM/ECF system to all counsel of record deemed to have consented to electronic service.

/s/ Don Z. Wang