

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-3810

RONALD T. HARRIS, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Ronald T. Harris, pro se, appeals a September 26, 2011, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for an acquired psychiatric disorder, to include post-traumatic stress disorder (PTSD), and sterility, including as a result of an in-service sexually transmitted disease (STD). Record of Proceedings (R.) at 3-13. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Board's decision will be affirmed.

I. BACKGROUND

The appellant served in the U.S. Army from September 1972 to October 1973. R. at 1806. His service medical records indicate that he was treated for an STD during service. A July 1973 record shows that the appellant was treated for "GC urethritis" and that he had "frequent sexual contact [with a] pregnant partner." R. at 659. An August 1973 record notes a history of treatment for gonorrhea. R. at 1232. The record does not contain any treatment for, or complaint of sterility.

A declaration of marital status, submitted to VA in April 1977, states that the appellant had a daughter who was born in February 1977. R. at 1797. The appellant also submitted his daughter's birth certificate, which lists him as the father. R. at 1799.

In June 2008, the appellant applied for disability compensation for sterility as a result of an STD contracted while he was on active duty. R. at 781-87. The regional office (RO) denied the appellant's claim in July 2009. R. at 644-50. Later that month, the appellant filed a Notice of Disagreement stating that he had contracted gonorrhea three times while he was stationed in Germany, and that his sterility began in service as a residual of contracting gonorrhea. R. 640-43.

In October 2009, the appellant underwent a VA genitourinary examination in which he stated that he fathered a child with a girlfriend while he was stationed in Germany, but that he has not had any children since then. R. at 118-19. He claimed that he was told he had a low sperm count, but there was no documentation or confirmation of the appellant's claimed sterility in his records. R. at 119. The examiner opined that it was less likely as not that the appellant's claimed sterility was a result of an STD contracted in service. *Id.* He explained:

Male infertility related to sexually transmitted disease is unusual and is typically associated with testicular involvement/orchitis.^[1] Review of service medical records indicates veteran was treated for gonococcal urethritis,^[2] without indication of testicular pain or orchitis which would indicate a significantly more severe illness.

Id. The examiner concluded that because there was no documentation that the appellant had an STD with testicular involvement, his in-service STD did not relate to his claimed sterility. *Id.*

In November 2009, the RO issued a Statement of the Case continuing denial of disability compensation for sterility. R. at 89-112. The appellant testified before a Board hearing in May 2010 that he had no children, and that his wife was never pregnant. R. at 31. He further testified that a VA doctor diagnosed him with sterility and told him that it was the result of the STDs. R. at 31-32.

¹ "Orchitis" is "inflammation of a testis, marked by pain, swelling, and a feeling of weight, often seen accompanying epididymitis. It may occur idiopathically or be associated with conditions such as mumps, gonorrhea, filarial disease, syphilis, or tuberculosis." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1333 (32d ed. 2012).

²"Gonococcal Urethritis" is "gonorrhea in the male urethra." *Id.* at 2008.

On September 26, 2011, the Board issued the decision here on appeal, in which it denied disability compensation for sterility, including as a result of an in-service STD. R. at 3-13. The Board found that the "preponderance of competent medical evidence does not establish a current diagnosis of sterility at any time during the [v]eteran's service or since." R. at 4. The Board also explained that the appellant, despite testifying that he had no children, submitted birth certificates for both a son and daughter in October 1992 in connection with another claim. R. at 8. Therefore, the Board concluded:

Because the medical evidence does not establish a diagnosis of sterility, and because the Veteran, in fact, does have children, there is no basis upon which to find that a current disability exists in this case. Without the existence of a current disability, service connection is not warranted. As the preponderance of the evidence is against this claim, the [v]eteran's appeal must be denied.

R. at 8.

II. ANALYSIS

In his informal briefing, the appellant argues that the Board decision was not based on the facts, which he presented. Appellant's Brief (Br.) at 2. In his Notice of Appeal to the Court, the appellant argued that he disagreed with the portion of the Board decision that highlighted the fact that he submitted two birth certificates for a previous claim because the subjects of the birth certificates were not his biological children, but instead his wife's children.

Establishing service connection generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) A current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) nexus between the claimed in-service disease and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). Pursuant to 38 C.F.R. § 3.303(b) (2012), a claimant may establish the second and third elements by demonstrating continuity of symptomatology. *See Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007). Continuity of symptomatology can be demonstrated by showing (1) that a condition was "noted" during service; (2) evidence of continuous symptoms after service; and (3) medical, or in certain

circumstances, lay evidence of a nexus between the current disability and the postservice symptoms. *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997).

A finding of service connection, or no service connection, is a finding of fact reviewed under the "clearly erroneous" standard in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.*

Here, the October 2009 VA examiner opined that "it is less likely as not that the veteran is sterile due to evidence of treatment for [an STD] while in service" because of "the lack of documentation [that] the veteran had an STD with testicular involvement (which would be more associated with loss of fertility)" in service. R. at 119. As such, there is no evidence of a nexus between the appellant's in-service STD and his claimed sterility, and the Board's finding that the appellant's in-service STD was not the cause of his claimed sterility was not clearly erroneous. *See Hersey*, 2 Vet.App. at 94.

Therefore, even if the Board erred by not considering the appellant's testimony that he had not fathered any children, he has not demonstrated that he was prejudiced by this error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal). Without evidence of a nexus between the appellant's in-service STD and his claimed sterility, he has not established that he has been prejudiced by any error that the Board may have committed. *See Shinseki v. Sanders*, 556 U.S. 396 (2009).

Additionally, the Court notes that the appellant stated in his informal brief that he wanted to appeal his PTSD claim. However, the Board remanded the appellant's PTSD claim for further development. Therefore, the matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (holding where Board-remanded order did not make a final determination with respect to the benefits sought, Board's remand did not represent final decision over which the Court has jurisdiction).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 26, 2011, decision is AFFIRMED.

DATED: December 28, 2012

Copies to:

Ronald T. Harris

VA General Counsel (027)