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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 09-3487

HENRY MERCZEL, 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, Henry Merczel, through counsel, appeals a June 12, 2009, Board of Veterans' Appeals (Board) decision in which the Board denied his claims for entitlement to service connection for a right hand condition, to include Raynaud's phenomenon, and for hepatitis C. Record of Proceedings (R.) at 3-9. 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 Court will vacate the decision with respect to the hepatitis C claim, reverse the decision with respect to the right hand claim, and remand the matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from June 1975 to June 1978 and in the U.S. Marine Corps from December 1978 to February 1979. R. at 4, 443, 555. His 1975 service entrance examination shows that, other than an irregular heartbeat, his general health condition was normal. R. at 496-97. Service medical records (SMRs) document a number of injuries and events relevant to the conditions involved in this appeal. In July 1975, the appellant was treated for a one

and one quarter inch laceration to his scalp, sustained after another soldier rammed his head against a wall during an altercation at Fort Dix, New Jersey. R. at 481-82, 516, 519; *see also* R. at 260-61 (appellant's testimony before the Board). That same month he reported fever, sore throat, and muscle aches. R. at 485-86.

In September or October 1977, while serving in Germany, the appellant lacerated his left index finger, which caused profuse bleeding; when he sought treatment about a month later, the finger had become infected and he was still unable to straighten it. R. at 514. Then, in November 1977, the appellant began experiencing problems with his hands. His fingers would become cold and white when exposed to cold weather. R. at 297. Though Army medical personnel thought it might be frostbite, the condition recurred, and a private physician examining the appellant in the months between his Army and Marine Corps service diagnosed Raynaud's disease. *Id.*; *see also* R. at 267, 294.

SMRs from January and February 1979 documented persistent fever, sore throat, fatigue, congestion, coughing, and body aches, which were symptoms of what was first diagnosed as a "viral syndrome" and later as early pneumonia. R. at 299-300, 305-10, 319. During this same period, Marine Corps medical personnel confirmed the earlier diagnosis of Raynaud's phenomenon, "secondary to early collagen vascular disease." R. at 294. Raynaud's phenomenon is an "intermittent bilateral [blood deficiency] of the fingers, toes, and sometimes ears and nose, with severe pallor and often paresthesias[, i.e., a tingling or prickling sensation] and pain, usually brought on by cold or emotional stimuli and relieved by heat; it is usually due to an underlying disease or anatomical abnormality."[1] The appellant was found to have "the typical triphasic response of pallor to cyanosis to rubor" that characterizes the condition. R. at 294; *see also* R. at 303-04. Based upon these findings a medical discharge from service was recommended in 1979. R. at 301.

Private, postservice medical records continued to diagnose Raynaud's phenomenon and chronicled complaints of "chronic pain in the fingers [and] difficulty with gripping/holding objects." R. at 196, 202. In 2001, the appellant was diagnosed with hepatitis C; his private physician would

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[1] DORLAND'S ONLINE ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007), *available at* http://www.dorlands.com/wsearch.jsp. "When idiopathic or primary it is called Raynaud['s] disease." *Id.*

later opine that "[i]t is impossible to determine the date of acquisition of his viral infection." R. at 202; *see* R. at 203-09. In 2002, the appellant filed claims for service connection for his hepatitis C and Raynaud's phenomenon, which the VA regional office (RO) denied in a February 2003 rating decision. R. at 379-82, 391. After the appellant filed a Notice of Disagreement, and the RO continued its denial, the appellant appealed to the Board. R. at 347-58, 369, 342.

In 2005, the appellant and his mother offered testimony before the Board testimony. Although admitting to drug use in the 1990s, he denied any such activity during or before service and expressed his belief that his hepatitis C was contracted during basic training at Fort Dix when he was one of multiple soldiers to receive inoculations with the same air gun. R. at 260-61; *see also* R. at 77-78. The appellant also offered medical treatise evidence that listed complaints such as fever, fatigue, chills, and "general achiness" – i.e., complaints documented in his SMRs – as symptomatic of hepatitis C. *See* R. at 113-15.

On March 29, 2006, the Board issued its first decision in this case. In it the Board found the record insufficient to make a determination on the appellant's claims and remanded them to the RO for a VA examination "to determine the exact nature of any conditions that the [appellant] may have, and to determine if any presently existing condition is related to or had its onset during service." R. at 250-51. The Board also specifically stated that it was

> imperative that the examiner who is designated to examine the [appellant] reviews the evidence in the claims folder, including a complete copy of this REMAND, and acknowledge such review in the examination report[;] . . . offer an opinion as to whether it is as least as likely as not that such disabilit[ies are] related to or had [their] onset in service[;] . . . [and] set forth the complete rationale for all opinions expressed and conclusions reached.

R. at 253. The VA medical examiner offered an opinion in April 2008. R. at 75-78. The RO continued its denial, and the appellant appealed to the Board for the second time. R. at 44-45, 57-67.

In its decision of August 19, 2008, the Board again remanded the appellant's two claims. The Board found that the examiner failed to "include a rationale as to why the examiner believed the air gun or lacerations were not the source of the veteran's hepatitis C." R. at 41. Instructing that an addendum to the April 2008 examination be prepared, the Board ordered the RO to readjudicate the claims after the examiner answered questions relating to current disability, in-service occurrence, and causation. R. at 42.

The Board also noted a VA Fast Letter that addresses the "relationship between immunization with jet injectors and hepatitis C." VA Fast Letter 04-13 at 1 (June 29, 2004) (capitalization omitted). This document stated that "[d]espite the lack of any scientific evidence to document transmission of [hepatitis C] with airgun injectors, it is biologically plausible." *Id.* at 2. Further, the Fast Letter emphasized: "It is essential that the report upon which the determination of service connection is made includes a full discussion of all modes of transmission, and a rationale as to why the examiner believes the airgun was the source of the veteran's [hepatitis] C." *Id.* The VA examiner was instructed to take this document into consideration on remand as well. R. at 41, 42.

In November 2008, the same VA physician who offered the April 2008 opinion stated that he "could not find evidence that [these] two conditions occurred during service." R. at 24. Regarding hepatitis C, the physician stated that he "could not find evidence that vaccination by air guns or head laceration [were] . . risk factor[s] for Hepatitis C." *Id.* There was no mention of the VA Fast Letter or the injury to the appellant's left index finger. The RO relied on this addendum opinion and again denied both claims for service connection; the appellant appealed to the Board. R. at 15, 21-22.

On June 12, 2009, the Board issued its third decision in this case, the one currently on appeal. The Board specifically found that the appellant currently suffered from Raynaud's phenomenon and that the evidence showed an in-service incurrence, but also found that "[t]he evidence of record [did] not include a nexus opinion connecting the [appellant's] right hand condition and his military service." R. at 7. Based upon this last fact, the Board denied the claim. *Id.* With respect to hepatitis C, the Board found the existence of a current disability; it also found, however, that the evidence did not show in-service incurrence or aggravation of the disease and denied service connection on this basis, without addressing nexus. R. at 8. This appeal followed.

The appellant argues that the Board's decision should be vacated because the April and November 2008 VA medical opinions are inadequate and violate the Board's March 2006 and August 2008 remand orders, and because the Board's statement of reasons or bases for its decision is inadequate. Appellant's Brief (Br.) at 13-22. For these reasons, he seeks remand of both claims. But the primary relief sought with respect to the claim for a right hand condition is reversal because, as the appellant contends, his Raynaud's phenomenon is presumptively entitled to service connection.

Id. at 10-12. The Secretary concedes that the Board's statement of reasons or bases is inadequate regarding its denial of the hepatitis C claim and agrees that remand is appropriate. Secretary's Br. at 2-6. He also acknowledges that the Board failed to address presumptive service connection for Raynaud's phenomenon, and agrees to a remand of that claim. *Id.* at 8-9. Nevertheless, the Secretary denies any other allegation of error and opposes reversal. *Id.* at 6-8, 9-12.

II. ANALYSIS

A. Hepatitis C

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of three elements: (1) A current disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a nexus between the claimed in-service injury or disease and the current disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 252 (1999).

Furthermore, when deciding a matter, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 507 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57. The Secretary concedes that remand of the hepatitis C claim is warranted because the Board's statement of reasons or bases is inadequate, and, for the following reasons, the Court agrees.

First, the Board's discussion erroneously conflated the second and third elements of a service-connection claim. The Board found that the appellant's claim failed because "[t]he evidence [did] not show in-service incurrence or aggravation *of hepatitis C*." R. at 8 (emphasis added). The second element does not require such particularity; rather, the appellant must show an in-service disease or injury that he alleges caused or aggravated his current disability. *See Davidson*, *supra*. Proving a

connection between an in-service disease or injury and a current disability is the requirement of the third element in a service-connection claim. *See id.* The appellant alleges that either his in-service inoculations, scalp laceration, or index-finger laceration could be the "injury" that led to his contraction of hepatitis C. R. at 8. The Board did not question the credibility of the appellant's assertions that such incidents occurred, and, in any event, they find support in the record. When the Board discussed the unlikelihood that any of these incidents were connected with the appellant's hepatitis C, however, it was making a nexus assessment and erroneously imposing a more demanding showing for the second element of a service-connection claim than is required. *See id.* (stating that the incidents proffered by the appellant "are not known risk factors for hepatitis C"). This confusion renders the Board's statement of reasons or bases for its decision inadequate because it prevents the appellant from understanding the basis for the Board's conclusions and hampers review by this Court. *See Caluza* and *Allday*, both *supra*.

Second, as the Secretary also concedes, the Board failed to address the adequacy of the November 2008 VA medical opinion addendum, which was drafted pursuant to the Board's August 2008 remand order. In that order, the Board discussed a VA Fast Letter that acknowledged that "transmission of hepatitis C virus with air gun injections was 'biologically plausible,' notwithstanding the lack of any scientific evidence so documenting." R. at 41. The Board then explicitly instructed the VA medical examiner to "take into consideration the VA Fast [L]etter discussed by the Board above," and opine "[w]hether it is at least as likely as not that the [a]ppellant's hepatitis C is related to his military service, to include the claimed air gun injections and lacerations," or more likely that postservice factors caused the condition. *Id.* The author of the November 2008 addendum, however, did not address whether any postservice factors were relevant or even acknowledge the VA Fast Letter or the appellant's in-service scalp laceration. *See* R. at 24.

The Board failed to mention these omissions. That failure amounts to a legal error because "a remand by this Court or the Board confers on the . . . claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). When "the remand orders of the Board or this Court are not complied with, the Board itself errs in failing to [e]nsure compliance." *Id.* After the Board initially found that the appellant was entitled to VA examination upon his first appeal (R. at 252-53), and then found the resulting examination

inadequate on the appellant's second appeal, the Board certainly should have ensured that the November 2008 medical opinion addendum was adequate on the appellant's *third* appeal. However, the Board did not.

Therefore, based upon the inadequacy of the Board's statement of reasons or bases and the *Stegall* violation, the Court will vacate the Board's decision with respect to the hepatitis C claim, and remand the matter for the Board to obtain an adequate, compliant, and responsive medical opinion. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy "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"). The appellant raises other allegations of error that the Secretary does not concede, but given this disposition the Court need not address those other arguments here. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him").

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board, *especially in a case with a procedural history such as this*, must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

B. Right Hand Condition, To Include Raynaud's Phenomenon

Both parties maintain that the Board should have discussed the alternative method of establishing service connection for Raynaud's phenomenon under 38 C.F.R. § 3.303(b) (2011). *See* Appellant's Br. at 10-12; Secretary's Br. at 9-10. The Court is in complete agreement.

The Board must consider and discuss all applicable provisions of law and regulation where they are made "potentially applicable through assertions and issues raised in the record." *Schafrath*

v. Derwinski, 1 Vet.App. 589, 592-93 (1991); *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008); 38 U.S.C. § 7104(a). According to VA regulations, when a "chronic disease [is] shown as such in service . . . subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes." 38 C.F.R. § 3.303(b). Raynaud's disease is explicitly considered a chronic disease that is presumptively entitled to service connection, 38 C.F.R. § 3.309(a) (2011), and has been so considered by VA since before the appellant filed his claim in 2002.

Although there is no dispute that § 3.303(b) applies to the appellant's claim for Raynaud's disease (*see, e.g.*, Secretary's Br. at 9 ("[T]he Board failed to apply that pertinent regulation . . . .")), the parties differ on the appropriate remedy. The appellant asks this Court to reverse the Board and order the award of service connection. Appellant's Br. at 12. The Secretary contends that vacatur and remand are appropriate for the Board to consider the regulation in the first instance. Secretary's Br. at 9. Although this Court generally remands a claim "where the Board has incorrectly applied the law," *Tucker*, 11 Vet.App. at 374, such a remedy is not invariable. *See Brannon v. Derwinski*, 1 Vet.App. 314 (1991) (reversing the Board's decision and remanding for award of service connection under § 3.303(b), even though the Board never addressed that provision). And while "incorrect application of the law does not necessarily constitute grounds for reversal[,] . . . reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision." *Tucker*, 11 Vet.App. at 374 (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)).

In the present case, there is only one permissible view of the evidence. Marine Corps SMRs from 1979 clearly diagnose the appellant with Raynaud's phenomenon and state that "[h]e had this while in [the] [A]rmy." R. at 294, 297, 303-05. The appellant submitted a claim for service connection for this condition in 2002. R. at 391. Numerous medical records document postservice diagnoses of Raynaud's phenomenon and the appellant's consistent assertion that he contracted the condition while a soldier stationed in Germany. *See* R. at 75-76, 110, 196, 200, 202; *see also* R. at 265-69 (appellant's testimony before the Board). Nothing in the record even suggests that the condition is attributable to an intercurrent cause. This case also presents the unusual situation in which the Court is not required to find the Board's evidentiary conclusions clearly erroneous: the Board explicitly found that the appellant was diagnosed with Raynaud's phenonemon in service and

that that condition manifested itself again postservice. *See* R. at 7; *cf. Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005) ("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."). Under these circumstances, the Court agrees with the appellant that reversal is the appropriate remedy.

The decision of the U.S. Court of Appeals for the Federal Circuit in *Groves v. Peake*, 524 F.3d 1306 (Fed. Cir. 2008), although addressing a service-connection claim in a slightly different procedural posture from the present case, is directly on point. In *Groves*, the veteran was diagnosed with paranoid schizophrenia while in service and was administratively discharged four months later. *Id.* at 1307. A few years later, the veteran was hospitalized and again diagnosed with paranoid schizophrenia, which was confirmed by a VA examination performed after the appellant submitted a claim for service connection. *Id.* After initially denying the claim, the RO granted service connection for the schizophrenia but denied the request for an earlier effective date, concluding there was no clear and unmistakable error in the initial denial. *Id.* at 1308. The Board agreed with the RO, and this Court affirmed the Board's decision, finding that the record at the time of the initial RO denial did not contain medical nexus evidence necessary to establish entitlement to service connection. *Id.*

On appeal, however, the Federal Circuit reversed, holding that this Court erred "by disregarding the applicability of § 3.303(b) and requiring medical evidence to establish nexus between the two diagnoses." *Id.* at 1310. Based upon (1) the undisputed evidence showing in-service and postservice diagnoses of paranoid schizophrenia; (2) the parties' agreement that paranoid schizophrenia is a psychosis, a chronic disease entitled to a presumption of service connection under § 3.309(a); and (3) the text of § 3.303(b), the Federal Circuit held "as a matter of law that [the veteran was] entitled to service connection for paranoid schizophrenia." *Id.*; *see also id.* at 1309 ("The plain language of § 3.303(b) establishes a presumption of service connection (rebuttable only by 'clearly attributable intercurrent causes') for a chronic disease which manifests during service and then again 'at any later date, however remote.'"). The Secretary acknowledges *Groves* in his brief but does not respond to the appellant's contention that the Federal Circuit's disposition of that case argues for reversal by this Court rather than remand. *See* Secretary's Br. at 9-10.

Though the Federal Circuit is statutorily prohibited from reviewing factual determinations or applications of the law to the facts of a particular case except in constitutional appeals, 38 U.S.C. § 7292(d)(2), "[i]n cases where the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of a veteran's claim, [that Court] treat[s] the application of law to undisputed fact as a question of law," *Conley v. Peake*, 543 F.3d 1301, 1304 (Fed. Cir. 2008) (citing *Groves*, 524 F.3d at 1310). That statement is consistent with the precedent of this Court, noted earlier, that reversal is appropriate "when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

In *Brannon*, this Court, rather than taking judicial notice of the characterization in medical treatises of a duodenal ulcer as a chronic condition, took judicial notice of the fact that VA's own regulations, i.e., § 3.309(a), considered that condition to be chronic and entitled to a presumption of service connection. 1 Vet.App. at 316-17. Notwithstanding the Board's finding that "inservice epigastric complaints did not represent a chronic stomach disorder," the Court reversed the Board's decision and remanded the matter with instructions to grant service connection. *Id.* at 317.

Although the Board, in the case on appeal here, found that the medical opinion did not address nexus, because Raynaud's phenomenon is a chronic condition under § 3.309, the appellant need not demonstrate nexus. *See Groves*, *supra*. Thus, after numerous RO decisions and three appeals to the Board, it is pointless to make the appellant endure more procedural delays before he is granted the service connection that he is legally entitled to based upon the undisputed facts and applicable law. The Court will reverse the Board's decision with respect to the appellant's right hand condition, to include Raynaud's phenomenon, and remand the matter with instructions to grant service connection. *See Groves* and *Brannon*, both *supra*. On remand the Board must determine and assign the appropriate disability rating and effective date.

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's June 12, 2009, decision is REVERSED, IN PART, and VACATED, IN PART, and the matters are REMANDED to the Board for further proceedings consistent with this decision.
DATED: August 1, 2011

Copies to:

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