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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 09-2499

MICHAEL J. STRONG, APPELLANT,

v.

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

Before HAGEL, *Judge*.

MEMORANDUM DECISION

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

HAGEL, *Judge*: Michael J. Strong, who is self-represented, appeals an April 17, 2009, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for hepatitis C.¹ The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the Board decision. Because the Board erred in finding that VA satisfied its duty to assist with respect to Mr. Strong's claim for benefits for hepatitis C, the Court will vacate that portion of the April 2009 Board decision and remand the matter for further development and readjudication consistent with this decision. The remainder of the Board decision will be affirmed.

I. FACTS

Mr. Strong served in the Army National Guard from July 1977 to October 1980 with periods of active duty for training from September 1977 to December 1977 and from January 7 to January 21, 1978. According to the Board, the procedural history of this matter is as follows:

¹ The Court notes that, in his informal brief, Mr. Strong indicates that he is also appealing the Board's denial of entitlement to benefits for diabetes mellitus. However, all of the arguments in Mr. Strong's informal brief relate to the Board's decision denying his claim for benefits for hepatitis C. Accordingly, the Court considers any appeal of the Board's decision denying his claim for benefits for diabetes mellitus abandoned. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

[Mr. Strong] originally filed claims of entitlement to service connection for diabetes mellitus, type II and hepatitis C in December 2002 and October 2003[, respectively]. The [regional office] sent October 2003 and December 2003 duty-to-assist letters asking [Mr. Strong] . . . to identify in-service risk factors allegedly responsible for his hepatitis C. [He] did not respond and the claims were denied in a March 2004 rating decision. Thereafter, [Mr. Strong] submitted statements in October 2004 in support of his claims and specifically in response to the 2003 duty-to-assist letters. The [regional office] treated the October 2004 statements as [] new claim[s] and again denied the claims in an August 2005 rating decision. Thereafter, the claims were ultimately properly and timely appealed to the Board.

Record (R.) at 4. This summary is supported by the record of proceedings.

Of particular relevance to the issue on appeal, in his December 2004 statement, Mr. Strong wrote:

[I]n November of 197[7] . . . I was hospitalized for symptoms of stomach pain, a chronic cough, and a reduced body temperature. . . . I recall feeling very cold at the time and thought that I [might] have pneumonia. At the time these symptoms were thought to be related to the flu or other common disease. In hindsight, I now feel that these were the earliest signs of my hepatitis C. . . .

There are a number of other events during service that I feel may have caused the hepatitis C.

During my reserve duties, I shared shaving razors with other G.I.s on several occasions.

Please also note that, in about September of 1977, a member of my unit went to the bathroom and slashed his wrists in an apparent suicide attempt. I was a member of a small group that was ordered to clean up the mess. The soldier who slashed his wrist[s] was a member of my platoon and company.

In addition, throughout my Reserve training, I recall that all members of my unit frequently cut their hands. I believe that I was exposed to their blood during the course of my training.

R. at 167.

In July 2005, Mr. Strong underwent a VA examination to determine whether his hepatitis C is related to service. The entirety of the examiner's report is as follows:

This is an opinion. The [claims] file and available medical records were reviewed. The veteran was diagnosed with hepatitis C in 2000. [He] states he shared razors

during his military career dating September 11, 1977[,] through December 11, 1977. [He] states he has no other risk factors and that he did not use cocaine. However, review of his medical records reveals an extended history of abuse of cocaine with his first hospitalization for cocaine[-]related hospitalization occurring in 1985 and the last available record for cocaine[-]related hospitalization in 1994. Therefore, it is at least as likely as not that the current hepatitis C condition is related to his extensive cocaine use, which is well documented. The veteran states that he shared razors during his military career[,] but there is no objective record of this actually taking place, and the veteran has already proven to have, at best, an unreliable memory.

R. at 117.

In his August 2007 appeal to the Board, Mr. Strong argued: "There is not one record that shows that a hepatitis C test was done at any time by the VA medical centers. The hepatitis C was not found until 1991 and a person can't get hepatitis C smoking crack cocaine[e] or weed." R. at 64.

In April 2009, the Board issued the decision on appeal. With respect to VA's duty to assist, the Board determined that all service medical records and VA medical records, as well as adequately identified private medical records, had been obtained, that a medical examination had been provided, and that no additional examination was necessary.

Next, the Board stated that Mr. Strong was first diagnosed with hepatitis C in 2000, two decades after his military service, but acknowledged his assertions that he has experienced symptoms he believed to be evidence of hepatitis C since service. The Board also noted Mr. Strong's assertions that he shared razors with other soldiers in service, as well as his assertion that he had been required to clean up the blood of another soldier who had slit his wrists. The Board found, however, that there was no evidence of either of these events in Mr. Strong's "service treatment records." R. at 10. The Board also found no evidence in Mr. Strong's service medical records of a chronic condition that began in service.

The Board then listed various risk factors for hepatitis C, including intravenous drug use, intranasal cocaine use, accidental exposure (as in the case of a health care worker), and shared toothbrushes or razors. The Board then noted that, after service, Mr. Strong had a "lengthy history of alcohol and drug abuse, specifically cocaine," for which he underwent "lengthy hospitalization treatments numerous times." R. at 11. The Board acknowledged Mr. Strong's statements that he never used cocaine intravenously or intranasally. The Board then noted the July 2005 VA medical

examination report that found Mr. Strong to be a poor historian and that his hepatitis C was likely related to his years of cocaine abuse. The Board found Mr. Strong not credible based on inconsistent statements and found no medical evidence that his current hepatitis C was related to any incident of his military service. Accordingly, the Board denied his claim.

II. ANALYSIS

In his informal brief, Mr. String first argues that the July 2005 VA medical examination report is inadequate because the examiner did not consider the evidence of record relating to his potential exposure to hepatitis C.² As an initial matter, the Court notes that Mr. Strong does not identify the particular evidence he believes the VA examiner overlooked. Nevertheless, the Court finds his argument persuasive.

The medical examination report indicates that Mr. Strong reported sharing razors with fellow soldiers during service as his only risk factor for hepatitis C and denied using cocaine. The examiner considered the following factors in reaching his opinion: the claims file; all available medical records; the date of the first diagnosis of hepatitis C compared to Mr. Strong's dates of service; Mr. Strong's statements regarding the community use of razors; and Mr. Strong's statements denying the intravenous and intranasal use of cocaine. After reviewing Mr. Strong's medical history of hospitalizations for drug abuse and after finding no evidence of razor sharing in the record, the examiner determined that "it is at least as likely as not that the current hepatitis C condition is related to his extensive cocaine use." R. at 117. The examiner's opinion in this case was based on the following factors: (1) there was no documentation in the medical records of shared razor use; (2) Mr. Strong used cocaine; (3) Mr. Strong had lied about cocaine use.

First, there is no reason to believe that a soldier's sharing of razors with other soldiers would be documented in the soldier's service medical records, and this absence of "corroboration" cannot be dispositive. Second, the examiner did not discuss the risk factors for hepatitis C at all, including the relative level of risk involved in intravenous or intranasal cocaine use versus the level of risk

² Mr. Strong also argues that the examiner did not "retrieve medical records during active duty during the time of exposure during service." It is the Secretary's duty, however, to obtain medical records, not the examiner's, and the Court will therefore address this argument in that context below. *See* 38 U.S.C. § 5103A.

involved in smoking cocaine, which is how Mr. Strong has consistently alleged he abused the drug. Therefore, the examiner's conclusion that Mr. Strong's hepatitis C is more likely than not related to his drug abuse is presented without any rationale and renders the opinion inadequate. *See Ardison v. Brown*, 6 Vet.App. 405, 407 (1994); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). Accordingly, it was error for the Board to rely on the July 2005 VA examination report to deny Mr. Strong's claim.

Given that the Board relied heavily on an inadequate medical opinion to deny Mr. Strong's claim for benefits, the Court will vacate the Board's decision denying entitlement to benefits for hepatitis C and remand the matter for further development and readjudication. The Board should provide Mr. Strong a new VA examination or opinion that discusses the risk factors for hepatitis C, takes into account all of Mr. Strong's reported risk factors, and provides an etiology opinion that is supported by adequate explanation and rationale. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) ("It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion."); *Ardison*, 6 Vet.App. at 407.

Although the Court is remanding Mr. Strong's claim, the Court is compelled to address his argument that the Board erred in finding that VA satisfied its duty to assist. The Court agrees. In his December 2004 statement, Mr. Strong stated that, in September 1977, a member of his "platoon and company" attempted suicide by slashing his wrists and that he was among the men tasked with cleaning up the soldier's blood. R. at 167. The Board denied Mr. Strong's claim, in part, because there was no documentation of this in his "service treatment records." R. at 10. The Court is dismayed that the Board provided such a patently illogical reason for denying Mr. Strong's claim.³ The notation of *another soldier's* attempted suicide is not the kind of information one would expect to find in *Mr. Strong's* service records. Mr. Strong provided a sufficiently small window of time (September 1977) and, perhaps, sufficient information about the other soldier (a member of his "platoon and company" (R. at 167)) for VA to request further information about the incident from

³ The Court also believes that the Board's statement that "[t]here is no documentation of shared razors" in Mr. Strong's "service treatment records" is similarly disingenuous. R. at 8. As noted above, there is simply no basis for the idea that such an occurrence would be memorialized in Mr. Strong's service medical records.

the Army National Guard. There is no record that such an inquiry was ever made and the Board does not discuss any attempts to obtain this information. Given that the Board denied Mr. Strong's claim in part because it found him to be not credible with respect to certain facts, it is inexcusable for VA to fail to attempt to obtain information that might both boost Mr. Strong's credibility and provide evidence in support of his claim. Accordingly, the Court concludes that the Board's determination that VA satisfied its duty to assist Mr. Strong is clearly erroneous. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). On remand, VA will, in compliance with its duty to assist under 38 U.S.C. § 5103A, request any necessary additional information from Mr. Strong and then attempt to obtain Army National Guard records regarding the attempted suicide incident Mr. Strong identified.

On remand, Mr. Strong is free to submit additional evidence and argument with respect to his claim for benefits for hepatitis C in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board 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). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

III. CONCLUSION

Upon consideration of the foregoing, that portion of the April 17, 2009, Board decision that denied entitlement to benefits for hepatitis C is VACATED and the matter is REMANDED for further development and readjudication consistent with this decision. The remainder of the Board decision is AFFIRMED.

DATED: April 26, 2011

Copies to:

Michael J. Strong

VA General Counsel (027)