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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 09-3136

JOHN R. BARBACCIA, APPELLANT,

v.

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

Before LANCE, *Judge*.

**MEMORANDUM DECISION**

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

LANCE, *Judge*: The appellant, John R. Barbaccia, through counsel, appeals a June 23, 2009, Board of Veterans' Appeals (Board) decision that found that new and material evidence had not been submitted to reopen claims for entitlement to service connection for hepatitis C and non-Hodgkin's lymphoma and that denied entitlement to service connection for a disability manifested by shortness of breath and fatigue. Record (R.) at 3-20. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the June 23, 2009, decision and remand the matter for further proceedings consistent with this decision.

**I. FACTS**

The appellant served on active duty in the U.S. Army from April 1979 to May 1982. R. at 345. The Board notes that the appellant also served in the Army National Guard from May 1 to May 9, 1992, and from February 1 to July 29, 2003. R. at 4.

In April 2000, the appellant filed an application for compensation or pension for non-Hodgkin's lymphoma and hepatitis C. R. at 233-37. In February 2001, the appellant submitted a

list of sources and records that he consented to VA obtaining to assist with his claims. R. at 222-23. On April 2, 2002, the Oakland, California, regional office (RO) denied his claims for entitlement to service connection for hepatitis C and non-Hodgkin's lymphoma. R. at 200-04.

In March 2005, the appellant sought to reopen his claims for entitlement to service connection for hepatitis C and non-Hodgkin's lymphoma and filed a claim seeking entitlement to service connection for a disability manifested by shortness of breath and fatigue. R. at 148-51. In August 2005, the RO denied the appellant's claims. R. at 138-142. The decision noted that service medical records (SMRs) did not list any conditions associated with shortness of breath and that VA treatment records did not attribute mild shortness of breath or easy fatigability to service. R. at 139. The decision also stated that new and material evidence had not been submitted to reopen the appellant's claims for service connection for hepatitis C and non-Hodgkin's lymphoma. R. at 140-141. In November 2005, the appellant filed a Notice of Disagreement (NOD). R. at 77. In August 2006, the RO issued a Statement of the Case (SOC). R. at 42-62. The SOC stated that the appellant's claims to reopen were denied because he submitted only evidence of diagnosis and treatment for hepatitis C and non-Hodgkin's lymphoma after discharge from service. R. at 61. Regarding the appellant's claim for entitlement to service for fatigue and shortness of breath, the SOC stated that service connection was not warranted absent evidence showing a chronic disability or disease associated with shortness of breath and fatigue and absent evidence linking this disability to service. *Id.* The appellant filed an appeal in September 2006. R. at 37.

In the decision currently on appeal, the Board denied the appellant's claims for hepatitis C and non-Hodgkin's lymphoma because the evidence submitted since the 2002 denial was new but not material and there was no evidence linking the diseases to service. R. at 18-19. Regarding the appellant's claim for fatigue and shortness of breath, the Board found no evidence to associate the claimed symptoms to service. R. at 19.

## **II. ANALYSIS**

### **A. Duty to Obtain Records**

The appellant argues that VA failed to fulfill its duty to assist because "VA made no attempt to secure records from any of the numerous primary, treating, private physicians including those who first diagnosed the non-Hodgkins lymphoma and hepatitis C diseases, and who were therefore in the

best position to provide opinions concerning etiology." R. at 3-4. The Secretary argues that the appellant's written consent (R. at 220, 222) was submitted in February 2001, which is prior to the April 2002 rating decision that became final, and that the consent was not "new and material" under 38 C.F.R. 3.156(a) (2010), because it was previously of record. Secretary's Brief (Br.) at 8. The Secretary further asserts that the appellant "has not demonstrated any prejudice where these post-service records were not obtained where his claims were denied due in part to lack of evidence of in-service occurrence." *Id.*, citing R. at 18-19.

Under 38 C.F.R. § 3.159(c) (2010), VA's duty to assist includes assisting a claimant to obtain evidence necessary to substantiate a claim. VA's duty to give such assistance extends to those attempting to reopen a finally decided claim. *Id.*

Here, the Secretary does not dispute the appellant's argument that VA made no attempt to obtain his medical records. As § 3.159(c) clearly states that the duty to assist includes obtaining records for an appellant who seeks to reopen a claim, the Court concludes that VA failed to fulfill its duty to assist. As for whether this error was prejudicial, in his request for VA to obtain the records, the appellant denoted the conditions for which each record was relevant. R. at 219, 220, 222, 234. By making clear references that the records he seeks VA to obtain relate to his lymphoma and to his hepatitis C, the appellant meets his burden of demonstrating that these records are potentially relevant to his attempting to reopen his claim and he is prejudiced by the RO and Board not having these records to review to make its decision. The Court remands the appellant's claims for hepatitis C and non-Hodgkin's lymphoma so that VA can fulfill its duty to obtain the records referenced by the appellant.

#### B. Inadequate Reasons and Bases

The appellant argues that the Board provided inadequate reasons or bases for its denial of his claim for service connection for fatigue and shortness of breath. Appellant's Br. at 7-10. The Secretary defends the Board's decision by noting that these are recent symptoms and there is no evidence that they are related to any period of active military service. Secretary's Br. at 9-10.

The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's

decision, as well as to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwniski*, 1 Vet.App. 49, 56-57 (1990).

While the appellant argues that the Board denied this claim on the basis that he did not have a diagnosis for his disability (Appellant's Br. at 7-10), the Secretary notes that the Board based its denial on "the overarching matter that there is no evidence linking the symptoms to any period of service or any service-connected disability" (Secretary's Br. at 10). In its decision, the Board notes that the appellant's conditions of fatigue and shortness of breath "recurrently appear in clinical records associated with [his cancer or hepatitis C] diagnoses and care therefor since 1994." R. at 19. Given that the appellant's complaints of fatigue and shortness of breath may or may not be symptoms of his other two claims that the Court has decided warranted remand, the Court will also remand these claims for the Board to readjudicate along with his claims to reopen once the appellant's medical records have been obtained. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) (en banc) (holding that "the Court retains its discretion to determine at the threshold that a claim or theory denied by the Board in any such decision or portion of a decision on review is so inextricably intertwined with matters still pending before VA that it should be remanded to VA to await development or disposition of a claim or theory not yet finally decided by VA") *aff'd* 631 F.3d 1380 (Fed. Cir. 2011).

### C. Duty to Provide a Medical Examination

Finally, the appellant argues that VA failed to fulfill its duty to assist by failing to obtain medical opinions concerning the etiology of his hepatitis C, non-Hodgkin's lymphoma, and his claims of fatigue and shortness of breath. Appellant's Br. at 10-13. As the Court is remanding these three claims, the Court concludes that this argument should be addressed by VA once it has attempted to gather the additional medical records. *See Shade v. Shinseki*, 24 Vet.App. 110, 117 (2010) (when evaluating the materiality of newly submitted evidence, the Board should not focus solely on whether the evidence remedies the principal reason for denial in the last prior decision, but rather should focus on whether the evidence, taken together, could at least trigger the duty to assist by providing a medical opinion).

On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument

submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's June 23, 2009, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: March 18, 2011

Copies to:

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