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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 09-2077

MERIDYTH DWYER, 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*: Meridyth Dwyer appeals through counsel a June 3, 2009, Board of Veterans' Appeals (Board) decision that denied entitlement to dependency and indemnity compensation. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the June 2009 Board decision. Because the Board relied on inadequate medical opinions and failed to adequately explain its reasons or bases, the Court will vacate the June 2009 Board decision and remand the matter for further development and readjudication consistent with this decision.

I. FACTS

Mrs. Dwyer is the widow of veteran William S. Dwyer, who served on active duty in the U.S. Army from October 1952 to September 1956. Mr. Dwyer died in March 1995. The immediate cause of death was hepatocellular carcinoma,¹ while cirrhosis of the liver and hepatitis C were listed as other significant conditions that contributed to but did not result in the underlying cause of death. Similarly, a March 1995 VA autopsy report indicated provisional anatomic diagnoses of

¹ Hepatocellular is a term that refers to the hepatic, or liver, cells. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 855, 857 (31st ed. 2007) [hereinafter DORLAND'S]. A carcinoma is "a malignant new growth made up of epithelial cells tending to infiltrate the surrounding tissues and give rise to metastases." *Id.* at 294.

hepatocellular carcinoma with lung metastasis, cirrhosis of the liver, and hepatitis C, among other conditions.

Various post-service medical records indicate that Mr. Dwyer had been diagnosed with hepatitis C or suffered from symptoms consistent with the disease. An April 1962 VA hospitalization record references "viral hepatitis." Record (R.) at 1095. A May 1992 private physician's note indicated that Mr. Dwyer's medical chart showed elevated values from liver function tests² since 1992. Blood and hepatitis C antibody test results from June 1992 and September 1994 were positive for hepatitis C.

In November 1994, Mr. Dwyer applied for disability compensation benefits "for service connected status for [h]epatitis 'C' which [he] believe[d] [he] caught in 1953 while" on active duty. R. at 1088. Mr. Dwyer explained that he believed that he contracted hepatitis C while in service because a man who bunked next to him in service "was carried out on a stretcher with a severe case of infectious hepatitis" and "[o]ne month later, the Red Cross would not accept [his] blood donation due to . . . exposure to [h]epatitis," even though he did not feel sick at that time. *Id.*

In December 1994, a private registered nurse who holds master of science in nursing and master of education degrees, and who qualifies as a clinical specialist, submitted a letter to VA in which she stated that she had known Mr. Dwyer since 1978. She opined that

[b]ecause [hepatitis C viral] can only be transmitted by blood transfusion or by needle sticks or inoculations[,] and because Mr. Dwyer was tested for hepatitis at the Boston, [Massachusetts] VA [h]ospital in 1962 and diagnosed as having sub clinical hepatitis (Note: there was no test for [hepatitis C viral] at this time and the existence of [h]epatitis C may very possibly not have been known to exist[]), I am convinced that Mr. Dwyer's . . . current very poor health [is] directly traceable to his having contracted [hepatitis C viral] from a poorly sterilized needle which was used during his participation in mass inoculations during his active service

R. at 956.

At the time of Mr. Dwyer's death, his claim for VA benefits was still pending. Following his death, in March 1995, Mrs. Dwyer submitted a letter to VA requesting dependency and

² This term is abbreviated as "LFTs" in the physician's note. "LFT" is an accepted acronym for "liver function test." See DICTIONARY OF MEDICAL ACRONYMS & ABBREVIATIONS 273 (5th ed. 2001).

indemnity compensation. This claim, along with a claim for accrued benefits, was denied by a VA regional office in October 1995 and, after further development, Mrs. Dwyer appealed to the Board.

In January 1996, Dr. Daniel Kasprzyk, a private physician, submitted a letter to VA stating that Mr. Dwyer

had given a history of exposure to hepatitis shortly before being discharged from the [m]ilitary [s]ervice. Since at least 1962 he . . . had chronic mild cholestasis. He was told at that time he had [n]on A-[n]on B [h]epatitis. It is now known that most of these patients had [h]epatitis C. The test for [h]epatitis C was not available until the late 1980[s].

R. at 575. Dr. Kasprzyk concluded by opining that he believed Mr. Dwyer "may have been exposed to [h]epatitis C while in the [s]ervice." R. at 575.

In July 1997 Mrs. Dwyer was afforded a hearing before the Board, at which time her representative clarified that it was Mrs. Dwyer's belief that her husband had contracted hepatitis C as the result of mass inoculations administered by the military.

In March 2004, the Board requested a medical opinion from a VA hepatologist.³ Specifically, the Board explained that "[t]he issue is whether [Mr. Dwyer's] cause of death is related to his service," and requested an opinion as to "whether it is at least as likely as not that [Mr. Dwyer's] [h]epatitis C, or any other disease or injury suffered during service, caused or contributed to [his] death." R. at 311. In response, Dr. Ayse Aytaman, the Director of the Hepatitis C Clinic in the VA New York Harbor Healthcare System, offered an opinion in April 2004. Dr. Aytaman stated that Mr. Dwyer

had chronic hepatitis C virus infection with no apparent risk factors with the exception of vaccinations he would have received during his military service in the 1950[s]. It is theoretically possible to transmit [hepatitis C virus] using improperly sterilized needles. However, the prevalence of [hepatitis C virus] infection in the 1950[s] was quite low, and the risk of nosocomial transmission from improperly sterilized reusable needles is also quite low. Therefore, we cannot say that the acquisition of [hepatitis C virus] in [Mr. Dwyer] is more likely than not related to vaccinations.

³ A hepatologist is one who specializes in "the study of the liver and the nature and treatment of its diseases." DORLAND'S at 857.

R. at 305. Dr. Aytaman also opined that, because casual contact does not lead to hepatitis C virus transmission, it was unlikely that Mr. Dwyer contracted the virus by being exposed to an infected soldier. Dr. Aytaman concluded by stating that hepatitis C virus

is a major cause of hepatocellular carcinoma, and [Mr. Dwyer] appear[ed] to have died as a consequence of liver cancer. In this case, however, we cannot determine the origin of the [hepatitis C virus] infection, and therefore, we cannot say it is more likely than not that the patient died as a complication of illness acquired during military service.

R. at 305.

In January 2005, the Board asked Dr. Aytaman to clarify his opinion, which it found to be insufficient in that it was not stated "in terms of 'whether it was at least as likely as not that [Mr. Dwyer's] hepatitis C, or any other disease or injury suffered during service[,] caused or contributed to [his] death." R. at 275. In response, Dr. Aytaman offered an additional opinion in May 2005, in which he stated that, even though improper sterilization techniques associated with vaccinations are "a known risk factor for transmission of [hepatitis C virus], the incidence of [hepatitis C virus] in [World War II] era or pre[-]Vietnam era veterans remains low and not higher than seen in general population. Review of available records does not allow us to conclude that [Mr. Dwyer] had [hepatitis C virus] infection during service." R. at 273. Dr. Aytaman stated that "[t]he earliest unequivocal evidence of . . . chronic [hepatitis C virus] infection [in Mr. Dwyer] [was] in 1980 prior to his heart surgery." R. at 273. He concluded that Mr. Dwyer "acquired hepatitis C prior to 1980, the exact time of which cannot be determined from available records Even though vaccinations with [im]properly sterilized needles are a known risk factor for hepatitis C transmission, with the . . . records [available] to me hepatitis C infection during service is not very likely." R. at 273.

After additional development, including a remand by this Court, in August 2006 the regional office made a formal finding that Mr. Dwyer's service records, which had not previously been obtained, were unavailable.

In October 2008, after still further development, the regional office made additional inquiries to the National Personnel Records Center in an attempt to obtain relevant service medical and personnel records. However, the National Personnel Records Center returned this request, explaining that it needed additional information about Mr. Dwyer's organizational unit. The regional office then sent a letter to Mrs. Dwyer in November 2008 asking her to furnish any such information

in her possession. Mrs. Dwyer submitted documents intended to satisfy this request in January and February 2009.

Thereafter, in June 2009, the Board issued the decision on appeal, denying entitlement to dependency and indemnity compensation. The Board found that VA satisfied its duty to assist in that the regional office requested information regarding Mr. Dwyer's organizational unit from Mrs. Dwyer, but determined that "[n]o response to this specific inquiry was ever received from [Mrs. Dwyer]" and that the Board therefore had to proceed to a determination of her "claim in the absence of service treatment or alternative service records." R. at 7.

The Board next concluded that there was "no documentation of any liver abnormalities within five years of service and that the opinions tending to support [Mrs. Dwyer's] claim [were] of limited probative value." R. at 10. The Board afforded greater probative value to the negative opinions offered by Dr. Aytaman in March 2004 and January 2005. It did so because his opinions were based on a review of the claims file and he had been shown to "possess the requisite training and credentials to provide a probative opinion." R. at 11. Finally, the Board addressed Mr. Dwyer's lay statements, but found that, "as a layperson who had no apparent training in the field of medicine, [he] was not shown during his lifetime to be competent to provide an opinion with regard to medical causation." R. at 12. Accordingly, the Board found that the weight of the evidence was against Mrs. Dwyer's claim.

On appeal, Mrs. Dwyer primarily argues that the Board committed reversible error by denying her claim on the basis that Mr. Dwyer's death was not service connected because, in so doing, it relied on Dr. Aytaman's medical opinions, which she contends were inadequate, whereas all other medical opinions of record preponderated in favor of her claim. In the alternative, Mrs. Dwyer argues that the Board failed to adequately explain why it denied her claim given the deficiencies in Dr. Aytaman's medical opinions, and that a remand is necessary for the Board to offer a more complete statement of its reasons or bases. Additionally, Mrs. Dwyer contends that the Board committed prejudicial error that necessitates remand by failing to ensure that VA complied with its duty to assist. Specifically, Mrs. Dwyer asserts that the Board's finding that she did not respond to the regional office's November 2008 letter asking for information pertaining to Mr. Dwyer's organizational unit was factually inaccurate and that the Board clearly erred by finding that

VA satisfied its duty to assist when there was no evidence that the regional office considered the submitted information or made additional inquiries to the National Personnel Records Center.

The Secretary agrees that the Board erred in relying on inadequate medical opinions and failing to properly explain its finding that VA satisfied its duty to assist. Additionally, the Secretary asserts that the Board erred in summarily dismissing Mr. Dwyer's lay statements as incompetent and of no probative value merely because he was not a medical professional. However, the Secretary argues that each of these errors necessitates remand, not reversal.

II. ANALYSIS

A. Board's Reliance on Dr. Aytaman's Medical Opinions

Mrs. Dwyer first argues that the Board erred in relying on Dr. Aytaman's negative medical opinions because those opinions were inadequate in that Dr. Aytaman failed to comply with the Board's instructions and, in so doing, stated his opinions in terms that imposed a greater burden of proof on Mrs. Dwyer than is permitted by law.

The Court agrees that the Board erred by relying on these medical opinions without further discussion. As explained above, the Board sought clarification from Dr. Aytaman regarding his April 2004 opinion because that opinion failed to comply with the Board's instructions. Specifically, the key portions of Dr. Aytaman's April 2004 opinion stated that "*we cannot say* that the acquisition of [hepatitis C virus] in [Mr. Dwyer] *is more likely than not* related to [in-service] vaccinations," and that "*we cannot say it is more likely than not* that the patient died as a complication of illness acquired during military service." R. at 305 (emphasis added). However, the Board had instructed Dr. Aytaman to address "whether it [was] *at least as likely as not* that [Mr. Dwyer's] [h]epatitis C, or any other disease or injury suffered during service, caused or contributed to [his] death." R. at 311 (emphasis added). In response, Dr. Aytaman issued a second opinion in May 2005, but still did not address the question specifically posed by the Board. Rather, Dr. Aytaman concluded that, with the information available to him at that time, it was "*not very likely*" that Mr. Dwyer was infected with hepatitis C virus during his service. R. at 273 (emphasis added). If anything, this opinion ventured further from answering the question posed by the Board than did Dr. Aytaman's initial opinion.

In relying on these opinions to conclude that Mr. Dwyer's death was not service connected, the Board offered no explanation as to why it was doing so in light of Dr. Aytaman's repeated failure to specifically address the question posed to him. In effect, Dr. Aytaman offered two opinions that did not comply with the Board's order to consider whether it was *at least as likely as not* that Mr. Dwyer's hepatitis C was contracted in service and caused or contributed to his death. Thus, in relying on these opinions—which leave unanswered the question of whether it was at least as likely as not that Mr. Dwyer's hepatitis C was incurred during service—without further discussion, it appears that the Board may have imposed a higher burden of proof on Mrs. Dwyer than is legally permissible, in that the Board may have effectively ignored the benefit of the doubt rule, which provides that “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S.C. § 5107(b).

B. Remedy

Mrs. Dwyer contends that because Dr. Aytaman failed to comply with the Board's instructions when offering his opinions, those opinions are inadequate and the only remaining medical opinions of record—the registered nurse's December 1994 opinion and Dr. Kasprzyk's January 1996 opinion—were at least to some degree favorable. She therefore contends that the Board's decision to deny her claim was clearly erroneous because “the only adequate evidence of record is positive” and reversal is therefore the appropriate remedy. Appellant's Brief (Br.) at 20. The Secretary, on the other hand, concedes that the Board erred in relying on Dr. Aytaman's opinions, but contends that the appropriate remedy is to vacate the Board's decision and remand the matter for further development and readjudication. The Court agrees with the Secretary.

It is well established that “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, a remand is the appropriate remedy.” *Tucker v. West*, 11 Vet.App. 369, 374 (1998). On the other hand, “reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision.” *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). Here, the Board's failure to discuss its decision to rely on Dr. Aytaman's opinions despite his failure to comply with its instructions, as well as its failure to specifically discuss whether the benefit of the doubt rule applied notwithstanding those opinions,

prevents Mrs. Dwyer from understanding precisely why her claim was denied and frustrates the Court's ability to review the Board's June 2009 decision. *See* 38 U.S.C. § 7104(d); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (stating that the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). This failure is especially problematic because the regional office previously found that Mr. Dwyer's service records were unavailable and "the Board has a heightened duty to explain its findings" when records are lost. *Cromer v. Nicholson*, 455 F.3d 1346, 1351 (Fed. Cir. 2006).

Even if Dr. Aytaman's opinions were wholly inadequate, it does not follow that, in light of the remaining medical opinions of record, reversal is the appropriate remedy. The Board discounted the remaining positive medical opinions as being of little probative value and provided an adequate explanation of its reasons or bases for reaching this conclusion. Specifically, the Board found that the registered nurse's December 1994 opinion was of little probative value because there was no indication she had reviewed the claims file or treated Mr. Dwyer for an extended period of time prior to offering her opinion and because her opinion was offered while Mr. Dwyer was still alive and therefore did not address the direct and contributory causes of his death. The Board also found that Dr. Kasprzyk's January 1996 opinion was of little probative value because it was conditional, in that it only opined that Mr. Dwyer "*may* have been exposed to hepatitis C during his service." R. at 11 (emphasis added). In light of these explanations, the Court is unable to determine that the Board clearly erred in evaluating the positive medical opinions of record. *See* 38 U.S.C. § 7261(a)(4); *see also Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991) (holding that Board's assessment of the credibility and weight to be given to evidence is a finding of fact that the Court review under the "clearly erroneous" standard of review). Accordingly, even if Dr. Aytaman's opinions were inadequate, "[t]his is not a situation where the only permissible view of the evidence is contrary to the Board's decision." *Barr v. Nicholson*, 21 Vet.App. 303, 312 (2007) (citing *Johnson*, 9 Vet.App. at 10). Rather, it is a situation in which the record is inadequate and remand is warranted. *See Tucker*, 11 Vet.App. at 374.

The Court is compelled to comment on one other issue that may arise on remand. Namely, the Court notes that, in relevant part, the instructions the Board provided to Dr. Aytaman in March

2004 asked him to comment only on "whether it is at least as likely as not that [Mr. Dwyer's] [h]epatitis C . . . caused or contributed to [his] death." R. at 311. Thus, the Board did not ask Dr. Aytaman to comment on what appears to be the other critical question in this case; namely, whether it is at least as likely as not that Mr. Dwyer was infected with the hepatitis C virus during his service. Although it appears Dr. Aytaman attempted to offer such an opinion, the terms of his opinion were deficient, as outlined above. On remand, the Board should carefully phrase any future inquiries to VA medical personnel so as to include this question.

C. Duty to Assist

Mrs. Dwyer also argues, and the Secretary agrees, that the Board was mistaken in finding that she did not respond to the regional office's November 2008 letter asking her to submit information regarding Mr. Dwyer's organizational unit and that the Board's statement of its reasons or bases for concluding that VA satisfied its duty to assist was therefore inadequate. The Court agrees that, in determining that VA satisfied its duty to assist, the Board provided an inadequate statement of its reasons or bases because it failed to discuss the information Mrs. Dwyer submitted in January and February 2009. On remand, the Board should specifically discuss these materials and whether they contain the information requested by the regional office's November 2008 letter. The Court reminds the Board that VA is required to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary," unless it is not reasonably possible "that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(1)-(2). As part of this duty to assist, under 38 U.S.C. § 5103A(b)(1), VA is required to make reasonable efforts to obtain all records "that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain." Further, under 38 U.S.C. § 5103A(b)(3), VA must continue to make efforts to obtain records held by a Federal department or agency until they are obtained, "unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." Similarly, pursuant to 38 C.F.R. § 3.159, VA is required to make as many requests as necessary to obtain records from Federal agencies. 38 C.F.R. § 3.159(c)(2) (2010). VA may discontinue its efforts to obtain records from a Federal department or agency only when it concludes that continued efforts would be futile, which requires that the Federal department or agency advise VA that either the requested documents do not exist or that the custodian does not have them. *Id.* Further, if VA

reaches such a conclusion, it is bound to provide Mrs. Dwyer with the notice that is outlined with specificity in 38 C.F.R. § 3.159(e).

D. Lay Evidence

Additionally, the Secretary contends that the Board did not properly consider the competency of Mr. Dwyer's lay statements that he believed he was infected by the hepatitis C virus while in service. The Court agrees that the Board clearly erred in this respect.

In the decision now on appeal, the Board considered Mr. Dwyer's lay statements that he believed that he acquired hepatitis C while in service because he was exposed to a fellow soldier who was infected with the virus and received no inoculations other than those provided by the military. The Board found that this lay opinion was of no probative value because, "as a layperson who had no apparent training in the field of medicine, [Mr. Dwyer] was not shown during his lifetime to be competent to provide an opinion with regard to medical causation." R. at 12. This statement seems to suggest that the Board concluded that lay testimony alone cannot, as a matter of law, establish the etiology of a disease or a nexus between an in-service injury or disease and a current disability. Such a blanket statement is contrary to the law and therefore clearly erroneous. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (holding that lay testimony may be competent and sufficient to establish nexus).

Indeed, the United States Court of Appeals for the Federal Circuit has previously explained that lay testimony may be independently sufficient to establish a particular medical etiology or diagnosis, particularly when the relevant medical question is one that does not require specialized training or education and is instead one that a lay person would ordinarily be competent to answer. *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *see also id.* at 1377 n.4 ("Sometimes the layperson will be competent to identify the condition where the condition is simple, for example a broken leg, and sometimes not, for example, a form of cancer."). Thus, on remand, the Board must evaluate whether Mr. Dwyer was competent to answer the particular medical questions at issue in this case in light of *Jandreau* and *Davidson*, both *supra*, and may not summarily dismiss those statements as incompetent merely because Mr. Dwyer was not a medical professional.

Additionally, on remand, Mrs. Dwyer is free to submit additional evidence and argument 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). 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, the June 3, 2009, Board decision is VACATED and the matter is REMANDED for further development and adjudication consistent with this decision.

DATED: January 14, 2011

Copies to:

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