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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 10-0958

STEVE A. HORBOL, 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*: Steve A. Horbol appeals through counsel a March 12, 2010, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits for sleep apnea, claimed as secondary to service-connected hepatitis C, and onychomycosis¹ of the toes. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the March 2010 Board decision. Because the Board failed to provide an adequate statement of its reasons or bases as to why Mr. Horbol is not entitled to VA benefits for sleep apnea, the Court will vacate that portion of the March 2010 Board decision and remand that claim for readjudication and further development, if necessary, consistent with this decision. The Court will affirm the remainder of the March 2010 Board decision.

¹Onychomycosis is known as "tinea unguium" or fungus "involving the nails." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1342, 1955 (31st ed. 2007).

I. FACTS

Mr. Horbol served on active duty in the U.S. Army from September 1972 to September 1975.

In January 2001, Mr. Horbol filed a claim for VA benefits for onychomycosis of the toes. In a June 2003 rating decision, a VA regional office denied Mr. Horbol's claim, finding that there was no indication of onychomycosis during service or of a relationship between his current onychomycosis and service. Mr. Horbol appealed that decision to the Board.

In July 2006, Mr. Horbol filed a claim for VA benefits for sleep apnea, including as secondary to service-connected hepatitis C. In a January 2007 statement, Mr. Horbol asserted that he was treated for sleep apnea during service and that "DEA" pharmacy records would corroborate his statements. Record (R.) at 74.

In an April 2007 rating decision, the regional office denied Mr. Horbol's claim for VA benefits for sleep apnea, finding that the condition neither occurred in nor was caused by military service. Mr. Horbol appealed that decision to the Board.

In support of Mr. Horbol's appeal, VA obtained VA medical center outpatient treatment records pertaining to the disabilities on appeal. Treatment notes dated from May to July 2008 note that Mr. Horbol had previously refused treatment for hepatitis C due to his fear of side effects, but that this condition had worsened and he was therefore willing to reconsider treatment. A September 2008 treatment note states that "[h]is joint pain is more likely than not related to hep[atitis] C, but again no guar[a]ntee the symptoms would resolve with therapy." R. at 110.

In March 2009, Mr. Horbol was afforded a VA medical examination. The examiner indicated that Mr. Horbol's medical records were reviewed. After recording Mr. Horbol's medical history and performing a physical examination, the examiner opined that:

Based on review of the medical records and medical literature, there is no evidence that the sleep apnea occurred [in or is] related to the military service. The sleep apnea is not related, caused by, or aggravated by service-connected hepatitis C.

The veteran was taking analgesics which include Narco, Naprosyn, and Soma muscle relevant for musculoskeletal pain, especially for arthralgia of both hands and feet, and was seen at [a] VA medical center by [an] orthopedist, rheumatologist, and hepatologist; all conclude[d] that his diffuse arthralgias of both hands and feet are not related to the hepatitis C in active duty. The veteran is currently not on any antiviral or specific treatment for his [service-connected] hepatitis C. Therefore, his sleep

apnea is not related to any treatment of hep[atitis] C as he is not receiving medication for his hep[atitis] C.

R. at 72.

In the March 2010 Board decision currently on appeal, the Board found that Mr. Horbol was not entitled to VA benefits for sleep apnea, including as secondary to service-connected Hepatitis C or onychomycosis. The Board explained that Mr. Horbol's service medical records contained no evidence of sleep apnea or onychomycosis and that the March 2009 VA examiner provided a negative nexus opinion as to his sleep apnea claim. The Board therefore concluded that the preponderance of the evidence was against Mr. Horbol's claims.

On appeal, in an informal brief, Mr. Horbol essentially argues that (1) the March 2009 VA medical opinion was inadequate, (2) the Board did not obtain "DEA records" demonstrating the medications he was taking, (3) the Board did not properly apply 38 C.F.R. § 3.310, and (4) the Board did not take additional medical evidence into consideration. In response, the Secretary concedes that the Court should remand Mr. Horbol's claim for VA benefits for sleep apnea because the March 2009 VA examination was inadequate, but contends that the Court should affirm the Board's decision that Mr. Horbol is not entitled to VA benefits for onychomycosis because that decision is not clearly erroneous and is supported by an adequate statement of reasons or bases.

II. ANALYSIS

A. Adequacy of VA Medical Examination

The Secretary "shall 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." 38 U.S.C. § 5103A(a)(1). The Secretary's duty to assist a claimant includes, among other things, "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see* 38 C.F.R. § 3.159(c) (2010). The medical examination provided must be "thorough and contemporaneous" and consider prior medical examinations and treatment. *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). A medical examination "is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability

. . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)); *Green*, 1 Vet.App. at 124. If an examination report "does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes." 38 C.F.R. § 4.2 (2010); *see Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (emphasizing Board's duty to return inadequate examination report). The Board may commit error requiring remand when it relies on an inadequate medical examination. *See Ardison*, 6 Vet.App. at 407 (holding that an inadequate medical examination frustrates judicial review).

Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). "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)).

Here, Mr. Horbol argues that the March 2009 VA medical examination was inadequate because the examiner was not an expert in the area of sleep apnea. Although the Secretary disagrees that the March 2009 VA examiner was not an expert, the Secretary nonetheless states in his brief that the examination was inadequate because the examiner overlooked favorable evidence and failed to fully explain his conclusion.

First, the Court disagrees with Mr. Horbol that the March 2009 VA examiner was not qualified to render a medical opinion. The examination was performed by George Z. Razooki, who identified himself as a medical doctor. "[T]he Board is entitled to assume the competence of a VA examiner." *Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007). Mr. Horbol offers nothing more than bald speculation that Dr. Razooki was unqualified to perform the March 2009 examination and, accordingly, has not carried his burden of demonstrating error on this point. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that appellant has the burden of demonstrating error).

Second, however, the Court agrees with the Secretary that the March 2009 VA examination is inadequate because the examiner misstated facts from the claims file and failed to provide supporting rationale for his conclusions. In this regard, the examiner stated that Mr. Horbol had seen

several physicians at a VA medical center and none had concluded that his joint pain was related to his hepatitis C. However, in a September 2008 treatment note, a staff physician clearly stated that "[Mr. Horbol's] joint pain is more likely than not related to hep[atitis] C." R. at 110. As noted by the Secretary in his brief, because the examiner made an incorrect statement in his opinion, the portions of his opinion that relate to sleep apnea could also be problematic.

Finally, the Court also concludes that the VA examiner failed to provide sufficient rationale for the medical opinion he offered. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) ("It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."); *Stefl*, 21 Vet.App. at 124 (stating that a medical opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions"). Here, the VA medical examiner stated that his opinion was based on a review of medical literature and the claims file; however, he did not specifically cite to or describe any relevant portions of the medical literature nor any specific evidence in the claims file to support his conclusory opinion that Mr. Horbol's sleep apnea was not related to his active service or his service-connected hepatitis C.

Accordingly, the Court will vacate that portion of the March 2010 Board decision relying on the March 2009 VA medical examination and remand the issue for further development and readjudication consistent with this opinion. The Court reminds the Board that, "[o]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

On remand, Mr. Horbol 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 also 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).

B. Duty to Obtain Records

As part of its duty to assist a claimant, VA is required to make reasonable efforts to obtain all records held by a governmental entity that are relevant to the claim and that pertain to the

claimant's military service if the claimant provides the Secretary information sufficient to locate such records. 38 U.S.C. § 5103A(c)(1). In that regard, 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.*

Here, Mr. Horbol argued both before VA and the Court that "DEA records" would reflect medications that he is taking for his sleep apnea. However, Mr. Horbol has not specifically identified the records he is referring to; for example, it is unclear whether by "DEA records" he is referring to controlled substances monitored by the Drug Enforcement Agency or another type of record, and he does not indicate which medications he has been taking and where they were prescribed. The Court notes that it is ultimately Mr. Horbol's duty to adequately identify records in support of his claim. *See Loving v. Nicholson*, 19 Vet.App. 96, 102 (2005) (noting that "the Secretary's duty to assist includes making 'reasonable efforts to obtain *relevant* records,' so long as the claimant '*adequately identifies*' those records" (quoting and adding emphasis to 38 U.S.C. § 5103A)). Accordingly, the Court concludes that Mr. Horbol has not met his burden of demonstrating error in this regard. *See Hilkert*, 12 Vet.App. at 151.

Nonetheless, as noted above, Mr. Horbol's claim for VA benefits for sleep apnea is being remanded on other grounds. The Court therefore advises Mr. Horbol that, because he is entitled to submit additional evidence and argument in support of his claim on remand, he should adequately identify any records in support of his claim during the readjudication process. *See Kutscherousky*, 12 Vet.App. at 372-73; *see also Kay*, 16 Vet.App. at 534.

C. Application of 38 C.F.R. § 3.310 and Other Medical Evidence of Record

Mr. Horbol also argues that the Board failed to properly apply 38 C.F.R. § 3.310, which pertains to secondary service connection, and the findings of other medical evidence in the record. The Court disagrees. First, the Court notes that the Board specifically cited to § 3.310 in its conclusions of law and correctly outlined the substance of this regulation in its section on service-connection criteria. Therefore, the Court concludes that Mr. Horbol has not met his burden of demonstrating error. *See Hilkert*, 12 Vet.App. at 151.

As to Mr. Horbol's argument that the Board failed to cite to additional medical evidence of record, he fails to cite to the purported pieces of evidence he believes the Board overlooked and how they are relevant to his claim, and the Court cannot discern any such omission from the record. Thus, although the Court is mindful that Mr. Horbol is self-represented, it is still his duty to adequately identify records that support his claim. Accordingly, Mr. Horbol has not carried his burden of demonstrating error in this regard. *See id.*

D. Entitlement to VA Benefits for Onychomycosis

Although Mr. Horbol does not raise any specific arguments as to his claim for onychomycosis in his informal brief, this Court's practice has been to liberally construe the pleadings of self-represented appellants. *See Calma v. Brown*, 9 Vet.App. 11, 15 (1996). Therefore, consistent with this practice, the Court will consider this claim on appeal because Mr. Horbol indicated that he was appealing this issue in his informal brief and because the Secretary also chose to address this claim in his brief. *Cf. Evans v. Shinseki*, 24 Vet.App. 292, 298 (2011) (stating that, in the context of a Substantive Appeal, if a veteran indicates an intent to appeal an issue, this "must be read to mean what it says").

Service connection for VA disability compensation purposes will be awarded to a veteran when the record before the Secretary contains lay or medical evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); 38 C.F.R. § 3.303 (2010). A finding of service connection generally involves findings of fact and is reviewed under the "clearly erroneous" standard. *See Hersey*, 2 Vet.App. at 94.

In addition, in rendering its decision, the Board is required to provide 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." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert*, 1 Vet.App. at 57. To comply with this requirement, 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board may commit error requiring remand when it fails to provide an adequate statement of its reasons or bases. *See Gilbert*, 1 Vet.App. at 57.

Here, the Board found that onychomycosis was not related to Mr. Horbol's service because there was no evidence of the condition during service and no indication of a connection between his active service and his current diagnosis of onychomycosis. The Board explained that, in addition to a lack of evidence of onychomycosis during service, there was no evidence of onychomycosis for many years after service. The Board also noted that it considered Mr. Horbol's lay statements, but that they were not sufficient to show an indication of a nexus between active service and his current symptoms. The Board therefore found that the preponderance of the evidence was against Mr. Horbol's claim for VA benefits for onychomycosis.

After reviewing the Board's analysis, the Court concludes that the Board thoroughly explained its conclusions, therefore satisfying the requirement that it provide an adequate statement of reasons or bases. The Court also concludes that the Board's findings are supported by the record and are therefore not clearly erroneous. Accordingly, the Court will affirm that portion of the March 2010 Board decision.

III. CONCLUSION

Upon consideration of the foregoing, that portion of the March 12, 2010, Board decision denying entitlement to VA benefits for sleep apnea, including as secondary to service-connected hepatitis C, is VACATED and the issue is REMANDED for further development and readjudication consistent with this decision. The remainder of the March 12, 2010, Board decision is AFFIRMED.

DATED: June 17, 2011

Copies to:

Steve A. Horbol

VA General Counsel (027)