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

NO. 10-0936

THOMAS L. HUBBARD, 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, veteran Thomas L. Hubbard, appeals through counsel a February 26, 2010, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to service connection for hepatitis C. Record of Proceedings (R.) at 3-26. 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. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

**I. BACKGROUND**

The appellant served on active duty in the U.S. Army from January 1973 until May 1974. R. at 178. The appellant's January 1973 enlistment examination reported all systems normal, and the appellant denied having any physical diseases or disorders and indicated that he was in good health. R. at 9.<sup>1</sup> April 1974 treatment records indicated that the appellant was diagnosed with viral

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<sup>1</sup> The Court cites to the Board's recitation of the facts, in lieu of direct citations to the record, because the relevant documents were not included in the record of proceedings. The Court reminds both parties that, although the Secretary is required to compile the record of proceedings, both parties are obligated to ensure that the record contains "any document . . . cited in a brief, in its entirety."

hepatitis A, Australian antigen negative, and was hospitalized for treatment for 11 days. *Id.* The treatment records also noted that the appellant had a history of drug use and hashish possession in the prior eight months. *Id.* The appellant's May 1974 service separation examination report indicated normal findings and no residuals from his hepatitis A illness. R. at 10.

At an October 2001 VA examination, the appellant stated his belief that he tested positive for hepatitis C during service in 1973. R. at 137. He also reported illegal IV drug use in 1973 and having had multiple sexual partners. R. at 134, 137. At a followup examination that same month, it was confirmed that the appellant tested positive for hepatitis C. R. at 132.

In his March 2007 claim for entitlement to service connection for hepatitis C, the appellant explained that he contracted the disease when he was stationed in Germany. R. at 166-80. He reported suffering symptoms such as fatigue, discolored urine, and blurry eyes. R. at 179. The appellant indicated that others in his unit contracted the disease, that he did not use needles, and that he did not have tattoos. *Id.*

A May 2007 treatment record suggested that the appellant reported a history of chronic hepatitis beginning in 1974, but denied illicit drug use or other risk factors. R. at 124. Although his hepatitis C was conclusively established, the appellant declined further treatment. R. at 125. In August 2007, the VA regional office (RO) issued a rating decision denying entitlement to service connection for the appellant's hepatitis C. R. at 108-13.

In a May 2008 statement following his Notice of Disagreement, the appellant averred that he was exposed to several risk factors while in service, including shared razors, receiving immunizations with jet injectors, and having been splattered with blood while standing near the scene of an automobile accident. R. at 70. In February 2009, the RO requested that an examination be conducted to determine whether "it is at least as likely as not that the veteran's current Hepatitis C is related to the Hepatitis A in service" and whether in-service risk factors, including "jet injector shots" and "sharing razors" caused the appellant's hepatitis C. R. at 44. The RO also stated that the record confirmed the presence of a "non[-]service connected risk factor," namely drug use. *Id.*

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*See* U.S. Vet. App. R. 28.1(a)(1)(B).

At the March 2009 examination, the examiner observed that the appellant smoked hashish, but that the appellant denied any IV drug use. R. at 38. The examiner also confirmed that the appellant was diagnosed with hepatitis C in 2001. R. at 37. In response to the RO's request, the examiner concluded that he could not determine whether the appellant's in-service hepatitis A caused him to contract hepatitis C, because hepatitis C was not identified until 1988 and, as a result, "testing for this was not available during that time frame." R. at 37. The examiner continued that there was insufficient evidence to connect the appellant's hepatitis C and jet injector immunizations. *Id.* The examiner acknowledged the appellant's hashish use and denial of IV drug use, and ultimately concluded that too much was unknown to ascertain the causes of the appellant's hepatitis C condition. R. at 38. The examiner did not address, consistent with the RO's request, whether sharing razors contributed to the appellant's condition.

In an addendum, provided later that same month, the examiner opined that, although jet injector immunizations were a "biologically plausible" cause of hepatitis C, he was unaware of any testing or studies that would assist in proving that hepatitis C was indeed caused by jet injector-induced immunizations. R. at 32. That same day, the RO issued the Supplemental Statement of the Case. R. at 27-31.

On appeal, the Board denied the appellant's claim. R. at 3-16. Relying on the March 2009 examination, the Board found that there was insufficient evidence of a link between the appellant's in-service hepatitis A and his current hepatitis C conditions. R. at 12. The Board observed that, although the March 2009 examiner failed to address the appellant's alleged exposure to shared razors, the examiner "implicitly considered all theories of exposure" elicited by the appellant. R. at 11. The Board ultimately concluded that there was insufficient evidence to find that the appellant contracted hepatitis C through the use of razors or contact with blood at the scene of an automobile accident. R. at 13. In addition, despite finding the appellant competent to testify as to his exposure to risk factors, the Board determined that the appellant was not a credible historian because he offered inconsistent accounts of his history of drug use in a self-serving manner. R. at 14. The appellant's assertions regarding his in-service risk factors were thus deemed to lack probative value. *Id.* This appeal followed.

## II. ANALYSIS

The appellant maintains that the Board committed three remandable errors. First, the appellant argues that the Board erroneously failed to find that his in-service hepatitis A caused his current hepatitis C and that the Board erected an insurmountable burden to proving such a connection. Appellant's Brief (Br.) at 5-7.

Apart from a conclusory statement on appeal, the appellant proffers no evidence to demonstrate a relationship between his in-service hepatitis A and his current hepatitis C. After acknowledging the examiner's statement that hepatitis C was first discovered 14 years *after* the appellant concluded service and tests linking hepatitis A and hepatitis C were unavailable during the appellant's term of service, the Board concluded that the available evidence could not support service connection for hepatitis C based on the appellant's in-service hepatitis A condition. R. at 12-13; 38 C.F.R. § 3.102 (2009). Contrary to the appellant's charge, the Board did not misapply the standard of proof; rather, the Board merely recognized that the relatively recent discovery of hepatitis C complicated the appellant's burden, and, in the absence of any further evidence, the speculations of a medical examiner would be "too tenuous" a basis upon which to establish service connection for hepatitis C. R. at 12-13. The Board's determination was therefore not erroneous.

Second, the appellant contends that the Board's reliance on the March 2009 examination was error because the examination failed to consider the risk factor of sharing razors in service. Appellant's Br. at 7-9. The Board acknowledged that the March 2009 examiner did not specifically address "all theories of exposure . . . elicited by the Veteran," but reasoned that all such theories were "implicitly considered" because the examination report was based on a complete physical examination, a review of the diagnostic test results, and a review of the appellant's self-reported history. R. at 12. The Board's analysis on this issue is flawed.

The March 2009 examiner ignored the RO's explicit instruction to comment upon the sharing of razors as a theory of exposure, and continued his silence in an addendum to his original examination report. R. at 32, 37-38. The examiner's silence on the appellant's sharing of razors as a theory of exposure cannot permit, contrary to the Board's reasoning, the finding that the theory was "implicitly considered" and therefore adequate. *See Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) (finding an examination inadequate where the examiner did not indicate whether he considered the

veteran's assertions of continued symptomatology); R. at 12. Such silence as to an identified theory of exposure cannot yield a fully informed evaluation by the Board. *See Barr*, 21 Vet.App. at 311; *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). The March 2009 examination is inadequate.

Nonetheless, the Board's reliance on an inadequate examination does not doom its decision. *See* 38 U.S.C. § 7261(b)(2) (the Court is required to "take due account of the rule of prejudicial error"). The Board separately, and adequately, found the appellant to be an incredible historian because he provided inconsistent and apparently self-serving accounts of his history of drug use:

A review of the service treatment records, however, specifically indicates that he was found to have a history of drug abuse within eight months of having been diagnosed with hepatitis A in April 1974, and was found to be in the possession of hashish. He also told a VA clinician in May 2007, during the pendency of his claim, that he again knew of no possible risk factors for hepatitis C. However, as discussed, he admitted in October 2001 to having used IV drugs on at least one occasion in 1973. At that time, the treating practitioner found that he had multiple risk factors for hepatitis C, including a history of illegal drug use and multiple sex partners.

R. at 13-14. Despite finding the appellant competent to provide in-service theories of exposure such as sharing razors and immunizations via jet injectors, the Board rejected all of the appellant's statements as unreliable and therefore lacking probative value. *Id.* The inadequacy of the March 2009 examination, in turn, results in no prejudice because the Board found that there is no qualifying, credible theory of exposure on which to establish service connection for his current hepatitis C condition. *See Bryant v. Shinseki*, 23 Vet.App. 488, 498 (2010) (citing *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-06 (2009)) (noting that the appellant bears the burden of demonstrating prejudicial error on appeal). There is simply no other evidence to evaluate the appellant's claim for entitlement to service connection.

In spite of the Board's credibility finding, the appellant suggests that the Board is bound to credit the RO's statements in its request for examination that the "evidence confirms" that "shared razors" are a "risk factor for this veteran." R. at 42, 44; Appellant's Br. at 9. However, statements made by the RO while developing the record do not constitute findings of fact binding upon the Board. *See Anderson v. Shinseki*, 22 Vet.App. 423, 427-28 (2009); *see also* 38 U.S.C. § 7104(a). Accordingly, irrespective of the RO's conclusions drawn from the appellant's statements, the Board

is obligated to make its own factual and credibility determinations. *See id.*; *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006).

Finally, the appellant maintains that the Board failed to provide him the "benefit of the doubt" in adjudicating his claim. Appellant's Br. at 5. However, as the Board explained, the benefit of the doubt is reserved for those instances where the evidence is, on balance, "nearly equal," *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001), not where, as here, the Board finds the appellant to be incredible and no other evidence exists upon which to establish service connection for his hepatitis C. R. at 14-15. The Board acted reasonably, and thus the Court must affirm its decision.

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the February 26, 2010, Board decision is AFFIRMED.

DATED: November 15, 2011

Copies to:

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