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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 10-3768

CARMINE A. DIBERNARDO, 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, Carmine A. DiBernardo, through counsel, appeals an August 12, 2010, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to service connection for hepatitis C. Record (R.) at 3-12. 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 affirm the August 12, 2010, decision.

I. FACTS

The appellant served in the U.S. Army from November 16, 1960, to October 3, 1962. R. at 368. Service medical records are silent for any diagnosis of or treatment for hepatitis C. *See* R. at 229-81. In March 1961, the appellant underwent an appendectomy. R. at 116-20, 127-33. The operation was performed under general anesthesia, and the records make no mention of a blood transfusion. *Id.*

A private laboratory report from November 1999, 37 years after the appellant left service, notes that the appellant tested positive for hepatitis C. R. at 330. VA and private medical records dated from 2001 to 2008 include various histories that indicate that the appellant was diagnosed with

hepatitis C sometime between 1995 and 1998. R. at 157-70, 320-32. In June 2003, a private liver biopsy demonstrated stage one fibrosis with focal areas of stage two fibrosis. R. at 320.

The appellant filed a claim for entitlement to service connection for hepatitis C in June 2006. R. at 304-17. In his claim, he asserted that he contracted hepatitis C from the immunizations and blood typing conducted during his basic training. R. at 317. The appellant filed a statement in support of his claim in September 2006 asserting that his hepatitis C was due to the use of contaminated airguns and had been dormant for years. R. at 223. In December 2007, the New York, New York, VA regional office (RO) issued a decision denying service connection for hepatitis C, R. at 175-78, and the appellant filed a Notice of Disagreement in January 2008, asserting that "the same needles were used on all [personnel]" during the vaccinations and blood typing, R. at 171.

The RO issued a Statement of the Case (SOC) in May 2008, again denying the appellant's claim. R. at 143-55. The RO explained that the appellant had not demonstrated that he contracted his hepatitis C while in service. R. at 154. The appellant perfected his appeal to the Board in June 2008 and included a statement that his hepatitis C was due to receiving blood during his March 1961 appendectomy. R. at 123-24. The RO issued a Supplemental SOC in July 2009 again denying his claim. R. at 110-13.

At a hearing before the Board in December 2009, the appellant identified two possible explanations for his hepatitis C: his 1960 immunizations and blood typing, and his March 1961 appendectomy. R. at 78-84. He testified that, during his immunizations, doctors did not clean the airgun between injections and that soldiers' blood was on the airgun. R. at 79. The appellant denied other risk factors for hepatitis C, including intravenous drug use and unsafe sex. R. at 81. In light of the appellant's testimony, the Board requested a medical opinion from Dr. Dennis Stevens, chief of the Infectious Diseases Section at the Boise, Idaho, VA medical center. R. at 31-33, 75-76. In an April 2010 opinion, Dr. Stevens thoroughly discussed the appellant's medical history, testimony, and contentions, but he opined that it was less likely than not that the appellant's hepatitis C was due to service. R. at 31-33.

On August 12, 2010, the Board issued the decision here on appeal. R. at 3-12. It determined, based on Dr. Stevens's letter, that the preponderance of the evidence weighed against the appellant's claim for service connection. R. at 9-11. The Board acknowledged that transmission of hepatitis

C by airgun vaccinations was a "biological possibility," but it found that this possibility fell short of the equipoise standard necessary to warrant application of the benefit of the doubt doctrine. R. at 10. Accordingly, the Board denied the appellant's claim. R. at 12.

II. ANALYSIS

A. Service Connection

The appellant first contends that the Board clearly erred when it determined that his hepatitis C was not related to service, despite its acknowledgment that transmission of the virus by airgun was a possibility. Appellant's Brief (Br.) at 8-10; *see* R. at 10 ("The biological possibility of transmission of the hepatitis C virus by jet airgun injectors has been acknowledged by VA."). This argument is unavailing. Establishing service connection generally requires medical evidence or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376–77 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 3.303 (2011).

As noted by Dr. Stevens and relied upon by the Board in its decision, while airgun transmission of hepatitis C is "biologically possible," three things must occur:

> First, the face of the air gun would have to have blood on the surface[;] second, there [would have to be] no attempt to remove blood from the device between patients; and[] third, . . . at least one recruit immunized before [the appellant] would have to have had an active hepatitis C infection.

R. at 31. Dr. Stevens estimated the current in-service occurrence of hepatitis C at approximately 10%; he further opined that this rate was likely lower at the time of the appellant's vaccinations. R. at 31-32. Based on this, he concluded that it was less likely than not that the appellant contracted hepatitis C while in service. R. at 33.

In addition to Dr. Stevens's opinion, the Board relied on VA Fast Letter 04-13 (FL 04-13), Relationship Between Immunization with Jet Injectors and Hepatitis C Infection as it Relates to Service Connection (June 29, 2004). The letter stated that, to date, "there [had] been no case reports

of [hepatitis C] being transmitted by an airgun" and that the source of infection is unknown in about 10% of acute and 30% of chronic hepatitis C cases. FL 04-13. The letter concluded that, while transmission via airgun was biologically plausible, a "report upon which the determination of service connection is made [must] include[] a full discussion of all modes of transmission, and a rationale as to why the examiner believes the airgun was the source of the veteran's hepatitis C." *Id.*

The Board considered the appellant's lay statements, but it determined that, while the appellant was competent to testify that he saw blood on the airgun, there was no medical evidence that anyone else present at the vaccinations suffered from hepatitis C. R. at 11; *see Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) ("Significant in our caselaw is that lay persons are not competent to opine as to medical etiology or render medical opinions."). Without such medical evidence, the Board accepted Dr. Stevens's conclusion that it was less likely than not that the appellant contracted hepatitis C from airgun injections. R. at 11. After a review of the record, the Court cannot conclude that the Board clearly erred when it determined that the evidence weighed against a finding of service connection. *See* 38 U.S.C. § 7261(a)(4) (the Court reviews Board's factual findings under the "clearly erroneous" standard of review).

Although the appellant contends that the Board should have applied the benefit of the doubt doctrine to his case, the doctrine only applies when the evidence is in equipoise. *See* 38 U.S.C. § 5107(b) ("When 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."); *Gilbert v. Derwinski*, 1 Vet.App. 49, 55-56 (1990). As discussed above, however, the Board found that the evidence of record weighed against a finding of service connection, and so the doctrine does not apply. R. at 11.

B. Adequacy of Dr. Stevens's April 2010 Opinion

The appellant next asserts that the Board erred when it determined that Dr. Stevens's April 2010 opinion was adequate for rating purposes. Appellant's Br. at 11-15. An adequate medical opinion must be "accurate and fully descriptive . . ., with emphasis upon the limitation of activity imposed by the disabling condition." 38 C.F.R. § 4.1 (2011). It must be based on an accurate factual premise and on a consideration of the veteran's prior medical history and examinations and must describe the disability in sufficient detail so that the Board's '"evaluation of the claimed disability

will be a fully informed one.'" *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991)). Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008).

The Court holds that the appellant has not met his burden of demonstrating error. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The appellant contends that Dr. Stevens provided no rationale for his conclusion that it was less likely than not that the appellant contracted hepatitis C from the airgun vaccinations, arguing that "the Board's own expert clearly gives at least a fifty percent chance of a relationship between one method of transmission." Appellant's Br. at 12. This is not, however, reflected by the record. Dr. Stevens discussed the circumstances under which hepatitis C could be transmitted by airgun, including the requirement that another service member suffer from an active infection, and he stated that the prevalence rate of hepatitis C in service was less than 10% at the time of the vaccinations. R. at 31-33. He concluded that "the likelihood of transmission in the 1960s would be far less than if the air gun [was] used in similar fashion today" and that the appellant "fits into the 20-30% of patients with Hepatitis C that have no obvious or identifiable source of infection." R. at 31-32. He concluded that it was more likely than not that the appellant did not acquire Hepatitis C while on active duty. R. at 31. Although Dr. Stevens did not specifically state that the likelihood of transmission of hepatitis C by airgun vaccination was less than 50%, the Court holds that the Board did not clearly err by making such an inference. *See Gilbert*, 1 Vet.App. at 52.

Similarly, although the appellant contends that Dr. Stevens "fails to provide a medical rationale for concluding that an active Hepatitis C infection from a previous recruit was not present," Appellant's Br. at 14, he misstates the responsibilities of a medical examiner. Dr. Stevens had no responsibility to make that factual determination. *See Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) ("The medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability."), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). Rather, based on the evidence available to him in the appellant's claims file and from the appellant's statements, he opined on the likelihood that the

appellant could have contracted hepatitis C from the vaccinations. R. at 31-32; *see Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *Ardison*, *supra*.

The Board determined that Dr. Stevens's April 2010 opinion "was based upon consideration of the [appellant's] prior medical history, including medical records, and also described the disability in sufficient detail for the Board to make an informed decision." R. at 5 (citing *Barr v. Nicholson*, 21 Vet.App. 303, 312 (2007)). After a review of the record, the Court concludes that the Board did not clearly err when it determined that Dr. Stevens's opinion was adequate for rating purposes. *See D'Aries* and *Ardison*, both *supra*.

C. Reasons or Bases

Finally, the appellant argues that the Board failed to provide an adequate statement of reasons or bases for its decision. Appellant's Br. at 11-15. Specifically, he contends that the Board improperly discounted his lay testimony regarding the airgun injections. Appellant's Br. at 13. As noted above, however, the Board accepted his testimony but stated that it found Dr. Stevens's April 2010 opinion to be more probative. R. at 11. To the extent that the appellant argues that the Board should have given more weight to his statements, it is beyond this Court's statutory authority to reweigh the evidence in the first instance or engage in de novo factfinding. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995) ("It is the responsibility of the [Board], not this Court, to assess the credibility and weight to be given to evidence."). Rather, the Court may only reverse or set aside factual findings of the Board that are clearly erroneous. *See* 38 U.S.C. § 7261(a)(4). The appellant has simply not offered a basis upon which the Court can set aside the Board's findings. Hence, as the Board's denial of the appellant's claim has been supported with an adequate statement of reasons or bases and because the Court is not left with the definite and firm conviction that a mistake has been made, the Board's August 12, 2010, decision will be affirmed.

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's August 12, 2010, decision is AFFIRMED.

DATED: January 25, 2012

Copies to:

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