

*Designated for electronic publication only*

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

No. 07-2686

ROBERT M. BROWN, APPELLANT,

v.

ERIC 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, Robert M. Brown, through counsel, appeals a July 20, 2007, decision of the Board of Veterans' Appeals (Board), that denied service connection for hepatitis C. 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 reasons set forth below, the Court will vacate the Board's decision and remand the matter for further adjudication.

**I. BACKGROUND**

A. Facts

The appellant served honorably in the U.S. Air Force from February 1968 until May 1970. Record (R.) at 60. Service medical records (SMRs) indicate that in November 1969 the appellant underwent treatment for an abscess on his left thigh. R. at 37-38. His discharge examination noted that he had undergone a cystectomy to repair the abscess, and was left with a two-inch scar on his left thigh but no other complications or sequelae. R. at 52, 54.

An April 1998 private medical document indicates that the appellant was by that time suffering from hepatitis C. R. at 96. Following a June 2002 liver biopsy, a private medical report indicated that the appellant had a "chronic active hepatitis[.]" R. at 104. In October 2003, the appellant filed a claim for disability compensation benefits for a hepatitis C infection. R. at 67-72. The appellant stated he had undergone no surgeries other than the one for his abscess, and, in the days following that surgery, his wound was treated with various instruments and "cloth materials" twice a day. R. at 74, 92. In October 2004, the appellant submitted a "risk factors for hepatitis" questionnaire in which he indicated that he never used intravenous drugs, never used intranasal cocaine, never engaged in high-risk sexual activity, never had hemodialysis, never had a tattoo or body piercing, never shared toothbrushes or razor blades, never had acupuncture with nonsterile needles, never had a blood transfusion, and never was exposed to contaminated blood or other fluids. R. at 106.

A May 2004 VA document indicates that the VA regional office (RO) declined to request a medical examination concerning the appellant's claim for service connection for hepatitis C. R. at 109. An examination was ordered on the appellant's abscess scar for a separate claim not here on appeal, but the RO stated specifically that, "we are not requesting an exam for [hepatitis]." *Id.* In a June 2004 decision, the RO denied the appellant service connection for his hepatitis C. R. at 119. The RO found no treatment or findings of residuals of hepatitis from the time of the appellant's abscess surgery to the present, that the appellant did not work in health services during his treatment period, and that the materials used to pack the abscess were sterile and could not have caused a hepatitis C infection. R. at 120.

On July 31, 2004, the appellant filed a Notice of Disagreement (NOD) in which he stated that the doctor who performed the surgery on his abscess was not wearing protective gloves, nor were the nurses who packed the abscess with sterile cloth. R. at 124. The appellant stated he believes that this lack of sanitation led to his infection. R. at 126. He further stated that no hepatitis C was found at his separation because no blood was drawn or tested as a part of his separation examination. *Id.* In April 2005, the appellant appealed to the Board. R. at 149-150. He stated that his hepatitis C was not discovered until a blood test years after his separation. R. at 149. He stated that the doctor and

nurses who treated his abscess treated others before him without gloves and without washing their hands, thus transferring blood and fluid from other patients. R. at 150.

The Board, in denying the appellant service connection for hepatitis C, found that a medical examination would be futile because "the Board finds that the record fails to establish that the veteran suffered an event, injury or disease in service." R. at 4. The Board found that there was no evidence that the appellant suffered from hepatitis C in the service and no evidence linking his current hepatitis to his service. R. at 5. Also, regarding the appellant's surgery for his abscess, the Board found "there is no corroborating evidence that the surgery was performed under conditions which exposed him to other people's blood, bodily fluids or waste due to doctors and nurses not wearing protective gloves." *Id.*

#### B. Arguments on Appeal

The appellant argues first that the Board acknowledged his statements concerning his unsanitary in-service surgery, but essentially rejected them without explaining why they are not competent. Appellant's Brief (Br.) at 3. The appellant argues that veterans are competent to provide lay evidence regarding matters within their personal knowledge and experience, and such evidence may not be rejected only because the record does not contain corroborating medical evidence. *Id.* at 5. The Board, the appellant argues, has a duty to determine the credibility of such evidence, and failure to do so requires remand. *Id.*

The appellant also argues that the Board failed to provide an explanation as to why he didn't receive an examination to determine whether his hepatitis C is related to service. *Id.* at 7. He argues that, in light of the lay evidence indicating that he was exposed to a risk factor for his illness, the Board had an obligation to explain why an examination was not warranted. *Id.*

The Secretary argues that the Board, in finding that the appellant's statements were not probative, relied on the appellant's SMRs, which reflected no complications or sequela from surgery, nor any notations of unsanitary conditions. Secretary's Br. at 4. The Board, the Secretary argues, did consider the appellant's statements, but "found that the objective medical evidence of record outweighed his allegations." *Id.* The Secretary also argues that the "Board found that an examination was not required because the evidence of record failed to establish that Appellant's hepatitis C was associated with an event, injury, or disease, in service." *Id.* at 5. The Secretary

further argues that an examination was not necessary and the Board was not obligated to provide an examination because the appellant's claim could properly be adjudicated without one. *Id.*

## II. ANALYSIS

Establishing service connection generally requires "(1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service; and (3) medical evidence of a nexus between the claimed in-service injury or disease and the current disability." *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). When a disease is first diagnosed after service, service connection may be established by evidence demonstrating that the disease was in fact "incurred" during the veteran's service. *See Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("Proof of direct service connection . . . entails proof that exposure during service caused the malady that appears many years later."); *Cosman v. Principi*, 3 Vet.App. 503, 505 (1992) ("[E]ven though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established."); 38 C.F.R. § 3.303(d) (2009). Lay testimony is competent to describe an observable sequence of events leading to an injury or incident in service. *Layno v. Brown*, 6 Vet.App. 465, 466 (1994) (stating that lay persons are competent to testify as to their observation of events or symptoms); *Harvey v. Brown*, 6 Vet.App. 390, 393 (1994) (stating that lay persons can testify as to sequence of events that lead to trauma in service).

The Board's decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and 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. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). If an appellant presents competent lay evidence of incurrence or aggravation of injury or disease in-service, such evidence is material evidence favorable to the appellant's claim, and the Board must provide

adequate reasons or bases for rejecting it. *See Caluza*, 7 Vet.App. at 506; *Layno*, 6 Vet.App. at 464.

The Court finds that the Board did not provide adequate reasons or bases for its decision to deny the appellant's claim. The Board stated that the appellant's SMRs are "devoid of complaints or diagnoses of hepatitis C" and that there is "no evidence of hepatitis C in service[.]" R. at 5. However, hepatitis C was not recognized as a disease until nearly two decades after the appellant's service. *See* 65 Fed. Reg. 48207 (Aug. 7, 2007) (stating that VA was proposing to add a diagnostic code for hepatitis C, "a type of viral infection that was not identified until 1989"). Therefore, the absence of a diagnosis of the disorder in the SMRs is not a reasonable basis for concluding that the appellant's hepatitis C was not incurred in service. *Cf. Daye v. Nicholson*, 20 Vet.App. 512, 517 (2006) (recognizing that the Board's reliance on lack of combat award that had not been established at the time of veteran's service was error; "'Back to the Future' may be a concept suitable for movies and theme parks but it cannot serve as a basis for denying the claims of veterans.>").

Essentially, the appellant argues that he was exposed to unsanitary conditions in connection with his in-service surgery and that as a result, he was exposed to the hepatitis C virus during service. R. at 125; Appellant's Br. at 3-4. With regard to his surgery, the appellant stated that the doctor who performed the surgery "did not wear protective plastic gloves during the operation nor did the nurses who cared for and packed my abscess with sterile cloth." R. at 124. The Board concluded that because the service medical records did not provide any "corroborating evidence that the surgery was performed under conditions[,] which exposed him to other people's blood, bodily fluids or waste due to doctors and nurses not wearing protective gloves" and there was no evidence to show that the appellant experienced any "complications or sequela from the surgery," the appellant was not exposed to hepatitis C in service. R. at 5. *Layno*, 6 Vet.App. at 470.

The Board implicitly rejected the appellant's lay testimony because there was a lack of contemporaneous medical evidence to corroborate his statement. R. at 5. This is not permitted. The Board cannot "determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *see also McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006) (concluding that the lack of actual evidence does

not constitute substantive negative evidence). The Board should have assessed the credibility and probative value of the lay evidence and not simply rejected it out of hand. *See Caluza*, 7 Vet.App. at 506.

The Court finds that the rejection of the appellant's lay testimony was not accompanied by reasons or bases supported by law. *Caluza* and *Layno*, both *supra*. Thus, the appellant was not provided with a precise explanation of the Board's decision and the Court was not provided with information needed to review the decision in an informed matter. *Id.*; *see also* 38 U.S.C. § 7104(d)(1); *Allday and Gilbert*, both *supra*. Because the Board failed to provide an adequate statement of reasons or bases for its decision, remand is the appropriate remedy. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons and bases for its determinations, or where the record is otherwise inadequate").

Under 38 U.S.C. § 5103A, the Secretary's duty to assist includes, in appropriate cases, the duty to conduct "a thorough and contemporaneous medical examination." *See Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). Section 5103A(d)(2) mandates that a medical examination be provided in disability compensation claim cases when (1) there is competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim. *McLendon*, 20 Vet.App. at 86.

Here, the Board concluded that an examination of the veteran was unnecessary because "the record fails to establish that the veteran suffered an event, injury, or disease in service." R. at 4. The Board reached this conclusion without assessing the probative value of the appellant's lay testimony regarding the circumstances surrounding his surgery. On remand, after its analysis of the appellant's lay statements, the Board should consider whether he is entitled to a new medical

examination. Also on remand, the appellant may present any additional evidence and argument in support of the matter remanded, and the Board must consider any evidence and argument so presented. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

### **III. CONCLUSION**

Upon consideration of the foregoing analysis, the record on appeal, and the parties' pleadings, the Board's July 20, 2007, decision is VACATED and the matter is REMANDED for further development consistent with this decision.

DATED: August 17, 2009

Copies to:

Virginia A. Girard-Brady, Esq.

VA General Counsel (027)