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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-0988

DAVID L. MAPA, 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, David L. Mapa, through counsel, appeals a July 10, 2006, Board of Veterans' Appeals (Board) decision in which the Board denied his claim for entitlement to service connection for hepatitis C. Record (R.) at 9. 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. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the July 10, 2006, Board decision, and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served honorably on active duty in the U.S. Navy from August 1974 to June 1976. R. at 14. In October 1974, he was treated for hepatitis A at a naval medical center in San Diego, California. R. at 24, 30-31, 37. In October 1996, the appellant sought service connection for residuals of hepatitis A. R. at 138-41. The VA regional office (RO) denied his claim in February 1997, noting that medical records dated subsequent to his in-service treatment showed that the condition had resolved and that there was no residual disability. R. at 179-80.

In February 2002, the appellant sought service connection for hepatitis C. R. at 182-85. To support his claim, the appellant submitted a letter from a private physician stating that he had been diagnosed with hepatitis C in 1997 and that "[t]he route of acquisition or the time of acquiring the infection is unknown." R. at 195. In an October 2002 correspondence to VA, the appellant stated since he "never fit the normal risk[-]factor profile associated with Hepatitis C infection," he believed that his infection was related to his time in the military. R. at 214. To support his conclusion, he noted that (1) he received his "military immunizations by the *Jet Gun Injection* method"; (2) during boot camp, a drill instructor "would pass the same razor from recruit to recruit to dry shave a missing spot"; and (3) when he was infected with hepatitis A, he was confined to a ward with other hepatitis patients and they would share razors and utensils. *Id.* The appellant also submitted a report on jet-gun inoculations that discussed "their capacity to transmit blood-borne infections," a *Newsweek* article about hepatitis C, and a report entitled "Hepatitis C in Vietnam Era Veterans." R. at 215-35.

In January 2003,¹ the appellant underwent a VA examination to determine whether his "current diagnosis of hepatitis C [was] related to the in-service diagnosis of hepatitis A." R. at 276-84. The examiner stated that the appellant's "lifestyle had no risk factors for hepatitis C," specifically noting that the appellant had no history of blood transfusions, tattoos, illicit drug or other needle use, unusual operations, or dental work. R. at 277. The examiner dismissed the appellant's theory regarding jet-gun injections, relying instead on a 1999 article that said these injectors could be used safely with "proper training and sterilization procedures." R. at 277-78. The examiner rejected the appellant's assertion that "the only injections he ever received was during his time in the Navy" by stating that "[i]njections for immunization and other purposes are not recognized as a means of transmission for hepatitis C." R. at 278. In addition, the examiner dismissed the appellant's theory regarding shared razors by referring to a 2001 article on patient-to-patient transmission of hepatitis C. *Id.* The examiner concluded that "it [was] unlikely that patient-to-patient transmission of hepatitis C on his ward during his hospitalization would be the cause of his hepatitis C." R. at 278, 281. The examiner further opined that the appellant's condition was not related to service because

¹ In its opinion, the Board mistakenly stated that this examination occurred in March 2003. R. at 8.

of the 20-year time span between the appellant's active duty and his hepatitis C diagnosis, and because "40% of patients with hepatitis C lack identifiable risk factors." R. at 278-80.

On January 30, 2003, the RO denied the appellant's claim. R. at 300-02. The appellant appealed in January 2004. R. at 307, 360-61. During a Board hearing in May 2005, the appellant's counsel stated that he was introducing into evidence a letter and evaluation from a Dr. Herrington that would support the appellant's assertions regarding the cause of his hepatitis C. R. at 401. He also stated that the appellant's physician "has been able to indicate no other possible link or cause of the Hepatitis than the experiences [the appellant] had in the [military]." R. at 402. The appellant testified that, while hospitalized for hepatitis A in 1974, he was isolated on a ward with other hepatitis patients; that he shared razors with those patients; and that he believed this was how he contracted hepatitis C. R. at 414-18.

In the July 10, 2006, decision here on appeal, the Board denied the appellant's claim for entitlement to service connection for hepatitis C. R. at 9-10. The Board recognized that the appellant has a current diagnosis of hepatitis C, but noted that the appellant's private doctor stated that the cause of the infection was unknown. R. at 7. The Board stated that the appellant's hepatitis A was "acute and resolved without residuals," and that there were no references to either hepatitis A or C in his service medical records or in his reserve medical records from 1993 to 1999. *Id.* The Board assigned little weight to the articles the appellant submitted in October 2002 and to the medical treatise evidence presented during the May 2005 hearing because this evidence was not "combined with an opinion of a medical professional." R. at 8 (citing *Mattern v. West*, 12 Vet.App. 222, 228 (1999)). On the other hand, the Board assigned "considerable weight to the VA medical opinion" because this opinion was "supported by rationale with reference to relevant medical treatise information" and was "unrebutted by any other competent medical opinion." *Id.* The Board stated that "[t]he veteran has submitted no medical opinion that identifies jet injector devices . . . or shaving razors as factors that contributed to his acquiring hepatitis C" and that "as a layperson he is not competent to give an opinion regarding medical causation or diagnosis." *Id.* at 9. Absent medical nexus evidence, the Board concluded that the veteran's claim must be denied. *Id.*

The appellant raises three arguments, although the Court notes that the brief submitted by the appellant's counsel does not comply with the Court's Rules of Practice and Procedure. *See U.S. VET. APP. R.* 28(a)(3), 28(a)(5), 32(b), 32(e), and 34(a). It provides insufficient references to the record, makes several unsubstantiated statements,² and otherwise demonstrates a wholesale disrespect for this Court and its recent caselaw. Nevertheless, since the Secretary's brief provides sufficient references to the record to enable judicial review, the Court will address the appellant's arguments. The appellant first argues that the Board did not provide an adequate statement of reasons and bases for its decision to deny service connection for hepatitis C. Appellant's Br. at 7. Specifically, the appellant asserts that the Board failed to discuss "whether there was evidence of a medical nexus between [the appellant's] service and his development of Hepatitis C" and failed to consider the appellant's statements regarding in-service inoculations and sharing razors while hospitalized for hepatitis A. *Id.* at 8-10. Second, he argues that the Board failed to appropriately weigh the appellant's testimony from the May 2005 hearing, and urges the Court to attribute great weight to all veterans' sworn testimony in accordance with the Federal Rules of Evidence. *Id.* at 11-15. Third, he argues that the Board member failed to suggest that the appellant submit medical nexus evidence. *Id.* at 15-16.

The Secretary argues that the Court should affirm the Board's decision because its statement of reasons or bases was adequate and urges the Court to reject the appellant's additional unsubstantiated allegations of error. Secretary's Br. at 5-13.

II. ANALYSIS

A. Applicable Law

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-

² The appellant's brief states that "his physicians concluded that his [hepatitis] C developed while he was in service," yet provides no support for this assertion. Appellant's Brief (Br.) at 7. The brief also states, without support, that individuals with whom the appellant was treated for hepatitis A were later diagnosed with hepatitis C. *Id.* at 8-9.

service disease or injury and the present disability. *Hickson v. West*, 12 Vet.App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). A finding of service connection is a finding of fact that this Court reviews under the "clearly erroneous" standard. *Russo v. Brown*, 9 Vet.App. 46, 50 (1996). As long as "there is a 'plausible' basis in the record for the factual determinations of the [Board]," the Court cannot overturn them, even if it might not have reached the same conclusion in the first instance. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

The Board's decision must include 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; 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*, 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 it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza*, 7 Vet.App. at 506.

When assessing the credibility and probative value of a medical nexus opinion, the Board must consider whether the medical opinion contains "such sufficient information that it does not require the Board to exercise independent medical judgment." *Stefl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007) (citing *Colvin v. Dewinski*, 1 Vet.App. 171, 175 (1991) (holding that the Board may only consider independent medical evidence and may not substitute its own medical opinion)). The Board must determine whether a medical opinion "support[s] its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Stefl*, 21 Vet.App. at 124-25. The Board may not rely on a medical examiner's conclusory statements if they lack supporting analysis. *Id.* at 124 (stating that the Board may not assess the probative value of "a mere conclusion by a medical doctor"). Further, the Board may not evade its statutory reasons-or-bases requirement by adopting an inadequate medical opinion that fails to discuss evidence supporting the veteran's position. *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). When an examination report is inadequate, the Board should remand the case to the RO for further development. *Bowling v. Principi*, 15 Vet.App. 1, 12 (2001); *Green (Victor) v. Derwinski*, 1 Vet.App. 121, 124 (1991).

B. Adequacy of the Board's Statement of Reasons or Bases

The Court finds that the Board's statement of reasons or bases is inadequate because it relied on a medical opinion that lacked rationale or analysis to support its conclusions. *See R. at 276-79; Stefl, supra.* As noted above, the Board may not rely on a medical examiner's conclusory statements if they lack supporting analysis. *Stefl, supra.* Here, the 2003 VA medical opinion dismissed the appellant's statements regarding jet-gun injections by referring to a 1999 article on the devices and stating that "injectors can be used safely . . . [with] proper training and sterilization procedures." R. at 278, 282. Without addressing the substance of the article or analyzing its application to the facts of the appellant's case, the medical examiner merely stated that "[i]t is unlikely based on this information that the hepatitis C was transmitted by jet injector device used for immunization on this patient." R. at 278. There is no explanation as to why the examiner believed that the jet injectors were used properly or were adequately sterilized in 1974. In addition, the examiner failed to recognize that the article supported the appellant's claim, as well. First, the article states that "as with any reusable device, [jet injectors] may have the potential to spread pathogenic viruses and bacteria." R. at 282. Second, it states that

the report of an outbreak of hepatitis B virus . . . transmission following use of one type of multiple-use nozzle jet injector in a weight loss clinic and laboratory studies in which blood contamination of jet injectors has been simulated have caused concern that the use of multiple-use nozzle jet injectors may pose a potential hazard of bloodborne-disease transmission to vaccine recipients. This potential risk for disease transmission would exist if the jet injector nozzle became contaminated with blood during an injection and was not properly cleaned and disinfected before subsequent injections.

R. at 283. Similarly, the examiner dismissed the appellant's assertion that he only received such injections while in the Navy by stating that "[i]njections for immunization and other purposes are not recognized as a means of transmission for hepatitis C" – without offering any supporting analysis at all. *Id.* The examiner also rejected the appellant's statements regarding shared razors by pointing to an article on "patient-to-patient transmission of hepatitis C" and stating that "it is unlikely that patient-to-[]patient transmission of hepatitis C on his ward during his hospitalization would be the cause of his hepatitis C." *Id.* Contrary to this conclusion, however, the article states that

"[t]ransmission of HCV from patient to patient has been documented" and discusses several situations in which such transmission occurred. R. at 281. Further, neither the article nor the examiner discuss the possibility of patient-to-patient transmission via shared razors. Thus, while the 2003 VA medical examination appears to support its conclusions "with reference to relevant medical treatise information," as the Board states, this appearance is superficial at best. The opinion is insufficient for rating purposes because it makes conclusory statements, lacks supporting analysis, and refers to medical treatise evidence that is either inapplicable or contradictory. *See Stefl, supra.*

Further, the 2003 medical opinion is inadequate because it relies on an inaccurate factual premise. To support the conclusion that the appellant's hepatitis C is not related to his service, the examiner referred to an article that found that "approximately 40% of patients with hepatitis C lack identifiable risk factors." R. at 278-80. Reliance on this statistic is flawed, since the appellant in this case actually *has* identifiable risk factors: jet gun injections and shared razors. R. at 214; *see also Hepatitis C Basics: How is hepatitis C spread?*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.hepatitis.va.gov/vahep?page=basics-04-00> (listing "sharing . . . razors, toothbrushes, and other personal health items" as an example of a risk factor). Neither the Board nor the medical examiner raised doubts as to the veracity of the appellant's statements with respect to his receiving inoculations by jet gun injection or sharing razors while hospitalized for hepatitis A in 1974. Because this opinion placed such significant weight on an inaccurate factual premise, it is of "questionable probative value." *See Mariano v. Principi*, 17 Vet.App. 305, 317 (2003) (stating that flawed methodology in a medical report renders the report of "questionable probative value"); *Bielby v. Brown*, 7 Vet.App. 260, 269 (1994) (finding a medical opinion lacking in evidentiary value where it fails to consider the correct facts documented in the claims file).

In addition, both the medical examiner and the Board emphasized the 20-year time span between the appellant's active duty and his diagnosis of hepatitis C. R. at 8, 278. In general, the Board may consider a "significant time delay" between service and diagnosis as a factor arguing against service connection. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). However, the emphasis on the time delay here is unjustified. As noted by the appellant in his testimony and in the medical literature evidence he submitted in 2002, hepatitis C was not known

until 1988. R. at 225, 414; *see also Lewis v. West*, 16 Vet.App. 454 (1999) (table) (taking judicial notice of a 1999 VA news release stating that "the virus was characterized by the name hepatitis C in 1989"). In May 2001, VA published a final rule amending 38 C.F.R. § 4.114, adding a separate diagnostic code for hepatitis C and noting that "the course of these liver diseases is commonly slow and prolonged." 66 Fed. Reg. 29,486, 29,488 (May 31, 2001) (preamble to final rule, 38 C.F.R. § 4.114). VA's own informational web page on hepatitis C states that "[t]he disease generally progresses slowly, over the course of 10 to 40 years." *Hepatitis C Basics: Long-Term Effects*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.hepatitis.va.gov/vahep?page=basics-06-00>. Thus, the Board's emphasis of the 20-year time span between service and diagnosis was misplaced.

Accordingly, the Court finds that the record lacks a competent medical nexus opinion to support the Board's finding that the appellant's hepatitis C was not incurred in or aggravated by service. A remand is the appropriate remedy "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." *Tucker v. West*, 11 Vet.App. 369, 374 (1998). Therefore, the Court will vacate the Board's decision and remand it for the Board to provide an adequate medical opinion and an adequate statement of reasons or bases addressing the appellant's entitlement to service connection for hepatitis C.

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held 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 must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

C. The Appellant's Remaining Arguments

Because this decision directs the Board to obtain an adequate medical opinion, there is no need for the Court to address the appellant's argument that the Board member failed to suggest that

the appellant submit medical nexus evidence. Additionally, as stated above, the appellant is free to submit additional evidence on the remanded matters. *See Kay, supra.*

With respect to the appellant's argument that the Court should attribute great weight to veterans' sworn testimony in accordance with the Federal Rules of Evidence, the Court notes that it is well established that the Federal Rules of Evidence are not binding on the Board or this Court. *Celano v. Peake*, 22 Vet.App. 341, 348 (2009) (citing *Boykin v. Derwinski*, 2 Vet.App. 479, 481 (1992)). Further, "[t]he practice of not adhering strictly to the Federal Rules of Evidence has its counterparts in other administrative agency settings as well." *Flynn v. Brown*, 6 Vet.App. 500, 504 (1994) (citing the Administrative Procedure Act, and cases involving Social Security, Medicare, the Board of Immigration Appeals, the Labor Department's Benefits Review Board, and the Merit Systems Protection Board). The Court concludes that the appellant's argument regarding sworn testimony and the Federal Rules of Evidence is without merit. At the end of this argument, the appellant also states that "the VA also failed in its duty to assist the veteran," but provides no further discussion on this matter. Appellant's Br. at 15. The Court finds this statement too terse to warrant analysis. U.S. VET. APP. R. 28(a)(5); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's July 10, 2006, decision is VACATED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: May 11, 2009

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