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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-2445

JOSEPH E. BARNETT, 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, Joseph E. Barnett, served in the U.S. Navy from August 31, 1951, to September 24, 1970, including service in Korea. Record (R.) at 585-88. He appeals, through counsel, a July 24, 2012, Board of Veterans' Appeals (Board) decision that determined that new and material evidence had not been received to reopen a claim for entitlement to service connection for residuals of exposure to asbestos. R. at 2-19. 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 reverse the July 24, 2012, decision and remand the matter for further proceedings consistent with this decision.

I. ANALYSIS

On appeal, the appellant asserts that the Board clearly erred when it determined that he had not submitted new and material evidence in support of his claim for entitlement to service connection for residuals of asbestos exposure. Appellant's Brief (Br.) at 10-17. Specifically, he contends that both his October 2008 lay statement that a nurse "told [him] that asbestos could definitely have caused [chronic obstructive pulmonary disease (COPD)] or at least made it worse"

and an April 2010 VA compensation and pension (C&P) examination are new and material evidence. *Id.* at 12, 14-16.

The Secretary responds that the Board properly determined that the appellant submitted no new and material evidence and that any reasons or bases error was not prejudicial. Secretary's Br. at 11-17. He also contends that the April 2010 examination could not be new and material evidence, as a notation of pleural capping "may appear on a chest X-ray due to pleural thickening, which . . . was already shown by diagnostic imaging of record prior" to the last final denial of the appellant's claim.[1] *Id.* at 18-19.

As a matter of law, a previously disallowed claim can be reopened upon the submission of new and material evidence. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 460 (2007) (citing 38 U.S.C. §§ 5108, 7105(c)). To satisfy these requirements, the evidence "must be both new and material." *Smith v. West*, 12 Vet.App. 312, 314 (1999).

> New and material evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record a the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

38 C.F.R. § 3.156(a) (2013).

In *Shade v. Shinseki*, the Court held that the regulatory requirement that the new evidence must raise a reasonable possibility of substantiating the claim "must be read as creating a low threshold." 24 Vet.App. 110, 117 (2010). Furthermore, in determining whether this threshold is met, VA should not limit its consideration to whether the newly submitted evidence relates specifically to the reason why the claim was last denied, but instead should ask whether the evidence could reasonably substantiate the claim were the claim to be reopened, either by triggering the

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[1] The Court notes that the Secretary relies on treatise evidence not of record to support this contention. Secretary's Br. at 19. The Court is precluded from considering any material that is not contained in the record. 38 U.S.C. § 7252(b); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990) (holding that review in this Court shall be on the record of proceedings before the Secretary and the Board). Nor is the evidence offered by the Secretary the type of information warranting judicial notice. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 103 (2012) ("The Court may take judicial notice of facts of universal notoriety that are not subject to reasonable dispute."); *Jones v. Shinseki*, 26 Vet.App. 56, 64 (2012) (treatise evidence should generally be weighed by the Board in the first instance). Therefore, the Court may not and will not consider any of the Secretary's arguments premised on extra-record evidence.

Secretary's duty to assist or through consideration of an alternative theory of entitlement. *Id.* at 118. The Court reviews the Board's determination of whether new and material evidence has been submitted under the "clearly erroneous" standard. *Elkins v. West*, 12 Vet.App. 209, 216 (1999).

For the purposes of a claim to reopen, the credibility of the newly submitted evidence, including lay evidence, is generally presumed. *Justus v. Principi*, 3 Vet.App. 510, 513 (1992).[2] Only *after* "evidence is found to be new and material and the case is reopened" should the Board decide the ultimate credibility or weight to be accorded to that evidence. *Id.*

Here, the Board determined that the appellant's October 2008 lay statement "[e]ven if true, . . . is speculative and does not amount to new and material evidence sufficient to reopen the claim" and that he "was told on multiple occasions that he needed medical evidence showing a current lung disorder is related to service, including asbestos exposure." R. at 15. The Board also determined that the October 2008 statement did not trigger the duty to assist under *Shade* and *McLendon v. Nicholson*, 20 Vet.App. 79 (2006), as the appellant "failed to provide a medical opinion from the nurse or nurse practitioner" and "VA provided [him] with another pulmonary VA examination [in April 2010,] during the course of which the examiner provided a medical opinion expressly rejecting the suggestion that [his] current COPD was related to service or his exposure to asbestos during service." R. at 16. The Board concluded that "no further development of the claim is needed," R. at 16, and refused to reopen the claim on the grounds that "reopening a claim only to deny it without providing assistance would be a hollow, technical decision," R. at 16-17 (citing *Shade*, 24 Vet.App. 123-24 (Lance, J. concurring)).

In making these determinations, the Board erred as a matter of law in several respects. First, requiring the appellant to submit medical evidence, rather than accepting his lay evidence as credible, violates both this Court's holding in *Justus* and the Federal Circuit's holding in *Davidson*

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[2] The Court notes that *Justus* applied the definition of new and material evidence set forth in *Colvin v. Derwinski*, 1 Vet.App. 171 (1991), which was overruled by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). Furthermore, that definition was linked to the well-grounded claim standard, which is no longer applicable. *See Gobber v. Derwinski*, 2 Vet.App. 470, 472 (1992) ("'[n]ew and material' evidence is, by its nature, well[ ]grounded, i.e., evidence that, if believed, would provide a 'reasonable possibility' that the outcome would be changed"). However, the issue of whether *Justus* should be revisited in light of these changes need not be decided here. *Compare Shade*, 24 Vet.App. at 121 (the new and material evidence standard requires the new evidence to be considered "in conjunction with evidence already of record"), *with Justus*, 3 Vet.App. at 512 ("all the evidence, both new and old" is to be considered only after a claim is reopened) (emphasis omitted).

v. Shinseki, which "explicitly rejected the view . . . that 'competent medical evidence is required . . . [when] the determinative issue involves either medical etiology or a medical diagnosis," 581 F.3d 1313, 1316 (Fed. Cir. 2009) (quoting *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007)).

Second, by invoking the April 2010 opinion as a rationale for why the October 2008 decision did not trigger the duty to assist, the Board essentially weighed these new pieces of evidence against each other without readjudicating the appellant's claim on the merits. *Cf. Justus*, 3 Vet.App. at 513. In essence, the Board determined that reopening was not warranted, as the proper course of action on reopening would be to provide the appellant with a new medical examination, which the RO already did. The flaw in this reasoning, however, and something clearly illustrated by the parties' briefs, is that the Board precluded the appellant from obtaining meaningful review of its decision. By relying on the April 2010 examination to find that the appellant's October 2008 lay statement was not new and material without reopening the appellant's claim, the Board conducted a weighing of the evidence but precluded the appellant from challenging the adequacy of that evidence as to the merits of his claim. *See Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (holding that the "Court's obligation to ensure the Secretary's compliance with the duty [to assist] does not arise and could serve no purpose when the adjudication of the merits of a claim is barred"). If the Board wished to rely on the April 2010 examination to refute the appellant's October 2008 statement, the way to do so would have been to reopen the claim and decide it on the merits. *But see Bernard v. Brown*, 4 Vet.App. 384, 394 (1993) (holding that when the Board addresses a question not addressed by the RO, "it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby").

The Court holds that the Board clearly erred when it determined that new and material evidence had not been submitted to reopen the appellant's claim for entitlement to service connection. *See Elkins*, 12 Vet.App. at 216. The Court will, therefore, reverse the Board's decision and remand this matter. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (holding that reversal

is the appropriate remedy when the Board's decision is clearly erroneous because the "only permissible view of the evidence is contrary to the Board's decision").

On remand, the Board must determine whether additional development is necessary and, after conducting any such development, readjudicate the appellant's claim on the merits. The Court will not at this time consider the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). The appellant is free, however, to submit these arguments, as well as additional evidence and argument, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

II. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's July 24, 2012, decision is REVERSED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: January 30, 2014

Copies to:
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