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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 09-1496

EDWARD E. CLARK, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

HAGEL, *Judge*: Edward E. Clark appeals through counsel an April 3, 2009, Board of Veterans' Appeals (Board) decision that denied entitlement to VA disability benefits for hepatitis C and a low back disability. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the Board decision. Because the Board failed to consider all relevant evidence and applicable regulations with respect to Mr. Clark's claim for benefits for a low back condition, and because the Board's determinations regarding credibility and VA's satisfaction of the duty to assist are clearly erroneous with respect to Mr. Clark's claim for benefits for hepatitis C, the Court will vacate the April 2009 Board decision and remand the matter for further development, where necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Clark served on active duty in the U.S. Army from June 1972 to June 1975. His June 1972 service entrance examination indicates that he had injured his back the previous October, but that, when he was released from his doctor's care, his doctor told him his "back was [as] good as new." Record (R.) at 2077. No back abnormalities were noted. Service medical records show that, in February 1973, Mr. Clark received treatment for a lumbar spine injury after being hit by a

surfboard. He was treated with heat and rest. In August 1972, Mr. Clark was referred to the troop clinic for an increased temperature.

In July 2002, Mr. Clark sought VA benefits for a low back disability and hepatitis C. In support of his claim, Mr. Clark submitted a letter from his mother. She wrote:

In regards to the Hepatitis C, my research has indicated that shortly after someone is exposed to Hepatitis C, they experience an increase in body temperature (fever) with flu[-]like symptoms.

Six weeks after my son enlisted and was in boot camp, my mother and I visited him at [the] Fort Jackson[, South Carolina,] hospital, along with several dozen young men that seem to be affected by the same thing. We were never told what he had.

Several weeks before his illness, when he was being inoculated for several things that are required by the [A]rmy[,] Gene described to me the condition of the pneumatic injection system used by the military. He described the condition of the apparatus[] as being covered with blood, skin, and pieces of flesh after dozens of soldiers had been inoculated ahead of him. Could this have been the source of initial infection?

Gene has described to me that[, in] the following eighteen months after boot camp, that he had no less than one and no more than three heroin addicts living in the room with him. He would wake up in the middle of the night, stepping on used syringes that were laying on the floor in the dark. Sharing razors in the field with fellow soldiers was a common practice. These are examples [of] how this viral infection is spread.

I would like to set the record straight before the question is asked[:] my son is not now or has ever been an [intravenous] drug user. Since his return to civilian life[,] he has not shared his razor[] or had a blood transfusion.

R. at 1914-15. Mrs. Clark also stated that, during a phone call home from his duty station in Germany, Mr. Clark informed her that he had injured his back.

In November 2002, VA arranged for Mr. Clark to undergo a contract medical examination. The examiner stated that Mr. Clark reported to be in good health with the exception of having been diagnosed with hepatitis C in 1997. The examiner recorded Mr. Clark's statement that he contracted the disease through "occupational exposure" while in service. R. at 1848. The examiner recorded Mr. Clark's symptoms and performed a physical examination in which all systems were normal. The

examiner then noted that diagnostic tests were ordered and were pending. Later in November 2002, the examiner issued an addendum giving a "definitive diagnosis" of hepatitis C. R. at 1847.

In December 2002, a VA regional office denied Mr. Clark's claims, finding that his back condition preexisted service and was not shown to have been permanently aggravated during service and that there was no evidence of in-service incurrence of hepatitis C. Mr. Clark filed a Notice of Disagreement with that decision.

In support of his claim, Mr. Clark resubmitted the letter from his mother and submitted statements from friends related to his back condition. One friend stated that she met Mr. Clark in 1989 and that he had experienced back pain as long as she had known him. A lifelong friend stated that he has seen Mr. Clark's "physical condition deteriorate" over the years since his discharge from service due to his back condition. R. at 1726. Mr. Clark also clarified that his pre-service back injury was to his cervical spine, while his in-service injury was to his lumbar spine.

In July 2004, Mr. Clark testified at a decision review officer hearing. He stated that he twice injured his back in service, once during a vehicle accident during which the jump seat he was riding in "broke loose and slammed into the floor," and once during a 40-kilometer march when he had to carry more equipment than usual due to his unit being shorthanded. R. at 1470-71. Continuously since these injuries, Mr. Clark testified, he has experienced lower back pain and pain radiating down his left leg. He also testified that he has had three back surgeries since service. Mr. Clark testified that his current back symptoms are the same or similar to the symptoms he had during active duty. With respect to his claim for benefits for hepatitis C, Mr. Clark repeated his statements regarding the heroin use of his roommates and his encounters with their dirty needles. He also stated that, on several occasions, he "guarded" heroin addicts who were chained to their beds and that, sometimes, during withdrawals the addicts would scratch and bite him. R. at 1474. Mr. Clark reported that he learned that he had hepatitis C in the mid-1990's after attempting to donate blood. He stated:

Well[,] the way it was explained to me when I had the biopsy of my liver is the levels of fibrosis. If you are a level 1, that means you have a possibility you contracted [hepatitis C] ten years prior. If you're a level two[,] that means 20 years prior[,] and so on and so on. . . . So when I was tested in the late 90's, that was approximately 20 years after my service in the military and I was tested at level 2 fibrosis. And I have never been a heavy drinker, so that damage to my liver was primarily caused by the virus itself.

R. at 1475.

In June 2006, the Board denied Mr. Clark's claim for benefits for hepatitis C and remanded his claim for benefits for a low back disability for a medical examination. On appeal to this Court, the parties filed a joint motion for remand of the Board's June 2006 decision regarding hepatitis C to obtain Mr. Clark's Social Security Administration records, as the July 2004 hearing transcript revealed that he was receiving Social Security disability benefits.

In July 2006, Mr. Clark underwent a VA spine examination. The examiner stated that he reviewed Mr. Clark's claims file. The examiner recorded (1) two pre-service back injuries; (2) three in-service injuries, two of which the examiner noted were not in Mr. Clark's service medical records; and (3) three post-service "surgical interventions," including spine injections. The examiner noted that Mr. Clark had not worked since 1992 due to his back and that he was receiving Social Security disability benefits. After a physical examination, the examiner gave an impression of "[s]tatus post[-] L5-S1 posterior lumbar interbody fusion" with "intermittent radiculopathic pain." R. at 1148. In an addendum, after reviewing x-rays, the examiner opined:

I think his back injury is related to [his] lumbar symptoms[,] so I do not think the cervical spine injury when [he] was 16 is related. However, I am unable to determine definitively if an injury to his lumbar spine in 1972 might be related to his current symptoms. I do not have x-rays to review; however, I think if it was indeed a mild lumbosacral strain that it is probably less likely than not that this injury is the cause of his current lumbar symptoms.

Id.

VA obtained Mr. Clark's extensive Social Security Administration records in July 2008. The record reveals that Mr. Clark receives Social Security disability benefits for a back disability and osteoporosis. He has been considered disabled for Social Security Administration purposes since March 19, 1992.

In October 2008, VA requested another spine examination, apparently under the mistaken belief that one had not yet been provided as directed by the Board's June 2006 remand decision. Later that month, a VA examiner reviewed Mr. Clark's claims file and conducted an examination. The examiner noted two pre-service and three in-service back injuries, as well as three post-service surgical interventions. The examiner recorded Mr. Clark's current complaints and symptoms and

noted that he had been receiving Social Security disability benefits for his condition. The examiner stated:

[T]he patient's back condition is less likely than not related to his in[-]service lumbar strain. The patient is 53 years old. He has had multiple back surgeries. He had an injection beginning in 1983 and surgery in 1989 and 1995. These can certainly be from age[-]related changes or other just normal activities of life. Additionally, the cervical injury of 1971 from wrestling and the automobile accident [of] March 1972 with a diagnosis of lumbosacral strain, although he was asymptomatic on entrance exam[,] it is less likely not contributory to his current back condition.

R. at 61.

In April 2009, the Board issued the decision on appeal. The Board first determined that VA satisfied its duty to assist Mr. Clark, that no other records needed to be obtained, and that no further medical examinations were necessary. With respect to Mr. Clark's claim for benefits for a back condition, the Board first determined, contrary to the regional office, that Mr. Clark was entitled to the presumption of sound condition upon his entry into service. Next, the Board recounted the July 2006 and October 2008 VA spine examinations. Finding the July 2006 examination "uncertain" and "not so specific as to ascertain if it weighs in favor of or against" Mr. Clark's claim, R. at 9-10, the Board relied on the October 2008 VA examination, finding that it "clearly" weighed against Mr. Clark's claim. R. at 10. Because there was no contrary medical evidence in the record, the Board denied Mr. Clark's claim for benefits for a low back disability.

Turning to Mr. Clark's claim for benefits for hepatitis C, the Board acknowledged Mr. Clark's statements regarding his exposure to heroin users and dirty needles, as well as his mother's statement regarding his report of the state of the inoculation equipment and his subsequent hospitalization at Fort Jackson. The Board noted, however, that, because Mr. Clark was not a combat veteran, his statements were not entitled to a presumption of credibility. The Board determined that Mr. Clark's account was "wholly incredible in several particulars." R. at 11. Specifically, the Board stated that Mr. Clark's service medical records were negative for treatment or complaints of being bitten or scratched or sharing razors. The Board then determined that Mr. Clark's and his mother's statements regarding the inoculation procedure were "not credible when evaluated in light of the totality of the record." *Id.* In particular, the Board stated:

It is wholly unworthy of belief that medical services personnel of the U.S. military, in a peacetime environment and engaged in an activity directed towards ensuring the health of its members, would engage in such patently negligent performance of their duties so as to not ensure the hygiene of such immunizations.

R. at 12. The Board continued:

As to [Mr. Clark's] account of "stepping on needles" used by heroin addicts, it is also inherently incredible that [Mr. Clark], presumably knowing of his roommates' predilections, would not have immediately reported to sick call instead of waiting over 20 years in this attempt to gain VA compensation.

[His] allegations are contradicted by his [service medical records] which show that [he] never made a single complaint related to be stuck by an infected needle or scratched or bitten by other servicemen who were heroin addicts.

Id. The Board rejected the November 2002 contract examination because it found it was based on an inaccurate factual premise, namely that Mr. Clark contracted hepatitis C due to occupational exposure during service. Accordingly, the Board denied Mr. Clark's claim.

II. ANALYSIS

A. Low Back Disability

Mr. Clark first argues that the Board provided an inadequate statement of reasons or bases for denying his claim for benefits for a low back disability. Specifically he contends that the Board failed to consider entitlement to benefits based on continuity of symptomatology. The Court agrees.

Although the Board included 38 C.F.R. § 3.303(b) regarding continuity of symptomatology in its recitation of the relevant laws and regulations, it failed to consider that regulation in the context of Mr. Clark's claim, specifically, his statements that his current back symptoms are the same symptoms he has experienced since injuring his back in service. The Secretary argues that the Board's failure to consider relevant evidence is harmless because Mr. Clark "is not competent to opine on the etiology of his low back disability" and because the medical evidence of record weighs against his claim. Secretary's Brief (Br.) at 5. It is clear, however, that Mr. Clark's statements regarding the continuous nature of his back symptoms are not attempts to "opine on the etiology" of his condition, but are simply statements of his first hand experience, to which he is unquestionably

competent to testify. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007) (stating that a veteran is competent to describe observable symptoms, such as pain).

With respect to the medical examinations of record, any reliance by the Secretary on the July 2006 VA examination as "against" Mr. Clark's claim overstates the Board's determination regarding that examination. In fact, the Board expressly found the July 2006 examination report to be "uncertain" and stated that it "was not so specific as to ascertain if it weighs in favor of or against" Mr. Clark's claim. R. at 9-10.

Additionally, whatever the merits of the October 2008 examination report, and whatever negative weight it carries, that evidence must be weighed against the favorable evidence of record. Simply put, an error cannot be harmless where the Board utterly fails to consider evidence favorable to the appellant's claim. Here, the Board acknowledged that Mr. Clark "alleges that his current back disability is related to injuries and/or back complaints from his active duty service period," but determined that "questions of diagnosis and etiology are within the province of trained medical professionals." R. at 8. Not only does this statement not take into account Mr. Clark's statements regarding the continuous nature of his symptoms, but also, to the extent it is *meant* to be a discussion of such statements, it fails because, as stated above, statements regarding continuous symptoms are not opinions on etiology and are well within the competence of the claimant to describe. *Jandreau*, 492 F.3d at 1376. Remand is therefore required.¹ *See* 38 U.S.C. § 7104(a) (the Board is required to consider all evidence of record and to consider, and discuss in its decision, all "applicable" provisions of law and regulation); *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Although the Court is remanding Mr. Clark's claim, it will nevertheless address Mr. Clark's remaining argument to clarify the issues to be discussed by the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009). Mr. Clark contends that the Board erred in finding that VA satisfied its duty to assist because VA improperly limited the scope of the October 2008 examination, thereby resulting in an inadequate examination report. Specifically, Mr. Clark asserts that VA erroneously highlighted only his pre-service injuries, "effectively limit[ing] the examiner's analysis

¹ The Court also notes that the Board's decision on this claim does not consider or discuss Mr. Clark's extensive Social Security records. Given that Mr. Clark receives Social Security disability benefits for a back condition, these records are likely highly relevant, and the Board, on remand, should expressly consider them.

to the issue of whether his current back problems were related to these pre-service injuries," and failed to inform the examiner of "his prior medical history of chronic and continuous back problems following his in-service injuries." Appellant's Br. at 22. Mr. Clark's argument is unpersuasive.

The VA examination inquiry reads:

[T]he veteran is to be afforded a VA orthopedic examination of the lumbar spine to determine the nature and etiology of any low back condition. The examining physician is requested to review pertinent documents in the claims file, including the service medical records, in detail, and to render an opinion as to whether the veteran[']s low back injury, if currently diagnosed, is of in-service origin or otherwise related thereto—i.e., whether any noted low back disorder was incurred in, or aggravated by[,] any incident of active military service. Specifically, the examiner should render an opinion as to whether the low back injury, if currently diagnosed, is related to:

1. a 1971 wrestling cervical injury noted on [the] veteran[']s military entrance exam that occurred prior to service[; or]
2. [a] [M]arch 1972 automobile accident which resulted in a lumbosacral strain, also noted on the veteran[']s military entrance examination.

R. at 57-58. It is clear, when read as a whole, that the examiner was asked to consider Mr. Clark's entire medical history, including his pre-service injuries and service medical records, as contained in his claims file, and to render an opinion regarding the nature, severity, and etiology of any low back condition diagnosed. There is no evidence that VA sought to obtain evidence in an impartial or biased manner, nor does the examination inquiry constrain the scope of the opinion sought. *See Austin v. Brown*, 6 Vet.App. 547, 552 (1994) ("[B]asic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner," and this requirement applies to the solicitation of medical opinions); *Bielby v. Brown*, 7 Vet.App. 260, 269 (1994) (finding improper the Board's reliance on an independent medical opinion where the Board constrained the scope of inquiry in the engagement letter, thereby "limiting [the examiner's] investigation and tainting the results").

To the extent that Mr. Clark objects to the October 2008 medical examination report itself, the Court finds no error in the Board's reliance on that report. The examiner stated that he reviewed Mr. Clark's claims file, recorded Mr. Clark's medical history—including pre-service, in-service, and

post-service injuries and treatment—performed a physical examination, and provided a detailed opinion supported by adequate rationale. *See Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991).

B. Hepatitis C

Service connection for VA disability compensation purposes is established when the record before the Secretary contains lay or medical evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); 38 C.F.R. § 3.303 (2011).

There is no dispute that Mr. Clark has a current diagnosis of hepatitis C, satisfying the first requirement of section 1110.

The Board essentially denied the existence of the second element—in-service incurrence—because it found that Mrs. Clark's statement regarding Mr. Clark's description of the *circumstances* of his inoculation was not credible. The Board did so because it simply could not fathom that the U.S. military would act in such a negligent manner. This conclusion is devoid of any actual analysis and is insufficient to support a finding of incredibility. *See* 38 U.S.C. § 7261(a)(4); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). At no time did the Board discuss military procedures for inoculating recruits during the period at issue, nor did the Board consider that such "negligence" is only negligent in hindsight: that is, what we today would consider a dangerous and unsafe practice as a result of the relatively recent understanding of blood borne diseases might have been standard practice at the time of Mr. Clark's service. *See* VA Fast Letter 04-13 at 1 (June 29, 2004) (regarding the blood-borne nature of hepatitis C).

In any event, it is the inoculation itself that constitutes the in-service incident required under 38 U.S.C. § 1110, and the precise circumstances of Mr. Clark's inoculation are irrelevant in light of VA's acceptance, however equivocal, that hepatitis C can be spread through the use of a pneumatic injection gun. *See* VA Fast Letter 04-13 at 2 (conceding that it is "biologically plausible" that hepatitis C infection can be spread through the use of pneumatic injection guns). Because there is no other evidence in the record of proceedings that contradicts Mrs. Clark's statements regarding Mr.

Clark's report of the conditions of his inoculations, the Board's finding that Mrs. Clark's statements were not credible will be reversed. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (holding that "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision").

The Board also found Mr. Clark incredible with respect to his statement regarding exposure to dirty needles used by heroin addicts and to being bitten and scratched by heroin addicts because of a lack of documentation in service medical records that he ever voiced his concerns about these events or sought treatment for bites or scratches. Although the Board characterized this as evidence weighing *against* Mr. Clark's credibility and, ultimately, his claim, it is actually the absence of evidence, which is not the same as negative evidence. *See Kahana v. Shinseki*, ___ Vet.App. ___, ___ (June 15, 2011), 2011 WL 2349788 at *7; *McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006).

The Board also failed to ensure that all relevant records were obtained, particularly records that might support Mr. Clark's credibility regarding the incurrence of hepatitis C as a result of his military service. Mrs. Clark's letter expressly stated that she visited her son at the Fort Jackson Army hospital approximately six weeks after his induction into service where he was being treated for an unknown condition that included fever and flu-like symptoms. Service medical records reveal that Mr. Clark was referred for further treatment for a fever in August 1972. The Court notes that VA's own Adjudication Procedure Manual requires that VA "[c]onsider the following factors when determining service connection for viral hepatitis: the incubation period for viral hepatitis is from 15 to 50 days[(i.e., 2-7 weeks);] the incubation period for homologous serum hepatitis is 50 to 180 days [(i.e., 7 weeks to 6 months)] following administration of vaccines or transfusions." M21-1MR, Part III, subpt. iv, ch. 4, § I(33)(f).

As Mr. Clark argues, Mrs. Clark's letter put VA on notice that there might be additional relevant service medical records that had not been obtained. The record does not contain any records of the Fort Jackson hospitalization nor does the record contain any attempts by VA to obtain records of this hospitalization. Assuming these records show what Mr. Clark claims, had VA obtained them, they are relevant to the question of his credibility. It was clear error for the Board to find that VA satisfied its duty to assist without discussing the relevance and whereabouts of these records. *See*

Nolen v. Gober, 14 Vet.App. 183, 184 (2000) (holding that the Court reviews the Board's determination that VA satisfied its duty to assist under the "clearly erroneous" standard of review).

With respect to the third element of section 1110, nexus between Mr. Clark's in-service inoculations and his current diagnosis of hepatitis C, the Board rejected the only potentially relevant medical evidence of record, the November 2002 contract medical examination, because it determined that it was based on an inaccurate factual premise. Although Mr. Clark argues that the Board's rejection of that opinion was improper, any error in this regard is harmless because the November 2002 examination report does not speak to nexus, assuming as it does the incurrence of hepatitis C in service. *See Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"). That examination report simply provides a "definitive diagnosis" of hepatitis C, a matter that is not in dispute.

This does not end the inquiry, however. VA's own guidance on this issue provides: "It is essential that the report upon which the determination of service connection is made includes 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." VA Fast Letter 04-13 at 2. The record contains no medical examination report that considers the relationship between Mr. Clark's inoculation by pneumatic injection and his hepatitis C. This is likely because, having incorrectly found Mr. Clark and his mother to be incredible, the Board determined that no other assistance was necessary. Given the erroneous nature of the Board's credibility determinations, outlined above, the Board also necessarily erred in not providing a medical examination to consider nexus. *See* 38 U.S.C. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4)(i) (2011).

The Board also ignored VA's own evidence of a possible nexus between Mr. Clark's in-service inoculations via pneumatic injection gun and his current diagnosis of hepatitis C: the VA Fast Letter that states that it is "biologically plausible" that hepatitis C may be spread by air gun inoculations. VA Fast Letter 04-13 at 2.

In light of these numerous and obvious errors, the Court will vacate the Board's decision denying entitlement to benefits for hepatitis C and remand the matter for a new VA medical examination that expressly considers the relationship, if any, between Mr. Clark's in-service

inoculation and his hepatitis C. On remand, Mr. Clark is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board 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), and that the Board has a duty to support all of its findings with an adequate statement of reasons or bases, 38 U.S.C. § 7104(d)(1).

Finally, Mr. Clark contends that the Board erred in not discussing his Social Security records in conjunction with this claim, as the Board was directed to do in the parties' September 2007 joint motion for remand. The Court concludes that any error in this regard is necessarily harmless, as it is not disputed that Mr. Clark receives Social Security disability benefits for his back disability, not for hepatitis C. See *Conway*, 353 F.3d at 1374; see also 38 U.S.C. § 7261(b)(2).

III. CONCLUSION

Upon consideration of the foregoing, the April 3, 2009, Board decision is VACATED and the matter is REMANDED for further development, where necessary, and readjudication consistent with this decision.

DATED: July 8, 2011

Copies to:

Michelle D. Powers, Esq.

VA General Counsel (027)