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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-3309

MARIA COLLAZO, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KASOLD, *Judge*.

MEMORANDUM DECISION

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

KASOLD, *Judge*: Veteran Maria Collazo appeals through counsel that part of an August 12, 2014, decision of the Board of Veterans' Appeals (Board) that denied benefits for hepatitis C. Ms. Collazo argues that the Board erred by (1) relying on an inadequate medical examination report and providing inadequate reasons and bases for finding the examination report adequate for Board decision and (2) failing to resolve reasonable doubt in her favor. The Secretary disputes these arguments. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons discussed below, that part of the Board decision on appeal will be affirmed.

In support of her first argument, Ms. Collazo contends that an October 2012 medical report was inadequate for Board decision because the examiner did not follow the guidance set forth in VA Training Letter 01-02. Ms. Collazo notes that the training letter states that sharing intravenous drug needles with others infected with hepatitis C—not simply intravenous drug use—is a primary risk factor for contracting hepatitis C. She contends that the 2012 examiner considered her drug use without considering whether she shared needles with infected drug users. Ms. Collazo bases her contention on (1) a notation by the examiner that intravenous drug use is a primary risk factor, without further notation that sharing needles with infected drug users is the essential issue, and (2) the analysis of the examiner that Ms. Collazo's multiple periods of drug use presented a greater

risk of her contracting hepatitis C than the single tattoo she acquired while in service. Otherwise stated, she contends the examiner failed to appreciate that the use of contaminated needles was the actual risk factor for hepatitis C. She further notes that there is no record evidence that she ever shared needles with infected drug users.

Ms. Collazo fails to demonstrate Board error because, inter alia, she fails to demonstrate the applicability of Training Letter 01-02 to medical examiners. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Secretary asserts that the training letter is for rating specialists, and Ms. Collazo fails to rebut that assertion. *Id.* Assuming arguendo that Training Letter 01-02 has any applicability to medical examiners, Ms. Collazo nevertheless fails to demonstrate that the examiner did not comply with it. *See Hilkert, supra*. The training letter itself refers several times to intravenous drug use as a primary risk factor, without further noting that sharing needles with infected users is the actual risk factor.¹ Moreover, medical examiners are presumed competent in the absence of clear evidence to the contrary. *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (holding that, in the absence of clear evidence to the contrary, medical examiners are presumed competent). Succinctly stated, the fact that the examiner listed intravenous drug use as a primary risk factor without further noting the use of contaminated needles as the actual risk fails to demonstrate that the examiner did not consider the risk of contaminated needle use, and Ms. Collazo otherwise fails to demonstrate that the examiner lacked the expertise to render the opinion he rendered. *See Sickels* and *Hilkert*, both *supra*.

Moreover, the Board is the adjudicator, not the medical examiner. *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). Reading the Board's statement as a whole, *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases "as a whole"), the Board noted that Ms. Collazo previously

¹ Ms. Collazo did not submit a copy of the training letter, but the Court takes judicial notice of what it states. *See Smith v. Derwinski*, 1 Vet. App. 235, 238 (1991) ("Courts may take judicial notice of facts not subject to reasonable dispute.")

admitted to sharing needles while taking drugs intravenously. Although this is not evidence that the needles were contaminated, Ms. Collazo fails to demonstrate clear error in the Board's weighing of the repeated drug use and sharing of needles, along with the other record evidence including the medical examiner's opinion of risk factors, when rendering its decision denying service connection for hepatitis C. To this end, it is further noted that service connection cannot be predicated on speculation, and Ms. Collazo fails to identify any record evidence beyond speculation that her hepatitis C was contracted while she was in service and received her one tattoo or underwent dental work. *See Hilkert, supra*; 38 C.F.R. § 3.102 (2015) (Board may not award benefits when the award would be based upon pure speculation); *see also McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006) (speculative medical opinion as to causation cannot establish a medical nexus to service).

As to the Board's statement of reasons and bases for assigning weight to the October 2012 examination report, the Board did so in the context of medical examiners being presumed competent to render the medical decisions they render, as well as the Board's determination, when read as a whole, that the October 2012 report provided a definitive opinion addressing both the drug use and the tattoo. The Board also addressed Ms. Collazo's assertion that she might have contracted HIV from the dental services she had while in service. The Board noted that this assertion was speculative and further found that Ms. Collazo did not assert that she observed unsanitary conditions associated with her dental care. In sum, the Board addressed Ms. Collazo's thoughts regarding how she might have contracted hepatitis C and found that the evidence did not support a nexus to service and that the weight of the evidence was against her claim for benefits. The Board's explanation in support of these findings is understandable and facilitative of judicial review. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"); *Janssen, supra*.

In support of her second argument, Ms. Collazo contends that the nexus evidence was in equipoise because (1) the record contains the July 2011 medical opinion that Ms. Collazo's hepatitis C possibly was contracted from in-service tattoo or dental work and (2) the October 2012 report did not correctly consider the risk factors. With regard to the July 2011 opinion, Ms. Collazo notes that the Board discounted that opinion because it did not reflect consideration of her drug use, and she

contends this was improper because the only other report to analyze *both* the drug use and the tattoo risk was inadequate for Board decision, to wit: the October 2012 medical report. As noted above, however, Ms. Collazo fails to demonstrate that the October 2012 report was inadequate for Board decision. Moreover, the Board discounted the July 2011 opinion because it was speculative, which is a proper basis for discounting the opinion. *See McLendon* and 38 C.F.R. § 3.102, both *supra*; *cf. Bloom v. West*, 12 Vet.App. 187, 187 (1999) (concluding that an opinion phrased in terms of "could" was speculative without a clear theory of etiology).

Succinctly stated, Ms. Collazo fails to demonstrate that the Board clearly erred by determining that the preponderance of the evidence weighed against the claim such that the benefit of the doubt rule was not for application. *See Hilkert, supra*; *see also Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) (acknowledging that the benefit of the doubt rule does not apply to "pure speculation"); *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (explaining that the benefit of the doubt rule is not applicable when the Board determines that the preponderance of the evidence weighs for or against a claim).

Upon consideration of the foregoing, that part of the August 12, 2014, Board decision on appeal is AFFIRMED.

DATED: January 29, 2016

Copies to:

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