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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 08-0168

JOSE A. NEGRON-JIMENEZ, APPELLANT,

v.

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

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: U.S. Army veteran Jose A. Negron-Jimenez appeals pro se from a December 7, 2007, Board of Veterans' Appeals (Board) decision that denied service connection for a skin disorder, to include as due to an undiagnosed illness, and for post-traumatic stress disorder (PTSD). The Board also remanded claims for (1) a psychiatric disorder other than PTSD, to include as due to an undiagnosed illness; (2) a respiratory disorder, to include as due to an undiagnosed illness; and (3) a cardiovascular disorder, to include as due to an undiagnosed illness. The remanded claims are not before this Court on review because they are not the subject of a final decision by the Board. *See Howard v. Gober*, 220 F.3d 1341 (Fed. Cir. 2000).

This 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 affirm in part and set aside in part the Board's December 2007 determination and remand a matter for further proceedings consistent with this decision.

The Court construes the appellant's informal brief to contain two principal arguments. He asserts that the Board decided his appeal without properly considering all the facts pertaining to his present health issues. He states that his condition "has been aggravated," although it is not clear

whether he intends to allege aggravation of a preexisting condition. *See* Appellant's Informal Brief at 2. Additionally, he complains that the Board failed to obtain "subsequent treatment documents." *Id.* at 1.

The appellant served on active duty from January 1958 to January 1960. He also served in the National Guard from January 3, 1991, to June 20, 1991, including service in Southwest Asia during the Persian Gulf War. He asserts that his present disabilities have their origin in his service in Southwest Asia.

I. ANALYSIS

As a general matter, "[d]ecisions of the Board shall be based on the entire record in the proceedings and upon consideration of all evidence and material of record and applicable provisions of law and regulation." 38 U.S.C. § 7104(a); *see also Schrafath v. Derwinski*, 1 Vet.App. 589, 593 (1991). The Board must also include in its decision 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. That 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, 56-57 (1990).

A. Duty To Assist

The Secretary is required to make reasonable efforts to assist a claimant in obtaining the evidence and information necessary to substantiate the claim unless no reasonable possibility exists that such assistance would aid in substantiating the claim. *See* 38 U.S.C. § 5103A(a)(1)-(2). In a claim for compensation, such as this case, this assistance includes obtaining relevant records including the service medical records (SMRs), and "[r]ecords of relevant medical treatment at Department health care facilities . . . if the claimant furnishes information sufficient to locate those records." 38 U.S.C. § 5103A(c)(2). In the decision here on appeal, the Board found that "all necessary development has been accomplished." Record (R.) at 5.

The duty to assist pertains to specifically identified documents that are facially relevant and material to the claim. *See Counts v. Brown*, 6 Vet.App. 473, 476 (1994). The Board noted that "neither the appellant nor his . . . representative has identified, and the record does not otherwise

indicate, any additional evidence that is necessary for a fair adjudication of the claim that has not been obtained." R. at 5. Because the appellant points to no specific missing documents from any particular treatment, he has essentially failed to identify any relevant documentary evidence not already obtained that he believes might affect his case.

B. PTSD Claim

This Court has set forth particular requirements to obtain service connection for PTSD. The veteran must demonstrate three elements: (1) A current, clear medical diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between current symptomatology and the specific claimed in-service stressor. *Cohen v. Brown*, 10 Vet.App. 128, 138 (1997); *see also* 38 C.F.R. § 3.304(f) (2009).

In the decision here on appeal, the Board found that "the preponderance of the evidence establishes that the veteran does not have PTSD." R. at 11. The Board elaborated on the evidence of record concerning PTSD as follows:

> While PTSD was diagnosed during service in 1991, this diagnosis was subsequently overruled on further examination. This finding was noted to have been reached after reviewing the veteran's records and examining him. Thus, the prior finding of PTSD has little probative value. Further, the most persuasive evidence in this case is from the March 1997 VA examiner who expressly examined the veteran for PTSD, and upon review of the claims folder and interview of the veteran, found that the veteran did not have PTSD. This examiner's report fully discussed the veteran's history. Therefore, that examination and the findings of the examiner have greater probative value in deciding this claim. Private psychological testing in October 2003 further showed that the veteran suffered from an anxiety disorder, and not PTSD.

Id. The Court's review supports the Board's summary of the evidence. The Court also views the foregoing explanation as a satisfactory statement of reasons and bases.

C. Aggravation

The intent behind the appellant's statements that his condition has been "aggravated" is not clear. There are two separate legal doctrines potentially implicated. *See* 38 U.S.C. § 1111; *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991); *see also* 38 U.S.C. § 1153.

The appellant does not specify which "condition has been aggravated." He might be referring to his PTSD claim, his skin condition claim, or even one of the conditions underlying the remanded

claims. To the extent he intends to raise an argument under the presumption of soundness or the presumption of aggravation in connection with his PTSD, the argument is precluded by the Board's finding, which the Court affirms, that he does not currently have PTSD. Because of this finding, no aggravation analysis could make a difference in the service connection determination. Moreover, because the issue was not raised below on the record, the Board did not err in failing to consider it. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) ("[T]he Board is required to consider all issues raised either by the claimant or by the evidence of record.").

If the appellant intended to assert an argument under the presumption of soundness or the presumption of aggravation, he does so for the first time on appeal. While the Court has discretion to evaluate an argument first raised on appeal, *see Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000), "[t]he mere assertion of a new theory on appeal . . . does not automatically warrant [] this Court's consideration . . . ." *Goodwin v. Peake*, 22 Vet.App. 128, 139 (2008). Because of the vague allegations and an undeveloped record, the Court will not address these allegations of aggravation. If the appellant believes that the facts of his case raise an issue under either or both of these legal provisions, he may advance those contentions on remand.

D. Claim for Skin Condition

"Service connection may be established for a Persian Gulf veteran who exhibits objective indications of chronic disability resulting from an undiagnosed illness [that] became manifest either during [the Persian Gulf War] or to a degree of 10 percent or more not later than December 31, 2001." R. at 6; *see also* 38 U.S.C. § 1117; 38 C.F.R. § 3.317 (2009). Service connection is indicated if "[b]y history, physical examination *and* laboratory tests," the disability "cannot be attributed to any known *clinical diagnosis*." 38 C.F.R. § 3.317(a)(1)(ii) (emphasis added).

A "diagnosis" is defined as "determination of the nature of a case of disease." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 514 (31st ed. 2007) [hereinafter [DORLAND'S]]. A "clinical diagnosis" is a "diagnosis based on signs, symptoms, and laboratory findings during life." *Id.* This definition is in accord with the requirements of the above-quoted regulation.

The Board noted that the record contained a plethora of purported diagnoses of the appellant's skin condition. *See* R. at 8. In March 1997 a VA examiner diagnosed it to be xerosis, which is "abnormal dryness of the . . . skin." DORLAND'S at 2115; *see* R. at 327. The appellant's VA

outpatient records from 1998 and 1999 contain diagnoses of sebhorrea dermatosis and dermatitis. *See* Secretary's Brief at 6; R. at 398-99, 402, 405, 412-16. The former condition is defined as "any skin disease, especially *not characterized* by inflammation," which results in excessive secretions of the subaceous glands. DORLAND'S at 505, 1710 (emphasis added). The latter condition is defined as "inflammation of the skin." DORLAND'S at 500. September 2005 VA clinical notes refer to the appellant's condition as neurodermatitis, which is a "name given to various types of eczema presumed to be cutaneous responses to prolonged scratching . . . to relieve [itching]. Some authorities consider this a psychogenic condition." DORLAND'S at 1283. In May 2006 VA physicians found a comedone "with suspected superimposed fungal infection." R. at 8. A comedone is another word for comedo, which is "[a] noninflammatory lesion of acne vulgaris." DORLAND'S at 397. Finally, in August 2006 there was a diagnosis of atopic dermatitis. Atopy is "a genetic predisposition toward . . . hypersensitivity reactions against common environmental antigens." DORLAND'S at 175.

These medical notes and opinions constitute a cacophony of inconsistent and even contradictory assessments. There is one assessment that characterizes the appellant's condition as dry skin and another that describes a condition of excessive secretions. There is one assessment that identifies the condition as not characterized by inflammation and others that diagnose it as an inflammation. Another advances the possibility that the appellant's skin condition is some sort of allergic reaction and still another that it is the result of scratching, perhaps with the suggestion that it is all in his head.

Nevertheless, the Board concluded that "[t]he clinical diagnoses assigned for the veteran's symptoms . . . remove this disability from the purview of the 'undiagnosed illness' presumptive provisions." R. at 9. The Board makes no explanation or attempt to reconcile these widely varying medical assessments. Rather, the Board and the Secretary seem to assume that there must be a clinical diagnosis somewhere in this thicket of confusion.

It is not clear to the Court, however, that the medical evidence contains a diagnosis, much less a clinical diagnosis. Several of the labels placed on the appellant's skin condition are merely a medical description of the symptoms and not a determination of the disease that caused them. Moreover, there is nothing in the record to indicate that there were any laboratory findings to confirm the diagnostic impressions of the VA physicians or to rule out any other possible explanations. So

far as the record reveals, the appellant has not been tested for allergies or for a fungal infection, which are the only suggestions of an underlying condition that might explain the symptoms of his skin condition. Such laboratory confirmation is, by definition, a fundamental requirement of a "clinical diagnosis." Without such confirmatory testing, the medical assessments constitute preliminary hypotheses at best and ad hoc guesses at worst.

Therefore, the Court will remand the issue of the skin condition for a more adequate statement of reasons and bases, which will probably require additional medical development. The Board must consider all evidence of record and adhere to the basic definition of a clinical diagnosis.

On remand, the appellant will be free to submit additional evidence and argument in support of his claim for a skin condition and the Board is required to consider any such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). A final Board decision following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court upon the filing of a new Notice of Appeal with the Court not later than 120 days after the date on which notice of the Board's new final decision is mailed to the appellant. *Marsh v. West*, 11 Vet.App. 468, 472 (1998).

II. CONCLUSION

Upon consideration of the foregoing, the Court AFFIRMS the Board's determination that the appellant is not entitled to service connection for PTSD, SETS ASIDE the Board's determination that the appellant is not entitled to service connection for a skin condition, to include as due to undiagnosed illness, and REMANDS the skin disorder matter for further proceedings consistent with this decision.

DATED: October 21, 2009

Copies to:

Jose A. Negron-Jimenez

VA General Counsel (027)