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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-2206

JIMMIE G. BRAND, 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, Jimmie G. Brand, through counsel, appeals a July 19, 2007, Board of Veterans' Appeals (Board) decision that denied disability compensation for a headache disorder, cysts, and undiagnosed illnesses manifested by memory loss and back pain. Record (R.) at 1-18. A claim for chronic fatigue syndrome was remanded, thus that claim is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). The appellant raises no allegation of error as to the back claim and that claim is deemed abandoned. *See Bucklinger v. Brown*, 5 Vet.App. 435 (1993). Both parties filed briefs and the appellant submitted a reply brief. 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, in part, and affirm, in part, the July 19, 2007, Board decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from September 1990 through May 1991, with service during Operation Desert Storm from November 8, 1990, to April 12, 1991. R. at 20, 162. He also had periodic inactive and active duty for training from December 1984 to

September 1990, and from May 1991 to October 1992. R. at 2. Service medical records (SMRs) are silent as to any headaches or cysts; however, as the Board notes in its decision "only partial records from this period are in the claims file" and "[t]here are also outstanding records from the veteran's period of National Guard service in 1985." R. at 7.

In March 1995, the appellant filed a claim seeking disability compensation for "consistent symptoms of Persian Gulf Syndrome" manifested by "chronic fatigue, headaches, temporary loss of memory, pain in joints, and [cysts] all over." R. at 76. In a May 1995 VA medical examination, the appellant was diagnosed having migraine headaches, ganglion cysts¹ on both wrists, and a lipoma² on the chest wall. R. at 88.

The appellant submitted a statement claiming that his headaches and cysts began during his military service in the Persian Gulf. R. at 175-77. Additionally, he submitted statements from John Fogg and Karl Jefferson, who served with him in the Persian Gulf. R. at 106-07. Mr. Fogg stated that during service the appellant frequently complained of "cloudy-like" headaches and developed cysts on the top of his wrists. R. at 106. Additionally, he noted that the appellant continued to suffer from headaches and cysts after his discharge from the service. *Id.* Mr. Jefferson stated that during service, the appellant frequently went on sick call because of headaches and cysts, which Mr. Jefferson described as "balls" on the appellant's hands. R. at 107. The appellant also submitted a statement from his niece, Nikki McElveen, who noted that the appellant complained of frequent headaches after his military discharge. R. at 108.

During an October 1997 VA neurological and mental disorders examination, the VA examiner observed that the appellant manifested "some indications of poor memory" with "slightly deficient" concentration. R. at 123. In September 1999, a VA regional office (RO) denied the appellant's claims for disability compensation for headaches, memory loss, cysts, and joint pain. R. at 162.

In a May 2001 hearing, the appellant testified that his headaches began in the fall of 1990 shortly before he went to the Persian Gulf. He stated that the headaches began during basic training

¹ Ganglion cysts are cysts that are usually attached to a tendon sheath in the hand, wrist or foot. STEDMAN'S MEDICAL DICTIONARY 726 (27th ed. 2000) [hereinafter STEDMAN'S].

² Lipomas are benign tumors composed of fatty tissue. STEDMAN'S at 28, 1020.

when he was "accidentally injected with a vial of atropine." R. at 193. His testified that his headaches continued and increased in frequency and severity during his Persian Gulf service. R. at 193-94. He also testified that cysts appeared on various parts of his body while he was in the Persian Gulf. R. at 198. He indicated that he received medical treatment for both conditions, and that occasionally he was placed on light duty and prescribed bed rest for his headaches. R. at 193-96, 198-200.

In April 2002, the Board denied the appellant's claims. R. at 282. The appellant appealed that Board decision to the Court, and in January 2003, the Court granted a joint motion filed by the parties to vacate and remand the claims to the Board for further adjudication R. at 372.

In March 2004, the Board remanded the matters to the RO, directing the RO to obtain a VA medical examination "to determine the nature and extent of any headaches, memory loss, and cysts." R. at 401. Further, the Board ordered the VA examiner to "offer an opinion as to whether it is at least as likely as not . . . that the veteran has headaches and cysts that are attributable to service, including his service in the Persian Gulf." *Id.* With regard to the appellant's memory loss, the Board directed the examiner to indicate whether appellant's memory loss was "attributable to an undiagnosed illness as a result of his service in the Persian Gulf." *Id.*

In August 2006, the appellant underwent a "mental disorders" examination to evaluate his chronic fatigue. The examiner noted that the appellant had "difficulty with recent memory, which has been a consistent complaint over several years." R. at 585. In February 2007, the appellant underwent a spine examination. R. at 718-21. The VA examiner diagnosed the appellant as having degenerative joint disease of the lumbar spine, atypical migraines, ganglion cysts on the hands, and lipomas on the left arm, right forearm and abdomen. R. at 720. The VA examiner opined that "[a]lthough the veteran reports that his ganglion cysts and lipomas and headaches started in the early 1990s soon after his return from [the] Gulf War, in my opinion, there is no causal relationship between [the] Gulf War and these conditions." R. at 720.

In the July 2007 Board decision here on appeal, the Board denied the appellant's claims. R. at 1-16.

II. ANALYSIS

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-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), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). "Lay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection.'" *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (quoting *Layno v. Brown*, 6 Vet.App. 465, 469 (1994)); *Washington v. Nicholson*, 21 Vet.App. 191, 195 (2007) (holding that, "[a]s a layperson, the appellant is competent to provide information regarding visible, or otherwise observable, symptoms of disability"). Further, lay evidence may be competent to show continuity of symptomatology. *Barr, supra*; *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997). Additionally, "[l]ay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional." *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (footnote omitted).

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 is required to consider all evidence of record and to discuss in its decision all "potentially applicable" provisions of law and regulation. 38 U.S.C. § 7104(a); *Schafrath v. Derwinski*, 1 Vet.App. 589, 592-93 (1991). 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; *see also Washington*, 19 Vet.App. at 367-68 (stating that it is the Board's responsibility "to assess the credibility of, and weight to be given to, the evidence"). When a veteran's records are presumed lost or destroyed, the Board is "under a heightened duty to consider and discuss the evidence of record and supply well-reasoned bases for its decision as a consequence of the appellant's missing SMRs." *Washington*, 19 Vet.App. at 371; *Cuevas v. Principi*, 3 Vet.App. 542, 548 (1992) (holding that the Board's duty to assist a claimant in developing his claim is heightened in cases in which the appellant's SMRs are lost or destroyed).

A. Inadequate Medical Examination

The appellant argues that the Board erred in relying upon the February 2006 VA medical opinion to deny his disability compensation claims for headache and cyst disabilities. Appellant's Brief (Br.) at 10-13. Essentially, he contends that the February 2006 opinion was inadequate because it was based on an inaccurate factual basis regarding the appellant's medical history. Appellant's Br. at 9. Without responding to the appellant's assertions, the Secretary argues that the "Board appropriately attached great probative weight to the sole VA examination of record that addressed causation, rejecting nexus." Secretary's Br. at 11.

Under 38 U.S.C. § 5103A, the Secretary's duty to assist includes, in appropriate cases, the duty to conduct a thorough and contemporaneous medical examination. *See Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). A medical opinion is considered adequate "where it is based on consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). On the other hand, a medical opinion based on an inaccurate factual premise is of no probative value. *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993). The prior medical history that an examiner should consider includes the veteran's lay assertions regarding the continuity of symptomatology. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (stating that a medical examination was inadequate where it failed to consider lay evidence regarding the

frequency and duration of the veteran's symptomatology of a psychiatric disorder); 38 C.F.R. § 3.159(c)(4) (2009) (providing that a medical examination must be "based upon a review of the evidence of record").

The Court agrees with the appellant that the February 2006 VA examination was inadequate. The February 2006 examiner opined that because the appellant reported that his ganglion cysts and headaches began *after* he returned from the Persian Gulf, there was no causal relationship between the appellant's Persian Gulf service and his ganglion cysts or headaches. R. at 720. However, this statement is inaccurate. With regard to the appellant's cysts, the record indicates that the appellant alleged that his cysts began *during* his service in the Persian Gulf and not *after* his return from the Persian Gulf. *Id.*

Additionally, the parties agree that the appellant never alleged that his headaches began *after* his service in the Persian Gulf. *See* Appellant's Br. at 11-12; Secretary's Br. at 14.³ Because the VA examiner's 2006 opinion is based on an inaccurate factual premise concerning the appellant's medical history of his headache and cyst disabilities, his opinion is of "questionable probative value." *See Mariano v. Principi*, 17 Vet.App. 305, 317 (2003) (stating that flawed methodology in creating a medical report renders report of "questionable probative value"); *Bielby v. Brown*, 7 Vet.App. 260, 269 (1994) (finding that a medical opinion is of no evidentiary value where it fails to consider the

³ The Court is aware that the parties disagree as to whether the appellant alleged that his headaches began in the winter of 1990-91, during his service in the Persian Gulf, or in the fall of 1990, shortly after he began active duty. For example, the appellant's brief states that he "*never* reported that his headaches began in the Gulf War. . . . Mr. Brand has consistently stated that his headaches began before he went to the Gulf and got worse while he was in the Gulf." Appellant's Reply Br. at 5 (emphasis added). The Secretary counters that appellant "*has always* alleged since his claims inception that his headaches . . . began during his Persian Gulf service." Secretary's Br. at 14 (emphasis added).

In fact, the record discloses that Mr. Brand has stated both that his headaches began shortly *before* he went to the Persian Gulf, and he has also stated that his headaches began *while* he was in the Persian Gulf. *See*, e.g., R. at 175, 193. The Court reminds both counsel that they are deemed officers of the Court and are responsible for the representations they make to the Court. As such, the parties have a duty of candor to the Court that extends to the representations they make to the Court about the facts set forth in the record.

correct facts as documented in the veteran's claims file). The Board erred when it relied on the VA examiner's 2006 opinion to deny the appellant's claims for compensation for headaches and cysts.

B. Adequacy of the Board's Reasons or Bases for the Denial of Service Connection

The appellant next argues that the Board's reasons or bases are inadequate because the Board failed to analyze the credibility and probative value of the lay testimony submitted in support of his claim. Appellant's Br. at 14-15. The Secretary argues that the Board properly rejected the lay evidence because lay evidence cannot establish medical nexus. Secretary's Br. at 11-12.

The Court agrees with the appellant that the Board's reasons or bases for rejecting the lay evidence in support of his claims are inadequate. The appellant submitted lay evidence regarding the occurrence of in-service symptomatology of headaches and cysts and the continuity of symptomatology after his discharge. Noting that "the post-service medical evidence does not demonstrate any findings indicative of a headache disability until 1994" or a "cyst disability until a May 1995 VA examination," the Board concluded that "in the absence of demonstration of continuity of symptomatology, these findings are too remote from service to be reasonably related service." R. at 10. With regard to the appellant's testimony, the Board concluded that although "the veteran himself believes that his headache and cyst disabilities are causally related to service, " he had not been shown to possess the training or credentials needed to render a competent opinion as to medical causation. . . . [H]is lay opinion does not constitute competent medical evidence and lacks probative value." R. at 10.

The Board never mentions the appellant's buddy statements and only considered the appellant's testimony in the limited context of whether it was competent to establish a medical nexus between his current disability and service. R. at 6. In this regard, the Board was correct that the appellant's lay testimony was not competent to establish such a nexus. *Espiritu v. Derwinski*, 2 Vet.App. 492, 494 (1992). However, the appellant's statements were competent and relevant to establishing the occurrence of in-service symptomatology and the continuity of that symptomatology after service. *See Barr*, 21 Vet.App. at 307 ("Lay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection.'" (quoting *Layno*, 6 Vet.App. at 469)); *Charles v. Principi*, 16 Vet.App. 370, 374 (2002) (stating that a lay person is competent to testify concerning symptoms capable of observation).

Furthermore, the Board is prohibited from rejecting lay evidentiary statements out of hand simply because they are not corroborated by medical evidence. *Buchanan*, 451 F.3d at 1337; *see also McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006) (concluding that the lack of actual evidence does not constitute substantive negative evidence). "The Court has emphasized that symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." *Savage*, 10 Vet.App. at 488. Here, the Board relied on the absence of corroborating evidence in contemporaneous medical records to deny the appellant's claims. The Board erred in discounting the appellant's lay testimony merely because it lacks contemporaneous medical evidence. The Board should have discussed the credibility and probative value of this testimony in its decision; its failure to do so was in error. *See Caluza*, 7 Vet.App. at 506. Here, the Board's failure to discuss adequately its rejection of positive lay evidence and assess the credibility and probative value of that evidence is particularly glaring where the Board acknowledged that service medical records from the appellant's Persian Gulf service have either been lost or destroyed. *See Washington*, and *Owens*, both *supra*.

Because the Board improperly relied on inadequate medical evidence and failed to provide an adequate statement of reasons or bases for its decision, remand is the appropriate remedy. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that 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"). Given this disposition, the Court will not address the other arguments raised by the appellant with regard to his claims. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant may present any additional evidence and argument in support of the matter remanded, and the Board must consider any evidence and argument so presented. *See Kay v. Principi*, 16 Vet .App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

III. CONCLUSION

Upon consideration of the foregoing analysis, the Record on Appeal, and the parties' pleadings, the July 19, 2007, Board decision is VACATED, in part, and the appellant's disability compensation claims for headaches, cysts, and memory loss will be REMANDED. The appellant's claim for disability compensation for an undiagnosed illness manifested by back pain will be AFFIRMED.

DATED: July 31, 2009

Copies to:

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