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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 07-1106

GEORGE J. LETAVISH, 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*: George J. Letavish appeals through counsel a February 5, 2007, Board of Veterans' Appeals (Board) decision that denied entitlement to VA benefits, either on a direct basis or as a manifestation of an undiagnosed illness, for (1) thyroid disease, (2) hypertension,[1] (3) diabetes mellitus, (4) fatigue, and (5) elevated cholesterol. Record (R.) at 1-11. The Board also remanded the issue of entitlement to VA benefits for an eye condition, and that matter is not before the Court at this time. R. at 11-14; *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute final decision that may be appealed). In his brief, Mr. Letavish states that he is appealing the Board's decision only with respect to issues two and four above; the Court therefore considers the remaining issues abandoned. Appellant's Brief (Br.) at 1; *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned). The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the February 2007 Board decision, and a single judge may conduct that review. *See Frankel v. Derwinski*, 1 Vet.App.

[1] Hypertension is defined as "high arterial blood pressure; various criteria for its threshold have been suggested, ranging from 140 mm Hg systolic and 90 mm Hg diastolic to as high as 200 mm Hg systolic and 110 mm Hg diastolic." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 909 (31st ed. 2007). [hereinafter DORLAND'S]. The cause of hypertension may be unknown or it may be secondary to other diseases. *Id.* Hg is mercury. *Id.* at 869.

23, 25-26 (1990). Because the Board failed to properly apply the law with respect to the matter of entitlement to VA benefits for fatigue, and because the Board relied on an inadequate medical examination with respect to the matter of entitlement to VA benefits for hypertension, the Court will vacate the February 2007 Board decision and remand the matters for further development and readjudication consistent with this decision.

I. FACTS

Mr. Letavish enlisted in the U.S. Navy Reserve in July 1985 and served on active duty from July 1985 to October 1985 and from January 1991 to March 1991, with recognized service in the Persian Gulf. R. at 18-19. His service medical records contain blood pressure readings of 134/92 (undated, with repeat reading of 128/90), 130/76 (September 1987), 122/80 (May 1988), and 140/92 (October 1990, with repeat readings of 144/88 and 150/90).[2] R. at 72, 76, 77, 87.

In June 1992, Mr. Letavish filed a claim for disability compensation for a "suspected blood disorder." R. at 39. At a May 1993 VA examination for that claim, his blood pressure was recorded as 149/86. R. at 106. That claim was denied by a VA regional office in June 1992. R. at 184-85. In his brief, Mr. Letavish asserts that he was first diagnosed with hypertension in 1994 when he sought medical treatment for injuries sustained in an automobile accident, and that he was prescribed medication to treat the condition in December 1994, which he has been taking continuously since that time, save for a brief period in 1997.[3] Appellant's Br. at 3-5; R. at 864.

In August 2000, Mr. Letavish filed claims for disability compensation for, among other conditions, hypertension and fatigue. R. at 187-91. A November 2000 VA examination recounted Mr. Letavish's complaints of chronic fatigue, including myalgias, migratory joint pain, and sleep disturbances. R. at 260. The examiner stated that Mr. Letavish reported onset of extreme fatigue in 1997, and that the fatigue "reduce[d] his daily activity to less than 50% of his pre-illness activity."

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[2] Blood pressure readings are composed of two numbers; the systolic blood pressure is indicated above the diastolic blood pressure. The systolic reading is the measure of blood pressure during contraction of the heart muscle; the diastolic reading is the measure of blood pressure during dilatation, or expansion, of the heart muscle. DORLAND'S at 1888, 518.

[3] Private medical records reveal blood pressure readings between March and December 1994 of 162/90, 148/90, 138/78, 148/88, 130/80, 148/92, 142/100, and 148/100. R. at 779-80.

Id. The examiner also noted Mr. Letavish's history of high blood pressure and stated that he was currently taking medication to treat the condition and that he did "not have any symptoms from the hypertension." R. at 265. Mr. Letavish's blood pressure was taken three times, resulting in readings of 130/90, 138/90, and 134/88. *Id.* The examiner gave diagnoses of chronic fatigue syndrome and controlled hypertension, but did not opine as to the etiology of either condition. R. at 261, 267. In December 2001, the regional office denied Mr. Letavish claims for compensation for chronic fatigue and hypertension. R. at 331-37. Mr. Letavish disagreed with this decision and eventually appealed to the Board.

In July 2003, the Board remanded Mr. Letavish's claims for further development. Specifically, the Board directed the regional office to obtain all private and VA medical records relating to the treatment of Mr. Letavish's claimed conditions for the period of October 1985 to the present. R. at 390. The Board further ordered that Mr. Letavish be afforded new VA medical examinations for his claimed conditions and specifically requested that the examiners opine as to whether the conditions, if present, related to military service. R. at 391-93.

In January 2005, Mr. Letavish underwent VA medical examinations for fatigue and hypertension performed by the same VA doctor who had performed the November 2000 examinations. The examiner stated, "All medical records were reviewed." R. at 482. Regarding chronic fatigue, the examiner stated that Mr. Letavish had experienced the condition since 1997, but that it had "resolved over the past 2 years," and that he was back to pre-illness levels of activity. *Id.* With respect to hypertension, the examiner noted that Mr. Letavish reported being diagnosed with that condition in 1994 and had been on several medications to control it since that time. R. at 483. The examiner stated that Mr. Letavish's chronic fatigue and hypertension began after his period of military service in the Persian Gulf and that it was "unlikely that [either] of these problems are a result of any type of military service." *Id.* In the diagnoses section of the report, the examiner stated "Chronic fatigue syndrome has resolved" and "Hypertension, which developed in 1994 and [is] currently under good control." *Id.*

In February 2006, the regional office issued a Supplemental Statement of the Case denying Mr. Letavish's claims, and the matter was returned to the Board. R. at 736-48.

In February 2007, the Board issued the decision on appeal, denying entitlement to VA benefits, either on a direct basis or as a manifestation of an undiagnosed illness, for fatigue and hypertension. Regarding fatigue, the Board found that because "the claimed fatigue is not currently characterized by objective [signs] that are perceptible to an examining physician, presumptive service connection due to service in the Persian Gulf is . . . not warranted." R. at 8. The Board denied direct service connection for fatigue because the January 2005 VA examiner concluded that the condition was not related to Mr. Letavish's military service and because there was no evidence of a current disability. R. at 9. Regarding hypertension, the Board determined that presumptive service connection due to service in the Persian Gulf was not warranted because the condition had been "assigned [a] known clinical diagnos[i]s." R. at 8. The Board determined that direct service connection was not warranted based on its finding that there was no evidence of "symptoms, diagnos[i]s, or treatment" for that condition during service and based on the January 2005 VA examiner's conclusion that the condition was not related to service . R. at 9.

On appeal, with respect to his claim for benefits for chronic fatigue syndrome, Mr. Letavish argues that the Board erred by not applying the presumption of service connection afforded to veterans of service in the Persian Gulf under 38 U.S.C. § 1117(a), 38 C.F.R. § 3.317, and *Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004). Appellant's Br. at 14-16. He also contends that the Board erred by not applying the rule of *McClain v. Nicholson* that where a claimant meets all of the requirements for service connection during the pendency of the claim, he is eligible for benefits even if the condition resolves prior to the adjudication of the claim. Appellant's Br. at 16-18; *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). He asserts that these errors warrant reversal of the Board's decision on this claim. With respect to his claim for benefits for hypertension, Mr. Letavish asserts that the Board erred by relying on an inadequate medical exam. Specifically, he contends that the January 2005 VA examination was inadequate because it is obvious that it did not take into account his prior medical history–in particular, his elevated blood pressure readings during and after service–and because it does not contain adequate rationale for its conclusion that his hypertension is unrelated to service. Appellant's Br. at 19-23. Finally, Mr. Letavish argues that the Board's decision on this claim is not supported by adequate reasons or bases. In that regard, he contends that the Board's decision was not based upon the entire record because it did not account for the

incidences of elevated blood pressure during service, nor did it consider his private medical records. Appellant's Br. at 25-26. Mr. Letavish further asserts that the Board's reasons or bases are inadequate because the Board failed to "address evidence that is, at the very least, conflicting" regarding whether his hypertension is related to service, and that the Board's reliance on the inadequate medical examination to support its decision is a violation of the Court's decision in *Gabrielson v. Brown*, 7 Vet.App. 36 (1994). Appellant's Br. at 26. He requests that the Court vacate and remand that portion of the Board's decision.

In response, the Secretary concedes that the Board failed to apply the rule of *McClain*, but argues that remand, not reversal, is the appropriate remedy in order for the Board to "evaluate the propriety of staged ratings in accordance with *McClain*." Secretary's Br. at 13. Regarding the claim for benefits for hypertension, the Secretary argues that the Board's decision should be affirmed because the January 2005 VA examination relied upon is adequate, as are the reasons or bases supporting the Board's decision. Specifically, the Secretary asserts that the Board reviewed the medical evidence of record and found no evidence of a link between Mr. Letavish's hypertension and his military service. Secretary's Br. at 8. The Secretary argues that the January 2005 VA examination is the only medical evidence of record to discuss the etiology of Mr. Letavish's hypertension, and that it was therefore proper for the Board to rely on that examination in reaching its decision. Secretary's Br. at 9. Regarding the January 2005 VA examination, the Secretary contends that the examiner reviewed the claims file "and provid[ed] a detailed account" of Mr. Letavish's medical history. Secretary's Br. at 11. Further, the Secretary argues, "[h]ad there been any notation of abnormal blood pressure or hypertension in service, [the examiner] would have been bound to include it in his opinion. However, there was not." Secretary's Br. at 11-12. Accordingly, the Secretary concludes, the January 2005 VA examination was adequate and accounted for Mr. Letavish's medical history.

II. ANALYSIS

Service connection for VA disability compensation purposes will be awarded to a veteran when the record before the Secretary contains (1) a medical diagnosis of a current disability, (2) medical evidence of incurrence or aggravation of a disease or injury in service, and (3) medical

evidence of a nexus between the in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); 38 C.F.R. § 3.303 (2008).

A finding of service connection generally involves findings of fact. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). The Court is required to reverse "a finding of material fact . . . if the finding is clearly erroneous." 38 U.S.C. § 7261(a)(4). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.*

A. Chronic Fatigue Syndrome

Entitlement to VA benefits may be established for veterans of the Persian Gulf War who exhibit objective indications of a chronic disability resulting from an undiagnosed illness that became manifest either during active service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10% or more no later than September 30, 2011, and which, by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis. *See* 38 U.S.C. § 1117(a); 38 C.F.R. § 3.317(a). Chronic fatigue syndrome is "a qualifying chronic disability" under § 3.317(a)(2)(B). Unlike claims for direct service connection, claims based on an undiagnosed illness under section 1117 and § 3.317 do not require a medical nexus linking the condition to service; rather, they are presumptively service connected when the requirements of section 1117(a) and § 3.317(a) are met. *Gutierrez*, 19 Vet.App. at 8-9; *but see* 38 C.F.R. § 3.317(c) (2008) (compensation will not be paid if there is affirmative evidence that (1) an undiagnosed illness was not incurred during service in the Southwest Asia theater during the Persian Gulf War, (2) an undiagnosed illness was caused by a supervening condition or event, or (3) the illness is the result of the veteran's own willful misconduct or abuse of alcohol or drugs).

The Board did not apply the presumption of service connection to Mr. Letavish's claim. Instead, it denied his claim because it found, based on the January 2005 VA medical examination, that Mr. Letavish did not currently suffer from chronic fatigue. Although the Board is correct that a finding of service connection generally requires evidence of a current disability (*Shedden*, 381 F.3d

at 1166-67), the fact that a claimed condition has resolved by the time VA adjudicates a claim does not automatically result in denial of the claim. Rather, the requirement that a claimant have a current disability "is satisfied when a claimant has a disability at the time a claim for VA disability compensation is filed or during the pendency of that claim, and . . . a claimant may be granted service connection even though the disability resolves prior to the Secretary's adjudication of the claim." *McClain*, 21 Vet.App. at 321. In Mr. Letavish's case, there is medical evidence that the onset of his fatigue was in 1997, and that it resolved in approximately 2003, so that it appears he had the condition both at the time he applied for VA benefits and during the pendency of his claim. The Board did not question this evidence, and in light of *McClain*, it is obvious that the Board erred in denying Mr. Letavish's claim for lack of a current disability.

Although Mr. Letavish argues for reversal, "where the Board has incorrectly applied the law . . . a remand is the appropriate remedy." *Tucker v. West*, 11 Vet.App. 369, 374 (1998); *see Hicks v. Brown*, 8 Vet.App. 417, 422 (1995). On remand, the Board must determine whether the presumption of service connection applies; that is, whether Mr. Letavish's fatigue was either incurred in service or manifested to a degree of 10% or more prior to resolving in approximately 2003. 38 U.S.C. § 1117(a); 38 C.F.R. § 3.317(a). If the Board determines that the presumption does apply, it must determine whether staged ratings are appropriate in this case. *McClain*, 21 Vet.App. at 321; *Fenderson v. West*, 12 Vet.App. 119, 126 (1999). Mr. Letavish is free to submit additional evidence and argument on this matter 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).

B. Hypertension

The Secretary has a duty to assist claimants and must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). As part of his duty, the Secretary must provide a medical examination or obtain a medical opinion "when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1). The duty to assist further requires a "thorough and contemporaneous" medical examination that considers prior medical examinations and treatment to complete the record. *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991) (holding that remand is appropriate where the Board relied on an inadequate medical examination report); *see also Hicks v.*

Brown, 8 Vet.App. 417, 422 (1995) (concluding that an inadequate medical evaluation frustrates judicial review). A medical examination is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's "'evaluation of the claimed disability will be a fully informed one.'" *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (quoting *Green*, 1 Vet.App. at 124). Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Mr. Letavish contends that the Board erred in relying on the January 2005 VA medical examination to deny his claim for compensation for hypertension because the examiner did not review his complete medical history, particularly the notations of elevated blood pressure during service. The VA examiner stated that "[all] medical records were reviewed" (R. at 482), and the Board noted that the examiner had recorded Mr. Letavish's medical history and current complaints (R. at 9). Although the Secretary is correct that there is no requirement that a medical examiner use the term "claims file" when stating what records were reviewed, it must be clear from the examiner's report that he did, in fact, review the claims file and is familiar with the claimant's medical history when a review of that history is relevant to the issue to be decided. *D'Aries*, 22 Vet.App. at 106; *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 303 (2008). Here, the Court cannot conclude that the examiner's report meets this standard.

The examiner's report of Mr. Letavish's medical history appears to have come directly from Mr. Letavish himself, and nowhere in the report does the examiner reference any service medical records or earlier blood pressure readings. R. at 483. Given that there is at least some evidence of elevated blood pressure readings during service and that the examiner apparently failed to consider them, the Court does not believe that the examination was based upon consideration of Mr. Letavish's prior medical history. *Ardison*, 6 Vet.App. at 407. Further, the examiner's statement that Mr. Letavish's hypertension is not related to service is conclusory, relying solely on the date of diagnosis of hypertension to determine that it "developed" after service and ignoring evidence of elevated blood pressure levels during service. R. at 483; *Nieves-Rodriguez*, 22 Vet.App. at 304 (holding that even where a medical examiner does review the claimant's medical history, he must

still provide "factually accurate, fully articulated, sound reasoning" for his conclusions). Because the report of the medical examination on which the Board relied to deny Mr. Letavish's claim for VA benefits for hypertension was inadequate, the Court will vacate that portion of the Board's decision and remand the matter for a new medical examination that takes into account Mr. Letavish's prior medical history, including his service medical records. *Green*, 1 Vet.App. at 124. As noted above, on remand, Mr. Letavish is free to submit additional evidence and argument on this matter. *Kutscherousky*, 12 Vet.App. at 372-73; *Kay*, 16 Vet.App. at 534.

The Court acknowledges that Mr. Letavish has raised an additional argument regarding the sufficiency of the Board's reasons or bases for its decision on his hypertension claim. However, because the Board must provide a new medical examination and readjudicate his claim, the reasons or bases for its decision will necessarily be different. Further, that argument could not result in a remedy greater than vacatur and remand, a remedy already provided by the Court, and therefore it is not necessary to address the remaining argument at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) ("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."). 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).

III. CONCLUSION

Upon consideration of the foregoing, the February 5, 2007, Board decision is VACATED and the matters are REMANDED for further development and readjudication consistent with this decision.

DATED: April 10, 2009

Copies to:

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