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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5507

EUGENE GABRIELLI, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Eugene Gabrielli, appeals through counsel an April 23, 2019, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for "disability manifested by cysts on body," erectile dysfunction, ischemic heart disease, peripheral neuropathy of all four extremities, and "a sleep disability."¹ Record (R.) at 7-32. The appellant does not challenge the Board's conclusion that he is not entitled to disability benefits for cysts and erectile dysfunction. The Court will not review the portion of the Board's decision addressing those matters. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997); *see also Cacciola v. Gibson*, 27 Vet.App. 45, 56-57 (2014).

This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's conclusions that the appellant is not entitled to disability benefits for peripheral neuropathy, a sleep

¹ The Board also remanded two other issues for additional development. Those matters are not before the Court. *See Breedon v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

disability, and ischemic heart disease, and it will remand those matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from April 1968 until January 1970. R. at 5180. He spent part of his service in South Korea near the demilitarized zone. R. at 4820. His unit, however, is "not on identified list for herbicide exposure." R. at 4835.

In May 2006, the appellant filed a claim for entitlement to disability benefits for peripheral neuropathy allegedly caused by Agent Orange. R. at 5082-95. In January 2007, the VA regional office (RO) denied his claim. R. at 5039-42. That decision became final and, in June 2009, the RO declined to reopen the appellant's peripheral neuropathy claim. R. at 5006-09.

In November 2012, the RO denied the appellant entitlement to disability benefits for obstructive sleep apnea and again declined to reopen his peripheral neuropathy claim. R. at 4810-19. In February 2013, the RO "confirmed and continued" its decision not to reopen the appellant's peripheral neuropathy claim. R. at 4697-4702.

In May 2013, the appellant's neurologist wrote that "if no cause is found" for his neuropathy, "it is more likely than not that the neuropathy is related to [A]gent [O]range exposure." R. at 4316. In December 2013, the RO denied the appellant entitlement to disability benefits for ischemic heart disease. R. at 4327-30. In December 2014, a physician wrote that in "light of absence of other known causes" for the appellant's peripheral neuropathy, "I . . . concurred with [the neurologist's] clinical conclusion . . . that the most likely cause be related to [A]gent [O]range exposure." R. at 4015.

In May 2017, the RO denied the appellant entitlement to disability benefits for a sleep condition. R. at 2875-81. In April 2018, the appellant entered the Rapid Appeals Management Program. R. at 2254. In May 2018, the RO denied all claims presently on appeal on the merits. R. at 11-12, 552-73.

On April 23, 2019, the Board issued the decision under review. R. at 7-32.

II. ANALYSIS

A. Secretary's Concession

The Secretary "concedes that the Board's denial of entitlement to direct service connection for bilateral upper and lower extremity peripheral neuropathy was not supported by an adequate statement of reasons or bases." Secretary's Brief at 10. The Court accepts the Secretary's concession. On remand, the Board should correct the errors that the Secretary identifies and address any evidence and argument that the appellant chooses to present.

B. Herbicide Exposure

The Secretary argues that the Court should affirm the Board's conclusion that the appellant was not exposed to herbicides during his active service. The statement of reasons or bases that the Board provided to support its conclusion is insufficient for the following reasons.

First, the Board chose to review a decision that it issued to another veteran in 1999 for its persuasive value. The Board found, however, that "[a]lthough some facts may be similar, it is not evidence that is specific to this case because it pertains to another veteran." R. at 21.

In its 1999 decision, the Board reviewed evidence that Camp Casey was located "in the area of the DMZ" or "near the DMZ." *Id.* The Board stated that the record in the 1999 case "contained a report that showed that herbicide use was approved for control of vegetation 'near the DMZ' in 1967 and began in 1968. Application was noted to have been applied from the Civilian Control Line . . . to the southern Border of the DMZ, *with priority application in the vicinity of roads* and tactically significant areas." *Id.* (emphasis added).

The appellant has presented numerous statements supporting his assertion that he traveled by truck from Camp St. Barbara to Camp Casey nearly every day while he served in South Korea. He reported that he smelled unusual odors while traveling between the two locations and experienced symptoms in his hands and feet. The record from the 1999 decision seems to reveal that Camp Casey was located in an area where herbicides were applied beginning in 1968. That "priority application" occurred "in the vicinity of roads" seems to support the appellant's assertion that his travels brought him into close contact with herbicides.

Because the Board did not consider whether the general evidence discussed in the 1999 decision lends credibility to the appellant's assertions, it has not adequately supported its conclusion that the 1999 Board decision has no persuasive value because the information that it contains is not "specific" to the appellant. To the extent that the Board concluded that, to be

probative, a prior Board decision must contain evidence specific to the appellant, it did not explain the legal basis for its conclusion and did not review Court caselaw that suggests otherwise. *See McCray v. Wilkie*, 31 Vet.App. 243, 254-55 (2019).

Furthermore, the evidence in the 1999 case that the Board discussed included a Government-produced document that gave a general description of herbicide use near Camp Casey. In other words, the evidence was not even specific to the claimant in the 1999 decision, yet it was enough to decide the case in his favor. The Board found that the 1999 decision "does not specify where [herbicides were] used." R. at 22. It certainly does. It shows herbicides were likely used at Camp Casey and were certainly used along roadways between the Civilian Control Line and the southern border of the demilitarized zone.

The Board also did not recognize that the evidence it cited against the appellant while discussing direct exposure – Department of Defense documents stating which units likely came into contact with Agent Orange in Korea – also is not "specific." It is unclear why the Board felt it permissible to rely on general evidence to overcome extensive evidence recounting the unique features of the appellant's service while ignoring other evidence in favor of his claim because it does not address "specifics."

Second, the Board seemed to find that its 1999 decision is not persuasive because the appellant did not serve in a unit that allows him to benefit from a regulatory provision instructing VA to presume that certain veterans were exposed to herbicides. 38 C.F.R. § 3.307(a)(6)(iv) (2020). Even though the appellant may be precluded from asking VA to presume that he was exposed to herbicides, he may certainly request that VA find that he has established that he was, in fact, likely exposed to herbicides. The Board determined that its 1999 decision does not assist the appellant in establishing presumptive herbicide exposure. That may be correct, but the Board should have considered whether that 1999 decision helps the veteran establish factual exposure.² *See Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994).

Third, the Board concluded that "even assuming" that the appellant traveled roads near the demilitarized zone, "with respect to his contentions that he was exposed to herbicide agents

² Throughout its decision, the Board conflated presumptive and direct exposure. At times, it seemed to find that because VA cannot presume that the appellant was exposed to herbicides, then there is no possible way that his evidence of direct exposure can be credible, probative, and persuasive. That is not correct. *See Polovick v. Shinseki*, 23 Vet.App. 48, 52-53 (2009).

because he drove on a road where he saw South Korean soldiers spraying the foliage on either side and also saw dead vegetation, the evidence does not support that the appellant is competent to recognize herbicide agents." R. at 22. The Board continued: "[The] mere observation of dead vegetation or spraying of vegetation does not necessarily mean that an herbicide agent, such as Agent Orange, as opposed to a commercial herbicide, was used." R. at 23. The Board noted that the appellant submitted photographs taken during his service that show dead vegetation, but concluded that "the photographs . . . do not indicate that an herbicide agent was the cause of any dead vegetation pictured, or even that such photographs were taken in a location where the appellant served."³ *Id.*

The Board strains against the logical implications of evidence submitted by the appellant and deploys a particularly odious tactic – common in Board decisions addressing herbicide exposure – of suggesting that the appellant must have been able either to recognize Agent Orange or otherwise definitively show that he was in an area immediately after its application to establish herbicide exposure. As is often the case, the standard of proof that applies to Board factual findings is nowhere to be found.

The appellant need only raise a "reasonable doubt" to succeed. 38 C.F.R. § 3.102 (2020). A reasonable doubt is "one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." *Id.* Reasonable doubt is "one within the range of probability as distinguished from pure speculation or remote possibility." *Id.* Section 3.102 is "not a means of reconciling actual conflict or a contradiction in the evidence" and does not apply when a preponderance of the evidence shows the factual assertion to be incorrect. *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001).

The appellant submitted lay evidence from other veterans supporting his assertion that he traveled on roadways in the demilitarized zone, smelled odd odors during his travels, experienced foot and hand discomfort, and camped within yards of the border. His fellow veterans also recounted their experiences with Agent Orange and their belief that the appellant must have been exposed. All of the veterans, including the appellant, reported close proximity to areas of dead vegetation. The 1999 Board decision reveals that roadways in the demilitarized zone were a particular focus of spraying operations. The appellant's service separation examination reports

³ Earlier in the decision, the Board indicated that at least one of the photos included an image of the appellant. R. at 22.

reveal that he had stomach and digestive problems when he left active service, supporting his assertion that he "had symptoms (diarrhea) of Agent Orange from June 25, 1969 until I was discharged."⁴ R. at 4298, 4613. More recently, two physicians have stated that because no other causes for the appellant's peripheral neuropathy have come to light, then his disorder is "most likely . . . related to [A]gent [O]range exposure." R. at 4015.

Against this evidence stands the Board's conjecture (there is no other word for it) that although the appellant and the other veterans may have seen the result of herbicide use, the herbicides in question were just as likely to be commercial varieties as Agent Orange. The Board did not acknowledge that one of the statements that the appellant entered into evidence was written by a veteran who applied Agent Orange during his service. On remand, the Board should review the evidence that the appellant has submitted, apply the appropriate standard of proof in a clear and methodical manner, and determine whether the appellant has established the reasonable possibility that he was exposed to Agent Orange. When it does so, it should leave aside ad hoc, unsupported guesses about what might have occurred.

Fourth, the Board's repeated response to the lay statements written by other veterans is that "objective records" prepared by the Department of Defense are entitled to "greater weight than the veterans' remote applications." R. at 23. This looks nothing like a traditional competence and credibility determination. The Board should have carefully reviewed the lay statements submitted in this case and determined whether the veterans were competent to make them. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). If they were, then the Board should have made careful credibility determinations and thoroughly explained its conclusions. Stating only that their recollections were remote in time is unconvincing. The Board did not mention the consistency of their statements or the fact that they tend to agree with one another. If the veterans are competent and credible, then their statements are factual and should be given full consideration.

Furthermore, the Board places more weight on the Department of Defense findings than they can possibly bear. The Board repeatedly "afford[ed] greater weight to the objective records" of the Department of Defense because its agents "would be in the best position to know which units were in areas where herbicides were used, and when." R. at 23. The Board again comes

⁴ The Board wrote one sentence about this argument, rejecting it only because "the appellant is not competent to state that his diarrhea and fever in June 1969 . . . were indicative of exposure to herbicide agents." R. at 25. The Board did not discuss an assertion by a veteran who purportedly applied herbicides that certain methods of application "would cause one to defecate." R. at 4224.

very close to concluding that, because the appellant cannot show that he is entitled to a presumption that he was exposed to herbicides, he also cannot be entitled to a factual finding that he was exposed to herbicides. Also, the evidence that the Board obtained "does not mention or document any specific duties performed by the [appellant's] unit members along the DMZ." R. at 4820. The Board, therefore, may be using the absence of evidence as negative evidence. It has not established the factual predicate necessary to do so. *Horn v. Shinseki*, 25 Vet.App. 231, 240 n.7 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact." (quoting *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (Lance, J., dissenting))).

Fifth, the Board concluded that, had the appellant experienced "foot numbness or tingling" during his service, a "reference to [these] would be expected in [service medical records] if the appellant had been also experiencing such problems that same year and complained of them, as he now recalls." R. at 24. The Board did not support that conclusion with appropriate medical support. It has, therefore, directly contravened *Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011), which prohibits the Board from reaching unsupported conclusions about information service medical records should contain.

Sixth, the appellant submitted several lay statements from family members indicating that he consistently experienced pain in his extremities that began when he returned from Korea. The Board dismissed these statements only because the family members "are not competent to opine as to the cause of such symptoms." R. at 24. They are competent to report their observations. *Jandreau*, 492 F.3d at 1377. The Board did not clearly find them not credible.⁵ Their observations are, therefore, factual, and they should have been given full consideration.

Seventh, the Board concluded that one of the veterans had not established that he "himself was competent to identify herbicide agents." R. at 25. That finding is clearly erroneous, indeed, absurd. The veteran in question was a member of "Chemical Company" and explained how the markings on the side of drums containing herbicides were used to identify "the specific formula." R. at 4223. He explained the mixing and application of herbicides, and he wrote that he was

⁵ The Board found that "the credibility of these statements, offered in the context of a claim for monetary benefits, are not probative as to whether the appellant experienced these symptoms immediately after, and continuously since, separation." R. at 24-25. The Court is not sure what this means. It is not a clear credibility determination, and the Board has provided no evidence that directly impugns the family members who made the statements.

"responsible for the maintenance of my truck, the tank and the mixing of the agents and on many occasions the application of the agents." *Id.* If he is not competent to "identify herbicide agents," it's hard to know who is. R. at 25.

The Board then found that, "[e]ven assuming arguendo that the appellant was indeed at Camp Casey and [the veteran] did indeed spray herbicide agents at Camp Casey, it does not necessarily follow that the appellant was actually exposed to an herbicide agent." *Id.* Once again, whether exposure "necessarily follow[s]" is not the appropriate standard. The question is whether those facts establish a reasonable possibility that the appellant was exposed.

Eighth, the Board wrote that another veteran's "remote recollections are conclusory and there is no indication he reviewed the appellant's records or is competent to identify herbicide agents himself." R. at 25. The veteran was the battery commander and battalion communications officer of the appellant's unit. R. at 2464. Based on his position, the veteran concluded that the appellant "would have had to be a part of our regular training exercises when we would camp out in the field extremely close to the North Korean border." *Id.* A veteran who knew the appellant said much the same thing. R. at 2370. The battery commander also noted that he "too filed an Agent Orange claim," and that his claim was successful. R. at 2464. Those facts call into question the Board's conclusion that this veteran's statements are not probative because the Department of Defense "is in the best position to know which units served where." R. at 25. The Board should consider the matter in greater detail on remand.

Finally, the Board did not sufficiently explain its decision to award limited probative value to the medical opinions linking the appellant's peripheral neuropathy to Agent Orange. The Board wrote both that the examiners' opinions were "conclusory" and that they rely on the appellant's assertions of exposure to Agent Orange. R. at 26. The Board should have discussed the fact that the physicians linked the appellant's peripheral neuropathy to Agent Orange only after ruling out multiple other potential causes for that disorder. If nothing else, their opinions show that none of the abnormalities that normally lead to peripheral neuropathy did so in this case, leaving open the question of what exactly caused the appellant's disorder and the possibility that Agent Orange was that cause. And because the physicians were unable to find any other cause for his neuropathy, their opinions may also bolster the appellant's assertion that he was exposed to herbicides. Lastly, the physicians do not seem, as the Board found, to have merely transcribed the lay history given by the appellant "unenhanced by any additional comment by the examiner." R. at 26. They seem

to have found his history believable because they could identify no other cause for peripheral neuropathy.

To summarize, the Board's statement of reasons or bases contains several ad hoc conclusions unmoored from the standard of proof that applies to Board factual findings. Once again, on remand, the Board should begin by making clear, well explained competence and credibility determinations. The Board should then determine whether the competent and credible evidence, when weighed against evidence undermining the appellant's claim (which seems to consist entirely of the Department of Defense's statements) establishes the reasonable possibility that the appellant was exposed to Agent Orange. The Board should leave its own suppositions aside.

C. Sleep Disability and Ischemic Heart Disease

The Secretary acknowledged that the appellant's claims for entitlement to disability benefits for ischemic heart disease and a sleep disorder both "include as secondary to exposure to herbicide agents." Secretary's Brief at 2. Both claims must be remanded for the Board to reconsider after it corrects the errors that the Court identified in the portion of its decision discussing the appellant's alleged herbicide exposure.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portions of the Board's April 23, 2019, decision denying the appellant entitlement to disability benefits for peripheral neuropathy in all four extremities, a sleep disability, and ischemic heart disease are VACATED and those matters are REMANDED for further proceedings consistent with this decision. The appellant's appeal of the Board's disposition of his claims for entitlement to disability benefits for a disability manifested by cysts and erectile dysfunction is DISMISSED.

DATED: December 23, 2020

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