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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. [redacted]

[redacted], APPELLANT,

V.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran [redacted] appeals through counsel a January 29, 2019, Board of Veterans' Appeals (Board) decision that denied service connection for cervical and lumbar spine disabilities, both including as secondary to a service-connected left knee disability. Record (R.) at 5-17.[1] For the reasons that follow, the Court will set aside the January 2019 Board decision and remand the matters for readjudication consistent with this decision.

I. FACTS

Mr. [redacted] served honorably on active duty in the U.S. Navy from October 1962 to October 1966. R. at 414.

In August 2003, Mr. [redacted] filed a claim for non-service-connected pension due to cervical and lumbar spine conditions, R. at 1939-52, which was granted by a VA regional office (RO) in September 2003, R. at 1929-37.

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[1] In the same decision, the Board reopened the claims for service connection for the cervical spine and lumbar spine disabilities. R. at 5. Because these determinations are favorable to Mr. [redacted], the Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

In August 2006, Mr. [redacted] filed for an "increase" for his non-service-connected pension and to amend his original claim, indicating that his conditions were the result of an in-service motor vehicle accident (MVA), occurring in either August or September 1966. R. at 1920. At that time, he indicated that he was treated in service at Oakland Naval Hospital. *Id*.

In February 2007, the RO requested information through the Personnel Information Exchange System (PIES) to seek records from Oakland Naval Hospital from June 1, 1966, to December 31, 1966. R. at 1836; *see* VA Adjudication and Procedures Manual, M21-1, III.iii.2.B.4.c and III.iii.2.D.1.a (noting that a PIES request is used to request clinical records from a Navy hospital if two full calendar years have elapsed since the veteran received treatment). In March 2007, the RO received a PIES response, indicating that searches for records from Oakland Naval Hospital for 1966 were conducted, but no records were located. R. at 1836; *see* R. at 1700 (February 2008 PIES request, requesting a line of duty determination for the claimed 1966 MVA and noting no available records).

In May 2007, RO personnel completed a formal finding of unavailability memorandum, reflecting that "[a]ll procedures to obtain the [identified] service records [from Oakland Naval Hospital] ha[d] been correctly followed" and exhausted, but no records were available. R. at 1826. In June 2007, the RO denied service connection for cervical and lumbar spine disabilities. R. at 1735-38.[2]

In October 2007, Mr. [redacted] filed a Notice of Disagreement (NOD), indicating that, prior to service discharge, he was a passenger in a car that was rear-ended by a drunk driver. R. at 1721-22. He indicated that he was treated at Oakland Naval Hospital with back and neck braces along with pain medication. R. at 1721. He reported that back and neck pain has continued since the accident. *Id*. Although the RO issued a Statement of the Case (SOC) in September 2008, R. at 1674-98, Mr. [redacted] did not perfect an appeal to the Board.

In August 2011, Mr. [redacted] sought to reopen the claims for service connection. R. at 1567, 1586-87. Following VA examination in September 2012, R. at 1330-44, the RO, in December 2012, denied reopening of the cervical spine service-connection claim but reopened the lumbar spine service-connection claim and denied the underlying claim on the merits. R. at 1407-08. In

[2] The RO also denied entitlement to an increase in non-service-connected pension. R. at 1735-38.

June 2013, Mr. [redacted] filed an NOD. R. at 1370-72. Following a December 2013 SOC, R. at 437-60, he perfected an appeal to the Board in January 2014, R. at 427-31.

During a July 2017 Board hearing, Mr. [redacted] testified regarding the in-service MVA and his treatment at Oakland Naval Hospital. R. at 162-76. Specifically, he testified that, although hospital personnel "gave [him] a clearance," they recommended he return for further examination and treatment, but he declined because he was due to be separated from service the upcoming October and he did not want to delay his discharge. R. at 164; *see* R. at 167-68 (noting that his decision not to seek additional treatment was influenced by his wife, whom he had recently married in July and "was not keen on being a military wife").

In November 2017, the Board remanded the claims for additional development, including to provide Mr. [redacted] another VA examination. R. at 151-55. The subsequent examination was conducted in January 2018 by a physician specializing in family medicine. R. at 57-91. The examiner provided negative linkage opinions as to the cervical and lumbar spine disabilities, both with respect to direct service connection and service connection as secondary to a service-connected left knee disability. *Id.*[3]

In the January 2019 decision on appeal, the Board denied service connection for cervical and lumbar spine disabilities. R. at 5-17. In this regard, the Board found no "competent evidence documenting that [Mr. [redacted]] incurred neck and back injuries due to [an MVA] during service." R. at 14. The Board also found the January 2018 medical opinion to be the most persuasive evidence of record, outweighing several favorable opinions provided by Mr. [redacted]'s treating VA physician. R. at 15. In reaching this determination, the Board noted that Mr. [redacted] had challenged the competency of the January 2018 examiner, but found his challenge unsupported and insufficient to rebut the presumption that the examiner conducted the examination in an appropriate manner and was qualified to render an etiology opinion. R. at 16. This appeal followed.

[3] Service connection for a left knee strain with patellofemoral pain syndrome and left knee instability, effective January 9, 2014, was granted by the RO in a June 2017 decision. R. at 212-16.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. [redacted]'s appeal is timely and the Court has jurisdiction to review the January 2019 Board 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).

The Board's determinations regarding service connection, whether the duty to assist has been satisfied, and the adequacy of a medical examination or opinion are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Davis v. West*, 13 Vet.App. 178, 184 (1999). "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 Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

III. ANALYSIS

On appeal, Mr. [redacted] challenges, in part, the adequacy of the January 2018 VA medical opinion. Appellant's Brief (Br.) at 4-11, 24-29. As noted by the Board, he also challenged the adequacy of the medical opinion below, arguing that the January 2018 examiner, a family medicine specialist, "was not competent to render an etiology opinion in regard to [his] cervical and lumbar disabilities." R. at 16. He argued that "the physician is not shown to have expertise or training on orthopedic disorders and therefore, 'her conclusions [are] no more probative than the appellant's

lay assertions' as to etiology and nexus." *Id*. (quoting a January 2019 post-remand brief provided by Mr. [redacted] veterans service organization officer).[4]

In addressing Mr. [redacted] argument, the Board, relying on the presumption of regularity (and presumably the "presumption of competency"[5]), found "no clear evidence that the VA examiner did not conduct the examination in an appropriate manner or that she was not qualified to render an etiology opinion as to nexus." R. at 16 (citing *Rizzo v. Shinseki*, 580 F.3d 1322, 1292 (Fed. Cir. 2009)). The Board concluded that "in the absence of clear evidence to the contrary, [Mr. [redacted]] unsupported contentions are insufficient to render the VA examination inadequate." *Id*.

Absent some challenge to "a VA medical expert's competence of qualifications before the Board, . . . VA need not affirmatively establish [the] expert's competency." *Rizzo*, 580 F.3d at 1291. However, "once the veteran raises a challenge to the competency of the medical expert, . . . [VA] must satisfy its burden of persuasion as to the examiner's qualifications." *Francway v. Wilkie*, 940 F.3d 1304, 1308 (Fed. Cir. 2019). Once the veteran makes this challenge, "[t]he Board must then make factual findings regarding the qualifications and provide reasons [or] bases for concluding whether [] the medical examiner was competent to provide the opinion." *Id*.

Here, although Mr. [redacted] challenged the competency of the January 2018 VA examiner, the Board rejected his argument as unsupported without clear evidence sufficient to rebut the veteran's competency argument. R. at 16. However, as the Court explained in *Francway*, "*Rizzo* and subsequent cases [] did not place the burden of persuasion or evidentiary production on the veteran." *Francway*, 940 F.3d at 1308; *see id*. at 1307 ("Although it is referred to as a presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raised the competency issue.").[6]

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[4] The January 2019 post-remand brief is not contained in the record of proceedings.

[5] As discussed below, *see n*.6, the Federal Circuit has advised that the "presumption of competency" should instead be referred to as a "requirement" that a veteran raise the issue of competency. The Court's use of "presumption of competency" here is intended solely to describe the Board's analysis.

[6] Although the three-judge panel in *Francway* found no inconsistency between its analysis and *Rizzo*, the en banc Federal Circuit clarified that, to the extent that the three-judge panel decision was inconsistent with *Rizzo*, *Rizzo* was overruled. 940 F.3d at 1307 n.1. The en banc Federal Circuit further noted that "in the future, the requirement that the veteran raise the issue of the competency of the medical examiner is best referred to simply as a 'requirement' and not a 'presumption of competency.'" *Id*.

The Board erred in requiring Mr. [redacted] to bear the burden of persuasion or evidentiary production. Instead, in light of his challenge to the January 2018 examiner's competence, the Board should have made factual findings regarding the examiner's qualifications and provided adequate reasons or bases for concluding whether the examiner was competent to provide the requested medical opinions. *See Francway*, 940 F.3d at 1307-08.

Remand is, therefore, warranted for the Board to make requisite findings of fact in the first instance and to provide adequate reasons or bases for its determination that VA satisfied its duty to assist with respect to obtaining an adequate medical opinion in consideration of Mr. [redacted] challenge to the examiner's competence. *See Francway*, 940 F.3d at 1308; *see also 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 need not address Mr. [redacted] remaining arguments, which could not result in a remedy greater than remand. However, the Court will provide guidance to the Board for readjudication of the claims upon remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted).

First, Mr. [redacted] also challenges the adequacy of the January 2018 opinion because the examiner failed to sufficiently address whether the spine disabilities were secondary to his service-connected left knee instability; specifically, that the examiner failed to consider the reasonably raised theory that the spine disabilities are related to several falls that resulted from his left knee disability. Appellant's Br. at 4-11. The Secretary asserts that neither the examiner nor the Board needed to address such a theory because Mr. [redacted] failed to present sufficient evidence regarding the theory and it was not reasonably raised by the record. Secretary's Br. at 7-11. The Court need not address Mr. [redacted] argument because, regardless of whether the theory was reasonably raised below, it definitely has been raised now. Therefore, when the Board revisits its assessment of the adequacy of the January 2018 opinion, it should consider whether the opinion sufficiently addresses this theory of secondary service connection.

Second, Mr. [redacted] argues that the Board failed to ensure VA fulfilled its duty to assist in obtaining medical records from Oakland Naval Hospital because, although VA searched for

records in 1966,[7] it failed to request records from 1964 or 1965. Appellant's Br. at 11-17; Reply Br. at 5-8. Specifically, he highlights 2003 VA treatment records, which reflect that he reported the in-service MVA as occurring in 1964 or 1965. Appellant's Br. at 16; Reply Br. at 5; *see* R. at 698 (April 2003 record identifying occurrence in 1964); R. at 681 (August 2003 record identifying occurrence in 1965 or 1966).

However, Mr. [redacted] seemingly makes inconsistent arguments in this regard. In his opening brief, he highlights the 2003 VA treatment records, but notes that "since August 2006 [(the date of his initial compensation claim)], he has remained steadfast in asserting [that] the MVA occurred in the second-half of 1966, in part because he remembers the tension between seeking additional treatment and pressure from his wife to leave the service immediately." Appellant's Br. at 15 (citing R. at 1543 (October 2011 statement), 1721 (October 2007 NOD), 1920 (October 2006 claim for compensation)); *see id*. (noting that 2003 VA treatment records reflect that he mentioned 1964 and 1965, but that he "later developed certainty"). The Secretary construed these statements as an acknowledgement that the assertions dating the MVA in 1966 close to Mr. [redacted] separation from service were accurate. Secretary's Br. at 12-13.

In his reply brief, however, Mr. [redacted] argues that the multiple different dates for the MVA are all plausible. Reply Br. at 5-6. He specifically argues that the 2003 treatment records reflected statements made "[c]loser in time to the accident" and that his "later developing certainty . . . was not necessarily correct." *Id*. It is, therefore, unclear to the Court whether Mr. [redacted] is arguing that VA should have requested records from Oakland Naval Hospital from 1964 or 1965 because the record contains inconsistent notations regarding occurrence, or because the MVA plausibly might have occurred in 1964 or 1965. Nevertheless, because the Court is remanding the appeal for the Board to revisit its determination that VA fulfilled its duty to assist Mr. [redacted] with respect to obtaining an adequate medical opinion, the Board should likewise reconsider whether VA has

[7] The parties dispute whether VA searched for records from Oakland Naval Hospital for the entire year of 1966, Secretary's Br. at 11 n.1 (citing R. at 1834), or just the last seven months of 1966, Appellant's Br. at 15; Reply Br. at 6 n.1 (citing R. at 1826, 1834). It appears to the Court that the RO requested records from Oakland Naval Hospital for the entire year of 1966. Both the RO's PIES request, R. at 1834, and its formal finding of unavailability memorandum, R. at 1826, reflect that the PIES response indicated that no records from 1966 existed. Although Mr. [redacted] avers ambiguity in these documents, he focuses on the RO's request for records only from June to December 1966, consistent with his statements, and not on the PIES response.

fulfilled its duty to assist with respect to obtaining service medical records in light of the arguments Mr. [redacted] raised on appeal to this Court.

On remand, Mr. [redacted] is free to submit additional arguments and evidence, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the appealed portion of the January 29, 2019, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: February 28, 2020

Copies to:

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VA General Counsel (027)