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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1793

JAMES W. BELL, APPELLANT,

v.

ROBERT A. McDONALD,
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, James W. Bell, appeals through counsel a March 25, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for hepatitis C. Record (R.) at 3-12. 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 reverse the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from February 1972 until February 1975. R. at 419. In May 1973, his care providers diagnosed him with "resolving hepatitis." R. at 1179.

In August 2001, a biopsy revealed that the appellant had "stage 4, grade-IV" hepatitis C "and findings consistent with cirrhosis as well." R. at 932. In August 2004, his care providers diagnosed him with "[c]hronic hepatitis C infection, cirrhosis stage." R. at 933.

In March 2010, the appellant filed a claim for entitlement to disability benefits for hepatitis C. R. at 1067-84. He noted that, during his active service, he received vaccinations via air gun. He asserted that those treatments caused his hepatitis C to develop. R. at 1075, 1079.

In September 2010, a VA medical examiner confirmed that the appellant has hepatitis C. R. at 126. The examiner stated, however, that she could not "offer an opinion" about whether the appellant's disorder is related to his active service because "any opinion would be speculation." R. at 126-27.

In September 2010, the VA regional office (RO) denied the appellant's claim. R. at 104-08. On November 5, 2010, he filed a Notice of Disagreement with the RO's decision. R. at 95. On November 10, 2010, Dr. Belur S. Sreenath opined that the appellant's disorder is "probably" related to the air gun injections that he received during his active service. R. at 98.

In a February 2013 Statement of the Case, the RO confirmed its decision to deny the appellant's claim. R. at 46-75. In March 2013, the appellant appealed to the Board. R. at 37. In November 2013, professional counselor Charles L. Koah opined that "it is at least likely as not that [the appellant's] hepatitis C had its origins in and is related to his active military service." R. at 19.

On March 25, 2015, the Board issued the decision here on appeal. R. at 3-12.

II. ANALYSIS

Establishing service connection for a claimed disorder, and therefore entitlement to disability benefits, generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinkseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet.App. 247, 253 (1999).

The Board found that the appellant currently has hepatitis C and that he received air gun injections during his active service. R. at 7-8. The Board also acknowledged that the appellant's in-service care providers diagnosed him with hepatitis. R. at 7. Based on those factual observations, the Board concluded that the first two prongs of the service-connection test recorded above are established. R. at 8. The only remaining question for the Board to resolve was whether there is a

causal connection between either the air gun injections the appellant received or his in-service hepatitis and his present disorder.

The Board found that there is not. It rejected the statements submitted by Dr. Sreenath and Mr. Koah and the appellant's lay statements about the etiology of his disorder and relied entirely on the September 2010 VA examiner's opinion to reach its decision. Based on the Board's findings, that opinion is the only remaining medical or lay evidence in the record addressing whether there is a nexus between the appellant's service and his present disorder that has probative value.¹

A conceptual misapprehension pervades the Board's analysis. The September 2010 examiner's opinion "provides neither positive nor negative support for service connection." *Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009). "Therefore, it is not pertinent evidence, one way or the other, regarding service connection." *Id.* The Board, however, labeled the September 2010 examiner's opinion a "negative nexus opinion." R. at 9. The Board later stated that the examiner opined that "it would be speculative to medically attribute the [appellant's] current hepatitis C to the in-service injections via air gun." It should have stated that the examiner opined that she could not answer the medical question presented to her without resorting to speculation, a subtle but important difference. In general, the Board chose to view neutral medical evidence as medical evidence against the appellant's claim.

That erroneous view of the evidence colored the Board's ultimate conclusion. The Board found that the "most probative evidence of record does not show that it is at least as likely as not that

¹ The appellant reads the Board's decision to mean that it accorded Dr. Sreenath's opinion some probative value. It is hard to see how that is the case. By concluding that the September 2010 VA examiner's opinion that the key medical question in this matter cannot be answered without resort to speculation is correct, the Board by necessity conveyed that it believes Dr. Sreenath's assertion that he can determine the etiology of the appellant's disorder to be patently wrong. *See Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010) ("An examiner's conclusion that a diagnosis or etiology opinion is not possible without resort to speculation is a medical conclusion just as much as a firm diagnosis or conclusive opinion."). Moreover, the Board thoroughly dismantled Dr. Sreenath's opinion and showed that he did not demonstrate that he had a solid grasp on the facts of this case and did not adequately support his conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (holding that a medical opinion must "contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) ("An opinion based on an inaccurate factual premise has no probative value.").

The appellant does, however, have the Board's own words on his side. The Board stated that Dr. Sreenath's failure to provide appropriate rationale "limits the probative value of his opinion" and that the September 2010 examiner's opinion is "due greater probative weight" than Dr. Sreenath's opinion. R. at 10-11. If the appellant is correct, the Board's decision to grant Dr. Sreenath's opinion a modicum of residual probative value bolsters the conclusion that the Court reaches below.

the [appellant's] current hepatitis C is etiologically related to his active service." R. at 12. For that reason, it concluded that "the preponderance of the evidence is against the claim." *Id.*

Once again, the only question remaining in this case is whether there is a link between the appellant's service and his present disorder. The Board failed to acknowledge that, based on its findings, there is no medical evidence in the record that adequately states whether the appellant's present hepatitis C is related to either the air gun injections he received during his active service, the hepatitis diagnosis that he received during his active service, or both.

The Board made two important findings: (1) the nexus question must be answered by a person with medical expertise; and (2) it can never be answered by a person with medical expertise without resort to speculation. R. at 5 (finding that the September 2010 examiner's report is adequate and that VA need not make any additional efforts to assist the appellant); R. at 9 ("[T]he etiology of hepatitis C is a complex medical question that falls outside the realm of common knowledge of a lay person as it requires medical knowledge and expertise"). Therefore, based on the Board's findings, the question will not, indeed cannot, ever be answered. It will forever remain a mystery.

The record contains no medical evidence indicating that the appellant's disorder is not linked to his service. It does, however, contain medical evidence identifying a link between the appellant's disorder and his service that may hold some residual probative value. Finally, citing a VA Fast Letter, the Board found that "transmission" of hepatitis C "through air gun injection is biologically plausible." R. at 6. Based on this evidence, the Court has a "definite and firm conviction" that the Board's conclusion that "the preponderance of the evidence is against the claim" is clearly erroneous and must be overturned.² *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); R. at 12.

² In the final paragraph of its decision, the Board mentioned some record evidence that may undermine the appellant's claim. The Board, however, determined that the nexus question must be answered by a medical expert and it in turn accepted a medical expert's opinion that it cannot be answered. The Board is not competent to review medical evidence and attempt to produce a statement that suggests that there is no nexus when a negative nexus opinion does not and cannot exist. See *Kahana v. Shinseki*, 24 Vet.App. 428, 435 (2011) (holding that when a Board inference "results in a medical determination, the basis for that inference must be independent and it must be cited"); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that, when the Board reaches a medical conclusion, it must support its findings with "independent medical evidence").

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's March 25, 2015, decision is REVERSED and the matter on appeal is REMANDED for assignment of a disability rating and effective date.

DATED: July 7, 2016

Copies to:

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