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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21- 1317

ALEX J. GUST, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Army veteran Alex Gust appeals a November 2020 Board decision that denied service connection for type II diabetes and for vision impairment and peripheral neuropathy as secondary to diabetes. He contests the Board's finding that he was not exposed to herbicides at Fort McClellan, Alabama, in 1979. The Court reverses the Board's negative exposure finding as lacking a plausible basis because the evidence of record, on balance, supports exposure. On remand, the Board must presume service connection for diabetes due to herbicide exposure and assess whether secondary service connection for vision impairment and peripheral neuropathy is warranted.

I. BACKGROUND

VA has recognized that herbicides—"specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram"—are hazardous to human health and that exposure to these chemicals can lead to severe disability or disease later in life. 38 C.F.R. § 3.307(a)(6)(i) (2022). Diabetes mellitus is one of many conditions that VA presumes is related to service if the evidence demonstrates that the veteran was exposed to herbicides in service. 38 C.F.R. § 3.309(e) (2022). Exposure can be proven two ways—with evidence showing actual exposure or with evidence

showing that the veteran served in a place and during a time for which VA presumes exposure to herbicide agents.

Mr. Gust served from 1979 until 1983. He claims that he was exposed to herbicides in 1979 during his basic training course at Fort McClellan, Alabama—a location for which presumptive exposure is not recognized. He claims that he developed diabetes and multiple related conditions as a result. This case turns on evidence presented to the Board regarding actual exposure, which the Court addresses.

A. Evidence Before the Board

Before the Board, Mr. Gust provided, among other things, multiple studies regarding the use of herbicides—including compounds identified in § 3.307(a)(6)(i)—at Fort McClellan. The evidence included a report by Dr. Hannah Mathers, a Combined Environmental Exposure (CEE) Report, and 1994 and 2010 Agent Orange Reports from the National Academy of Science Institute of Medicine (IOM). The Mathers report documents the type, volume, and timing of herbicide use at Fort McClellan. The CEE report, prepared by Mr. Gust's counsel, documents the use and storage of herbicides at Fort McClellan. Finally, the IOM reports, which were commissioned by Congress as part of the 1991 Agent Orange Act, document the potential health hazards associated with herbicide exposure and identify certain conditions that are highly associated with herbicide exposure. Both IOM reports also address the persistence of TCDD, an herbicide used at Fort McClellan, in soil and the effects of proximity to contaminated soil on human health.

The Mathers report detailed that herbicides, including the chemical compounds identified in § 3.307, were used at Fort McClellan between 1974 and 1976 in concentrations more than 13 times greater than in Vietnam. R. at 220. For this reason, the report avers that soldiers who were "working and training around the post, lying on the ground on Pelham range or engaged in field training exercises" had an exceptionally high risk of exposure. R. at 217. Although the report was limited to the period between 1974 to 1976, it noted that "the record does show ... some of these same herbicides were used before 1974 and still used well after 1976." R. at 220.

Additionally, Mr. Gust included an interview with a forester who worked at Fort McClellan from 1960 to 1987. In the interview, the forester stated that he used "a lot of Tordon" while on the job, which is an herbicide that contains picloram, a toxin identified in § 3.307(a)(6)(i). R. at 19.

The CEE report documented that, as late as 1999, soil samples from across the base contained TCDD; 2, 4, 5-T; and 2, 4-D. R. at 562. The CEE report noted that, "one soil sample from a depth of only 0 to 1 ft (meaning a surface sample) in June 1999 was positive for TCDD at a level of 1.81E-05 (=0.0000181) measured in milligrams per kilogram (mg/kg)." R. at 562. The CEE report also noted that the Agency for Toxic Substances and Diseases Registry (ATSDR) limits safe oral exposure for an "acute duration" to only .0002 micrograms, meaning that the measured surface level in 1999 was "90.5 times higher" than the safe acute limit. *Id.* Further, the 1994 IOM report also concluded that, after entering the soil, TCDD "could remain stationary for an indefinite period," potentially remaining in affected soil for years after it was initially sprayed. 1994 IOM Report at 288. The 2010 IOM report found that, over 30 years after Agent Orange was sprayed in Vietnam, mean dioxin levels in soil and human breast milk "were significantly higher than those in the non-sprayed areas." 2010 IOM Report at 186-87.

Finally, Mr. Gust provided lay statements attesting to "always sweating and rolling around in dirt, grass, and different things located on the base" and having to get "down and dirty" during basic training activities. R. at 585. Taken together, Mr. Gust argued to the Board, the evidence demonstrated actual exposure to covered herbicide agents during his time at Fort McClellan.

B. The Board Decision

The Board reviewed all of this information but determined that Mr. Gust did not provide "competent or probative evidence that he was exposed to an herbicide agent by virtue of contact with the soil or grass during basic training at Fort McClellan." R. at 12. The Board regarded the Mathers report as nonprobative as to exposure because its conclusion—soldiers who trained at Fort McClellan were likely to have been exposed to herbicides—was "based on active spraying of herbicide agents at that base from 1974 to 1976." R. at 17. It then assessed each additional piece of evidence submitted by Mr. Gust, save the 2010 IOM report, as nonprobative because none addressed whether "contact with the soil or grass years after herbicides were sprayed would constitute herbicide exposure." R. at 14.

Moreover, the Board found that he "would not be able to perceive that he had [] exposure through the senses alone, and does not have the expertise to determine whether any potential residue of TCDD in the soil or grass with which he may have come into contact with would equate to exposure." R. at 12 (internal quotations removed). Put differently, the Board found that Mr. Gust was not competent to say that he was exposed to TCDD; instead, it found that none of the evidence

in the record directly supported the veteran's assertion that he had been exposed to TCDD during basic training. To substantiate the alleged exposure, said the Board, the veteran would need to submit

[e]vidence that he was in general proximity to an area shown to have been treated by an herbicide agent during a certain period contemporaneous with or prior to his service, and competent and probative evidence that the residue from such treatment days, months or years later, as the case may be, could constitute exposure within the meaning of section 3.309(e).

R. at 13.

Significantly, the Board was unable to point to any negative evidence in the record—that is, evidence tending to show that exposure to herbicides was less likely or that other causes were operative beyond potential exposure. It sought records from the Joint Service Records Research Center (JSRRC), National Archives and Records Administration, and Armed Forces Pest Management Board (AFPMB), but the records either did not exist or were unavailable. The Board found that "[w]hile the responses by the JSRRC and AFPMB are not sufficient for the Board to conclude that the Veteran was not exposed to an herbicide agent at Fort McClellan, there is no competent or probative evidence supporting such exposure, for the reasons discussed above." R. at 23. So, it denied Mr. Gust's claim and this appeal followed.

II. ANALYSIS

Under 38 U.S.C. § 5107(b), a veteran must prove every element of a claim to a 50% certainty; and if there is an approximate balance of the evidence on a particular element, the veteran prevails. *Wise v. Shinseki*, 26 Vet.App. 517, 530 (2014). The Court reviews for clear error the Board's factual findings, including its assessment of the evidence and whether a veteran was actually exposed to herbicides. *See Stover v. McDonough*, 35 Vet.App. 394, 403 (2022). The Board's evidentiary determinations, including findings concerning the competence and probative value of evidence, are also reviewed under the clear error standard. *See Harvey v. Shulkin*, 30 Vet.App. 10, 19–20 (2018). A finding is clearly erroneous when it lacks a plausible basis in the record. *Fears v. Wilkie*, 31 Vet.App. 308, 314 (2019). When the Board has performed all necessary fact-finding and explicitly weighed the evidence, and the Court is left with a definite and firm conviction that a mistake has been made, it reverses the Board's finding. *DeLoach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013).

Lay testimony alone can support a finding that a veteran was exposed to herbicide agents, so long as it is competent and credible. *See Layno v. Brown*, 6 Vet.App. 465, 469 (1994). Competency concerns the witness's qualification to testify as to a particular fact. A witness is competent to testify on matters actually observed or experienced through the five senses, and on matters that are within personal knowledge. *Id.* The Board has wide latitude to assess the competence of lay evidence, but its findings must be supported by the record. Here, although Mr. Gust is not competent to opine as to whether herbicides were present in the soil and grass that he came into contact with, he was competent to report on whether he had contact with soil, grass, and airborne dust while at Fort McClellan. The Board framed its competency finding too broadly: in finding Mr. Gust not competent to identify herbicides in the soil or grass, it overlooked that he was competent to speak as a fact witness about whether he had contact with soil, grass, and dust during basic training.

As for Mr. Gust's scientific evidence, the Board discounted each piece until it found that he failed to submit any probative evidence supporting exposure. First, the Board rejected the CEE report's discussion of TCDD found in surface samples of the soil at Fort McClellan and its conclusion that the measured levels exceeded, by 90 to 900 times, the "oral limit" that the ATSDR considered healthy for humans and animals. It said that the ATSDR's limit and the veteran's arguments based on it were inapposite because that regarded *oral* exposure and Mr. Gust's alleged exposure was "presumably . . . dermal exposure (if there was any exposure at all)." R. at 12. It found the Mathers report lacked probative value because it only addressed active spraying between 1974 and 1976, which was inapplicable to the veteran's service in 1979. Moreover, the Board said, the report did not "suggest that a person would be exposed to an herbicide agent from any residue in the soil or grass from spraying in prior years." R. at 17. Finally, it discounted the forester's interview because his statements were "not specific enough" to show that herbicide was sprayed while the veteran was at Fort McClellan. R. at 19. But the Board assessed each piece of evidence in a vacuum without discussion of any relationship between the evidence, and then faulted the veteran for failing to provide a single "competent opinion by an expert that contact with soil at some time after TCDD or another herbicide agent was sprayed in the area would amount to herbicide exposure." R. at 14.

This is problematic because it suggests an impossibly high burden of proof. To be sure, expert evidence is helpful, but there's no law or regulation requiring veterans to prove exposure

with expert evidence, let alone with a single smoking-gun-type dispositive item. And although the Board acknowledged that the veteran did not need to "submit direct proof that he had contact with a particular area where the soil was known to have been sufficiently contaminated such that it can be determined he was exposed to an herbicide agent for purposes of section 3.309(e)," R. at 13, its actual treatment of the evidence of record seemed to require exactly that.

When examining the evidence together, the balance of the evidence unequivocally favors Mr. Gust and includes (1) competent lay statements claiming contact with dirt and grass at Fort McClellan in 1979; (2) a competent expert opinion from Dr. Mathers describing the massive amount of herbicides sprayed and stored at Fort McClellan from at least 1974 to 1976; (3) testimony from a forester, employed from 1960 to 1987 at Fort McClellan, who handled herbicides that included a contaminant that VA regulation recognizes as harmful; (4) two IOM reports showing that herbicides, like those sprayed at Fort McClellan, can remain active in the soil for decades after initial contamination; (5) a CEE report that TCDD was found in soil samples from Fort McClellan as late as 1999 and the ATSDR's finding that much lower levels are harmful via oral ingestion; and (6) two IOM reports showing that proximity to contaminated soil is linked to human exposure to herbicide agents.

Further, the Board could not cite to any negative evidence in support of its finding that Mr. Gust was not exposed to herbicides. Now, to be sure, the evidence submitted does not establish as a matter of law that veterans who served at Fort McClellan in 1979 were uniformly exposed to herbicides; however, the evidence submitted is readily sufficient to meet § 5107(b)'s approximate balance burden of proof in the complete absence of any countervailing evidence. Absent a persuasive justification for discounting each piece of evidence submitted, the only plausible reading of the record is that Mr. Gust submitted sufficient evidence to meet the burden of proof on the question of actual exposure.

Moreover, the Court is also convinced that no additional evidentiary development is required or could further assist Mr. Gust's case, particularly when no negative evidence currently exists. *See Andrews v. McDonough*, 34 Vet.App. 216, 221 (2021) ("The purpose of a remand is either to allow for further development or to require the Board to consider an issue anew and make a fully informed decision based on correct factors."). Thus, remand of the exposure issue is not warranted and, instead, the Court reverses the Board's exposure finding and remands only for the Board to apply the remaining portions of 38 C.F.R. §§ 3.307 and 3.309—that is to presume service

connection for diabetes due to herbicide exposure. *See DeLoach*, 704 F.3d at 1380. Remand for readjudication of his vision impairment and neuropathy conditions claimed as secondary to his diabetes is likewise required because they are inextricably intertwined with service connection for diabetes. *See Parseeya-Picchione v. McDonald*, 28 Vet.App. 171, 177 (2016).

III. CONCLUSION

The Board's negative actual exposure finding is REVERSED and the remainder of its November 9, 2020, decision is VACATED and REMANDED for further adjudication consistent with this opinion.

DATED: January 26, 2023

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