

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 23-6982


Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I). The Board of Veterans' Appeals (Board) erred when it denied service connection for the Veteran's left knee tendonitis, status post total arthroplasty and right knee tendonitis, post status arthroplasty claims. The Board relied on an inadequate VA DBQ that failed to consider the full medical history of the claims at issue and also contained factual inaccuracies.

II) The Board failed to provide adequate reasons and bases for denying service connection for the Veteran's left knee tendonitis, status post total arthroplasty and right knee tendonitis, post status arthroplasty claims. More specifically, the Board failed to address all favorable evidence for the claims at issue.

STATEMENT OF THE CASE

A rating decision was issued under the legacy system dated November 19, 2018. (R. 2271). The rating decision granted service connection for the Veteran's lipomas and cysts claim with an effective date of September 29, 2017. The rating decision also denied service connection for Veteran's claims for PTSD, right knee tendonitis, and left knee tendonitis and denied the Veteran entitlement to TDIU. On a Notice Of Disagreement (NOD), dated May 2, 2019, the Veteran appealed these denials and the effective date for the lipomas and cysts claim under the DRO Review Process. (R. 2192).

A Statement of the Case (SOC) was issued by the VA, dated February 10, 2020, denying entitlement to an earlier effective date for the Veteran's lipomas and cysts claim and continuing to deny service connection for the Veteran's right and left knee conditions,

mental health condition, sleep apnea, and entitlement to TDIU. (R 2021). Subsequently, the Veteran appealed the SOC decision to the BVA on a timely filed VA Form 9, dated April 9, 2020. (R. 1967).

SUMMARY OF THE ARGUMENT

The Board of Veterans' Appeals (Board) erred when it denied service connection for the Veteran's left knee tendonitis, status post total arthroplasty and right knee tendonitis, post status arthroplasty claims. The Board relied on an inadequate VA DBQ that failed to consider the full medical history of the claims at issue and also contained factual inaccuracies.

In its decision, the Board denied service connection for the Veteran's bilateral knee condition by relying on a VA DBQ dated July 23, 2018. (R. 2383). The VA examiner noted that the Veteran's bilateral knee tendonitis was diagnosed in 2017 and his bilateral osteoarthritis was diagnosed in 2016. (R. 2383-2384). These dates are inaccurate. The Veteran has treatment records from May 2007 where he was seen for his left knee and osteoarthritis is noted in those records. (R. 2164). Furthermore, the VA examiner did not consider treatment records from December 2012 where osteoarthritis is listed as an active problem for the Veteran. (R. 2450).

Also, the VA examiner's DBQ is inadequate as it is not based on the Veteran's full medical history for the claimed condition. In February 1994, the Veteran was evaluated by a medical professional and made complaints that he was experiencing pain behind both

kneecaps. (R. 3137). This note is not addressed in the DBQ from 2018 and, as such, the resulting report was not based on a full history of the Veteran's knee conditions. (R. 2385).

Additionally, the Board failed to provide adequate reasons and bases for denying service connection for the Veteran's left knee tendonitis, status post total arthroplasty and right knee tendonitis, post status arthroplasty claims. More specifically, the Board failed to address all favorable evidence for the claims at issue.

In this case, the Board failed to address all material evidence for the Veteran's bilateral knee claims. In its decision, the Board states that the Veteran's symptoms began in 2005. This is untrue. As seen in treatment records from February 1994, the Veteran was evaluated by a medical professional and made complaints to the examiner that he was experiencing pain behind both kneecaps. (R. 3137). This record is not noted in the Board's decision nor in the VA medical opinion the Board based its decision on. (R. 3137).

STANDARD OF REVIEW

The Court reviews findings of fact by the Board under the clearly erroneous standard. Service connection determinations are issues of fact. *Futch v. Derwinski*, 2 Vet. App. 204, 206 (1992). This Court also reviews claimed legal errors by the Board under the de novo standard, where the previous Board decision is not entitled deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet. App. 532 (1993) (en banc). This Court also reviews de novo whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet. App. 36, 42-46 (2005). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.” *Butts*, 5 Vet. App. at 538. The Court should determine whether the Board’s decision is in accordance with the law.

ARGUMENT

I) The Board of Veterans’ Appeals (Board) erred when it denied service connection for the Veteran’s right knee tendonitis, post status arthroplasty and left knee tendonitis, post status arthroplasty claims. The Board relied on an inadequate VA DBQ.

A medical opinion is inadequate if it is based on an inaccurate factual premise. *Reonal v. Brown*, 5 Vet. App. 458, 460–61 (1993). An adequate medical opinion is one that is based on a veteran’s full medical history. *Miller v. Wilkie*, 32 Vet. App. 249, 262 (2020).

In a decision, dated October 27, 2023, the Board relied upon a VA DBQ from July 23, 2018, that contained factual inaccuracies. (R. 2383). The examiner noted that the Veteran was diagnosed with osteoarthritis in 2016 which is when the Veteran decided to have his knees evaluated. This ultimately led the Veteran to have both knees replaced in the Summer of 2017. (R. 2385). This premise is inaccurate as it does not indicate the correct diagnosis date for the Veteran’s osteoarthritis. In May 2007, the Veteran was seen specifically for his left knee and osteoarthritis of the knee is noted on the records from that visit. (R. 2164). Furthermore, the VA examiner did not consider treatment records from December 2012 where osteoarthritis is listed as an active problem for the Veteran. (R. 2450).

Furthermore, the VA examiner’s DBQ is inadequate as it is not based on the Veteran’s full medical history for the claimed condition. In February 1994, the Veteran

was evaluated by a medical professional and made complaints to the examiner that he was experiencing pain behind both kneecaps. (R. 3137). This note is not addressed by the VA examiner in 2018 leading to a report that was not based on a full history of the Veteran's knee conditions. (R. 2385).

Based on the above, the Board's decision denying the Veteran's right and left knee claims should be remanded for further clarification and proper adjudication can take place.

II) The Board of Veterans' Appeals (Board) erred when it failed to provide adequate reasons and bases for denying the Veteran's right knee tendonitis, post status arthroplasty and right knee tendonitis, post status arthroplasty claims. More specifically, the Board failed to address all favorable evidence for the claims at issue.

The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusion on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision. 38 U.S.C. § 7104(d)(1); *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 the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604

(Fed.Cir.1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert*, supra.

In this case, the Board failed to address all material evidence for the Veteran's knee claims. In its decision, the Board states that the Veteran's symptoms began in 2005. This is untrue. As seen in treatment records from February 1994, the Veteran was evaluated by a medical professional and made complaints to the examiner that he was experiencing pain behind both kneecaps. (R. 3137). This record is not noted in the Board's decision nor in the VA medical opinion the Board based its decision on. (R. 3137). The Board had a duty to address these records as is related to the Veteran's knees.

Based on the above, the Board's decision denying the Veteran's right and left knee claims should be remanded for further clarification and proper adjudication can take place.

CONCLUSION

For the above-referenced reasons, the Court should remand the Board's Decision dated October 27, 2023, denying service connection for the Veteran's bilateral knee claims so that proper adjudication of the contentions can be conducted.

Respectfully Submitted,

/s/ Brett Burke

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