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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 07-2993

DOUGLAS O. REESE, APPELLANT,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HOLDAWAY, *Judge*.

MEMORANDUM DECISION

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

HOLDAWAY, *Judge*: The appellant, Douglas O. Reese, appeals a June 14, 2007, Board of Veterans' Appeals (Board or BVA) decision that denied the appellant's claims for entitlement to service connection for diabetes mellitus and peripheral neuropathy, an eye disability, and kidney disease, all claimed as secondary to diabetes mellitus. Because the appellant does not address in his brief the Board's decision to deny service connection for hepatitis C, the Court deems that claim abandoned. *See Cromer v. Nicholson*, 19 Vet.App. 215, 217 (2005); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review this decision for which single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate, in part, the June 14, 2007, BVA decision, and remand the matters for readjudication.

I. FACTS

The appellant served on active duty in the U.S. Air Force from June 1965 to December 1968. Record (R.) at 95, 139, 352. While service medical records (SMRs) do not indicate complaints, treatment, or diagnosis of diabetes, peripheral neuropathy, or kidney disease (R. at 18-70), they do

contain findings pertaining to the appellant's eyes, including an ophthalmologic consultation report dated in January 1968 noting complaints that his eyes were red and burning in the morning (R. at 38); an undated consultation report noting that the appellant was near sighted and wore glasses prior to service (R. at 63); an October 1968 treatment record indicating swelling in one eye (R. at 26); and a November 1968 separation examination indicating that he wore glasses in early childhood for eye strain but has not worn them since (R. at 42-43).

In September 2002, the appellant filed a claim for service connection for diabetes, claimed as a result of exposure to Agent Orange. R. at 186. While he did not serve in Vietnam, the appellant claimed that he was exposed to Agent Orange while handling drums of the defoliant at Anderson Air Force Base in Guam as a member of the 3535 Supply Squadron, 320th Bombardment Wing. *Id.* The VA regional office (RO) made a request to the National Personnel Records Center (NPRC) to "furnish any documents showing exposure to herbicides" and "furnish dates of service in Vietnam." R. at 328. The NPRC responded that there were no records of exposure to herbicides. *Id.*

On December 10, 2002, the RO denied the appellant's claim because there was no evidence that he came in contact with Agent Orange. R. at 330-34. The appellant filed a Notice of Disagreement, requesting that the RO "obtain copies of my efficiency reports showing that my duties in the military included handling herbicides." R. at 336. In response to another request by the RO, the NPRC submitted personnel records that confirmed that he had been on temporary duty in Guam. R. at 352. There were no records confirming exposure to herbicides. R. at 347-53. On February 11, 2004, during a personal hearing, the appellant testified that he was exposed to Agent Orange while handling damaged or corroded drums. R. at 540-41. He also testified that they did not wear protective clothing. *Id.* The appellant reported that the skin on his feet, legs, and upper arms would get irritated. R. at 541. The appellant also stated that "nobody in [his] family ever had diabetes" and that doctors told him that his diabetes was related to Agent Orange, but they did not write it in his file. R. at 545. The appellant submitted articles pertaining to the storage and handling of chemicals at Anderson Air Force Base in Guam. R. at 637, 638, 644. The appellant provided additional testimony during the hearing in July 2004 wherein he discussed his job handling the drums and described how liquid leaked from the drums to his shoes and pants legs. R. at 660-82.

He also reported that his arms and legs would "go to sleep," that they felt "like pins," and that his legs would break out with black spots. R. at 672.

In an October 11, 2005, decision, the Board remanded the appellant's claims in order to obtain his complete service personnel records beginning on December 20, 1965, the day he was assigned to temporary duty in Guam. R. at 835. The Board stated that "if additional evidence is obtained that indicated the veteran was exposed to Agent Orange or a similar herbicide while stationed in Guam, the veteran should be afforded a VA diabetes mellitus examination to determine whether his current diabetes mellitus is related to his military service." R. at 838.

In October 2005, Dr. Kitchens, an archivist from the United States Air Force Historical Research Agency, in response to a query from the Appeals Management Center, reported that "the Agency holds no significant resources documenting individual shipments, transfer points, or handling of Agent Orange." R. at 851. He added that it was "improbable" that any detailed administrative documents, such as inventory lists, remained in existence. *Id.* If they did exist, they would be held by the National Archives and Records Administration at Archives II, in College Park, Maryland. *Id.*

On July 18, 2006, the appellant underwent a VA examination. The examiner confirmed that the appellant has Type II diabetes mellitus. He wrote:

The patient states that he has been able to locate documentation that he was exposed to Agent Orange while serving in the military. If this is true, then I believe it is more likely than not that he has type II diabetes mellitus resulting from exposure to this herbicide while serving in the military.

R. at 1177. The appellant submitted what appears to be an excerpt from a book discussing the use of Agent Orange in Vietnam. R. at 1192-1203. The excerpt states that servicemen who handled drums of Agent Orange for storage were not trained how to do so safely and did not wear gloves or protective gear. *Id.* On June 14, 2007, the Board issued the decision on appeal. R. at 1-14. This appeal followed.

II. ANALYSIS

The appellant argues that the preponderance of the evidence is in his favor and that nexus medical evidence existed in the form of a January 16, 2008, medical record from the Columbia,

South Carolina, VA Medical Center. Appellant's Brief (Br.). Because the January 2008 medical record postdates the decision on appeal, the Board could not have considered it as part of its analysis. Generally, this Court is "precluded by statute from including in the record on appeal . . . and generally from considering any material that was not contained in the 'record of proceedings before the Secretary and the Board.'" *Timberlake v. Gober*, 14 Vet.App. 122, 133 (2000) (quoting 38 U.S.C. § 7252(b)); see *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990) (review in Court shall be on record of proceedings before Secretary and Board). Therefore, the Court cannot consider the appellant's submission in connection with its review of the June 2007 Board decision. See *Bonhomme v. Nicholson*, 21 Vet.App. 40, 43 (2007) (per curiam).

A Board decision must include a statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1). The statement must be sufficient to enable a claimant to understand the precise reasons for the disposition of the claim and to facilitate Court review. *Norris v. West*, 11 Vet.App. 219 (1998).

In the instant case, the Secretary concedes that the Board's analysis of the appellant's hearing testimony was inadequate and requires remand. Secretary's Br. at 13-14. The Secretary points out that the Board failed to determine the credibility of the appellant's testimony or his competence to testify that he was exposed to Agent Orange while working in the drum lot in Guam. *Id.* Such testimony, if accepted, could lead to an award of service connection on a direct basis. See *Dalton v. Nicholson*, 21 Vet.App. 23, 38 (2007) ("The [Board] has the duty to assess the credibility and weight to be given to the evidence." (quoting *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); see also *McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006) (competent testimony "can be rejected only if found to be mistaken or otherwise deemed not credible, a finding . . . the Court cannot make in the first instance"). Therefore, the claim of entitlement to service connection for diabetes mellitus will be remanded for the Board to discuss the appellant's testimony and to provide an adequate statement of reasons or bases as to whether it is credible and competent.

The Secretary also concedes that VA may have failed to notify and assist the veteran in developing the facts pertinent to his claim. Secretary's Br. at 14-15, citing *Veterans Claims Assistance Act of 2000*, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000); *Quartuccio v. Principi*, 16 Vet.App. 183 (2002); *Charles v. Principi*, 16 Vet.App. 370 (2002). This duty to assist is neither

optional nor discretionary. *Littke v. Derwinski*, 1 Vet.App. 90 (1990). In his reply to the VA's request for documentation regarding the inventory, handling, and shipment of Agent Orange, Dr. Kitchens responded that if additional records existed, they would be "held by the National Archives and Records Administration at Archives II." R. at 853. The Secretary acknowledges that there did not appear to be a follow-up request to the National Archives. Secretary's Br. at 15. The Court agrees that the Board must provide an adequate statement of reasons or bases explaining whether an attempt to obtain these records is required. *See* 38 C.F.R. § 3.159(c)(2).

Because the appellant's claims of entitlement to service connection for peripheral neuropathy, an eye disability, and kidney disease are claimed as secondary to diabetes mellitus, they are inextricably intertwined with the appellant's claim of entitlement to service connection for diabetes mellitus and will also be remanded. *Harris v. Derwinski*, 1 Vet.App. 180; 183 (1991); *see also Gurley v. Nicholson*, 20 Vet.App. 573, 575 n. 1 (2007) (remand of two inextricably intertwined issues serves the interest of judicial economy).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's June 14, 2007, decision is VACATED to the extent that the Board denied service connection for diabetes, peripheral neuropathy, eye disability, and kidney disease, and these matters are REMANDED for readjudication consistent with this decision. The Board's decision is otherwise AFFIRMED.

DATED: April 23, 2009

Copies to:

Douglas O. Reese

VA General Counsel (027)