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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO.

, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, _____, served in the U.S. Navy from June 23, 1972, to December 20, 1973, including service aboard the U.S.S. *Constellation* off the coast of Vietnam. Record (R.) at 995. He appeals, through counsel, an August 13, 2012, Board of Veterans' Appeals (Board) decision that denied his claim for entitlement to service connection for a respiratory disorder, to include chronic obstructive pulmonary disease (COPD) and asbestosis, claimed as a result of exposure to asbestos. Record (R.) at 2-18. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the August 13, 2012, decision and remand the matter for further proceedings consistent with this decision.

On appeal, the appellant contends that the Board failed to provide an adequate statement of reasons or bases to support its findings that an April 10, 2012, VA medical expert opinion was more probative than a May 20, 2012, private medical opinion, and that no additional development was necessary pursuant to VA's duty to assist. Appellant's Brief (Br.) at 7-13. The Secretary responds that the Board adequately explained why it determined that the April 2012 opinion was more

probative than the May 2012 opinion, and he asks the Court to affirm the Board's decision. Secretary's Br. at 3-7.

The Court agrees that the Board failed to provide an adequate statement of reasons or bases for its decision. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The author of the May 2012 private opinion, Dr. Craig Bash, provided nine reasons for why he disagreed with the April 2012 VA opinion, with citations to medical literature. R. at 21-22. Among his reasons, he explained that the VA examiner "incorrectly describe[d] the necessary exposure to asbestos"¹ as requiring "a 20-year exposure," when in actuality "there is often a 20[-]year latency," and that the "chest x-rays need[ed] to be carefully reviewed for inte[r]stitial disease[, as] often the patient has asbestosis with a normal appearing [chest x-ray]." *Id.*

The Board acknowledged and discussed these reasons, but it ultimately determined that the April 2012 opinion was more probative. R. at 11-14. In so doing, the Board acknowledged that the VA examiner incorrectly "reported that pulmonary asbestosis is associated with exposures exceeding 20 years or more to asbestos" but discounted this deficiency, as it "was not . . . the only basis for his determination that the [appellant] did not have asbestosis." R. at 11. The Board also considered Dr. Bash's opinion that chest x-rays needed to be carefully reviewed but discounted this contention, explaining that "only x-ray *reports* were available for review" (emphasis added) and that "a careful review of the actual x-ray is not possible in this case." R. at 13.

Here, although it was within the Board's purview to find Dr. Bash's May 2012 opinion to be less probative than the April 2012 VA opinion, *see Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005), the Board failed to adequately explain why, in light of Dr. Bash's opinion to the contrary, the April 2012 VA opinion was adequate and that no additional development was required. In particular, the Court is not convinced that the Board possessed the medical expertise necessary to discount Dr. Bash's critiques of the April 2012 opinion, including the VA examiner's misstatement of the amount of asbestos exposure necessary to cause asbestosis. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (holding that the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a

¹ The appellant's "exposure to asbestos during service has been conceded." R. at 6.

Board opinion"); *see also Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that lay persons are generally not competent to offer testimony on matters requiring medical expertise). This is particularly troublesome in light of the Board's own previous determination that a medical expert opinion—the April 2012 opinion—was required in this case. *See* R. at 33-35.

Similarly, the Court cannot reconcile the Board's apparent concession that a thorough review of the appellant's chest x-rays could reveal asbestosis but that "careful review of the actual x-ray [was] not possible" with its finding that VA had satisfied its duty to assist the appellant. *See* R. at 13, 16. If, indeed, careful review of actual chest x-rays—as opposed to the x-ray reports contained in the record and reviewed by the April 2012 examiner, *see* R. at 7, 13—is necessary to confirm or rule out a diagnosis of asbestosis, but no such chest x-rays are available for review, then it is not clear why the Board did not remand this case for additional development. *See McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (holding that a medical examination was necessary when, *inter alia*, there was "insufficient competent medical evidence on file for the Secretary to make a decision on the claim").

The Court thus holds that the Board failed to provide an adequate statement of reasons or bases and will, accordingly, vacate and remand the decision on appeal. *See Allday*, 7 Vet.App. at 527. On remand, the Board must consider whether, in light of the May 2012 opinion, additional development is required, to include either a new medical opinion addressing Dr. Bash's critiques of the April 2012 opinion or a new medical examination. The appellant is free to submit additional evidence and argument, 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 Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

After consideration of the parties' briefs and a review of the record, the Board's August 13, 2012, decision is VACATED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: February 3, 2015

Copies to:

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VA General Counsel (027)