Mendenhall v. McDonough

United States Court of Appeals for Veterans Claims

March 29, 2021, Decided

No. 19-6996

Reporter
2021 U.S. App. Vet. Claims LEXIS 516 *

Allan J. Mendenhall, Appellant, v. Denis McDonough, Secretary of Veterans Affairs, Appellee.

Notice: DESIGNATED FOR ELECTRONIC PUBLICATION ONLY.

PURSUANT TO U.S. VET. APP. R. 30(a), THIS ACTION MAY NOT BE CITED AS PRECEDENT.

Case Summary

Overview
HOLDINGS: [1]-The BVA's decision denying service connection for bilateral shoulder, hip, and knee disabilities was not proper under 38 U.S.C.S. § 5103A(c)(1)(A), (C) because the BVA did not discuss whether there were any hospital records from Chu Lai that might corroborate veteran's account, nor did the BVA discussed whether VA satisfied its duty to assist in completing the record; It did not even mention VA's January 2013 letter requesting that veteran send more information about his purported hospitalization at Chu Lai.

Outcome
Decision set aside and the matter remanded.

Judges: [*1] Before FALVEY, Judge.

Opinion by: FALVEY

Opinion

MEMORANDUM DECISION

FALVEY, *Judge*: Army veteran Allan J. Mendenhall appeals through counsel a July 31, 2019, Board of Veterans' Appeals decision denying service connection for bilateral shoulder, hip, and knee disabilities. The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board adequately explained its implicit determination that the duty to assist in obtaining records had been satisfied. As the issues of adequate identification and VA's duty to assist were reasonably raised by the record, the Board needed to address them. Because the Board did not do so, its statement of reasons or bases is inadequate, and thus we will set aside the Board's decision and remand the matter for further proceedings.

I. FACTS

Mr. Mendenhall served from January 1968 to January 1972. Record (R.) at 493. In his entrance medical examination, he reported no problems with his joints. R. at 418, 421. While in service, he reported knee and shoulder pain, but he attributed these to a pre-service accident. R. at 446, 448, 456. In his November 1971 separation examination, he stated that he was in good health [*2] and reported no abnormalities in his joints. R. at 414-16.

In May 2012, Mr. Mendenhall filed a claim for benefits for bilateral knee disabilities, stating that he was injured in service in 1969. R. at 495-500. In a July 2012 VA treatment record, he reported chronic knee, hip, and shoulder pain. R. at 277. He stated that he was in a tank that hit a landmine, and that the resulting explosion threw him against the tank's steering column, injuring his knees and hips, and against the

turret, injuring his shoulders. *Id.* In August 2012, VA made a request for all Mr. Mendenhall's service treatment records. R. at 488. In September 2012, all available records were sent to VA. R. at 478.

In October 2012, Mr. Mendenhall made a statement repeating that he was injured in a landmine explosion. R. at 396. He said that the explosion took place in 1969, and that it left him unconscious for several days. *Id.* He said that he spent around a month in a hospital in Chu Lai, Vietnam, before going to Hawaii for rest and recreation, and finally returning to Vietnam. *Id.*

In January 2013, VA sent a letter to Mr. Mendenhall, noting his claimed treatment from a hospital at Chu Lai, but that VA needed him to give the approximate date (month and year) and the name of the hospital. [*3] R. at 234. That same month, the regional office (RO) denied service connection for his knee, hip, and shoulder disabilities. R. at 240-47. A February 2013 rating decision continued the denial. R. at 186-89, 207-14.

In March 2014, the RO issued the Statement of the Case (SOC), which continued the denial of service connection. R. at 158-77. The SOC noted that VA sent Mr. Mendenhall a request for more information about his alleged hospitalization but that he did not respond. R. at 173-77.

In a March 2015 statement filed by his representative, Mr. Mendenhall repeated his account that he was injured in a landmine explosion in 1969 and then hospitalized in Chu Lai. R. at 25-26. That same month, VA certified his appeal to the Board. R. at 19.

In July 2019, the Board issued its decision denying service connection for Mr. Mendenhall's claimed bilateral hip, knee, and shoulder disabilities. R. at 5. The Board noted that Mr. Mendenhall's service treatment records did not show any sign of the injury and hospitalization he alleged and that the only evidence in the record supporting his account consisted of his own statements. R. at 10. The Board denied service connection for his bilateral hip, knee, and shoulder disabilities. R. at 11-12. This appeal followed.

II. ANALYSIS

VA has a duty to assist claimants in obtaining service [*4] medical records "if the claimant has furnished the Secretary information sufficient to locate such records," and any other relevant records held by the Federal government that "the claimant adequately identifies." 38 U.S.C. § 5103A(c)(1)(A), (C). "The duty to assist is not triggered if the claimant does not adequately identify outstanding records." *Molitor v. Shulkin*, 28 Vet.App. 397, 403 (2017); *see also Wood v. Derwinski*, 1 Vet.App. 190, 193 (1992) (noting that "the duty to assist is not a one-way street"). Whether VA has satisfied the duty to assist is a factual determination, *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000), which the Board must support with an adequate statement of reasons and bases, 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Mr. Mendenhall argues that VA failed in its duty to assist by not obtaining the records of his purported hospitalization in Chu Lai in 1969. Appellant's Brief (Br.) at 9-13. He notes that VA uses a different procedure to obtain hospital clinical records than for obtaining service treatment records. *Id.* at 9-10; *see* VA ADJUDICATION PROCEDURES MANUAL [M21], III.iii.2.B.4.b (noting that "clinical records are rarely included in STRs");[1] *see also* VETERANS BENEFITS MANUAL 1706 (2020) (noting that hospital records are stored differently than service treatment and personnel records). Although VA requested Mr. Mendenhall's service treatment records, it did not specifically [*5] request his hospital records. *See* R. at 478. He argues that, by providing the city of hospitalization and the relevant year, he had adequately identified the records and VA had the duty to at least attempt an initial search before asking him for more information. Appellant's Br. at 10-11. He argues that the Board's statement of reasons or bases was inadequate because it did not discuss whether VA satisfied its duty to assist. *Id.* at 12-14.

In response, the Secretary argues that Mr. Mendenhall did not adequately identify the records and VA thus had no duty to obtain them. Secretary's Br. at 6-12. The Secretary notes that VA requested more information from Mr. Mendenhall so that it could obtain any hospital records from Chu Lai, but that he did not respond. *Id.* at 7; *see* R. at 234. The Secretary also argues that Mr. Mendenhall identified two hospitals in his brief (the 27th Surgical Hospital and the 91st Evacuation Hospital), which leaves unclear where he was hospitalized. *Id.* at 7-8; *see* Appellant's Br. at 11-12, 11-12 n.1. The Secretary also argues that Mr. Mendenhall supplied the year but not the month of his purported hospitalization, leaving the timeframe of any hospitalization unclear. Secretary's Br. at 8. The Secretary argues [*6] that, because of these failings, Mr. Mendenhall did not adequately identify the records and so did not trigger VA's duty to assist. *Id.* at 7.

The issues of whether Mr. Mendenhall adequately identified

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[1] While the M21is not binding on the Board, *Overton v. Wilkie*, 30 Vet.App. 257, 263-64 (2018), it is cited here and by Mr. Mendenhall to show that the process for obtaining hospital records and service treatment records are different; requesting one will not necessarily lead to obtaining the other.

the records and whether VA satisfied its duty to assist were reasonably raised by the record. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that the Board must address all issues reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Mr. Mendenhall asserted that he was injured in a landmine explosion and was treated in 1969 at a military hospital in Chu Lai, Vietnam. R. at 26, 396. He argues that the hospital was possibly the 91st Evacuation Hospital, Appellant's Br. at 11, and that one of his service treatment records is marked "91 EVAC HOSP," R. at 470, thus giving a potential name for the hospital—one of the pieces of information that VA requested from him to obtain the records, R. at 234. He supplied the year of his purported hospitalization, 1969, but not the month as requested. *See* R. at 234. Although Mr. Mendenhall did not respond to VA's request for information, R. at 173-77, a fact which he does not dispute, *see* Appellant's Br. at 10-11, the record reasonably raised the twin issues of whether Mr. Mendenhall adequately identified the records, thus triggering VA's duty to assist, and whether [*7] VA satisfied its duty to assist in obtaining them.

Yet the Board did not address these issues. The Board noted that the landmine explosion and hospitalization do not appear in Mr. Mendenhall's service records, and it thus found his account of the incident not credible. R. at 11. The Board said that it was "highly unlikely" that such an incident would not appear in the records and that, even if the hospital records were lost, "surely" some follow-up would appear in the service treatment records. R. at 10. The Board cites no authorities for its reasoning, only those suppositions. The Board did not discuss whether the record was complete, namely whether there were any hospital records from Chu Lai that might corroborate Mr. Mendenhall's account. Nor did the Board discuss whether VA satisfied its duty to assist in completing the record. It did not even mention VA's January 2013 letter requesting that Mr. Mendenhall send more information about his purported hospitalization at Chu Lai.

The Secretary in his brief argued that Mr. Mendenhall did not adequately identify the purported records and so did not trigger VA's duty to assist in obtaining them. Secretary's Br. at 6-12. But these arguments do not appear [*8] in the Board's decision, and the Court cannot accept the Secretary's post hoc rationalizations in lieu of reasons or bases from the Board. *See Frost v. Shulkin*, 29 Vet.App. 131, 140 (2017). As the issues of adequate identification and VA's duty to assist were reasonably raised by the record, the Board had to address them. *See Robinson*, 21 Vet.App. at 552. The Board's failure to include an analysis of those issues leaves its statement of reasons or bases inadequate. *See Wise v. Shinseki*, 26 Vet.App. 517, 529 (2014) (holding that VA must support its determination that VA satisfied its duty to assist with an adequate statement of reason or bases); *see also Gilbert*, 1 Vet.App. at 56-57.

Because the Board gave an inadequate statement of reasons or bases, remand is the proper remedy. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is appropriate where the Board has failed to provide an adequate statement of reasons or bases). Mr. Mendenhall brings additional allegations of error, but because they would lead to remedies no broader than remand, this Court need not consider them. *See Best v. Principi*, 15 Vet.App. 18, 19 (2001). Generally, the veteran is free on remand to submit additional evidence and argument, including those raised in his briefs, and he has 90 days from the date of the post-remand notice VA provides to do so. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence [*9] or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also* 38 U.S.C. § 7112 (a remand must be performed in an expeditious manner); *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the above, the July 31, 2019, Board decision is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: March 29, 2021