BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]
[redacted] LAWLER, [redacted]

DOCKET NO. [redacted]) DATE August 7, 2017
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On appeal from the
Department of Veterans Affairs Regional Office in Seattle, Washington

THE ISSUES

1. Entitlement to service connection for a low back disability.

2. Entitlement to service connection for left foot neuroma.

REPRESENTATION

Veteran represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

J.A. Gelber, Associate Counsel

INTRODUCTION

The Veteran served on active duty from August 1984 to October 1990.

These matters come before the Board of Veterans' Appeals (Board) on appeal from a July 2005 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Waco, Texas. The RO in Seattle, Washington, exercises current jurisdiction over the claims file.

In April 2009, the Veteran testified at a Board hearing in Seattle, Washington, before Veterans Law Judge (VLJ) Mary Gallagher, who has since retired. A transcript of that hearing has been associated with the claims file and reviewed. In a letter sent in June 2017, the Veteran was offered the opportunity to present testimony at a new Board hearing before a different VLJ. As the Veteran did not respond within 30 days, this opportunity was deemed waived.

This case was previously before the Board in December 2008 and December 2009, on which occasions it was remanded for further development. As the requested development has been completed, no further action to ensure compliance with the remand directives is required. *Stegall v. West*, 11 Vet. App. 268 (1998).

The issue of entitlement to service connection for left foot neuroma is addressed in the REMAND portion of the decision below and is REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDING OF FACT

The competent and probative evidence is at least in equipoise as to whether the Veteran's low back disability had its onset during or is otherwise etiologically related to his period of active service.

CONCLUSION OF LAW

The criteria for entitlement to service connection for a low back disability have been met. 38 U.S.C.A. §§ 1110, 1131, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2016).

REASONS AND BASES FOR FINDING AND CONCLUSION

I. Duties to Notify and Assist

As the issue decided herein is being granted in full, any deficiency as to VA's duties to notify and assist would be harmless error and will not be discussed.

II. Service Connection

Service connection will be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a).

As a general matter, establishing service connection requires competent evidence of (1) the existence of a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the in-service disease or injury and the present disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004); 38 C.F.R. § 3.303.

Certain chronic diseases, including arthritis, will be considered incurred in service if manifest to a degree of ten percent within one year of service. 38 C.F.R. §§ 3.307, 3.309(a).

Under 38 C.F.R. § 3.303(b), an alternative method of establishing service connection for the chronic diseases listed in Section 3.309(a) is through a demonstration of continuity of symptomatology. *Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed. Cir. 2013). Continuity of symptomatology may be established if a claimant can demonstrate (1) that a condition was "noted" during service; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. *Savage v. Gober*, 10 Vet. App. 488, 495-97 (1997), *overruled on other grounds by Walker*, 708 F.3d 1331.

The Veteran is competent to report symptoms and experiences observable by his senses. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); 38 C.F.R. § 3.159(a).

In relevant part, 38 U.S.C.A. § 1154(a) (West 2014) requires that VA give "due consideration" to "all pertinent medical and lay evidence" in evaluating a claim for disability benefits. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 57-58 (1990).

After review of the record, the Board finds that the criteria for service connection for a low back disability have been met.

The evidence demonstrates a current diagnosis of degenerative arthritis of the lumbar spine. 04/19/2016 VBMS, C&P Exam (Back DBQ), p. 1. Thus, the Board finds that a current disability is shown.

The competent and probative evidence is at least in equipoise as to whether the record demonstrates a continuity of symptomatology. In this regard, the Veteran asserts that he began experiencing low back pain after an in-service surgery on his

right knee. 04/21/2009 VBMS, Hearing Testimony No. 1, p. 1. Within two weeks of discharge, VA received the Veteran's application for compensation for several claimed disorders, including back pain with sciatic nerve damage, indicating low back pain. 10/23/1990 VBMS, VA 21-526; 10/23/1990 VBMS, VA 21-4138. In October 2001, the Veteran reported experiencing back pain for ten years, with it worsening as a result of a motor vehicle accident in June 1997. 01/14/2003 VBMS, Medical-Government No. 2, pp. 2, 5-6. The record demonstrates that the Veteran has continued to seek treatment for low back pain on a more or less continuous basis since that time. Accordingly, the Board finds that the competent and probative evidence is at least in equipoise as to whether low back pain was noted during service and whether there is post-service continuity of the same symptomatology. *See Savage*, 10 Vet. App. at 495-97.

The Board finds the April 2016 VA examiner's opinion that it is less likely than not that the Veteran's low back disorder is "secondary to his active duty service" to be competent and credible; however, the opinion is given little probative weight as the rationale provided appears to only apply to secondary service connection, and is thus inadequate to support the opinion provided. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). Moreover, the April 2016 VA examiner did not opine as to whether the Veteran's low back disorder had its onset during service. As the disability in question is a chronic disease under 38 C.F.R. § 3.309(a), an award of service connection may be established solely on the basis of continuity of symptomatology. *Walker*, 1331, 1338. Hence, any doubt is resolved in the Veteran's favor and the claim is granted.

ORDER

Service connection for a low back disability is granted.

REMAND

Although the Board regrets the additional delay, a remand is necessary to ensure that due process is followed and that there is a complete record upon which to decide the Veteran's claim so that he is afforded every possible consideration. Specifically, a remand is needed to obtain an adequate opinion as to the etiology of the Veteran's left foot neuroma, including whether it has been aggravated by any service-connected disabilities.

In April 2016, a VA examiner opined that the Veteran's left foot neuroma is not related to service, stating his agreement with a rating decision denying direct service connection. The Board finds that the examiner's agreement with an AOJ decision denying direct service connection is not an adequate rationale to support his opinion. *See Stefl*, 21 Vet. App. 124. Indeed, the examiner's role is to opine based on his specialized medical training and experience, which was not accomplished here.

Additionally, the examiner failed to address whether the Veteran's left foot neuroma has been aggravated by any of his service connected-disabilities.

The Board notes that a May 2016 supplemental statement of the case states that the Veteran's separation examination contains no evidence of left foot neuroma. The separation examination does not appear to be associated with the virtual file. Accordingly, the AOJ should attempt to obtain the Veteran's in-service separation examination and associate it with the virtual file.

Accordingly, the case is REMANDED for the following actions:

1. Request the Veteran's in-service separation examination and associate it with the virtual file.

   If such efforts prove unsuccessful, prepare a memorandum of unavailability and associate it with the virtual file.

2. After completing directive #1, request an addendum opinion from the VA examiner who provided the April 2016 opinion, or another appropriate VA examiner, as to the etiology of the Veteran's left foot neuroma. An in-person examination is not required unless deemed necessary by the examiner. The examiner should be provided and review the virtual file, including a copy of this Remand. The examiner should address the following:

a. Is it at least as likely as not (50 percent or greater probability) that left foot neuroma manifested during, or is otherwise related to, the Veteran's period of active service?

b. Is it at least as likely as not (50 percent or greater probability) that the Veteran's left foot neuroma has been aggravated (*i.e.*, permanently worsened beyond the normal progression of that disease) by any of his service-connected orthopedic disabilities?

The term "aggravated" refers to a permanent worsening of the underlying condition beyond the natural progression of the disease, as opposed to temporary or intermittent flare-ups or symptoms that resolve with return to the baseline level of disability.

If aggravation is found, please state, to the extent possible, the baseline level of disability prior to aggravation.

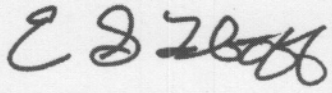
A comprehensive rationale for all opinions is to be provided. All pertinent evidence, including both lay and medical, should be considered. If an opinion cannot be

given without resorting to speculation, the examiner should explain why and state whether the need to speculate is due to a deficiency in the state of general medical knowledge (no one could respond given medical science and the known facts), the record (additional facts are required), or the examiner (does not have the knowledge or training).

3. Thereafter, if any benefit sought on appeal remains denied, issue a supplemental statement of the case and return the case to the Board, if otherwise in order.

The Veteran has the right to submit additional evidence and argument on the matter the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West 2014).



ERIC S. LEBOFF
Veterans Law Judge, Board of Veterans' Appeals