UNITED STATES COURT OF VETERANS APPEALS

No. 94-1031

BERNARD R. SMITH, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided September 4, 1996)

Stephanie Forester was on the pleadings for the appellant.

Mary Lou Keener, General Counsel; *Ron Garvin*, Assistant General Counsel; *R. Randall Campbell*, Deputy Assistant General Counsel; and *Rudrendu Sinhamahapatra* were on the pleadings for the appellee.

Before NEBEKER, *Chief Judge*, and MANKIN[1] and IVERS, *Judges*.

NEBEKER, *Chief Judge*: The appellant, Bernard R. Smith, appeals an August 31, 1994, Board of Veterans' Appeals (Board or BVA) decision denying entitlement to service connection for a varicocele. (Varicocele is "a varicose enlargement of the veins of the spermatic cord producing a soft compressible tumor mass in the scrotum." WEBSTER'S MEDICAL DESK DICTIONARY 751 (1986).) The Board's decision also denied entitlement to service connection for residuals of a hemorrhoidectomy, but the appellant has not appealed that issue. The appellant has submitted a motion for remand in lieu of a brief. The Secretary has filed a response in opposition of the motion. After consideration of the record on appeal and the pleadings of the parties, the Court will vacate the BVA's decision and remand the matter for the following reasons.

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[1]Judge Mankin was assigned and participated in this case, but died before its final disposition.

I. FACTS

The appellant served in the U.S. Army from June 1944 to April 1946. Record (R.) at 21. He initially claimed entitlement to service connection for a varicocele in January 1978. R. at 24-27. He submitted a diagnosis dated March 1978 of a varicocele above his left testicle. R. at 38. The regional office (RO) discovered that his service medical records had been lost in a fire at the National Personnel Records Center in 1973. R. at 31. The RO denied his claim on March 1, 1978. R. at 34. A couple of weeks later, the appellant submitted a statement explaining that he had been kicked in the groin during basic training at Camp Blanding, after which he was unable to complete basic training due to the injury. R. at 41-42. He reported that he had been treated for this condition by Dr. Paul K. Good, but no treatment records were available. *Ibid.* The RO sent the appellant a letter requesting that he furnish the dates he was treated at Camp Blanding and any medical evidence which established the continuity of treatment from separation from service to the present. R. at 46. The appellant responded that he had not been able to obtain hospitalization records from Camp Blanding and that he was treated after discharge by Dr. Paul K. Good, but that those records were not available. R. at 48. A May 1978 RO decision referred to the appellant's claim for service connection for a varicocele as an attempt to reopen and stated, "Vet[eran]'s claim is a duplicate of that denied by 3-1-78 rating due to not being shown in any service records. No new [and] material evidence submitted. Confirm prior denial." R. at 51. The RO sent the appellant a letter dated May 24, 1978, stating:

> The application which you recently filed for disability benefits is essentially a duplicate of a claim previously filed by you.
>
> Our records show that we notified you on March 9, 1978 that your claim for varicose veins, left testicle was disallowed and that you were permitted to appeal this decision within one year from that time, otherwise that decision would become final unless you could submit new and material evidence. Since you have not presented any new and material evidence, no change in our previous decision is warranted and no action on your duplicate claim will be taken.

R. at 53.

The appellant then wrote the RO a letter stating it had always been his belief that the Army "keep[s] very detailed records," but that his Camp Blanding records were not available. R. at 56.

He attached a form dated May 29, 1945, which informed the commanding officer at Camp Blanding that the appellant was to report for physical examination on June 1, 1945. R. at 58. The RO again decided that the appellant had not submitted any new and material evidence. R. at 61, 63.

In May 1985, the appellant submitted another statement reiterating that he had been kicked in the groin and, as a consequence, had not finished basic training. R. at 70-71. The RO determined that no new and material evidence had been submitted to reopen his claim for service connection. R. at 78. In December 1988, the appellant submitted copies of daily sick reports which noted that in August 1944 he had undergone treatment for an unspecified condition which preexisted service. R. at 114-19. The RO again found that the appellant had not submitted any new and material evidence to warrant reopening his claim. R. at 124.

In a personal hearing in July 1989, the appellant alleged that after he had been kicked in the groin in August 1944, his service records had been changed to show that the varicocele preexisted service to protect the officer who had kicked him. R. at 149. He also testified that the injury he sustained at that time had persisted over the years and had interfered with his sex life. R. at 151. The hearing officer found that no new and material evidence had been submitted. R. at 157-58. The appellant appealed that decision to the BVA which, in a March 1990 decision, considered the claim on a de novo basis and determined that a varicocele was not incurred in or aggravated by service. R. at 170-74.

The appellant appealed that decision to this Court. *Smith v. Derwinski*, 2 Vet.App. 147 (1992). We held that the Board had improperly required objective medical evidence to corroborate the appellant's testimony and had not complied with its duty to provide adequate reasons and bases for its denial of service connection; we vacated the Board's decision and remanded the matter. On remand from this Court, the BVA issued another decision which relied on medical treatises to deny entitlement to service connection. R. at 252-58. The appellant again appealed to this Court, and on February 14, 1994, we granted the parties' joint motion to vacate and remand for the Board to comply with *Thurber v. Brown*, 5 Vet.App. 119 (1993).

On remand, the appellant submitted a sworn statement from his wife in which she stated:

> I am intimately familiar with the physical capacity of my husband, being married to him prior to him entering into the service. Upon his discharge, I truly affirm, that my husband suffered from a service

> related disability which interfered with sexual activity for the past 48 years; that I have personally witnessed discomfort, pain, anxiety, and occasional dysfunction as a result of such injury; that there is no treating physician, friend or person knowledgeable with the condition who is any longer alive.

R. at 266. On June 9, 1994, the BVA sent the appellant's attorney a letter explaining that the BVA proposed to rely on "`evidence developed or obtained by it subsequent to the issuance of the most recent' Statement of the Case . . . ." R. at 270. The letter went on to state:

> A period of 60 days from the date of this letter is allowed for you to submit any additional argument or comment. . . .
>
> . . . .
>
> The Board will consider additional evidence in this appeal only on written motion for good cause for its submission at this time and if the evidence is accompanied by a waiver of consideration by the agency of original jurisdiction.

R. at 270-71. Attached were a statement of the reliance the Board proposed to place on the evidence and excerpts from the pertinent treatises. R. at 272-92. No response was received to the invitation to submit within 60 days additional argument or comment, although apparently the White House forwarded to VA a copy of a letter the appellant had written to President Clinton regarding his quest for benefits. *See* R. at 294, 296. The Board's decision now on appeal followed.

II. ANALYSIS

The appellant argues in his motion for remand that the BVA relied on medical treatises to support its denial of the appellant's claim without providing the appellant with an opportunity to submit additional evidence as required by *Thurber, supra*, and *Austin v. Brown*, 6 Vet.App. 547 (1994). Although the February 1994 remand by this Court directed the BVA to comply with *Thurber, supra*, the BVA had restricted the appellant's response to the submission of additional argument or comment and told him that the BVA would only consider additional evidence on written motion for good cause for its submission. *See* R. at 270. The appellant additionally argues that the BVA again failed to provide adequate reasons and bases for its denial in that it found the appellant's testimony not to be particularly credible because of the lack of corroboration by medical records.

The appellant points out that the BVA gave no reasons for its implicit rejection of his wife's sworn statement. Finally, the appellant argues that the BVA failed to fulfill its duty to assist the appellant by not reopening his claim and informing the appellant that he had 60 days in which to furnish information regarding possible alternate sources of evidence as required by the VA ADJUDICATION PROCEDURE MANUAL, (M21-1). In response to the appellant's motion, the Secretary argues that his claim for service connection was not well grounded and, therefore, any errors in the BVA's decision are harmless.

In the interim, the Court of Appeals for the Federal Circuit upheld this Court's decision in *Barnett v. Brown*, __F.3d__, No. 95-7058 (Fed. Cir. May 6, 1996), *aff'g* 8 Vet.App. 1 (1995), concluding that the Board must preliminarily decide that new and material evidence has been presented in a case it has previously adjudicated, before addressing the merits of the claim. *Barnett,* __F.3d at __, slip op. at 7. This is a mandatory jurisdictional requirement. 38 U.S.C. § 5108. Moreover, once the Board finds that no such evidence has been offered, that is where the analysis must end. *Barnett*, 8 Vet.App. at 4. The Board's review of the evidence of record is necessary to determine whether new and material evidence has been submitted, but a "review [of] the former disposition of the claim" (§ 5108, *supra*) by the Board is beyond its jurisdiction. *Barnett,* __F.3d at __, slip op. at 7 (holding "that the Board does not have jurisdiction to consider a claim which it previously adjudicated unless new and material evidence is presented"); *see also McGinnis v. Brown*, 4 Vet.App. 239, 244 (1993) (Board reopening is unlawful when new and material evidence has not been submitted). However, in the present case we need not decide whether *Barnett* is retroactively applicable because our earlier vacation and remand *directed* a merits consideration, not a new and material evidence analysis. Despite the Secretary's argument to the contrary, we conclude that under the circumstances revealed in this record, the appellant's claim is well grounded. While the well groundedness of the initial claim filed in 1978 may be questioned, we need not address the point. By the mid-1980's, the record contained evidence that appellant was unable to complete basic training because of the kick in the groin. In addition, appellant asserted that his service records had been changed to protect the officer alleged to have kicked him. More important is his testimony that the symptoms continued over the years and had interfered with his sexual performance. This was corroborated by the appellant's wife's statement. Plausibility of the claim thus existed at least from

1989. Accordingly, we deal with the other issues raised.

In its decision, the Board stated:

> The Board's review of several surgical and neurological texts does not show that blunt trauma of the scrotum or groin causes or helps to cause a varicocele. . . . Those texts show that the left testicle is affected 90 percent of the time (the veteran's varicocele is on the left) and that the cause is idiopathic or due to incompetent valves in the testicular veins. . . . The Board finds that these authorities are probative as the etiology [of] this varicocele. As a matter of law, as a lay person, the veteran's testimony as to the cause of his condition is not competent evidence of causation. Gowen v. Derwinski, 3 Vet.App. 286, 288-89 (1992). [This is a memorandum decision and therefore of no precedential value. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992); *but see Espiritu v. Derwinski*, 2 Vet.App. 492 (1992).] Moreover, the veteran has not cited any medical texts or authorities to support his theory. Since there is no medical authority to support his position, the incidental evidence showing that he was treated for an unspecified pre-existing disorder in August 1944 and that his basic training was abbreviated is not relevant as those circumstances are germane to the issue of service incurrence only if one accepts his medically unsupported position that trauma caused the varicocele.

R. at 11-12. The Board also found that the preponderance of the evidence was against the appellant's alternative claim that any preexisting varicocele was aggravated by service. R. at 12.

Thurber, 5 Vet.App. at 126, requires that

> before the BVA relies, in rendering a decision on a claim, on any evidence developed or obtained by it subsequent to the issuance of the most recent [Statement of the Case] or [Supplemental Statement of the Case] with respect to such claim, the BVA must provide a claimant with reasonable notice of such evidence . . . and a reasonable opportunity for the claimant to respond to it.

In *Austin*, this Court dealt with the same issue--a letter advising the appellant of the BVA's intended reliance on evidence developed after the issuance of the last Statement of the Case and its requirement that good cause be shown to submit additional evidence. As this Court explained in *Austin*, the appellant's right to submit evidence under *Thurber* cannot be premised on a preliminary showing of "good cause." *Austin*, 6 Vet.App. at 551. As in *Austin,* the BVA's decision here violates

the fair process principle because it relies on evidence obtained in "a process that does not ensure an impartial opinion." *Id.* at 552.

The Board suggests in its decision that the appellant's testimony regarding in-service onset of his condition is not credible because he has not supported that testimony with medical documentation.

> Since there is no medical authority to support his position, the incidental evidence showing that he was treated for an unspecified pre-existing disorder in August 1944 and that his basic training was abbreviated is not relevant as those circumstances are germane to the issue of service incurrence only if one accepts his medically unsupported position that trauma caused the varicocele.

R. at 12. Regarding the appellant's alternative claim that, if his varicocele did preexist service, it was aggravated thereby, the Board stated it did "not find that the veteran's testimony is particularly credible in view of the absence of records of treatment during the more than three decades which elapsed during the time after his discharge from service and his initial claim for service connection." R. at 12. "Nowhere do VA regulations provide that a veteran must establish service connection through medical records alone." *Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991); *see also Triplette v. Principi*, 4 Vet.App. 45, 49 (1993). Moreover, the Board does not even mention the appellant's wife's statement. The Board is not free to ignore evidence of record. *Webster v. Derwinski*, 1 Vet.App. 155, 159 (1991). Finally, as the appellant points out in his motion for remand, VA failed to follow the VA ADJUDICATION MANUAL, (M21-1) Part III, para. 4.22(c)(2), which requires that

> If benefits were denied prior to May 18, 1990, and a case for which [the Army Surgeon General's office (SGO)] records may exist (Army veteran with service during the periods 1942-1945 or 1950-54) is encountered during normal processing, the regional office will reopen the claim on its own initiative to obtain any SGO records.

The record on appeal does not show that VA attempted to obtain any SGO records. Also, where, as here, service medical records have been destroyed or lost, the Board has a duty to advise the claimant to obtain other forms of evidence. *Dixon v. Derwinski*, 3 Vet.App. 261, 263 (1992) (In "fire-related" cases, the M21-1 instructs VA personnel to assist the claimant in obtaining evidence from alternate or collateral sources and includes a list of appropriate alternate forms of evidence to be considered

in lieu of missing service medical records.); *see also Layno v. Brown*, 6 Vet.App. 465, 469 (1994). The Board failed to do this.

III. CONCLUSION

Accordingly, the Board's decision regarding denial of service connection for a varicocele is VACATED and the matter REMANDED for further adjudication. On remand, the appellant will be free to submit additional evidence and argument, and the Board must seek any other evidence it thinks is necessary to the resolution of the appellant's claim. *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992).