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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 08-2187

JAN KAUFMAN, APPELLANT,

V.

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

Before MOORMAN, *Judge*.

MEMORANDUM DECISION

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

MOORMAN, *Judge*: The appellant, Jan Kaufman, appeals through counsel a May 1, 2008, Board of Veterans' Appeals (Board) decision that denied service connection for an acquired psychiatric disorder and a bilateral knee disorder; and found that new and material evidence had not been submitted to reopen previously denied claims for service connection for chronic obstructive pulmonary disease (COPD), claimed as a lung condition and a back disorder. Record (R.) at 3-24. Both parties have filed briefs and the appellant filed a reply brief. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the May 2008 Board decision. A single judge may conduct that review because the outcome in this case is controlled by the Court's precedents and "is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's May 2008 decision and remand the matters for readjudication consistent with this opinion.

The appellant served on active duty in the U.S. Navy from September 1965 to June 1967. R. at 492. He filed claims for service connection for a back disability, a bilateral knee disability, and a lung condition in January 2002. R. at 477-90. Those claims were denied in September of that year. R. at 361-57. The appellant also filed a claim for a psychiatric disorder in October 2003 which was denied in 2004. R. at 290-95, 341. In the course of the proceedings concerning these claims, the appellant's claims for a back disability and for COPD (previously described as a lung disorder) were

allowed to become final and are here on appeal as claims to reopen. The claims for service connection for a psychiatric condition and a bilateral knee condition are here on direct appeal.

The appellant argues that the Board should have obtained medical records from the Little Rock VA medical center (MC) from the period dating from January 2006. Appellant's (App.) Brief (Br.) at 12-15. He asserts that the Board's failure to obtain these records constitutes a breach of the duty to assist. *Id.* The Secretary concedes that, because of this failure to obtain records, the Board's determination that the appellant's claim for service connection for a psychiatric disorder should be vacated and remanded. Secretary's (Sec'y) Br. at 8-11. The Secretary asserts that the Board decision concerning the other claims should be affirmed.

VA's duty to assist includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1), (b); *see Loving v. Nicholson*, 19 Vet.App. 96, 102-03 (2005) (discussing requirement that the records be adequately identified). VA is not required to assist a claimant in obtaining identified records "if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); *see Golz v. Shinseki*, 590 F.3d 1317, 1320 (Fed. Cir. 2010). The duty to assist "is not boundless in its scope" and "not all medical records or all [Social Security Administration] disability records must be sought – only those that are *relevant* to the veteran's claim." *Id.* at 1320-21 (emphasis added). "Relevant records for the purpose of § 5103A are those that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim." *Id.*; *see, e.g., Moore v. Shinseki*, 555 F.3d 1369, 1374 (Fed. Cir. 2009) (stating that "VA is statutorily required to obtain all of the veteran's relevant service medical records, not simply those which it can most conveniently locate"); *McGee v. Peake*, 511 F.3d 1352, 1355, 1358 (Fed. Cir. 2008); *see also Quartuccio v. Principi*, 16 Vet.App 183, 187-88 (2002); *Clarkson v. Brown*, 4 Vet.App. 565, 567-68 (1993); *Murincsak v. Derwinski*, 2 Vet.App. 363, 366, 370 (1992).

Relevance is not established where the identified records pertain to a "completely unrelated medical condition and the veteran makes no specific allegations that would give rise to a reasonable belief that the medical records may nonetheless pertain to the injury for which the veteran seeks benefits." *Golz*, 590 F.3d at 1322-23 (concluding that VA is not required to obtain Social Security records from SSA if VA determines, without review of the actual records, that there is no reasonable possibility that such records, which pertain to back and leg pain, are relevant to the veteran's claim

for VA disability compensation for PTSD). Nevertheless, in close or uncertain cases, "[a]s long as a *reasonable possibility exists that the records are relevant* to the veteran's claim, VA is required to assist the veteran in obtaining the identified records." *Id.* at 1323 (emphasis added): *see McGee*, 511 F.3d at 1357 (discussing VA's obligation, in fulfilling its duty to assist, to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits").

The appellant asserts that the records from the Little Rock VAMC are relevant to all of his claims here on appeal. App. Br. at 12-15; App. Reply Br. at 1-4. He states that it is not possible to determine whether the missing records contain evidence that would support the claim without first obtaining the records. The Secretary, while conceding that the missing records may be pertinent to the appellant's claim for a psychiatric condition, does not make any argument regarding the missing records' relevance to any of the other claimed conditions. The record indicates that the appellant presently suffers or asserts that he suffers from all four of the claimed conditions and that he goes to the Little Rock VAMC for "most of his medical needs." R. at 3-24, 232-39, 317-18.

The appellant has asserted that the missing records are relevant to all of his claims and the Secretary has offered no argument or evidence in rebuttal of that position. Thus, the Court is unable to determine whether or not the records from the Little Rock VAMC will be relevant to the appellant's claims. As the duty to assist obligates VA to obtain all of the appellant's medical records, especially those that are already in VA's possession and were produced by a VA facility, the Court will vacate and remand all of the appellant's claims so that the Board may obtain the missing medical records and readjudicate the appellant's claims once VA has fulfilled its duty to assist. 38 U.S.C. § 5103A; *see also Moore*, 555 F.3d at 1374. Though the appellant asserts other arguments in his brief, the Court deems it unnecessary to address those arguments in contemplation that additional medical evidence will be considered on remand.

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's May 1, 2008, decision is VACATED and the matters are REMANDED.

DATED: November 24, 2010

Copies to:

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