

1 UNITED STATES COURT OF VETERANS APPEALS

2 No. 91-1417

3 HERBERT J. BOECK, APPELLANT,

4 v.

5 JESSE BROWN,
6 SECRETARY OF VETERANS AFFAIRS, APPELLEE.

7 On Appeal from the Board of Veterans' Appeals

8 (Decided September 20, 1993)

9 *Herbert J. Boeck, pro se.*

10 *James A. Endicott, Jr., General Counsel, David T. Landers, Acting Assistant General*
11 *Counsel, Thomas A. McLaughlin, Deputy Assistant General Counsel, and Adrienne Koerber were*
12 *on the pleadings for appellee.*

13 Before KRAMER, HOLDAWAY, and IVERS, *Judges.*

14 HOLDAWAY, *Judge:* Appellant, Herbert J. Boeck, appeals an February 28, 1991, decision
15 of the Board of Veterans' Appeals (BVA or Board) which denied service connection for a prostate
16 disorder, post-traumatic stress disorder (PTSD), and ulcerative colitis, and denied entitlement to
17 benefits pursuant to 38 U.S.C.A. § 1151 (West 1991) for additional disability of the prostate as
18 a result of treatment rendered by the Portland Veterans' Administration (now the Department
19 of Veterans Affairs) (VA) Medical Center (MC) beginning in July 1986. The Court will vacate
20 and remand the Board decision as to the ulcerative colitis claim, and affirm the BVA decision as
21 to all other claims.

22 **BACKGROUND**

23 Appellant, a World War II veteran, had active service from November 1933 to November
24 1937 and from December 1941 to December 1945. Service connection is currently in effect for
25 irritable bowel syndrome, rated 30% disabling; residuals of a gunshot wound of the pleural cavity,
26 rated 20% disabling; residuals of a gunshot wound of Muscle Group II on the right, rated 20%
27 disabling; and bronchitis, residuals of malaria, and residuals of a hookworm infestation, rated
28 noncompensably disabling. Appellant was treated on occasion during service for bowel
29 complaints. In April 1961, appellant was examined at the Virginia Mason Clinic, a private
30 facility, and diagnosed with old or inactive chronic ulcerative colitis. Appellant submitted a claim

1 of service connection for ulcerative colitis in May 1961. In May 1963, appellant's claim was
2 denied by the Board because there was no finding of ulcerative colitis upon examination in
3 October 1961, at the Seattle VAMC. Since the May 1963 BVA decision, appellant has submitted
4 additional clinical records, dating from 1963 through 1989, which indicate that appellant suffers
5 from ulcerative colitis.

6 In July 1986, appellant was admitted to the Portland VAMC for treatment of inflammatory
7 bowel disease. Upon examination, it was discovered that appellant's "prostate was large, firm
8 without nodules." Although extensive laboratory work was done, it is not entirely clear whether
9 any of the tests related to the prostate. On November 3, 1987, appellant reported to the
10 American Lake VAMC with complaints of abdominal pain. Appellant was informed that he was
11 scheduled for a physical examination on November 23, 1987, and that he should return at that
12 time. The following day, November 4, 1987, appellant sought medical assistance from Dr. Ellis
13 Johnson, a private physician. After further examination and treatment, Dr. Johnson diagnosed
14 appellant with prostate cancer in mid-1988. In January 1989, Dr. Johnson submitted a statement,
15 in which he said, "It is my professional opinion that Herbert J. Boeck was ill-served while a patient
16 of the [VA] Hospitals considering the medical problems that existed when he became my patient
17 on November 4, 1987 (one day after he was refused treatment at the American Lake Hospital)."

18 In late 1988, appellant claimed that he was suffering from PTSD as a result of World War
19 II combat experiences. In December 1988, appellant received a psychological examination at the
20 Portland VAMC. The examiner determined that there were no symptoms of PTSD. In March
21 1989, the VARO denied service connection for ulcerative colitis, a prostate disorder, and PTSD,
22 and determined appellant's prostate cancer was not caused by the Portland VAMC's failure to
23 perform diagnostic studies. A Notice of Disagreement was submitted on March 30, 1989. In July
24 1989, appellant testified at a personal hearing that he now suffers "severe residuals" from his
25 prostate cancer resulting from the Portland VAMC's lack of treatment. Appellant also related
26 several incidents during service which he claims are a basis for his alleged PTSD. On February
27 28, 1991, the BVA determined that a chronic prostate disorder was not incurred during service,
28 that the criteria for an award of benefits under 38 U.S.C.A. § 1151 had not been met, that PTSD
29 was not incurred in or aggravated by service, and that a new factual basis was not presented for
30 an award of service connection for ulcerative colitis.

31 ANALYSIS

32 After reviewing all the evidence, both old and new, the BVA determined that the
33 evidence did not provide a basis for concluding that ulcerative colitis was incurred during service.
34 *Herbert J. Boeck*, BVA 91-6511, at 9 (Feb. 28, 1991). The Board stated that "there are no sound

1 medical principles which would demonstrate an etiological relationship between the veteran's
2 ulcerative colitis and his service-connected hookworm residuals with irritable bowel syndrome.
3 Thus there is neither a primary nor secondary basis for assigning service connection for ulcerative
4 colitis." *Id.* at 9-10. The Board did not cite to any medical evidence or medical treatises in
5 support of its medical conclusion. The Court has held that the BVA may not supply its own
6 unsubstantiated medical opinion. "If the medical evidence of record is insufficient, or . . . of
7 doubtful weight or credibility, the BVA is always free to supplement the record by seeking an
8 advisory opinion, ordering a medical examination or citing recognized medical treatises in its
9 decisions that clearly support its ultimate conclusions." *Colvin v. Derwinski*, 1 Vet.App. 171, 175
10 (1991); *see Thurber v. Brown*, 5 Vet.App. 119 (1993). Accordingly, the Board's denial of service
11 connection for ulcerative colitis is vacated, and the matter remanded for readjudication.

12 The Board's determination that neither a prostate disorder nor PTSD was incurred in or
13 aggravated by service is a finding of fact which must be reviewed by the Court under the clearly
14 erroneous standard. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990); *see* 38 U.S.C.A. § 7261(a)(4)
15 (West 1991). "[U]nder the 'clearly erroneous' rule, this Court is not permitted to substitute its
16 judgment for that of the BVA on issues of material fact; if there is a 'plausible' basis in the record
17 for the factual determinations of the BVA . . . [the Court] cannot overturn them." *Gilbert*, 1
18 Vet.App. at 53. There is no clinical evidence indicating a prostate condition during service or
19 within one year of separation. The first indication of a prostate disorder was recorded in July
20 1986, nearly forty years after separation from service. Additionally, appellant's most recent
21 psychological examination reveals no symptomatology of PTSD. Appellant's lay opinion that he
22 has PTSD and that his prostate disorder was a result of his service-connected colitis are entitled
23 to no weight. *See Espiritu v. Derwinski*, 2 Vet.App. 492, 494-95 (1992). After a complete and
24 thorough examination of the BVA's factual findings, the Court finds a plausible basis for the
25 Board's decision.

26 Finally, appellant contends that negligent treatment by the Portland VAMC beginning
27 in 1986 caused or contributed to prostate cancer. Under 38 U.S.C.A. § 1151:

28 Where any veteran shall have suffered an injury, or an aggravation of an injury, as
29 the result of hospitalization, medical or surgical treatment, . . . and such injury or
30 aggravation results in additional disability to or the death of such veteran,
31 disability or death compensation under this chapter . . . shall be awarded in the
32 same manner as if such disability, aggravation, or death were service-connected.

33 A veteran claiming entitlement to VA benefits has the burden of submitting evidence sufficient
34 to justify a belief by a fair and impartial individual that the claim is well grounded. *See* 38
35 U.S.C.A. § 5107(a) (West 1991); *see Tirpak v. Derwinski*, 2 Vet.App. 609, 610-11 (1992). If a

1 claim is not well grounded, the BVA does not have jurisdiction to adjudicate that claim. See
2 *Grottveit v. Brown*, 5 Vet.App. 91, 93 (1993). Because appellant failed to present a well-grounded
3 claim, the Court need not reach the interesting question of whether 38 U.S.C.A. § 1151 applies
4 in circumstances where a veteran enters a VA hospital with a non-service-connected disease, and
5 the claim is made that the negligent failure to diagnose this disease is "aggravation" of that disease.

6 The medical "treatment" appellant received at the Portland VAMC occurred
7 approximately two years prior to Dr. Johnson's diagnosis of prostate cancer. The July 1986
8 examination at the Portland VAMC revealed only a firm, large prostate, with no nodules.
9 Extensive laboratory testing was performed by the Portland VAMC at that time. Appellant has
10 produced no clinical evidence indicating that he was suffering from prostate cancer in July 1986.
11 There is absolutely no expert medical evidence as to the significance, if any, of having a "firm,
12 large prostate, with no nodules." Appellant's lay testimony that he was suffering from prostate
13 cancer in July 1986 is not sufficient. See *Espiritu*, at 494-95. Similarly, Dr. Johnson's statement,
14 submitted in January 1989, that appellant was "ill-served" is simply too vague and speculative to
15 infer that appellant had prostate cancer at the time of treatment at the Portland VAMC. See
16 *Tirpak*, 2 Vet.App. at 611. Indeed, the statement in the case sub judice is far weaker than the
17 "may or may not" language in *Tirpak* that was held insufficient to "ground" a claim. Moreover,
18 it does not appear that when he made this statement Dr. Johnson had access to appellant's clinical
19 records from the Portland VAMC, or even knew what "treatment" or tests the Portland VAMC
20 had, in fact, performed. It is as likely as not that the "ill-served" statement derived solely from
21 appellant's version of his treatment. In short, even if believed, the statement that appellant was
22 ill served would not support a finding (a) that he had cancer at the time of the examination or (b)
23 that good medical practice would have disclosed it. A medical opinion that these two facts were
24 more probable than not would be the sine qua non of a well-grounded claim in the context of this
25 case. Therefore, since there is no well-grounded claim, the decision of whether 38 U.S.C.A.
26 § 1151 is applicable to such a claim will have to await another day.

27 The February 28, 1991, decision of the Board is VACATED, and the matter REMANDED
28 with respect to appellant's claim of service connection for ulcerative colitis. With respect to
29 appellant's claims of service connection for a prostate disorder, and PTSD, and appellant's claim
30 of entitlement to benefits pursuant to 38 U.S.C.A. § 1151, the decision of the Board is
31 AFFIRMED.