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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-3243

NORRIS T. HUNT, APPELLANT,

v.

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

Before HAGEL, *Judge*.

MEMORANDUM DECISION

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

HAGEL, *Judge*: Norris T. Hunt appeals through counsel a September 24, 2008, Board of Veterans' Appeals (Board) decision that found that (1) new and material evidence had not been submitted to reopen a claim for hypertension; (2) VA benefits were not warranted for obesity; and (3) an increased disability rating for post-traumatic stress disorder to 30% disabling was warranted.¹ The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a) to review the September 2008 Board decision, and a single judge may conduct that review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). Because the Board provided an adequate statement of reasons or bases

¹The Board also remanded the issues of entitlement to (1) VA benefits for an eye disability, sleep apnea, a cardiovascular disorder, osteoarthritis, and lumbar spine degenerative disc disease; (2) an increased disability rating for bilateral hearing loss; and (3) a total disability rating based on individual unemployability. Therefore these matters are not before the Court at this time. *See* 38 U.S.C. § 7266 (stating that the Court reviews only final decisions of the Board; *Howard v. Gober*, 200 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute a final decision that may be appealed (citing 38 C.F.R. § 20.1100(b) (1999))).

In addition, in his brief, Mr. Hunt makes no arguments as to the Board's findings that (1) new and material evidence had been submitted to reopen a claim for an eye disability; (2) an increased disability rating was not warranted for erectile dysfunction, ulcerative colitis, or hemorrhoids; (3) an earlier effective date was not warranted for entitlement to VA benefits for erectile dysfunction or an award of special monthly compensation; and (4) there was no legal entitlement to an earlier effective date for entitlement to VA benefits for diabetes mellitus, tinnitus, ulcerative colitis, defective hearing, and hemorrhoids. The Court therefore deems any appeal as to these claims abandoned. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

for finding that Mr. Hunt was not entitled to VA benefits for obesity and an increased disability rating for post-traumatic stress disorder, the Court will affirm those portions of the September 2008 Board decision. Because the Board did not provide an adequate statement of reasons or bases for its finding that new and material evidence had not been submitted to reopen a claim for VA benefits for hypertension, the Court will vacate that portion of the September 2008 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

A. Post-Traumatic Stress Disorder

Mr. Hunt served on active duty in the U.S. Army from July 1968 to June 1970. In August 2002 a VA regional office awarded Mr. Hunt entitlement to VA benefits for post-traumatic stress disorder, assigning a 10% disability rating. In January 2005, Mr. Hunt filed a claim for an increased disability rating for that condition. In April 2005, he was afforded a VA examination. The VA examiner reported that he reviewed Mr. Hunt's VA medical center records and noted that Mr. Hunt attended weekly post-traumatic stress disorder groups. The examiner stated that Mr. Hunt remained employed full-time but that he experienced nightmares, intrusive memories, avoidant behaviors, and heightened arousal. Mr. Hunt also reported to the examiner that he and his wife had been married since 1971, that she was very supportive, and that he had a few friends. The examiner reported no suicidal or homicidal behavior and Mr. Hunt denied hallucinatory experiences. The examiner continued that Mr. Hunt's thought process was logical and goal directed, his insight and judgment appeared intact, and his memory in all spheres was also intact. The examiner assigned a Global Assessment of Functioning Score of 60.²

After further development, Mr. Hunt received another VA examination in May 2006. The examiner stated that Mr. Hunt's VA medical center treatment records and prior VA examination were reviewed. Mr. Hunt related that he continued to attend weekly post-traumatic stress disorder group sessions and that he continued to experience sleep problems due to nightmares, intrusive thoughts,

²A Global Assessment of Functioning score represents "the clinician's judgment of the individual's overall level of functioning" and is "useful in planning treatment and measuring its impact[] and in predicting outcome." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 30 (4th ed. 1994); see *Richard v. Brown*, 9 Vet.App. 266, 267 (1996).

flashbacks, avoidant behaviors, irritability, social isolation, difficulty concentrating, and hyper-startle response. He also reported almost losing his job due to problems with other people and concentration on the job. Mr. Hunt stated that he had difficulty communicating with his family and that he was estranged from his son, but that his relationship with his wife and two daughters was good. The examiner stated that Mr. Hunt's "psychosocial functioning continues to be severely impacted and impaired by his [post-traumatic stress disorder]," and assigned a Global Assessment of Functioning score of 55, noting "moderate symptoms and moderate difficulty in social and occupational functioning." Record (R.) at 1551, 1554.

The regional office continued Mr. Hunt's 10% disability rating, and he appealed to the Board. In support of his appeal, Mr. Hunt submitted a private psychiatric report, stating that his post-traumatic stress disorder had worsened over the past few years. The report also stated that Mr. Hunt's Global Assessment of Functioning score was 45. Additional VA medical center treatment records reflected Global Assessment of Functioning scores of 45 and 55.

B. Hypertension and Obesity

In February 2003, Mr. Hunt filed a claim for VA benefits for hypertension, which was denied by the regional office in February 2004. Mr. Hunt did not appeal that decision, and it became final. In January 2006, Mr. Hunt filed a claim for entitlement to various VA benefits claimed as secondary to his service-connected post-traumatic stress disorder, including obesity. In support of his claim, he submitted several articles relating to post-traumatic stress disorder and physical health, including obesity-related illnesses. In September 2006, the regional office asked Mr. Hunt to clarify the disabilities for which he was seeking benefits. Later that month, Mr. Hunt's January 2006 claim was amended to include hypertension. In a November 2006 decision, the regional office found that new and material evidence had not been submitted to reopen his claim for hypertension, finding that the articles Mr. Hunt submitted were not a professional opinion as to his condition, and that entitlement to VA benefits for obesity was not warranted, stating that obesity was not a disability for which VA benefits could be awarded. Mr. Hunt appealed that decision to the Board.

C. September 2008 Board Decision

In the Board decision currently on appeal, the Board found "that the evidence shows [Mr. Hunt]'s disability more nearly approximates the criteria for a 30[%] disability rating for [post-

traumatic stress disorder]. " R. at 26. The Board explained that Mr. Hunt demonstrated nearly all of the symptoms outlined in the 30% rating criteria, while he exhibited few of the symptoms outlined in the 50% rating criteria. The Board also stated that Mr. Hunt's Global Assessment of Functioning scores, ranging from 45-60, more closely supported a 30% disability rating. Specifically, the Board stated that the clinical findings were more closely analogous to a Global Assessment of Functioning score between 51-60, which is consistent with a 30% rating. The Board therefore found that Mr. Hunt was entitled to a 30% disability rating, but no higher.

The Board next found that new and material evidence had not been submitted to reopen Mr. Hunt's claim for hypertension, including as secondary to his service-connected diabetes mellitus. The Board explained that the evidence added to the record since the last prior final decision showed a continuing diagnosis of hypertension, a fact already established when Mr. Hunt's claim was previously denied. .

As to his obesity claim, the Board found that, although it was documented that Mr. Hunt was obese, "the competent evidence of record shows this disorder is not secondary to [his post-traumatic stress disorder]." R. at 18. The Board explained that, although the articles Mr. Hunt submitted showed that physical health problems increased in individuals with post-traumatic stress disorder, the articles did not specifically relate to Mr. Hunt and did not conclusively state that post-traumatic stress disorder caused obesity. The Board also found that a VA examination was not warranted for this claim because the relationship between post-traumatic stress disorder and obesity was too tenuous. The Board therefore concluded that the evidence preponderated against a finding of VA benefits for obesity.

D. Arguments

On appeal, Mr. Hunt argues that he is entitled to a disability rating in excess of 30% for post-traumatic stress disorder. Specifically, he contends that the Board provided an inadequate statement of reasons or bases for its decision in that it did not discuss referral for extraschedular consideration nor did it adequately discuss his Global Assessment of Functioning scores. Next, Mr. Hunt contends that as to his obesity claim, the articles he submitted are competent evidence showing that his obesity was related to his post-traumatic stress disorder, such that a medical examination was warranted. Finally, as to his hypertension claim, Mr. Hunt argues that the Board erred because it did not discuss

the evidence he submitted reflecting that his hypertension may be secondary to his post-traumatic stress disorder.

In response, the Secretary argues that the Court should affirm the September 2008 Board decision because the Board provided an adequate statement of reasons or bases and the Board's findings are plausible based on the record. Specifically, the Secretary contends that the Board explained why a 50% disability rating for post-traumatic stress disorder was not proper and argues that, although a Global Assessment of Functioning score should be considered, it is not determinative of the disability rating assigned. Next, the Secretary argues that the Board adequately discussed why the articles Mr. Hunt submitted in support of his claim for obesity were not probative evidence and that, because of this, a medical examination was not warranted. Finally, as to Mr. Hunt's hypertension claim, the Secretary contends that this claim should be remanded because the Board did not discuss whether this claim could be reopened as secondary to post-traumatic stress disorder.

II. ANALYSIS

A. Post-Traumatic Stress Disorder

1. *Global Assessment of Functioning Scores*

A Board determination of the appropriate degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 3664, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.* Vacatur and remand may be warranted where the Board has failed to provide an adequate statement of reasons or bases for its determinations or where the record is inadequate. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Here, Mr. Hunt contends that the Board did not provide an adequate statement of reasons or bases for its determination that he was not entitled to a disability rating in excess of 30% for post-traumatic stress disorder. Specifically, Mr. Hunt argues that the Board did not adequately discuss his Global Assessment of Functioning score of 45. The Court disagrees.

The relevant disability regulation for post-traumatic stress disorder is 38 C.F.R. § 4.130, Diagnostic Code 9411 (2009). That Diagnostic Code states that a disability rating of 50% is warranted if there is:

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; a difficulty in understanding complex commands; impairment of short- and long-term memory; impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

38 C.F.R. § 4.130, Diagnostic Code 9411 (internal parentheses omitted). The Diagnostic Code states that a disability rating of 30% is warranted if there is "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." *Id.* The primary difference between the two ratings is how much the claimant's post-traumatic stress disorder interferes with occupational and social interactions. The symptoms listed simply provide examples of how those impairments in occupational and social interactions may manifest. *See Mauerhan v. Principi*, 16 Vet.App. 436 (2002).

In its decision, the Board provided a lengthy discussion of the evidence in the record and the applicable provisions governing the assignment of appropriate disability ratings. In making its determination, the Board noted Mr. Hunt's symptoms, including nightmares, intrusive thoughts, avoidant behaviors, flashbacks, social isolation, and hyper-startle response. The Board also discussed Mr. Hunt's Global Assessment of Functioning scores. The Board stated that most of the Global Assessment of Functioning scores assigned to Mr. Hunt were consistent with a 30% disability rating. Mr. Hunt took issue with this characterization in his brief, stating that "most" of his scores reflected a higher disability rating. The Court concludes however, that the Board adequately discussed Mr. Hunt's Global Assessment of Functioning scores. The Board stated that "the symptoms experienced by [Mr. Hunt] are consistent with the criteria noted for scores between 51 and

60." R. at 27. The Board explained that, although Mr. Hunt had received a Global Assessment of Functioning score of 45, the other Global Assessment of Functioning scores were more accurate and supported by the other clinical findings of record. The Board stated:

Specifically, while [Mr. Hunt] only very recently described some thoughts of suicidal ideation, he had no other "serious symptoms." He had no severe obsessional rituals, his thinking and judgment were intact, and he had a good relationship with his wife and daughters. When he did work, he was able to isolate himself so as not to cause a fight with his coworkers. Therefore, while [he] was once assigned a [Global Assessment of Functioning] score of 45, the Board finds that his symptoms are more closely analogous to the symptoms associate with [Global Assessment of Functioning] scores between 51 to 60. Such scores are consistent with the increase to a 30% rating.

R. at 27. Although Mr. Hunt was assigned a Global Assessment of Functioning score of 45 on more than one occasion, as he points out in his brief, the Court concludes that the Board provided adequate reasons or bases for its decision, including how Mr. Hunt's Global Assessment of Functioning scores factored into his overall disability rating. Accordingly, the Board's characterization of "most" of Mr. Hunt's Global Assessment of Functioning scores as consistent with a 30% disability rating is not clearly erroneous.

Further, the Board explained that it evaluated Mr. Hunt's symptoms described in his treatment records and examination reports, as well as his Global Assessment of Functioning scores, and found that, overall, his post-traumatic stress disorder was moderate, warranting a 30% disability rating, but no higher. In specifically finding that Mr. Hunt was not entitled to a disability rating in excess of 30%, the Board enumerated the symptoms contained in the 50% criteria and explained that, based on the evidence of record, Mr. Hunt did not exhibit a majority of these symptoms.

Based on the extensive discussion provided by the Board in making its determination that Mr. Hunt's post-traumatic stress disorder did not warrant a disability rating in excess of 30%, the Court is not convinced that the Board's decision lacks an adequate statement of reasons or bases, or is otherwise clearly erroneous. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Accordingly, the Court will affirm that portion of the September 2008 Board decision that denied entitlement to a disability rating in excess of 30% for post-traumatic stress disorder.

2. Referral for Extraschedular Consideration

Section 3.321(b)(1), title 38, Code of Federal Regulations, provides the following as to the criteria for award of an extraschedular rating:

To accord justice . . . to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

38 C.F.R. § 3.321(b)(1) (2009).

This regulation requires that a case be "exceptional" to be considered for extraschedular review. In determining whether the Board erred by not discussing § 3.321(b), the Court must first determine whether a claimant "specifically sought extraschedular evaluation." *Dingess v. Nicholson*, 19 Vet.App. 473, 497 (2006), *aff'd sub nom. Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007). "[T]he Board is not required to anticipate a claim for extraschedular consideration when it was neither specifically nor reasonably raised." *Id.* at 498; *see Talbert v. Brown*, 7 Vet.App. 352, 356 (1995) (holding that the Board is not required to engage in prognostication, but must consider all issues reasonably raised). If the veteran did not specifically seek extraschedular consideration, the Court must determine whether that issue was reasonably raised by the evidence and, thus, "whether the Board erred in failing to address sua sponte extraschedular consideration." *Dingess*, 19 Vet.App. at 498; *see Smallwood*, 10 Vet.App. at 98.

Here, Mr. Hunt contends in his brief that "[t]he question of an extraschedular rating is a component of a claim for an increased rating." Appellant's Br. at 8 (citing *Bagwell v. Brown*, 9 Vet.App. 337, 339 (1996)). He does not, however, explain where in the record he purports to have raised a claim for extraschedular consideration or where such a claim was reasonably raised. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("In the absence of specificity as to any particular inadequacy . . . Mr. Coker's argument, which is advanced by counsel, fails."), *rev'd*

on other grounds sub nom. Coker v. Peake, 310 Fed. Appx. 371 (Fed. Cir. May 1, 2008). Likewise, the Court does not find evidence in the record suggesting that Mr. Hunt's post-traumatic stress disorder is "exceptional or unusual." 38 C.F.R. § 3.321(b)(1). The Court therefore concludes that the matter was not reasonably raised by Mr. Hunt or the evidence and therefore the Board did not err in not discussing whether referral for extraschedular consideration was warranted.

B. Obesity

Pursuant to 38 C.F.R. § 3.159(c)(4)(i) (2009), VA must provide a claimant a medical opinion or examination if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in [38 C.F.R.] § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

See also 38 U.S.C. § 5103A(d)(2).

In *Duenas v. Principi*, the Court held that, when the Board considers whether a medical examination or opinion is necessary under section 5103A(d) and § 3.159(c)(4), it must provide a written statement of the reasons or bases for its conclusion, pursuant to 38 U.S.C. § 7104(d)(1), and that, absent a finding of nonprejudicial error, vacatur and remand is warranted where it fails to do so. 18 Vet.App. 512, 517-18 (2004) (citing *Tucker*, 11 Vet.App. at 374. In *McLendon v. Nicholson*, the Court observed that the third prong of § 3.159(c)(4)(i), which requires that the evidence of record "indicate" that "the claimed disability or symptoms may be associated with the established event," establishes "*a low threshold*." 20 Vet.App. 79, 83 (2006) (emphasis added).

Here, Mr. Hunt contends that the Board did not provide adequate reasons or bases as to why he is not entitled to a VA medical examination for his obesity claim. Specifically, he contends that the articles he submitted are competent evidence of a nexus between his obesity and his post-traumatic stress disorder. However, the Board explicitly found that the articles were "not competent evidence of a link between [Mr. Hunt's post-traumatic stress disorder] and obesity." R. at 19. Thus, the articles did not satisfy the "low threshold" of evidence outlined in *McLendon*. 20 Vet.App. at 83. Further, it is the Board's duty to assess the weight and credibility of the evidence. *See Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Court notes that, generally, medical treatise evidence may satisfy the low threshold noted in *McClendon* and is competent evidence; however, as was noted by the Board, the medical treatise evidence offered in this case does not provide an indication that post-traumatic stress disorder causes or aggravates obesity, only that individuals with post-traumatic stress disorder self-report more health issues such as obesity.

Moreover, obesity alone is not considered a disability for which service connection may be granted. *See generally* 38 C.F.R. Part 4 (VA Schedule for Rating Disabilities) (2009) (does not contemplate a separate disability rating for obesity). Rather, applicable VA regulations use the term "disability" to refer to the average impairment in earning capacity resulting from diseases or injuries encountered as a result of or incident to military service. *See Allen v. Brown*, 7 Vet. App. 439, 448 (1995); *Hunt v. Derwinski*, 1 Vet.App. 292, 296 (1991); 38 C.F.R. § 4.1 (2009). The question is thus whether Mr. Hunt's obesity is a disability—i.e., a condition causing impairment in earning capacity. In this case, there is no such evidence.

Thus, the Court concludes that the Board complied with its duty pursuant to *Duenas* and provided an adequate statement of reasons or bases for why a medical examination was not warranted. The Board explained that the articles Mr. Hunt submitted were general and only showed that people with post-traumatic stress disorder self-reported more physical problems than those without, and that none of the articles related to obesity as a specific disorder. Because a medical examination would not "indicate" that "the claimed disability or symptoms may be associated with the established event" (38 C.F.R. §3.159(c)(4)(i)), the Court concludes that the Board provided adequate reasons or bases for its determination that Mr. Hunt was not entitled to a medical

examination for his obesity. The Court will therefore affirm that portion of the September 2008 Board decision that denied entitlement to VA benefits for obesity.

C. Hypertension

Pursuant to 38 U.S.C. § 5108, "If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." "New and material evidence" means evidence not previously submitted to agency decisionmakers which relates to an unestablished fact necessary to substantiate the claim, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled must raise a reasonable possibility of substantiating the claim. *See Untalan v. Nicholson*, 20 Vet.App. 467; 38 C.F.R. § 3.156(a) (2009). The Court generally reviews whether a claimant has submitted new and material evidence to reopen a prior claim under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Suaviso v. Nicholson*, 19 Vet.App. 532, 533 (2006).

Here, Mr. Hunt contends that the Board erred in declining to reopen his claim for VA benefits for hypertension because it did not discuss the evidence he submitted in support of his theory that his hypertension may be secondary to his service-connected post-traumatic stress disorder. The Secretary concedes this point in his brief:

Since the Board had jurisdiction over [Mr. Hunt]'s request to reopen his claim for entitlement to service connection for [hypertension] on a direct basis and secondary to [diabetes mellitus], and secondary to [post-traumatic stress disorder], the Board was required to provide a statement of reasons and bases pertaining to [his] claim for service connection for [hypertension] secondary to [post-traumatic stress disorder].

Secretary's Br. at 20; *see Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) (holding that the Board is obligated to consider all theories of a claim that are raised by the record); *Bingham v. Principi*, 421 F.3d 1346, 1349 (Fed. Cir. 2005) (recognizing that separate theories in support of a claim for a particular benefit are not equivalent to separate claims and that a final denial on one theory is a final denial on all theories). Accordingly, because the Board did not discuss whether the evidence Mr. Hunt submitted in support of his theory that his hypertension is secondary to his post-traumatic stress disorder was new and material and could possibly reopen his claim, the Court will

remand that portion of the September 2008 Board decision for readjudication consistent with this decision.

III. CONCLUSION

Upon consideration of the foregoing, that portion of the September 24, 2008, Board decision finding that new and material evidence had not been submitted to reopen a claim for VA benefits for hypertension is VACATED and the matter is REMANDED for readjudication consistent with this decision. The remainder of the September 2008 Board decision is AFFIRMED.

DATED: May 25, 2010

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