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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-0854

RONALD J. CLAY, APPELLANT,

V.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: U.S. Army veteran Ronald J. Clay appeals through counsel from a February 4, 2013, Board of Veterans' Appeals (Board) decision denying an initial disability rating higher than 30% for an anxiety disorder not otherwise specified, claimed as post-traumatic stress disorder (PTSD). For the following reasons, the Court will set aside the February 2013 Board decision and remand the matter for further adjudication.

I. ANALYSIS

A. Inadequate Medical Examination

Mr. Clay argues that the Board erred in relying on an inadequate medical examination to deny a rating in excess of 30% for his anxiety disorder. Specifically, he argues that the November 2009 VA examination was inadequate because (1) it contained no rationale supporting its conclusions, (2) the scope of the examination was limited to a nexus determination, and (3) the examiner did not review the private medical opinions.

A medical examination is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's '"evaluation of the claimed disability will be a fully informed one."' *Stefl v.*

Nicholson, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). The medical examination report must contain clear conclusions and supporting data, as well as "a reasoned medical explanation" connecting the data and conclusions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). Whether a medical opinion is adequate is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 103 (2008).

Mr. Clay's allegations that the November 2009 VA examiner failed to provide a rationale for his medical conclusions is not supported by the record. In the November 2009 examination, the VA examiner discussed Mr. Clay's marital and family relationships, evaluated his PTSD stressors, and conducted a psychological examination. *See* Record (R.) at 11; *see also* R. at 134. The examiner noted that Mr. Clay's symptoms included difficulty falling or staying asleep, an exaggerated startle response, monthly intrusive recollection of stressful events, feelings of detachment or estrangement from others, avoidance of thoughts, feelings or conversations associated with his combat trauma, occasional hyperviligence, anxiety, depression, restlessness, restricted affect, and occasional irritability. R. at 17. The examiner also noted that Mr. Clay's remote, recent, and immediate memory were normal. R. at 11. After administering several tests to assess the severity of Mr. Clay's symptoms, the examiner determined that Mr. Clay's symptoms were mild and diagnosed him with anxiety disorder, not otherwise specified. In reaching his conclusion, the examiner explained that the severity of Mr. Clay's symptoms were not severe enough to meet the criteria presented by the *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (DSM-IV), for PTSD. *See* R. at 12; *see also* R. at 134 (noting the PTSD symptoms exhibited were mild and other symptoms were denied or not severe enough to meet the DSM-IV criteria); *see also* 38 C.F.R. § 4.130 (2014), Schedule of Ratings – Mental Health Disorders, Diagnostic Code (DC) 9411 (PTSD), 9413 (anxiety disorder, not otherwise specified) (requiring familiarity with the DSM-IV in using the schedule of ratings for mental health disorders). Accordingly, the examiner explained his conclusion denying a PTSD determination, and the Board's reliance on this examination is not clearly erroneous. *See Nieves-Rodriguez, supra*. To the extent that Mr. Clay suggests that the VA examiner did not provide a rationale for assigning a 30% disability rating, he confuses the role of the examiner and the rating specialist. *See Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) (holding that it is the Board, not

the medical examiner, "that interprets medical reports in order to match the rating with the disability"), *rev'd on other grounds sub nom*. *Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009).

The Court also rejects Mr. Clay's assertion that the November 2009 medical examination was erroneously limited to providing a nexus opinion, as the examination assessed the frequency, severity, and duration of his mental disorder symptoms. The examiner assessed the severity of Mr. Clay's symptoms by administering the Mississippi Scale for Combat-Related PTSD, the PTSD checklists for combat and noncombat trauma, and the MMPI PTSD subscales. Based on these tests and his examination and interview with Mr. Clay, the examiner concluded that Mr. Clay's symptoms were not severe enough to interfere with his occupational and social functioning. *See* 38 C.F.R. § 4.130, DC 9411 (providing a 30% disability rating if the claimant demonstrates only "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks" and providing a 50% disability rating if the claimant demonstrates "[o]ccupational and social impairment with reduced reliability and productivity").

However, the Court discerns some merit in Mr. Clay's assertion that the examiner failed to review private medical records. The 2009 VA examiner stated that he reviewed Mr. Clay's claims file, which included private medical reports from Dr. Richard J. O'Halloran, but he also expressly stated that he did not review any private medical records. R. at 138. Although the 2009 examiner is not required to address all favorable evidence, he or she must nevertheless obtain a complete history and consider all relevant evidence in forming an opinion. *See D'Aries* 22 Vet.App. At 104 ("An opinion is adequate where it is based upon consideration of *the veteran's prior* medical history and *examinations* and also describes the disability in sufficient detail so that the Board's 'evaluation will be a fully informed one.'" (emphasis added) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407(1994))); *Stefl*, 21 Vet.App. at 123 (finding a medical examination adequate that relies on prior medical history and examinations); *Green*, 1 Vet.App. at 124 (requiring that medical examinations take into account records of prior medical treatment). Moreover, in light of contradictory information the Board is required to return a medical examination for clarification or explain why such action is not necessary. *See Vazquez-Flores v. Peake*, 22 Vet.App. 37, 50 (2008), *vacated on other grounds by Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009); *see also Adams v.*

Principi, 256 F.3d 1318, 1321-22 (Fed. Cir. 2001) (affirming this Court's remand to the Board for clarification as to the import of evidence, holding that "clarification ... can take the form of an explanation from [the examining doctor] of his opinion, or if necessary supplemental medical evidence"). The Board's failure to address the contradictory statements in the 2009 VA examination regarding whether the 2009 examiner's conclusion was based on Mr. Clay's complete medical history, or failure to explain why clarification was not necessary, warrants remand. *Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (holding that the Board has a duty, under 38 C.F.R. § 19.9(a) (2000) to remand a case "[i]f further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision"); *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 184,(2009) (en banc) (concluding that the Board provided inadequate reasons or bases for its decision where it failed to seek clarification of an ambiguous medical opinion or explain why clarification was not necessary), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011).

Mr. Clay argues for reversal of the Board's decision assigning a 30% disability rating and requests that the Court assign a 50% rating based on Dr. O'Halloran's medical reports. In order for the Court to reverse the Board's decision the Court would have to conclude that the only permissible view of the evidence is contrary to the Board's decision. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision."). The Court notes that the Board provided reasons for assigning limited weight to Dr. O'Halloran's psychological reports, and therefore, the Court concludes that the favorable evidence of record in insufficient to reverse the Board decision assigning a 30% disability rating. *See* R. at 12-15.

In light of the remand, the Court need not address Mr. Clay's additional arguments that the Board provided an inadequate statement of reasons or bases, and failed to apply the benefit of the doubt. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

B. Tainted Record

Mr. Clay next argues that the Board's review of a tainted record violated his due process rights under the Fifth Amendment to the U.S. Constitution and his right to fair process under *Thurber v. Brown*, 5 Vet.App. 119 (1993). Specifically, he contends that, without his knowledge

or approval, a Veterans of Foreign Wars representative inserted a disparaging note between the pages of Dr. O'Halloran's July and October 2009 medical opinions, and these comments tainted the record before the Board.

On September 3, 2009, VA received Mr. Clay's statement in support of claim requesting benefits for PTSD, and enclosing Dr. O'Halloran's medical report dated July 2009, diagnosing him with PTSD. R. at 154, 182-89. On the same date, Mr. Clay authorized the Veterans of Foreign Wars to act as his accredited representative and filed VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative. R. at 290. In between pages 5 and 6 of Dr. O'Halloran's report – just before the the assignment of a Global Assessment of Functioning (GAF) score – is a typed note with a handwritten salutation to the "BVA" and handwritten closing "R. Epps [,] VFW ACCRED. REP," that reads as follows:

> BVA,
> As per discussions w/RO 317 Rating Specialists, Decision Review Officers, and their reviews, they indicate that this private examiner has a known history of assigning much lower GAF scores as opposed to VA Mental Health C&P examiners, and as such do not assign greater probative value to the examiner's assessments.
>
> R. Epps
> VFW ACCRED. REP.

R. at 187.

This same note was placed between the pages of Dr. O'Halloran's October 2009 medical report also submitted to VA. R. at 117 (October 2009 psychological report of Dr. Richard J. O'Halloran, stamped received by VA on December 8, 2009). The Court is troubled by the submissions from a purported accredited representative who accepts the responsibility to advocate for the veteran; however, neither the Board nor this Court establishes and maintains the standards for representatives. *See* 38 C.F.R. §§ 14.629 (assigning responsibility for accrediting representatives to VA Office of General Counsel), 14.632 (establishing standards of conduct for representatives) (2014); *see also Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005) (concluding that the Board and this Court maintain jurisdiction to review a VA accreditation-cancellation decision).

Mr. Clay asserts that because he was unaware of these notes placed in between his medical reports until he received a copy of the record of proceedings, he raised the constitutional argument for the first time to the Court. The Board mentioned the representative's notes and stated that it had

conducted an independent review of the medical evidence; however, it did not have an opportunity to address the due process and fair process argument that Mr. Clay did not have an opportunity to rebut the negative notation evidence. *See Cushman v. Shinseki*, 576 F.3d 1290, 1300 (Fed. Cir. 2009) (finding a violation of a constitutional right to a fair hearing where the Board considered an altered medical record); *Colayong v. West*, 12 Vet.App. 524, 535 (1999) (remanding case where errors in obtaining a medical opinion compromised the fairness of an adjudication process). The Court will exercise its discretion and remand the matter for the Board to address Mr. Clay's arguments in the first instance. *See Maggitt v. West*, 202 F.3d. 1370, 1377-78 (Fed. Cir. 2000) (holding that the Court has the discretion to hear or remand a legal issue raised for the first time on appeal).

On remand Mr. Clay will be free to submit additional argument and evidence as to the remanded matters, and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's February 4, 2013, decision, and REMANDS the matter for further proceedings consistent with this decision.

DATED: July 11, 2014

Copies to:

Corey A. Baskin, Esq.

VA General Counsel (027)