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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-0357

RAMON SANCHEZ, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: Ramon Sanchez, through counsel, appeals a December 17, 2014, Board of Veterans' Appeals (Board) decision denying disability compensation benefits for post-traumatic stress disorder (PTSD) and erectile dysfunction (ED). Additionally, the Board denied entitlement to a total disability rating based on individual unemployability (TDIU). Record (R.) at 3-22. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board decision and the vacated matters will be remanded for further proceedings consistent with this decision.

I. BACKGROUND

A. Service History

The appellant served in the U.S. Army from October 1968 to November 1971. R. at 652. The appellant's October 1968 entrance medical examination detected no psychiatric disorders. R. at 2171-72. The appellant completed 11 months of basic training and earned marks of excellence

for his military conduct and efficiency. R. at 656. The appellant's service medical records do not contain any complaints of or treatment for a mental illness.

On September 23, 1969, the appellant was punished under article 15 for being absent without leave (AWOL) from September 17, 1969, to September 18, 1969. R. at 660. In May 1971, he was convicted by a summary court-martial for having been AWOL from March 1, 1971, to April 12, 1971. R. at 664-65, 1666. In the medical history section of an August 1971 separation examination, the appellant denied experiencing depression, excessive worry, or nervous trouble of any sort. R. at 2102-03. The medical evaluation portion of the August 1971 separation examination indicates that the appellant did not have any psychiatric disorder. R. at 2175-76.

B. Postservice Medical History

In May 1994, the appellant was diagnosed with hepatitis C. R. at 2042-45. He reported that when he was between the ages of 12 to 31 he abused alcohol, drinking up to a pint of alcohol daily. R. at 2044-46. He also reported a history of intravenous drug use. *Id.* Two years later, in 1996, the appellant sought treatment for severe anxiety. R. at 1966. He reported that during an argument with his wife he threw a remote control against the wall. *Id.* He also confronted a supervisor at his job. *Id.* The appellant thought that he had overreacted in handling both situations. *Id.* Additionally, he reported having a difficult relationship with one of his daughters, who had moved out of the house. *Id.* The appellant described feelings of "losing control" and "perspective on reality like in acid trips [that] he did in the 60's [and] 70's." *Id.* He also complained of insomnia, hand trembling, and difficulty with concentration and memory. *Id.*

On examination, the appellant appeared tense, hypervigilant, and paranoid. *Id.* The examiner found that the appellant's mood was anxious, his cognition was loose and bizarre, and his insight into his condition was "poor." R. at 1967. The examiner diagnosed the appellant as having a brief psychotic episode and an adjustment disorder. *Id.* During treatment the following month, the appellant elaborated on his childhood. R. at 1977. He reported that his father used to beat and whip him, and his mother would put him into a closet. *Id.* The appellant's father died when the appellant was 9 years old. *Id.* His mother remarried, and his drunken, abusive stepfather "introduced [the appellant] to drugs and alcohol." *Id.* Although the appellant elaborated on his use of alcohol during his childhood, he did not describe the frequency of use or type of drugs that he had used. He then

became involved with juvenile hall and between the ages of 12 to 17 years old became a ward of the State. *Id.*

Ten years later, between May and September 2006**,** the appellant received outpatient medical treatment for depression at a private medical facility. R. at 1957-62. In addition to the previous social history, the appellant reported that at the age of 12 he was sexually molested by a neighbor. *Id.* Finally, the appellant reported that he had not used either alcohol or illicit drugs for the past 21 years. He noted that he had experimented with drugs, "especially psychedelics,"[1] and that in 1985 he ceased using illicit drugs and alcohol. R. at 1960. A mental status examination revealed that the appellant had paranoid delusions about his boss and coworkers. R. at 1958. His mood was depressed, and his affect was blunted. *Id.* The appellant was diagnosed with major depression with psychotic features. *Id.*

In October 2006, the appellant began receiving mental health treatment at a VA medical center (VAMC). In November 2006, VAMC treatment records note that the appellant had reported a past history of childhood molestation and military sexual trauma (MST). R. at 363, 1422. After an initial evaluation, in January 2007, he was referred to and accepted into an inpatient residential program at the National Center for PTSD. R. at 1411, 2105-10. The appellant participated in the inpatient PTSD program from February 2007 until June 2007. R. at 1211. Thereafter, he began participating in a monthly outpatient PTSD program. Additionally, in 2008, the appellant reenrolled and participated in another residential PTSD program. R. at 37.

In April 2007, the appellant filed a claim for disability compensation for PTSD, depression, and anxiety. R. at 2125-38. In May 2007, he alleged that in 1969 he had experienced MST on three occasions R. at 261. In December 2008, a VA regional office (RO) denied service connection for PTSD on the basis that "the evidence of record does not provide credible evidence that the claimed stressor occurred." R. at 1053-59. The appellant appealed that RO decision to the Board. R. at 1045; *see also* R. at 983-1014.

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[1] In discussing this medical report, the Board erroneously reported that the appellant stated that he began abusing psychedelics when he was a ward of the State. However, a review of this medical record indicates it was *after* the appellant became a ward of the state that the examiner noted he "started using psychedelics." R. at 1957.

While the appeal was pending, a number of favorable medical opinions were added to the record. For example, Dr. Josue, the appellant's treating VA psychiatrist, submitted several letters regarding the appellant's condition. R. at 280, 952, 1940-41. In September 2007, Dr. Josue noted that the appellant had recently graduated from a residential treatment program for PTSD, was attending outpatient group therapy, and appeared "severely depressed and anxious." R. at 1941. Dr. Josue diagnosed the appellant with PTSD, MST, and recurrent major depression. *Id.* Additionally, he commented that the appellant had intrusive thoughts related to in-service MST. *Id.*; *see also* R. at 280 (February 2009 letter stating the appellant's PTSD was "exacerbated by his military trauma"), 952 (January 2010 opinion stating that the appellant had "severe PTSD symptoms related to his [MST]" and stating that the appellant's symptoms of "paranoia, severe anxiety, depression, [and] nightmares [were] related to his MST"), 183 (medical record stating that the appellant "continues to experience flashbacks and nightmares related to his [MST]), 159 (2013 medical record stating that appellant is "anxious and depressed. He has flashback and nightmares related to trauma in service"), 118 (2014 medical record stating that the appellant "continues to experience flashbacks, nightmares related to [MST]"), 37 (May 2014 letter from Dr. Josue stating that the appellant "continues to have severe PTSD symptoms related to his MST," including "paranoia, severe anxiety, depression, [and] nightmares").

In March 2010, Dr. Cesta, a private psychiatrist, also submitted a favorable medical opinion diagnosing the appellant with "PTSD, chronic, severe, with delayed onset." R. at 953. Dr. Cesta noted that during the interview, the appellant had a depressed mood and restricted affect and that he had "episodes of crying" when he discussed "the sexual assault he experienced in the military." *Id.* Dr. Cesta opined that MST "triggered" the appellant's PTSD and Dr. Cesta remarked that the appellant's PTSD symptoms were "specifically related to the events in the military." *Id.* Dr. Cesta was aware of the appellant's childhood abuse, but he did not think that the appellant had PTSD before service as he noted that there was "no psychiatric treatment, no psychiatric symptoms, and no evidence of psychiatric illness prior to his enlistment in the military." *Id.* By contrast, Dr. Cesta noted that the appellant's "post military experience included a steady deterioration from psychiatric illness, the inability to engage in interpersonal relationships, the development of a substance abuse disorder, and clear evidence of PTSD." *Id.* Dr. Cesta emphasized that the symptoms of the

appellant's PTSD – hypervigilance, paranoia, and fear – were all related to the appellant's MST. Additionally, Dr. Cesta stated that "[t]here are no flashbacks, nightmares, or any other symptoms that connect [PTSD] to the childhood events Mr. Sanchez experienced." R. at 954.

The appellant also underwent an April 2014 VA mental disorder examination. The examiner discussed the appellant's in-service stressors and described the nature of the MST. R. at 242. The examiner also described the appellant's history of childhood trauma and molestation by a neighbor. *Id.* The VA examiner diagnosed the appellant with PTSD, an unspecified depressive disorder, and alcohol and substance abuse disorders in full-sustained remission. R. at 241. The VA examiner opined that the appellant's childhood sexual abuse and his MST were each adequate to support the diagnosis of PTSD. R. at 248. However, the VA examiner stated that she was "unable to opine whether or not his PTSD is also due to MST without resorting to mere speculation" because she was "unable to establish clear markers which are inten[d]ed to be indicators of a change in behavior." *Id.* Additionally, she found the appellant's behavior during service was "not out of character with his pre-military behavior[.]" *Id.*

In October 2014, Dr. Cesta submitted an addendum to his March 2010 opinion. R. at 31-36. Dr. Cesta reiterated his opinion that the appellant's PTSD is attributed to military service because there were no indications that he had suffered from a mental disorder when he was enlisted in service and the appellant's symptoms, including his nightmares and flashbacks, were directly related to his military trauma, and not to his childhood traumas. R. at 32-33. Additionally, he responded to the VA examiner's statement that she could not provide an opinion regarding whether the appellant's PTSD was attributed to MST because she could not find clear "markers" of behavioral changes.

Specifically, Dr. Cesta disagreed with the VA examiner that there were no behavioral markers. Dr. Cesta noted that the appellant exhibited exemplary behavior in service for 11 months, which changed after the appellant was sexually assaulted. R. at 32. He also noted that the appellant developed a substance abuse disorder in service, and that the transition "to intravenous drug use after sexual assault represents a dramatic change in behavior." *Id.*

Additionally, Dr. Cesta stated that there was "no relevance in the fact that [the appellant] did not speak about [MST] trauma until he received mental health care services at the VA in 2006." R. at 34. Dr. Cesta noted that the diagnostic criteria for PTSD "do not lay out a time frame in which

patients are required to reveal their traumatic events to treating mental health care professionals." *Id.* Additionally, Dr. Cesta stated that "issues such as shame, guilt, altered sexual identity, and feelings of self-loss are all a component of being sexually assaulted especially when it is man on man sexual assault." *Id.* On December 17, 2014, the Board issued the decision on appeal.

II. ANALYSIS

A. Applicable Law

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999). To establish service connection for PTSD, a claimant must present (1) evidence of a current diagnosis of PTSD; (2) "a link, established by medical evidence, between current symptoms and an in-service stressor"; and (3) "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. § 3.304(f) (2016). Because "veterans face unique problems documenting their claimed stressor in personal assault cases," the Secretary has "'provided for special evidentiary-development procedures' in those cases." *Bradford v. Nicholson,* 20 Vet.App. 200, 204 (2006) (quoting *Patton v. West,* 12 Vet.App. 272, 280 (1999)). These special procedures are detailed in 38 C.F.R. § 3.304(f)(5) and provide that when a PTSD claim is based on in-service personal assault, "evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident." *Id.* Examples of evidence that may be used to corroborate the stressor include records from mental health counseling centers or physicians and statements from family members. *Id.* Additionally, evidence of behavior changes following the claimed assault is another type of relevant evidence that may be used to corroborate the stressor. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to, "a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression . . . ; or unexplained economic or social behavior changes." *Id.*

Previously, this Court held that an opinion by a mental health professional based on a postservice examination of the veteran was not credible supporting evidence that may be used to corroborate the occurrence of a stressor. *Moreau v. Brown*, 9 Vet.App. 389, 395-96 (1996). However, in *Menegassi v. Shinseki,* 638 F.3d 1379, 1382 (Fed. Cir. 2011) the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) departed from this view and held that under § 3.304(f)(5), "medical opinion evidence may be submitted for use in determining whether the occurrence of a stressor is corroborated." *See also Patton,* 12 Vet.App. at 280 (rejecting the requirement that "something more than medical nexus evidence is required to fulfill the requirement for 'credible supporting evidence'" in personal-assault cases (quoting *Cohen v. Brown,* 10 Vet.App. 128, 145 (1997))). Accordingly, *Menegassi* made clear that a medical opinion may provide corroborating evidence of a stressor. However, a favorable medical opinion diagnosing PTSD is not per se conclusive evidence that a stressor occurred. Rather, such an opinion must be weighed against all other evidence of record for purposes of determining whether a claimed in-service sexual assault has been corroborated. *Menegassi*, 638 F.3d at 1382 n.1.

The Court reviews the Board's factual determination as to the sufficiency of corroborative evidence of the in-service stressor under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4)*; Sizemore v. Principi,* 18 Vet.App. 264, 270 (2004) (citing *Pentecost v. Principi,* 16 Vet.App. 124, 129 (2002)) (regarding corroborative evidence). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The Board must also provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for its decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

B. Board's Rejection of Opinions by Appellant's VA Psychiatrist

The appellant argues that Dr. Josue's medical opinions corroborate his MST stressors and that the Board failed to provide an adequate statement of reasons or bases for rejecting Dr. Josue"s opinions. In 2007, Dr. Josue, the appellant's treating VA psychiatrist, diagnosed and treated him for PTSD. R. at 1941. On multiple occasions, Dr. Josue opined that the appellant's PTSD was related to MST. *See* R. at 37, 118, 159, 280, 952, 1940. Despite this evidence, the Board determined that there was no credible evidence to support the appellant's claimed in-service stressors. R. at 19. The Board specifically rejected Dr. Josue's medical opinions because his opinions "appear to be heavily based upon a history provided by the veteran" and "do not identify any specific supporting evidence corroborating the assault[s]." R. at 19. The appellant contends that the Board's reason for rejecting Dr. Josue's opinions is flawed. Appellant's Brief (Br.) at 9-16, 22. Specifically, he argues that the Board's rejection of Dr. Josues' opinions violates §3.304(f)(5) and *Menegassi*. Appellant's Br. at 11-15. The Court agrees. Essentially, the Board has imposed a requirement that a medical opinion must rely on independent corroborative evidence to support the occurrence of a stressor. Such a requirement violates the holding in *Menegassi* and the plain language of §3.304(f)(5).

After reviewing the plain language of § 3.304(f)(5), *Menegassi* recognized that a VA medical opinion based on the claimant's description of an MST may corroborate the claimant's stressor. There is nothing in the regulation that requires a medical opinion to identify specific, independent evidence to corroborate the occurrence of a stressor. Indeed, there is nothing in the regulation that requires a medical opinion to be based on more than the veteran's statements to the physician – the regulation simply states that "records from physicians" may be a source to corroborate the veterans' claimed stressor. *See* 38 C.F.R. § 3.304(f)(5); *see also* 67 Fed. Reg. 10,330 (Mar. 7, 2002). Therefore, the Board's analysis in this respect is flawed, and its reason for rejecting Dr. Josue's opinions is insufficient. The Court concludes that a remand is warranted to permit the Board to provide an adequate statement of reasons and bases under the correct legal standards. *See Tucker v. West*, 11 Vet. App 369 (1998).

C. Behavior Markers

Section 3.304(f)(5) provides several alternative types of evidence that may corroborate the occurrence of in-service MST. "Evidence of behavior changes following the claimed assault is one

type of relevant evidence." *Id.* Examples of behavior changes that may corroborate a claimed stressor include "a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks or anxiety without an identifiable cause; or unexplained economic or social behavior changes." *Id.* Having erroneously concluded that Dr. Josue's report was not probative because it was based solely on the appellant's statements, the Board compounded this error by relying on the VA examiner's opinion to deny the appellant's claim. Although the examiner indicated that the appellant's MST was "adequate to support the diagnosis of PTSD," she stated that she was "unable to opine whether or not his PTSD is also due to MST without resorting to mere speculation" because she was "unable to establish clear markers which are inten[d]ed to be indicators of a change in behavior." R. at 248. It is apparent from the VA examiner's remarks that she erroneously believed that *unless* she was able to opine that there were behavioral changes during service, she may not provide an opinion that the appellant's PTSD was linked to MST. However, there is no requirement that a doctor's opinion must be supported by evidence of changes in behavior following MST.

The Board agreed with the VA examiner's conclusion that there were no changes in the appellant's behavior that might corroborate the appellant's stressor. Additionally, the Board discussed a behavioral change that was not addressed by the VA examiner – deterioration in military work performance. Before the Board, the appellant argued that he had had an "exemplary performance record" for the first 11 months of service. He pointed out that initially he had earned marks of excellence for military conduct and efficiency, which changed, after the MST, to marks of unsatisfactory performance. R. at 16-17. In response to this argument, the Board stated that an "11-month period without behavioral infractions hardly broke the chain of consistently oppositional behavior that the appellant displayed from the ages of 12 to 17." *Id.* This statement by the Board shows that it misapplied § 3.304(f)(5). Under the regulation, deterioration in work performance is evaluated according to whether there is a change in work performance *during* military service. Instead, the Board incorrectly assessed whether the appellant's exemplary work habits represented a general change in his preservice behavior.

Additionally, even if it were appropriate to focus on the appellant's preservice behavior, the Court also takes a dim view of the capricious nature of the Board's statement. It is not clear the

length of time that the Board would consider sufficient to break the "chain of oppositional behavior." The Board's statement represents personal whim and provides no reasoned explanation of its random choice that the appellant's exemplary work performance did not last long enough to mark a change in preservice behavior. Thus, the Court finds that the Board's explanation for its finding that there was no deterioration in the appellant's work performance to be insufficient.

D. Board's Credibility Finding

The Board "has the duty to assess the credibility and probative weight of evidence." *McClain v. Nicholson*, 21 Vet.App. at 319, 325 (2007). When assessing the credibility of lay statements, the Board may consider factors such as facial plausibility, bias, self-interest, and consistency with other evidence of record. *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006). It is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence, and the Court may overturn that finding only if it is clearly erroneous. *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

Here, the Board found that the appellant was not credible. R. at 18. In doing so, the Board relied heavily on the fact that the appellant did not mention his MST until "35 years following separation from service." *Id.* Further, the Board suggested that his statements about MST were at odds with statements he had made "throughout this 35-year period" following service "when he consistently discussed childhood-based stressors such as the stress of the molestation and physical abuse that he experienced as a child." *Id.* The Board concluded that it was "unlikely that the Veteran would not have mentioned multiple in-service rapes in connection with his discussions of his past stressful experiences." *Id.* The Board found that the real motivation for appellant's "changing story" was his pecuniary "self-interest" that was manifested by his filing a claim for disability compensation benefits for PTSD. *Id.*

The appellant points out that the Board's credibility finding is not supported by the record. The Court agrees. For example, the Board inaccurately states that during the 35-year period following discharge the appellant "consistently" reported a history of childhood sexual abuse is inaccurate. In fact, the appellant first reported that he had undergone childhood sexual abuse in the spring of 2006 – several months before he reported to a VA social worker that he had also

experienced MST. Thus, contrary to the Board's statement, there is no evidence in the record that the appellant "consistently" reported childhood sexual abuse and changed his story only to pursue a claim for VA benefits.

There is no evidentiary basis for the Board's statement that the appellant changed his story. Additionally, Dr. Cesta explained that it is not unusual for victims of sexual abuse to be reluctant to report to therapists that they have been sexually abused and to be able to report the abuse only when they feel comfortable. Further, Dr. Cesta explained that "issues such as shame, guilt, altered sexual identity, and feelings of self-loss are all a component of being sexually assaulted especially when it is man on man sexual assault." R. at 34. Thus, the Court concludes that there is no basis for the Board's finding that the appellant's description of his stressors was not credible because it was inconsistent with his description of his history of childhood sexual abuse.

The Court is also persuaded by the appellant's argument that the Board's conclusion that it is "unlikely that the Veteran would not have mentioned multiple in-service rapes in connection with his discussions of his past stressful experiences," represents the Board's own unsubstantiated opinion as to the expected behavior of a victim of MST. *See Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion"); *see also Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011) (explaining that the "relative severity, common symptomatology, and usual treatment" of a disability are medical issues requiring special expertise). Further, there is no support for the Board's conclusion that the appellant was not credible because of a pecuniary self-interest in VA benefits. As the appellant accurately points out, he had been treated for PTSD for 5 months *before* he filed a claim for disability compensation. Additionally, the Court notes that the record shows that long after the appellant filed his claim, he participated in another residential treatment program for PTSD and that he has continued to participate in monthly outpatient therapy for PTSD for 7 years, with his most recent visit occurring in 2014. Although the Board ascribed the appellant's motivation for relating his history of MST to a pecuniary interest, the Board ignored the appellant's extensive history of treatment for PTSD both before and after he filed his claim for VA benefits based on PTSD. *See Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991). The Court finds that the Board's finding that the appellant was not credible is clearly erroneous.

In accordance with *Best v. Principi*, 15 Vet.App. 18 (2001) (per curiam order), the Court will not address the appellant's other arguments at this time. On remand, the Board is required to adjudicate the case anew. *Id.* at 20. In addition, on remand, the appellant will be free to submit additional evidence and argument on the claim, and the Board is required to consider any such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court will also remand the appellant's claims for secondary service connection for ED and TDIU as these claims are inextricably intertwined with the appellant's claim for service connection for PTSD. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue could have a "significant impact" upon another, the two claims are inextricably intertwined); *see also Gurley v. Nicholson*, 20 Vet.App. 573, 575 (2007) (recognizing the validity of remands based on judicial economy when issues are inextricably intertwined).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's December 17, 2014, decision is VACATED and the matters are REMANDED for further proceedings.

DATED: September 13, 2016

Copies to:

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VA General Counsel (027)