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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3139

CECIL SHERRILL, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Cecil Sherrill appeals through counsel a May 29, 2015, decision of the Board of Veterans' Appeals (Board) that denied service-connected disability compensation for obstructive sleep apnea, including as secondary to service-connected post-traumatic stress disorder (PTSD). The appellant argues that the Board neglected to adequately address his theory that his PTSD caused him to gain excessive weight, which in turn caused his sleep apnea. This appeal is timely and the Court has jurisdiction 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 reasons set forth below, the Court will vacate the Board's decision and remand the matter for further proceedings.

The Board remanded the issue of service-connected disability compensation for left ear hearing loss. That issue is not before the Court because it was not the subject of a final Board decision. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute a final decision that may be appealed); *Breeden v. Principi*, 17 Vet.App. 478 (2004).

I. BACKGROUND

The following summary of the claim history most relevant to the issues on appeal is reflected in the record of proceedings before the Court (record of proceedings).

The appellant served on active duty in the U.S. Air Force from August 1962 to April 1966. Record (R.) at 4, 786. Service medical records do not reflect sleep apnea. R. at 10. In December 2007, he sought service connection for sleep apnea and PTSD. R. at 502. The VA regional office (RO) denied the claims in June 2008, R. at 456-59, the appellant filed a Notice of Disagreement, R. at 453, the RO issued a Statement of the Case, R. at 355-60, and the appellant perfected his appeal to the Board, R. at 348-49. On his appeal form, he asserted that his doctor had informed him that his sleep apnea was due to his PTSD. R. at 349.

The RO awarded the appellant service connection for PTSD in March 2009. R. at 355-60.

In December 2009 and February 2011, the appellant testified before a member of the Board. R. at 271-83, 285-301. He reiterated his assertion that there was a relationship between his PTSD and his sleep apnea. R. at 277, 298.

In July 2011, the Board remanded the sleep apnea claim, instructing VA to provide a medical opinion as to whether the condition was related to service or caused or aggravated by PTSD. R. at 227-242, *see* R. at 236-40.

A VA medical examination and opinion was provided in September 2011. R. at 146-49, 159-60. The examiner confirmed a diagnosis of obstructive sleep apnea but opined that the condition was not related to service or to the appellant's PTSD. R. at 147-48, 160. The examiner explained that service medical records were silent for any feature of sleep apnea and that "it is not a commonly held principle that PTSD causes or aggravates [obstructive sleep apnea,] as the most common cause is upper airway obstruction due to pharyngeal airspace compromise by tongue size, obesity, neck size, etc." R. at 147-148.

In October 2014, the appellant submitted a written brief to the Board through his veterans service organization representative. R. at 994-1001. The appellant asserted that PTSD is an independent risk factor for obesity and attached a document, dated in October 2010, entitled "VA/DoD Clinical Practice Guidelines for Management of Post-Traumatic Stress Disorder" (PTSD management guidelines). *Id*. The guidelines stated that "[p]ersons with PTSD may have high rates

of health risk behaviors, health problems, and medical conditions. . . . In addition to alcohol and drug use, persons with PTSD are at high risk for . . . obesity (Vleweg et al., 2006)." R. at 1000.

In May 2015, the Board issued the decision here on appeal denying service connection for sleep apnea. R. at 3-35. The Board relied on the September 2011 VA medical opinion, which it found to be adequate. R. at 6, 10-12. With respect to service connection as secondary to PTSD, the Board cited the examiner's statement that it is not a generally held principle that PTSD causes or aggravates sleep apnea. R. at 11. The Board noted that the appellant had "submitted some treatise evidence," but found the information too general to establish a medical nexus. R. at 11-12.

Before the Court, the appellant does not challenge the Board's determination that his sleep apnea is not directly related to service. Rather, he asserts that the Board provided an inadequate statement of reasons or basis for implicitly rejecting his theory, raised in the brief to the Board, that his PTSD caused him to gain weight, which in turn caused his sleep apnea. The appellant further contends that the Board failed to discuss whether a VA medical opinion was required in this regard.

The Secretary disputes the appellant's argument and argues for affirmance of the Board's decision, arguing principally that the appellant failed to meet his burden to show that he was prejudiced by the alleged errors.

II. ANALYSIS

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); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Secondary service connection may be awarded when a disability "is proximately due to or the result of a service-connected disease or injury." 38 C.F.R. § 3.310(a) (2016). "Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a)." *Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc).

The Secretary's duty to assist a disability compensation claimant includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). A medical examination or opinion is considered necessary

> when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

McLendon v. Nicholson, 20 Vet.App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4)(i) (2016).

The Board must 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); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). 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*, 7 Vet.App. at 506.

The Court agrees with the appellant that the Board neglected to adequately address his theory of service connection that his PTSD caused him to gain excessive weight, which in turn caused his sleep apnea (weight gain theory). The appellant raised this theory in his brief before the Board, particularly in view of the requirement that the appellant's administrative filings must be read sympathetically in the context of the record evidence. *See DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011) ("the Secretary generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing"); *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (the Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record), *aff'd sub nom*. *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir.

2009). The appellant asserted in his brief to the Board that he was obese and that VA medical guidelines indicate that PTSD is an independent risk factor for obesity. R. at 995. He attached VA PTSD management guidelines stating that persons with PTSD are at high risk for obesity. R. at 1000. In addition, the record contains medical evidence that obesity is a recognized factor in the etiology of sleep apnea, as the September 2011 VA examiner stated that "the most common cause [of obstructive sleep apnea] is upper airway obstruction due to pharyngeal airspace compromise by tongue size, *obesity*, neck size, etc." R. at 147-148 (emphasis added). The examiner also indicated, on review of medical records, that the appellant weighed 164 pounds at the time of his discharge in 1966, 212 pounds in 2005, and 212 pounds at the 2011 examination. R. at 159-60.[1]

Although the weight gain theory was raised by the appellant, the Board did not address it, other than with a passing mention that the appellant submitted treatise evidence that was insufficient by itself to establish a medical nexus by virtue of its generic nature. R. at 11. However, the existing opinion from September 2011 did not specifically address the theory and the Board did not discuss whether a supplemental VA medical opinion was required. The above-discussed evidence raises the reasonable possibility of a finding in this regard that the record provides an "indication" that the appellant's weight gain "may" be associated with his PTSD and that his sleep apnea "may" be associated with his weight gain. *McLendon*, 20 Vet.App. at 83. As we held in *McLendon*, this is a "low threshold" and relevant types of evidence include "medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits." *Id*. In addition, the determination must take into consideration "all information and lay or medical evidence [of record] (including statements of the claimant)." 38 U.S.C. § 5103A(d)(2). The Board neglected to discuss the relevant record evidence in this context, including, as described above, the appellant's weight gain since service, the VA PTSD management guidelines discussing a relationship between PTSD and obesity, and the statement by the September 2011 VA examiner indicating that obesity is an etiological factor with respect to obstructive sleep apnea. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board must provide a sufficient statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

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[1] In addition, the Secretary's brief does not dispute the appellant's assertion that he raised the weight gain theory in his brief to the Board. *See* Appellant's Brief at 5.

The Court is not persuaded by the Secretary's argument that the appellant was not prejudiced because the VA PTSD management guidelines only suggest a correlation between PTSD and obesity and not a causative relationship. The Secretary asks the Court in this regard to make factual determinations that are more appropriately made by the Board or a medical professional. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that appellate tribunals generally are not appropriate fora for initial fact finding); *Webster v. Derwinski*, 1 Vet.App. 155, 159 (1991) (the role of the Court is generally not to conduct de novo factfinding but rather to remand for the Board to find facts in the first instance); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (the Board may not rely on its own medical judgment).

Accordingly, the Court finds that the Board's decision lacks adequate reasons or bases for not sufficiently addressing a theory of service connection for sleep apnea as secondary to weight gain caused by the appellant's service-connected PTSD. On remand, the Board must consider whether VA should provide the appellant with a medical opinion (and examination if necessary) with respect to this issue. The appellant is free on remand to submit evidence and argument and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings, and the filings of the parties, the May 29, 2015, Board decision denying service connection for obstructive sleep apnea is VACATED and the matter is remanded for further proceedings consistent with this decision.

DATED: November 9, 2016

Copies to:

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VA General Counsel (027)