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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3007

GEORGE ST. CYR, 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*: The appellant, George St. Cyr, through counsel, appeals a June 25, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied his claim for an initial disability rating in excess of 30% for post-traumatic stress disorder (PTSD). Record of Proceedings (R.) at 2-21. 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 decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from December 1966 to December 1969. R. at 167. In October 2012, the appellant filed a disability compensation claim for PTSD. R. at 115-16. In November of the same year, the appellant underwent a VA examination, during which he reported symptoms such as flashbacks, difficulty concentrating, irritability, and waking up several times per night as a result of nightmares. R. at 383-84.

In February 2013, the regional office (RO) granted the appellant service connection for PTSD and assigned a disability rating of 30%. R. at 69-74. In February 2014, the appellant filed a Notice

of Disagreement with that decision. After the RO issued a Statement of the Case, the appellant perfected his appeal to the Board. R. at 47-48, 50-66.

In July 2014, the appellant testified at a Board hearing. R. at 233-46. The appellant testified that his former employer accommodated his PTSD by allowing him to work alone. R. at 236. He also stated that his home life was "pretty good," but that he occasionally gets angry for no reason. *Id.* The appellant further testified that most of the time he isolates himself from others, but that occasionally he and his wife go out. R. at 236-38. The Board member asked the appellant whether his symptoms had been the same since late 2012 or whether they had changed over time, and the appellant testified that he is "up more often at night now" and has experienced more frequent nightmares. R. at 243-44.

In June 2015, the Board issued the decision on appeal, denying entitlement to an initial disability rating in excess of 30% . R. at 2-21. This appeal followed.

II. ANALYSIS

The Secretary's duty to assist includes, in appropriate cases, the duty to conduct a thorough and contemporaneous medical examination "when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see also Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). In addition to the section 5103A duty-to-assist provisions, "VA regulations specifically require the performance of a new medical examination . . . [when] 'evidence indicates there has been a material change in a disability or that the current rating may be incorrect.'" *Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994) (quoting 38 C.F.R. § 3.327(a) (regarding reexaminations)). This Court's caselaw is also clear that VA is obligated to obtain a new medical examination to obtain evidence necessary to adjudicate the claimant's request for an increased rating when the claimant "subsequently asserts that a higher rating is justified due to an increase in severity since the original rating." *Id.*; *see Snuffer v. Gober*, 10 Vet.App. 400, 403 (1997) ("[W]here the appellant complained of increased hearing loss [2] years after his last audiology examination, VA should have scheduled the appellant for another examination."); *cf. Palczewski v. Nicholson*, 21 Vet.App. 174, 182 (2007) (the "mere passage of

time" between a prior VA medical examination and the adjudication of a claim is not, in and of itself, sufficient to compel VA to provide the veteran with a new, contemporaneous medical examination).

The Board's determination whether the Secretary fulfilled his duty to assist with regard to providing an adequate medical examination is a finding of fact reviewed under the "clearly erroneous" standard of review. *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). Under that standard of review, "[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. 364, 395 (1948)).

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

The appellant argues that the Board failed to provide an adequate statement of reasons or bases for its determination that the record accurately reflected the appellant's disability level. Appellant's Brief (Br.) at 5. Specifically, the appellant argues that his 2014 Board hearing indicated that his PTSD symptoms had worsened since his 2012 medical examination, but that the Board failed to address why the 2012 examination was adequate in light of the 2014 testimony. *Id.* at 5-7. The Secretary argues that the Board provided an adequate statement of reasons or bases. Secretary's Br. at 5-9.

In the duty-to-assist analysis of the decision on appeal, the Board addressed the appellant's testimony regarding worsened PTSD symptoms:

At the July 2014 Board hearing, the [appellant] testified that his nightmares and sleep impairment had worsened during the course of this appeal. The Board finds that the November 2012 VA examination report, in connection with the other evidence of record (including the [appellant's] report of his current symptomology at the July

2014 Board hearing), accurately reflects the Veteran's psychiatric symptoms and level of social and occupational impairment throughout the initial rating period (including any additional sleep impairment since the November 2012 VA examination). As such, the Board finds that additional VA examination is not required and the Board may render a decision based on the evidence of record.

R. at 7. The Board's analysis is inadequate to facilitate judicial review. As the appellant correctly notes, the Board needed to discuss whether the appellant's 2014 testimony indicated that there was a "material change" in the appellant's condition that would "require the provision of a contemporaneous examination." Appellant's Br. at 5-6 (quoting 38 C.F.R. § 3.327(a)). Despite its attempt to compare the appellant's symptoms to the diagnostic code (R. at 13), the Board provides no rationale for its finding that, in light of the appellant's testimony, the duty to assist has been satisfied. Accordingly, the Court will vacate the Board's decision and will remand the matter in order for the Board to provide an adequate statement of reasons or bases for its finding that the duty to assist has been satisfied. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). On remand, the Board should carefully consider whether the duty to assist has been satisfied, and if it has not, the Board should remand the claim so that the appellant may receive a new examination. *See Caffrey and Palczewski*, both *supra*.

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, 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 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 Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's June 25, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: November 15, 2016

Copies to:

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