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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-0646

DANIEL R. BARNETT, 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*: Daniel R. Barnett appeals through counsel a January 12, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for obstructive sleep apnea (OSA). The appellant contends that the Board neglected to consider service connection based on the presumptions afforded to Persian Gulf War veterans and that the Secretary failed to comply with his duty to assist. This appeal is timely and the Court has jurisdiction over those issues pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate because the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *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 adjudication.

The Board referred to the VA regional office (RO), for appropriate action, the issue of entitlement to service connection for erectile dysfunction. Accordingly, the Court lacks jurisdiction to consider that issue on the merits. *See* 38 U.S.C. § 7252(a) (providing that the Court's jurisdiction is generally limited to review of final Board decisions); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that "the court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"); *see also Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011); *Link*

v. West, 12 Vet.App. 39, 47 (1998) ("Claims that have been referred by the Board to the RO are not ripe for review by this Court.").

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 veteran served on active duty in the U.S. Army from November 1985 to April 1986 and from January 2004 to April 2005. R. at 3, 458, 460. His second period of service included active duty in support of Operation Iraqi Freedom in Kuwait and Iraq. R. at 458.

In June 2006, he underwent a sleep study (polysomnography) to assess snoring, sleep maintenance insomnia, and hypersomnolence (excessive sleepiness). R. at 262. The examiner noted, inter alia, that his sleep efficiency was 94.3%; that he had "218 respiratory events which gave him an apnea/hyponea index of 28.9 per hour overall and 47.6 per hour supine;" and that 217 of those events were "obstructive." *Id*. The diagnosis was "Obstructive Sleep Apnea Syndrome,[1] Adult; moderate to severe." *Id*. A repeat sleep study in August 2006 confirmed the diagnosis. R. at 264.

In August 2007, the appellant applied for service-connected disability compensation for sleep apnea. R. at 314-27. He asserted that he experienced erratic sleep patterns and stress in service, which left him "in a constant tired state" with difficulties "remain[ing] awake and alert during the day." R. at 326.

In May 2008, the RO issued a rating decision denying service connection for sleep apnea, R. at 157-63; the appellant filed a Notice of Disagreement, R. at 150; the RO issued a Statement of the Case continuing denial of the claim, R. at 121-39; and the appellant perfected his appeal to the Board in October 2009, R. at 110-19. He again asserted that he had sleep difficulties during his service in

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[1] Obstructive sleep apnea (OSA) is "sleep apnea resulting from collapse or obstruction of the airway with the inhibition of muscle tone that occurs during REM sleep. In adults it is primarily seen in middle-aged obese individuals, with a male predominance . . . ." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 117 (32d ed. 2012) (hereinafter "DORLAND'S"). Sleep apnea is "transient periods of cessation of breathing during sleep. It may result in hypoxemia and vasoconstriction of pulmonary arterioles, producing pulmonary arterial hypertension. The two primary types are central sleep and obstructive sleep." *Id.*

Iraq. R. at 117. He indicated that he did not request treatment in service because he thought that his sleep difficulties were due to his uncomfortable living conditions and an inability to shut out thoughts of the war. R. at 118.

Following further administrative proceedings, the Board remanded the claim in April 2013 with instructions that VA provide the appellant with a medical nexus opinion. R. at 62-65. That opinion was provided in June 2013. R. at 26. The examiner diagnosed "[e]levated BMI [(body mass index)] and natural aging with residual OSA." *Id*. She opined that the appellant's reported sleep disturbance in service is not the same as his OSA, "which on polysomnograpy showed 94% sleep efficiency." *Id*. She further opined: "Although within the realm of possibility, since the [appellant] was on AD [(active duty)] 15 months of his roughly 50 years on earth, it is less likely than not that his OSA had its onset during service." *Id*. She explained that (1) the onset of OSA is usually insidious[2] and may begin in childhood; (2) it is more likely than not that individuals deployed to a combat area will have some sleep disturbance, (3) stress is a common cause of sleep disturbance; (4) stress is not a known cause of OSA; (5) on a March 2005 post-deployment questionaire, the appellant denied "still feeling tired after sleeping;" (6) "OSA is predominantly caused by a developmentally narrow oropharyngeal airway and/or elevated BMI, often with superimposed natural aging;" and (7) at the time of the June 2006 sleep study, the appellant's BMI was 30. *Id*.

After further proceedings, the Board issued the decision here on appeal. R. at 2-10. Relying on the VA medical opinion, the Board denied service connection on a direct basis. Before the Court, the appellant contends that the Board neglected to consider whether the appellant's disability could qualify for presumptive service connection under the special provisions applicable to veterans of the Persian Gulf War, including whether a further medical opinion was needed to properly assess that issue. The Secretary concedes that the appellant meets the definition of a Persian Gulf War veteran and that the Board did not discuss the possibility of presumptive service connection under the special provisions. He asserts, however, that any such error was nonprejudicial because the appellant's sleep apnea cannot qualify for special treatment under those provisions.

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[2] Insidious means "coming on in a stealthy manner; of gradual and subtle development." DORLAND'S at 943.

II. ANALYSIS

The appellant contends that his disability might qualify for presumptive service connection under the special provisions relating to Persian Gulf War Veterans in 38 U.S.C. § 1117, as implemented by 38 C.F.R. § 3.317, that address certain "undiagnosed illnesses" and "medically unexplained chronic multisymptom illnesses" (MUCMIs). Specifically, he contends that his disability could be considered to arise from a MUCMI, which is defined in § 3.317 as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.17(a)(2)(B)(ii) (2016). The regulation further provides that "[c]hronic multisymptom illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained." *Id*. Section 3.317 also provides a list of "signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multisymptom illness" that includes "[f]atigue," "[s]leep disturbances," and "signs or symptoms involving the respiratory system (upper or lower)." 38 C.F.R. § 3.317(b).

The Court finds persuasive the appellant's argument that the Board's decision lacks adequate reasons or bases for not discussing whether the appellant's disability qualified for presumptive service connection under § 3.317 as a MUCMI and whether a further VA medical opinion was necessary to make a determination in that regard. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board's statement of reasons or bases "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court"); *see also* 38 U.S.C. § 5103A(d)(1) (for disability compensation claims, the Secretary's duty to assist 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").

As argued by the appellant, the record evidence reflects nighttime sleep disturbances, daytime sleepiness, and symptoms involving the respiratory system. R. at 262. In addition, although the VA examiner noted generally the predominant causes of sleep apnea, she rendered no explicit opinion as to whether the appellant's disability has at least a "partially understood etiology *and* pathophysiology" per § 3.17(a)(2)(B)(ii) (emphasis added). The Court thus finds that the potential

applicability of § 3.317 was reasonably raised by the record and should have been addressed by the Board. *See 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 Court is not persuaded by the Secretary's argument that the issue was not reasonably raised by the record and that any failure by the Board to address it was nonprejudicial. While the Secretary sets forth several arguments as to why the appellant's disability does not qualify under § 3.317, those arguments require regulatory interpretation and application of law to facts that should be made in the first instance by the Board. For example, the Secretary contends that § 3.317(a)(1)(ii) precludes presumptive service connection because it limits qualifying disabilities to those that "cannot be attributed to any known clinical diagnosis" and the appellant's condition has been diagnosed as sleep apnea. However, the regulation specifically defines a MUCMI as a "diagnosed illness" in § 3.317(a)(2)(ii) and the Secretary fails to explain the impact of that provision under his argument.

As a further example, the Secretary argues that § 3.317(a)(2)(ii) precludes presumptive service connection because the VA medical opinion demonstrates that the appellant's sleep apnea is an illness of at least partially understood etiology and pathophysiology. However, although the examiner indicated the predominant causes of sleep apnea in general, she did not explicitly discuss "pathophysiology," R. at 262, and it is not clear to the Court whether her discussion encompassed that concept in regard to the appellant's condition. Whether the examination report was sufficiently specific and complete to allow for a Board determination under the regulatory language, or whether such determination requires a further medical opinion, is a factual issue for the Board to decide in the first instance. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (the Board's determination of whether a medical opinion is adequate is a finding of fact); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (the Board may not rely on its own medical judgment). The Board did not determine whether the VA medical examination report was adequate in this regard.

The Court therefore will remand the matter for the Board to discuss the applicability of § 3.317, to include discussion of whether a further VA medical opinion is necessary to determine

whether the appellant's disability is a qualifying MUCMI for purposes of presumptive service connection.

Given this disposition, the Court will not at this time address the appellant's remaining arguments, because he can raise them to the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (holding that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining 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 may present, and the Board must consider, any additional evidence and argument in support of the matter remanded. *See Kay v. Principi,* 16 Vet.App. 529, 534 (2002); *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). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings, and the filings of the parties, that part of the January 12, 2016, Board decision that denied service connection for a disability diagnosed as obstructive sleep apnea syndrome is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: November 29, 2016

Copies to:

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