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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4563

ROMULO RAMOS, JR., APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Romulo Ramos, Jr., served in the U.S. Air Force from January 1958 to January 1962 and from August 1967 to September 1987, including service in Thailand. Record (R.) at 1309-13, 1347. He appeals, through counsel, an October 20, 2015, Board of Veterans' Appeals (Board) decision that, in part, determined that new and material evidence had not been submitted to reopen a claim for entitlement to service connection for residuals of a melanoma of the middle to lower back.[1] R. at 1-16. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the October 20, 2015, decision and remand the matter for further proceedings consistent with this decision.

The appellant argues, inter alia, that the Board "erred when it failed to properly consider [his] lay testimony" and "improperly held [him] to a heightened standard" in requiring "competent medical evidence sufficient to establish entitlement to service connection on the merits." Appellant's Brief (Br.) at 10, 13. Specifically, he contends that the Board did not properly consider his

[1] The Board's grant of entitlement to service connection for coronary artery disease with angina is a favorable finding, which the Court cannot disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

testimony during a September 2015 hearing that he first noticed the melanoma on his back during service but "really didn't pay that much attention to it until . . . several years ago." *Id.* at 13, R. at 1970. In response, the Secretary asks the Court to affirm the Board's decision, as it is supported by a plausible basis in the record and the appellant fails to demonstrate that its findings are clearly erroneous. Secretary's Br. at 4-10.

As a matter of law, a previously disallowed claim can be reopened upon the submission of new and material evidence. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 460 (2007) (citing 38 U.S.C. §§ 5108, 7105(c)). To satisfy these requirements, the evidence "must be both new and material." *Smith v. West*, 12 Vet.App. 312, 314 (1999).

> New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

38 C.F.R. § 3.156(a) (2016).

In *Shade v. Shinseki*, the Court held that the regulatory requirement that new and material evidence must raise a reasonable possibility of substantiating the claim "must be read as creating a low threshold." 24 Vet.App. 110, 117 (2010). VA should not limit its consideration to whether the newly submitted evidence relates specifically to the reason why the claim was last denied, but instead should ask whether the evidence could reasonably substantiate the claim were the claim to be reopened, either by triggering the Secretary's duty to assist or through consideration of an alternative theory of entitlement. *Id.* at 118.

In the decision on appeal, the Board found that the appellant was "not shown to be competent to establish a diagnosis . . . of malignant melanoma; or to relate such disability to active service." R. at 9. It further found that evidence added to the record since the May 2008 rating decision "does not include competent evidence relating status-post excision of malignant melanoma to any disease or injury in active service" and thus reopening was not warranted. R. at 10. The Board noted that the appellant's "general statements and testimony" relating his melanoma to service "are cumulative of statements made previously" and not new and material. *Id.*

The Court holds that the Board's failure to specifically address the appellant's testimony that he first noticed the melanoma on his back during service renders its statement of reasons or bases inadequate. Although the Board noted that his "general statements and testimony" were cumulative of statements previously made, it is unclear from the record and the May 2008 rating decision that such a statement was made at that time. Although the Secretary argues that "the Board found that his lay statements were not new and material," Secretary's Br. at 9, the Board did not specifically address this testimony, as is its duty. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding "that the evaluation and weighing of the evidence are factual determinations committed to the factfinder–in this case, the Board"); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (noting that it is the Board's duty, as factfinder, to assess the credibility and probative weight of all relevant evidence).

Absent a specific discussion of the appellant's testimony, the Court cannot understand the precise basis for the Board's determination that new and material evidence had not been received to reopen the appellant's claim. As the Court's review of this matter is frustrated, the Board's statement of reasons or bases is inadequate. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (holding that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Accordingly, the Court will vacate and remand the Board's decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations").

Given this outcome, the Court need not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (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"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs, and a review of the record, the Board's October 20, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: March 7, 2017

Copies to:
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