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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0252

RICHARD L. EICHENBERGER, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
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*: The appellant, Richard L. Eichenberger, through counsel, appeals a December 15, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for post-traumatic stress disorder (PTSD).[1] Record (R.) at 1-19. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266. Both parties submitted briefs, and the appellant submitted a reply brief. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the December 15, 2015, decision and remand the matter for further proceedings consistent with this decision.

I. FACTS

The appellant served in the U.S. Navy from May 1966 to August 1969, including service in the Republic of Vietnam. R. at 75.

[1] As the Board remanded the appellant's claim for entitlement to service connection for an acquired psychiatric disorder, other than PTSD, to include depressive disorder, not otherwise specified, that matter is not final and not before the Court. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 Vet.App. 475 (2004).

In November 2011, the appellant submitted a claim for entitlement to service connection for PTSD. R. at 374. He underwent a VA compensation and pension (C&P) examination in January 2012 and the examiner opined he did not meet the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (DSM-IV), criteria for a diagnosis of PTSD.[2] R. at 339, 337-49. The January 2012 C&P examiner stated that the appellant's test results from the Trauma Symptoms Inventory were "invalid as a result of over-endorsing symptoms and endorsement of symptoms that are not typical of PTSD." R. at 339. The January 2012 C&P examiner noted an Axis I diagnosis of depressive disorder not otherwise specified.[3] R. at 340. In a February 2012 rating decision, the VA regional office (RO) denied the appellant's claim. R. at 273-82.

The appellant appealed and his VA treating psychologist, Dr. Parker, submitted an opinion which included a diagnosis of PTSD related to the appellant's combat experience in Vietnam. R. at 270-71. Dr. Parker explained that he "had clinical contact with [the appellant] that has allowed for an assessment of his symptoms of [PTSD] and the resulting impairment from these symptoms as well as clinical contact allowing for the provision of psychological treatment targeting symptoms and challenges relat[ed] to combat-related post-traumatic stress." R. at 270. Dr. Parker noted an Axis I diagnosis of PTSD. R. at 271. Subsequently, in September 2012, VA obtained an addendum opinion from the January 2012 C&P examiner who opined that the appellant's "claimed condition was less likely than not . . . incurred in or caused by the claimed in-service injury, event, or illness." R. at 220, 217-224. In an October 2012 rating decision, the RO continued its denial of the appellant's claim. R. at 171-82.

In December 2012, Dr. Parker submitted a second opinion and reiterated his opinion that the appellant has PTSD. R. at 162-64. Dr. Parker explained that the January 2012 C&P opinion "does not acknowledge or allow for clinical credence that combat Veterans with a diagnosis of [PTSD] may produce an invalid profile on the Trauma Symptom Inventory when the Veteran experiences high levels of traumatic stress responding as manifested in dissociative-related symptoms and experiences high levels of avoidance behavior." R. at 163. Dr. Parker noted an

[2] Effective August 4, 2014, VA amended 38 C.F.R. § 4.125 by deleting references to the DSM-IV and requiring a mental disorder diagnosis to conform to the criteria in the fifth edition of the DSM (DSM–5). *See* 79 Fed. Reg. 45,093 (Aug. 4, 2014) (interim final rule).

[3] The DSM-IV uses a multiaxial system for classifying mental disorders. *See Diagnostic and Statistical Manual of Mental Disorders* 27-36 (4th ed., text revision 2000). Axis I refers to clinical disorders and other conditions that may be a focus of clinical attention. *Id.* at 27-29. The DSM-5 uses a nonaxial system. *See Diagnostic and Statistical Manual of Mental Disorders* 16 (5th ed., 2013).

Axis I diagnosis of PTSD. *Id.* The appellant appealed, R. at 153, and underwent a second C&P examination in January 2014, R. at 120-29. The January 2014 C&P examiner opined that the appellant did not meet the DSM-IV or DSM-5 criteria for a diagnosis of PTSD. R. at 126. The January 2014 C&P examiner noted a diagnosis of "Other Specified Depressive Disorder (Depressive Episode with insufficient symptoms)." R. at 120. VA issued a Statement of the Case, R. at 94-119, and the appellant perfected his appeal, R. at 73.

In the decision on appeal, the Board denied the appellant's claim to entitlement to service connection for PTSD, as it found that the most probative medical evidence of record reveals that he does not have a current diagnosis of PTSD and has not had a diagnosis of PTSD during the pendency of his appeal. R. at 11. In doing so, the Board assigned Dr. Parker's medical opinion less probative weight than the January 2012 C&P opinion, its September 2012 addendum, and the January 2014 C&P opinion. R. at 12. This appeal followed.

II. ANALYSIS

Establishing service connection for PTSD generally requires: (1) evidence of a current diagnosis of PTSD conforming to the DSM-5; (2) credible supporting evidence that a claimed in-service stressor occurred (corroborating evidence); and (3) competent evidence of a causal nexus between the current symptomatology and the in-service stressor. 38 C.F.R. §§ 3.304(f) (2016), 4.125(a) (2016). Moreover, 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). 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); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

The appellant argues, inter alia, that the Board failed to provide an adequate statement of reasons or bases for its determination that Dr. Parker's medical opinion is less probative than the January 2012 and January 2014 C&P opinions. Appellant's Brief (Br.) at 15, 21-23. In response, the Secretary asserts that it was within the Board's purview to weigh competing medical opinions and favor one opinion over the other and that it provided an adequate statement of reasons or bases

for doing so in this case. Secretary's Br. at 23. Here, in the Board's analysis section, it found that the January 2012 and January 2014 C&P opinions "should be afforded great probative weight," as they "were supported by objective testing and well-reasoned, thoroughly explained rationale as to why [the DSM-IV and DSM-5] diagnostic criteria were not satisfied." R. at 12. In contrast, the Board afforded Dr. Parker's medical opinion less probative weight, as it was "based upon acceptance of the [appellant]'s own reports of psychiatric symptoms without any suggestion in the record that the doctor has administered objective testing that refutes the VA examiners' test results" and as Dr. Parker's "contradiction of the VA examiners' opinions consists essentially of conclusory assertions that the [appellant] has PTSD." *Id.*

However, Dr. Parker acknowledged the January 2012 C&P examination and opinion and that, as part of that examination, the examiner administered the Trauma Symptom Inventory. R. at 163. Dr. Parker noted that the January 2012 C&P "examiner indicated that an invalid profile was produced by this administration of the Trauma Symptom Inventory and, as such, indicated that the examination lacks objective evidence to support [the appellant]'s self-report of the severity of his symptoms." *Id.* Dr. Parker explained that the January 2012 C&P opinion "does not acknowledge or allow for clinical credence that combat Veterans with a diagnosis of [PTSD] may produce an invalid profile on the Trauma Symptom Inventory when the Veteran experiences high levels of traumatic stress responding as manifested in dissociative-related symptoms and experiences high levels of avoidance behavior." *Id.* He stated that the appellant has "consistently, in his receipt of mental health care provided by the Department of Veterans Affairs, [] noted significant, frequent, and intense traumatic stress responding reflecting dissociative-related phenomena and avoidant behavior across all domains of psychosocial functioning," and that he has "observed such traumatic stress responding in a manner that provides evidence of not only these noted challenges but traumatic stress reactions that span the symptoms clusters of [PTSD], allowing for clinical data that augments and confirms [the appellant]'s self-report of symptoms and subsequent impairment." *Id.* Dr. Parker opined that the results in the January 2012 C&P opinion "do[] not accurately account for or recognize the symptom profile, severity and the limitations and impairment faced by [the appellant] as a result of his combat-related [PTSD]." *Id.*

The Board, in its recitation of the facts, acknowledged Dr. Parker's statement that the January 2012 C&P opinion "did not acknowledge or allow for clinical credence that combat Veterans with diagnoses of PTSD may produce invalid profiles on the trauma symptom inventory

when experiencing high levels of traumatic stress responding, as manifested in dissociative-related symptoms and high levels of avoidance behavior." R. at 10. The Board noted that Dr. Parker "observed such traumatic stress responding by the [appellant] in a manner that provided evidence of not only these noted challenges but traumatic stress reactions that spanned the symptoms clusters of PTSD, allowing for clinical data that augmented and confirmed [his] self-report of symptoms and subsequent impairment." *Id.*

Thus, reviewing Dr. Parker's December 2012 opinion and the Board decision, each as a whole, reveals that Dr. Parker opined why an invalid result on the Trauma Symptom Inventory, such as the appellant's in the January 2012 C&P examination, is common in combat veterans suffering from PTSD. R. at 10, 163; *see Acevedo v. Shinseki*, 25 Vet.App. 286, 294-95 (2012) (requiring medical examination reports to be read as a whole); *Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006) (a Board decision generally should be read as a whole). Absent a discussion of the weight given to Dr. Parker's December 2012 opinion that combat veterans with PTSD may produce invalid results on that test and his opinion regarding the appellant's results on the Trauma Symptom Inventory, the Court cannot understand the precise basis for the Board's determination that Dr. Parker's "contradiction of the VA examiner's opinions consists essentially of conclusory assertions that the [appellant] has PTSD." R. at 12; *see* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. Although the Board discussed this evidence in its recitation of the facts, merely listing relevant evidence is not adequate to fulfill the Board's obligation to provide a statement of reasons or bases for its decision. *See Abernathy v. Principi*, 3 Vet.App 461, 465 (1992).

To the extent that the Secretary argues that the Board is permitted to favor one medical opinion over the other, Secretary's Br. at 23, the Court agrees, *see Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992). However, the Board is permitted to favor one medical opinion over the other so long as it gives an adequate statement of reasons or bases for doing so. *See id.*; *see also Owens v. Brown*, 7 Vet.App. 429, 433 (1995) ("It is not error for the [Board] to favor the opinion of one competent medical expert over that of another when the Board gives an adequate statement of reasons and bases."). Here, as the Court's review of this matter is frustrated, the Board's statement of reasons or bases is inadequate. *See Caluza*, 7 Vet.App. at 506; *Gabrielson*, 7 Vet.App. at 39-40. 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").

The Court will not consider the appellant's remaining arguments at this time. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) ("It is well settled 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 is free to submit additional evidence and argument 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 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

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's December 15, 2015, decision is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: June 7, 2017

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