

DONALD A. JAFFA)
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 Appellant,)
)
 v.) Vet. App. No. 17-0006
)
 DAVID J. SHULKIN, M.D.,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, Donald A. Jaffa, and Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, by and through their representatives, respectfully move this Court to vacate those portions of the Board of Veterans' Appeals (Board) decision of September 12, 2016, that denied entitlement to service connection for sleep apnea, diabetes mellitus, and peripheral neuropathy of the bilateral lower extremities. [R. at 1-38]. The parties agree that the Board's decision to reopen the claim of entitlement to service connection for sleep apnea is a favorable grant and should not be disturbed. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

In the decision, the Board further denied entitlement to service connection for hypertension, peripheral neuropathy of the bilateral upper extremities, and obesity. The parties do not wish to disturb the denial of those issues and, accordingly, the parties respectfully request that the Court dismiss the appeal as to those claims. *See Pederson v. McDonald*, 27 Vet. App. 276 (2015).

The Board also remanded issues seeking entitlement to service connection for a psychiatric disability (to include depression and PTSD), entitlement to an increased rating for bilateral hearing loss, and entitlement to a total disability rating based on individual unemployability (TDIU). Those issues are not ripe for appellate review and are, therefore, not affected by this motion. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand “does not represent a final decision over which this Court has jurisdiction.”).

BASIS FOR PARTIAL REMAND

With regard to the sleep apnea claim, the parties agree the Board erred by not providing an adequate statement of reasons or bases explaining the rejection of Appellant’s lay statements of continuity of symptoms as not credible nor did the Board adequately consider all reasonably raised theories of entitlement. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board also erred in failing to ensure that VA

provide a medical examination to adjudicate Appellant's claims for service connection for sleep apnea and diabetes or, in the alternative, provide an adequate statement of reasons or bases as to why no such VA examination was necessary. See *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

The parties further agree the issue of entitlement to service connection for peripheral neuropathy of the bilateral lower extremities, which has been, in part, medically associated with Appellant's diabetes, is inextricably intertwined with the diabetes claim on appeal. See *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) (two issues are "inextricably intertwined" when they are so closely tied together that a final Board decision cannot be rendered unless both are adjudicated);

Reasons or Bases (Sleep Apnea)

Competent lay testimony may effectively establish the presence of observable symptomatology and, in certain circumstances, it may provide a sufficient basis for establishing service connection. See *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007). However, if otherwise competent testimony is determined not to be credible, it may, with adequate explanation, be dismissed as non-probative. See *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *McLendon*, 20 Vet.App. at 84.

Here, Appellant contended he had continuous symptoms of sleep apnea since service due to military conditions causing sleep deprivation.

[R. at 222-25 (212-42)]; *see also* [R. at 2877 (2874-78)]. He also contended he was seen and treated for a deviated septum and sinusitis in the military, which he believes contributed to his development of sleep apnea. *See* [R. at 2876-77 (2874-78)]; [R. at 3034 (3031-35)]; [R. at 2711]; [R. at 3404]. He contended that his deviated septum was a result of in-service assault. [R. at 3034 (3031-35)]. Indeed, his service treatment records note the deviated septum and sinusitis. *See, e.g.*, [R. at 4133-36].

The Board decision focuses solely on Appellant's contention of sleep deprivation causing sleep apnea, and does not consider or otherwise address the significance of his in-service treatment for a deviated septum or sinusitis. *See* [R. at 12-15 (1-38)].

In rejecting Appellant's statements describing in-service sleep deprivation and continuity of symptomatology as "not credible," moreover, the parties agree the Board provided only a cursory statement finding service treatment records silent for such complaints. [R. at 15 (1-38)]. The parties agree the cursory analysis is inadequate to explain why in-service sleep deprivation and post-service sleep disturbances, which are symptoms capable of lay observation, were found not credible. *See Buchanan*, 451 F.3d at 1336-37.

On remand, the parties agree the Board should provide an adequate statement of reasons or bases considering all the asserted theories of entitlement to service connection for sleep apnea, to include due to

deviated septum and/or sinusitis, and providing an adequate explanation of any rejection of his lay statements describing in-service sleep conditions.

Duty to Assist – Providing a VA Examination (Sleep Apnea and Diabetes)

In *McLendon*, the Court explained a VA medical examination must be provided pursuant to 38 U.S.C. § 5103(A) 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 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, 20 Vet. App. at 81.

Here, the record reflects, and the Board noted, current diagnoses of diabetes and sleep apnea. See, e.g., [R. at 104]; [R. at 14, 18 (1-38)]. As noted above, Appellant has described in-service sleep deprivation related to the circumstances of his service. See [R. at 222-25]. Service treatment records also confirm in-service references to a deviated septum and sinusitis, which Appellant had contended are related to his sleep apnea. See, e.g., [R. at 4133-36]; [R. at 2874-78]. The record also contains an April 2016 private medical opinion relating, at least in part, Appellant's sleep apnea and diabetes to in-service "long term sleep deprivation." [R. at 104].

As noted above, the Board rejected Appellant's lay statements as not credible. [R. at 15 (1-38)]. Again, the parties agree the Board's finding of a lack of credibility is not supported with an adequate statement of reasons or bases nor did the Board address at all, in-service record of a deviated septum and sinusitis. *See generally id.*; [R. at 4133-36]; [R. at 2874-78].

The Board also summarily rejected the April 2016 private opinion as "speculative." [R. at 19 (1-38)]. With regard to the duty to assist, the Board found "no credible lay evidence" or "a competent etiology opinion of record" triggering VA's duty to obtain a VA examination. [R. at 9 (1-38)].

The parties agree the Board's explanation as to why no VA examination(s) was(were) warranted was inadequate. The duty to provide a VA examination is triggered even at a "potential association" between a current disorder and service. *McLendon*, 20 Vet. App. at 83 (indicating the third prong of the analysis sets a "low threshold"). The Board's cursory paragraph did not explain why the April 2016 private opinion, in-service records related to a deviated septum and sinusitis, and/or Appellant's lay statements describing in-service sleep deprivation was insufficient to provide a "potential association" between the claimed disorders and service. *See id.*; *see also* [R. at 9 (1-38)].

On remand, the Board should either remand Appellant's claim to the RO so that the RO can provide Appellant appropriate VA examination(s) to

resolve whether Appellant's current diabetes and/or sleep apnea is/are related to his described in-service sleep deprivation, treatment for sinusitis, and/or treatment for a deviated septum or, in the alternative, provide an adequate statement of reasons or bases as to why no such examination(s) is(are) necessary.

Inextricably Intertwined Issue (Bilateral Lower Extremities)

Again, peripheral neuropathy of the bilateral lower extremities has been, at least in part, medically attributed to Appellant's diabetes and, therefore, is inextricably intertwined with the adjudication of his diabetes claim. See, e.g., [R. at 1340]; [R. at 1354]; [R. at 2659]; see also [R. at 322-333]. Thus, the parties agree vacatur and remand of the bilateral lower extremities claim is also appropriate. See *Harris*, 1 Vet. App. at 183.

Other Considerations

Furthermore, Appellant will be free to submit additional evidence and argument regarding his claims, and the Board may develop additional information, as deemed appropriate. See *Kutscherousky v. West*, 12 Vet.App. 369 (1999); *Colon v. Brown*, 9 Vet.App. 104, 108 (1996); *Holland v. Brown*, 6 Vet.App. 443 (1994); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992). Additionally, if the Court grants this motion, the Board shall obtain a copy of the Court's order and this joint motion and incorporate them into Appellant's claims file for appropriate consideration in subsequent decisions on this claim. See *Breeden v. Principi*, 17 Vet.App. 475 (2004).

Finally, before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1983). The Board must “reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case.” *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board shall also afford Appellant’s claim expeditious treatment as required by 38 U.S.C. § 7112. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (the Secretary’s duty to ensure compliance with the terms of a remand “include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court’s remand order”).

CONCLUSION

The parties respectfully move this Court to set aside only those portions of the Board's decision of September 12, 2016, that denied entitlement to service connection for sleep apnea, diabetes mellitus, and peripheral neuropathy of the bilateral lower extremities and remand those matters for further proceedings consistent with this motion.

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Respectfully submitted,

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