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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0999

MICHAEL D. SMITHERS, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
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, Michael D. Smithers, through counsel, appeals the March 2, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a disability rating higher than 30% for post-traumatic stress disorder (PTSD). Record (R.) at 2-13. This appeal is timely and the Court has jurisdiction over the matter on appeal 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 reasons that follow, the Court will vacate the March 2, 2016, Board decision and remand the matter for further proceedings.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from September 1970 to January 1973. R. at 25. In November 2009, he filed a claim for non-service-connected pension. R. at 598-611. In April 2010, the VA regional office (RO) denied the claim because the appellant's income exceeded the maximum annual disability pension limit. R. at 560-69. In May 2010, the appellant filed a Notice of Disagreement (NOD) with the RO decision, disputing the RO's conclusion regarding his income. R. at 547-58.

In June 2010, the appellant requested that his appeal be handled through a decision review officer (DRO). R. at 545. In October 2010, the appellant participated in an informal conference with the DRO and signed a paper stating that he "want[ed] to withdraw [his]appeal." R. at 509.

On March 7, 2011, the appellant filed a claim for disability compensation benefits for PTSD. R. at 282-92. On June 7, 2011, the RO granted service connection for PTSD, and assigned a 10% disability rating, effective March 7, 2011, the date on which the appellant filed his claim. R. at 171-74, 181-85. On March 15, 2012, the appellant notified the RO that he "would like to request reconsideration of my claim" because he "believ[ed] the evidence . . . supports an evaluation greater than 10[%]." R. at 161. He also stated that he was sending additional evidence "as part of this appeal." *Id*. at 162. In response, on March 16, 2012, the RO notified the appellant that "although you mention 'appeal' in the last paragraph of this correspondence[,] we are inferring this request to be a claim for reconsideration." R. at 159. Further, the RO stated: "If this not what you are wishing, please notify our office in writing." *Id*. There is no indication in the record that the appellant responded to the RO letter.

In February 2013, the RO increased the disability rating for PTSD from 10% to 30%, effective March 15, 2012, the date on which the RO stated it had received the appellant's claim for a disability rating increase for PTSD.[1] R. at 106. In January 2014, the appellant filed an NOD disagreeing with the 30% disability rating[2] (R. at 81), and in July 2014, he perfected his appeal (R. at 35) after the RO issued a Statement of the Case (SOC) (R. at 38-73).[3]

The record before the Board included VA psychiatric examinations, VA outpatient psychiatric treatment records, and several opinions from the appellant's treating VA psychiatrist. For example, in May 2011, the appellant underwent a PTSD examination. R. at 187-91. The examiner determined that the appellant had experienced military trauma that was related to his fear of hostile military or terrorist activity. R. at 190. Further, the examiner stated that the appellant persistently reexperienced the traumatic event through nightmares, flashbacks, anxiety, fear, anger,

[1] Apparently, the RO considered the appellant's March 15, 2012, correspondence disagreeing with the 10% disability rating for PTSD to be a "request for reconsideration" and a claim for a disability rating increase for PTSD.

[2] The record indicates that in September 2013, the appellant filed an NOD with the RO, which the RO acknowledged receiving on October 3, 2013 (R. at 80-81); however, the RO was unable to locate this NOD.

[3] The sole issue identified in the NOD, SOC, and the Substantive Appeal was entitlement to "an evaluation in excess of 30[%] for [PTSD]." R. at 59.

survival guilt, panic attacks, heart pounding, sweating, extremely restless sleep, and muscle tension. *Id*.

The examiner found that the appellant had persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness manifested by a "markedly" diminished interest in significant activities, feelings of detachment and estrangement from others, inability to have loving feelings, social distancing, emotional numbness, and a sense of a foreshortened future. *Id*. Finally, the examiner found that the appellant had persistent arousal symptoms, including sleep disturbance, irritability or outbursts of anger, hypervigilance, and exaggerated startle response. *Id*.

The examiner noted that the appellant's PTSD caused changes in his "cognition, sleep, heath, social, family functioning, [and] relationships." *Id*. In the area of family functioning and relationships, the appellant had been married three times. *Id*. His relationship with his current wife was marked by his irritability, angry verbal outbursts, emotional isolation, and decreased interest in sex. *Id*. The appellant and his wife did not sleep in the same room; he lived downstairs. *Id*.

In addition to PTSD, the examiner diagnosed the appellant with bipolar disorder, which was manifested by "depression, and elevated, expansive, or irritable mood." R. at 190. The examiner stated that because of the appellant's mental disorders, he "would likely have mild difficulty maintaining gainful employment." R. at 191.

In January 2012, Dr. Martineau, the appellant's treating physician, stated that for the past 6 years he had been treating the appellant for PTSD, manifested by nightmares, flashbacks, intrusive thoughts, memory problems, marked irritability, low tolerance for frustration, hypervigilance, and isolative behavior. R. at 77. During that time, the appellant's PTSD had worsened with "grossly inappropriate behavior" and "marked dysfunction." *Id*. As a result, the examiner concluded that the appellant had "impairment" in all "domains" of his life, including family, work, and interpersonal relationships. *Id*.

In January 2013, the appellant underwent a VA examination. R. at 119-43. The examiner diagnosed the appellant with PTSD and bipolar disorder. R. at 120. The examiner stated that there was "marked overlap" between the appellant's PTSD symptoms and his bipolar disorder. The examiner identified the overlapping symptoms as loss of interest in activities, emotional numbing, distancing in relationships, sleep disturbance, and irritability. *Id*. However, the examiner stated that he could separate the symptoms of the appellant's PTSD from those of his bipolar illness. *Id*. The VA examiner explained that it was possible to separate the symptoms of each illness because

at the same time that the appellant experienced a decrease in the frequency of certain unique PTSD symptoms (intrusive memories, hypervigilance, and startle response), there was an increase in the severity of the overlapping symptoms. Therefore, the examiner opined, it was "more likely than not" that the overlapping symptoms (loss of interest in activities, emotional numbing, distancing in relationships, sleep disturbances) were associated with his bipolar disorder. *Id*.

Additionally, the examiner opined that the level of occupational and social impairment resulting from the appellant's PTSD "most likely" met the threshold for a 30[%]" disability rating. R. at 123. On the other hand, the examiner opined that the level of occupational and social impairment resulting from the appellant's bipolar disorder met the 50% disability rating level. *Id*.

VA outpatient treatment records from March 2013 state that the appellant's isolation, emotional numbness, irritability, and flashbacks had increased. R. at 469-73. In June 2013, Dr. Martineau stated that the appellant's PTSD had "markedly" worsened. R. at 76. He specifically noted an increase in the appellant's emotional withdrawal, isolation, memory disturbances, hypervigilance, and hyperarousal. *Id*. Further, Dr. Martineau opined that the appellant was "impaired in work, family, and social situations due to the severity and chronicity of his PTSD symptoms." *Id*. May 2014 VA treatment records note that the appellant reported an increase in nightmares, flashbacks, emotional withdrawal, anger, and irritability. R. at 412-17.

The record before the Board also included lay statements from the appellant's daughters and his wife describing his mental disorders. In March 2012, Regina Smithers, the appellant's daughter, observed that the appellant had "sudden and great outbursts of anger and rage," including verbal attacks towards family members. R. at 163. She noted that after an outburst, he "frequently cannot remember [the incident] and denies much of the hateful and angry things he said." *Id*. at 164. She also noted that he "frequently, makes others, including some of his clients and employees feel uncomfortable" with "inappropriate actions and complaints of sadness and anxiety."[4] *Id*. at 163. His other daughter, Christina Smithers, noted that the appellant's angry outbursts are "now spreading to his office as well as public places" and that occasionally [the appellant] was physically violent with other family members, including his wife and Regina, his other daughter. R. at 168. Because of her father's outbursts, Christina stated, he had an inability "to establish effective relationships." R. at 168.

[4] The appellant is a practicing chiropractor.

The appellant's wife commented on his "threatening behaviors toward strangers," and his inability to cope with problems. R. at 165. She noted that she "had to intervene with employees that complain they are working in a hostile environment." *Id*. In September 2013, the appellant's wife submitted another statement reporting that at social engagements, the appellant threw or destroyed things around him "as well as frighten[ed] guests." R. at 98. She stated that he "would never be able to work under anyone or any kind of pressure that he could not control." R. at 101.

On March 2016, the Board issued the decision here on appeal denying the appellant's claim for a disability rating in excess of 30% for PTSD. R. at 2-15.

II. ANALYSIS

A. Adequacy of 2013 VA Examination

A VA medical examination or opinion is adequate if it is "thorough and contemporaneous," considers the veteran's prior medical examinations and treatment, and "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). "[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). The medical opinion "must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions." *Stefl*, 21 Vet.App. at 124; *see Nieves-Rodriguez*, 22 Vet.App. at 304 (2008) ("[M]ost of the probative value of a medical opinion comes from its reasoning."); *see also Hicks v. Brown*, 8 Vet.App. 417, 421 (1995) (inadequate medical evaluation frustrates judicial review). "An opinion based upon an inaccurate factual premise has no probative value." *Reonal v. Brown*, 5 Vet.App. 460, 461 (1993).

Whether a medical opinion is adequate is a finding of fact that the Court reviews for clear error. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). Under this standard, the Court "will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect." *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("[T]he [Court] may not reverse [a factual finding] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

With any finding on a material issue of fact or law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The need for a statement of reasons or bases is particularly acute when the Board's findings and conclusions pertain to the degree of disability resulting from mental disorders. *Mitchem v. Brown*, 9 Vet.App. 138, 140 (1996); *see* also *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) ("[W]hen it is not possible to separate the effects of the [service-connected condition and the non-service-connected condition], VA regulations . . . clearly dictate that such signs and symptoms be attributed to the service-connected condition."). To comply with the reasons-or-bases requirement, the Board must analyze the credibility and probative value of the evidence, account for the persuasiveness of the evidence, and provide reasons for rejecting 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).

Here, the appellant was diagnosed with PTSD and bipolar disorder. The Board, relying on the 2013 VA examiner's opinion, concluded that the two mental disorders could be "differentiated" from each other and that the level of social and occupational impairment resulting from the appellant's service-connected PTSD results in occupational and social impairment that is compatible with the 30% disability rating. R. at 9. The appellant argues that the Board's reliance on the 2013 examiner's opinion is misplaced because that examination report is inadequate. Appellant's Brief (Br.) at 11-18.

The 2013 examiner opined that many of the appellant's symptoms that impaired his social and occupational functioning were attributable to his bipolar disorder and not PTSD. R. at 121. The Court agrees with the appellant that the evidence in the record shows that the examiner's statement is premised on an inaccurate factual basis. The appellant points out that, contrary to the 2013 examiner's assertion, the evidence indicates that the appellant's PTSD symptoms (hypervigilance, nightmares, flashbacks, and intrusive thoughts) did not improve, in fact, these symptoms worsened as did his other symptoms (loss of interest in activities, emotional numbing, distancing in relationships, sleep disturbances), which the examiner stated overlapped with bipolar disorder. *See* R. at 76-77 (2012 medical statement the appellant's PTSD symptoms have worsened and 2013 medical statement that the appellant's PTSD symptoms "are markedly worsening"), 469-73 (2013 outpatient treatment notes stating that the appellant's PTSD symptoms "have

worsened over time"). Although there is no reasons-or-bases requirement imposed on medical examiners, *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012), it is incumbent on the Board to address flaws in an examiner's opinion that affect the probative value of that opinion. Here the Board failed to address the inaccurate factual premise underlying the 2013 examiner's 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.

B. Effective Date

The appellant presents several arguments why he is entitled to an effective date earlier than March 12, 2012, for a disability rating higher than 30%. Appellant's Br. at 21-26. However, the Board did not decide this issue. Indeed, the appellant raises this issue for the first time on appeal in his brief. The Court's jurisdiction is limited to final Board decisions on claims for particular benefits. *See Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000) (holding that "[a] 'decision' of the Board, for purposes of [this Court's] jurisdiction under [38 U.S.C. § 7252], is the decision with respect to the benefit sought by the veteran"); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that this Court's "jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed").

"There are five common elements to a veteran's application for benefits: status as a veteran, the existence of disability, a connection between the veteran's service and the disability, the degree of disability, and the effective date of the disability." *Collaro v. West*, 136 F.3d 1304, 1308 (1998). A RO adjudication about one or more of these elements may form the substance of a veteran's NOD. An NOD may be broad enough to initiate an appeal of all issues and claims adjudicated by the RO or narrowly limited to cover only specific issues and claims. *See Maggitt v. West*, 202 F.3d at 1375 ("[A] narrow or specific NOD may limit the jurisdiction of the reviewing court to the specific elements of the disability request contested in the NOD."); *Ledford*, 136 F.3d at 780 (holding that an NOD that specifically expressed disagreement only as to the assigned effective date of the service-connected disability did not constitute an NOD as to the evaluation of a service-connected disability); *see also Jarvis v. West*, 12 Vet.App. 559, 562 (1999) (same).

Here, the appellant expressed disagreement with the disability rating. R. at 81. There is no evidence in the record before the Court that the appellant in any way disagreed or took issue with the effective date. As a result of the narrow NOD filed by the appellant, the Board decision does not include the issue of the proper effective date for the 30% disability rating assigned by the RO. Accordingly, because the appellant's NOD did not include the issue of his entitlement to an effective date earlier than March 12, 2012, this was not the subject of the final Board decision on appeal. Thus, the matter is not properly before the Court and the Court will not address the appellant's arguments.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the March 2, 2016, Board decision is VACATED and the matter is remanded for further adjudication.

DATED: June 16, 2017

Copies to:

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VA General Counsel (027)