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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0893

SCOTT A. HOWLETT, APPELLANT,

V.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Army veteran Scott A. Howlett appeals through counsel from a December 23, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a disability rating in excess of 30% for chronic headaches.[1] For the following reasons, the Court will set aside the December 2015 decision with respect to the matter on appeal and remand that matter for readjudication.

I. ANALYSIS

Mr. Howlett argues that the Board erred in failing to ensure substantial compliance with the instructions in a prior Board remand pertaining to a VA medical examination and therefore failed to assure VA complied with the duty to assist. He also argues that the Board's statement of reasons or bases was insufficient to support its determination that he was entitled to a 30% disability rating, but no higher, for his service-connected headache disability. The Court finds merit in both arguments.

[1] The Board also denied an initial disability rating in excess of 20% for temporomandibular joint syndrome prior to January 25, 2012, and in excess of 30% after that date. Mr. Howlett raises no assertions of error with respect to these issues and the Court therefore will not consider them. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

A. Duty To Assist

The Court reviews the Board's determinations that the duty to assist has been met under the "clearly erroneous" standard. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Nolen v. Gober*, 14 Vet.App. 183, 184 (2000) (Board's determination whether the Secretary has fulfilled his duty to assist generally is a finding of fact). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

1. Stegall Error

In a November 2014 remand, the Board found that the VA medical examinations of record were insufficient to allow assessment of the rating criteria for the next higher rating for Mr. Howlett's headache condition. The Board ordered VA to obtain various records pertaining to his headache claim and schedule a medical examination to include consideration of those records. In ordering a new medical examination, the Board gave the following instructions:

> Notify the [v]eteran that it is his responsibility to report for any scheduled examination and to cooperate in the development of the claims, and that the consequences for failure to report for a VA examination without good cause may include denial of the claims. In the event that the [v]eteran does not report for any scheduled examination, *documentation must be obtained* which shows that *notice scheduling the examination was sent* to the last known address. It must also be indicated whether any notice sent was returned as undeliverable.

Record (R.) at 430 (citations omitted, emphasis added). The Secretary concedes, and the Court's review confirms that "the record does not contain documentation explicitly showing that notice scheduling the examination was sent to [Mr. Howlett's] last known address or indicating whether any examination notice was undeliverable." Secretary's Brief (Br.) at 6.

In the decision here on appeal, the Board found that Mr. Howlett failed to report for a VA medical examination without good cause and maintained the disability rating at 30% for his headache condition, based on the preexisting medical evidence of record. The Board further found that VA substantially complied with its remand instructions.[2] R. at 3. The Board noted that "[Mr.

[2] Neither the Board nor the Secretary invoked any presumption of regularity with respect to the generation and mailing of examination notices. This may be explained by the fact that the basis for such a presumption has not been established in the Court. *See Kyhn v. Shinseki*, 26 Vet.App. 371, 374 (2013) (if the Board wishes to invoke the presumption of regularity, it should "explain in detail the regular and established procedure that VA follows to schedule medical examinations and provide notice of the scheduled examination to claimants"); *Posey v. Shinseki*, 23

Howlett's address] has been consistent throughout the appeal period. None of the correspondence [VA] sent to [him], to include the June 2015 Supplemental Statement of the Case (notifying him of his failure to report to the VA examination), has been returned as undeliverable." R. at 13.

The Court cannot agree with the Board's assessment. The issue is not whether other VA correspondence reached Mr. Howlett, but whether he received notice of the VA examination to which he did not report. That is precisely what compliance with the Board's remand instructions should have established. The Board's remand instructions may have reflected the fact that VA's normal practice does not include placing examination notice letters in the claims file. *See Kyhn v. Shinseki*, 23 Vet.App. 335, 339 (2010). The Board's remand instructions were an important and salutary provision intended to avoid the very type of dispute that has arisen in this case, and substantial compliance would have required the documentation ordered in the Board remand. The Court concludes that the Board erred in failing to require compliance with its remand instructions as to documentation of notice of the scheduled VA examination. *See Stegall v. West*, 11 Vet.App. 268 (1998).

Even apart from the Board's remand instructions, its finding that Mr. Howlett failed to report to the scheduled examination without cause, which implies a finding that he received proper notice of the examination, was based on an incomplete record. Assuming that a proper notice letter was generated and sent, that letter would have been constructively part of the record before the Board. *See Bell v. Derwinski*, 2 Vet.App. 611 (1992) (documents generated by Veterans Health Administration were in the constructive possession of the Secretary and before the Board). In the absence of this letter, the Board was unable to fulfill its duty to discuss all issues raised by the evidence of record. *See Thompson*, *supra*. Thus, the Board's *Stegall* error resulted in a second reasons or bases error.

In view of the above discussion, remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998). On remand, the Board must require VA to comply with its November 2014 remand instructions and make an explicit finding of receipt or nonreceipt of the examination notice based on VA's response and the other evidence of record. Alternatively, the Board may moot the

Vet.App. 406, 410 (2010) (the foundation of any presumption of regularity is a showing by affidavit or otherwise what the regular procedure may be). Rather, their position on appeal rests on substantial compliance with the Board's remand instructions and, alternatively, on prejudicial-error analysis.

issue by obtaining a medical examination that will support evaluation of the rating criteria for Mr. Howlett's headache condition.

2. Prejudicial Error Analysis

The Secretary contends, however, that any *Stegall* error (and presumably the resulting reasons-or-bases error) would not have prejudiced Mr. Howlett because he did not allege, either before the Board or in his primary brief on appeal, that he did not receive notice of the examination to which he failed to report. *See* 38 U.S.C. § 7261(b)(2) (Court must "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 556 (2009) (appellant's responsibility to point out prejudicial effect of alleged error). "[I]n addressing the prejudicial effect of any error of law or fact, the Court is not confined to the findings of the Board but may examine the entire record before the Agency, which includes the record of proceedings." *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010).

If Mr. Howlett did not receive notice of the scheduled VA examination, prejudice is clear. The Board repeated its previous finding that the VA examinations of record were insufficient to evaluate the rating criteria for a 50% disability for Mr. Howlett's chronic headaches. *See* R. at 6. The Board further commented that the scheduled VA examination "may have assisted in his claim, to include addressing whether his headache disability was manifested by prostrating attacks occurring on average once a month over the past several months." R. at 12.

While Mr. Howlett's failure to allege nonreceipt does not support a conclusion of lack of notice, neither does it establish that he did receive notice.[3] The Court notes that in 2008 Mr. Howlett received an award of total disability on the basis of individual unemployability, in part

[3] In an effort to clarify Mr. Howlett's position on receipt or nonreceipt of the examination notice, the Court requested supplemental briefing in which he would state whether he received the notice letter, or explain any inability to so state. In the supplemental brief, Mr. Howlett's counsel included some results of a search in the VBMS system and in the Compensation and Pension Record Interchange (CAPRI) of the Rhode Island regional office, information that the Court did not request.

Although Mr. Howlett's supplemental brief did not particularly advance his position, the Secretary filed a response in which he contended that the Court may not consider the contents of the supplemental brief on the basis that it would amount to consideration of extrarecord evidence not before the Board. Nevertheless, the Secretary attacks Mr. Howlett's credibility based on the reported results of the CAPRI documents.

The Court is not convinced that the Secretary is correct. *Cf. Kyhn*, 26 Vet.App. at 375 (Court may consider assertion of nonreceipt for the first time on appeal because it is part of appellant's argument); *see also Bell*, *supra* (documents generated by VHA constructively part of the record before the Board); R. at 4 (appeal processed using VBMS). In any view of the matter, the opportunity for the Board to consider certain of the evidence in the supplemental briefing is yet another reason for remand.

because of a major depressive disorder. *See* R. at 15. In June 2015, when the SSOC notified him of failure to report to the scheduled examination issued, Mr. Howlett was represented by the Disabled American Veterans. His lack of response to that document is therefore not as significant to the notice issue as it might have been if he had the benefit of counsel. *See Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009) (veteran does not lose pro se status because of assistance from a veterans' service organization). Neither will the Court speculate on the recordkeeping capacity or the reliability of recollection of a pro se claimant with mental issues. The Court concludes that Mr. Howlett's silence as to nonreceipt does not negate the prejudice arising from the Board's errors.

To be clear, the Court makes no finding as to receipt or nonreceipt of the examination notice. Rather, the Court is unable to conclude that the Board's errors with respect to its remand instructions and reasons or bases for its discussion of the notice issue were harmless.

B. Reasons or Bases

Mr. Howlett further argues that the Board's statement of reasons or bases for its denial of a 50% disability rating was insufficient, even in view of the evidence of record. The Board is required to support its determinations of fact and law with a written statement of reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009), and discuss all provisions of law and regulation that are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

The Court has held, in the context of a headaches claim, that

> the Board must explain its conclusion as to the applicability of [38 C.F.R.] §§ 4.3, 4.7. and 4.21 in terms of *each of the factors* in [38 C.F.R. § 4.124a, Diagnostic Code (DC)] 8100 for a 50% rating—"very frequent", "completely prostrating", "prolonged attacks", and "productive of economic inadaptability"—and the meaning ascribed to these terms in comparison to the DC 8100 criteria for the appellant's current 30% rating.

Pierce v. Principi, 18 Vet.App. 440, 445 (2004). The Board's discussion did not fulfill these requirements, which the Board should observe on remand. *See Schafrath, supra.*

Mr. Howlett is free to submit additional evidence and argument on remand in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board must consider such argument and evidence. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

Upon consideration of the foregoing, the Court SETS ASIDE the December 23, 2015, Board decision with respect to the appealed issue, and REMANDS that matter for further proceedings consistent with this decision.

DATED: June 28, 2017

Copies to:

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