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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2240

CORNEALIUS WHITFIELD, SR., 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, Cornealius Whitfield, Sr., served in the U.S. Army from December 1970 to December 1972. Record (R.) at 182. He appeals, through counsel, a June 7, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for post-traumatic stress disorder (PTSD).[1] R. at 1-18. 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. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the June 7, 2016, decision and remand that matter for further proceedings consistent with this decision.

The appellant argues that the Board clearly erred when it determined that VA satisfied its duty to assist or, in the alternative, that it failed to provide an adequate statement of reasons or bases to support that determination. Appellant's Brief (Br.) at 6-17. Specifically, he first asserts that the Board erred when it determined that VA was not obligated to conduct a search for his unit's morning reports to confirm one of his alleged stressors. *Id.* at 8-10. Second, he contends that the Board erred when it determined that a May 2015 VA PTSD compensation and pension

[1] The Court lacks jurisdiction over the claim for entitlement to service connection for an acquired psychiatric disorder other than PTSD, to include depression, that the Board remanded, and it will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

opinion was adequate. *Id.* at 11-17. In response, the Secretary contends that, even assuming VA erred by failing to corroborate the appellant's alleged stressor, any error in that regard was harmless, as the May 2015 VA examiner presumed his alleged stressor occurred and provided an adequate opinion for her determination that the appellant does not meet the diagnostic criteria for PTSD. Secretary's Br. at 6-14.

Establishing service connection for PTSD generally requires: (1) evidence of a current diagnosis of PTSD;[2] (2) credible supporting evidence that a claimed in-service stressor occurred; and (3) competent evidence of a causal nexus between the current symptomatology and the claimed in-service stressor. 38 C.F.R. §§ 3.304(f) (2017), 4.125(a) (2017); *see Cohen v. Brown*, 10 Vet.App. 128, 138 (1997). Regarding the first element, the DSM-IV requires, inter alia, that the person "has been exposed to a traumatic event in which . . . the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others." DSM–IV at 467. "Where a current diagnosis of PTSD exists, the sufficiency of the claimed in-service stressor is presumed," but the second service-connection element requires "credible evidence that the claimed in-service stressor actually occurred." *Sizemore v. Principi*, 18 Vet.App. 264, 275 (2004); *see Cohen*, 10 Vet.App. at 145. If the claimed stressor is not related to combat, its occurrence must be corroborated by credible supporting evidence. *Cohen*, 10 Vet.App. at 142 ("If the claimed stressor is not combat related, a veteran's lay testimony regarding in-service stressors is insufficient to establish the occurrence of the stressor and must be corroborated by 'credible supporting evidence.'"); 38 C.F.R. § 3.304(f).

The Secretary has a duty to assist a claimant in obtaining evidence necessary to substantiate the claim. 38 U.S.C. § 5103A(a)(1). This duty includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit," including military records in the custody of a Federal department or agency. 38 U.S.C. § 5103A(a), (c)(1)(A); 38 C.F.R. § 3.159(c), (c)(2) (2017); *see Loving v. Nicholson*, 19 Vet.App.

[2] Effective August 4, 2014, VA amended 38 C.F.R. § 4.125 by deleting references to the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) (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). The amended regulation states that its provisions do not apply to claims that were certified to the Board or were pending before the Board, this Court, or the U.S. Court of Appeals for the Federal Circuit prior to August 4, 2014. *Id.* The amended regulation is not applicable to the appellant's claim, as it was pending before the Board prior to the August 2014 amendment. *See id.*; R. at 408.

96, 102-03 (2005). "VA will end its efforts to obtain [such] records . . . only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile," such as when "the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them." 38 C.F.R. § 3.159(c)(2). If the Secretary is unable to obtain those records after making reasonable efforts to do so, he must notify the claimant of that fact. 38 C.F.R. § 3.159(e)(1).

The Board's determination that VA fulfilled its duty to assist is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). In addition, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's 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); *Gilbert*, 1 Vet.App. at 56-57.

There is no dispute that the appellant's claimed stressors must be corroborated by credible supporting evidence. R. at 9; Appellant's Br. at 6-17; Secretary's Br. at 6-14; *see Cohen*, 10 Vet.App. at 142; 38 C.F.R. § 3.304(f). Here, the Board acknowledged three of the appellant's alleged in-service stressors: (1) an in-service incident in which he jumped off the top of an armored personnel carrier when it hit an embankment and turned over when attempting to float into the Rhine River; (2) his training to deploy to the Republic of Vietnam; and (3) an injury to his right hand while playing football. R. at 6-7; *see* R. at 1414-15. With respect to his first alleged stressor, the Board explained that, in March 2015, the agency of original jurisdiction (AOJ) attempted to corroborate the stressor from the U.S. Army and Joint Services Records Research Center (JSRRC). R. at 8. The Board stated that the JSRRC response indicated that they were unable to locate copies of the appellant's unit records for the requested time period and that they "do not maintain a 1972 Morning Report for the 1st Battalion, 13th Infantry," but that "[a] Morning Report search may be conducted in order to verify this incident." R. at 8; *see* R. at 201. The Board noted that the AOJ issued an April 2016 formal finding that there was a lack of information required to corroborate the appellant's alleged stressors "and noted that 'the information required to corroborate the stressful events described by the [appellant] WAS RETURNED AS UNVERIFIED from the [JSRRC]' and that 'all efforts to obtain the needed information have been exhausted and any further attempts would be futile.'" R. at 9; *see* R. at 200.

The Board acknowledged the JSRRC's suggestion that VA could request morning reports from the National Personnel Records Center to verify the appellant's alleged stressor and stated that morning reports "usually show daily changes in the status of service members in a specific unit" and "often contain information about service members who were sick or injured on any given day." R. at 9. The Board determined that "a search of morning reports would not yield any relevant results," as the appellant "indicated that no service member was injured in this event." *Id.* However, in his January 2013 testimony at a Board hearing, the appellant testified that no one in his unit was seriously injured in the alleged armored personnel carrier incident, but that fellow service members suffered sprained ankles and other similar injuries. R. at 1414. Moreover, the appellant testified that there may be reports or records of the repairs done to the armored personnel carrier after the incident and the appellant's former representative stated that there may be reports of the incident, as the military "takes pretty good note of the incidents of the equipment that is damaged or has to be repaired and services [and] that may be a way to prove his stressor by asking to get those reports." R. at 1415.

In light of the Board's explanation that morning reports are a useful tool as they often contain information regarding service members who were injured on any given day, R. at 9, and the appellant's testimony that service members in his unit were injured, though not seriously, and that there may be reports of the incident, R. at 1414-15, the Court cannot understand the Board's determination that "a search of morning reports would not yield any relevant results," R. at 9; *see* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57. The Board's failure to explain adequately why VA's duty to assist did not require the Secretary to conduct a search for the appellant's unit's morning reports frustrates judicial review and requires that the matter be remanded. *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 address one aspect of the appellant's remaining argument. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that the Court may address an appellant's other arguments to provide guidance on remand). The appellant asserts that the May 2015 VA medical opinion is inadequate as the examiner stated that "there are no markers in his records of this event" when discussing the appellant's alleged armored personnel carrier stressor. Appellant's Br. at 13-14. On remand, the Board must address the appellant's request that VA seek unit morning reports

and provide an adequate statement of reasons or bases for its determination that a search for such reports would not yield any useful results and, after doing so, must discuss whether a new medical opinion is necessary. *Compare* R. at 54-64 (Apr. 2016 private examiner diagnosis of PTSD based on the alleged in-service armored personnel carrier turning over), R. at 102 (May 2015 VA examiner stating "[t]here is no evidence to support that he feared for his or other soldier's lives during the event" and "there are no markers in his records of this event"), *with* R. at 204 (Nov. 2014 appellant's statement in support of claim stating "[t]he incident was tremendously scary and I at one point feared for my life."); *cf. McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (holding that VA is required to provide a medical examination where there is, inter alia, "insufficient competent medical evidence . . . to make a decision on the claim"); *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) ("A [medical] opinion based on an inaccurate factual premise has no probative value."); 38 C.F.R. § 3.102 (2017).

The Court will not consider the appellant's remaining arguments at this time. *See 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 shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

After consideration of the appellant's and Secretary's briefs, and a review of the record, the Board's June 7, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: August 31, 2017

Copies to:

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