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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2192

RODERICK C. DEAN, 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, Roderick C. Dean, appeals, through counsel, a May 13, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for an acquired psychiatric disorder, including a personality disorder, adjustment disorder, depression, and post-traumatic stress disorder (PTSD). Record (R.) at 1-23. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the May 13, 2016, decision.

I. BACKGROUND

The appellant served in the U.S. Air Force from January 26, 1977, to August 11, 1977. R. at 112. His service personnel records include several reprimands for various infractions. R. at 98-99, 103-04; *see also* 127-28. On August 3, 1977, the appellant was recommended for a general discharge due to his "apathy, defective attitude, or inability to expend effort constructively." R. at 127-28. The appellant's service medical records include a June 1977 examination report and accompanying report of medical history, in which he endorsed "depression or excessive worry" related to his "squadron troubles and discharge." R. at 1281-83. He also reported "nervous

trouble" as a result of his pending discharge. *Id.* The examination report reflects that the medical examiner evaluated the appellant as psychiatrically "normal." R. at 1280.

Beginning in April 1997, the appellant sought mental health treatment and reported tremendous stress from being abducted from work. R. at 2284, 2287. In May 1998, he reported feeling depressed after a coworker threatened his safety. R. at 2115-16. In January 1999, he reported feeling depressed after policemen impounded his truck and exchanged angry words with him. R. at 2095-96. In October 2000, the appellant sought treatment at the Detroit VA Medical Center and reported feeling down for the past several months after losing his job. R. at 832-34. He reported a history of sexual abuse by his brother-in-law's brothers when he was a child, and also reported sexual abuse by an ex-boyfriend. R. at 833. The clinician diagnosed him with "adjustment disorder with depressed mood." *Id.*

In November 2004, the appellant filed a claim for service connection for PTSD and depression, asserting that he was raped in service. R. at 1743-59. In August 2006, he initiated an appeal as to a December 2005 rating decision by the New Orleans VA regional office (RO) that had denied entitlement to service connection for a personality disorder and adjustment disorder with depressed mood claimed as PTSD and depression. R. at 1264 (Notice of Disagreement); 1335-41 (rating decision).

During the pendency of the appeal, the Board remanded the appellant's claim six times for additional development—in July 2010, July 2012, February 2013, September 2013, January 2014, and August 2015. R. at 1014-23, 692-705, 657-63, 560-66, 512-18, 366-409. The development obtained on remand included a September 2010 VA examination report in which the appellant reported stressors from Hurricane Katrina and from being mistreated by the police, R. at 790, and the examiner diagnosed "PTSD due to stressors associated with Hurricane Katrina and incarceration," R. at 792. The appellant was scheduled for an additional VA psychiatric examination in February 2016 to address the etiology of each of his acquired psychiatric disorders, *see* R. at 405-06, but he arrived 40 minutes late to the appointment and the examiner was unable to complete the examination, R. at 76. He was rescheduled twice to complete the examination, but failed to appear for either appointment. *Id.*

In a May 2016 decision, the Board denied entitlement to service connection for an acquired psychiatric disorder, including a personality disorder, adjustment disorder, depression, and PTSD. R. at 1-23. The Board determined that there was no credible evidence that the appellant's alleged

in-service stressor (i.e., a sexual assault by a fellow airman) actually occurred and that there was otherwise no competent, credible medical evidence that related any of his other psychiatric disorders to service. R. at 18-21. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred when it failed to address the relevance of his in-service psychiatric complaints and behavioral problems in determining whether his acquired psychiatric disorder was incurred in service. Appellant's Brief (Br.) at 4-5. He relatedly asserts that the Board misinterpreted the law when it required proof of an in-service stressor to award service connection for adjustment disorder and depression. *Id.* at 6-9. The appellant also contends that the Board should have either obtained an additional medical opinion based on the evidence of record or explained why obtaining one was unnecessary. *Id.* at 9-10. The Secretary disputes the appellant's contentions. Secretary's Br. at 10-18.

At the outset, the Court notes that the appellant has not raised any arguments challenging the Board's finding that service connection was not warranted for PTSD or for a personality disorder. *See* Appellant's Br. at 6-10.¹ Rather, he argues that the Board focused its analysis on PTSD, to the detriment of the other diagnosed acquired psychiatric disorders of adjustment disorder and depression, and erroneously conflated the evidentiary requirements for service connection for PTSD with those of the other acquired psychiatric disorders. *See id.* The Court will direct its analysis accordingly. *See Johnson v. Shinseki*, 26 Vet.App. 237, 239 (2013) (affirming the Board's determination as to issues appealed but not argued); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (stating that an appellant "must plead with some particularity the allegation of error"), *rev'd on other grounds sub nom. Coker v. Peake*, 310 Fed. Appx. 371 (Fed. Cir. 2008) (per curiam order); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (stating that the appellant bears the burden of persuasion on appeal to show Board error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.

¹ Indeed, the Secretary argues that the appellant has abandoned those issues, Secretary's Br. at 2, and the appellant offers no rebuttal, *see* Reply Br. at 4-10.

See Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). A Board determination regarding service connection generally involves findings of fact that the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Russo v. Brown*, 9 Vet.App. 46, 50 (1996).

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); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). 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*, 7 Vet.App. at 506.

In the decision on appeal, the Board found that there was "no competent, credible medical evidence of record that relates any of the [appellant's] acquired psychiatric disorders to his military service." R. at 18. The Board noted that the appellant was competent to report psychiatric symptoms he experienced since service, R. at 19, but found that his "statements as to [the] continuity of any acquired psychiatric symptomatology since service to the present, or otherwise linking his current acquired psychiatric disorder to his military service, are not credible," R. at 20.

In reaching its decision, the Board acknowledged the appellant's reprimands for misconduct in service, as well as his report of depression, excessive worry, and nervous trouble in the June 1977 report of medical history. R. at 13-14. The Board noted that, according to the accompanying June 1977 examination report, the clinician noted that the appellant's complaints of depression, excessive worry, and nervous trouble referred to his squadron troubles and discharge and that, despite his complaints, he was evaluated as psychiatrically normal. *Id.* In recounting the chronology of the appellant's post-service medical history, the Board noted that he was first diagnosed with depression in April 1997 and was first diagnosed with an adjustment disorder in March 2000. R. at 14-15. The Board found that, aside from the September 2010 and February 2016 VA examination reports, none of the appellant's post-service treatment records reflected psychiatric complaints related to military service. *Id.* The Board also noted that the appellant did not file his claim for an acquired psychiatric disorder until November 2004, more than 25 years after he was discharged from service. R. at 20.

First, the Court is not persuaded that the Board failed to address the relevance of the appellant's in-service psychiatric complaints and behavioral problems when it determined that his adjustment disorder and depression were not related to service. *See* Appellant's Br. at 4-5; *Hilkert*, 12 Vet.App. at 151. To the contrary, the Board detailed the documented instances of the appellant's misconduct in service, ultimately leading to a recommendation that he be discharged due to unsuitability. *See* R. at 13-14. The Board also duly considered the appellant's report of depression, excessive worry, and nervous trouble during a June 1977 examination, but found that, despite his complaints, the examiner evaluated him as psychiatrically normal. *Id.* The Board concluded that there was no medical evidence relating the appellant's acquired psychiatric disorders to service and that his lay statements as to the continuity of any psychiatric symptoms since service were not credible. R. at 18-20.

Although the Board primarily discussed the appellant's statements pertaining to his alleged stressor when evaluating his credibility, the Board also addressed his statements pertaining to his other diagnosed psychiatric disorders, noting his "inconsistent statements as to when he initially sought psychiatric treatment." R. at 20. For example, the Board noted that, during the appellant's March 2010 hearing, he reported that he underwent psychiatric treatment for adjustment disorder within twelve months of his discharge from service. R. at 16, 20. Further, the Board's credibility determination also rested on the fact that the appellant had consistently attributed his psychiatric symptoms to his experiences during Hurricane Katrina and his financial troubles and that he had delayed in filing a claim for an acquired psychiatric disorder until more than 25 years after service. R. at 20. The appellant's argument thus amounts to nothing more than a disagreement with how the Board weighed and evaluated the evidence, and the Court discerns no error in this regard. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the "duty [of] the Board to analyze the credibility and probative value of evidence"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record); *Russo*, 9 Vet.App. at 50.

The Court is likewise not persuaded that the Board erroneously required proof of an in-service stressor to award service connection for adjustment disorder and depression or otherwise conflated the evidentiary requirements for service connection for PTSD with those of his other diagnosed disorders. *See* Appellant's Br. at 6-9; *Hilkert*, 12 Vet.App. at 151. In discussing the applicable law and regulations, the Board first described the general criteria required to establish service connection for a disability under 38 C.F.R. §§ 3.303(a) and (d), and then addressed the

more specific regulations pertaining to certain chronic diseases (including psychoses) as contemplated by § 3.303(b), personality disorders as contemplated by § 3.303(c), and the relaxed evidentiary requirements for establishing service connection for PTSD in particular under 38 C.F.R. § 3.304(f). R. at 10-11. In applying those regulations to the facts of the case, the Board discussed its finding as to the lack of an in-service stressor as it pertained to the appellant's PTSD claim. R. at 18-21. However, the Board also addressed the criteria applicable to the appellant's other acquired psychiatric disorders under §§ 3.303(a) and (d), and concluded that "there [was] no competent, credible medical evidence of record that relate[d] any of the [appellant's] acquired psychiatric disorders to his military service." R. at 18. In reaching its conclusion, the Board acknowledged the appellant's reports as to the continuity of his psychiatric symptomatology since service, but found that those statements were not credible. R. at 20. The Board also considered the appellant's brother's statement describing his observations as to the appellant's behavioral changes and sadness following service, but found that the brother was not competent to diagnose an acquired psychiatric disorder and that there was no other lay or medical evidence of mental health symptoms or treatment until 1996. R. at 21. Thus, the Court is not persuaded that the Board applied an incorrect legal standard when evaluating whether service connection was warranted for adjustment disorder and depression or that it improperly required the presence of an in-service stressor to support those claims. *See Hilkert*, 12 Vet.App. at 151.

The Court is also not persuaded that the Board was required to either attempt to obtain an additional medical opinion or explain why one was unnecessary. *See Appellant's Br.* at 9-10; *Hilkert*, 12 Vet.App. at 151. In August 2015, the Board remanded the appellant's case for a VA examination and medical opinion to determine the current nature and etiology of his psychiatric disorders. R. at 405-07. However, the examiner was unable to diagnose the appellant or complete the examination because the appellant arrived 40 minutes late to his examination appointment. R. at 76. VA made two attempts to reschedule the appellant to complete his examination, but he did not show up for either appointment. R. at 76, 84. The examiner released the partial results that he was able to obtain during the curtailed examination. R. at 76. The Board recounted these facts and concluded that the RO took the necessary steps to schedule the appellant for his VA examination. R. at 8. The Board noted that VA's duty to assist in the development of a claim is not a one-way street and that, when a claimant fails to report for an examination without good

cause, the claim shall be rated based on the evidence of record. *Id.* The Board adjudicated the appeal accordingly. *See* R. at 10-21.

"The duty to assist is not always a one-way street [and] [i]f a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence." *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). After the appellant arrived 40 minutes late to an examination, resulting in an incomplete evaluation, and failed to show up for two rescheduling attempts, he now asserts that VA was required to do more, arguing that the examiner should have provided a medical opinion based on the existing evidence or explained why an in-person examination was required to provide such an opinion. *See* Appellant's Br. at 9-10. However, VA regulations make clear that "[w]hen a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record." 38 C.F.R. § 3.655(a), (b) (2017). This is precisely what the Board did in its decision, and the appellant fails to demonstrate that something additional was required after his repeated failure to report for examinations without good cause. *See Hilkert*, 12 Vet.App. at 151; *Wood*, 1 Vet.App. at 193.

Finally, to the extent that the appellant repackages his arguments above as a challenge to the Board's reasons or bases, the Court has already considered and rejected those arguments and will not address them further.

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's May 13, 2016, decision is AFFIRMED.

DATED: October 17, 2017

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