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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3258

EFREM KNOWLES, 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 Efrem Knowles appeals through counsel an August 11, 2016, Board of Veterans' Appeals (Board) decision that denied his claim for service connection for obstructive sleep apnea. The parties have neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. For the reasons that follow, the Court will set aside the August 11, 2016, decision and remand the matter for further proceedings consistent with this decision.

I. ANALYSIS

On appeal, Mr. Knowles argues that the Board clearly erred when it determined that a June 2014 VA medical opinion was adequate. Appellant's Brief (Br.) at 7-9. Alternatively, he contends that the Board failed to provide an adequate statement of reasons or bases to support that determination. *Id.* at 10-12. The Secretary responds that the June 2014 VA medical opinion was adequate and the Board provided sufficient rationale for its finding. Secretary's Br. at 7-12.

Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). "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)); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The Board must support all its material determinations of fact and law with an adequate statement of reasons or bases. 38 U.S.C. § 7104(d)(1); see *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. 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 where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curium), see also *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

The Board found the June 2014 VA medical opinion "highly probative" because the VA examiner "conducted a physical examination and thoroughly reviewed [Mr. Knowles's] entire medical history as it pertains to obstructive sleep apnea, to include lay statements of record." R. at 6.¹ Although the VA examiner stated that he had reviewed the entire record, R. at 74, 76, 1219,

¹ The Board indicated twice that the VA examiner performed a physical examination of Mr. Knowles, R. at 6, but the VA examination report is clear that the VA examiner provided his opinion following a telephone interview, R. at 74, 76, 1219, 1222.

1222, it is unclear from the medical opinion to what extent the VA examiner considered the lay assertions of Mr. Knowles and his wife that symptoms of his obstructive sleep apnea began during service. The Board found that Mr. Knowles and his wife were competent to report symptoms of sleep apnea² and competent to report when those symptoms began, and it made no findings as to the credibility of those statements. R. at 6. The VA examiner's opinion, however, does not address these competent lay statements. Instead, the VA examiner's rationale focused on the lone symptom of "sleep disturbance" due to pain documented in the service treatment records and the absence of other documented in-service sleep symptoms. R. at 77, 1223.

The Court recognizes that there is no reasons-and-bases requirement imposed on examiners. *Acevedo*, 25 Vet.App. at 293. Nevertheless, the probative value of a medical opinion derives from the "factually accurate, fully articulated, sound reasoning for the conclusion." *Nieves-Rodriguez*, 22 Vet.App. at 304. Although the VA examiner stated that he had reviewed all the relevant evidence of record, his rationale focuses on the presence and absence of symptoms as documented in the service treatment records without any discussion of the competent lay statements of Mr. Knowles and his wife that describe the presence of additional in-service symptomatology. Accordingly, it is not clear that the examination was based on an accurate factual premise or, thus, why the Board relied on it. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 n.1 (Fed. Cir. 2006) (stating that a medical examination, which relied on the absence of contemporaneous medical evidence, "failed to consider whether the lay statements presented sufficient evidence of the etiology of [the veteran's] disability such that his claim of service connection could be proven without contemporaneous medical evidence"); *Dalton v. Nicholson*, 21 Vet.App. 23, 39 (2007) (finding a medical examination inadequate where the examiner "impermissibly ignored the appellant's lay assertions that he had sustained a back injury during service"). A remand is therefore necessary to obtain an adequate medical opinion with supporting rationale. *See Hicks v. Brown*, 8 Vet.App. 417, 421 (2005) (holding that the Board's reliance on an inadequate medical examination is cause for remand); *Ardison*, 6 Vet.App. at 407; *see also Bowling v. Principi*, 15 Vet.App. 1, 12 (2001) (citing 38 C.F.R. § 19.9(a) (2000) (holding that the

² "Symptoms of obstructive sleep apnea are loud snoring, recurrent apneic episodes during sleep followed by gasping inspiration with partial or complete arousal, nocturnal restlessness, and daytime sleepiness." *STEDMAN'S MEDICAL DICTIONARY* 111 (27th ed. 2000).

Board has a duty to remand a case "[i]f further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision").

On remand, Mr. Knowles 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. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

II. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's August 11, 2016, decision is SET ASIDE, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: October 17, 2017

Copies to:

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