*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 16-2277

BONITA HENDERSON, APPELLANT,

V.

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

Before BARTLEY, *Judge*.

**MEMORANDUM DECISION**

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

BARTLEY, *Judge*: Veteran Bonita Henderson appeals through counsel a May 9, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than February 13, 2009, for the grant of service connection for major depressive disorder. Record (R.) at 2-10. Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons that follow, the Court will set aside the May 9, 2016, Board decision and remand the matter for further development and readjudication consistent with this decision.

## I. FACTS

Ms. Henderson served on active duty in the U.S. Army from June 1983 to May 1985. R. at 98. In September 2003, she was awarded service connection for migraine headaches, effective April 16, 2003. R. at 2524-30.

In October 2002, Ms. Henderson presented for psychiatric treatment at a VA medical facility, at which time she stated that she experienced frequent panic attacks without a specific trigger but that they would sometimes occur when she was in a crowded room. R. at 2486. She

also reported frequent depression. *Id*. Ms. Henderson described recurrent nightmares related to three specific events, two of which occurred during her military service. R. at 2487. In addition, Ms. Henderson stated that her mother had passed away three years prior "and this event ha[d] been extremely difficult." R. at 2486-87. The VA psychiatrist noted that Ms. Henderson had a medical history positive for migraine headaches and was currently taking amitriptyline as treatment.[1] R. at 2487. Following examination, the psychiatrist provided Axis I diagnoses of major depressive disorder and anxiety disorder and Axis III diagnoses of hypertension and migraine headaches.[2] R. at 2486-89.

In August 2004, Ms. Henderson submitted an informal claim for, inter alia, an increased evaluation for migraine headaches and service connection for a psychiatric disorder, including post-traumatic stress disorder (PTSD), depression, and anxiety. R. at 2393-94. In November 2004, a VA regional office (RO), inter alia, increased the evaluation for her migraine headaches and denied service connection for any psychiatric disorder. R. at 2247-56.

In January 2005, Ms. Henderson filed a Notice of Disagreement (NOD) with, inter alia, the denial of service connection for PTSD. R. at 2236. Attached to her NOD, Ms. Henderson included a November 2004 statement from her treating VA psychiatrist and psychologist, wherein the clinicians indicated that they had treated Ms. Henderson since November 2002 for PTSD "secondary to trauma which occurred while she was in the military." R. at 2239. They indicated that "[s]ince leaving the [s]ervice, she has had other stressful life events which further exacerbated her PTSD, Depression and Panic Attacks." *Id*. They further stated that "[i]n addition, she suffers intense and frequent migraine headaches . . . [and that h]er psychiatric symptoms as well as her migraine headaches are chronic and severe." *Id*.

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[1] Amitriptyline is an anti-depressant medication, which, in smaller doses, is also used in the treatment of migraine headaches. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 63 (32d ed. 2012) (hereafter DORLAND'S); THE MERCK MANUAL 1544-45, 1721, 1724 (19th ed. 2011).

[2] The *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, which was in effect in 2002, used a multiaxial system for classifying mental disorders. Axis I referred to clinical disorders, while Axis III referred to general medical conditions "that are potentially relevant to the understanding or management of the individual's mental disorder." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 27, 29 (4th ed., text revision 2000) (hereafter DSM-IV-TR).

Ms. Henderson subsequently asserted that in January 2006 she experienced a severe migraine that worsened and resulted in left-sided paralysis. R. at 1507. She indicated that she was hospitalized at a private hospital and was diagnosed with either a TIA (transient ischemic attack (mini-stroke)) or CVA (cerebral vascular accident (stroke)). *Id*. Following discharge from the private hospital, she sought treatment at a VA medical center. A January 2006 VA treatment record noted that Ms. Henderson had a "prior history of panic disorder and depression as well as [being] service connected for migraines" and that she reported a sudden onset of left hemiparesis.[3] R. at 1509. The physician noted that Ms. Henderson presented with signs and symptoms inconsistent with TIA or CVA and there were no neurologic findings that clearly identified a focal cerebral event. *Id*. The physician concluded that there was a questionable etiology for Ms. Henderson's reported symptoms, but suggested that migraines and conversion disorder[4] might be appropriate etiologies and ordered recommendations and diagnoses from the mental health clinic and neurological service. R. at 1510.

Upon neurologic examination in February 2006, Ms. Henderson provided the same history regarding the onset of her left-sided hemiparesis and informed the VA neurologist that she was diagnosed with a stroke or TIA. R. at 1512. The neurologist noted that Ms. Henderson gave "a convoluted and inconsistent story," R. at 1513, and her physical examination was inconsistent with a recent cerebral infarct, R. at 1515. He indicated that conversion or somatization disorders[5] may be potential diagnoses. *Id*.; *see* R. at 1410 (July 2006 VA neurology treatment record maintaining impression of potential diagnoses); *see also* R. at 1437-38 (VA treatment record noting that Ms. Henderson was diagnosed by a neurologist with conversion disorder).

In September 2006, a VA psychologist opined that Ms. Henderson's "medical problems are aggravated by [her] PTSD symptoms[,] and her depression and anxiety also are more difficult to

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[3] Hemiparesis is defined as muscular weakness or partial paralysis affecting one side of the body. DORLAND'S at 837.

[4] Conversion disorder is a mental disorder characterized by conversion symptoms (loss or alteration of voluntary motor or sensory function suggesting physical illness, such as seizures, paralysis, dyskinesia, anesthesia, blindness, or aphonia) having no demonstrable physiological basis, and whose psychological basis is suggested by exacerbation of symptoms at times of psychological stress, relief from tension or inner conflicts provided by the symptoms, or secondary gain. DORLAND'S at 549; DSM-IV-TR at 492-498.

[5] Somatization disorder is a mental disorder characterized by multiple somatic complaints that cannot be fully explained by any known general medical condition, but are not intentionally feigned or produced. DORLAND'S at 553; DSM-IV-TR at 486-490.

treat as a result." R. at 1390. In August 2007, the same psychologist opined that Ms. Henderson's psychological stress was negatively affecting her physical health. R. at 1314. She specifically noted that Ms. Henderson "has been having many more migraines since she has tried to deal with her friend. She realizes the correlation." *Id*.; *see also* R. at 1301 (September 2007 VA treatment record: "Migraines have increased which she believes is due to stress.").

In February 2009, Ms. Henderson's then-representative informed the RO that "Ms. Henderson was claiming service connection for depression secondary to her service[-]connected migraine headaches." R. at 1223. He requested that the pending appeal for any psychiatric disorder include a secondary theory of entitlement and requested a VA examination. *Id*.

Upon VA psychiatric examination in March 2009, Ms. Henderson stated that "her migraine headaches have contributed significantly to her depression," primarily because her migraines necessitate that she frequently lie down in a dark room, causing helplessness and hopelessness, and prevent her from socializing. R. at 1211-15. Following examination, the examiner provided Axis I diagnoses of major depressive disorder, panic disorder, and alcohol abuse, and listed chronic headaches among the Axis III diagnoses. R. at 1216. The examiner opined that the major depressive disorder "does appear as likely as not due to [Ms. Henderson's] chronic migraine headaches." R. at 1209.

In April 2009, the RO granted service connection for major depressive disorder as secondary to the service-connected migraine headache disability, assigning an effective date of "February 13, 2009, the date the claim for service connection secondary to migraine headaches was submitted." R. at 1108. In June 2009, Ms. Henderson filed an NOD as to the effective date assigned. R. at 1023; *see also* R. at 1021 (report of contact documenting Ms. Henderson's contention that the effective date should be in 2004, when she filed her original claim). Following an October 2009 Statement of the Case, R. 1001-14, Ms. Henderson perfected the appeal to the Board in December 2009, R. at 998.

In June 2011, Ms. Henderson testified before the Board regarding the relationship between her depression and her migraine headaches. R. at 949-62. She testified that she began experiencing migraines after an incident that occurred during service. R. at 953. She indicated that her original claim for PTSD based on the same incident was denied, but she continued to pursue the etiology

of her psychiatric disability until eventually it was determined to be due to her migraines. R. at 954.

In February 2012, the Board denied Ms. Henderson's claim for an earlier effective date. R. at 936-46. The Board, noting that "[t]he regulations require that a claim must be filed," found that "the claim for service connection for a psychiatric disability on a secondary basis was not received until February 13, 2009." R. at 945. The Board further noted that, even assuming the August 2004 pending claim encompassed all possible theories of entitlement, "her major depressive disorder was first shown to be associated with her service-connected migraine headaches" during the March 2009 VA examination; therefore, an effective date earlier than February 13, 2009, could not be awarded. R. at 944-45. Ms. Henderson subsequently appealed the February 2012 Board decision to this Court.

In a March 2013 memorandum decision, the Court set aside and remanded the February 2012 Board decision, finding that the Board ignored "the evidence of record that suggests [] entitlement to secondary service connection may have arisen before the March 2009 VA examination [that] conclusively established a relationship between her major depressive disorder and her migraine headaches." R. at 920. The Court found that the Board failed to consider and discuss potentially favorable evidence of both disabilities existing since service and evidence before February 2009 suggesting a possible relationship between the two disabilities. R. at 920-21.

In January 2014, the Board remanded the claim for a retrospective medical opinion addressing "[w]hether at any time prior to February 13, 2009, it is factually ascertainable that [Ms. Henderson's] major depressive disorder was either caused by or aggravated by her migraine headache disorder." R. at 817 (citing *Chotta v. Peake*, 22 Vet.App. 80, 86 (2008), and *Vigil v. Peake*, 22 Vet.App. 63, 67 (2008)). Following a "nonresponsive" medical opinion obtained in March 2014, R. at 16, the Board again remanded the claim in January 2015, R. at 14-18.

In a September 2015 opinion, a VA psychologist, "having done an extensive review" of the evidence of record, opined that she "is not able to find evidence that it is factually ascertainable that [Ms. Henderson's] depressive disorder was caused by or aggravated by her migraine headache disorder prior to Feb[ruary] of 2009." R. at 51-52. As rationale, the examiner indicated that

"[w]hile the migraine disorder is identified by treating mental [health clinicians,] there is [no] documentation that the condition was negatively impacting her mood." R. at 52.

In May 2016, the Board issued the decision here on appeal. R. at 2-10. The Board found that Ms. Henderson filed a claim for service connection for a psychiatric disability on a secondary basis on February 13, 2009. R. at 3. The Board found that "the evidence of record simply did not show that her major depressive disorder was associated with her service-connected migraine headaches until the March 2009 VA psychiatric examination." R. at 7-8. The Board found the September 2015 medical opinion "highly probative insofar as it confirms that there was no evidence prior to February 2009 reflecting a psychiatric-impact of service-connected migraine headaches." R. at 9. This appeal followed.

## II. ANALYSIS

Ms. Henderson argues that the Board failed to ensure that VA fulfilled its duty to assist by obtaining an adequate medical opinion addressing whether it was factually ascertainable prior to February 13, 2009, that her psychiatric condition was caused or aggravated by her service-connected migraine headaches. Appellant's Brief (Br.) at 5-9. In addition, she argues that the Board failed to provide an adequate hearing in that the acting veterans law judge who conducted the Board hearing did not comply with her duties under 38 C.F.R. § 3.103(c)(2). *Id*. at 9-12 (citing *Bryant v. Shinseki*, 23 Vet.App. 488, 496 (2010)).

The Secretary responds that the September 2015 medical opinion was adequate and, therefore, there was no error in the Board's reliance on the medical opinion to deny Ms. Henderson's claim. Secretary's Br. at 8-13. In addition, he argues that the Court should decline to address Ms. Henderson's argument regarding the adequacy of the Board hearing pursuant to the doctrine of issue exhaustion. *Id*. at 15-18. He further argues that if the Court addresses the issue of the adequacy of the Board hearing, the active veterans law judge complied with her regulatory duties and Ms. Henderson has failed to demonstrate prejudicial error. *Id*. at 19-27.

When a claim is remanded to provide the claimant with a VA medical examination or opinion, the Secretary must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical 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)), 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). *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's determination of the adequacy of a medical opinion is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see also Ardison*, 6 Vet.App. at 407 (holding that the Board errs when it relies on an inadequate medical examination). "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)). The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *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 evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

In its decision, the Board found VA's duty to assist had been satisfied with respect to providing a VA examination or opinion because across the appeal period, the March 2009, March 2014, and September 2015 VA examiners "conducted physical examinations, were provided the claims file for review, recorded [Ms. Henderson's] history, and provided factually supported and explained opinions." R. at 5. The Board found the September 2015 medical opinion "highly probative" because it "confirm[ed] that there was no evidence prior to February 2009 reflecting a

psychiatric-impact of service-connected migraine headaches." R. at 9; *see also* R. at 7-8 ("[T]he fact remains that the evidence of record simply [does] not show that her major depressive disorder was associated with her service-connected migraine headaches until the March 2009 VA psychiatric examination.").

Despite the Board's finding to the contrary, the Court concludes that the September 2015 examiner's rationale is inadequate and the Board therefore erred by relying on it to deny Ms. Henderson's claim. The September 2015 examiner opined that she was unable to find evidence that it was factually ascertainable prior to February 2009 that Ms. Henderson's depressive disorder was caused or aggravated by her migraine headaches. R. at 51-52. As her sole rationale, the examiner noted that, although Ms. Henderson's treating mental health clinicians noted her co-existing migraine disability, the treatment records did not document that her migraine headaches negatively affected her mood. R. at 52. Although the examiner indicated that she performed an extensive review of Ms. Henderson's claims file, the examiner only discussed a lack of documentation in mental health treatment records of an effect of Ms. Henderson's migraines on her mood. R. at 52.

In rendering her opinion, however, the examiner did not acknowledge potentially favorable evidence, including evidence previously identified by the Court. R. at 920-21. In October 2002, a VA psychiatrist assigned an Axis III diagnosis of migraine headaches and noted that Ms. Henderson's migraine headaches were being treated with an anti-depressant medication. R. at 2486-89. In January 2006, Ms. Henderson reported left-sided hemiparesis arising from severe migraine pain. R. at 1507. Following examination, however, several VA clinicians indicated that the etiology of her symptoms was unclear and suggested mental health conditions as possible etiologies. R. at 1410, 1437-38, 1510, 1515. In September 2006, August 2007, and September 2007, Ms. Henderson's treating psychologist opined on a relationship between Ms. Henderson's migraine headaches and her psychiatric state. R. at 1301, 1314, 1390. Finally, during the June 2011 Board hearing, Ms. Henderson testified to a relationship between her migraine headaches and her depression as existing since service. R. at 952-53.

The Court recognizes that there is no reasons-and-bases requirement imposed on examiners and there is no requirement that a medical examiner comment on every favorable piece of evidence in the claims file. *Monzingo*, 26 Vet.App. at 105; *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 examiner indicated that she reviewed all the relevant evidence of record, her rationale focused on the lack of a definitive medical relationship as noted in VA mental health treatment records and she failed to discuss potentially favorable evidence of record suggesting a relationship prior to February 2009. Absent any elaboration or additional discussion, the Court cannot conclude that the examiner's opinion was based on extensive review of the record or that her rationale was adequate to sufficiently inform the Board of the expert judgment that served as the basis for her opinion. *See Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293; *Nieves-Rodriguez*, 22 Vet.App. at 301.

To the extent that the Board "observe[d] that evidence connecting major depressive disorder with a service-connected disability was not added to the record until *after* February 2009," R. at 8 (emphasis in original), it is undisputed that Ms. Henderson's August 2004 claim for service connection was pending in February 2009 and the Board, in the context of that pending claim, specifically requested a retrospective medical opinion. *See* R. at 16-17, 816-17; *Chotta*, 22 Vet.App. at 85 (holding that the duty to assist may include obtaining a retrospective medical opinion to fill in gaps in the medical evidence of record). The Court notes that "in an original claim for benefits, the date the evidence is submitted or received is irrelevant when considering the effective date of the award." *McGrath v. Gober*, 14 Vet.App. 28, 35 (2000). The important inquiry is when the facts found demonstrate that entitlement to service connection arose, not the date the evidence demonstrating entitlement was submitted. *See* 38 U.S.C. § 5110(a) ("[T]he effective date of an award . . . shall be fixed in accordance with the facts found."); *McGrath*, 14 Vet.App. at 35 ("Thus, when an original claim for benefits is pending, . . . the date on which the evidence is submitted is irrelevant even if it was submitted twenty years after the time period in question."); *see also DeLisio v. Shinseki*, 25 Vet.App. 45, 48-49 (2011) (explaining that "an effective date should not be assigned mechanically based on the date of a diagnosis" and holding that the Board must examine "all of the facts" to determine when a condition first manifested).

The Board therefore erred in relying on the September 2015 opinion and remand for a new medical opinion is warranted. *See D'Aries*, 22 Vet.App. at 104; *Ardison*, 6 Vet.App. at 407; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy

"where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Because the Court has determined that remand of Ms. Henderson's claim is appropriate, the Court need not address her other arguments, which could not result in a greater remedy.[6] Ms. Henderson remains free on remand to present those arguments, as well as any additional arguments and evidence, to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

## III. CONCLUSION

Upon consideration of the foregoing, the appealed portion of the May 9, 2016, Board decision is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: October 23, 2017

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VA General Counsel (027)

[6] It is unclear whether Ms. Henderson argues that she is entitled to an effective date earlier than February 13, 2009, based on a direct theory of entitlement. To the extent that she is making such an argument, she is free on remand to raise this argument to the Board.