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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1681

R.J. BROWN, JR., 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 R.J. Brown, Jr., appeals through counsel an April 8, 2016, Board of Veterans' Appeals (Board) decision denying an evaluation in excess of 10% for service-connected allergic rhinitis. 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 April 2016 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Brown served with the Army National Guard with various periods of active duty for training from February 1974 to February 1998. R. at 3. In August 2006, he filed a claim for service connection for a sinus condition. *See* R. at 1599, 1827, 2186.

A September 2008 VA examiner noted that the veteran experienced congestion, red and puffy eyes, dental pain, headaches, and sore throat; treated these symptoms daily with steroid nasal spray; and reported receiving antibiotics as often as three to four times per year for his sinus

condition. R. at 1638-39. The examiner diagnosed allergic rhinitis and opined that it was at least as likely as not related to service. R. at 1640.

In November 2008, a VA regional office (RO) granted service connection for allergic rhinitis with a noncompensable evaluation, R. at 1599, and in December 2008, Mr. Brown filed a Notice of Disagreement (NOD) as to the evaluation, stating that he used four types of medication that provided only partial relief, R. at 1572-74.

In February 2009, a private physician, Dr. Green, noted congestion, drainage, a sore throat, tenderness, and wheezing and that the veteran had been sick for one week. R. at 1043. Dr. Green diagnosed acute sinusitis and prescribed Rocephin.¹ *Id.* In August 2009, Dr. Green again diagnosed Mr. Brown with acute sinusitis and during a check-up the following day indicated that his dizziness and congestion were improving but tenderness and redness remained. R. at 1044. Dr. Green noted a Rocephin prescription and that the veteran should continue using his present medication. *Id.*

In August 2009, the veteran perfected his appeal, R. at 1463, and in June 2009, the RO issued a Statement of the Case (SOC) continuing to deny a compensable evaluation for service-connected allergic rhinitis, R. at 1490. In October 2010, Dr. Green stated that Mr. Brown's sinus congestion and drainage was a chronic problem, which had recently worsened, and that he was experiencing tenderness and red throat. R. at 1045. Later that month, Dr. Green prescribed Rocephin. R. at 1046. Also in October 2010, another private physician, Dr. Jiu, noted nasal congestion, tooth pain, and sinus pressure and that the veteran used steroid nasal spray and allergy medication without significant improvement. R. at 1037.

A November 2010 statement from Mr. Brown's wife indicated that he consistently experienced congestion, frequent headaches, swelling in his face and around the eyes, sneezing, and tooth pain and that he was sometimes out of work due to these symptoms. R. at 1161. During a November 2010 Board hearing, the veteran testified that his sinuses "always close[d] up," which caused trouble breathing, teary eyes, tooth pain, and drainage. R. at 1190-92. He stated that he experienced sinus attacks or problems "constant[ly], not every day, but [a] majority of the time." R. at 1191.

¹ Rocephin is a brand of antibiotic. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 312, 330, 1615 (32d ed. 2012).

In February 2011, Dr. Green noted drainage, tenderness, watery and red eyes, congestion, sore throat, and a cough; diagnosed acute sinusitis and bronchitis; and prescribed Rocephin. R. at 1047, 1050. He also indicated that Mr. Brown missed five days of work that month due to chronic sinusitis. R. at 751.

During a March 2011 VA examination, Mr. Brown reported congestion, headaches, facial tissue and eyelid swelling, and tooth pain and that he had used a steroid nasal spray twice a day, every day, for years. R. at 1024. The examiner noted that the veteran's symptoms occasionally increased, requiring him to use additional medication, "i.e., antibiotics." *Id.* Mr. Brown stated that symptoms occurred approximately three to five times per year, lasted three to five days, and caused him to miss two to three days of work on average and that he had missed approximately four days of work since the beginning of that year. R. at 1025. In January 2012, Dr. Green indicated that Mr. Brown missed six days of work that month due to sinusitis. R. at 749.

In September 2012, the Board remanded the claim because the March 2011 examiner did not discuss whether the veteran's symptoms were incapacitating. R. at 965-66. The Board stated that Mr. Brown reported congestion, sneezing, headaches, tooth pain, facial swelling, red eyes, and sore throat; that these symptoms may be related to his service-connected condition; and that a more thorough examination was thus necessary to address whether such symptoms met the criteria for a compensable evaluation. R. at 966. Also in September 2012, Dr. Green indicated that the veteran missed three days of work that month due to sinus problems. R. at 750. A September 2012 VA examiner stated that Mr. Brown experienced no incapacitating sinusitis episodes requiring four to six weeks of antibiotic treatment but had four to five non-incapacitating episodes per year lasting an average of three to five days. R. at 942.

In September 2013, Dr. Green indicated that the veteran had missed seven days of work that month due to a sinus infection. R. at 752. An August 2014 VA treatment note stated that Mr. Brown missed work on numerous occasions because of chronic, recurrent acute sinusitis and that he received antibiotics on many occasions. R. at 462.

In the April 2016 decision on appeal, the Board granted a 10% evaluation, but no higher, for service-connected allergic rhinitis, claimed as nasal congestion. R. at 4, 6. This appeal followed.

II. ANALYSIS

Mr. Brown argues that the Board erred by failing to consider whether the frequency of nasal episodes more nearly approximated an evaluation in excess of 10% for service-connected allergic rhinitis and by providing inadequate reasons or bases for denying referral for extraschedular consideration. Appellant's Brief (Br.) at 8-17. The Secretary disputes the veteran's arguments and urges the Court to affirm the August 2016 Board decision. Secretary's Br. 5-18.

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "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)). As with any finding on a material issue of fact and law presented on the record, the Board must support its degree-of-disability determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that 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).

Here, the Board determined that an initial compensable evaluation was not warranted under 38 C.F.R. § 4.97, diagnostic code (DC) 6522 (allergic rhinitis), and therefore considered whether a higher evaluation may be assigned under a sinusitis DC. The General Rating Formula for Sinusitis provides a 10% evaluation for one or two incapacitating episodes of sinusitis per year requiring prolonged (lasting four to six weeks) antibiotic treatment, or three to six non-incapacitating episodes of sinusitis per year characterized by headaches, pain, and purulent discharge or crusting. 38 C.F.R. § 4.97, DC 6510-14 (2017). To qualify for the next higher evaluation of 30%, there must be three or more incapacitating episodes of sinusitis per year requiring prolonged (lasting four to six weeks) antibiotic treatment, or more than six non-incapacitating episodes of sinusitis per year characterized by headaches, pain, and purulent discharge or crusting. *Id.*

The Board found that a 10% evaluation for service-connected allergic rhinitis, claimed as nasal congestion, was warranted under DC 6510 because the March 2011 VA examination report indicated that Mr. Brown experienced symptoms four to five times per year and missed approximately four days of work per year due to sinusitis episodes and because the September 2012 VA examination report noted three to five non-incapacitating episodes per year characterized by headaches, pain, and crusting. R. at 4, 8. The Board denied an evaluation in excess of 10%, however, because evidence did not demonstrate prolonged antibiotic treatment lasting four to six weeks or more than six non-incapacitating episodes per year. R. at 8.

The Court finds that the Board did not adequately explain or address favorable evidence that may warrant a higher evaluation. *See Caluza*, 7 Vet.App. at 505-06. First, the Board provided a conclusory statement that there was no evidence of prolonged antibiotic treatment lasting four to six weeks, but failed to discuss notations in the record regarding antibiotic treatment. *See* R. at 1638-39 (September 2008 VA examiner noting that the veteran received antibiotics as often as three to four times per year for his sinus condition); R. at 1043 (February 2009 medical record indicating a prescription for Rocephin, an antibiotic); R. at 1044 (August 2009 medical record noting that the veteran should continue using his present medication, which included Rocephin); R. at 1046 (October 2010 Rocephin prescription); R. at 1047, 1050 (February 2011 Rocephin prescription); R. at 1024 (March 2011 VA examiner indicating that the veteran's symptoms occasionally increased, requiring antibiotics); R. at 462 (August 2014 VA treatment record indicating that the veteran received antibiotics on many occasions). The Board acknowledged that Mr. Brown experienced nasal symptoms four to five times per year and missed work approximately four times each year due to sinusitis episodes, R. at 8, but did not explain whether these episodes were commensurate with a 30% evaluation in light of the above evidence. *See Caluza*, 7 Vet.App. at 505-06; *see also* 38 C.F.R. § 4.97, DC 6510-14 (a 30% evaluation is warranted for three or more incapacitating sinusitis episodes per year requiring prolonged antibiotic treatment).

The Secretary argues that the February 2009, August 2009, October 2010, and February 2011 medical records noting Rocephin prescriptions demonstrate only that Mr. Brown was prescribed an antibiotic on four occasions over a two-year period and do not indicate that any of these prescriptions were for four to six weeks. Secretary's Br. at 9. Initially, the Court notes that the medical records do not contain any indication as to the length of each antibiotic treatment and

therefore do not suggest that the antibiotic treatments were for less than four to six weeks. *See* R. at 1043-44, 1046-50. Moreover, the Board did not provide any explanation as to why the veteran's antibiotic use does not meet the 30% criteria and the Court does not accept the Secretary's post-hoc arguments and rationalizations in lieu of Board reasons or bases, particularly where the Board also did not address the September 2008 VA examination and August 2014 VA treatment record indicating antibiotic treatment three to four times per year and on many occasions. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) ("it is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court").

Second, the Board found that Mr. Brown did not experience more than six non-incapacitating sinusitis episodes per year, R. at 8, but failed to discuss evidence suggesting almost daily constant sinus issues. *See* R. at 1190-91 (veteran's November 2010 testimony that he experienced sinus attacks a majority of the time); R. at 1161 (his wife's November 2010 statement that he consistently experienced symptoms, including frequent headaches, congestion, sneezing, and tooth pain); *see also* R. at 462 (August 2014 treatment note indicating that the veteran missed work on numerous occasions because of chronic, recurrent sinusitis).

The Secretary asserts that the Board considered the November 2010 testimony. Secretary's Br. at 9. Although the Board referenced the hearing in its recitation of facts, it did not address Mr. Brown's testimony regarding frequency of sinus symptoms in its analysis. R. at 8. Moreover, the Board did not explain how almost daily sinus attacks were not commensurate with a higher evaluation. *See Caluza*, 7 Vet.App. at 505-06. The Secretary also appears to argue that the veteran's complained-of symptoms were not related to sinusitis. Secretary's Br. at 10. But the Court notes that, in the context of describing his service-connected condition, Mr. Brown expressly testified that the complained-of symptoms were due to his sinuses. R. at 1190-92. Indeed, the Board granted a 10% evaluation for these same symptoms pursuant to DC 6510, but failed to discuss how the evidence of headaches, pain, and drainage did not warrant a 30% evaluation under the same DC. Therefore, the Board provided inadequate reasons or bases for denying an evaluation in excess of 10% for service-connected allergic rhinitis, claimed as nasal congestion and evaluated

by VA under the sinusitis DC, and remand is thus warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board failed to provide an adequate statement of reasons or bases for its determinations).

On remand, per *Quirin v. Shinseki*, 22 Vet. App. 390, 395 (2009), the Board should consider whether the schedular rating criteria contemplate such symptoms as tooth pain and facial swelling and, if not, whether referral for extraschedular consideration is warranted. *See Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see also* R. at 9 (the Board finding that the schedular rating criteria adequately described Mr. Brown's allergic rhinitis and the effects of his disability, including nasal congestion, headaches, sore throat, sinus pressure, and tenderness).

The veteran is free on remand 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 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 April 8, 2016, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 27, 2017

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