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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3787

LAQUANZA SMITH, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, LaQuanza Smith, through counsel appeals an October 19, 2016, Board of Veterans' Appeals (Board) decision that denied disability compensation for a left knee disability, and for a right knee disability, to include as secondary to the left knee disability. Record (R.) at 1-24. The Board remanded the appellant's claim for disability compensation for a right shoulder disability. The remanded matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from June 1993 to February 1994. R. at 52. A service treatment record from August 1993 reflects that the appellant reported left knee

pain and muscle spasms while running and jumping rope that lasted two weeks. R. at 90. A January 1994 Report of Medical History reflects that, upon separation, the appellant marked that she did not have "trick" or locked knee, arthritis, or swollen or painful joints at that time or historically; and the examination results for her lower extremities revealed no abnormalities. R. at 1245-48.

In April 2007, the appellant filed a claim for disability compensation for a knee disability. R. at 1578; *see* 1573-82. In April 2008, a VA regional office (RO) denied the appellant's claim for a bilateral knee condition, and the appellant disagreed with that decision and perfected her appeal. R. at 1498-99, 1504-22, 1540-41, 1546-51. In January 2013, the appellant testified before the Board. R. at 1322-38. The appellant testified that she first experienced problems with her knee in service, her symptoms continued postservice, she sought postservice treatment around 1998 or 1999, and she had knee surgery around 2001 or 2002. *See* R. at 1329-35. In June 2013, the Board denied the appellant's claim for a right knee disability and remanded the claim for a left knee disability. R. at 1203-24. The appellant appealed the denial of her right knee disability claim to the Court, and the Court granted a joint motion for partial remand on the basis that the right knee disability claim was inextricably intertwined with the left knee disability claim. R. at 853-57.

In May 2014, the appellant underwent a VA examination. R. at 239-55. The examiner diagnosed the appellant with mild degenerative joint disease, a type of arthritis, of the left knee and opined that it was less likely as not that the appellant's current left knee condition was related to or caused by an in-service event. R. at 240, 243, 253. An affidavit from February 2016 by the appellant reflects that the "[p]ain in [her] left knee began around 1993 and has increased since, resulting in problems with [her] right knee." R. at 278. On October 19, 2016, the Board denied entitlement to disability compensation for a left knee disability and for a right knee disability, as secondary to the left knee disability. R. at 1-24. This appeal followed.

II. ANALYSIS

The appellant argues that the Board's statement of reasons or bases is insufficient because the Board relied on the January 1994 report of the appellant's history and her pecuniary interest to find her statements of postservice symptomatology not credible and outweighed by probative medical evidence. Appellant's Brief (Br.) at 6-11. The appellant also argues that the Board erred when it relied on the May 2014 VA examination, which she alleges was inadequate. *Id.* at 12-15. The Secretary argues that the Board did not make a credibility determination, but rather determined

that the appellant's lay statements were outweighed by other evidence, and provided a sufficient statement of reasons or bases for that determination. Secretary's Br. at 9-12. Further, the Secretary argues that the May 2014 VA examination was adequate. *Id.* at 5-9.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2017). For chronic diseases included in the provisions of 38 U.S.C. § 1101(3) and 38 C.F.R. § 3.309(a) (2017), service connection may also be established by showing continuity of symptoms, which requires a claimant to demonstrate (1) a condition "noted" during service; (2) evidence of postservice continuity of the same symptoms; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the postservice symptoms. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331, 1340 (Fed. Cir. 2013) (holding that only those chronic diseases included in 38 C.F.R. § 3.309 are subject to service connection by continuity of symptoms described in 38 C.F.R. § 3.303(b)); 38 C.F.R. § 3.309(a) (including arthritis as a chronic condition for which service connection may be established by continuity of symptoms). Continuing symptoms, not treatment, must be the focus of the evidentiary analysis. *Wilson v. Derwinski*, 2 Vet.App. 16, 19 (1991).

Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

It is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence. *See Washington v. Nicholson*, 19 Vet.App. 362, 369 (2005); *Owens v.*

Brown, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). When analyzing lay evidence, if the Board determines that lay evidence is competent and credible, it must weigh the evidence against other evidence of record, providing an appropriate statement of reasons or bases for its conclusions. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1334-37 (Fed. Cir. 2006); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57; *see also* 38 U.S.C. § 7104(d)(1).

Contrary to the Secretary's argument, in assessing the appellant's lay statements, the Board found that the appellant's lay statements of continuous postservice symptoms were not credible: "[T]here is no credible evidence of continuity of symptoms of a left knee disorder during and since service." R. at 5; *see* Secretary's Br. at 5. Additionally, the Board found that the appellant's lay statements were outweighed by other evidence. R. at 12. The Board supported both determinations with the following statement of reasons or bases:

[T]he only evidence that tends to support the claim consists of the [appellant]'s own assertions. In connection with this appeal, the [appellant] has asserted that she suffers from left knee pain continuously since her service, specifically as a result of her running and jumping rope during service. However, in her January 1994 report of medical history, the [appellant] denied that she currently had, or that she ever had a "trick" or locked knee or swollen and painful joints. Hence, in light of these contradictory statements, the Board finds that any assertions as to her in-service left knee symptoms, and a continuity of symptoms after service, are outweighed by the probative medical evidence of record. *See Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) (a pecuniary interest may affect the credibility of a claimant's testimony).

Id.

The Court agrees with the appellant that the Board's statement of reasons or bases for its credibility determination is insufficient. First, the Court does not understand why the Board relied on a 1994 report of the appellant's in-service history to find her statements regarding "symptoms that occurred *after* that time" not credible. Appellant's Br. at 11 (emphasis added). The only other reason provided by the Board for discounting the appellant's lay statements was because she had a pecuniary interest in obtaining VA benefits; however, the Board may not disregard testimony altogether simply because the witness has an interest in the outcome of a proceeding. *See Cartright*, 2 Vet.App. at 25. Therefore, the Court finds that the Board's statement of reasons or bases for its credibility determination is insufficient. *See Buchanan*, 451 F.3d at 1334-37; *Allday*, 7 Vet.App. at 527.

Accordingly, the Court will remand the matter for the Board to provide a sufficient statement of reasons or bases. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here 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, a remand is the appropriate remedy."). Because the appellant's claim for a left knee disability is inextricably intertwined with her claim for a right knee disability, to include as secondary to the left knee disability, R. at 853-57, the Court will also vacate that part of the Board's decision that denied the appellant's claim for a right knee disability and remand the matter. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 177-78 (2009) (en banc) (finding that the Court has discretion to determine whether claims denied by the Board are so inextricably intertwined with a matter still pending before VA that claims should be remanded to await development or disposition of a claim not yet finally decided), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet.App. 31 (2012) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013); *see also Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (holding that, where the facts underlying two claims are "intimately connected," the interests of judicial economy and of avoiding piecemeal litigation require the claims to be appealed together).

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *see Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 19, 2016, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: December 28, 2017

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)