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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3537

ROBERT M. PAYAO, APPELLANT

v.

ROBERT L. WILKIE,
ACTING 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 Robert M. Payao appeals through counsel a July 6, 2016, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than August 12, 2010, for the award of service connection for kidney disease. Record (R.) at 2-14.¹ 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). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will set aside that part of the July 2016 Board decision on appeal and remand the matter for further adjudication consistent with this decision. The balance of the appeal is dismissed.

¹ The Board also denied entitlement to an effective date earlier than August 12, 2010, for the award of service connection for sinusitis and an effective date earlier than March 21, 2012, for the award of service connection for sleep apnea. R. at 14. Because Mr. Payao has not challenged these portions of the Board decision, the appeal as to those matters will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

I. FACTS

Mr. Payao served on active duty in the U.S. Air Force from July 1975 to January 1998. R. at 1222. In November 1998, the regional office (RO) granted service connection for gout with a noncompensable evaluation. R. at 2161.

A June 11, 2007, arthritis clinic note assessed "[u]ncontrolled gout" and noted that Mr. Payao stopped taking his prescribed allopurinol because he "fear[ed] renal impairment." R. at 2199.² A same day addendum opinion from an attending physician indicated that Mr. Payao had a history of gout since his 30's that he treated with allopurinol, "but ha[d] not taken [it] in months due to concern about his kidneys." R. at 676. The examiner opined that, as part of the veteran's assessment and plan of care, "[i]n view of renal insufficiency, previous allopurinol treatment, and current management with [prescription medications], would continue [prescription] NSAID [nonsteroidal anti-inflammatory drug] for acute attacks." *Id.*

In July 2007, Mr. Payao submitted a claim for an increased evaluation for his service-connected gout. R. at 2358. Specifically, he stated: "I want to re-open my claim for an increase in my impaired hearing, gout[,] and major depressive disorder. I am treated for all these conditions at the VAMC [VA medical center]." *Id.* In March 2008, the RO granted an increased evaluation to 20%, effective April 24, 2006, the date that treatment provided "objective evidence of treatment for more than one exacerbation of gout in one year." R. at 2158. Mr. Payao filed a timely Notice of Disagreement (NOD). R. at 2129.

Throughout 2009 and 2010, all VA treatment records note that Mr. Payao's past medical history includes Stage 3 chronic kidney disease, "possibly related to NSAIDs." R. at 595 (September 2009 follow-up appointment); 566 (October 2009 depression follow-up appointment); 562 (December 2009 Pharmacy consultation note); 511 (May 2010 follow-up appointment). In March 2009, an examiner assessed Stage 3 chronic kidney disease and advised Mr. Payao that "NSAIDs can damage kidneys." R. at 623. In May 2009, an examiner noted in an addendum gout treatment opinion that he had some reluctance to increase the current dose of allopurinol because the veteran "ha[d] renal insufficiency" and the current dose had previously provided "adequate control" of his symptoms. R. at 2060. In June 2009, an examiner, during a routine gout follow-up

² Allopurinol is a xanthine oxidase inhibitor "used for treating gout caused by excessive levels of uric acid in the blood." Omundhome Ogburu, MedicineNet, *What is Allopurinol, and How Does It Work (mechanism of action)?*, https://www.medicinenet.com/allopurinol/article.htm#what_brand_names_are_available_for_allopurinol?

appointment report, noted that, regarding a prescription treatment plan, Mr. Payao was aware that renal failure "can get worse with NSAIDs" and "will consider" decreasing use if renal failure gets worse. R. at 603. An August 2009 arthritis clinic addendum opinion noted that, in discussion regarding a treatment plan for Mr. Payao's service-connected gout, "mild renal insufficiency" was an ongoing concern and "[d]ue to renal disease, need to be cautious, and would avoid [an allopurinol] dose over 400 [milligrams per day]." R. at 1995.

In November 2009, the RO denied an increased evaluation for service-connected gout, R. at 1976, and Mr. Payao timely disagreed, R. at 1923-24. In a July 2010 neurological clinic note, an examiner, in discussing medications, noted that the veteran was prescribed multiple NSAIDs for gout, continued to take Indocin³ with chronic kidney disease since 2007, and needed to use NSAIDs "with caution." R. at 502.

On August 11, 2010, VA received the veteran's formal supplemental claim for, inter alia, service connection for kidney disease. R. at 1811. In a February 2011 rating decision, the RO denied service connection for kidney disease. R. at 1655-64. Mr. Payao submitted a timely NOD and specifically requested entitlement to service connection for a chronic kidney disease "as secondary due to prescribed medications for service[-]connected disabilities." R. at 1509.

In a May 2013 rating decision, the RO granted service connection for kidney disease as secondary to gout evaluated at 60% and assigned August 12, 2010, as the effective date as "the date of your original claim for service connection for this issue." R. at 1350. Mr. Payao submitted a timely NOD as to the assigned effective date. R. at 1275-79. In a December 2014 decision, the Board granted an increased evaluation for service-connected gout and remanded the issue of entitlement to an earlier effective date for kidney disease to obtain a Board hearing. R. at 104-29.

In October 2015, Mr. Payao testified at a Board hearing. R. at 35-47. In the July 2016 decision on appeal, the Board denied entitlement to an effective date earlier than August 12, 2010, for the award of service connection for kidney disease. R. at 2-16. Specifically, the Board determined that "the only date that could serve as a basis for the award of service connection for kidney disease is the date of receipt of the [v]eteran's initial application for service connection" and "[t]here is no legal entitlement to an earlier effective date." R. at 9. The Board also found that, although 38 C.F.R. § 3.310 provides that a secondary condition be treated as a part of the original

³ Indocin is an NSAID "used to treat mild to moderate acute pain and relieve symptoms of arthritis." U.S. National Library of Medicine, *Indomethacin*, <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0000945/>.

condition for the purposes of granting service connection, establishing the effective date is governed by 38 C.F.R. § 3.400. *Id.* This timely appeal followed.

II. ANALYSIS

Mr. Payao argues that the Board failed to sympathetically assess his July 2007 claim for an increased evaluation of service-connected gout to "reasonably encompass" a claim for secondary service connection for kidney disease. Appellant's Brief (Br.) at 14-24 (citing *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009)). In the alternative, the veteran argues that the Board provided inadequate reasons or bases for its determination because it failed to address evidence in the record that reasonably raised a claim for kidney disease as secondary to gout earlier than the assigned August 2010 date. *Id.*; Reply Br. at 3-11. The Secretary argues that the Board, in determining the correct effective date, considered whether the July 2007 claim encompassed a claim for kidney disease and provided adequate reasons or bases for its decision. Secretary's Br. at 7-20.

As a general rule, the effective date of an award of VA disability compensation, based on an original claim or a request to reopen a claim, is the date of receipt of the claim or request or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i) (2017); see *Sutton v. Nicholson*, 20 Vet.App. 419, 422 (2006). The scope of a claim is not limited to a particular diagnosis and "may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." *Clemons*, 23 Vet.App. at 5. VA must provide all claimants a sympathetic reading of the claimant's filings and determine and adjudicate all claims reasonably raised by the record. See *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005); *Moody v. Principi*, 360 F.3d 1306 (Fed. Cir. 2004); *Szemraj v. Principi*, 357 F.3d 1370 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). Moreover, VA must be mindful of its "duty to fully and sympathetically develop a . . . claim to its optimum" by "determin[ing] all potential claims raised by the evidence [and] applying all relevant laws and regulations." *Moody*, 360 F.3d at 1310 (internal quotation marks and citation omitted) (holding that, when determining whether a claimant filed an informal claim, the Board must sympathetically read filings and resolve ambiguity "in favor of the veteran"); see *DiLisio v. Shinseki*, 25 Vet.App. 45, 53 (2009) (VA "generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of

service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing"); *see also* 38 C.F.R. § 3.103(a) (2017) (requiring VA "to render a decision which grants every benefit that can be supported in law.").

The Board's determination of the effective date for a service-connected disability is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *See Evans v. West*, 12 Vet.App. 396, 401 (1999); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996). As with any finding on a material issue of fact and law presented on the record, the Board must support its 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). The Board must also address all potentially favorable evidence. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order).

The Board's reasons or bases for denying an effective date earlier than August 12, 2010, for chronic kidney disease are inadequate because it ignored earlier evidence in the record that arguably reasonably raised a claim for service connection for chronic kidney disease secondary to service-connected gout. Beginning in June 2007, the month prior to Mr. Payao's filing for an increased evaluation for his service-connected gout, R. at 2358, evidence of record clearly demonstrates that Mr. Payao suffered from kidney problems related to the medication prescribed to him to treat his gout. R. at 2199, 676. Specifically, "renal insufficiency" affected his pain management with NSAID medication and was a concern for his treating physicians. R. at 676. After March 2009, while VA was developing his claim for an increased evaluation for service-connected gout, Mr. Payao's treatment records reflect the diagnosis of Stage 3 chronic kidney disease as "possibly related to NSAIDs" listed in his past medical history for every VA medical appointment. R. at 511, 562, 566, 595, 623. In August 2009, the veteran's kidney problems remained an ongoing and evident concern of his doctor for the treatment of his gout. R. at 1995. Although the evidence reflects the issue before August 12, 2010, the Board failed to acknowledge Mr. Payao's kidney symptoms as related to the treatment of his gout. R. at 7-9; *see Thompson*, 14 Vet.App. at 188.

Because the evidence of record reasonably raised the issue of secondary service connection for chronic kidney disease due to the prescribed NSAID medication for service-connected gout, the Board was obligated to address it when adjudicating the proper effective date. *See Robinson*, 21 Vet.App. at 552 (holding that the Board is required to address all issues expressly raised by the appellant or reasonably raised by the record); *Coker v. Nicholson*, 19 Vet.App. 439, 441 (2006) (holding that the Board's failure to address a request for a compensation and pension examination and hearing testimony as reasonably raised claims for service connection was error), *rev'd on other grounds sub nom. Coker v. Peake*, 310 Fed. Appx. 371 (Fed. Cir. 2008) (per curiam order). Where, as here, the Board fails to address potentially favorable material evidence of record, the Court cannot conclude that the Board provided adequate reasons or bases for its decision. *See Thompson*, 14 Vet.App. at 188; *Caluza*, 7 Vet.App. at 506. The Board's failure to do so prevents the veteran from understanding the precise basis for the Board's finding in that regard and frustrates judicial review of that issue. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57.

Accordingly, the Court concludes that the Board provided inadequate reasons or bases for denying an effective date earlier than August 10, 2010, for service connection for chronic kidney disease, necessitating remand. *See 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"); *Gilbert*, 1 Vet.App. at 52. In addition, the Court is unable to conclude that Mr. Payao was not prejudiced by the Board's failure to recognize consistent evidence linking his chronic kidney disease to the treatment of his service-connected gout and developed in the course of his claim for an increased evaluation for that condition. *See Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("Where the effect of an error on the outcome of a proceeding is unquantifiable, however, we will not speculate as to what the outcome might have been had the error not occurred."); *Arneson v. Shinseki*, 24 Vet.App. 379, 389 (2011) (finding prejudice when error "could have altered" the Board's determinations).

Mr. Payao is free on remand to present any additional arguments and evidence to the Board pertinent to the remanded matters 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 portion of the July 6, 2016, Board decision denying entitlement to an effective date earlier than August 12, 2010, for the award of service connection for kidney disease is SET ASIDE and the matter is REMANDED for readjudication with this decision. The balance of the appeal is DISMISSED.

DATED: March 30, 2018

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