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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1779

ROBERT F. PARLETT, APPELLANT,

v.

ROBERT L. WILKIE,
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, Robert F. Parlett, through counsel appeals an April 13, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to special monthly compensation (SMC) at a higher rate than that provided by 38 U.S.C. § 1114(m). Record (R.) at 1-14. 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 matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served honorably on active duty in the U.S. Air Force from February 1966 to December 1969. R. at 1295; *see, e.g.*, R. at 162, 187, 584, 587, 596.¹ In July 1993, a VA regional office (RO) increased the appellant's disability rating for service-connected post-traumatic stress disorder (PTSD) to 100%, effective December 6, 1992. R. at 1080.

¹ The April 2017 Board decision incorrectly reflects the appellant's period of active duty service as being from December 1966 to December 1969. R. at 2.

In September 2011, the appellant filed a claim for SMC based upon the need for regular aid and attendance. R. at 904-05. In November 2011, the appellant submitted a letter from his now-deceased wife stating that his PTSD had "increased" and that, as a result, his "personal hyg[ie]ne has become worse . . . all he wants to do is sleep . . . and [he] has to be reminded to shower, shave[,] and put clothes on that are clean, not to keep wearing the same clothes all week." R. at 892.

In February 2012, the RO denied entitlement to SMC based on the need for regular aid and attendance due to PTSD, his only service-connected disability at the time. R. at 843-48. The appellant timely appealed the denial. R. at 687-88, 736-59, 796-97. In October 2013, the appellant filed a disability compensation claim for Parkinson's disease. R. at 689-93. In May 2014, the RO granted disability compensation for Parkinson's disease with right lower extremity tremor and rigidity, and with left lower extremity tremor, each rated as 20% disabling; with left and right upper extremity tremor, each rated as 10% disabling; and with various other conditions associated with Parkinson's disease, each rated as noncompensable. R. at 633-50. The RO also awarded SMC based upon the loss of use of a creative organ. *Id.*

In August 2014, the Board granted SMC based on the need for regular aid and attendance due to his service-connected Parkinson's disease under 38 U.S.C. § 1114(l). R. at 595-601. The appellant appealed that Board decision, and the parties filed a joint motion for remand (JMR), which the Court granted in December 2015. R. at 342-47. The JMR reflects the parties' agreement that the Board had "failed to consider whether [the appellant's] service-connected PTSD could have served as the basis for SMC at the aid and attendance rate under 38 U.S.C. § 1114(l) with the consideration of whether the higher rate of SMC at the intermediate rate under 38 U.S.C. § 1114(p) was warranted for [his] service-connected Parkinson's disease disabilities." R. at 344-45. Additionally, the parties agreed that the Board had "failed to consider the [2011] lay evidence from the now-deceased spouse as to the effects of [the appellant's] PTSD on his ability to maintain his personal hygiene." R. at 344.

In July 2016, the Board granted SMC at the higher rate provided by 38 U.S.C. § 1114(m) and 38 C.F.R. § 3.350(f)(4). R. at 185-93. In addition, the Board remanded the appeal for further development, including a VA examination to determine whether SMC based upon the need for regular aid and attendance was warranted solely due to PTSD. R. at 189-90.

In January 2017, the appellant underwent a VA examination. R. at 80-86. According to the examiner, the appellant lives alone in a house that he has owned and occupied for 25 years, which is safe and comfortable. R. at 81. He gardens but needs help maintaining his home and yard. *Id.* Two of his adult children live near him and provide some assistance. *Id.* He enjoys the garden club, has acquaintances, and visits Cornell University to plant flowers in the greenhouse there. *Id.* He can drive short distances on good days. *Id.* Although he reports that he needs minor assistance with bathing and dressing, he states that he typically manages on his own and, with time and effort, can handle his daily home activities adequately with respect to self-care and grooming. R. at 81-82. He shops for groceries once weekly with assistance and, although he reports that he is able to make simple meals, he also admits that his eating habits "could be better." R. at 82.

With respect to his PTSD, the examiner observed that the appellant had been hospitalized for one week in January 2017, the month of the anniversary of his wife's suicide in January 2013, for "increased PTSD and depression, with suicidal ideation" and that he had been categorized as a high risk patient, currently being monitored by VA. *Id.* Nevertheless, the examiner noted that he presented as stable at the time of the examination. *Id.* The examiner determined that the appellant continues to experience symptoms consistent with chronic, severe PTSD, noting that his mental health problems were exacerbated by the physical challenges and limitations of his Parkinson's disease. R. at 85. The examiner further found that the appellant's "psychosocial and occupational functioning remains significantly impacted, resulting in severely compromised functioning in all realms." *Id.* The examiner also reported that, although the appellant acknowledged periods of neglect and some difficulty bathing and dressing, he is capable of caring for most of his basic needs and grooming, and the appellant stated that he "can manage" these tasks by himself. R. at 86. The examiner concluded that, despite his severe psychosocial challenges, the appellant did not satisfy the criteria for aid and attendance on the basis of his PTSD alone. *Id.*

In April 2017, the Board denied entitlement to SMC at a higher rate than that provided by 38 U.S.C. § 1114(m) based upon the need for regular aid and attendance due to his service-connected PTSD. R. at 1-14. This appeal followed.

II. ANALYSIS

The appellant argues that the Board committed prejudicial error by (1) "misinterpret[ing] and misappl[y]ing the law" when it assigned less probative weight to statements made by him and

his late wife without adequate reasons or bases, (2) failing to explain why his severe and persistent suicidal ideation did not indicate that he lacked the capacity to protect himself from the hazards or dangers incident to his daily environment, (3) failing to explain why certain other favorable evidence did not warrant a higher level of SMC, and (4) merely adopting the conclusion of the January 2017 VA examiner as its own. Appellant's Brief (Br.) at 6-13; Reply Br. at 1-5. In response, the Secretary maintains essentially that the Board's decision should be affirmed because there was a plausible basis for its denial and the appellant failed to demonstrate that the decision was unsupported by adequate reasons or bases, was clearly erroneous, or otherwise resulted in prejudicial error. Secretary's Br. at 7-19.

SMC is a benefit available when a veteran's service-connected disability or disabilities result in "additional hardships above and beyond those contemplated by VA's schedule for rating disabilities." *Breniser v. Shinseki*, 25 Vet.App. 64, 68 (2011); see 38 U.S.C. § 1114 (2018); 38 C.F.R. §§ 3.350, 3.352 (2018). Specifically, SMC under section 1114(l) is available where a veteran is "so helpless as to be in need of regular aid and attendance" because of a service-connected disability. 38 C.F.R. § 3.350(b)(3). Factors that VA may consider in deciding entitlement to SMC on this basis include,

inability of claimant to dress or undress himself (herself), or to keep himself (herself) ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed himself (herself) through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment.

38 C.F.R. § 3.352(a). Additionally, a higher rate of SMC is available "if the veteran, as the result of service-connected disability, has suffered disability under conditions which would entitle such veteran to two or more of the rates provided in one or more subsections (l) through (n) of [section 1114], no condition being considered twice in the determination." 38 U.S.C. § 1114(o).

The Board's determination of whether a veteran is entitled to SMC due to the need for regular aid and attendance is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. See *Turco v. Brown*, 9 Vet.App. 222, 224 (1996). Additionally, 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 v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). 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). The Board must analyze the credibility and probative value of the material evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any 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 summarized the findings of the January 2017 VA examiner and concluded that the preponderance of the evidence weighed against the appellant's claim, finding that the record does not support his contention that he is in need of regular aid and attendance solely due to his PTSD. R. at 4, 9-11. Specifically, the Board found as follows:

The record shows instead that, although the [appellant] has significant difficulties as a result of his PTSD, the only clinical opinion in the record was that he did not meet the criteria for aid and attendance benefits. The Board has considered the written statements from the [appellant's] late wife to the effect that the [appellant] had to be reminded to shower, shave and put on clean clothes. The Board accepts these statements as factual. The [appellant] has himself indicated that he experiences periods of neglect, though he is capable of caring for most of his basic needs. The Board finds that the VA [examiner's] opinion is of greater weight and that the evidence does not demonstrate an inability of the [appellant] to keep himself ordinarily clean and presentable or incapacity to protect himself from hazards or dangers incident to his daily environment.

R. at 10-11.

The Court agrees with the appellant that the Board's statement of reasons or bases is inadequate. First, the Board failed to support its finding that the probative value of the January 2017 VA examiner's opinion outweighed that of the lay evidence of record, specifically the statement of the appellant's late wife. Appellant's Br. at 6, 7-9; Reply Br. at 2-3. As noted by the appellant, the Board determined that the statements of the appellant's wife were "factual." Appellant's Br. at 8; see R. at 10. Yet, the Board assigned the appellant's wife's statements less probative weight than the opinion of the January 2017 VA examiner without explanation. R. at 11.

Second, it appears that the Board merely adopted the opinion of the January 2017 VA examiner as its own without discussing in any detail the particular findings of the examiner or other evidence of record potentially favorable to the appellant, including evidence that VA had been monitoring the appellant because he was categorized as a high risk patient. *See* Appellant's Br. at 12-13; Reply Br. at 1; *see also Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) ("The medical examiner provides a disability evaluation and the rating specialist interprets medical reports in order to match the rating with the disability."), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). In so doing, the Board did not fulfill its obligation to provide adequate reasons or bases by "discuss[ing] all the evidence which appears to support appellant's position." *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). Consequently, the Court's review of the Board's decision is frustrated. *See Allday*, 7 Vet.App. at 527; *see also Gilbert*, 1 Vet.App. at 56-57. Accordingly, remand is necessary. *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.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See 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"); *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 April 13, 2017, decision denying entitlement to SMC at a higher rate than that provided by 38 U.S.C. § 1114(m) is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: September 24, 2018

Copies to:

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