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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 17-0626

MICHAEL P. FROHOCK, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before MOORMAN, *Senior Judge*.[1]

MEMORANDUM DECISION

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

MOORMAN, *Senior Judge*: The appellant, Michael P. Frohock, appeals through counsel a December 20, 2016, decision of the Board of Veterans' Appeals (Board) that denied his claims for entitlement to service connection for chronic fatigue, joint pain, and precancerous mass of the lower intestine. Record (R.) at 2-11. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). The appellant submitted a brief and reply brief, and the Secretary submitted a brief. 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

Mr. Frohock served on active duty in the U.S. Marine Corps from March 1983 to November 1995 and from July 2002 to July 2004, including service in the Southwest Asia theater of operations from December 1990 to April 1991. R. at 2910-14. He has asserted that while "in and around Al Wafrah, Kuwait, [he] was exposed to burning crude oil vapors, smoke, soot, and a tar-

[1]Judge Moorman is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. Vet. App. Misc. Order 02-18 (Jan. 16, 2018).

like precipitate [that] covered [his] clothing and [his] exposed skin and equipment." R. at 5739.

In June 2009, Mr. Frohock had surgery to remove 18 inches of his lower intestine after discovery of a precancerous mass, diagnosed as a rectosigmoid polyp with severe dysplasia. R. at 4974, 5208-09, 5738. Because he had no family history of this type of cancer or previous bowel disease, the doctor who performed the surgery described "pathology such as his [as] fairly uncommon in his age group." R. at 5039. Following the surgery, Mr. Frohock suffered from both frequent bowel movements and constipation. R. at 2173-74.

In October 2009, Mr. Frohock filed a claim for service-connection benefits for PTSD, chronic fatigue syndrome, a precancerous mass of the lower intestine, and joint pain. R. at 5736-5739. A September 2010 rating decision granted entitlement to service connection for PTSD but denied the other claims. R. at 4986-99.

In February 2011, Mr. Frohock filed a Notice of Disagreement (NOD) with the denial of his claims for chronic fatigue syndrome, a precancerous mass of the lower intestine, and joint pain. R. at 4783-4795. With his NOD, Mr. Frohock submitted a statement to VA stating that, since his service, he had experienced "moderate to severe physical and mental fatigue with at times an inability to stay awake while conversing with others"; had been undergoing drug treatment for sleep disorders and fatigue; had suffered from "moderate to severe short[-]term memory problems [that] limit[ed] [his] abilities and career choices"; and had at times been unable to remember something that he had heard minutes earlier or "why [he] walked to a room inside [his] house." R. at 4974.

In October 2012, Mr. Frohock reported to his VA physician, having suffered from fatigue and low energy since his 2009 surgery, difficulty concentrating, and intermittent joint pains in his hips and back and shoulders. R. at 841. His physician ascribed fatigue to a "wide differential" of numerous possible origins. R. at 843.

In November 2012, Mr. Frohock's physician referred him for a neuropsychological evaluation. R. at 785-89. Test results showed "some level of attention and working memory deficits" consistent with Mr. Frohock's reports and that his attention problems were "longstanding." R. at 787, 789. The evaluator noted that Mr. Frohock's borderline performance in visual discrimination and varying performance in executive functioning were possibly affected by

fatigue and that "[o]verall, results indicate[d] problems with attention with increasing disinhibition and impulsivity with tasks requiring continued focus." R. at 788-89.

That same month, Mr. Frohock reported to his VA physician symptoms of poor concentration, memory impairment, fatigue, chest pain, and joint pain. R. at 793. In 2013, he reported to his VA physician that he had pain in "most joints," including his neck, hips, and hands. R. at 712. In a January 2014 VA examination report, the examiner noted that Mr. Frohock had sleep disturbance. R. at 2730.

The RO issued a Statement of the Case (SOC) in March 2014, R. at 4849-79, and Mr. Frohock perfected his appeal to the Board, R. at 4843.

Mr. Frohock saw a physician in May 2014 for a skin lesion on his back that he reported had been there a long time but had changed in appearance recently. R. at 753-54. The physician discovered a similar lesion on the back of the veteran's right upper arm. *Id.*

In September 2015, Mr. Frohock underwent a VA sleep clinic evaluation to test for obstructive sleep apnea. R. at 409-15. He reported symptoms of snoring, nonrefreshing sleep, nightmares, startled awakening, difficulty returning to sleep, and leg jerking associated with dreams. R. at 409-10. His fiancé reported that he snored and made noises at night. R. at 409. The sleep physician documented sleep-disordered breathing symptoms of snoring, apneas, diaphoresis, and choking. R. at 410. A diagnosis of "R/O obstructive sleep apnea" was made, among others, and a followup home sleep study was ordered to test further for obstructive sleep apnea. R. at 414-15.

In May 2016, the Board remanded Mr. Frohock's claim for further development. R. at 1825-28. The Board explained that "the [v]eteran has or appears to have an undiagnosed illness or medically unexplained chronic multisymptom illness" (MUCMI) because he "essentially attributed his joint pain, chronic fatigue, and precancerous mass of the lower intestine to environmental hazards in the Gulf War." R. at 1825-26. With regard to each claimed condition, the Board directed a medical examiner to "state whether the symptoms are attributable to a known clinical diagnosis," and to state whether Mr. Frohock's disability pattern is consistent with a MUCMI of unknown etiology, "a diagnosable chronic multisymptom illness with a partially explained etiology," or "a disease with a clear and specific etiology and diagnosis." R. at 1827. If

the examiner found the veteran's disability pattern fit either of the latter two descriptions, the examiner was to opine "whether it is related to presumed environmental exposures." *Id.*

In July 2016, Mr. Frohock underwent a VA examination for chronic fatigue syndrome, and the examiner completed a Disability Benefits Questionnaire (DBQ) in connection with the examination. R. at 231-33. The examining physician did not diagnose chronic fatigue syndrome but noted Mr. Frohock's report that he "hasn't had any energy for 20 years." R. at 231. The examiner stated that "debilitating fatigue" had reduced Mr. Frohock's activity level to less than half of his pre-illness level for more than six months. R. at 232. He opined the veteran had "multiple issues that can cause fatigue including his medications as well as his various medical diagnos[e]s" but did not have chronic fatigue syndrome. R. at 238.

The same examining physician completed a DBQ for "[n]on-degenerative [a]rthritis (including inflammatory, autoimmune crystalline and infectious arthritis) and dysbaric osteonecrosis" and for "[n]eck (cervical spine) conditions." R. at 203-23, 227-30. Mr. Frohock reported progressively worse pain in his ankles, back, shoulders, and neck over the past 20 years. R. at 227-28. The examiner noted that, in 2014, Mr. Frohock was diagnosed with degenerative arthritis of his cervical and thoracolumbar spine and both hips. R. at 203, 210, 217-18. He opined that Mr. Frohock had "no diagnosis of 'joint pain'" but rather joint pain was a symptom of degenerative arthritis of the joints in question. R. at 237. With regard to the precancerous intestinal mass, he opined: "The cause of this condition is unknown." R. at 238. The examiner also provided an addendum opinion for "clarification to address the Gulf War issue for each of those three claimed disorders (precancerous mass, joint pain, chronic fatigue)." R. at 241. He opined:

> The veteran's disability patterns are not an undiagnosed condition, a medically unexplainable chronic multisymptom illness of unknown etiology, or a chronic multisymptom illness with a partially explained etiology. They have a clear and specific etiology and diagnosis. The diagnosed conditions are less likely as not to have a correlation to any exposures to any substances or agents.

Id.

In December 2016, the Board denied service connection for chronic fatigue, joint pain, and a precancerous mass of the lower intestine. R. at 11. With regard to each claimed condition, the Board found that the most probative evidence showed the veteran did not have an undiagnosed illness or a medically unexplained chronic multisymptom illness. R. at 7, 8, 10. Accordingly, it

declined to grant service connection on a presumptive basis under 38 C.F.R. § 3.317 (2018). *Id*. The Board also found that the most probative evidence failed to link each claimed condition to the veteran's service. *Id*. This appeal followed.

II. ANALYSIS

A veteran of the Persian Gulf War is entitled to VA benefits on a presumptive basis if he or she exhibits a "qualifying chronic disability" and which, "[b]y history, physical examination, and laboratory tests cannot not be attributed to any known clinical diagnosis." 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a)(1)(i)-(ii). A qualifying chronic disability means "a chronic disability resulting from any of the following (or any combination of the following): (A) An undiagnosed illness; (B) A medically unexplained chronic multisymptom illness [(MUCMI)] that is defined by a cluster of signs or symptoms, such as: (1) Chronic fatigue syndrome; (2) Fibromyalgia; (3) Functional gastrointestinal disorders (excluding structural gastrointestinal diseases)." 38 C.F.R. § 3.317(a)(2)(i).

Further, § 3.317(a)(2)(ii) defines "MUCMI" as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." It further explains that MUCMIs "of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be considered medically unexplained." *Id.*

Finally, § 3.317(b) provides a non-exhaustive list of "manifestations of undiagnosed illness or [MUCMIs]" that includes "(1) Fatigue; (2) Signs or symptoms involving skin; (3) Headache; (4) Muscle pain; (5) Joint pain; (6) Neurological signs or symptoms; (7) Neuropsychological signs or symptoms; (8) Signs or symptoms involving the respiratory system (upper or lower); (9) Sleep disturbances; (10) Gastrointestinal signs or symptoms; (11) Cardiovascular signs or symptoms; (12) Abnormal weight loss; [and] (13) Menstrual disorders."

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable the claimant to understand the precise basis for the Board decision and to facilitate informed review

by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting 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 this case, the appellant asserts that the Board overlooked competent evidence of multiple objective manifestations of a qualifying chronic disability that are specifically recognized in § 3.317: "Signs or symptoms involving [the] skin," "[n]europsychological signs or symptoms," "[s]igns or symptoms involving the respiratory system," "[s]leep disturbances," and "[g]astrointestinal signs or symptoms." 38 C.F.R. § 3.317(b)(2), (b)(7)-(10); *see* App. Br. at 19.

Indeed, the record appears to contain medical evidence unaddressed by the Board that qualifies as such "signs or symptoms," including the following: treatment for a skin lesion of the back that the appellant described as having "been there a long time," R. at 754; "moderate to severe short[-]term memory problems [that] limit[ed] [the appellant's] abilities and career choices," R. at 4974; "attention and working memory deficits," R. at 787; *see* R. at 368; "deficits in attention" that were "longstanding" with "increasing disinhibition and impulsivity with tasks requiring continued focus," R. at 789; the appellant's report that he was "receiving drug treatment . . . for sleep disorders," *id.*; sleep disturbance, R. at 2730; and sleep-disordered breathing symptoms of snoring, apneas, diaphoresis, and choking, R. at 410; *see* R. at 367-73. The Board did not acknowledge the existence of this evidence, much less consider whether any, or all, of these documented symptoms meet the definition of a "qualified chronic disability" under § 3.317. *See* 38 C.F.R. § 3.317(a)(2)(ii); (b)(2), (b)(7)-(10); *see also* § 3.317(a)(3) ("For purposes of this section, 'objective indications of a chronic disability' include both 'signs,' in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification.").

The Court therefore finds the appellant's argument persuasive. The Board's reasons or bases are inadequate because it failed to adequately discuss record evidence that the appellant complained of signs and symptoms that § 3.317 explicitly states are to be considered associated with a qualifying chronic disability. *See Caluza*, 7 Vet.App. at 506. Further, the Board should have considered the medical evidence listed above, together with the evidence of record of fatigue, joint

pain, and gastrointestinal symptoms to determine whether these symptoms, in any combination, constitute a "qualifying chronic disability" under § 3.317. *See* 38 C.F.R. § 3.317(a)(2)(i) (stating that a "qualifying chronic disability" is one that results from an undiagnosed illness, a MUCMI, or "*any combination*" of these (emphasis added)).

This matter must therefore be remanded for readjudication. *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"). On remand, the Board must consider the medical evidence listed above that it did not address in the decision on appeal; any other relevant medical evidence of record of "signs or symptoms" of an undiagnosed illness or MUCMI; together with the evidence of symptoms of fatigue, joint pain, and gastrointestinal problems. When considering whether the appellant's gastrointenstinal symptoms are properly for consideration when determining whether he has a MUCMI, the Board should determine whether the symptoms are "structural" or "functional" in nature. *See Atencio v. O'Rourke*, 30 Vet.App. 74, 82-83 (2018) (holding that, under § 3.317(a)(2), only symptoms of functional, and not structural, gastrointestinal disorders may qualify for consideration of whether they are part of a "cluster of signs or symptoms" that constitute a MUCMI). The Board must then determine whether, when considering these symptoms together in any combination, presumptive service connection under § 3.317 is warranted. *See* 38 C.F.R. § 3.317(a)(2)(i).

The Court will not, at this time, consider the appellant's remaining arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). In pursuing the matter on remand, the appellant is free to submit additional evidence and argument on the remanded matters, 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 benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). "A remand is meant to entail a critical

examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

III. CONCLUSION

After considering the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's December 20, 2016, decision is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: September 27, 2018

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