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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3231

JOHNNY H. MCQUAGE, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Johnny H. McQuage appeals through counsel an August 11, 2017, Board of Veterans' Appeals decision denying service connection for a right shoulder disorder and left and right knee disorders,[1] all including as secondary to service-connected post-traumatic stress disorder (PTSD). Record (R.) at 2-16.[2] The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in denying service connection for the right shoulder and bilateral knee conditions, including as secondary to PTSD. Because the Board provided inadequate reasons or bases for denying these claims, the Court will set aside those portions of the Board decision and remand the matters.

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[1] The Court will refer to the left and right knee disorders as bilateral knee disorders, while recognizing that they are separate conditions and claims.

[2] The Board remanded a claim for entitlement to compensation under the provisions of 38 U.S.C. § 1151 for left eye cataract surgery residuals. R. at 2, 15-16. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider those matters at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2018).

I. FACTS

Mr. McQuage served on active duty in the U.S. Army from June 1968 to June 1971. R. at 3684. A June 1968 entrance examination noted no shoulder or knee problems. R. at 3958-61. An undated service treatment record indicated that the veteran hurt his right arm when he fell getting off of a truck; his condition was good with full range of motion; and he was treated with an ace bandage and instructed to return to the clinic as needed. R. at 3934.

In April 2007, Mr. McQuage filed a claim for service connection for a right shoulder condition, bilateral knee conditions, and PTSD. R. at 3981, 3994. A VA regional office (RO) denied the claim in October 2007. R. at 3802. In October 2007, the veteran filed a Notice of Disagreement (NOD); in February 2008, the RO issued a Statement of the Case (SOC) continuing to deny those claims; and in March 2008, he perfected his appeal. R. at 3505, 3555-56; 3783.

During an October 2009 decision review officer (DRO) hearing, Mr. McQuage testified that he was involved in an in-service explosion that caused him to fly into a brick structure and injure his right side. R. at 2839. He stated he had problems since service, including knee problems. *Id*. An October 2009 treatment record noted that the veteran reported being crushed on the right side of his body while stationed in Okinawa, and that he had PTSD and intractable pain. R. at 2810. During a July 2010 Board hearing, Mr. McQuage testified that an in-service explosion injured his right side, including his shoulder and knee, and he injured his left knee in service when he jumped off of a truck in the rain, slipped on asphalt, and fell into a brick wall. R. at 2766, 2781, 2783.

In June 2011, a VA examiner stated that Mr. McQuage's claims file contained one episode of falling off of a truck and injuring his right arm, but he had full range of motion; there were minimal visits noted in his medical records; and his separation examination does not indicate any right shoulder or bilateral knee conditions. R. at 2269. The examiner diagnosed right shoulder impingement with acromioclavicular arthrosis and bilateral knee degenerative joint disease (DJD). R. at 2272. He noted right shoulder flexion to 60 degrees and abduction to 45 degrees, where the normal endpoint for both is to 180 degrees, *see* R. at 1940; that painful motion began at 40 degrees; and that the veteran was unable to complete repetitive testing due to fatigue or pain. R. at 2271. He stated that Mr. McQuage could not fully extend either knee and that range of motion seemed to be affected by pain and fatigue. *Id*. The examiner opined that the veteran's right shoulder and bilateral knee conditions were degenerative in nature and more so due to aging and not any specific

injury. *Id*. He stated there was not enough evidence in the claims file to support his claims that the conditions were related to service. *Id*.

In February 2013, the RO granted service connection for PTSD with a 50% rating effective April 2007, R. at 2100, and continued to deny the shoulder and knee claims, R. at 2095-96. In October 2013, the veteran's representative submitted a brief to the Board regarding the shoulder and knee claims, stating that VA's PTSD website, which includes treatment guidelines and studies, indicates that PTSD makes arthritis worse. R. at 4406-07. The representative asserted that, because PTSD had not been service connected at the time of the June 2011 VA shoulder and knee examination, this information had not been considered and that a new examination as to the relation between joint conditions and PTSD was thus necessary. *Id*. In April 2014, the Board remanded the shoulder and knee claims to obtain an examination as to whether those conditions were due to or aggravated by service-connected PTSD. R. at 2010.

In May 2014, a VA examiner noted right shoulder flexion and abduction to 45 degrees, where the normal endpoint is to 180 degrees for both, and that painful motion began at 40 degrees; that Mr. McQuage was unable to perform repetitive use testing because it was too painful; that he had functional loss or impairment of the right shoulder, specifically less movement than normal, incoordination, and pain on movement; that he experienced pain on palpation; and that the shoulder condition impacted his ability to work. R. at 1939-44. The examiner opined that the veteran's in-service shoulder injury had healed and he did not have shoulder problems until 30 years after service, and that it was less likely than not that the shoulder condition was related to service. R. at 1939, 1944.

The May 2014 VA examiner also noted right and left knee flexion to 90 degrees, where the normal endpoint is 140 degrees, and that painful motion began at 85 to 90 degrees; that Mr. McQuage had functional loss or impairment of the left and right knee, specifically less movement than normal, pain on movement, disturbance of locomotion, and interference with sitting; that he experienced pain on palpation; and that the knee conditions impacted his ability to work. R. at 1933-38. The examiner explained that she noted only one medical record regarding the in-service fall and that the veteran did not have severe knee issues in service; as he reported, his knees did not become a problem until 10 to 15 years prior; and that it was less likely than not that his bilateral knee condition was related to service. R. at 1933, 1938.

In August 2016, the Board remanded the shoulder and knee claims to obtain a medical opinion addressing whether the veteran's service-connected PTSD caused or aggravated (beyond the natural progress of the disease) those conditions. R. at 1596. The Board cited the address for the VA website that contained information regarding pain and PTSD that was referenced by the veteran's representative. R. at 1592. The Board instructed the examiner to review the claims file, including a copy of its remand. R. at 1596.

In January 2017, a VA examiner noted right shoulder and bilateral knee DJD and stated that there was no theoretical basis to conclude that PTSD caused those conditions. R. at 1277. As to aggravation, the examiner opined that he could not determine a baseline of severity for the shoulder and knee conditions and that, regardless of an established baseline, those conditions were less likely than not aggravated beyond their natural progression by PTSD. R. at 1277-78. The examiner stated that pain can be influenced by PTSD, but there was no way to quantify this and thus it was not possible to determine to what degree, if any, the veteran's pain was influenced by PTSD. R. at 1277.

In the August 2017 decision on appeal, the Board denied service connection for a right shoulder disorder and bilateral knee disorders, including as secondary to PTSD. This appeal followed.

II. ANALYSIS

Mr. McQuage argues that the Board erred when it denied service connection for his right shoulder and bilateral knee conditions as secondary to service-connected PTSD. Appellant's Brief (Br). at 15-21; Appellant's Reply Br. at 11-13. The Secretary disputes the veteran's arguments and urges the Court to affirm the August 2017 Board decision. Secretary's Br. 21-29.

The Court finds that the Board provided inadequate reasons or bases for denying the right shoulder and bilateral knee claims. The Board acknowledged the January 2017 VA examiner's statement that pain could be influenced by PTSD, but it determined that, even if Mr. McQuage experienced an increase in pain, a worsening of his underlying right shoulder and bilateral knee conditions beyond their natural progression had not been shown. R. 10, 14. However, the Board failed to explain why an increase in severity of right shoulder and bilateral knee pain due to PTSD would not qualify as aggravation under 38 C.F.R. § 3.310(b)—a provision that requires that any

increase in severity of a non-service-connected disease due to a service-connected disease be service connected.

The U.S. Court of Appeals for the Federal Circuit's recent decision in *Saunders v. Wilkie* is instructive here in assessing whether an increase in pain of a non-service-connected condition may constitute aggravation. 886 F.3d 1356 (Fed. Cir. 2018). The Federal Circuit held that pain in the absence of a presently diagnosed condition may qualify as a "disability" under 38 U.S.C. § 1110 where the veteran shows that his or her "pain reaches the level of a functional impairment of earning capacity." *Id.*at 1367-68 (explaining that a veteran could not establish service connection simply by asserting subjective pain).

Although there is no question whether Mr. McQuage has current diagnoses of right shoulder and bilateral knee disabilities, *Saunders* highlights the importance of considering pain when determining whether to grant service connection. This is particularly true in assessing Mr. McQuage's claims, where the January 2017 VA examiner stated that PTSD may influence pain and the June 2011 and May 2014 VA examiners opined that right shoulder and bilateral knee pain affected range of motion, caused functional impairment, and impacted the veteran's ability to work. R. at 1277-78, 1933-44, 2269-72. The Board did not adequately explain why an increase in severity of right shoulder and bilateral knee pain due to PTSD could not constitute aggravation under § 3.310(b) and therefore remand is necessary. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (the Board must support its determination with an adequate statement of reasons or bases); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations or where the record is otherwise inadequate). On remand, per *Quirin v. Shinseki*, 22 Vet. App. 390, 395 (2009), when assessing aggravation and the January 2017 VA examiner's opinion, the Board should consider *Mittleider v. West*, 11 Vet.App. 181, 182 (1998), which holds that where the Board it is unable to discern the effects of both service-connected and non-service-connected disabilities, the Board should attribute such effects to the service-connected disability.

Given this disposition, the Court need not address Mr. McQuage's additional arguments that could not result in a remedy greater than remand. *See Best v. Principi*, 15 Vet.App. 18, 19 (2001). The veteran is free on remand to submit additional evidence and argument, including the articles found on the VA website referenced in his briefs to the Court and the article attached to

his brief, as well the arguments raised in those briefs; he has 90 days from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also* 38 U.S.C. § 7112 (a remand must be performed in an expeditious manner); *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the foregoing, the portion of the August 11, 2017, Board decision denying service connection for a right shoulder disorder and left and right knee disorders, all including as secondary to PTSD, is SET ASIDE and the matters are REMANDED.

DATED: November 30, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)