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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1907

EDNA L. WRIGHT, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Edna L. Wright, appeals through counsel a May 17, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to special monthly compensation (SMC) based on the need for regular aid and attendance. Record (R.) at 1-13. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the Board's May 17, 2017, decision and will remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served in the U.S. Army from December 1966 to October 1968. R. at 610. At separation from service, she was diagnosed with hyperactive precordium, grade II-III/IV. R. at 577. In a 1971 rating decision, VA awarded service connection for a heart murmur and assigned a noncompensable rating. *See* R. at 2440 (rating codesheet).

In September 2008, the appellant requested non-service-connected pension and aid and attendance in connection with several disabilities, including a recent stroke. R. at 2473-78. In a February 2009 statement in support of claim, she referenced a December 2008 VA letter

addressing her "service connected compensation request for heart disease" and noted that her medical records would support her claim. R. at 2449. Following a VA examination that month, in which an examiner diagnosed stage 2 congestive heart failure secondary to valvular heart disease, R. at 1001, VA reclassified the appellant's service-connected heart condition as "valvular heart disease with cardiac arrhythmia" and increased her rating to 100%, R. at 2443. In a March 2009 letter, VA informed the appellant that it would not consider her request for non-service-connected pension benefits with aid and attendance because her service-connected benefits had increased. R. at 2433-34.

In September 2009, the appellant requested compensation for aid and attendance, stating that she was "under [] care of a physician with severe multiple service-connected disabilities and legally blind." R. at 926. According to a November 2009 Report of General Information, a VA employee noted that she called the appellant for clarification, and the appellant responded over the phone that she was "only claiming [a]id and [a]ttendance and not service connection for [a] blind condition." R. at 923.

In February 2010, VA requested that an examiner provide an opinion as to whether the appellant's stroke was due to her valvular heart disease with cardiac arrhythmia and whether it was "as likely as not aggravated by the service connected disability." R. at 887. In March 2010, a VA examiner concluded that it was "less likely as not that the veteran's cerebrovascular accident was caused by or related to her valvular heart disease and cardiac arrhythmia." R. at 882. The examiner opined that "[t]he more likely etiology of [the appellant's stroke] was atherosclerotic disease and not embolic from a cardiac source." *Id.*

In an April 2010 rating decision, a VA regional office (RO) denied entitlement to SMC based on the need for aid and attendance. R. at 836-44. The appellant filed a Notice of Disagreement in July 2010 and perfected her appeal in July 2012. R. at 834-35, 705. In August 2013, she called the RO and asserted that her heart attack and blindness were the result of VA medical error. R. at 639. A VA employee called her in December 2013, and VA sent her two letters in December 2013 and March 2014, seeking additional information to develop her claim for benefits under 38 U.S.C. § 1151. R. at 634, 631-33, 629-30, 625-26. The appellant did not respond.

After the Board remanded the claim for an updated medical examination in February 2015, R. at 611-17, which was provided in May 2015, R. at 37-56, the Board denied the appeal in a May

2017 decision, R. at 1-13. The Board found that, although the appellant was legally blind for SMC purposes, her blindness was due to a non-service-connected stroke. R. at 9. The Board relied on the March 2010 VA examination report to conclude that there was no relationship between the appellant's service-connected valvular heart disability and her stroke. *Id.* The Board also found that her valvular heart disability alone did not result in the need for regular aid and attendance. R. at 9-10. The final paragraph of the Board's decision states:

While the evidence of record indicates that the [appellant's] blindness/[stroke] is not related to her service-connected disability, the Board notes that no claim has been filed for those disabilities at this time, aside from the claim regarding medical error. If, for example, the [appellant] believes that her [stroke] or blindness may be related to her service-connected disability, she may submit a claim for entitlement to those benefits.

R. at 11. This appeal ensued.

II. ANALYSIS

The appellant argues that the Board erred when it relied on a 2010 VA medical opinion to deny the claim, as the opinion did not address whether her service-connected heart disability caused or aggravated the condition that resulted in her stroke (and blindness) or otherwise made the stroke worse. Appellant's Brief (Br.) at 5-9.

The Secretary responds that a VA medical opinion addressing aggravation was unnecessary where the appellant never sought benefits for blindness or stroke and, in fact, expressly denied that she was seeking service connection for blindness. Secretary's Br. at 5-10. In the alternative, he argues that the March 2010 VA medical opinion was adequate to adjudicate the claim because it adequately addressed the question of aggravation. *Id.* at 11-12.

In reply, the appellant argues that her claim for SMC based on blindness and stroke residuals necessarily encompassed claims for service connection for those disabilities, and that her statement over the phone was not a withdrawal of those claims. Reply Br. at 1-8.

SMC is a benefit paid in addition to basic rates of disability compensation and is available to veterans whose service-connected disability results 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* VA Gen. Coun. Prec. 5-89 (Mar. 23, 1989) (explaining that SMC is a supplementary statutory benefit based on noneconomic factors such as personal inconvenience, social inadaptability, or the profound nature of a disability). The rate of SMC is set forth in

38 U.S.C. § 1114 and "varies according to the nature of the veteran's service-connected disabilities." *Moreira v. Principi*, 3 Vet.App. 522, 524 (1992).

The Board's determination regarding entitlement to SMC is a finding of fact that the Court reviews for clear error. *Breniser*, 25 Vet.App. at 68. "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its SMC 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).

In this case, the record reflects that VA has taken two conflicting positions throughout the development of the appellant's aid and attendance claim. When VA requested a medical opinion in February 2010 to address this claim, it identified the issue of "Cerebrovascular Accident secondary to Valvular Heart Disease" and asked the examiner to specifically comment on whether the appellant's stroke was caused by or aggravated by her service-connected valvular heart disease with cardiac arrhythmia. R. at 887. In other words, VA operated as though a secondary service-connection claim for stroke was part of the appellant's aid and attendance claim.

An April 2010 rating decision relied on the March 2010 VA medical examiner's conclusion that the appellant's stroke was not caused by her service-connected heart disability as part of its basis for denying entitlement to SMC for aid and attendance. R. at 839-40. A May 2012 Statement of the Case (SOC) likewise repeated the examiner's findings when it continued the denial of entitlement to aid and attendance. R. at 732-33. The Board, in turn, relied on the March 2010 VA medical opinion to find that "[t]here is no medical evidence of record that indicates that there is a relationship between the valvular condition and the stroke" and "the preponderance of the evidence indicates that the [appellant's] blindness is not due to her service-connected disability." R. at 9. In

reaching those conclusions, the Board seemed to implicitly adjudicate a claim for service connection for stroke secondary to the appellant's service-connected heart disability.

However, at other times during the pendency of this case, VA operated as though the appellant's September 2009 filing did not include a claim for secondary service connection for blindness. According to a November 2009 report of contact, a VA employee called the appellant to clarify the claim submitted and the appellant responded over the phone that she was "only claiming [a]id and [a]ttendance and not service connection for [a] blind condition." R. at 923. Neither the April 2010 rating decision nor the May 2012 SOC explicitly listed the issue of secondary service connection for stroke as a separate claim being adjudicated, despite relying on the examiner's findings regarding secondary service connection. R. at 711, 732-33, 838-40. And, despite the Board's finding that "[t]here is no medical evidence of record that indicates that there is a relationship between the valvular condition and the stroke," R. at 9, it also concluded that "[w]hile the evidence of record indicates that the [appellant's] blindness/[stroke] is not related to her service-connected disability, the Board notes that no claim has been filed for those disabilities at this time, aside from the claim regarding medical error," R. at 11.

The Secretary now insists that a secondary service-connection claim for stroke (and resulting blindness) was never raised by the record. Secretary's Br. at 7. In making this assertion, he skips over the appellant's September 2009 claim for SMC for aid and attendance based, in part, on blindness and instead jumps to the report of telephone contact where she "affirmatively and unequivocally stated that she was not seeking service connection for blindness." *Id.* at 9 (referencing R. at 923). However, as the appellant points out in reply, if her claim for SMC for aid and attendance encompassed a secondary service-connection claim for blindness, the November 2009 report of contact could not have constituted an effective withdrawal because she did not make the withdrawal in writing, much less in a manner that was explicit, unambiguous, and reflecting a "full understanding of the consequences." Reply Br. at 4 (citing 38 C.F.R. § 20.1304(b)(1) and *DeLisio v. Shinseki*, 25 Vet.App. 45, 57 (2011)).

The Secretary also argues that *Breniser* should control the outcome here, as that case involved an SMC claim where the veteran argued that the Board should have determined whether a non-service-connected stroke affecting his need for aid and attendance was aggravated by a service-connected cold injury, and the Court held that the record did not reflect an intent to apply for VA benefits for the stroke or attribute the stroke to the service-connected cold injury.

Secretary's Br. at 9-10 (citing 25 Vet.App. 64). However, the appellant responds that *Breniser* is readily distinguishable, as the veteran there argued that a claim for SMC encompassed a claim for service connection for *all* conditions that contributed to the need for aid and attendance. Reply Br. at 2-3. She contends that her situation is more straightforward, as she did not argue that *any* non-service-connected disability that might be in her medical records formed the basis of her SMC claim, but rather she explicitly based her SMC request on her blindness. *Id.* at 3 (citing R. at 926).

The Secretary's arguments fail to convincingly address the appellant's September 2009 SMC claim explicitly noting her blindness, as well as the fact that VA proceeded to obtain a medical opinion addressing secondary service connection and then used the opinion to deny the SMC claim in the rating decision, SOC, and Board decision. The Court cannot adjudicate this appeal until the Board provides a statement of reasons or bases that explains (1) whether the September 2009 SMC claim encompassed a secondary service connection claim for stroke/blindness; (2) whether the March 2010 VA medical opinion addressing secondary service connection for stroke was obtained in error; (3) whether the April 2010 rating decision and May 2012 SOC contained implicit denials of secondary service connection for stroke that would have a preclusive effect on any future claims for this condition; and (4) whether—given the case's procedural history—the Board has jurisdiction over the issue of entitlement to secondary service connection for stroke/blindness.

Although the Court has determined that a remand for adequate reasons or bases addressing the above issues is necessary, it notes the appellant's remaining argument that the Board failed to adjudicate all reasonably raised theories of entitlement to SMC when it did not consider whether her stroke and blindness were caused by negligent VA care. Appellant's Br. at 9-12. In its decision, the Board twice noted that the appellant filed a claim for benefits based on medical error, but spoke no further on the issue. R. at 6, 11. In his brief, the Secretary argues that the appellant's claim for benefits under 38 U.S.C. § 1151 was separate from her claim for SMC based on the need for aid and attendance and that, in any case, her section 1151 claim should be considered abandoned under 38 C.F.R. § 3.158. Secretary's Br. at 13-14. However, as the Court is remanding this case for the reasons discussed above, and as the appellant has now explicitly raised this additional argument, the Board should address it in the first instance below.

On remand, the appellant is free to submit additional evidence and argument, 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); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109 and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Board's May 17, 2017, decision denying entitlement to SMC based on the need for regular aid and attendance is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: December 28, 2018

Copies to:

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