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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4590

OSCAR MOLLEDA, 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, Oscar Molleda, through counsel appeals a November 8, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for obstructive sleep apnea (OSA), including as secondary to a service-connected disability. 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 on active duty in the U.S. Navy from October 1981 to February 2003. R. at 1353-54, 1571-72. In October 2003, a VA regional office (RO) granted him disability compensation for asthma, effective March 1, 2003. R. at 1337-52.

An April 2007 VA medical treatment record reflects the appellant's diagnosis of moderate OSA. R. at 777-80. In June 2008, he filed a disability compensation claim for OSA. R. at 1290. The RO denied this claim in a November 2008 rating decision, which the appellant appealed. R. at

602, 605-18, 1260, 1262-70. The appellant underwent a VA examination in September 2009. R. at 620-21. The examiner opined that (1) the appellant "is less likely as not to have [OSA] as secondary due to asthma," (2) he "is less likely as not to have asthma as the cause of his [OSA]," and (3) his "service[-]connected disability may at least as likely as not cause an acute aggravation of his [OSA] but not permanently." R. at 621.

In July 2013, the Board remanded the claim for an addendum opinion because the September 2009 VA examiner provided no rationale for his opinions. R. at 143-45. The appellant underwent a VA examination in August 2013. R. at 130-32. The examination report included instructions to determine whether OSA, as a pre-existing condition, was permanently aggravated by service-connected asthma. R. at 130-31. With respect to OSA as a pre-existing condition, the examiner concluded that OSA was not clearly and unmistakably aggravated beyond its natural progression by service because "[a]sthma is not known to aggravate OSA." R. at 131. With respect to secondary service connection, the examiner concluded that the appellant's OSA is less likely than not due to service-connected asthma because "[a]sthma is not [a] known cause of OSA"; however, in that portion of the report, the examiner did not indicate whether OSA was aggravated by service-connected asthma. R. at 131-32.

In April 2016, the Board requested an opinion from a VA sleep disorder specialist to address whether it is "at least as likely as not . . . that [the appellant's OSA] is due to or aggravated (permanently worsened) by the service-connected asthma." R. at 92. In June 2016, a VA sleep disorder specialist answered the question by opining both that "[a]sthma is at least as likely as not to cause OSA (=>50% chance that asthma could cause OSA)" and that "it is at least as likely as not . . . that [the appellant's OSA] is not due to or aggravated (permanently) by his service-connected asthma." R. at 85-86. She explained that (1) despite research showing an association between asthma and new-onset OSA, such research "does not mean that this specific [appellant's] OSA is linked to his asthma" because the mechanisms underlying the association have not been identified and it is unclear whether those mechanisms applied to the appellant's case; (2) OSA could be attributed to the appellant's noncompliance with continuous positive airway pressure (CPAP) treatment or his high body mass index; and (3) his excessive daytime sleepiness could be caused by evening shift work, "uncontrolled asthma—[the appellant] reports using his inhaler 4x/during sleep," and CPAP difficulties leading to poor tolerance and noncompliance. R. at 85.

The Board sought an addendum opinion from the June 2016 VA sleep disorder specialist addressing the following inquiry:

> Please prepare an addendum to your opinion clarifying your response to the question whether the [appellant's OSA] is due to or aggravated (permanently worsened) by the service-connected asthma. Your answer is that it is at least as likely as not that [the appellant's OSA] is not due to or aggravated (permanently) by his service-connected asthma. Please clarify this answer by indicating whether the [appellant's] service-connected asthma either caused or aggravated sleep apnea.

R. at 88. In July 2016, the specialist responded that the appellant's service-connected asthma did not cause his OSA and that, as to whether his service-connected asthma aggravated his OSA, "the answer is >=50% not likely, but data/research is still not yet definitive on this matter." R. at 89.

In February 2017, the Board denied disability compensation for OSA, including as secondary to service-connected asthma. R. at 56-73. The appellant, through the same counsel representing him here on appeal, appealed the Board's decision to the Court, and the parties filed a joint motion for remand (JMR) in August 2017, in which they agreed that the Board had failed to provide adequate reasons or bases for finding that "'[a]ggravation means that the disability *permanently* worsened beyond its natural progression.'" R. at 49-53 (emphasis in original). In August 2017, the Court granted the motion and remanded the matter for action consistent with the JMR. R. at 53.

On September 7, 2017, the Board informed the appellant, and his then-representative, Disabled American Veterans, that he may submit additional argument or evidence, but that it had to be submitted "within 90 days of the date of this letter or until the date the Board issues a decision in [his] appeal, whichever comes first." R. at 40-42. However, on September 19, 2017, the appellant's counsel informed the Board that he recently had been appointed as the appellant's representative before VA. R. at 18-22. The appellant's counsel requested a copy of the 90-day letter, if one had already been mailed. R. at 19. Counsel also wrote: "[W]e have additional evidence and argument that we intend to submit. To be clear, please do not issue a decision before the end of the allotted 90[-]day period." R. at 19.

On November 8, 2017, the Board denied entitlement to disability compensation for OSA, including as secondary to service-connected asthma. R. at 1-14. This appeal followed.

II. ANALYSIS

The appellant argues that the Board erred by relying on inadequate VA medical opinions and providing an inadequate statement of reasons or bases for discounting the September 2009 opinion. Appellant's Brief (Br.) at 7-21; Reply Br. at 11-15. The Secretary maintains that the Court should decline to address the arguments concerning the adequacy of the VA opinions because they should have been raised previously; he also disputes the appellant's contentions and requests affirmance. Secretary's Br. at 6-21.

A. Issue Exhaustion

The Secretary requests that the Court exercise its discretion to decline consideration of the appellant's arguments concerning the adequacy of the August 2013, June 2016, and July 2016 VA opinions. In support of his argument, he avers that the Board relied on these opinions in its February 2017 decision, yet the appellant, who was represented by the same counsel, failed to raise any arguments concerning these opinions in the August 2017 JMR. *See* Secretary's Br. at 6-9. The Court declines to do so because neither the August 2017 JMR nor the Court's August 2017 order granting the JMR reflects an intent to limit the Board's duties on remand. Rather, the parties, quoting *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), agreed that on remand the Board must "'reexamine the evidence of record . . . and issue a timely, well-supported decision in this case.'" R. at 50-51. Thus, the terms of the JMR did not relieve the Board of its duty to address and provide adequate reasons or bases regarding the adequacy of the August 2013, June 2016, and July 2016 VA opinions and the appellant is not precluded from now raising arguments concerning these opinions. *See Carter v. Shinseki*, 26 Vet.App. 534, 543-44 (2014) (holding that, when an appellant is represented, the terms of a JMR may narrow the Board's focus on remand, but this is a case-by-case determination and language requiring the Board to reexamine the evidence of record did not limit the Board's duties), *overruled on other grounds by Carter v. McDonald*, 794 F.3d 1342 (Fed. Cir. 2015).

The Secretary also asserts that the Court should refuse to hear the appellant's arguments because his counsel failed to raise them to the Board on remand. Secretary's Br. at 7-9. Under the specific circumstances here, his argument is not persuasive. As the appellant argues, in September 2017, his counsel notified the Board that he had only recently been retained to represent the appellant before VA and he requested that the Board not issue a decision before the 90-day period to submit additional evidence and argument expired because they had "additional evidence and

argument that [they] intend[ed] to submit." R. at 18-19; *see* Reply Br. at 6-7. Because the Board issued its decision prior to the expiration of the 90-day period, the Court will not preclude the appellant from raising these arguments now. *See Clark v. O'Rourke*, 30 Vet.App. 92, 97-98 (2018) (finding that an appellant's 90-day postremand period for submission of evidence "exists as a matter of right" and "may not be curtailed absent a voluntary, knowing, and intentional waiver of that right").

B. VA Medical Opinions

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion] when developing a service-connection claim, . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id*. (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

"Whether a medical [examination or] opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, 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*, 1 Vet.App. at 56-57.

In the decision on appeal, the Board did not expressly discuss its reasons for finding the August 2013, June 2016, and July 2016 VA opinions adequate. *See* R. at 4. Rather, the Board, in relying on those examinations and opinions, implicitly found that they were adequate. From the Board's discussion of the relative probative value of those opinions, however, the Court is able to

discern some of the Board's reasons. *See Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (per curiam) (rendering a decision on the Board's statement of reasons or bases "as a whole"). In that regard, the Board first ascribed "low probative weight" to the September 2009 VA opinion because the examiner's conclusion—that "asthma 'may at least as likely as not cause an acute aggravation of his obstructive sleep apnea but not permanently'"—constituted a "conclusory statement with no supporting evidence of record whatsoever and . . . used the wrong standard by including the word 'permanently.'" R. at 10 (quoting R. at 621). However, the Board found the August 2013, June 2016, and July 2016 VA opinions to be of "greater probative value" because "the examiner and the [sleep disorder specialist], had knowledge of the [appellant's] medical history and record[, . . .] discussed the pertinent facts, extensively reported [his] medical history, and provided a conclusion in medical opinions based on sufficient facts and data." *Id*.

The appellant raises several arguments concerning the adequacy of the August 2013, June 2016, and July 2016 VA opinions. Appellant's Br. at 7-21; Reply Br. at 8-15. Specifically, he avers that (1) the opinions are not supported by an adequate rationale because the examiners did not meaningfully explain why asthma could not have aggravated OSA—particularly considering research showing an association between those conditions, *see* Appellant's Br. at 10-18; Reply Br. at 11-14; (2) the June 2016 sleep disorder specialist engaged in improper speculation when she "'assume[d]'" that the appellant did not use a CPAP machine "'at all'" in February 2010 and "'assume[d] that he never demonstrated [CPAP] compliance'" based on an absence of medical evidence confirming such compliance, Appellant's Br. at 15-16 (quoting R. at 84-85); and (3) the sleep disorder specialist, in July 2016, imposed a heightened standard of proof when she opined that asthma was not aggravated by OSA because the "'data/research is still not yet definitive on this matter,'" Appellant's Br. at 17 (quoting R. at 89); Reply Br. at 12-13.

In response, the Secretary maintains that (1) by deeming the opinions probative, the Board found their rationales to be sufficient; (2) the appellant seeks to impose a reasons or bases requirement on the examiners; (3) the appellant has not pointed to any evidence undermining the examiners' rationales; (4) the sleep specialist's June and July 2016 opinions should be read together; and (5) the sleep specialist's reference to medical literature showing that "'asthma was associated with an increased *risk* of new[-]onset OSA'" does not, by reference to increased risk, impose a standard of proof greater than a 50% probability. Secretary's Br. at 16-19 (quoting R. at 85).

The Secretary's arguments in part amount to post hoc rationalizations, which the Court cannot accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."). The Board's explanation for finding the opinions probative does not address the sufficiency of the examiners' rationales or the appellant's specific contentions that the examiner engaged in improper speculation and imposed a heightened standard of proof. Thus, although the parties make competing arguments as to whether the August 2013, June 2016, and July 2016 VA opinions were adequate, the Court's review is frustrated by the Board's inadequate statement of reasons or bases for its implicit finding concerning their adequacy. *See Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57. Consequently, remand is warranted. *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.[1] *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

[1] To the extent that the appellant argues that (1) the clinicians who issued the August 2013, June 2016, and July 2016 VA opinions imposed a higher legal standard than the law requires to establish that a non-service-connected disability is aggravated by a service-connected disability and (2) the Board improperly and inconsistently rejected the September 2009 VA opinion because of its reliance on a higher legal standard for secondary aggravation, the Court notes that this issue is currently pending before a panel of the Court and the basis for a motion for class certification. *See Ward v. Wilkie*, U.S. Vet. App. No. 16-2157 (consolidated with *Neal v. Wilkie*, U.S. Vet. App. No. 17-1204) (oral argument to be held Feb. 1, 2019).

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 November 8, 2017, decision denying entitlement to disability compensation for OSA, including as secondary to a service-connected disability, is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: January 30, 2019

Copies to:

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