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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3830

DARYL TURNER, APPELLANT,

v.

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

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Army veteran Daryl Turner appeals a September 14, 2017, Board of Veterans' Appeals decision that denied entitlement to service connection for a psychiatric disability and a seizure disability. Mr. Turner argues that the Board failed to consider his lay statements that during active service he had been diagnosed with and treated for psychiatric and seizure disabilities. He further contends that the Board erred in relying on VA medical opinions that are inadequate because they are premised on an inaccurate factual premise. Specifically, he argues that the opinions rest on the assumption that his favorable lay statements are not credible, even though the Board made no credibility finding. Because the Board did not in the first instance make a factual finding as to Mr. Turner's credibility, the Court will set aside the Board's decision and remand the matters for further proceedings.

I. ANALYSIS

The Board must provide a statement of reasons or bases adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court.¹ The statement of reasons or bases must explain the Board's reasons for discounting favorable

¹ 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

evidence,² discuss all issues raised by the claimant or the evidence of record,³ and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."⁴

In his December 2008 claim, Mr. Turner stated that while on active duty he was seen by a psychiatrist who diagnosed him with anxiety and recommended discharge from service.⁵ In a March 2009 statement, Mr. Turner again stated that he had undergone psychiatric treatment during active service and before separation was diagnosed with an anxiety disorder.⁶ He also asserted that he suffered from seizures during active service, received treatment for his seizures in the infirmary, and was diagnosed with a seizure disability.⁷

In the decision on appeal, the Board found that "the record does not reveal that [Mr. Turner] has ever been diagnosed with seizures."⁸ As to the claimed psychiatric disorder, the Board relied on a June 2011 VA examiner's conclusion that Mr. Turner "had not been diagnosed with a mental health disorder in service."⁹ But the Board's analysis did not address Mr. Turner's December 2008 or March 2009 statements that he had received both anxiety and seizure diagnoses as well as treatment during active service. Moreover, although the Board explained that determining the etiology of psychiatric and seizure disorders was beyond lay competence,¹⁰ it did not find that Mr. Turner's reports of diagnoses given by medical personnel were not credible. Therefore, the Board did not adequately explain the reasons or bases for discounting Mr. Turner's favorable evidence.¹¹

The Secretary argues that the Board's decision should be affirmed with respect to both matters. As regards the claimed psychiatric disability, the Secretary contends that "the evidence of record appears to refute, rather than support the veracity of [Mr. Turner's] March 2009

² *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

³ *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

⁴ *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

⁵ Record (R.) at 1249.

⁶ R. at 1210.

⁷ *Id.*

⁸ R. at 8.

⁹ R. at 11.

¹⁰ R. at 8, 11.

¹¹ *See Thompson*, 14 Vet.App. at 188; *see also* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

statement."¹² As to the claimed seizure disability, the Secretary contends that the Board's finding that there was no credible evidence of that disability was an implied negative credibility determination and that any failure to consider Mr. Turner's statement to the contrary is harmless error because it is not supported by corroborating evidence.¹³ But these arguments amount to a post hoc rationalization of the Board's decision, and the Court rejects these attempts to cure the Board's failure to address the credibility of Mr. Turner's statements in the first instance.¹⁴

The Board's failure to discuss Mr. Turner's December 2008 and March 2009 statements frustrates judicial review and remand is required.¹⁵ On remand, the Board should explicitly determine the credibility of Mr. Turner's statements that he was diagnosed with and treated for psychiatric and seizures disorders during active service.

Because the Court holds that the Board should determine, in the first instance, whether Mr. Turner's statements are credible, it would be premature for the Court to address whether the Board erred in relying on VA examinations that assumed Mr. Turner was not diagnosed with or treated for any pertinent condition during service. However, the Court notes that a Board determination that Mr. Turner's lay statements are credible would invalidate the factual predicate on which those opinions were based.¹⁶

The Court will not now address Mr. Turner's remaining arguments.¹⁷ But on remand Mr. Turner is free to submit those arguments, along with additional evidence and argument,¹⁸ which the Board must consider.¹⁹

¹² Secretary's Brief (Br.) at 11.

¹³ *Id.* at 25.

¹⁴ See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating 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.").

¹⁵ See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations").

¹⁶ See *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993) (medical opinions based upon inaccurate factual premises are entitled no probative weight).

¹⁷ See *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand.").

¹⁸ See *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

¹⁹ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's September 14, 2017, decision and REMANDS the matters for further proceedings consistent with this decision.

DATED: February 14, 2019

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