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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3594

JASPER STEPP, JR., 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 Jasper Stepp, Jr., appeals through counsel a June 20, 2017, Board of Veterans' Appeals decision denying service connection for an acquired psychiatric disability, claimed as post-traumatic stress disorder (PTSD). R. at 1-12. 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 provided adequate reasons or bases for denying service connection for a psychiatric disability. Because the Board failed to discuss VA mental health records showing a diagnosis of PTSD, the Court will set aside the Board decision and remand the matter.

I. FACTS

Mr. Stepp served on active duty in the U.S. Army from July 1989 to May 1992. R. at 764. In September 1994, a VA provider assessed depression. R. at 1555. A July 1997 mental hygiene record noted PTSD, alcohol abuse, and depression diagnoses. R. at 1477. An April 2001 psychiatric consult note indicated diagnoses of alcohol abuse and alcohol-induced mood disorder. R. at 1418. In June 2004, Mr. Stepp filed a claim for service connection for PTSD, R. at 1466,

which a VA regional office (RO) denied on June 30, 2005, R. at 1325. The veteran did not appeal that decision and it became final.

A January 2010 primary care record noted an assessment of depression and PTSD. R. at 1244. That same month, Mr. Stepp requested that VA reopen the PTSD claim. R. at 1344. A February 2010 mental health record indicated diagnoses of alcohol dependence, anxiety disorder, and depressive disorder. R. at 1226. The psychologist stated that the veteran's alcohol use prevented ruling out substance-induced effects on mood and recommended further assessment. *Id.* In April 2010, VA confirmed Mr. Stepp's alleged stressor of seeing wreckage and dead bodies on the "Highway of Death" while he was stationed in Kuwait during Desert Storm. R. at 1296. That same month, a VA examiner diagnosed alcohol dependence, anxiety disorder, and depressive disorder, but opined that response bias issues and alcohol dependence precluded any inference that anxiety and depression were related to service; rather, those conditions were more likely secondary to alcohol abuse. R. at 1288-89. In June 2010, the RO reopened the PTSD claim but continued to deny service connection. R. at 1152.

A July 2010 primary care record noted a PTSD diagnosis. R. at 1141. In October 2010, a VA examiner diagnosed alcohol dependence and anxiety disorder. R. at 1093. The examiner noted that the functional impact of the veteran's symptoms was somewhat difficult to determine due to his apparent exaggeration of some symptoms and his history of alcohol dependence. R. at 1095 (stating that the veteran lacked credibility). The examiner opined that it was possible that anxiety was secondary to alcohol abuse and that it seemed less likely related to in-service stressors. R. at 1095-96. The examiner also stated that it seemed that the veteran was overreporting PTSD symptoms because a September 2009 PTSD screening was negative and the veteran only began reporting symptoms shortly thereafter in a January 2010 screening. *Id.*

In November 2012, a private treatment record noted diagnoses of alcohol dependence and PTSD, noting in-service stressors including witnessing bodies on the "Highway of Death." R. at 895. In January 2013, a VA examiner diagnosed alcohol dependence and stated that the veteran continued to drink. R. at 319, 329. The examiner noted that Mr. Stepp overreported PTSD and anxiety symptoms and that his statements were inconsistent. R. at 329 (stating that this undermined his credibility). In April 2014, the Board denied service connection for an acquired psychiatric disorder, including PTSD. R. at 825.

In October and December 2014, Dr. Karen Grippo, a VA psychologist, diagnosed anxiety disorder and alcohol dependence in remission. R. at 284, 287. She stated that there were some inconsistencies regarding alcohol use and Mr. Stepp's sobriety period, and some previous notations of overreporting symptoms. R. at 283, 286. Dr. Grippo opined that his social and occupational impairment might be related to alcohol use but that further assessment of PTSD and a period of documented sobriety would be helpful. *Id.* In February 2015, Dr. Grippo diagnosed unspecified trauma and stressor disorder and alcohol use disorder in sustained remission; noted that Mr. Stepp reported that he had stopped drinking three years prior and had "slip[ped]" once during that time; and stated that she would continue the PTSD assessment. R. at 275-76; *see* R. at 254-255, 261-62 (similar diagnoses in May, June, and August 2015 and notations that the veteran remained sober).

In May 2015, this Court granted a joint motion for remand, in which the parties agreed that (1) the Board did not address whether Mr. Stepp was notified of the evidence he could submit to substantiate his claim, which included diagnoses for PTSD, depression, and anxiety; and (2) that remand was necessary for the Board to ensure that the VA examinations were adequate because the April and October 2010 examiners did not provide rationale for their negative nexus opinions. R. at 757-63. In July 2015, the Board found that the April 2010, October 2010, and January 2013 examinations were inadequate as to the veteran's diagnoses other than PTSD. R. at 731. The Board remanded the claim for VA to obtain a new examination and to notify Mr. Stepp of the information necessary to substantiate his claim. R. at 732-33.

In September 2015, Dr. Grippo diagnosed PTSD and alcohol use disorder in sustained remission, noting that Mr. Stepp awoke in the middle of the night due to "anxiety and smell memories of dead bodies in the service." R. at 252-53 (indicating that the veteran remained sober). In October 2015, Dr. Philip Hatfield, a VA examiner, stated the presence of exaggerated or overreported symptoms during testing "does not rule out the possibility that there is a mental disorder or a personality disorder present, but it precludes diagnosing a psychological disorder at this time." R. at 594. A December 2015 VA mental health physician note indicated a diagnosis of PTSD, alcohol use disorder in sustained remission, and major depressive disorder. R. at 237.

In June 2016, the Board remanded the claim because the October 2015 examiner stated that Mr. Stepp had never been diagnosed with a mental health disability and the record contained evidence noting psychological diagnoses. R. at 426-27. The Board noted that the examiner did not explain why he believed those diagnoses were in error. R. at 427. In June 2016, Dr. Hatfield

diagnosed alcohol use disorder in sustained remission. R. at 180. He again stated that the presence of exaggerated or overreported symptoms during testing "does not rule out the possibility that there is a mental disorder or a personality disorder present, but it precludes diagnosing a psychological disorder at this time." R. at 185; *see also* R. at 183 (noting that it appeared that the veteran had been sober for over two years). In October 2016, the RO instructed the examiner to specifically address the September 1994 and April 2010 VA examinations that noted depression and anxiety disorders and to reconcile his opinion with those diagnoses of record. R. at 149.

In a November 2016 addendum opinion, Dr. Hatfield stated that the September 1994 VA examination was not then available for his review. R. at 143. He noted that the April 2010 VA examiner opined that overreported symptoms and active alcohol dependence precluded making an inference that anxiety or depression were related to service; that the October 2010 examiner determined that anxiety symptoms were less likely due to military stressors and noted concern over exaggerated symptoms; that it did not appear that the November 2012 psychologist who diagnosed PTSD had reviewed VA mental health records that raised questions about the veteran's credibility; and that the January 2013 VA examiner noted that overreporting symptoms undermined the veteran's credibility. R. at 143-44. Dr. Hatfield concluded that, given the evidence available to him at that time, he was unable to reconcile any past mental health diagnoses due to the persistent pattern of overreported symptoms and a history of alcohol dependence that convoluted past diagnoses. R. at 144.

In February 2017, Dr. Grippo diagnosed chronic PTSD and alcohol use disorder in remission. R. at 74 (noting trauma related to Desert Storm and increased anxiety, nightmares, isolation, and intrusive thoughts). Later that month, Dr. Hatfield provided another addendum opinion, stating that the September 1994 VA examination diagnosing depression was not reliable because it was not a mental health examination and, therefore, it did not utilize testing with controls for potential response bias and because the veteran had been drinking heavily at that time. R. at 73-74. Dr. Hatfield further stated that the April 2010 diagnosis of depression was also unreliable because the veteran only had one month of sobriety at that time and that was not enough time to accurately establish a diagnosis. R. at 74. He concluded that there had been no valid mental health diagnosis, except alcohol use disorder, established through the most recent VA examination. *Id.*

In March 2017, a VA psychiatrist assessed PTSD, depression, and alcohol use disorder in sustained remission. R. at 71-72 (noting that increased trauma-related nightmares were disrupting

sleep). Later that month, Dr. Grippo again diagnosed chronic PTSD and alcohol use disorder in sustained remission. R. at 68 (veteran reporting trauma related to Desert Storm).

In the June 2017 decision on appeal, the Board denied service connection for an acquired psychiatric disability, claimed as PTSD.

II. ANALYSIS

Mr. Stepp argues, *inter alia*, that the Board provided inadequate reasons or bases for denying service connection for an acquired psychiatric disorder. Appellant's Brief (Br.) at 12-30. The Secretary disputes the veteran's arguments and urges the Court to affirm the June 2017 Board decision. Secretary's Br. at 10-26.

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

Here, the Board noted that the January 2013 VA examiner and Dr. Hatfield found Mr. Stepp's reports of psychiatric disabilities not reliable, and that this conclusion was echoed by Dr. Grippo in her December 2014 mental health note. R. at 12. The Board thus determined that it would likewise assign no credibility to the veteran's statements regarding any in-service incidents causing his psychiatric diagnoses. *Id.* The Board further stated that Dr. Grippo did not diagnose PTSD in December 2014 because of the concern that the veteran's symptoms were not the result of an in-service stressor but instead were the result of alcohol dependence. *Id.* The Board then concluded that, to the extent that Mr. Stepp's treating psychiatrists diagnosed an acquired psychiatric disorder related to service, those diagnoses were only as credible as the veteran's reports. *Id.*

The Court finds that the Board provided inadequate reasons or bases for denying service connection for an acquired psychiatric disorder, claimed as PTSD. The Board found Mr. Stepp not credible and that the evidence weighed against granting service connection in part because in

December 2014, Dr. Grippo did not diagnose PTSD; had concerns about the veteran's reports of symptoms being unreliable; and thought the symptoms could be the result of alcohol dependence. R. at 12. However, the Board did not discuss Dr. Grippo's diagnoses of PTSD in September 2015, February 2017, and March 2017. R. at 68, 74, 253. Although Dr. Grippo may have had reservations in December 2014 about diagnosing Mr. Stepp with PTSD, *see* R. at 283 (notations in the record of overreporting symptoms), she simultaneously indicated that further PTSD assessment was necessary, *id.*, and, in February 2015, that she was continuing the PTSD intake assessment and would continue to do so in future sessions, R. at 275-76. It appears that any such concerns she may have had in December 2014 were abated given that she diagnosed the veteran with PTSD in those later sessions. R. at 68, 74, 253. The Court also notes that, although Dr. Grippo initially thought Mr. Stepp's symptoms may be caused by alcohol dependence, she also stated in December 2014 that a period of documented sobriety would be helpful in determining to what those symptoms were related. R. at 283. In the later mental health notes in which Dr. Grippo diagnosed PTSD, she noted that Mr. Stepp had continued his sobriety. R. at 68, 75, 252.

Because the Board's credibility determination and ultimate claim denial were based in part on Dr. Grippo's December 2014 mental health record, the Board should have discussed her September 2015, February 2017, and March 2017 mental health notes, which seemingly address issues the Board noted from the December 2014 mental health record—i.e., whether the veteran's report of symptoms was reliable and how alcohol use and sobriety impacted diagnosing a psychiatric disorder. *See Caluza*, 7 Vet.App. at 506. Further, those mental health notes appear to be material evidence favorable to Mr. Stepp because they indicate a current disability and suggest a possible nexus to service. *See id.*, *see also* R. at 68, 74, 252-53 (Dr. Grippo diagnosing PTSD after noting that the veteran reported trauma related to Desert Storm and awoke at night due to "smell memories of dead bodies in service").

Because the Board failed to discuss these records, the Court will remand the matter for the Board to provide adequate reasons or bases. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy where the Board did not provide an adequate statement of reasons or bases for its determinations).

Mr. Stepp argues that the Court should reverse the Board's credibility finding. Appellant's Br. at 17-21. However, remand, rather than reversal, is appropriate here because the Board has not made a factual finding as to Dr. Grippo's September 2015, February 2017, and March 2017

mental health notes, or weighed those records against other evidence of record. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that reversal is appropriate only "where the Board has performed the necessary factfinding and explicitly weighed the evidence"); *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (the Board, as factfinder, is responsible for assessing the credibility, competence, and probative value of evidence). Moreover, Mr. Stepp acknowledges that remand is necessary for the Board to "repair its errors" as to credibility. Appellant's Br. at 21.

On remand, per *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009), the Board should ensure that it, and not the VA examiners, are making the necessary credibility determinations. *See* R. at 12 (Board, after referencing VA examinations, stated that it would likewise assign no credibility to Mr. Stepp's statements); R. at 329 (June 2013 VA examiner stating the veteran's credibility was undermined); R. at 143-144 (Dr. Hatfield noting the June 2013 examiner's credibility finding before providing his conclusion that he could not reconcile his opinion with past diagnoses given the pattern of overreported symptoms); *see also Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007) (contrasting the roles of medical examiners and VA adjudicators), *rev'd on other grounds sub nom. Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009); *Caluza*, 7 Vet.App. at 511 (VA adjudicators are obligated to determine the credibility of lay statements).

Given this disposition, the Court need not address Mr. Stepp's additional arguments that could not result in a remedy greater than remand. *See Best v. Principi*, 15 Vet.App. 18, 19 (2001). Although the Court need not address each argument for remand, it does note that Mr. Stepp's assertion that the Board was obligated to address the reasonably raised issue of service connection for alcohol use dependence is without merit. Appellant's Br. at 28; Appellant's Reply Br. at 14. As the Secretary correctly explains, a veteran may not be awarded direct service connection for primary alcohol abuse disabilities, *Allen v. Principi*, 237 F.3d 1368, 1376 (Fed. Cir. 2001) (finding that 38 U.S.C. § 1110 precludes compensation for primary alcohol abuse disabilities), and Mr. Stepp points to no evidence that his alcohol abuse is secondary to any service-connected disorder, Secretary's Br. at 26 (citing *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000)). As to Mr. Stepp's argument that the Board failed to provide notice that his credibility was a factor in any adjudicatory document, Appellant's Br. at 21-23, he offers no authority to support his assertion that such notice was required after the Board reviewed the evidence of record but before it issued its decision, *see Evans v. West*, 12 Vet.App. 22, 31 (1998)

(Court will give no consideration to a "vague assertion" or an "unsupported contention"). Further, it seems axiomatic that evidence must be credible for the Board to rely on it. In any case, Mr. Stepp should now be aware of VA's concerns regarding his credibility and, on remand, should submit any evidence he believes is necessary to "defend, or rehabilitate" his credibility. *See* Appellant's Br. at 21. He is free on remand to submit additional evidence and argument, including those raised in his 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 June 20, 2017, Board decision denying service connection for an acquired psychiatric disability, claimed as PTSD, is SET ASIDE and the matter is REMANDED.

DATED: April 4, 2019

Copies to:

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