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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1753

DONALD T. HIGH, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Donald High served the Nation honorably in the United States Air Force. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a February 28, 2018, decision of the Board of Veterans' Appeals that denied service connection for an acquired psychiatric disorder, including an adjustment disorder with mixed anxiety and depressed mood and a heart disability other than ischemic heart disease (IHD).[2] Because the Board did not provide a statement of its reasons or bases sufficient to allow meaningful judicial review with respect both these claims, the Court will set aside the Board's decision and remand this matter for further proceedings.

I. ANALYSIS

Appellant argues that the Board erred when it denied service connection both for an acquired psychiatric disorder and heart disabilities other than IHD. As explained below, the

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[2] Record (R.) at 2-17. The Board also remanded the issue of whether VA should reopen a claim for service connection for a right eye injury and bilateral defective vision. The Court lacks jurisdiction over this remanded matter. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order). In addition, the Board denied service connection for PTSD and IHD. Appellant makes no argument as to these denials so the Court deems an appeal as to them abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

Secretary concedes error as to the latter point (and the Court agrees) and the Court determines that appellant has the better argument as to the former matter. Before addressing each condition, we set out the legal principles that will frame the resolution of this matter.

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.[3] The Court reviews the Board's findings regarding service connection for clear error,[4] and may overturn the Board's finding only if there's no plausible basis in the record for the Board's decision and it's "left with the definite and firm conviction that" the Board's decision was in error.[5] Moreover, as the finder of fact, the Board has a duty to assess the weight and credibility of the evidence.[6]

As we will see, medical examinations play an important role in this appeal. A medical opinion is adequate when it is "based upon consideration of the veteran's . . . medical history and examinations and also describes the disability in sufficient detail" so that the Board's "evaluation of the claimed disability will be a fully informed one."[7] "It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."[8] The Court also reviews the Board's determinations about the adequacy of medical opinions for clear error.[9]

Finally, the Board must provide a statement of the reasons or bases for all its material determinations of law and fact "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[10] A failure to comply with this requirement necessitates remand.[11]

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[3] *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2018).

[4] 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[5] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

[6] *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

[7] *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

[8] *Nieves-Rodriguez*, 22 Vet.App. at 304.

[9] *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *see Gilbert*, 1 Vet.App. at 52.

[10] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

[11] *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

A. Heart Conditions Other Than IHD

The Secretary concedes that remand is required with respect to the Board's denial of service connection for heart conditions other than IHD.[12] The Court agrees.

The Board found that appellant had currently diagnosed heart conditions other than IHD.[13] It also acknowledged appellant's service in Vietnam and, therefore, his presumptive exposure to herbicides such as Agent Orange.[14] And the Board concluded that these conditions were not related to service.[15]

The Board did not explain the basis on which it reached its conclusion concerning the non-IHD heart conditions. It simply stated a conclusion, namely that the conditions were not related to appellant's service. That does not allow meaningful judicial review. And this error is not harmless because the January 2011 medical opinion on which the Board relied concerning appellant's heart conditions does not discuss this matter at all.[16] On remand, the Board must ensure that it fully describes its reasons for reaching its service-connection determination concerning appellant's non-IHD heart conditions. Moreover, it must ensure that it has adequate medical evidence before it to reach its conclusions in this regard.

B. Acquired Psychiatric Disorder

While appellant makes several arguments about the Board's denial of service connection for an acquired psychiatric disorder, the dispositive one concerns the Board's reliance on a January 2014 VA medical examination report as part of its reasoning to deny his claim. The Board's reasoning for relying on this examination report is not sufficient for the Court to engage in meaningful judicial review.

The January 2014 examiner diagnosed appellant with an adjustment disorder with mixed anxiety and depressed mood.[17] The Board accepted this finding.[18] The examiner went on to opine

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[12] *See* Secretary's Brief (Br.) at 14-16.

[13] R. at 12. The Board's decision is somewhat curious in this regard. At one point the Board states that the veteran has such a non-IHD heart condition, R. at 12, but one page later the Board provides that it is assuming he has such a condition. R. at 13. This oddity is immaterial to the resolution of this appeal, but the Board should take care on remand to be precise about what it is finding as opposed to what it is assuming.

[14] *Id*.

[15] R. at 13.

[16] *See* R. at 510-13.

[17] R. at 318.

[18] R. at 8.

that appellant's psychiatric condition was likely not related to service. Specifically, the examiner stated that "the veteran reported a history of childhood abuse by his father."[19] The examiner then stated that "[i]t is as likely as not (50/50 probability) that the veteran's reported sub-clinical PTSD/anxiety symptoms where [sic] incurred or caused by his childhood abuse."[20] In fact, the examiner repeated these two statements twice in his relatively brief analysis.[21]

In its decision, the Board relied heavily on the January 2014 examination report.[22] The Board specifically discussed the examiner's conclusion that appellant's symptoms were most likely the result of the childhood abuse that, according to the examiner, appellant reported during the examination.[23] While the Board did not make a formal finding that the examination was adequate for adjudication purposes, its discussion makes it plain that it implicitly made this determination.

The problem arises because appellant repeatedly stated that he did not report "abuse" to the examiner. For example, in a written statement to the Board appellant stated that "things were asked and answered [at the examination] and were taken out of context."[24] He continued by stating that he "NEVER said that [his] father abused [him.]"[25] In addition, he testified before a Veterans Law Judge under oath and again contested the examiner's statements about childhood abuse.[26]

In its decision, the Board noted that appellant challenged the examiner's statement that he had reported abuse.[27] But the Board never resolved the factual question as to whether the examiner misunderstood appellant or whether appellant actually reported abuse during the examination. Instead, the Board noted that the examination report was "detailed and credible, and deserves the greater probative weight."[28]

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[19] R. at 317.

[20] *Id*.

[21] *Id*.

[22] R. at 8-11.

[23] R. at 8-9.

[24] R. at 1379.

[25] *Id*. (capitalization in original).

[26] R. at 32.

[27] R. at 9-10. Oddly, earlier in its decision the Board stated that "the veteran had voiced no concerns or complaints about the examination." R. at 9. That statement is directly contradicted not only by the record but also by the Board itself which addresses appellant's complaint about the examination.

[28] R. at 10.

It is true that the Board is the factfinder and is charged with weighing the evidence.[29] The problem here is that the Board either misunderstood the question it was addressing or provided inadequate reasoning for its conclusion if it understood the question correctly. There is reason to believe the Board was mistaken about the question – that is whether the examiner misunderstood what appellant said – because after finding the report highly probative it commented that appellant was not competent to provide nexus evidence on the facts of this case.[30] That is true enough, but it has nothing to do with the dispute actually raised about the examination report. The issue was not whether appellant could say that abuse did not cause his condition. The Board was certainly correct that appellant could not do that. But the question was a factual one about what happened at the examination. And appellant had personal knowledge of that issue.

Alternatively, if we assume the Board correctly understood the question it was addressing as dealing with what appellant told the examiner, its decision lacks sufficient reasoning. The Board does not explain why it determined that the examiner was correct about what appellant told him and, correspondingly, appellant was wrong. This failing is even more significant because the Board never discusses appellant's credibility. The Board is the judge of credibility, but it must explain if it finds a claimant to be incredible. The Board did not do so here, leaving the Court to guess about the Board's reasoning.[31] Judicial review is not the place for guessing. On remand, the Board must sufficiently explain its reasoning concerning the report of abuse on which the examiner based his assessment. If the Board determines the examiner was incorrect, it must obtain a new examination.[32]

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[33] On remand, appellant may submit additional evidence and argument and has 90 days to do so from

[29] *See Madden*, 125 F.3d at 1481; *Owens*, 7 Vet.App. at 433.

[30] R. at 10.

[31] *See Madden*, 125 F.3d at 1481; *Owens*, 7 Vet.App. at 433.

[32] *See Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) (examination based on an inaccurate factual premise is entitled to no weight).

[33] *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

the date of VA's postremand notice.[34] The Board must consider any such additional evidence or argument submitted.[35] The Board must also proceed expeditiously.[36]

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and a review of the record, the Court SETS ASIDE the Board's February 28, 2018, decision and REMANDS this matter for further adjudication.

DATED: May 10, 2019

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

[34] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[35] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[36] 38 U.S.C. §§ 5109B, 7112.