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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 18-3011

PETER J. BLACKMON, APPELLANT,

V.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Self-represented veteran Peter J. Blackmon appeals a May 29, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for traumatic brain injury (TBI). Record (R.) at 4-7. For the reasons that follow, the Court will set aside the May 2018 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Blackmon served honorably in the U.S. Army from January 1968 to January 1970, including service in the Republic of Vietnam. R. at 1409. The December 1969 service separation examination report reflects no defects or diagnoses. R. at 3720-21.

In July 2002, Mr. Blackmon filed a claim for service connection for post-traumatic stress disorder (PTSD). *See* R. at 3444. In connection with his claim for PTSD, he submitted accounts of five combat-related stressors related to his service in Vietnam. R. at 3470-79. In June 2003, a VA examiner diagnosed PTSD and linked the diagnosis to traumatic events Mr. Blackmon experienced during service. R. at 3457-61. A VA regional office (RO) subsequently granted service connection for PTSD. R. at 3444-52.

In April 2012, Mr. Blackmon sought service connection for residuals of TBI. R. at 1082-90. At that time, he contended that he incurred TBI from "combat mortar rounds blasting all around [him]," which resulted in his current emotional symptoms of inability to keep calm, tearfulness, sadness, and general unease. R. at 1090.

In July 2013, the RO denied the claim, finding no diagnosis of TBI either in Mr. Blackmon's service or post-service treatment records. R. at 989-90. In August 2013, Mr. Blackmon filed a Notice of Disagreement, again contending that he received a TBI in service when "the earth shook beneath [him] with tremendous force, causing [his] brain to shake with extreme force, bouncing from side to side (jolting) inside [his] head." R. at 972. He additionally indicated that his "TBI symptoms often parallel [his] PTSD symptoms." *Id*.; *see* R. at 973-75.

In September 2014, the RO issued a Statement of the Case (SOC), which informed Mr. Blackmon, in relevant part, that "[s]ometimes TBI symptoms and mental disorder symptoms overlap. You are service connected for [PTSD] which may be the source of some of the nerve and emotional symptoms you are indicating." R. at 891. Mr. Blackmon subsequently perfected an appeal to the Board. R. at 715-19. At that time, he stated: "just because my TBI symptoms overlap[] with my mental disorder symptoms, your words (as stated in your S.O.C.), it is without a doubt my emerging TBI symptoms are the same as my emerging PTSD symptoms." R. at 718.

Following VA mental examination in April 2015, the VA examiner confirmed a diagnosis of PTSD and opined that Mr. Blackmon's PTSD resulted in total occupational and social impairment. R. at 673-79. The examiner also noted that, although Mr. Blackmon reported a TBI, she "did not find it in his medical records." R. at 674; *see id*. (reflecting that when asked whether Mr. Blackmon has a diagnosed TBI, the examiner answered "Not shown in records received" instead of "No").

In the May 2018 decision on appeal, the Board denied service connection for TBI, finding that the most probative evidence of records did not show the existence of a TBI disability at any point during or in proximity to the appeal period. R. at 5-7. In reaching this determination, the Board acknowledged that Mr. Blackmon had not been afforded a VA examination relating to the claimed TBI, but that VA's duty to assist did not require providing an examination in the absence of a current disability. R. at 5-6. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Blackmon's appeal is timely and the Court has jurisdiction to review the May 2018 Board 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).

The Board's determinations regarding service connection and whether the duty to assist has been satisfied are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Davis v. West*, 13 Vet.App. 178, 184 (1999). "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)).

The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence 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).

III. ANALYSIS

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). As noted by the Board, "[t]he existence of a current disability is the cornerstone of a claim for VA disability compensation." R. at 5 (citing *Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997)). The Board denied the claim for service connection because it determined that the competent evidence of record did not establish that Mr. Blackmon demonstrated a current TBI residual disability. R. at 5-7.

Under a liberal construction of his brief, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), Mr. Blackmon argues that the Board erred in denying service connection for TBI when it

determined that he did not have a TBI disability without providing him an examination. Appellant's Informal Brief (Br.) at 1-3. The Secretary concedes that the Board erred in failing to provide adequate reasons or bases for its determination that VA's duty to assist did not require providing Mr. Blackmon with an examination. Secretary's Br. at 6-11.

The duty to assist includes providing a veteran with a medical examination and opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the veteran qualifies; (3) an indication that the disability or persistent or recurrent symptoms of disability may be associated with the veteran's service or with another service-connected disability; and (4) insufficient competent evidence on file for the Secretary to make a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d)(2); *Waters v. Shinseki*, 601 F.3d 1274, 1276-77 (Fed. Cir. 2010); 38 C.F.R. § 3.159(c)(4)(i) (2018).

The Board determined that the duty to assist did not require providing Mr. Blackmon with an examination "[b]ecause the weight of the evidence demonstrates no indication of a current disability." R. at 6. The Board added that, "[a]bsent evidence that indicates that [Mr. Blackmon] has a current disability that is related to an injury or symptoms in service, the Board finds that a VA examination or opinion is not necessary for disposition of the claim." *Id*.

The Court concludes that the Board erred in its duty-to-assist analysis in two respects. First, although the Board appropriately cited the four *McLendon* elements, it did not correctly apply them. Notably, the first *McLendon* element is "competent evidence of a current disability or persistent or recurrent symptoms of a disability." *McLendon*, 20 Vet.App. at 81; *see* R. at 5-6. The Board found this element was not met because the competent evidence did not establish that Mr. Blackmon had a current disability, R. at 6-7; however, the Board appears to have overlooked that the first *McLendon* element could be satisfied with competent evidence of persistent and recurrent symptoms of a disability.

Through several submissions, Mr. Blackmon reported emotional and behavioral symptoms, which he attributed to an in-service TBI. *See* R. at 717-19, 972-75, 1090. The Secretary acknowledges that emotional/behavioral symptoms are one of the three main areas of dysfunction in residual TBI disabilities, Secretary's Br. at 8-9 (citing 38 C.F.R. § 4.124a, Diagnostic Code (DC)

8045 (2018)[1]). Although the Board found Mr. Blackmon not competent to *diagnose* TBI, R. at 6, it did not consider whether his statements were competent evidence demonstrating persistent and recurrent symptoms of a disability.

The Court notes that Mr. Blackmon asserted that his symptoms overlap with his service-connected PTSD, an assertion endorsed by the RO, *see* R. at 891, and the Secretary, *see* Secretary's Br. at 9. *See also* 38 C.F.R. § 4.124a, DC 8045 Note (1) (providing that there may be an overlap of manifestations between a residual TBI disability and a comorbid mental, neurologic, or physical disorder that can be separately evaluated under another DC). To the extent that the Board relied on the April 2015 VA examiner's notation of no diagnosis of TBI following an interview and examination of Mr. Blackmon as competent evidence delineating his symptoms, R. at 5, the examiner, contrary to the Board's characterization, did not assess whether he presented with a residual TBI disability, but instead indicated that her review of the available records did not uncover a diagnosis of TBI, R. at 674. Moreover, according to VA, the April 2015 examiner did not possess the requisite specialty to determine if Mr. Blackmon demonstrated TBI upon examination. *Compare* VA Adjudication and Procedures Manual, M21-1, III.iv.3.D.2.j (identifying physiatrists, psychiatrists, neurosurgeons, and neurologists as those examiners qualified to provide an initial TBI diagnosis) *with* R. at 679 (listing the April 2015 VA examiner's specialty as psychologist).

Second, although the Board acknowledged that Mr. Blackmon served under combat conditions, R. at 5; *see also* R. at 3444-52 (RO's grant of service connection for PTSD based on combat stressors), it did not consider whether his statements regarding in-service events, under the combat presumption, would satisfy the second and third *McLendon* elements. *See McLendon*, 20 Vet.App. at 81; *see also* 38 U.S.C. § 1154(b). The combat presumption under section 1154(b) "reduce[s] the evidentiary burden for combat veterans with respect to evidence of in-service incurrence or aggravation of an injury or disease" by mandating that VA "'accept as sufficient proof of service [ ]connection . . . satisfactory lay or other evidence of service incurrence or aggravation'" of an injury or disease "'if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or

[1] DC 8045 provides, in part: "There are three main areas of dysfunction that may result from a TBI and have profound effects on functioning: cognitive . . . , emotional/behavioral, and physical." 38 C.F.R. § 4.124a, DC 8045.

aggravation in such service.'" *Dalton v. Nicholson*, 21 Vet.App. 23, 36-37 (2007) (quoting section 1154(b)). The combat presumption can be invoked to demonstrate not only that certain events occurred during service, but also that the disability occurred during service. *Reeves v. Shinseki*, 682 F.3d 988, 999 (Fed. Cir. 2012).

As the Board found that Mr. Blackmon did not demonstrate a current disability, it did not proceed to determine if the remaining *McLendon* elements were satisfied. R. at 5-6. If it had, it would have had to assess Mr. Blackmon's statements, in consideration of the combat presumption, vis-à-vis the second and third *McLendon* elements. *See McLendon*, 20 Vet.App. at 81. As noted by the Secretary, "[i]f [Mr. Blackmon's] contentions are credible or if the events described by [him] or the disability itself is presumed to have occurred pursuant to [section] 1154(b), this may provide sufficient indicia between [his] claimed symptoms and his military service to warrant a VA examination" pursuant to *McLendon*. Secretary's Br. at 11.

The Court agrees and concludes that the Board failed to provide adequate reasons or bases for its determination that VA's duty to assist had been satisfied with respect to whether a VA examination is needed to adjudicate the claim for service connection. The claim, therefore, must be remanded for the Board to revisit its duty-to-assist determination, specifically to determine if, under *McLendon*, VA's duty to assist requires providing Mr. Blackmon with an examination or, if not, for the Board to provide adequate reasons or bases for its determination. *See McLendon*, 20 Vet.App. at 84-86; *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where 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").

On remand, Mr. Blackmon is free to submit additional arguments and evidence, including the arguments raised in his brief to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the May 29, 2018, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: June 27, 2019

Copies to:

Peter J. Blackmon

VA General Counsel (027)