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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1317

JAMES A. COMER, 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, James A. Comer, through counsel appeals a February 15, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for residuals of an asserted in-service traumatic brain injury (TBI), including migraine headaches and a seizure disorder. Record (R.) at 1-23. Additionally, the Board determined that new and material evidence had been received to reopen the following disability compensation claims: left ear tinnitus; left ear hearing loss; benign or fatty tumors, including as secondary to in-service herbicide and fuel exposure (tumors); a bilateral upper extremity disability, claimed as right upper extremity carpal tunnel syndrome with nerve damage, including as secondary to in-service herbicide and fuel exposure (upper extremity disability); and a seizure disorder. These are favorable findings that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). Moreover, the Board remanded the matters of entitlement to disability compensation for bilateral hearing loss, bilateral tinnitus, tumors, and an upper extremity disability. The remanded matters are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over

which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

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 denying entitlement to disability compensation for an asserted in-service TBI, including migraine headaches and a seizure disorder, and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from March 1966 to December 1967, including service in Vietnam. R. at 1520. Service treatment records do not reflect complaints or findings of a concussion, TBI, seizures, or headaches. R. at 1587-616. In a December 1967 report of medical history, the appellant denied loss of memory, amnesia, or a history of head injury. R. at 1600. Also, his head and neurologic system were clinically evaluated as normal on separation. R. at 1602. An October 2007 private treatment record reflects that he began experiencing seizures around that time; and a cranial computerized tomography scan revealed a "[p]ossible small area of posterior right parietal hemorrhage," which his physician believed "more likely represents an area of calcification secondary to some previous insult." R. at 441; *see* R. at 446-47, 480-81.

The appellant filed disability compensation claims for headaches and seizures in 2010 and for a TBI in September 2012. R. at 1416, 2330-45. In October 2012, a private physician reviewed a magnetic resonance imaging scan of the brain and found that "[t]here are some source[s] of hemorrhage[,] . . . but it is not clear." R. at 677. He explained that it "[c]ould be related to old trauma, but [he did] not really see atrophy," and it "[m]ight be related with seizures because there is a brain injury." *Id.* A VA regional office declined to reopen claims for migraine headaches and a seizure disorder and denied the TBI claim in November 2012. R. at 1325-34.

The appellant disagreed with that decision, asserting that his TBI was related to "[t]he accidental exposure to the firing of [an] 'Honest John'" rocket during basic training at Fort Hood, Texas, in April or May 1966. R. at 1309. He stated that he was uncertain whether the incident had been reported and that he was not medically treated after the incident. R. at 1311. He also attached an August 2012 letter from a private neurologist, which reflects: "I believe that the immense

concussion that [the appellant] suffered in 1966 when in the military is likely to have resulted in a TBI." R. at 45.

The appellant subsequently perfected his appeal. R. at 1026; *see* R. at 1032-56. In February 2017, he testified before the Board that he was about 15 feet from the Honest John rocket launcher when it fired and knocked him and others to the ground. R. at 719. He further testified that he suffered from headaches since that incident, but did not seek treatment in service. R. at 725, 728-29.

On February 15, 2018, the Board denied entitlement to disability compensation for residuals of an asserted in-service TBI, including migraine headaches and a seizure disorder.¹ R. at 1-23. This appeal followed.

II. ANALYSIS

The appellant argues that the Board provided an inadequate statement of reasons or bases for finding him not credible to report his in-service TBI and further erred when it found the duty to assist satisfied without addressing whether a medical nexus opinion was warranted. Appellant's Brief (Br.) at 6-11; Reply Br. at 1-2. The Secretary counters these assertions and seeks affirmance. Secretary's Br. at 4-9.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). Whether the record establishes entitlement to service connection is a finding of fact, which the Court reviews under the "clearly erroneous" standard of review. *See Russo v. Brown*, 9 Vet.App. 46, 50 (1996). 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

¹ The Board explained that it had recharacterized the issue on appeal. In that regard, it reopened the claim for a seizure disorder, noted that the migraine headaches claim had remained pending since March 2010, and characterized the issue on appeal as noted above. R. at 5-8.

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 initially found that the duty to assist has been satisfied, without explicitly addressing whether a VA medical opinion should have been obtained. R. at 8. The Board then determined that the second element of service connection—the occurrence of an in-service injury or event—was not satisfied. R. at 10-12. The Board reasoned that "there is no factual basis in the record" for finding that any migraine headaches or seizure disorder was incurred in service or manifested within 1 year or several years thereafter; upon discharge in 1967, an examiner found the appellant's neurological system to be "normal"; and the appellant at that time denied any history of a "head injury." R. at 10-11.

The Board also found the appellant's "reports that he suffered from a TBI without treatment in service" to be "less than credible" and outweighed by the "competent medical evidence" of record. R. at 12. The Board reasoned that his statements "lack internal consistency" because, (1) although he filed claims for headaches and seizures in 2010, he did not report a TBI until 2012; and (2) "his contemporaneous statements during service showed an affirmative denial in 1967 of a history of a head injury." R. at 13.

The appellant argues that the Board's reasons for finding him not credible are inadequate. Appellant's Br. at 8. He asserts that, when he filed his disability compensation claims for headaches and seizures in 2010, he "simply listed the symptoms of his TBI," rather than the TBI itself, and he never attributed his headaches and seizures to any other in-service event. *Id.* He also contends that, in 1967, all he knew was that he "simply was knocked down" from the rocket blast and suffered hearing problems and migraines; he "did not know that he experienced a TBI" or experience seizures at the time. *Id.* Moreover, he argues that the Board erred by relying on the absence of corroborating records without a proper foundation. *Id.* at 8-9 (citing *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) ("[T]he Board must first establish a proper foundation for drawing inferences against a claimant from an absence of documentation.")). Finally, he asserts that, if the Board had found his statements regarding an in-service incident to be credible, the Board would have been required to obtain a medical opinion addressing a possible link between that incident and his current headache and seizure disabilities. *Id.* at 9, 11.

As noted above, the Board's negative credibility determination was premised on two alleged inconsistencies—the appellant filing claims for disability benefits for headaches and seizures in 2010 without including a claim for benefits for TBI and denying a head injury at discharge from service. R. at 13. The Board, however, did not explain why it would be *inconsistent* to seek benefits for two current disabilities and later identify those disabilities as possible residuals of an in-service TBI. *See* Appellant's Br. at 8; 38 C.F.R. § 4.124a, Diagnostic Code 8045 (2019) (listing seizures as a potential residual of a TBI); *see also* R. at 1309. Nor did the Board explain or cite any authorities for the notion that denying an in-service *head injury* is necessarily inconsistent with later contending that he suffered an in-service injury to *the brain*. *See VA Adjudication Procedures Manual*, M21-1, pt. III, subpt. iv, ch. 4 § N(2)(a) (defining TBI as "the physical, cognitive and/or behavioral/emotional residual disability resulting from an event of external force causing an injury to the brain"), (c) (providing examples of external force for the purpose of "TBI events"). The Court thus agrees with the appellant that the Board failed to adequately explain its negative credibility determination. *See Allday*, 7 Vet.App. at 527.

Further, the Court cannot conclude that this error is harmless because, as the appellant contends, if the Board had found his statements regarding an in-service incident to be credible, the Board potentially could have found that he was entitled to a VA medical examination. Appellant's Br. at 11 (noting that the appellant has current disabilities and that a private medical provider related his disabilities to an in-service TBI); *see McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (setting forth a four-part test clarifying when an examination is warranted); 38 C.F.R. § 3.159(c)(4) (2019). Accordingly, remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

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. *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 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 February 15, 2018, decision denying entitlement to disability compensation for residuals of an asserted in-service TBI, including migraine headaches and a seizure disorder, is VACATED and the matter is REMANDED for proceedings consistent with this decision.

DATED: July 16, 2019

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)