

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5855

WILLIE L. BRIDGES, 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, Willie L. Bridges, through counsel appeals a September 6, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than December 22, 2008, for the award of service connection for post-traumatic stress disorder (PTSD). Record (R.) at 4-8. 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 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 1983 to May 1990. R. at 330. He filed a claim for disability compensation for PTSD in September 2002 and later submitted a statement outlining asserted stressors while serving in Panama. R. at 4541-42, 4660-74. In March 2003, the U.S. Armed Services Center for Unit Records Research confirmed that he had seen dead Panamanians during service. R. at 4534. Later that month, the appellant underwent a PTSD examination; the examiner noted that "he never was in any danger" during service in Panama and

concluded that he did not meet the criteria for a PTSD diagnosis. R. at 4477-79. In a July 2003 decision, a VA regional office (RO) noted that the appellant provided "a stressor statement that . . . [he] saw . . . dead Panamanians" but denied disability benefits on the basis that there was no "confirmed diagnosis of [PTSD]." R. at 4473-76. The appellant did not appeal that decision.

He sought to reopen his claim in December 2008 and subsequently submitted a November 2011 examination report from a private psychologist, who noted his service in Bolivia and Panama and ultimately diagnosed PTSD. R. at 2931-34, 2940, 4463; *see* R. at 2928-42. After an extended procedural history, the Board, in a November 2014 decision, found that new and material evidence had been presented to reopen the appellant's claim and granted disability compensation for PTSD, relying primarily on the March 2003 memorandum confirming a stressor during his service in Panama and the 2011 November examination report. R. at 2825-31; *see* R. at 2983-89, 3362-64, 3611, 3619-25, 3955-80, 4338-39, 4345-50. The following month, the RO implemented that decision, assigning a 50% disability rating for PTSD, effective December 22, 2008, R. at 2782-96, and the appellant appealed the assigned effective date, R. at 845, 2438-75, 2756-57. In his February 2015 Notice of Disagreement, he asserted that an earlier effective date was warranted "due to the government not finding [his] records" when his claim was initially denied and that the "military had those records." R. at 2757.

In September 2018, the Board denied entitlement to an effective date earlier than December 22, 2008, for the award of service connection for PTSD. R. at 4-8. This appeal followed.

II. ANALYSIS

The appellant contends that the Board provided inadequate reasons or bases, because it failed to discuss the addition of service department records to his claims file after the 2003 denial of his claim. Appellant's Brief (Br.) at 6-16. In that regard, he asserts that those additional service records confirmed his service in Bolivia and that, pursuant to 38 C.F.R. § 3.156(c), he is entitled to an effective date as of the date of his original claim because his PTSD is based on experiences in Bolivia. *Id.* The Secretary responds that there is no indication that service records were missing at the time of the 2003 denial of his claim and that, even if records were missing, there is no indication that they would have changed the outcome of that decision, which was based on lack of a PTSD diagnosis rather than lack of confirmed stressors. Secretary's Br. at 4-11. The Secretary requests affirmance. *Id.*

Ordinarily, if a claim is finally denied and later reopened and granted based on the submission of new and material evidence, the effective date of benefits will be the date that the claimant filed the application to reopen. 38 U.S.C. § 5110(a)(1) (effective to Aug. 22, 2017); 38 C.F.R. § 3.400(b)(2)(i), (r) (2019). However, § 3.156(c) provides an exception to this rule. Paragraph (c)(1) provides, in pertinent part, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1) (2019). Paragraph (c)(3) further provides that "[a]n award made based all or in part on the records identified by paragraph (c)(1) . . . is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3). Finally, paragraph (c)(4) permits a retroactive evaluation of disability in certain circumstances. 38 C.F.R. § 3.156(c)(4).

In *Blubaugh v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) underscored that § 3.156(c) "serves to place a veteran in the position he [or she] would have been had . . . VA considered the relevant service department record before the disposition of [the] earlier claim." 773 F.3d 1310, 1313 (Fed. Cir. 2014). The Federal Circuit noted that paragraph (c)(1) "is a separate and distinct provision from [paragraphs] (c)(3) and (c)(4)" and that "[t]he language and overall structure of § 3.156(c) strongly suggest that § 3.156(c)(1) requires . . . VA to reconsider only the merits of a veteran's claim" whenever newly acquired relevant service records are associated with the claims file, and that "[o]nly if [] VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1) must it consider an earlier effective date under subsections (c)(3) and (c)(4)." *Id.* at 1314.

This Court further emphasized the distinction between paragraph (c)(1) and paragraphs (c)(3) and (c)(4) in *Emerson v. McDonald*, stating that the operative clause in § 3.156(c)(1) "mandates that 'VA will reconsider the claim'" at any time after it issues a decision on a claim, if it receives relevant service department records not previously associated with the claims file. 28 Vet.App. 200, 208 (2016) (quoting 38 C.F.R. § 3.156(c)(1)). More recently, in *George v. Shulkin*, the Court explained that "reconsideration" under paragraph (c)(1) requires VA to reassess its original decision "in light of the new service records" and noted that this may also include the development of additional evidence. 29 Vet.App. 199, 205 (2018), *vacated on other grounds sub nom. George v. Wilkie*, No. 2018-1736, __ F. App'x __, 2019 WL 4010813 (Fed. Cir. Aug. 26,

2019). The Court further explained that, had the Board "skipped past § 3.156(c)(1), which demands reconsideration of the original claim, and [gone] straight to § 3.156(c)(3), which deals with the effective date of a claim granted via reconsideration," that would "indicate that [the Board] did not understand the relevant legal framework." *Id.*

A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *Evans v. West*, 12 Vet.App. 396, 401 (1999). As 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 v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Here, the Board found that the appellant's initial claim for PTSD was denied in July 2003, he did not appeal that decision, "[t]here is no indication that VA received new and material evidence sufficient to reopen the . . . claim . . . prior to December 22, 2008," and the effective date of an award based on receipt of new and material evidence is generally the date of the claim to reopen. R. at 4-6. The Board acknowledged that an earlier effective date may be awarded based on "previously missing service records" and the appellant's assertion that he was entitled to a 2002 effective date because "the 'government' did not find his records" prior to denying his initial claim. R. at 5, 6. In that regard, the Board found that the appellant's 2002 claim had been denied on the basis that he did not have a diagnosis of PTSD and the award of disability compensation was predicated on a 2011 diagnosis. R. at 7. The Board thus concluded that "the record is against a finding that [his] claim was reopened based upon previously missing service records, and therefore entitlement to an earlier effective date on that basis is not warranted." *Id.* Accordingly, the Board denied an effective date prior to December 22, 2008. R. at 8.

The appellant maintains that there is some evidence that records reflecting his service in Bolivia were not before the RO in 2003; those service records are relevant because he has reported stressful events during that service; and the 2011 examination, which served as the basis for an award of benefits, recited his service in Bolivia. Appellant's Br. at 8-13. He asserts that the November 2014 award of benefits was therefore in part based on the receipt of additional service records and that the Board erred in not discussing whether he was entitled to an earlier effective date on that basis. *Id.* at 14-16.

The Secretary counters that "there is nothing . . . to indicate that records of his service in Bolivia were not associated with his file" in 2003 and that the 2011 diagnosis was not based on service in Bolivia. Secretary's Br. at 7-8. The Secretary further asserts that the Board made the requisite findings as to § 3.156(c), because it found that "the record is against a finding that the [appellant's] claim was reopened based upon previously missing service records." *Id.* at 10 (quoting R. at 7). Additionally, he avers that, even if the Board erred in applying § 3.156(c), the appellant was not prejudiced because the effective date under § 3.156(c)(3) is based on the date entitlement arose or the date VA received the prior claim, whichever is later, and entitlement here did not arise until he was diagnosed with PTSD in 2011—later than the currently assigned 2008 effective date. *Id.* at 10-11.

As reflected above, the Board acknowledged the appellant's argument that he was entitled to an earlier effective date because VA failed to obtain certain military records prior to the initial denial of his claim, *see* R. at 6, 2757, but concluded that an earlier effective date was not warranted because "the record is against a finding that [his] claim *was reopened* based upon previously missing service records," R. at 7 (emphasis added). The Board did not make any explicit findings as to whether relevant service records were associated with his claims file after the 2003 denial of his claim and, if so, whether the initial 2002 claim had been reconsidered pursuant to § 3.156(c)(1). *See Emerson*, 28 Vet.App. at 208. Because those findings are necessary before reaching a determination about the appropriate effective date under § 3.156(c)(3), *see George*, 29 Vet.App. at 205, the Board's statement of reasons or bases is inadequate and precludes effective judicial review, *see* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527. Further, contrary to the Secretary's argument, the Court cannot conclude that the appellant was not harmed by the Board's failure to conduct an analysis under § 3.156(c)(1) because, if reconsideration is warranted, it may include development of additional evidence prior to an assessment of the appropriate effective date. *See George*, 29 Vet.App. at 205. 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.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*,

15 Vet.App. 18, 20 (2001) (per curiam order). 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 September 6, 2018, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: October 17, 2019

Copies to:

Jonathan W. Greene, Esq.

VA General Counsel (027)