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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 18-1842

DARRYL I. LOCKE, 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*: Veteran Darryl I. Locke appeals through counsel a January 12, 2018, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for an acquired psychiatric disorder. Record (R.) at 2-13. For the reasons that follow, the Court will set aside the January 12, 2018, Board decision and remand the matter for further development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Locke served on active duty in the U.S. Air Force from January 1986 to June 1987. R. at 195.

In November 1986, Mr. Locke reported for duty intoxicated. R. at 227. In January 1987, after Mr. Locke was found intoxicated while on duty as a vehicle operator, he informed his commander that his behavior was due to extreme emotional and financial distress arising from his mother's deteriorating health. *Id*. When his mother died in February 1987, he was referred to the local Social Actions program. R. at 1966.

The examination by that program indicated that Mr. Locke showed "very minimal" alcohol history, and his diagnosis was nondependent abuse of alcohol – problem drinker. *Id*. He was recommended to enter the local Social Actions program. *Id*.

In April 1987, Mr. Locke was arrested for driving under the influence and was admitted to a USAF Alcohol Rehabilitation Center (ARC) with a diagnosis of alcohol dependence, continuous. R. at 263, 1969. The May 1987 ARC discharge note indicates that Mr. Locke reported "a long, extend[ed] history of alcohol consumption" and alcohol-related behavioral and mental health issues. *Id*.

In June 1987, Mr. Locke was discharged due to alcohol-related misconduct. R. at 195. He later testified at a 2016 Board hearing that after he was discharged in 1987, he continued to self-medicate with alcohol to treat depression until he first sought professional treatment in 2000. R. at 873.

Between 2000 and 2010, Mr. Locke received sporadic treatment at several different mental health facilities and hospitals. *See* R. at 861. Within that time frame, the veteran was variously diagnosed with alcohol dependency, substance-induced mood disorder, major depressive disorder (MDD), dysthymia, bipolar disorder, schizoaffective disorder, mood disorder, psychosis, anxiety, generalized anxiety disorder, unspecified episodic mood disorder, cocaine dependency, and obsessive compulsive disorder. *See, e.g.*, R. at 84-180; 1063-69; 1099-1104; 1559-61; 1753; 1786.

In October 2010, Mr. Locke filed a claim for service connection for MDD and dysthymia. R. at 2031.

Upon VA examination in May 2011, an examiner diagnosed substance-induced mood disorder, which was "more likely than not" a result of "his experience while in service (death of his mother) and his subsequent substance abuse." R. at 1800. The examiner discussed Mr. Locke's narrative indicating that his alcohol abuse began in service after his mother died and opined that Mr. Locke is a "reliable historian." R. at 1798.

In August 2011, a VA regional office (RO) denied the claim because the evidence of record, including the May 1987 ARC discharge note, indicated a long and extended history of alcohol abuse and consumption that showed that his mental health issues were substance induced and a product of his "own willful and persistent misconduct." R. at 1546. In October 2011, the veteran filed a Notice of Disagreement. R. at 1530.

Upon private medical examination in June 2012, Dr. Jeffery Klopper diagnosed Mr. Locke with major depression and alcohol dependence and opined that his conditions were at least as likely as not incurred during and aggravated by his service. R. at 1479. As to the basis for his opinion, Dr. Klopper noted that the veteran "did not drink alcohol until[] active duty according to [patient] and wife." R. at 1480.

In July 2012, the RO issued a Statement of the Case continuing to deny the claim. R. at 1491-1504. Two months later, the veteran perfected an appeal to the Board. R. at 1481-82.

Mr. Locke underwent another VA examination in October 2015 and was diagnosed with substance-induced mood disorder secondary to substance abuse. R. at 1438. The examiner opined that the veteran's substance abuse was more likely than not temporarily exacerbated by his mother's death; however, "there is no evidence that a service[-]related condition or event caused the [v]eteran to abuse alcohol." *Id.* In a January 2016 addendum opinion, that examiner clarified that the veteran's substance-induced mood disorder is "a continuation of alcohol abuse prior to the [v]eteran's military service," not a continuation of or result of an event that occurred during military service. R. at 911. The examiner opined that the condition may have been briefly exacerbated by the death of his mother during his service, but there is no evidence that a service-related condition or event caused him to abuse alcohol. *Id*. She also discredited previous contrary opinions because they did not account for evidence showing that the veteran had a pre-service history of alcohol abuse/dependency, including the ARC examination, 2008 medical records indicating that the veteran reported "drinking since the age of 18," and his extensive history of alcohol abuse. *Id*. The examiner stated that it was "not possible to determine" whether the veteran actually meets the criteria for his prior diagnoses including bipolar disorder, dysthymia, and MDD, because of his continuous alcohol and substance abuse. R. at 912. Therefore, she concluded that the only appropriate diagnosis for the veteran was substance-induced mood disorder, which was not likely service connected. *Id*.

During a July 2016 Board hearing, Mr. Locke and his ex-wife testified that he did not have alcohol abuse or mental health issues prior to his service. R. at 860, 865.

In January 2018, following a December 2016 Board remand for further development, R. at 308, the Board issued the decision currently on appeal. R. at 2-13. The Board denied service compensation for an acquired psychiatric disorder because it found that the evidence of record

weighed against a finding that the veteran has a diagnosis of an acquired psychiatric disorder other than substance-induced mood disorder and indicated that that disorder resulted primarily from alcohol abuse rather than service. R. at 3. This appeal followed.

II. JURISDICTION

Mr. Locke's 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).

III. ANALYSIS

Mr. Locke argues that the Board erred by not ensuring that VA fulfilled its duty to assist by providing an adequate medical examination. Appellant's Brief (Br.) at 12. The veteran also argues that the Board clearly erred in finding that he did not have a mental health condition during the pendency of his appeal, or, alternatively, that the Board failed to provide adequate reasons or bases for that determination. *Id*. at 9-10, 12. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 9-20. The Court agrees with the veteran that the Board provided inadequate reasons or bases for its decision.

The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *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).

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). An injury or disease incurred during active service will not be deemed to have been incurred in the line of duty if the injury or disease was a result of the person's own willful misconduct. 38 U.S.C. § 105; 38 C.F.R. § 3.1(m) (2019). Abuse

of alcohol or drugs is generally considered willful misconduct; however, a veteran may be entitled to service connection on a secondary basis for a condition arising from substance abuse if it is as likely as not that the substance abuse is secondary to a service-connected disability. *Allen v. Principi*, 237 F.3d 1368, 1376 (Fed. Cir. 2001).

As noted above, the Board denied Mr. Locke service connection for an acquired psychiatric disorder because it found that the evidence of record did not establish that he had a current psychiatric disorder other than substance-induced mood disorder. R. at 10-12. Its rationale for that determination was that the May 2011 VA examiner's opinion and Dr. Klopper's June 2012 opinion, which both found that the veteran's mental health diagnoses were more likely than not service-related, were outweighed by the 2015 VA examiner's opinion and her 2016 addendum opinion, which concluded that the veteran had no identifiable mental health diagnoses other than substance-induced mood disorder, which was not likely a product of his service. R. at 10-11.

For the Board, the key difference between the favorable opinions and the unfavorable VA opinions was their differing assessments of the veteran's history of substance abuse. *See id*. The examiners with favorable opinions based their conclusions on the fact that the veteran did not have a pre-service history of substance abuse, while the unfavorable VA opinions factored in a long pre-service history of substance abuse. *Id*. Because the Board concluded that the evidence of record showed that the veteran had a substance abuse problem prior to service, R. at 6-9, it discounted the favorable opinions that were based, in part, on the putatively inaccurate factual premise that he did not drink before service and it favored the 2015 and 2016 VA opinions that acknowledged his pre-service alcohol use, R. at 10-11.

Although the Board may favor one competent medical opinion over another that comes to a different conclusion, it must provide adequate reasons or bases for its relative weighing of that conflicting evidence. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 300 (2008); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Board did not do so here, because it did not adequately address why the record evidence that the veteran did not drink before service—e.g., the February 1987 Social Actions examination reflecting "very minimal" alcohol history, R. at 1966, and the veteran's and his ex-wife's July 2016 Board hearing testimony that he did not have any issues with alcohol abuse or mental health prior to service, R. at 860, 865—was not persuasive. Notably, the Board did not find that evidence not credible or otherwise explain why it was less probative than

the evidence showing that he had a pre-service history of alcohol abuse. Instead, the Board simply acknowledged the existence of this favorable evidence and summarily concluded that it was inaccurate. R. at 10. The Board's failure to substantively analyze this potentially favorable material evidence and explain why it was not probative renders inadequate its reasons or bases for its decision. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("[M]erely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases."); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam) (holding that, for the Board's reasons or bases to be adequate, the Board must provide reasons for discounting favorable evidence); *Caluza*, 7 Vet.App. at 506.

Remand is therefore warranted for the Board to reassess that evidence and adequately explain whichever view of the evidence it adopts. *See Wise v. Shinseki*, 26 Vet.App. 517, 521 (2014) (holding that failure to provide adequate reasons or bases for relying on a medical opinion justifies remand); *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"). If the Board, on remand, determines that the evidence preponderates for a finding that the veteran did not abuse alcohol before service, it will need to reassess the adequacy of the 2016 VA opinion and may need to order additional development consistent with that finding.

Given this disposition, the Court need not address Mr. Locke's additional reasons-or-bases arguments, which could not result in a remedy greater than remand. *See* Appellant's Br. at 12. Likewise, the Court declines to address the veteran's other challenges regarding the adequacy of the 2016 VA opinion and whether the Board clearly erred in finding no current psychiatric disability during the pendency of his appeal, because resolution of those issues depends on the Board's reassessment of the conflicting evidence. *See* Appellant's Br. at 12-13.

IV. CONCLUSION

Upon consideration of the foregoing, the appealed portion of the January 12, 2018, Board decision is SET ASIDE and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: October 24, 2019

Copies to:

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