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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3567

RORY R. KEMPF, 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, Rory R. Kempf, through counsel appeals a June 5, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for obstructive sleep apnea (OSA). Record (R.) at 3-18. The Board also granted entitlement to benefits for post-traumatic stress disorder (PTSD), which is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part and dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *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."). 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 benefits for OSA 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 June to August 1979, June to August 1980, and December 1990 to June 1991, including service in the Persian Gulf War from

January to May 1991. R. at 2772-74; *see* R. at 164.[1] In September 2016, he underwent a VA sleep study, after which he was diagnosed with OSA, based on respiratory disturbances and oxygen desaturation above normal levels. R. at 950. Under the heading "Recommendations," the VA physician advised him to try a continuous positive airway pressure (CPAP) machine, avoid tobacco and alcohol, control his weight and exercise regularly, and practice good sleep hygiene, which he defined as "maintaining regular bedtimes [and] awakening times in addition to a regular daytime schedule," to ensure "at least eight hours of consolidated sleep per night." *Id.*

The appellant sought benefits for OSA, which he related to his service in the Persian Gulf, in May 2017. R. at 1598-604. A VA regional office denied his claim the following month, R. at 162-66, and the appellant filed a Notice of Disagreement with that decision through current counsel, R. at 134-36. He argued that his OSA "should be considered to arise from a medically unexplained chronic multisystem illness" (MUCMI) under 38 C.F.R. § 3.317. R. at 134. The appellant, through current counsel, later perfected his appeal to the Board, again asserting his belief that his OSA was a MUCMI under § 3.317. R. at 41-45.

In the June 2018 decision on appeal, the Board considered whether the appellant's OSA could be considered a MUCMI and found that it could not, because it was attributed to a known clinical diagnosis with a known pathophysiology and etiology. R. at 11. This appeal followed.

II. ANALYSIS

A. Parties' Arguments

On appeal, the appellant contends that the Board erroneously found that only chronic fatigue syndrome (CFS), fibromyalgia, and irritable bowel syndrome (IBS) may be considered MUCMIs and that this error "tainted its entire decision." Appellant's Brief (Br.) at 9. He further argues that the Board misapplied the law as it relates to MUCMIs by considering whether OSA, as a general matter, has a conclusive etiology or pathophysiology, rather than considering his OSA specifically. *Id.* at 10-11. In that regard, he avers that, to the extent that the Board may have found that OSA has a conclusive etiology because it is caused by his weight, no medical evidence relates OSA to his weight and the Board erred by relying on a medical dictionary definition of OSA to

[1] The Court notes that the appellant's Form DD-214 for his first period of active duty does not appear in the record of proceedings. *See* U.S. VET. APP. R. 28.1(a)(B) (stating that the record of proceedings must contain any document cited in the parties' briefs). There is no dispute regarding the appellant's service, however, and therefore the Court need not seek supplementation of the record.

draw that conclusion. *Id.* at 11. Additionally, he argues that the Board erred in relying on a finding that no medical provider suggested that his OSA has an unexplained etiology. *Id.* at 12. Regarding the specific criteria for a MUCMI, he asserts that the Board overlooked evidence that he has fatigue, sleep disturbances, and symptoms involving the respiratory system, three of the symptoms on the non-exhaustive list of signs and symptoms that may be manifestations of a MUCMI. *Id.* at 13-14. Similarly, he argues that the Board overlooked "features" of a MUCMI listed in § 3.317, namely fatigue, and therefore provided inadequate reasons or bases for finding that his OSA did not exhibit such a feature. *Id.* at 14-15. Finally, he contends that the Board failed to address the reasonably raised theory of entitlement to benefits for OSA based on aggravation of that condition by his service-connected PTSD. *Id.* at 15-18.

For his part, the Secretary concedes that the Board misstated the law when it found that only CFS, fibromyalgia, and IBS are MUCMIs under § 3.317, but asserts that the Board's ensuing analysis of whether OSA is a MUCMI renders that error harmless.[2] Secretary's Br. at 5-6. He next argues that the Board properly determined that, because the appellant's OSA is attributable to a "known clinical diagnosis," it could not be considered a MUCMI. *Id.* at 6. The Secretary also rejects the appellant's argument that the Board erred in finding that his OSA has a conclusive etiology (i.e., obesity) because the September 2016 VA physician recommended that the appellant control his weight as a way of improving his condition. *Id.* at 8. The Secretary notes that the appellant raises the possibility of benefits for OSA based on aggravation by PTSD for the first time on appeal, *id.* at 11, and argues that the issue was neither explicitly nor reasonably raised and therefore the Board did not have a duty to address it, *id*. at 11-13. He urges the Court to affirm the Board decision. *Id.* at 13.

B. Law

Service connection for a disability may be established on a presumptive basis for veterans with a qualifying chronic disability that became manifest during service in the Southwest Asia theater of operations during the Persian Gulf War or to a degree of 10% or more not later than December 31, 2021. *See* 38 U.S.C. § 1117(a); 38 C.F.R. § 3.317(a)(1)(i) (2019). A qualifying chronic disability may result from an undiagnosed illness or a MUCMI "that is defined by a cluster of signs or symptoms." 38 U.S.C. § 1117(a)(2)(A), (B); *see* 38 C.F.R. § 3.317(a)(2)(i). Pertinent

[2] The Court accepts the Secretary's concession but need not consider whether this particular Board error was prejudicial in light of the prejudicial errors outlined in Part II.C below.

to this case, a MUCMI is defined as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii). Section 1117 itemizes 13 examples of "signs or symptoms that may be a manifestation of . . . a chronic multisymptom illness," including fatigue, "[s]igns or symptoms involving the upper or lower respiratory system," and sleep disturbances. 38 U.S.C. § 1117(g)(1), (8), (9); *see* 38 C.F.R. § 3.317(b)(1), (8), (9).

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 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.

C. Discussion

Here, the Board denied the appellant's claim because it determined that his OSA could not be considered a MUCMI. First, the Board summarized the definition of sleep apnea found in a medical dictionary: "Apnea is defined as a cessation of breathing. [OSA] is defined as resulting from a collapse or obstruction of the airway with the inhibition of muscle tone during [rapid eye movement] sleep. It is seen primarily in middle aged obese individuals with male predominance." R. at 10 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 115 (30th ed. 2003)). The Board then acknowledged that "signs and symptoms involving the respiratory system, fatigue, and sleep disturbances are listed among the possible manifestations of an undiagnosed illness or [MUCMI] for purposes of presumptive service connection," but concluded that the appellant's "problems ha[d] been attributed to a specific diagnosis, namely obstructive sleep apnea." *Id.* The Board found that the definition of OSA "on its face indicates a specific pathophysiology" and stated that the September 2016 VA evaluator "noted that the [appellant] was 67 inches tall, and weighed 203.9 pounds with a body mass index [(BMI)] of 32." R. at 11; *see* R. at 949. The Board found that

there was "no medical evidence to the contrary" and gave the VA sleep study report significant probative weight. *Id.*

The Court agrees with the appellant that the Board's reasons or bases are inadequate. Although not explicit in the Board's explanation, it appears from the Board's recitation of the appellant's vital statistics and its reference to the definition of OSA—including the notation that it primarily occurs in obese individuals—that the Board determined that the etiology of the appellant's OSA is his weight. *See* R. at 11. The Board did not explain how it reached that conclusion or point to any supportive medical evidence of record relating to the etiology of the appellant's OSA. Appellant's Br. at 11-12; *see* R. at 949-50 (September 2016 sleep study report recommending weight control as part of treatment plan for OSA). As the Secretary concedes, "[w]hether a condition is 'medically unexplained' is particular to the claimant in each case." Secretary's Br. at 5 (citing *Goodman v. Shulkin*, 870 F.3d 1383 (Fed. Cir. 2017); *Stewart v. Wilkie*, 30 Vet.App. 383, 390 (2018)). Here, the Board did not explain whether a medical dictionary definition of OSA was "sufficient to conclusively identify the cause" of the appellant's specific illness. *Stewart*, 30 Vet.App. at 391 ("[I]f definitional . . . evidence were sufficient to conclusively identify the cause of a claimed illness . . . the illness would not be medically unexplained. Any lesser degree of certainty would require evaluation of the unique facts of the veteran's situation."); *see id.* ("If an illness could, as a general matter, be excluded from being a MUCMI on the basis of definitional materials or treatises, there would be no necessity of examining all the facts of record and the claimant's unique symptoms."); *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991) (finding that the Board is prohibited from "provid[ing] [its] own medical judgment in the guise of a Board opinion"), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998); *see also* Appellant's Br. at 10-11.

The Board next found that there was "no competent lay or medical evidence" to establish the appellant's condition as a MUCMI. R. at 11. The Board explained that "[d]iagnostic testing has clearly and unequivocally found [OSA,] and [the appellant's] medical providers have not suggested that [his] reported symptoms . . . arise from unexplained physiology or etiology." R. at 12. The Board noted that, following the appellant's diagnosis of OSA and treatment—which purportedly included weight loss—"his sleep has improved and, to the extent that he continues to experience sleep problems not addressed by his sleep apnea treatment, these issues have been linked to his symptoms of his PTSD." *Id.*

Here, too, the Board's explanation is inadequate. The Board relied on the absence of evidence from medical providers that the appellant's OSA is the result of unexplained etiology or physiopathology. As the appellant contends, however, "where there is no medical reason why a doctor would be expected to comment on a particular matter, silence in the medical records with regard to that matter cannot be taken as substantive, negative evidence." Appellant's Br. at 12 (citing *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011)). Because the Board did not explain why any of the medical providers would have been expected to discuss whether the appellant's OSA had a conclusive etiology, it did not establish the proper foundation for relying on the absence of evidence. *See* 38 U.S.C. §§ 7104(d)(1), 7261(a)(4); *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."); *Horn v. Shinseki*, 25 Vet.App. 231, 239 n.7 (2012) (recognizing that the absence of evidence cannot be substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact").

Because the appellant identifies evidence that potentially satisfies the other requirements for a MUCMI, *see* Appellant's Br. at 14-15, the Court is unable to conclude that the errors in the Board's etiology discussion are harmless. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). In light of these errors, remand is necessary. *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, including whether a theory of aggravation of OSA by service-connected PTSD was reasonably raised. *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 June 5, 2018, decision denying entitlement to benefits for OSA is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: November 13, 2019

Copies to:

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