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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-1548

KENNETH C. SWANSON, APPELLANT,

v.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Air Force veteran Kenneth C. Swanson appeals through counsel a November 28, 2017, Board decision denying service connection for right ear hearing loss. Record (R.) at 2-14. The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board erred in failing to ensure compliance with its May 2016 remand instructions and in relying on inadequate VA examinations. The Secretary concedes that the Board provided inadequate reasons or bases for finding substantial compliance with the May 2016 remand and urges the Court to remand the matter. Mr. Swanson responds that reversal is the appropriate remedy with respect to substantial compliance and that, contrary to the Secretary's assertions, the errors in the VA examinations are not cured by reading them as a whole.

Because the Court cannot ascertain how the Board on remand could explain that a VA examiner's statement referred to research that he was required to review by the May 2016 remand, when the Secretary himself conceded that the examiner did not clearly state that he reviewed such research, the Court will reverse the Board's finding that there was substantial compliance with the prior remand order. Similarly, because the VA examiners either did not reference this research, stated that her or she did not have access to this research, or provided insufficient detail for the

Board to ascertain that the examiner considered this research, the Court finds the examinations inadequate. Accordingly, we will set aside the remainder of the November 2017 Board decision and remand the matter for further development and readjudication consistent with this decision.

I. FACTS

Mr. Swanson served on active duty from September 1952 to October 1978. R. at 526-35. In December 2009, he filed a claim for service connection for hearing loss. R. at 1184. In April 2010, a VA examiner diagnosed bilateral hearing loss, but opined that it was not caused by service. R. at 1148. In August 2010, a regional office (RO) denied service connection, R. at 964; in April 2011, the veteran filed a Notice of Disagreement (NOD), R. at 952; in August 2012, the RO issued a Statement of the Case (SOC) continuing to deny the claim, R. at 934; and in October 2012, Mr. Swanson perfected his appeal, R. at 904.

In February 2016, following a Board remand, the RO granted service connection for left ear hearing loss. R. at 658. Later that month, the RO issued a Supplemental SOC continuing to deny service connection for right ear hearing loss. R. at 651.

In May 2016, the Board remanded the right ear hearing loss claim for additional development, including to obtain a new VA examination. R. at 617. The Board instructed the RO to forward Mr. Swanson's claim to an otolaryngologist to address the likelihood that hearing loss was related to service. R. at 618. The Board also instructed the examiner to consider the veteran's statements that his right ear hearing loss was related to in-service noise exposure; that he did not have civilian occupational or recreational noise exposure after separation, except for recreational hunting a few times in the 1970s; and that he was advised that he had a hearing deficit immediately after service. R. at 619. The Board stated that if there was a medical basis to support or doubt the history provided by Mr. Swanson, the examiner should state this with a fully reasoned explanation. *Id.* The Board further instructed the examiner to comment on the likelihood that the loud noises experienced by the veteran resulted in damage to auditory hair cells. R. at 620. Finally, the Board instructed the otolaryngologist to comment on "the impact, if any, of the line of research conducted by Dr. Sharon G. Kujawa," and then listed four articles by Dr. Kujawa. *Id.*

In October 2016, a VA audiologist opined that the veteran's right ear hearing loss was less likely caused by or the result of service, explaining that a service medical record and a separation examination showed normal hearing; there was no threshold shifts in service; and an Institute of

Medicine study stated that there was no scientific basis on which to conclude that hearing loss appearing many years after noise exposure could be causally related to that exposure if hearing was normal immediately after the exposure. R. at 86. The examiner then noted that Mr. Swanson reported in-service noise exposure; he worked in retail and equipment installation after separation; and "[r]ecreationally he goes hunting only 2-3 times." R. at 87.

In February 2017, the RO deferred issuing a rating decision because the Board had instructed that the examination be conducted by an otolaryngologist and the October 2016 examination was completed by an audiologist and because the "the questions asked by [the Board] were not answered." R. at 161.

In March 2017, a VA audiologist opined that right ear hearing loss was less likely related to service because Mr. Swanson's hearing was normal at separation. R. at 123. The examiner stated that she could not comment on Dr. Kujawa's research without speculation because she did not have access to those documents, but, based on abstracts from those articles, they seemed to suggest some evidence of cochlear nerve degeneration, but not changes in thresholds. R. at 126. The examiner indicated that it would be more appropriate for a neurophysiologist, rather than a clinical audiologist, to apply this data to humans. *Id.* (noting that the studies were conducted on animals).

The examiner further stated that that it was less likely that loud noises resulted in damaged auditory hair cells. *Id.* She stated that the "configuration of the hearing loss is not suggestive of noise exposure in that it is bilateral, rather symmetrical, and somewhat flat in shape," noting that at separation there was normal right ear hearing and only a high frequency hearing loss in the left ear. *Id.* (indicating that this shift was compatible with noise exposure, but that the much more severe current decline was less likely due to service).

In addition, the examiner stated that the veteran appeared competent to report his history; he did not have occupational noise exposure after separation; and the record consistently indicated that he was told he had right ear hearing loss. R. at 127. The examiner again noted that at separation right ear hearing was normal and there was some left ear hearing loss, and explained that the veteran was thus correct in stating that he was told that he had hearing loss at the time of separation, but that hearing loss was in the left, rather than right, ear. *Id.* (noting that the left ear hearing loss did not meet the VA criteria for hearing loss).

In June 2017, Mr. Swanson underwent a VA examination to assess the etiology of his left ear hearing loss. R. at 59-63. In July 2017, the RO again deferred issuing a rating decision because an audiologist conducted the March 2017 examination rather than an otolaryngologist. R. at 54.

In September 2017, a VA otolaryngologist stated that he was asked to "comment on right hearing loss in regard to noise exposure with resultant hearing loss in right ear secondary to hair cell damage, I did review articles referring to research in this regard." R. at 28. He stated that he discussed the case with the audiologist who conducted the left ear examination in June 2017, because "[t]his type of opinion is more in the [a]udiological expertise than in general otolaryngology." *Id.* (noting that the June 2017 examiner was not asked to opine on the right ear, but that it was more appropriate for her to provide an opinion on the right ear). The otolaryngologist concluded that he and the audiologist agreed that the national standard does not yet support that loud noise damage to the inner ear occurs but does not become manifest until years later. *Id.*

In the November 2017 decision on appeal, the Board denied service connection for right ear hearing loss. R. at 14.

II. ANALYSIS

Mr. Swanson argues that the Board erred in failing to ensure compliance with its May 2016 remand instructions and in relying on inadequate VA examinations, as well as provided inadequate reasons or bases for relying on those examinations. Appellant's Brief (Br.) at 13-24; Appellant's Reply Br. at 1-6. The Secretary concedes that the Board provided inadequate reasons or bases for finding substantial compliance with the May 2016 remand and urges the Court to remand the matter. Secretary's Br. at 9-19. Mr. Swanson responds that reversal is the appropriate remedy with respect to substantial compliance and that, contrary to the Secretary's assertions, the errors in the VA examinations are not cured by reading them as a whole. Appellant's Reply Br. at 1-5.

A remand by the Board confers on the claimant a legal right to compliance with the remand order. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Substantial compliance with the remand order, not strict compliance, is required. *Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010); *Dyment v. West*, 13 Vet.App. 141, 147 (1999). The Board's determination of whether there was substantial compliance with a remand is a finding of fact that the Court reviews under the "clearly erroneous" standard. *See Gill v. Shinseki*, 26 Vet.App. 386, 391-92 (2013) (reviewing the Board's finding of

substantial compliance for clear error), *aff'd per curiam sub nom. Gill v. McDonald*, 589 F. App'x 535 (Fed. Cir. 2015).

An adequate VA examination "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012); *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Although a medical examination does not need to "explicitly lay out the examiner's journey from the facts to a conclusion" to be adequate, the Court must be able to discern the examiner's reasoning to sanction the Board's reliance on it. *Monzingo*, 26 Vet.App. at 105; *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (the Court has repeatedly held that the Board cannot rely on an examination unless it contains sufficient detail and rationale to permit the Board to make a fully informed decision on a claim).

Here, the Secretary concedes that the September 2017 VA examiner did not clearly state that he reviewed Dr. Kujawa's research. Secretary's Br. at 12. The Secretary asserts that "[a]lthough the Board presumed that he addressed the specific research, the examiner only stated, 'I did review articles referring to research in this regard.'" *Id.* (citing R. at 12 (Board stating that the examiner noted the line of research conducted by Dr. Kujawa)). The Secretary contends that remand is appropriate for the Board to explain how it concluded that the examiner's statement referred to the specific articles at issue. R. at 12-13. Mr. Swanson asserts that the parties agree that, at the very least, it is unclear whether or not the September 2017 examiner took Dr. Kujawa's work into account. Appellant's Reply Br. at 1. He argues that therefore there was not substantial compliance with the Board's May 2016 remand directive and that reversal is thus warranted. *Id.* at 2 (citing 38 U.S.C. § 7261(a)(4) and stating that, where findings of fact are clearly erroneous, the Court shall reverse such findings). The Secretary also concedes that the Board did not explain how any of the medical opinions addressed its directive for an examiner to comment on the likelihood that the veteran's loud noise exposure resulted in damage to auditory hair cells. Secretary's Br. at 12-13.

The Court will reverse the Board's finding that there was substantial compliance with its May 2016 remand directives. Contrary to the Secretary's contentions, it is unclear to the Court how the Board, if given the opportunity, could explain that the September 2017 examiner's statement referred to the specific articles at issue when the Secretary himself conceded that the examiner did not clearly state that he reviewed Dr. Kujawa's research. Secretary's Br. at 12 ("[a]lthough the

Board presumed that he addressed the specific research, the examiner only stated, 'I did review articles referring to research in this regard.'"); *see* R. at 28 (in September 2017, the VA otolaryngologist stated that he was asked to "comment on right hearing loss in regard to noise exposure with resultant hearing loss in right ear secondary to hair cell damage, I did review articles referring to research in this regard."). The Court ascertains no reason to place Mr. Swanson back on the "hamster-wheel" to have the Board provide an explanation for something that seemingly cannot be explained. *See Coburn v. Nicholson*, 19 Vet.App. 427, 434 (2006) (Lance, J., dissenting) (discussing the "hamster-wheel reputation of veterans law"); *see also* 38 C.F.R. § 4.2 (2019) ("If . . . the examination report . . . does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").

The Court further notes that the October 2016 audiologist failed to mention or consider Dr. Kujawa's research, R. at 86-87; *see also* R. at 161 (RO deferring decision in February 2017 because the October 2016 examiner did not answer the Board's questions), and the March 2017 audiologist stated that she could not comment on Dr. Kujawa's research without speculation because she did not have access to those documents, R. at 126 (indicating that it would be more appropriate for a neurophysiologist, rather than a clinical audiologist, to apply the data she had ascertained from the article abstracts). Therefore, none of the VA examinations complied with the Board's May 2016 directive for an examiner (specifically, an otolaryngologist) to comment on "the impact, if any, of the line of research concluded by Dr. Sharon G. Kujawa," R. at 620, and thus the Board clearly erred in determining that there was substantial compliance with the prior remand order, R. at 3; *see Gill*, 26 Vet.App. at 391-92; *Dyment*, 13 Vet.App. at 147. Accordingly, reversal of that finding is appropriate. *See* 38 U.S.C. § 7261(a)(4) (the Court shall "in the case of a finding of material fact adverse to the claimant . . . reverse such a finding if the finding is clearly erroneous"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Court may overturn the Board's decision only if it is clearly erroneous); *see also Tucker v. West*, 11 Vet. App. 369, 374 (1998) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)) (reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision).

Similarly, because the Board previously remanded the right ear hearing loss claim to obtain a new VA examination that addressed research conducted by Dr. Kujawa and the subsequent VA examiners either did not reference Dr. Kujawa's research, stated that he or she did not have access to this research, or provided insufficient detail for the Board to ascertain that the examiner

considered this research, the Court finds that the October 2016, March 2017, and September 2017 examinations are thus inadequate and the Board erred in relying on them. *See Monzingo*, 26 Vet.App. at 105; *Nieves-Rodriguez*, 22 Vet.App. at 304; *see also D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). The Court will therefore remand the claim for further development, including obtaining a new VA examination, and readjudication. *See Hicks v. Brown*, 8 Vet.App. 458, 460-61 (1993) (an inadequate medical evaluation frustrates judicial review); 38 C.F.R. § 4.2.

Mr. Swanson is free on remand to submit additional evidence and argument, including any raised in his brief; he has 90 days from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted, including as it pertains to the inadequacy of the VA examinations. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also* 38 U.S.C. § 7112 (a remand must be performed in an expeditious manner); *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the foregoing, the portion of the November 28, 2017, Board decision finding substantial compliance with the May 2016 Board remand order is REVERSED and the remainder of the November 28, 2017, decision is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: December 23, 2019

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