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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7041

DAVID J. VENDITTI, APPELLANT,

v.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran David J. Venditti appeals through counsel a September 26, 2018, Board of Veterans' Appeals (Board) decision declining to reopen a previously denied claim for service connection for hepatitis C.¹ Record (R.) at 4-7. For the reasons that follow, the Court will set aside the September 2018 Board decision and remand the matter for further development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Venditti served on active duty in the U.S. Navy from September 1977 to October 1981. R. at 2045. He subsequently served in the New York Air National Guard from October 1981 to January 2007, *see* R. at 2050, including a period of active duty service in the U.S. Air Force from May 1983 to August 1983, R. at 2049. A National Guard service history documents additional time credited to active duty. R. at 2051-52.

¹ The Board also remanded a claim for service connection for depression. R. at 6-7. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider that issue at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2019).

Mr. Venditti underwent a separation examination in July 1981, several months before he separated from active duty U.S. Navy service. R. at 1584-85. At that time, the examiner noted a burn scar on Mr. Venditti's right lower leg but did not document any other identifying marks. R. at 1585. Mr. Venditti underwent a National Guard enlistment examination in February 1982,² at which time the examiner noted a left arm tattoo in addition to the right leg burn scar. R. at 1688-89.

In February 1994, Mr. Venditti underwent a liver biopsy that revealed chronic hepatitis C. R. at 1422. A contemporaneous summary from his treating physician documents Mr. Venditti's report that he was "noted to have abnormal liver enzymes when attempting to give blood in 1987," and that his "only risk factors for viral hepatitis include a tattoo which he obtained in 1978 and multiple sexual partners following a divorce in 1986." R. at 1405.

In April 2013, Mr. Venditti filed a claim for service connection for hepatitis C, among other conditions, contending that the virus "was contracted due to a tat[t]oo while on active duty with the U.S. Navy." R. at 1487. In September 2013, Mr. Venditti underwent a VA examination. R. at 1281-84, 1300-01. The examiner identified high risk sexual activity as a possible risk factor, R. at 1282, and opined that the veteran's hepatitis C was at least as likely as not incurred in or caused by service, noting documentation that the possible exposure was in the 1980s. R. at 1300-01. In October 2013 correspondence, Mr. Venditti's treating physician opined that "the exact mode of acquisition is not readily determined, [but] it appears that [Mr. Venditti] acquired the infection during his time of service in the armed forces." R. at 1280.

However, in a November 2013 rating decision, a VA regional office (RO) denied service connection for hepatitis C, reasoning that, because Mr. Venditti reported a tattoo as the infection source, and because his July 1981 Navy separation examination did not note a tattoo but his February 1982 National Guard enlistment examination did, Mr. Venditti must have obtained his tattoo—and his hepatitis C infection—when he was not on active duty. R. at 1264-65. Mr. Venditti was notified of this decision in December 2013. R. at 1256. He submitted a timely Notice of Disagreement (NOD) in January 2014, stating his intention to proceed, if necessary, to review by the Board. R. at 1253-55. The record includes a Statement of the Case (SOC) dated in July

² A May 2008 VA report indicates that Mr. Venditti's National Guard service began in October 1981. R. a 2050.

2015, R. at 1041-73, as well as an undated cover letter with a notation that a copy was sent to Mr. Venditti's current counsel, R. 1039-40.

In March 2016, Mr. Venditti submitted to the RO, through counsel, "a further statement in support of [his] claim." R. at 1017. He included a statement from a legal nurse consultant who opined that, based on review of the claims file, "it is at least as likely as not that the tattoo on the left bicep occurred in the late 1970s and early 1980s." R. at 1016. The following month, the RO responded that it could not accept the March 2016 correspondence as a Substantive Appeal of the 2013 rating decision because it was untimely as to the July 2015 SOC. R. at 860. The RO also notified him that he had one year from the date of that letter to file an NOD to initiate an appeal of that determination. R. at 861.

In May 2016, Mr. Venditti's counsel responded that neither he nor Mr. Venditti had received the July 2015 SOC and notified VA that Mr. Venditti's address had changed. R. at 857. Counsel enclosed a Substantive Appeal of the unfavorable 2013 rating decision and asked that it be accepted as timely because the July 2015 SOC was not received. R. at 857-58. The RO did not take further action on that matter.

In November 2017, Mr. Venditti filed another claim for service connection for hepatitis C. R. at 755-58. In a December 2017 decision, the RO found that the 2013 rating decision was final, determined that new and material evidence had not been submitted, and declined to reopen the claim. R. at 459-60. Mr. Venditti timely appealed that decision, R. at 438-39, and the RO issued an SOC in March 2018 continuing to deny reopening, R. at 390-422. Also, in March 2018, the RO issued a decision that the presumption of regularity with respect to mailing the July 2015 SOC was not rebutted. R. at 260-61. Mr. Venditti filed a timely Substantive Appeal as to the March 2018 SOC, R. at 244, but did not take further action regarding the March 2018 rating decision.

In the September 2018 decision on appeal, the Board made two findings of fact: that the 2013 rating decision was final and that new evidence added to the record since that date was cumulative of the evidence of record at the time of the final 2013 rating decision. R. at 4. In its discussion of the 2013 rating decision's finality, the Board noted that Mr. Venditti "initiated, but did not perfect, an appeal"; it did not discuss Mr. Venditti's allegation that neither he nor his counsel received the July 2015 SOC. R. at 5. As for whether new and material evidence had been submitted, the Board acknowledged that Mr. Venditti submitted new medical records—that it did not identify—supporting his contention that the source of his hepatitis C was a tattoo received

while he was on active duty, but found that the RO had previously reached a factual determination that the tattoo was not received during a period of active duty service and that none of the new evidence contradicted that finding. R. at 6. Therefore, the Board found that the new evidence was not material and declined to reopen the claim. *Id.* This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Venditti's appeal is timely and the Court has jurisdiction to review the September 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Prior to February 19, 2019, appellate review of an adverse RO decision was initiated by filing an NOD and completed by filing a Substantive Appeal after an SOC had been issued. 38 U.S.C. § 7105(a) (2012); 38 C.F.R. § 20.200 (2018); *see Murphy v. Shinseki*, 26 Vet.App. 510, 514 (2014); *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc). When an NOD is filed, the agency of original jurisdiction (AOJ) "will take such development or review action as it deems proper" and, "[i]f such action does not resolve the disagreement," the AOJ "shall prepare [an SOC]." 38 U.S.C. § 7105(d)(1); *see* 38 C.F.R. §§ 19.26(a), (d) (2018). If the AOJ fails to send a copy of the SOC to the claimant and his or her representative (if there is one), the disputed issue remains pending until it is adjudicated—either expressly or implicitly—by the AOJ. *See Ingram v. Nicholson*, 21 Vet.App. 232, 243 (2007); *Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995); *see generally Crumlich v. Wilkie*, 31 Vet.App. 194, 200-01 (2019).

"[T]he Court exercises de novo review over Board determinations that are critical to its jurisdiction," *Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011), such as timeliness in the appeal process, *see Young v. Shinseki*, 25 Vet.App. 201, 203-04 (2012) (the Court has jurisdiction to review the Board's jurisdiction determination); *King v. Nicholson*, 19 Vet.App. 406, 409 (2006) (same). Additionally, the Court has "jurisdiction over claims that an appellant has reasonably raised to the RO and that the [Board] has failed properly to adjudicate." *Buckley v. West*, 12 Vet.App. 76, 82-83 (1998) (citing *Collaro v. West*, 136 F.3d 1304, 1308-09 (Fed. Cir. 1998), and *Ledford v. West*, 136 F.3d 776 (Fed. Cir. 1998)).

For claims to reopen decided before February 19, 2019, a claimant must submit new and material evidence to reopen a prior, finally denied claim before there can be any consideration of the claim on the merits. *See* 38 U.S.C. § 5108 (2012) ("If new and material evidence is presented

or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim."'). The Court reviews for clear error the Board's determination that a claimant did not submit new and material evidence sufficient to reopen a previously denied claim. *See Suaviso v. Nicholson*, 19 Vet.App. 532, 533–34 (2006); *Elkins v. West*, 12 Vet.App. 209, 217 (1999) (en banc). "A factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

For any finding on a material issue of fact and law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 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 rejecting 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).

III. ANALYSIS

Mr. Venditti raises two primary arguments on appeal. First, he asserts that the Board failed to consider his contention that the 2013 rating decision is not final because neither he nor his attorney received the July 2015 SOC. Appellant's Brief (Br.) at 15-17. Specifically, he notes that he submitted a Substantive Appeal in May 2016 and requested that, under the circumstances of this case, VA consider whether it was timely. *Id.* at 16. In the alternative, he asserts that the Board provided inadequate reasons or bases for its determination that he did not submit new and material evidence because it failed to explain why the new evidence, specifically the March 2016 nurse consultant's opinion, was not, in conjunction with the evidence already of record, material to his claim. *Id.* at 8-15.

The Secretary disputes both contentions. Regarding the finality of the 2013 rating decision and presumption of regularity, the Secretary counters that the RO adjudicated these matters in April 2016 and March 2018 and that Mr. Venditti did not initiate appeals of those determinations. Secretary's Br. at 10-11. The Secretary asserts that the Board, therefore, "did not have jurisdiction

to consider whether [the] March 2016 statement could constitute a timely [S]ubstantive [A]ppeal." *Id.* at 10. He further asserts that, because the Board lacked jurisdiction over that question, it is not properly before the Court and the Court should affirm the Board's finding that the 2013 rating decision is final. *Id.* at 10-11. As for whether Mr. Venditti submitted new and material evidence sufficient to reopen his hepatitis C claim, the Secretary asserts that no new evidence would be material unless it "provide[s] corroborating evidence that [Mr. Venditti's] hepatitis C was related to his active duty." *Id.* at 13. The Secretary concedes that the Board did not discuss the nurse consultant's opinion, *id.* at 14, but argues that any error in its failure to do so is not prejudicial because the opinion was "merely redundant of the evidence already considered in November 2013," *id.* at 15.

In reply, Mr. Venditti notes that the timeliness of a Substantive Appeal is, under statute, a determination for the Board—and not the RO—to address. Reply Br. at 1-3. Therefore, the RO's March 2018 decision is not dispositive of that question, and the Board was required to consider his argument that the July 2015 SOC was not properly issued. *Id.* at 1-5. As for the materiality of the nurse consultant's opinion, Mr. Venditti contends that, when—as is required—it is considered with the other evidence of record, it suggests that he was tattooed during a period of time unaccounted for by his service examinations, for example, during the intervening time between his July 1981 separation examination and his actual separation in October 1981. *Id.* at 5-7.

The first question that must be resolved is whether the 2013 rating decision is final; if it is not, Mr. Venditti need not reopen his claim. *See Ingram*, 21 Vet.App. at 243; *Tablazon*, 8 Vet.App. at 361. His appeal of the Board's finding that the 2013 rating decision was final includes two separate arguments: (1) whether the presumption of regularity in VA's mailing of the July 2015 SOC attached (and whether the Board was obligated to discuss that question absent an NOD to the RO's March 2018 determination that the presumption was not rebutted) and (2) whether, under the circumstances alleged, the Board was obligated to address whether his May 2016 Substantive Appeal was timely or consider whether to equitably toll the 60-day period for filing a Substantive Appeal.

The Court concludes that the Board failed to adequately address the second argument. As Mr. Venditti correctly noted, an alleged failure to meet the 60-day period for filing a Substantive Appeal is not a jurisdictional bar to the Board's adjudication of a matter. *Percy v. Shinseki*, 23 Vet.App. 37, 45-46 (2009); *see Hunt v. Nicholson*, 20 Vet.App. 519, 524-25 (2006)

(recognizing that allowing equitable tolling of the deadline for filing Substantive Appeals is in accordance with maintaining the "nonadversarial, uniquely pro-veteran claims process within VA"); *Rowell v. Principi*, 4 Vet.App. 9, 17 (1993) ("[F]ailure to file a timely [Substantive] Appeal does not automatically foreclose an appeal, render a claim final, or deprive the [Board] of jurisdiction."). To that extent, the Secretary's contention that the Board lacked jurisdiction to consider the timeliness of Mr. Venditti's March 2016 statement as a Substantive Appeal is contrary to established precedent.

Additionally, it is well established that the Board is required to consider all issues that are either raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 3 (2009) (per curiam order) (noting that the Court has "jurisdiction to remand to the Board any matters that were reasonably raised below that the Board should have decided, with regard to a claim properly before the Court, but failed to do so"). The Secretary does not dispute that Mr. Venditti requested below that VA consider whether his May 2016 Substantive Appeal was timely. *See* Secretary's Br. at 8. Rather, the Secretary argues that the matter was properly adjudicated by the RO, that the RO's adjudication is now final, that the Board lacked jurisdiction to consider it, and that Mr. Venditti is foreclosed from raising the matter to the Court. *Id.* at 8-9. But Mr. Venditti is correct that, under the version of the governing statute then in effect, "questions as to timeliness or adequacy of [a Substantive Appeal] *shall be determined by the Board.*" 38 U.S.C. § 7105(d)(3) (2018) (emphasis added). Thus, whether the May 2016 Substantive Appeal was timely was not properly before the RO, and adjudication of the matter by the RO would not vitiate the Board's responsibility to consider the argument.

Furthermore, in accordance with the limits on its authority, the RO's March 2018 decision did not, in fact, adjudicate whether the May 2016 Substantive Appeal was timely filed, in light of his allegation that the SOC was not received, or whether the 60-day period for filing a Substantive Appeal should be equitably tolled. *See* R. at 260-61. Rather, the RO addressed only whether VA should be afforded the presumption of regularity in mailing the July 2015 SOC. R. at 260. Therefore, the Court cannot conclude that Mr. Venditti forfeited his opportunity for Board review of his assertions that his May 2016 Substantive Appeal was timely or that the 60-day period should be equitably tolled. Instead, because the Board did not consider these reasonably raised issues, the Court concludes that the Board provided inadequate reasons or bases for its

determination that the 2013 decision was final; consequently, remand is required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is required where the Board has, *inter alia*, failed to provide an adequate statement of reasons or bases for its determinations).

Per *Quirin*, the Court will provide additional guidance to the Board on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted). If the Board again determines, after considering Mr. Venditti's arguments regarding the timeliness of his May 2016 Substantive Appeal, that the 2013 rating decision is final, it must specifically address whether the nurse consultant's opinion is, when considered with the previous evidence of record, material evidence sufficient to reopen the claim. In the September 2018 decision on appeal, the Board determined that Mr. Venditti submitted new evidence, but that the evidence was not material. R. at 6. "Material evidence" is defined as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a) (2019). Here, Mr. Venditti asserts that, when considered with the previous evidence of record showing at least one period of active service—July to October 1981—not covered by his service examinations, the nurse consultant's opinion that his tattoo was received in the late 1970s or early 1980s relates to an unestablished fact—in-service incurrence—necessary to substantiate his claim. Reply Br. at 5-7. The Board failed to discuss in any detail its reasons for concluding that no material evidence was submitted, which frustrates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527; *Gilbert*, 1 Vet.App. at 56-57.

In accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (*per curiam* order), Mr. Venditti is free to submit any additional arguments and evidence on remand, including any additional arguments he made to this Court; the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the September 26, 2018, Board decision is SET ASIDE, and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: December 26, 2019

Copies to:

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