

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Docket No. 15-3197

GREGORY HEAL,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee

Appeal from the Board of Veterans Appeals
Docket Number 10-27 828

BRIEF OF APPELLANT, GREGORY M. HEAL

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STATEMENT OF THE ISSUES

1. Whether the Board erred by failing to adequately explain the reasons and bases for its denial of the veteran's service-connection claim.
2. Whether the Board erred in finding that the VA has satisfied its duty to assist where, as here, the VA relied upon an inadequate VA examination and associated nexus opinion to deny the veteran's service-connection claim.
3. Whether the Board erred by failing to consider all of the evidence favorable to the veteran's claim concerning personal assault.
4. In light of the Board's reliance on an inadequate VA examination, whether it committed further error by refusing to accord the veteran a new examination with associated nexus opinion that considered all of the veteran's claims including PTSD due to personal assault.

STATEMENT OF THE CASE

A. Procedural history

This matter was before the Board of Veterans' Appeals (Board) on appeal from a rating decision of the Togus, Maine regional office (RO) that denied Mr. Heal's service-connection claim for posttraumatic stress disorder (PTSD), which had previously been denied as a claim for anxiety disorder. (R. 3; *see also* R. 786-91, 2288-93).

Thereafter, in March 2011, the veteran testified at a hearing. (R. 3; *see also* 304-21). In August 2011, the Board reopened Mr. Heal's claim and remanded the claim to encompass any acquired psychiatric disorder pursuant to this Court's holding in Clemons v. Shinseki, Vet. App. 1, 8 (2009). (R. 3; *see also* R. 278-90). The Board also instructed that Mr. Heal was to be provided with a VA examination. *Id.*

In January 2013, the Board requested a medical opinion on the issues of etiology and nexus. (R. 166-68). The opinion was completed by Dr. Rubin on February 11, 2013. (R. 171-77). In June 2013, a private psychiatrist, Dr. Newcomb, examined Mr. Heal, reviewed relevant records from the case file, and submitted an examination report responding to Dr. Rubin's report. (R. 178-81).

On November 1, 2013, the Board issued a decision, denying Mr. Heal's service-connection claim. (R. 111-26). However, following Mr. Heal's appeal, this Court vacated the Board's decision in June 2014 and remanded the veteran's case for further agency action. (R. 100, *see also* 101-05). Following the Court's remand, the veteran was afforded a second hearing in January 2015. (R. 3, *see also* R. 41-55). Thereafter, the Board again denied Mr. Heal's service-connection claim on April 30, 2013. (R. 2-23). Accordingly, Mr. Heal, who served on active duty from September 1975 to February 1977, (R. 3), now seeks judicial review of the Board's April 30, 2015, decision.

B. The Board's decision

In its most recent denial, the Board determined that the VA has satisfied its statutory duties with respect to notice and assistance. (*See generally* R. 4-9). With respect to the duty to provide adequate notice, the Board wrote that the VA's July 2008 pre-adjudication notice letter fully addressed the required notice elements for service connection claims. (R. 4).

As a separate issue, the Board devoted considerable space to rebutting the parties' prior contention (incorporated in the Court's June 2014 remand) that the Board had not complied with the notice requirements mandated in 38 C.F.R. § 3.304(f)(5) dealing with a PTSD claim based on personal assault. (R. 5-8). Essentially, the Board argued that it had, in fact, complied with the regulatory notice requirements. The Board also found that

the provisions of 38 C.F.R. § 3.103(c)(2) regarding notice duties of a hearing officer had been satisfied, as well. (R. 9).

Regarding the duty to assist, the Board found that the VA had satisfied its obligations in this case. (R. 8-9). Specifically, the Board noted that the VA has obtained all relevant records and, most recently, obtained a medical opinion concerning nexus following its August 2011 remand. (R. 8). The Board further determined that no additional medical opinion are required in this case. (R. 8-9).

On the merits, the Board found that there is not clear and unmistakable evidence that any psychiatric disability preexisted Mr. Heal's service. (R. 4; Findings of Fact 1). The Board also found that the evidence of record does not support a PTSD diagnosis. (R. 4; Findings of Fact 2). In addition, the Board found that no acquired psychiatric disorder had its onset during Mr. Heal's active duty service, or for many years thereafter, and did not result from any event in service. (R. 4; Findings of Fact 3). Accordingly, the Board concluded that an acquired psychiatric disorder was not incurred in or aggravated by active duty service. (R. 4; Conclusion of Law).

In reaching its findings and conclusion, the Board discussed, in general terms, the bases for granting a service-connection claim, including the special requirements for PTSD claims. (*See generally* R. 9-10). The Board also discussed and analyzed, in general terms, the evidence of record that it found probative to the veteran's claim. (*See generally* R. 11-22).

In its analysis of the evidence, the Board determined that the record does not reflect a valid diagnosis of PTSD based on his credible in-service stressors (teasing and death of his mother) and that Mr. Heal's alleged stressor involving personal assault is not credible. (*See generally* R. 11-13). However, as explained below, in reaching that conclusion, the Board simply ignored evidence of record corroborating the veteran's

assertions of in-service personal assault. (R. 552). The Board acknowledged that the veteran does currently have both depressive and anxiety disorders. (R. 11).

Regarding the veteran's current psychiatric disorders (depression and anxiety), the Board further acknowledged that events that occurred during Mr. Heal's service could satisfy the second criteria for service connection. (R. 14). Accordingly, the Board concluded that the third criteria, *i.e.*, whether a nexus exists between the in-service events and the veterans current psychiatric disorders, is the issue presented in this matter. *Id.*

Although the Board acknowledged that the record contains competent opinion evidence both supporting and not supporting a nexus, the Board concluded that the negative nexus evidence was most probative. (R. 15-22). Specifically, the Board gave the greatest weight to the February 2013 negative nexus opinion of Dr. Rubin, and lesser weight to the positive nexus opinion of Dr. Newcomb. (*See generally* R. 19-22). The Board concluded that the preponderance of the evidence was against Mr. Heal's claim and, therefore, that application of the benefit of the doubt doctrine is not warranted in the present case. *Id.*

In reaching that conclusion, however, the Board criticized Dr. Newcomb's favorable nexus opinion because the psychiatrist relied on the veteran's assertions that he had been assaulted while on active duty. (R. 22). As explained below, however, the Board's findings and conclusion in this case are seriously flawed, including its erroneous finding that the veteran was not personally assaulted while on active duty. Therefore, those findings and conclusions should be rejected by the Court.

SUMMARY OF ARGUMENT

In the present case, the Board did not provide an adequate explanation of its reasons and bases for denying the veteran's claim for an acquired psychiatric disorder. The Board's error was especially egregious with regard to its denial of the veteran's PTSD

claim. Essentially, the Board mistakenly concluded that the veteran's allegations of in-service personal assault are not credible. That determination, however, does not bear scrutiny because the Board simply ignored direct and indirect evidence of personal assault during the veteran's active duty service.

In addition, the Board denied the overall service-connection claim based on the unfavorable nexus opinion of a VA examiner who was not privy to the veteran's entire service-connection claim. Specifically, the examiner was unaware that the veteran alleged service-connection due to personal assault. Therefore, the examiner did not address a critical portion of the veteran's claim. Lastly, because the aforementioned VA examination was inadequate, the Board committed further serious error by refusing to provide the veteran with a new VA medical examination, including nexus opinion. In other words, the Board erroneously found that the VA had satisfied its duty to assist Mr. Heal. In fact, it did not.

ARGUMENT

I. The Board's denial of Mr. Heal's claim is not supported by adequate reason and bases.

A. Introduction

The Board's explanation of the reasons and bases for its April 30, 2015, decision is inadequate with respect to its denial of the veteran's service-connection claim for an acquired psychiatric disorder and, therefore, violates 38 U.S.C. §7104(d)(1). Masors v. Derwinski, 2 Vet. App. 181, 188 (1992); Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990). Pursuant to the statute, the Board was required to provide a written statement of reasons or bases explaining its findings of fact and conclusions of law to enable Mr. Heal to understand the basis for the decision and also to facilitate judicial review.

To comply with the statutory requirement, the Board was required to consider all

applicable provisions of law and regulation, analyze the credibility and probative value of evidence, account for evidence it found persuasive or unpersuasive, and provide adequate reasons for rejecting material evidence favorable to the claim. Tatum v. Shinseki, 23 Vet. App. 152, 155 (2009); *see also* Gabrielson v. Brown, 7 Vet. App. 36, 40 (1994); Abernathy v. Principi, 3 Vet. App. 461, 465 (1992); Simon v. Derwinski, 2 Vet. App. 621, 622 (1992); Hatlestad v. Derwinski, 1 Vet. App. 164, 169 (1991).

In the present case, the Board's reasons and bases are inadequate for several reasons, as explained in detail below. Essentially, the Board's conclusion that the veteran does not have an acquired psychiatric disorder that is related to his active duty service is seriously flawed and should be rejected by the Court. Contrary to the Board's contentions, its conclusions that Plaintiff does not have a current PTSD disorder, that his allegations of personal assault are not credible, and that the 2013 medical opinion upon which it relied is adequate *all* lack substantial support and reflect legal error. Accordingly, the Board's finding that the VA satisfied its duty to assist pursuant to 38 U.S.C. § 5103A cannot be sustained in this case. (R. 5).

The statute provides that the VA shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate his claims. 38 U.S.C. § 5103A(a)(1). Here, contrary to the Board's flawed conclusion, the VA failed to do so. Specifically, the duty to assist requires that the assistance provided by the VA shall include providing a medical examination or obtaining a medical opinion where it is necessary in order to make a decision on the veteran's claim. 38 U.S.C. § 5103A(d)(1); *see also* McLendon v. Nicholson, 20 Vet. App. 79 (2006).

This Court has consistently held that, pursuant to 38 C.F.R. §§ 4.1 and 4.2, an examination report must, among other things, provide an *adequate rationale* to support an understanding of the conclusion contained therein. *See, e.g.*, Bloom v. West, 12 Vet.

App. 185, 187 (1999); Goss v. Brown, 9 Vet. App. 109, 114 (1996); Hicks v. Brown, 8 Vet. App. 417, 421 (1996); Stanton v. Brown, 5 Vet. App. 564, 569 (1993). As explained below, contrary to the Board's conclusion, the VA examination report with associated nexus opinion relied upon by the Board to deny Mr. Heal's claim is not adequate.

Here, the physician who completed the 2013 medical opinion was not apprised of Mr. Heal's specific service-connection claim for PTSD and, in addition, was unaware of any in-service personal assault. Therefore, the 2013 examiner did not render any opinion which addressed all of the critical issues in this case. As a result, the Board committed further error by refusing to obtain a new medical nexus opinion as requested by the veteran.

This Court has held that when the Board adopts a medical examiner's opinion as its own statement of reasons or bases, the examiner must have "fairly considered the material evidence which appears to support the appellant's position." Wray v. Brown, 7 Vet. App. 488, 493 (1995) (citing Gabrielson, 7 Vet. App. at 40). In this case, the examiner did not do so. Accordingly, because it was based on the inadequate etiology opinion contained in the January 2013 VA medical opinion, the Board's explanation of its reasons and bases was fundamentally flawed.

Moreover, where as here, the Board has previously remanded the veteran's claim, this Court has held that the remand, as a matter of law, confers upon the appellant the right to substantial compliance with the remand order. Stegall v. West, 11 Vet. App. 268, 271 (1998); *see also* D'Aries v. Peake, 22 Vet. App. 97, 105 (2008)). Accordingly, when compliance with the remand order does not occur, as is the case with the Board's reliance on the inadequate 2013 medical opinion in the present matter, "the Board itself errs in failing to insure compliance." Stegall, 11 Vet. App. at 271.

The Board also failed to afford Mr. Heal the benefit of the doubt, constituting

further error. For example, in concluding that the preponderance of the evidence is against the veteran's claim, the Board found that his allegations of personal assault are not credible and, therefore, cannot support his service-connection claim for PTSD. In doing so, however, the Board ignored competent in-service evidence directly contradicting the Board's flawed finding. Accordingly, the Board's errors, as enumerated above, irreparably tainted its statement of reasons or bases in the present case which, in turn, precludes effective judicial review. *See Quirin v. Shinseki*, 22 Vet. App. 390, 398 (2009) (citing *Tucker v. West*, 11 Vet. App. 369, 374 (1998)).

B. The Board's rejection of the veteran's service connection claim for an acquired psychiatric disorder does not bear scrutiny.

1. The Board erroneously concluded that Mr. Heal did not suffer personal assaults during service and does not currently suffer from PTSD.

Regarding the veteran's PTSD claim, the Board conceded only two in-service stressors, *i.e.*, repeated verbal teasing due to poor eyesight and the death of his mother while he was on active duty. The Board rejected Mr. Heal's contention that he was also physically assaulted during service, finding that the allegation was not credible. (R. 12, 13). Accordingly, the Board denied the service-connection claim for PTSD based on a finding that the two conceded stressors were not sufficient to support a valid diagnosis of the disorder. (R. 12-13). That was error.

The Board's conclusion that the veteran's allegation of PTSD based on personal assault is not credible is directly contradicted by the evidence of record. Specifically, the record contains the statement of the veteran's platoon sergeant corroborating that Mr. Heal "*continues to get in fights and arguments with other members of the company.*" (R. 552) (emphasis added). The Board, moreover, failed to address the sergeant's statement or to offer any explanation for its conclusion that Mr. Heal was not assaulted during

service. On the contrary, the Board merely wrote that “during a June 2013 private psychiatric examination, the Veteran apparently reported a third stressor of at times getting in fights and often being beaten up after being ridiculed in service. However, for the reasons discussed below, the Board finds this third stressor involving physical assault not to be credible.” (R. 12).

The Board’s decision went on to discuss, (R. 14), at some length why the Board concluded that there was no physical assault, only “verbal teasing.” In doing so, however, *the Board ignored the specific evidence in the record corroborating Mr. Heal's personal assault claim.* The Board asserted that the fact that Mr. Heal had not admitted sooner that he was assaulted made his statements not credible. But by ignoring the evidence of record establishing that Mr. Heal was involved in fights with other members of his unit, the Board's conclusion is irreparably tainted. In other words, the Board concluded that the evidence of a personal assault stressor was not credible *without considering the in-service evidence* that the stressor occurred.

Moreover, the evidence supporting the personal assault stressor is highly probative. The sergeant was very specific. He wrote that Mr. Heal was involved in *both “fights” and “arguments.”* While the “arguments” would reasonably refer to verbal disputes, his assertion that the disputes also involved “*fights*” leaves no reasonable doubt that physical altercations also occurred. In addition, independent, objective, *contemporaneous evidence* directly supporting the veteran's claim would normally be found to be more probative than contradictory subjective recollections 30 or more years after the fact. Here, however, the Board simply ignored the former and considered only the latter. That was error.

In this case, the sergeant's report should have been determinative. There was simply no logical reason for the sergeant to assert that Mr. Heal was involved in both

fights and arguments if he was only involved in arguments. Indeed, aside from being obviously redundant, such an interpretation would violate the common rules of linguistic interpretation. The sergeant wrote *both* fights and arguments and in the absence of contrary contemporaneous evidence, his statement speaks for itself that the veteran was involved in both physical and verbal altercations.

Moreover, the veteran must be given the benefit of the doubt on all material issues. Here, where there is direct, independent, contemporaneous evidence reflecting that personal assaults occurred, the veteran must be given the benefit of the doubt on that issue. The Board, however, erroneously failed to do so. Accordingly, the Board has simply ignored critical evidence of record directly supporting the veteran's personal assault claim. The Board, moreover, was required to consider *all of the evidence in the record* under 38 U.S.C. § 7104(a). Here it failed to do so, arriving at a credibility determination that is directly contradicted by the record.

The Board then compounded its error. In asserting that it should rely upon Dr. Rubin's negative opinion and reject the positive nexus opinion by Dr. Newcomb, the Board specifically relied upon this erroneous conclusion that Mr. Heal was not getting into fights during service. (R. 22). Thus, the Board wrote:

as noted above, Dr. J.L.N.'s opinion was based, in part, on the Veteran's report that '*he would often get in fights with others and would often be beaten up with the origin of the fight often being in ridicule directed at him,*' and that '*he was shunned, beaten, humiliated and marginalized due to his significant visual impairments.*' *However, as discussed above, the Board does not find any such assertions of personal assault to be credible.*

Id. (Emphasis added). While the Board has a degree of latitude in determining credibility, it cannot reasonably be argued that the Board was allowed to simply ignore the evidence that corroborates the veteran's claim and then rely on the purported absence of such evidence as the basis to reject the psychiatrist's favorable nexus opinion. Thus, the record reflects specific evidence supporting the conclusion that the veteran should

have been afforded the benefit of the doubt on the issue of in-service personal assaults.

Moreover, the record not only contains direct evidence from the veteran's platoon sergeant supporting the allegations of personal assault, but indirect evidence, as well. Specifically, the Board further acknowledged that, under the governing regulations, evidence of personal assault in PTSD claims may be established by evidence other than the veteran's service record. 38 C.F.R. § 3.304(f)(5). Such evidence includes evidence of behavioral changes such as requests for duty transfer, deterioration in performance and performance evaluations, social behavior changes such as disregard for military authority, depression or anxiety, and substance abuse. *Id.* (See also R. 5, 7).

Here, the Board acknowledged that Mr. Heal has been medically diagnosed with PTSD. (R. 11). Moreover, a competent medical diagnosis of PTSD must be assumed to be consistent with criteria enumerated in the DSM. (R. 10, 11). See also Cohen v. Brown, 10 Vet. App. 128, 153 (1997). The Board, however, rejected the veteran's allegations of PTSD based on personal assault despite the fact that, during active duty service, the record reflects that he exhibited the very behavioral changes enumerated in the regulation. Indeed, the Board acknowledged the behavioral problems but simply ignored them in the context of the personal assault allegations.

Specifically, the Board acknowledged that Mr. Heal did not have a pre-existing psychiatric disorder and, therefore, was presumed to be psychologically sound at the time he entered service. (R. 15). In reaching that conclusion, the Board relied, in part, on the 2013 medical opinion of Dr. Rubin. (R. 16; see also R. 171-77). Dr. Rubin expressly reported that no psychiatric disorder other than excessive alcohol intake pre-existed service. (R. 176-77).

Notably, however, although Dr. Rubin reported excessive alcohol use prior to service, the record reflects that it was *not disruptive* at the time he entered service.

Indeed, it did not prevent his acceptance into active duty service. Moreover, as Dr. Rubin specifically pointed out, once in the service, Mr. Heal qualified as a Light Infantryman and, was promoted to Private First Class. (R. 172, 174). Thus, the record supports a finding that Mr. Heal was initially performing well.

The Board acknowledged Dr. Rubin's finding that Mr. Heal was initially successful during service. (R. 20). During service, however, the veteran's condition drastically deteriorated which he attribute, in part, to personal assaults. The Board acknowledged that, at the time of his discharge, the veteran stated he had depression and excessive worry. (R. 17). Notably, depression and anxiety constitute supporting evidence for personal assault as a PTSD stressor. 38 C.F.R. § 3.304(f)(5)

In addition, in contrast to his initial in-service success, the Board noted that Dr. Rubin reported that the veteran subsequently exhibited "*behavioral and disciplinary problems* for which he received reprimands, counseling, and ultimately discharge from the military." (R. 19) (emphasis added). Indeed, the Board noted that Dr. Rubin reported that Mr. Heal deliberately used excessive drinking as a means to get out of further military service. (R. 20). The Board conceded that the veteran explicitly testified that he used alcohol during service as a means "to relieve psychiatric symptoms." (R. 16).

Thus, by the Board's own admission (supported by Dr. Rubin's findings), the record reflects substantial indirect evidence supporting Mr. Heal's claim of in-service personal assault in addition to the direct evidence. Indeed, his military service was initially successful but following the personal assaults his condition drastically deteriorated. Specifically, he experienced depression and anxiety, he began drinking more and more excessively, he got into trouble with the military authorities, and was ultimately discharged (which Dr. Rubin believes was a deliberate strategy). In sum, the evidence reflects a once successful young man who became increasingly unable to cope

with military service as a result of personal assaults. That indirect evidence of personal assault, corroborates the *direct evidence* from Mr. Heal's platoon sergeant who expressly wrote that Mr. Heal "continues to get in fights" with other members of his unit.

Given the numerous in-service behavioral changes and deterioration in performance exhibited by Mr. Heal, as well as the direct evidence of in-service, personal assaults, the Board's failure to meaningfully consider the numerous evidentiary indications that Mr. Heal was personally assaulted constitutes error that requires that this case be remanded.

2. In denying the veteran's service-connection claim as it concerns PTSD, the Board erroneously relied on an inadequate medical opinion.

In the present case, the Board's letter requesting a medical etiology letter was tainted by the fact that it essentially ignored Mr. Heal's claim for PTSD. (R. 166-68). Moreover, the request was further compromised by the fact that it was made prior to Mr. Heal's revelation that he was personally assaulted during service. Thus, Dr. Rubin, who rendered his opinion in January 2013, was unaware of material facts related to Mr. Heal's claim and, therefore, based his etiology opinion on an incomplete record.

Nor was the error harmless. As discussed above, Dr. Rubin noted numerous behavioral changes during service, including deteriorating performance, troubles with military authorities, increased alcohol use, depression, anxiety, and a deliberate attempt to get out of active duty. Such evidence, alone, constitutes valid corroboration of the veteran's personal assault stressor. Here, moreover, as discussed above, there is also direct evidence in the record that Mr. Heal was assaulted.

Thus, Dr. Rubin's medical opinion was flawed since it did not address a critical aspect the Mr. Heal's service-connection claim despite Dr. Rubin's claim that he had read the C-File. Therefore, the Board's denial of the veteran's claim must fail. *See, e.g.,*

Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (2008) (explaining that “[a] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two”) (emphasis added); Parrish v. Shinseki, 24 Vet. App. 391, 401 (2011) (providing that “the foundation and rationale of a medical opinion are crucial when the Board compares medical opinions and assesses weight to be provided thereto”) (emphasis added); Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007).

Here, Dr. Rubin’s failure to consider the veteran’s PTSD allegations, the evidence supporting that claim and, most importantly, the evidence supporting personal assault as an in-service PTSD stressor constitutes serious error. Wray v. Brown, 7 Vet. App. 488, 493 (1995) (explaining that a VA examiner must have “fairly considered the material evidence which appears to support the appellant's position”). Here, Dr. Rubin, upon whose opinion the Board relied, did not do so.

This Court's prior decision in Gabrielson v. Brown, 7 Vet. App. 36 (1994), is instructive. In that case, the Court noted that the medical examiner failed to address evidence of record that contradicted the examiner's conclusion and supported the veteran's claim. *Id.* at 40. The Court asserted that “under these circumstances, the IME opinion here raises more questions than it purports to answer and indeed provides a weak foundation upon which to base a decision.” *Id.*

The Court further explained that:

An IME opinion is only that, an opinion. In an adversarial proceeding, such an opinion would have been subject to cross-examination on its factual underpinnings and its expert conclusions. The VA claims adjudication process is not adversarial, but the Board's statutory obligation under 38 U.S.C. § 7104(d)(1) to state “the reasons or bases for [its] findings and conclusions” serves a function similar to that of cross-examination in adversarial litigation. *The BVA cannot evade this statutory responsibility merely by adopting an IME opinion as its own, where, as here, the IME opinion fails to discuss all the evidence which appears to support appellant's position.* Accordingly, the BVA decision here contained ‘neither

an analysis of the credibility or probative value of the evidence submitted by and on behalf of appellant in support of [her] claim nor a statement of the reasons or bases for the implicit rejection of this evidence by the Board.' Therefore, the case should be remanded. *Id.* (quoting Gilbert v. Derwinski, 1 Vet. App. 49, 59 (1990)) (emphasis added).

Here, Dr. Rubin did not meaningfully consider either the veteran's PTSD claim, generally, or the evidence, both direct and indirect, supporting his allegations of personal assault, specifically. The latter error is especially important because, as described above, the physician described several in-service events and behavioral changes that could directly support personal assaults during service.

In addition, the mere fact that Dr. Rubin rendered his opinion prior to the veteran's allegations of personal assault cannot salvage the Board's flawed conclusion that Mr. Heal does not have PTSD. PTSD based on personal assault constitutes a material element of the veteran's service-connection claim. Moreover, the record contains substantial evidence supporting the occurrence of in-service personal assaults, including direct, objective, contemporaneous evidence from Mr. Heal's platoon sergeant indicating that he had been involved in fights. Thus, Dr. Rubin's opinion, which does not address either the PTSD claim or the sufficiency of personal assaults to support a PTSD diagnosis was inadequate.

As this Court held in Gabrielson, where, as here, the Board adopted a medical nexus opinion as its own that failed to discuss all the evidence supporting the veteran's claim, the resultant error requires that the case be remanded. Gabrielson, 7 Vet. App. at 40; *cf.* Nieves-Rodriguez, 22 Vet. App. at 301 (explaining that "[a] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two").

II. The Board committed further error by refusing to obtain a new medical nexus opinion.

Where, as here, the Board has already determined that a medical opinion is necessary in order to fairly determine the veteran's service-connection claim, it is well established that the opinion must be adequate. *See, e.g., Barr v. Nicholson*, 21 Vet. App. 303 (2007). Here, for all of the reasons discussed, *supra*, Dr. Rubin's 2013 opinion is not adequate to fairly and accurately determine Mr. Heal's service-connection claim.

In the circumstances presented, the Board was required to obtain a new medical opinion to, at a minimum, address and resolve the outstanding issues related to the veteran's PTSD claim based on personal assault. Accordingly, the Board's refusal to obtain a new opinion, (R.8-9), constitutes additional serious error. *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

Specifically, in *McLendon*, the Court set forth the criteria under which the VA must provide an examination or obtain a medical opinion. *McLendon*, 20 Vet. App. at 81 (citing 38 U.S.C. § 5103A(d)(2)). With respect to the first element, it is undisputed that Mr. Heal has been medically diagnosed with PTSD, as the Board acknowledged. (R. 11). Mr. Heal has satisfied the second element, as well. For example, the Board conceded that the record establishes two legitimate PTSD stressors (teasing and his mother's death). (R. 12). That alone satisfies the second element. Here, in addition, the veteran also has evidence of personal assault as a third stressor. *Id.* As described in detail above, moreover, the record reflects both direct and indirect evidence of personal assault. The Board simply ignored that evidence even despite its acknowledgment that personal assault can be shown by indirect evidence outside of the veteran's service records. (R. 7).

With respect to the third element, Mr. Heal's platoon sergeant confirms that he was involved in fights with other members of his military unit. (R. 552). In addition, Dr. Rubin reported that, although Mr. Heal's active duty service was initially marked by

success, including a promotion, his behavior dramatically deteriorated over time to the point where he was discharged from service. (*See, e.g.*, R. 166-68). Such deterioration occurred during the time period when Mr. Heal alleges he was repeatedly assaulted.

The specific events and behavior changes noted by Dr. Rubin are precisely those that may support an allegation of personal assault, including deterioration in performance, alcohol abuse, depression and anxiety, and disregard for authority. Thus, there is both direct and indirect evidence in the record that supports the veteran's allegation of personal assault.

Notably, the third McLendon element requires *only an indication* that the current disability *may be related* to the veteran's service. The third element, therefore, involves only "a low threshold." McLendon, 20 Vet. App. at 83. Indeed, this Court has stated that the type of evidence that indicates that there may be a nexus includes "medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits." *Id.* Here, the evidence far surpasses the low threshold envisioned under the third element.

The fourth and final McLendon element requires that where, as here, the evidence is sufficient to indicate that a nexus *may exist*, "there must be a medical opinion that provides some non-speculative determination as to the degree of likelihood that a disability was caused by an in-service disease or incident to constitute sufficient medical evidence on which the Board can render a decision with regard to nexus. McLendon, 20 Vet. App. at 85. Thus, the Board's rejection of Dr. Newcomb's report was its refusal to obtain a new and adequate medical opinion in this case constitutes error and must be rejected by the Court.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court vacate the Board's April 30, 2015, decision and remand the veteran's claim for further administrative action.

DATED: January 14, 2016 Respectfully submitted,

/s/Francis M. Jackson
Francis M. Jackson, for the Appellant

CERTIFICATE OF SERVICE

I, Francis M. Jackson, hereby certify that I have served a copy of this Brief of the Appellant electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following attorney(s) on the date listed below:

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