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

REPLY BRIEF OF APPELLANT, GREGORY M. HEAL

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REPLY ARGUMENT

Contrary to the Secretary's arguments, the Board's explanation of its reasons and bases for the denial is inadequate and therefore, violates 38 U.S.C. §7104(d)(1). *See, e.g.,* Masors v. Derwinski, 2 Vet. App. 181, 188 (1992); Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990).

Further, the Board erroneously found that the VA satisfied its duty to assist pursuant to 38 U.S.C. § 5103A despite relying on seriously flawed VA medical opinion. Specifically, the flawed VA examination evidence relied upon by the Board failed to include an adequate rationale to support an understanding of the negative nexus conclusions 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).

Indeed, the negative nexus conclusion relied upon by the Board is inherently unreliable and reflects a failure by both the examiner and the Board to adequately consider and address all of the material evidence favorable to the veteran's claim, in this case, his allegation of in-service personal assault as a claimed stressor resulting in PTSD.

As this Court has previously held, 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 v. Brown, 7 Vet. App. 36, 40 (1994)).

Here, in addition, the Board exacerbated its errors by failing to ensure that its previous remand directives concerning the need for an adequate VA examination and associated nexus opinion were substantially complied with. *See, e.g.,* Stegall v. West, 11 Vet. App. 268, 271 (1998); D 'Aries v. Peake, 22 Vet. App. 97, 105 (2008)). Therefore,

when compliance with the remand order does not occur, as is the case with the Board's reliance on the inadequate medical opinion in the present matter, "the Board itself errs in failing to insure compliance." Stegall, 11 Vet. App. at 271.

In the present case, 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, (R. 22), 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 either ignored or failed to adequately assess both in-service and post-service evidence that contradicts the Board's flawed finding.

Accordingly, because the Board's denial of Mr. Heal's service-connection claim was based on an inadequate VA medical opinion, as well as an inadequate assessment of critical evidence favoring the veteran's service-connection claim, the Board failed to provide an adequate statement of reasons or bases, which effectively precludes meaningful judicial review in this case and, therefore, requires remand of Mr. Heal's claim for service connection for an acquired psychiatric disability. *See* Quirin v. Shinseki, 22 Vet. App. 390, 398 (2009) (citing Tucker v. West, 11 Vet. App. 369, 374 (1998)).

The Secretary initially contends that Mr. Heal "neither alleges nor argues that [the Board] clearly erred in finding that service connection is not warranted." (Sec'y Br. at 7). The Secretary posited that Mr. Heal instead argues that the Board erred because it failed to provide an adequate explanation of its reasons and bases for denying the veteran's service-connection claim. *Id*. The Secretary's contention simply misconstrues Mr. Heal's position, at best, and should be rejected by the Court.

A reasonable reading of the veteran's arguments as enumerated in his opening brief

establish, that a primary criticism of the Board's decision is that it reached its negative conclusion based on a seriously flawed VA medical opinion. It is well established that a medical examination must be supported by an adequate rationale. 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).

Indeed, "[a] medical examination report must contain not only clear conclusions with supporting data, but also *a reasoned medical explanation connecting the two*." Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (2008) (emphasis added) (emphasis added); Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007). The February 2013 VA medical opinion rendered by Dr. Rubin did not do so. (R. 171-77). In the present case, contrary to the Secretary's suggestion, the Board's reliance on a seriously flawed VA medical examination as the basis for denying the veteran's service-connection claim constituted clear error.

The Secretary also argues that the Board's finding that Mr. Heal's allegation of in-service personal assault was not credible should be upheld by the Court. (*See generally* Sec'y Br. at 8-15). The Secretary's argument, however, is not supported or supportable on this record. Specifically, the Board in this case acknowledged only two in-service PTSD-related 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. (R. 12, 13). On that basis, the Board denied the service-connection claim for PTSD based on a finding that the two acknowledged stressors were not sufficient to support a valid diagnosis of the disorder. (R. 12-13). Contrary to the Secretary's arguments, that was error.

Initially, the Secretary argues that the veteran's claim is somehow weakened

because he did not mention or cite a March 2012 VA examination report in his opening brief. (Sec'y Br. at 9-10). On the contrary, there was no need to cite the examination report because it was not germane to the actual issue presented in the case, *i.e.*, whether Mr. Heal's in-service physical assault stressor resulted in his current PTSD.

In other words, the central issue is whether an in-service physical assault constitutes a nexus between Mr. Heal's military service and PTSD or other current psychiatric disability. The March 2012 VA examiner did not address that issue specifically because she limited her analysis to whether the two acknowledged stressors (verbal teasing and mother's death) were sufficient to result in PTSD. As such, there was no need to cite the March 2012 examination report where, as here, the primary basis for the Board's negative nexus conclusion was its finding that the February 2014 negative nexus opinion by Dr. Rubin, (R. 171-77), was more probative than the June 2013 positive nexus opinion by Dr. Newcomb. (R. 141-44).

In the present case, the Board rejected Dr. Newcomb's positive nexus opinion because the Board refused to credit Mr. Heals's history to Dr. Newcomb regarding in-service personal assaults. (R. 22). Contrary to the Secretary's assertions, that finding is erroneous. Specifically, the Board's conclusion that Mr. Heals's history of personal assault in teh service is not credible is directly contradicted by the evidence of record. 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 failed to address the sergeant's statement, choosing, instead, to simply ignore it.

Essentially, the Board asserted that the fact that Mr. Heal had not admitted sooner that he was assaulted during service made his statements not credible. (R. 13-14). 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 ever considering the in-service evidence that the fights occurred*. Indeed, based on the sergeant's statement, there can be no reasonable doubt that in-service physical altercations occurred. Thus, the Board erred by ignoring such critical evidence and instead concluding that nothing beyond verbal teasing occurred, *i.e.*, that no fights happened.

In an attempt to salvage the Board's flawed decision, the Secretary argues that the evidence which the Board ignored indicates that Mr. Heal was the assaulter rather than the individual assaulted. (Sec'y Br. at 12-13). The Secretary appears to suggest that the fact that Mr. Heal was disciplined during service somehow invalidates his allegation of being assaulted. (*See, e.g.,* Sec'y Br. at 13). The Secretary appears to have misconstrued the evidence, however.

First, the charge of assault against Mr. Heal, that the Secretary mentions, did not involve his fellow unit members, *i.e.*, the individuals that he alleges both verbally harassed and physically assaulted him. (*See, e.g.,* R. 563). Second, the Secretary cites another statement purporting to show that Mr. Heal was not assaulted. (Sec'y Br. at 13; *see also* 554). The statement does not support such a conclusion, however. On the contrary, the statement merely reflects the author's opinion that Mr. Heal frequently starts "trouble" with other soldiers. (R. 554). Nowhere does it indicate that Mr. Heal ever physically assaulted his fellow service members. *Id*.

Third, even if, *arguendo*, the Secretary's contention was correct, his argument does not salvage the Board's denial of the claim. The fundamental problem with the Board's conclusion that the evidence does not support Mr. Heal's assertion that he was assaulted while in service is that *the Board ignored the very evidence* which can reasonably be read

to show that he was assaulted. The Board's failure to even consider the evidence establishes error on the Board's part. For that reason that the decision must fail.

Contrary to the Secretary's argument, evidence purporting to show that Mr. Heal assaulted his fellow service members rather than being assaulted by them *played no role whatsoever in the Board's denial of his service-connection claim*. In other words, the Secretary's argument is red herring. Indeed, the Secretary is improperly attempting to make arguments that were not made by the Board, itself.

The Secretary, through counsel, is asking the Court to affirm the Board's decision on grounds that were never relied upon by the Board in denying Mr. Heal's service-connection claim. It is axiomatic, moreover, that such a course is strictly prohibited, *i.e.*, the Secretary is not free to rely upon new arguments thought up by counsel on appeal. *See, e.g.,* Securities and Exchange Commission v. Chenery, 332 U.S. 194, 196 (1947); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168, 9 L. Ed. 2d 207, 83 S. Ct. 239 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [orders]."); SEC v. Chenery Corp., 318 U.S. 80, 87-88, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

Contrary to the Secretary's argument, the Board's decision must stand or fall on its own reasoning. In this case, the decision must fail because the Board failed to consider evidence of record that supports the conclusion that Mr. Heal was, in fact, the victim of physical assaults during service. This Court should reject the Secretary's attempt to seek affirmation of the Board's flawed decision based on grounds that the Board did not itself invoke.

In addition, the Board should have accorded Mr. Heal the benefit of the doubt in the circumstances of this case. Specifically, the Board's finding that Dr. Rubin's negative nexus opinion was more probative than Dr. Newcomb's positive nexus opinion was

flawed for the reasons discussed above an in the main brief. The Board's unsupported and unsupportable conclusion reflects its failure to consider the evidence supporting Mr. Heal's allegation that he was the victim of personal assaults during service.

The Board expressly wrote that it rejected Dr. Newcomb's positive nexus opinion because:

> 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. Therefore, Dr. J.L.N.'s opinion was based on an inaccurate basis.

(R. 22). Thus, the Board, while completely ignoring the evidence establishing in-service altercations, simply found that Mr. Heal, although subjected to verbal abuse, was not victimized by physical assaults. *Id*. 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 Mr. Heal's claim and then rely on the alleged absence of such evidence as the basis to reject the psychiatrist's favorable nexus opinion.

The Secretary argues that the Board properly determined that application of the benefit of the doubt doctrine was unwarranted in this case. (Sec'y Br. at 15-16). The Secretary's argument lacks merit. Under the benefit of the doubt rule, there need only be an "*approximate* balance of positive and negative evidence" in order for the veteran to prevail on his claim. *See, e.g.,* 38 U.S.C. § 5107(b) (emphasis added). In addition, the VA's reasons and bases requirement under 38 U.S.C. §7104(d) applies to the Board's application of the benefit of the doubt rule, as well. *See, e.g.,* Gilbert, 1 Vet. App. at 58.

Thus, where, as here, there is evidence supporting the veteran's service-connection claim, "the Board *must provide* a satisfactory explanation as to why the evidence was not in equipoise." Williams v. Brown, 4 Vet. App. 270, 273-74 (1993) (emphasis added).

As the benefit of the doubt doctrine provides:

> [w]hen, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, *there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter*, the benefit of the doubt in resolving *each such issue* shall be given to the claimant.

38 U.S.C. § 5107(b) (emphasis added). Based on the evidence of record reflecting that Mr. Heal was engaged in physical altercations during service, Dr. Newcomb's opinion that his current psychiatric disabilities are related to his service (including instances of physical assault), and the problems inherent in Dr. Rubin's flawed negative nexus conclusion, Mr. Heal should have been afforded the benefit of the doubt on the issue of in-service personal assaults.

Contrary to the Secretary's arguments, the Board's failure to accord Mr. Heal the benefit of the doubt in the circumstances of this case constituted error. *See* Gutierrez v. Principi, 19 Vet.App. 1, 9 (2004) (finding Board's reasoning flawed when it failed to adequately discuss evidence in support of the veteran's claim); Caluza v. Brown, 7 Vet.App. 498, 506 (1995) (holding that the Board must provide reasons for its rejection of any material evidence favorable to claimant).

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: May 3, 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 Reply 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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