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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1477

HARRY A. JOHNSON, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Harry A. Johnson, appeals through counsel a March 19, 2015, decision of the Board of Veterans' Appeals (Board) that, among other things, denied his claims for service connection for a skin disorder, right-hand arthritis, carpal tunnel syndrome, and chronic obstructive pulmonary disease (COPD) denied a disability rating in excess of 30% for post-traumatic stress disorder (PTSD), including secondarily an anxiety disorder and sleep disorder; and denied an earlier effective date for the award of a 30% rating for PTSD.[1] Record (R.) at 1-31. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs, and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the Board's March 19, 2015, decision as to a right hand disability and carpal tunnel syndrome and will remand the Board's decision as to a skin disorder, COPD, PTSD, an anxiety disorder, and a sleep disorder for further development consistent with this decision.

[1]The Board also remanded the appellant's claim for gastroesophageal reflux disease, to include as secondary to PTSD. The Court does not have jurisdiction to address the remanded claim. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi,* 17 Vet.App. 475 (2004).

I. FACTS

A. Skin, COPD, Right-Hand Arthritis, and Carpal Tunnel Syndrome Claims

Mr. Johnson served on active duty in the U.S. Army from July 1965 to May 1971. R. at 241. In October 2010, Mr. Johnson sought entitlement to service connection for a skin condition, asserting that "[w]hile serving in Vietnam I started developing white spots on my arms [,] [i]t flares up in the heat [,] [and] I have not been treated for this condition." R. at 1283. In September 2011, a VA regional office (RO), inter alia, denied his claim, R. at 1153, and in December 2011, Mr. Johnson filed a Notice of Disagreement (NOD), R. at 762-79.

In January 2012, Mr. Johnson filed a claim for a right hand disability and for COPD, which he asserted was related to the recurring bronchitis for which he was treated during service. R. at 1054-55. Mr. Johnson also claimed that he cut his hand on a piece of wire during service that had contributed to his right hand disability. *Id.* He underwent VA examinations for these conditions in March 2012. R. at 892-931.

In April 2012, the RO denied the right hand disability and COPD claims. R. At 883-84. In May 2012, the RO issued a Statement of the Case (SOC) denying Mr. Johnson's claim for a skin condition, among others, R. at 783-807, and Mr. Johnson filed a Substantive Appeal, R. at 741-58. In July 2012, Mr. Johnson filed an NOD with the April 2012 rating decision. R. at 624-41.

In August 2012, VA also ordered a subsequent COPD examination to determine whether Mr. Johnson's in-service "exposure to sulfuric acid mixture, asbestos exposure from brakes, and exhaust fumes" caused or aggravated his COPD. R. at 712-14. Mr. Johnson underwent the COPD examination later that same month. R. at 707-11. Later that month, the RO issued an SOC continuing to deny the claims for a right hand disability and COPD, R. at 683-705, and a Supplemental SOC (SSOC) continuing to deny the skin condition claim, R. at 670-76. The RO also issued SSOCs regarding the right hand disability, skin, and COPD, claims in October 2013, February 2014, and March 2014, respectively. R. at 287-90, 310-19, 616-19.

B. PTSD, Anxiety, and Sleep Disorder Claims

VA treatment records form February 2010 show that Mr. Johnson was diagnosed with "Anxiety Disorder, Not Otherwise Specified" (NOS). R. at 1446. In June 2010, Mr. Johnson filed

a claim for service connection for PTSD. R. at 1484-85. In an August 2010 VA examination, the examiner provided "a DSM-IV [(*Diagnostic and Statistical Manual of Mental Disorders*, 4th ed.)] diagnosis for Anxiety Disorder, NOS." R. at 1310-19. The examiner also noted, among other things, that Mr. Johnson had "difficulty falling asleep." R. at 1317. A VA regional office (RO) denied Mr. Johnson's PTSD claim in September 2010 for lack of a diagnosis of PTSD. R. at 1355-60.

In October 2010, Mr. Johnson submitted a claim for a sleep disorder on a direct basis and also as secondary to a mental disorder or PTSD. R. at 1283. In February 2011, Mr. Johnson filed a claim for service connection for his anxiety disorder. R. at 1255. In September 2011, the RO issued a rating decision denying service connection for a psychiatric condition/anxiety disorder. R. at 1152.

In December 2011, Mr. Johnson underwent a VA PTSD examination. R. at 1085-1100. The examiner concluded that Mr. Johnson's symptoms did not meet the diagnostic criteria for PTSD. R. at 1086. The examiner also stated that Mr. Johnson did not exhibit "anxiety NOS" at the time of the examination, which he explained is a separate disorder from PTSD. R. at 1100. The examiner further explained that "[anxiety NOS] is not diagnosed at this time as [Mr. Johnson's] anxiety NOS has evolved into full threshold PTSD." R. at 1100. That same month, the RO granted Mr. Johnson's claim for PTSD, rated it as 30% disabling, and assigned an effective date of September 2011. R. at 1073-77. The rating decision noted that VA treatment records showed a diagnosis of PTSD on September 16, 2011. R. at 1076. Mr. Johnson filed a Notice of Disagreement (NOD) in January 2012. R. at 982-96.

In a May 2012 SOC, the RO continued the award of 30% and the effective date of September 2011 for Mr. Johnson's service-connected PTSD. R. at 864-80. Also in May 2012, the RO issued a separate SOC continuing the September 2011 RO decision's denials of Mr. Johnson's claims for an anxiety disorder and a sleep disorder, among others. R. at 783-807.

In August 2012, the RO issued SSOCs regarding the PTSD claim and the anxiety and sleep disorder claims. R. at 673-76 (SSOC for anxiety/sleep disorder claims); 681-82 (SSOC for PTSD claim). Mr. Johnson filed Substantive Appeals of both SSOCs. R. at 741-58, 831-48. The RO issued further SSOCs regarding the appellant's PTSD, anxiety disorder, and sleep disorder claims

in January 2013 (PTSD), September 2013 (PTSD), and February 2014 (anxiety and sleep disorder claims). R. at 310-14, 343-47, 535-42.

C. Decision on Appeal

In the March 2015 decision on appeal, the Board determined that Mr. Johnson's complaints of a sleep disorder and anxiety were service-connected as secondary to his service-connected PTSD disability but, nevertheless, concluded that an earlier effective date was not warranted because it was not factually ascertainable that he had PTSD until September 16, 2011, his currently assigned effective date. R. at 9. Regarding the skin disorder, the Board found there was no evidence of a current condition. R. at 19-20. Regarding the right-hand arthritis and carpal tunnel syndrome, the Board concluded that the evidence of record weighed against entitlement to service connection. R. at 20-22. Regarding COPD, the Board rejected the appellant's lay evidence and relied on the medical examinations of record to conclude that service connection was not warranted. R. at 24.

II. ANALYSIS

A. Skin Disorder Claim

The appellant first argues that the Board erred in not providing him with a medical examination in conjunction with his claim for service connection for a skin disorder. Appellant's Brief (App. Br.) at 7-10. To this end, the appellant asserts that the Board erroneously discounted his lay statement that "[w]hile serving in Vietnam I started developing white spots on my arms [,] [and] [i]t flares up in the heat," without determining its probative value or whether it was competent proof of a current skin condition or persistent or recurrent symptoms of a skin condition. App. Br. at 10. He asserts that his lay statements "cleared the low threshold of proof necessary to trigger the necessity of an exam[ination] to decide the claim" and that "in the absence of an examination, the Board decided the claim on its own medical opinion [that the] appellant does not suffer a current-day skin condition." *Id.* (citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).

In disability compensation claims, the duty to assist includes providing the claimant with a VA medical examination or opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury,

or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim. *See* 38 U.S.C. § 5103A(d)(2); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-57 (Fed. Cir. 2003); *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4)(i) (2015).

The Board's determinations as to each element are reviewed by this Court "using a standard that is multifaceted." *McLendon*, 20 Vet.App. at 81; *see also Waters v. Shinseki*, 601 F.3d 1274, 1277 (Fed. Cir. 2010). Relevant to this appeal, the first element, evidence of a current disability or persistent or recurrent symptoms, requires that the evidence be competent. This threshold determination does not require the Board to weigh competing facts or to find as a factual matter that a current disability does in fact exist, but merely to assess whether (1) evidence of a current disability exists and (2) that evidence is competent. *McLendon*, 20 Vet.App. at 81-82. This determination is reviewed by the Court under the "clearly erroneous" standard of review. *Id*. A finding of material 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); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The second element requires evidence establishing that the claimant suffered an in-service event, injury, or disease. "This is a classic factual assessment, involving the weighing of facts, and the Board's findings are subject to the 'clearly erroneous' standard of review." *McLendon*, 20 Vet.App. at 82. The third element, whether the evidence of record "indicates" that the current disability "may be associated with the claimant's . . . service," 38 U.S.C. § 5013A(d)(2), "requires only that the evidence 'indicates' that there 'may' be a nexus between the two. This is a low threshold." *McLendon*, 20 Vet.App. at 83. The Board's overall conclusion that a medical examination is not necessary is reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard of review. 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81.

Before deciding a claim, the Board is required to consider all relevant evidence of record and

to consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104(a); *Weaver v. Principi*, 14 Vet.App. 301, 302 (2001) (per curiam order). As with any finding on a material issue of fact and law presented on the record, the Board must support its finding that a claimant was not entitled to a VA medical examination or opinion with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Duenas v. Principi*, 18 Vet.App. 512, 517 (2004); *Gilbert*, 1 Vet.App. at 52. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any 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).

Here, in denying his claim for a skin condition, the Board found that "service treatment records are negative for any complaints or treatment for a skin condition"; that the appellant's "entrance and separation examinations do not note any skin conditions"; and that "[p]ost-service VA and private treatment records also do not show treatment for or diagnosis of any skin condition." R. at 19. The Board then noted the appellant's lay assertion "that he developed white spots on his arms while in service" but found that "none of [the appellant's] statements can be interpreted to suggest that he has a current skin disability." R. at 20.

The Court concludes that the Board erred in its treatment of the appellant's lay evidence of record in determining that a medical examination was not necessary. The Board did not, as required, assess the credibility or competency of the appellant's lay statements or provide an explanation for its discounting of the appellant's lay evidence. *See Caluza*, 7 Vet.App. at 506. The Board also did not assess whether the lay statements constitute evidence of "persistent or recurrent symptoms" of a skin condition, as is required under 38 U.S.C. § 5103A(d)(2). Instead, the Board vaguely noted that "none of [the appellant's] statements can be interpreted to suggest that he has a current skin disability." R. at 20.

Accordingly, the Court will remand the appellant's claim for a skin condition. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is

otherwise inadequate, a remand is the appropriate remedy."). On remand, the Board will consider the issue of the appellant's credibility and competency with respect to his reports of in-service and current symptomatology of a skin condition. If the Board finds the appellant's statements credible, it must then reconsider whether a VA medical examination is necessary to develop the claim. *See* 38 U.S.C. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4)(i) (2015). The Court emphasizes that, for purposes of whether a medical examination is warranted, the determination of whether competent evidence of a current disability (or persistent or recurrent symptoms of a disability) exists is a "threshold" determination that does not require the Board to weigh competing facts or to find as a factual matter that a current disability does in fact exist, but merely to assess whether (1) evidence of a current disability exists and (2) that evidence is competent. *McLendon*, 20 Vet.App. at 81-82. Although the Board may weigh the absence of contemporaneous medical evidence against the other evidence of record in making such a determination, the Board may not solely rely on the absence of contemporaneous medical evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006). The Board must consider all of the relevant evidence of record and provide a reasoned explanation for all of its findings.

B. Arthritis and Carpal Tunnel Syndrome Claims

Next, the appellant asserts that the Board erred in denying service connection for his right-hand arthritis and carpal tunnel disability because the examination related to those conditions was inadequate. App. Br. at 11-13, 13-16. He also asserts that the Board provided inadequate reasons or bases for relying on the VA examination and for discounting his lay statements that he began experiencing chronic pain in his right hand following his in-service right hand laceration injury. *Id.* at 13.

A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown,* 6 Vet.App. 405, 407 (1994)). Additionally, the opinion must "support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Id*. at 124-25; *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions

with supporting data, but also a reasoned medical explanation connecting the two"). However, the law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). "Whether a medical opinion is adequate is a finding of fact, which this Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

"Lay testimony is competent . . . to establish the presence of observable symptomatology and 'may provide sufficient support for a claim of service connection.'" *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (quoting *Layno v. Brown*, 6 Vet.App. 465, 469 (1994). The Board has discretion to determine whether lay testimony "is competent and sufficient in a particular case." *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *see Buchanan,* 451 F.3d at 1336 (explaining that it is completely within the Board's discretion to weigh the lay evidence presented in support of a claim for benefits)*; Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (explaining that an appellant may not be competent to testify about the etiology or diagnosis of a disability).

In this case, the Court concludes that, reading the report as a whole, the March 2012 examination was adequate and that the Board provided adequate reasons or bases for its decision to deny service connection for arthritis and carpal tunnel syndrome. *See Monzingo,* 26 Vet.App. at 107. The March 2012 examiner concluded that the appellant's current arthritis and carpel tunnel syndrome were unrelated to the in-service incident of an injury to his right hand and provided adequate reasoning for that conclusion. R. at 894, 925-26. As the Board noted, the March 2012 examiner "opined that the laceration sustained in service was appropriately treated and healed without residuals or sequelae" and that the "laceration 'was repaired with a simple closure without evidence of tendon, muscle, or bone involvement with regards to the injury.'" R. at 21 (quoting R. at 926).

Regarding the appellant's lay statements that he has suffered chronic pain in his right hand since the time of his in-service laceration injury, the Board and the examiner both accounted for this evidence. The March 2012 examiner specifically noted the appellant's current complaints of pain along with his history of a laceration to the right thumb. R. at 893-94, 925-26. The Board noted that the appellant "has claimed that the laceration he incurred during service is the cause of [his] current

pain" and that the appellant "has stated that over the years he developed pain in his hands, and that he had some stiffness and achiness in the right hand." R. at 20. The Board then explained that "[i]n this case, the [appellant] has not been shown to have had the requisite medical training to render him competent to identify arthritis or other joint pathology, . . . is not reporting a contemporary medical diagnosis different than what has been discussed, and his reports of right hand pain do not support a later diagnosis by a medical professional." R. at 21-22 (citing 38 C.F.R. § 3.159 (2015) and *Jandreau*, 492 F.3d at1377 (holding that lay evidence may be deemed competent and sufficient to establish a diagnosis of condition if (1) the layperson is competent to identify a medical condition; (2) the layperson is reporting a contemporaneous medical condition; or (3) the lay testimony is later supported by a medical professional)). The Board therefore concluded that the appellant's lay statements lacked probative value and assigned more weight to the 2012 VA examination evidence. R. at 22. Therefore, because the Board provided adequate reasons or bases and applied the appropriate law in its analysis of the appellant's lay evidence, the appellant's argument in this regard must fail. *See Schafrath*, 1Vet.App. at 593 and *Caluza*, 7 Vet.App. at 506.

C. COPD Claim

The appellant also contends that the Board erred in denying his claim for service connection for COPD by relying upon two inadequate VA examinations conducted in March 2012 and August 2012. He asserts that the March 2012 examiner failed to provide an opinion regarding whether the appellant's in-service exposure to sulfuric acid fumes, asbestos, or exhaust fumes caused or aggravated his COPD. App. Br. at 15. He also argues that, although the August 2012 examiner provided an opinion regarding whether the appellant's in-service exposures caused his COPD, the examination was nonetheless inadequate because it did not address the issue of aggravation as the Secretary requested. *Id.* at 14; *see* R. at 713 (VA's instruction that the examiner "address aggravation"). He further asserts that the Board's reasons or bases were inadequate because it failed to adequately address the aggravation issue. App. Br. at 15.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253

(1999); *Caluza*, 7 Vet.App. at 506.

Secondary service connection may be awarded when a disability "is proximately due to or the result of a service-connected disease or injury." 38 C.F.R. § 3.310(a) (2015). "Additional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a)." *Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc). In this context, aggravation means "any increase in disability," as "distinguished from the more specific form of the term 'aggravation' used in 38 U.S.C. § 1153, . . . which authorizes compensation for an increase in disability resulting from aggravation during service of an injury or disease which existed before service." *Id.* at 445, 448-49. Where secondary aggravation is found, the claimant is compensated for the degree of disability over and above the degree of disability existing prior to the aggravation. *Id.* at 448.

The Court concludes that the Board provided inadequate reasons or bases for its reliance on the August 2012 VA examination report in determining that the appellant's COPD was not aggravated by his in-service exposures. The August 2012 examiner stated that determining if the appellant's exposure to sulfuric acid fumes, asbestos, or exhaust fumes aggravated his COPD would require "testing over time, along with repeated visits." R. at 711. Far from a negative nexus opinion regarding aggravation, this statement amounts at most to non-evidence or a speculative opinion. *See Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009) ("The examiner's statement, which recites the inability to come to an opinion, provides neither positive nor negative support for service connection."(citations omitted)); *Perman v. Brown*, 5 Vet.App. 237, 241 (1993) (stating that a speculative or equivocal opinion may be considered "non-evidence"). As such, the Board erred in relying upon the August 2012 examination to deny service connection for a respiratory disorder based upon a theory of aggravation due to the appellant's alleged in-service exposures, and it provided inadequate reasons or bases in this regard as well. *See Jones v. Shinseki*, 23 Vet.App. 382, 389 (2010) ("Before the Board can rely on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence").

Therefore, the Court will remand the appellant's claim, and, on remand, the Board must either obtain an adequate examination regarding the aggravation theory of service connection or otherwise

provide adequate reasons or bases for its decision in this regard. *See Tucker,* 11 Vet.App. at 374. If, as seems to be the case here, the medical examination is unclear on a relevant point, the Board should return it for clarification or explain why such action is unnecessary. *Vazquez-Flores v. Peake*, 22 Vet.App. 37, 50 (2008), *vacated on other grounds sub nom. Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009); *see Jones,* 23 Vet.App. at 389.

D. PTSD, Anxiety, and Sleep Disorder Claims

Finally, the appellant contends that the Board failed to explain why it "folded" his anxiety and sleep disorder conditions into his PTSD claim despite these conditions being diagnosed two years prior to his PTSD diagnosis. App. Br. at 16-20. He notes that the record shows that he was diagnosed with an "Axis I anxiety disorder" in February 2010 and that, therefore, the Board erred in denying an earlier effective date (EED) for his PTSD award. *Id*. at 19. Mr. Johnson also argues that he is entitled to a separate rating for his anxiety disorder. *Id.* at 19-20. The Secretary argues that, based on the December 2011 PTSD examination, the Board correctly determined that the appellant's anxiety and sleep disorders are part of his PTSD symptomatology and diagnosis. Secretary's (Sec'y) Br. at 20. The Secretary rationalizes that "because anxiety is part and parcel of [the a]ppellant's PTSD, an earlier diagnosis of anxiety would not entitle him to an earlier effective date because he did not have a full diagnosis of PTSD at that point." *Id.* at 21.

There are well-recognized rules for determining the effective date of an award. Generally, "the effective date of an award based on an original claim . . . of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a); *see* 38 C.F.R. §3.400 (2015). Unless the application for benefits is received within one year of the date of the veteran's discharge, the effective date will be the date of receipt of the claim or the date the entitlement arose, whichever is later. 38 C.F.R. § 3.400(b)(2)(i). Thus, determining the effective date often turns on when a claim, informal or formal, was received by VA. *See Edwards v. Peake*, 22 Vet.App. 29, 31 (2008); 38 C.F.R. § 3.155(a) (2015) (if an application form is received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the claimant's informal claim). The Board's determination as to the effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *Evans v. West*, 12 Vet.App. 396, 401 (1999).

In this case, the Board separately addressed the issues of service connection for anxiety and a sleep disorder apart from his claim for an EED and increased rating for his PTSD. The Board "note[d] that a VA outpatient treatment record from February 2010 contains a diagnosis of an anxiety disorder, not otherwise specified" and "that the December 2011 VA examiner found the [appellant's] Anxiety Disorder, NOS, had 'evolved into full threshold PTSD.'" R. at 7 (quoting R. at 1100). The Board also found that "subsequent VA treatment records and examinations reveal anxiety and chronic sleep impairment as part of the [appellant's] PTSD diagnosis" and concluded that "entitlement to service connection for anxiety and a sleep disorder as part of the [appellant's] service-connected PTSD is granted." R. at 8.

Finally, in addressing the effective date for "service-connected PTSD with anxiety and sleep disorder," the Board noted that the appellant "asserts that the effective date for this claim should be assigned from the date of his original claim in June 2010." R. at 9. The Board explained that "[w]hile the Board has added anxiety and a sleep disorder to the [appellant's] service-connected disability, these are secondary to PTSD." *Id.* The Board then concluded that "it is factually ascertainable that the [appellant] was first diagnosed with PTSD on September 16, 2011, which is the earliest time that the evidence showed this diagnosis to be related to service" and that "[a]s such, service connection can still not be assigned earlier than it was factually ascertainable that the [appellant] had PTSD [and] [t]herefore, an [EED] is not warranted." *Id.*

The Court concludes that the Board clearly erred and provided inadequate reasons or bases in determining the effective date for the appellant's anxiety and sleep disabilities was September 16, 2011. This error stems from the fact that the Board seemed to find (albeit it is unclear) that the appellant's anxiety and sleep disorder claims were secondary to the service-connected PTSD *throughout the entire appeal period. See* R. at 8-9. To the extent that the Board found this to be the case, it committed clear error. The record seems to indicate that the appellant first filed claims for anxiety and a sleep disorder in November 2010. R. at 1283. The Board also found that the appellant was first diagnosed with anxiety in February 2010. R. at 8. The Board also found that the appellant was only later diagnosed as having PTSD – in September 2011. R. at 8-9. However, inexplicably, the Board did not determine whether the earlier manifestation of anxiety warranted a separate award of service connection for anxiety or a sleep disorder prior to September 16, 2011, the effective date

of the appellant's award of service connection and 30% disability rating for PTSD. Pursuant to 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400, the Board should have determined the appropriate effective dates for his anxiety and sleep claims based upon the dates his claims were submitted and the dates of the diagnoses of these conditions, not upon the date of his PTSD diagnosis.

Further, pursuant to another VA regulation,

> [i]f the diagnosis of a mental disorder is changed, the rating agency shall determine whether the new diagnosis represents progression of the prior diagnosis, correction of an error in the prior diagnosis, or development of a new and separate condition. If it is not clear from the available records what the change of diagnosis represents, the rating agency shall return the report to the examiner for a determination.

38 C.F.R. § 4.125(b) (2015). However, the Board completely failed to make the determination required by § 4.125(b) of whether the new diagnosis of PTSD "represents progression of the prior diagnosis, correction of an error in the prior diagnosis, or development of a new and separate condition." *Id.*; *see also* 38 C.F.R. § 4.13 (2015) (Effect of change of diagnosis).

Accordingly, the Court will remand the appellant's claims for anxiety, a sleep disorder, and PTSD for the Board to provide adequate reasons or bases for its decision and for further development consistent with this decision. *See Tucker,* 11 Vet.App. at 374; *see also Byron v. Shinseki*, 670 F.3d 1202, 1205-06 (Fed. Cir. 2012) (holding that remand is appropriate where VA must make further factual determinations). Because the Board found that the appellant's anxiety and sleep disorder claims were secondary to his service-connected PTSD, the Court also is remanding the appellant's PTSD claim. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998) (where a decision on one issue would have a significant impact upon another, and that impact could render any review by this Court of the decision on the other claim meaningless and a waste of judicial resources, the two claims are inextricably intertwined).

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Court has held 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). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for

"expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's March 19, 2015, decision as to a right hand disability is AFFIRMED and the Board's decision as to a skin disorder, COPD, PTSD, an anxiety disorder, and a sleep disorder are REMANDED for further development consistent with this decision.

DATED: June 7, 2016

Copies to:

Perry A. Pirsch, Esq.

VA General Counsel (027)