UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 15-4463

CHET R. BENNETTS,

Appellant,

v.

ROBERT A. MCDONALD,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REBUTTAL ARGUMENTS

Appellant Chet R. Bennetts (Bennetts) appeals the October 27, 2015, Board of Veterans' Appeals (Board) decision that denied his claim to reopen his claim for service connection for a sleep disorder and denied a higher rating for service-connected PTSD and right lower extremity neuropathy.[1] In his brief, Bennetts noted the Board's error in holding him to a higher standard than provided by law, failing to meet its duty to assist, relying upon an examination inadequate for rating purposes, failing to consider favorable evidence and otherwise providing inadequate reasons and bases for its decision.

In response to Bennetts' brief, the Secretary submits the Court should affirm the denial of the claim to reopen a sleep disorder, to include sleep apnea, because the claim was properly adjudicated as a claim to reopen, his previous claim was denied due to lack of a diagnosis, and none of the new evidence submitted established a diagnosis of a sleep disorder.[2] In regard to higher ratings for PTSD and right lower extremity neuropathy, the Secretary states Bennetts failed to demonstrate any error in the Board's decision and its reasons and bases were adequate.

In rebuttal, Bennetts addresses the Secretary's contentions and resubmits the arguments raised in his brief: the Board held him to a higher standard than

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[1] R 2 - 21 (October 2015 Board Decision). The decision also remanded his right knee SC claim.

[2] Secretary's Brief (SB) at 4

provided by law, failed to meet its duty to assist, relied upon an examination inadequate for rating purposes, failed to consider favorable evidence and otherwise provided inadequate reasons and bases for its decision.

II. REBUTTAL ARGUMENTS

A. The Board Committed Remandable Error When, in Denying Bennetts' Claim to Reopen his Claim for Service Connection for a Sleep Disorder, to Include Sleep Apnea, it Failed to Meet its Duty to Assist, Held Bennetts to a Higher Standard than Provided by Law, Ignored Favorable Evidence, and Failed to Provide Adequate Reasons and Bases for its Decision.

In May 2013, Bennetts sought to reopen and expand his December 2008 sleep disorder service-connection claim, to include sleep apnea, on a direct and secondary basis, that had been denied by the final March 2009 rating decision for lack of a diagnosed sleep disorder.[3]

In the October 2015 decision on appeal, the Board denied the claim as a claim to reopen the previously denied sleep disorders claim. While generically finding Bennetts had submitted new evidence showing ongoing sleep problems, the Board found the evidence was not material as it did not show a diagnosed sleep disorder; however, the Board did not consider (or even mention) sleep

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[3] R 918 (December 2008 VAF21-4138) (sleep disorder); 831 (825 - 32) (March 2009 RD). The AOJ/RO relied on the January 2009 PTSD exam which reported Bennetts' sleep problems were symptoms of his service-connected PTSD. R 853 - 65 (January 2009 mental health exam); 611 (May 2013 VAF21-4138) (sleep apnea).

apnea.[4]

In response to Bennetts' brief, the Secretary states Bennetts objects to the Secretary's treatment of the claim as a claim to reopen when sleep apnea was raised by Bennetts, but not discussed in the Board's decision, but Bennetts raises this issue for the first time on appeal, despite continuity of counsel, and the Court should decline to consider it.[5]

The Secretary also opines, should the Court consider Bennetts' arguments, the Court must still reject the allegation of error.[6] The Secretary states the only sleep problems reported by Bennetts since the prior denial were insomnia and difficulty sleeping, which are identical to the prior symptoms of record, and Bennetts cannot establish a sleep apnea diagnosis or treatment for sleep apnea on his behalf.[7] The Secretary concludes the problem all along is no medical evidence of any diagnosable sleep disorder.[8] The symptoms reported since the denial are identical to the symptoms before the original denial and the Board had

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[4] R 5 - 7. In explaining its decision the Board confused Bennetts' sleep disorder claim with a headaches claim - a claim not on appeal.

[5] SB at 6, citing R 79-88, 154-63, 184, 205, 609; *Halle v. Nicholson*, 20 Vet.App. 237, 238 (2006) (per curium); *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015); *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000); *Massie v. Shinseki*, 25 Vet.App. 123, 127-28 (2011); *Overton v. Nicholson*, 20 Vet.App. 427, 438-39 (2006)

[6] SB at 7

[7] SB at 8, citing R 611-12, 952 (932-52); 928 (928-30); 859 - 60 (853-65); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc); *Leonard v. Principi*, 17 Vet.App. 447, 452-53 (2004)

[8] SB at 8, citing R 860 (853-65)

no obligation to consider the merits of the claim.[9]

In rebuttal, Bennetts notes, in a veteran's pursuit of disability compensation, the entire claims process – until an appeal is filed with the Court – is non-adversarial and the Secretary works on behalf of veterans.[10] While a veteran seeking disability compensation must reasonably identify the benefit sought, the VA also has a duty to fully and sympathetically develop the claim to its optimum.[11] Furthermore, if, upon appeal to the Court, a veteran is not making a new claim, but simply making new arguments for an existing claim, the Court has jurisdiction over the appeal and can consider the new argument or remand the matter for the Board to consider it in the first instance.[12]

Furthermore, Bennetts submits the Secretary confuses a reasonably raised claim with an express claim for service connection. In what the Board considered as a claim to reopen, Bennetts expressly raised a claim to include sleep apnea.[13] The Board must presume that the newly submitted evidence is credible.[14] Further, to determine whether someone has sleep apnea, a sleep study must be

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[9] SB at 9 - 10, citing R 166-68; 1137-1357; 825-32; 38 C.F.R. § 3.156(a) (2016)

[10] *Trilles v. West*, 13 Vet. App. 314, 332 (2000)

[11] 37 C.F.R. § 3.155(a) (2003); *Szemraj v. Principi*, 357 F.3d 1370, 1371 (Fed. Cir. 2004)

[12] See 38 U.S.C. §§ 7252(a), 7266(a) (2015); *see also Breeden v. Principi*, 17 Vet. App. 475, 478 (2004); *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000) (holding that this Court has discretion to hear arguments presented to it in the first instance, provided that it otherwise has jurisdiction over the claim).

[13] R 611 - 12 (May 2013 VAF21-4138) (sleep apnea)

[14] *Duran v. Brown*, 7 Vet.App. 216, 220 (1994); See *also Justus v. Principi*, 3 Vet.App. 510, 513 (1992).

conducted.[15] The Board, however, ignored the language of Bennetts' claim which sought not only to reopen the previously denied sleep disorder (insomnia, inability to stay asleep) claim, but also to service-connect his sleep apnea - a separate, unique medical disability never considered by the Secretary.[16] As such, the claim must be remanded.

B. The Board Committed Remandable Error When, in Denying Bennetts' Claim for a Higher Rating for Service-Connected PTSD with a Cognitive Disorder, it Failed to Meet its Duty to Assist and Provided Inadequate Reasons and Bases for its Decision.

In the October 2015 decision on appeal, the Board denied a higher rating to continue the 50 percent rating by relying on the October 2013 mental disorders exam and finding Bennetts' symptoms were most closely associated with a 50 percent rating.[17]

In response to Bennetts' brief, the Secretary claims Bennett again raises the issue of the inadequacy of the October 2013 examination report for the first time on appeal, despite counsel, with the exception of "boilerplate" regarding the Secretary's duty to provide an adequate examination.[18] Should the Court

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[15] *cf Bellanich v. Nicholson*, 21 Vet.App. 412, (2006); see also http://www.vba.va.gov/pubs/forms/VBA-21-0960L-2-ARE.pdf ("NOTE: The diagnosis of sleep apnea must be confirmed by a sleep study, provide the sleep study results in Section V, Diagnostic Testing...")

[16] *See Schroeder v. West,* 212 F.3d 1265 (Fed. Cir. 2000); *Robinson v. Mansfield,* 21 Vet. App. 545 (2007), *aff'd sub nom,* 557 F.3d 1355 (Fed. Cor. 2009)

[17] R 8 - 13; 206 - 13 (October 2013 exam).

[18] SB at 12 - 13, citing R 84 (79 - 88), 152, 155-57 (154-63), 609; *Halle*, 20 Vet.App. at 238; *Halle*, 20 Vet.App. at 238; *Maggitt*, 202 at 1377-78; *Massie*, 25 Vet.App. at 127-28; *Overton*, 20 Vet.App. at 438-39

consider the argument, the Secretary suggests Bennetts was not service-connected for a depressive disorder, or claimed service connection for a depressive disorder and the examiner, and the Board, were not required to consider whether it was caused or aggravated by service-connected PTSD, particularly if Bennetts cannot demonstrate the examiner failed to consider his depression symptoms.[19]

In rebuttal to the Secretary, Bennetts notes the fact pattern for this case is similar to *Westerkamp v. Shinseki*, 2014 U.S. App. Vet. Claims LEXIS 174 (U.S. App. Vet. Cl. Feb. 5, 2014), which, although not binding precedent, is instructive In *Westerkamp v. Shinseki*, a veteran argued the Board provided him inadequate reasons or bases for its decision to deny him a higher rating for his service-connected PTSD because it construed his claim too narrowly. He asserted the Board improperly focused on his diagnoses of PTSD, while ignoring his coincident diagnoses of depressive disorder, and therefore failed to adjudicate the "reasonably raised" issue of service connection for depressive disorder. In holding for the veteran, Judge Bartley remanded the Board decision denying an increased initial evaluation for PTSD with a reasonably raised issue of entitlement to service connection for depressive disorder, both on a direct and secondary basis to the PTSD.

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[19] SB at 12, citing R at 203-05 (184-05), 212 (206-35); *MacPhee v. Nicholson*, 459 F.3d 1323 Fed.Cir. (2006); *Brokowski v. Shinseki*, 23 Vet.App. 79, 84-85 (2009); *Hilkert,* 12 Vet.App. at 151; *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704 (2009)38 C.F.R. § 4.14 (2016)

In the October 2015 decision on appeal, the Board denied a higher rating to continue the 50 percent rating by relying on the October 2013 mental disorders exam and finding Bennetts' symptoms were most closely associated with a 50 percent rating.[20]

The Secretary does not dispute the relied-on October 2013 examiner reported two Axis-I diagnoses, PTSD and a post-concussional cognitive disorder, which were inextricably intertwined, the examiner also failed to discuss any other mental disorder.[21] The examiner (and the Board) ignored Bennetts' multiple, separate diagnoses for an Axis-I major depressive disorder.[22] While the examiner reported Bennetts suffered from a depressed mood, the examiner did not consider if the separately diagnosed Axis-I mental disorder was not only caused or aggravated by Bennetts' service-connected PTSD and cognitive disorder.[23]

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[20] R 8 - 13; 206 - 13 (October 2013 exam).

[21] *Id.*

[22] This is a partial list. R 50 (49 - 52) (July 2014 VAMC record); 144 (143 - 45) (January 2014 VAMC record); 285 (284 - 87) (June 2013 VAMC record); 295 (295 - 98) (June 2013 VAMC record); 408 (408 - 10) (July 2012 VAMC record); 432 - 33 (432 - 36) (April 2012 VAMC record); 531 (530 - 43) (February 2012 psych note); 545, 549 - 50 (544 - 56) (February 2012 psych evaluation addendum); 558, 562 (557 - 69) (February 2012 psych evaluation addendum); 573, 579 (572 - 80) (January 2012 VAMC record).

[23] *Clemons v. Shinseki,* 23 Vet. App. 1 (2009); *Schroeder v. West,* 212 F.3d 1265 (Fed. Cir. 2000) (The Board must consider every theory reasonably raised by the record.)

C. The Board Committed Remandable Error When, in Denying Bennetts' Claim for Higher Ratings for Lower Extremity Radiculopathy, it Relied upon an Examination Inadequate for Rating Purposes, Failed to Consider Favorable Evidence, and Provided Inadequate Reasons and Bases for its Decision.

The Secretary claims, in regard to Bennetts' argument the Board failed to set an effective date for the 20 percent rating, Bennetts fails to demonstrate how he was prejudiced by the Board's failure.[24] In any case, the Secretary, in the Rating Decision, assigned an effective date of May 2013 for the 20 percent rating, which was date assigned for a 10 percent rating, which Bennetts failed to disagree, and no reason to believe the result on remand would be any different.[25] In regard to Bennetts argument the examination was inadequate due to the examiner's failure to consider flare-ups impacting the severity of the bilateral radiculopathy, the Secretary claims none of the evidence cited is applicable to the severity of Bennetts service-connected back disability and irrelevant.[26] Finally, the Secretary submits the Board considered the daily right leg symptoms in Bennetts back examination, which were identical to the 2013 peripheral nerves

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[24] SB at 13 - 14, citing *Hilkert,* 12 Vet.App. at 151; *Leonard*, 17 Vet.App. at 452-53; *Shinseki*, 129 S.Ct. at 1704

[25] SB at 14, citing 193 (184-205); *Mlechick v. Mansfield*, 503 F.3d 1340, 1346 (Fed. Cir. 2007); *Edenfield v. Brown*, 8 Vet.App. 384, 390-91 (1995); *cf Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991)

[26] SB at 15, citing R 214-22; 215-17, 221, 214-22; *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), aff'd sub nom. *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001)

examination, which was a more comprehensive examination.[27]

In rebuttal to the Secretary, Bennetts notes the Secretary has conceded the Board did not assign an effective date for the increased rating, or otherwise remand or refer the increased rating award back to the Secretary.[28] Further, the statement of reasons or bases must explain not only the Board's reasons for discounting favorable evidence, but address all issues raised by the claimant or the evidence of record, and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."[29] Without the Board commenting on the effective date of the increased rating, it is impossible to know if the effective date set below was prejudicial.

Furthermore, while the Secretary contends it was adequately considered by the Board, the Secretary cannot reasonably dispute the October 2013 thoracolumbar spine examiner diagnosed both “mechanical back strain and right leg radiculopathy,” and noted the radiculopathy was subject to flare-ups, accompanied by additional functional impairment caused by increased ‘pain and weakness [that] could significantly limit functional ability during flare-ups,” that

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[27] SB at 217 - 18, 219 (214-22); 231-33 (230-35).

[28] R 14 - 16; 230 - 35 (October 2013 peripheral nerves exam).

[29] *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

was "likely to occur."[30] Reasonably, fluctuations in the severity of the lumbar spine's symptoms are directly relevant to the rating of the radiculopathy and whether it is mild, marked, moderately severe, or severe.[31] Further, the Secretary cannot reasonably dispute, in order to be adequate for rating purposes, a medical examination must occur during period of flare-ups in order to ensure a proper disability rating.[32] As such, for the reasons set forward in Bennetts' brief, the claim must be remanded.

CONCLUSION

Accordingly, Bennetts requests this Court to reverse the Board's decision, or in the more likely alternative, remand the claims for further adjudication with the facts of record and the controlling law.

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[30] R 214 - 22 (October 2013 thoracolumbar spine exam).

[31] 38 C.F.R. § 4.124a, DC 8520

[32] *Ardison v. Brown,* 6 Vet.App. 405, 408 (1994)("[T]he Board must provide for the conduct of an adequate examination during the active stage of appellant's [disorder], and must, on the basis of that examination and all evidence of record, ascertain the existence, extent, and significance under the rating schedule of any [symptom] due to [the disorder].")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the party below:

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