

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3933

CHAD M. CASEY

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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ISSUES PRESENTED FOR REVIEW

- I. Where the Board failed to liberally construe the Veteran's claim when it denied service connection for anxiety and a sleep disorder, and failed to adjudicate the reasonably raised claim of entitlement to an increased rating for PTSD in excess of 10 percent, did it commit prejudicial legal error?
- II. Where the Board improperly referred the Veteran's claim for entitlement to service connection for sleep apnea to the AOJ for adjudication, did it commit prejudicial legal error?

STATEMENT OF THE CASE

Procedural History

The Veteran filed a claim for service connection for many disabilities in August 2010, including "anxiety attacks." R-2299-2300; 2311-18. In February 2011, the Regional Office denied service connection for "sleeping difficulty" and anxiety. R-1919 (1912-29). Mr. Casey submitted a notice of disagreement that same month. R-1894-95. A September 2011 statement of the case continued the denial of service connection for sleeping difficulties and anxiety. R-1701 (1673-1720).

Mr. Casey perfected his appeal to the Board in October 2011. R-1606 (1606-22). He submitted a statement attached to his VA Form 9, which described his difficulty with "psychosis." R-1617. Mr. Casey stated that he had "been denied service connection for psychosis for purpose of establishing eligibility to treatment." *Id.* He described nightmares and "a fear that someone was after me to finish me off."

Id. Later that month, VA contacted the Veteran to clarify the issues on appeal, specifically with regard to “the psychosis issue.” R-1605. The Veteran “stated that he did not mean to say psychosis, he meant to say anxiety.” *Id.* He stated that “he was confused . . . he thought his anxiety was his psychosis.” *Id.*

A May 2012 letter from the Veteran’s representative indicated that the pending appeal included claims for entitlement to service connection for sleeping difficulty and “generalized anxiety disorder.” R-1209. On the same day, in a different letter, the Veteran requested “entitlement to service connection for PTSD.” R-1204 (1199-1204). After the Veteran’s submission of his PTSD claim, VA issued an appeals review/deferral form in which a VA staff member noted that the Veteran also had a pending appeal for service connection for anxiety, and noted that it was possible that anxiety was a symptom associated with PTSD. R-1198. The RO awarded service connection for PTSD in July 2012, and assigned a 10 percent rating. R-1140 (1134-45). Mr. Casey did not submit a notice of disagreement with this decision.

In January 2014, the Veteran’s claims for service connection for anxiety and a sleep disorder were remanded by the Board. R-957 (939-64); *see* R-1063-75 (December 2012 SSOC); R-1039-46 (January 2013 SSOC). The remand was for a medical opinion to determine whether the sleep disorder and anxiety were part and parcel of the PTSD, or separate disabilities. R-957.

In August 2014, the Veteran submitted a claim for service connection for sleep apnea. R-793, 800-02. The RO concluded that this claim was part of the Veteran's claim for "sleeping difficulty" which was already on appeal. R-511.

In April 2015, the Veteran submitted a claim for an increased rating for his service connected PTSD. R-55; *see* R-46 (46-52) (VA request for clarification and Veteran's response).

In August 2015, the Board issued its decision. R-1-33. The Board denied service connection for sleep disorder and anxiety, concluding that these conditions were symptoms of the Veteran's PTSD. R-16. The Board did not address the Veteran's increased rating claim for PTSD. *See* R-1-33. The Board also referred the Veteran's sleep apnea claim back to the AOJ, finding that sleep apnea was an etiologically separate claim from the appealed claim for a sleep disorder. R-6.

Medical History

Chad Casey served in the United States Marine Corps from July 2001 to July 2005. R-1559. In October 2011, Mr. Casey submitted a statement in which he described his nightmares and "fear that someone was after [him] to finish [him] off." R-1617. In May 2012, he elaborated on his PTSD symptoms, describing reliving experiences from Haiti, difficulty sleeping, nightmares, hypervigilance, paranoia, depression, guilt, anger, violence, social impairment, and isolative tendencies. R-1199-1201.

The next month, Mr. Casey attended a VA examination for PTSD. R-1148-60. The examiner diagnosed him with PTSD. R-1150, 1159. He did not check off anxiety or sleep impairment as symptoms associated with PTSD, although he did check off that the Veteran experienced recurrent distressing dreams of the traumatic event. R-1157, 1158-59.

At a Board hearing in May 2013, the Veteran testified regarding his sleeping difficulties and his anxiety. R-965-97. He explained having trouble failing asleep due to pain in his legs, and taking medication to help with the leg pain. R-984-85. Regarding his anxiety, he described having issues in crowded places and when others walked behind him. R-986. Sometimes he avoided getting out of the car if there were too many people around. *Id.*

During a March 2014 VA treatment appointment, Mr. Casey screened positive for PTSD, indicating that he had nightmares, tried to avoid certain situations, was constantly on guard or watchful, and felt detached from others. R-160 (158-60). That same month, he reported “anxiety to be around people and in crowded places and has difficulty with falling into sleep – which pt attributes to his PTSD.” R-221 (152-57, 221-23). Mr. Casey attended a VA examination in that same month. R-173-87, 224-58. The examiner indicated that the Veteran did not have sleep apnea. R-256, 258. Instead, the examiner stated that the Veteran’s sleep disorder was characterized by difficulty falling asleep. *Id.* Mr. Casey also attended a PTSD VA examination that same month. R-166-71. The examiner opined that the Veteran’s anxiety and sleep

difficulties were related to his PTSD. R-170. The same VA examiner confirmed this assessment in October 2014. R-128 (121-28).

SUMMARY OF THE ARGUMENT

In denying the Veteran's claims for service connection for anxiety and a sleep disorder, the Board failed to read the Veteran's claim liberally. Had the Board done this as it was required to do, it would have adjudicated the issue of an increased rating for the service connected PTSD. The Board found that the Veteran's anxiety and sleep disorder were symptoms of his service connected PTSD. The Veteran's statements make clear that he sought compensation for these symptoms. He was not competent to diagnose himself with anxiety or a sleep disorder, whether as separate disabilities or as symptoms of his PTSD. He expressed his desire to be compensated for these symptoms, and the Board should have interpreted his claim as such. In this instance, because the Board found that these symptoms were part of his PTSD, it was required to adjudicate whether the Veteran was entitled to an increased PTSD rating due to the Veteran's anxiety and sleep impairment.

Furthermore, the Board improperly referred the issue of service connection for sleep apnea to the AOJ for adjudication. The Veteran was not competent to diagnose himself with sleep apnea, and he consistently made clear that he sought compensation for sleeping issues including waking up throughout the night and feeling tired during the day. The Board should have liberally construed the Veteran's claim for service

connection for sleep apnea, and adjudicated it along with his claim for “sleeping difficulties.”

Remand is required for the Board to readjudicate the Veteran’s claims under a correct interpretation of the law, and provide adequate reasons or bases for its decision.

STANDARD OF REVIEW

The Court reviews the Board’s decisions regarding claims for increased ratings or for service connection under the clearly erroneous standard. A determination regarding service connection or the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996); *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994); *Lovelace v. Derwinski*, 1 Vet.App. 73, 74 (1990). The Board’s answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999); *Mense v. Derwinski*, 1 Vet.App. 354, 356 (1991).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board’s decision is not entitled to any deference. 38 U.S.C. § 7261(a); see *Butts v. Brown*, 5 Vet.App. 532 (1993) (en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Butts*, 5 Vet.App. at 538. The Court should determine whether the Board’s decision, in which it misinterpreted the law and failed to provide adequate reasons or bases, is not in accordance with the law.

ARGUMENT

- I. **The Board failed to liberally construe the Veteran's claim when it denied service connection for anxiety and a sleep disorder, and failed to adjudicate the reasonably raised claim of entitlement to an increased rating for PTSD in excess of 10 percent.**

The Board denied service connection for anxiety and a sleep disorder based on the findings of the March 2014 addendum medical opinion. R-16; R-170. This examiner opined that the Veteran's anxiety problems and sleep impairment were not separate disorders, but were related to the Veteran's service-connected PTSD. R-16; R-170. The problem with the Board's decision is that it failed to read the Veteran's pleadings liberally, and thus failed to determine whether an increased rating for PTSD was warranted based on his anxiety problems and sleep impairment.

The issue of an increased rating for PTSD, due to a worsening of PTSD symptoms including sleep impairment and anxiety, was reasonably raised by the record. The determination as to whether an issue has been properly raised must be made with due regard for VA's duty to read a veteran's submissions sympathetically. *See Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009). Veterans' claims must be broadly interpreted and veterans are generally not subject to a strict pleading standard. *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007); *see also Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (holding that the scope of a claim is generally defined by the symptoms for which a veteran is seeking compensation). Moreover, VA has the duty to consider all legal theories raised by the record that may lead to a grant of the benefits requested,

regardless of whether they are specifically raised by the claimant. *See Schroeder v. West*, 212 F.3d 1265, 1269-71 (Fed. Cir. 2000); *Douglas v. Derwinski*, 2 Vet.App. 435, 438 (1992) (en banc); *Akles v. Derwinski*, 1 Vet.App. 118 (1991).

Although the Veteran pursued separate claims for his anxiety attacks, sleep disorder, sleep apnea, and PTSD, he was not competent to diagnose the etiology of his mental health symptoms; thus, the Board should have construed his claim liberally. Where a veteran does not have the legal and/or medical knowledge to narrow the universe of his claim or identify his precise condition, the Board should broadly consider the scope of the veteran's claim. *See Clemons*, 23 Vet.App. at 5. In *Clemons*, the Court found that the "claimant's intent in filing a claim is paramount to construing its breadth. . . ." *Id.* While a veteran "who has no special medical expertise may testify as to the symptoms he can observe, he generally is not competent to provide a diagnosis that requires the application of medical expertise to the facts presented" *Id.* at 4-5 (citing *Espiritu v. Derwinski*, 2 Vet.App. 492, 494-95 (1992)).

The claimant has consistently made clear that he seeks compensation for his worsening sleep problems and his anxiety. *See e.g.* R-1200-01; R-1209; R-1617; R-2299. Furthermore, the record demonstrates the Veteran's confusion regarding the characterization of his claims. R-1617. The Board was required to look at the Veteran's intent in filing the claim in order to construe its breath. *Clemons*, 23 Vet.App. at 5. The Veteran intended to seek compensation for his anxiety and sleep disorder symptoms, *whether or not*, these symptoms were part of his PTSD or completely separate disabilities.

The Veteran is not competent to diagnose himself with a sleep disorder or anxiety disorder. The Board should have instead focused on the *symptoms* for which Mr. Casey sought compensation, and construed his claim liberally.

The Board's failure to discuss whether the breadth of Mr. Casey's claim could be understood to include entitlement to an increased rating for PTSD frustrates judicial review. Moreover, the Board's failure to analyze the potential applicability of *Clemons* and the mandate that VA give a sympathetic reading to Mr. Casey's filings renders its statement of reasons or bases inadequate. *See* R-16. For the foregoing reasons, the Board's decision that failed to adjudicate the Veteran's claim for an increased rating for PTSD, should be remanded for further proceedings.

II. The Board improperly referred the Veteran's claim for entitlement to service connection for sleep apnea to the AOJ for adjudication.

The Board erred in its decision which determined that the issue of entitlement to service connection for sleep apnea was not properly before it on appeal. R-6. The Board determined that the Veteran's claim for sleep apnea was "an etiologically separate claim from his appealed claim for a sleep disorder, which, upon reviewing the claims file, is a claim for service connection for insomnia related to service-connected PTSD, a condition etiologically and physiologically distinct from sleep apnea." *Id.* However, "multiple medical diagnoses or diagnoses that differ from the claimed condition do not necessarily represent wholly separate claims." *Clemons*, 23 Vet.App. at 4.

The Veteran is not competent to diagnose his symptoms as “sleep apnea.” Although a veteran who has no special medical expertise may testify as to the symptoms he can observe, he generally is not competent to provide a diagnosis that requires the application of medical expertise to the facts presented. *See Espiritu*, 2 Vet.App. at 494-95 (stating that a layperson can provide an account of symptoms but not a diagnosis that requires medical knowledge). The Veteran “had neither the legal or medical knowledge to narrow the universe of his claim or his current condition to [sleep apnea].” *Clemons*, 23 Vet. App. at 5 (citing *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007)).

Mr. Casey’s claim for benefits based on “sleeping difficulty” or “sleeping issues” encompassed benefits based on sleep apnea because the evidence developed during the processing of the claim indicated that the symptoms for which Mr. Casey was seeking VA benefits may have been caused or aggravated by sleep apnea. *Clemons*, 23 Vet.App. at 3; *see* R-793 (Veteran claiming sleep apnea, stating that his doctor told him his “sleeping issues” may be due to sleep apnea, but clarifying he had never been tested for sleep apnea, and referring to his disability as a “sleeping disorder”).

Although the Veteran’s August 2014 claim refers to “sleep apnea” specifically, it cannot be a claim limited only to that diagnoses, but must rather be considered a claim for any sleep disorder that may reasonably be encompassed by the Veteran’s description of the claim, the symptoms he describes, and the information that he submits in support of the claim. *See Clemons*, 23 Vet.App. at 5.

The Veteran made clear that he was requesting compensation for “sleeping issues” which he was told may be a result of sleep apnea. R-793. He described his sleeping issues as “waking up several times throughout the night and feeling tired all day.” *Id.* These are the same symptoms that he reported in connection with his sleep disorder, which the Board had jurisdiction over. *See* R-7; *see e.g.* R-169-70 (March 2014 examiner noted difficulty falling or staying asleep or restless sleep, as well as chronic sleep impairment); R-984 (Veteran describing sleeping difficulties such as difficulty sleeping at night and difficulty failing asleep); R-1199 (Veteran describing difficulty falling asleep and nightmares). It is the Veteran’s intent in filing a claim that “is paramount to construing its breadth.” *Clemons*, 23 Vet.App. at 5 (*citing Ingram*, 21 Vet.App. at 256).

The Veteran filed a single claim – one for disability compensation based upon sleeping difficulties, and given the conflicting evidence of record regarding the cause of the Veteran’s sleep problems and the multiple diagnoses, the Board failed to make findings of fact necessary to correctly determine the Veteran’s current condition relative to the claim that he filed. *See Clemons*, 23 Vet.App. at 4. The Board’s failure to exercise jurisdiction over the issue of entitlement to service connection for sleep apnea constituted prejudicial legal error. A remand, not a referral, is the appropriate action when the Board has jurisdiction over an issue but the evidence has not been developed enough for proper appellate adjudication. *Godfrey v. Brown*, 7 Vet.App. 398,

409-10 (1995). On the other hand, referral, rather than remand, of an issue to the RO is appropriate only where the issue is not in appellate status. *Id.*

In *Young v. Shinseki*, 25 Vet.App. 201 (2012), the Court specifically noted that an improper referral “could result in an improper effective date being assigned by an RO because referral connotes that the matter referred is not part of the underlying claim adjudicated by the Board.” The Court went on to add that “[t]he error ultimately could be corrected on appeal of the decision awarding the improper effective date, but correction of the improper referral at the earliest possible point in the adjudication could avoid extensive delays in finally adjudicating and resolving the claim.” *Id.* at 204. The Court also noted that “when a claim (or a part or theory in support of a claim) erroneously is referred instead of remanded, a claimant loses his statutory right to expedited consideration absent Court correction.” *Id.*

Remand is required for the Board to assume jurisdiction over the issue of entitlement to service connection for sleep apnea and adjudicate the claim accordingly. At minimum, the Board should be required to consider the aforementioned evidence and discuss whether the issue is properly in appellate status in light of the fact that the Veteran was not competent to diagnose himself with sleep apnea, and sought compensation for symptoms similar to those associated with the general sleep disorder on appeal.

CONCLUSION

The Board's decision denying service connection for anxiety and a sleep disorder is inadequate for two reasons: 1) the Board failed to liberally construe the Veteran's claim as one for an increased rating for PTSD, and 2) the Board failed to adjudicate the Veteran's claim for service connection for sleep apnea which was already in appellate status. At the very least, the Board provided inadequate reasons or bases for its decision because it did not discuss why it concluded that adjudication of these issues was not necessary. Remand is the appropriate remedy.

Respectfully submitted,
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