

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3933

CHAD M. CASEY, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Chad M. Casey appeals through counsel an August 21, 2015, Board of Veterans' Appeals (Board) decision denying, inter alia, service connection for a sleep disorder, other than sleep apnea, and anxiety and referring a claim for service connection for sleep apnea to the VA regional office (RO) for development and adjudication. Record (R.) at 2-31.¹ This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and

¹ The Board denied entitlement to an initial evaluation in excess of 10% for paresthesias in the region supplied by the left infraorbital nerve and service connection for a left eye disorder as secondary to service-connected paresthesias, but the veteran does not raise contentions of error with regard to these matters and the Court will therefore dismiss the appeal of those issues. *See* R. at 16; *Pederson v. McDonald*, 27 Vet.App. 276, 281–86 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing the appeal of that issue); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same). Furthermore, the Court notes that because Mr. Casey does not challenge the portions of the Board decision denying service connection for anxiety and a sleep disorder other than sleep apnea, other than to argue that his complaints concerning these symptoms constituted a reasonably raised claim for an increased post-traumatic stress disorder (PTSD) evaluation, an argument that the Court will address herein, dismissal of the Board's denial of service connection for those issues is appropriate. *See Pederson*, 27 Vet.App. at 281-86.

In addition, the Board remanded for additional development claims for service connection for a low back disorder, right knee disorder, and left knee disorder and entitlement to an evaluation in excess of 10% for post-left-shoulder-strain residuals, in excess of 10% for post-right-shoulder-strain residuals, and in excess of 10% for right wrist carpal tunnel syndrome. R. at 2, 17-22. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider those matters at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2016).

7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will modify the August 21, 2015, Board decision to reflect that the claim for service connection for sleep apnea is remanded to the RO rather than referred, set aside the portion of the Board decision referring that issue, and remand that issue for development, if necessary, and adjudication consistent with this decision. As noted, the appeal as to the balance of the issues addressed in the Board decision, including the denial of service connection for a sleep disorder, other than sleep apnea, and anxiety, will be dismissed.

I. FACTS

Mr. Casey served on active duty in the U.S. Marine Corps from July 2001 to July 2005. R. at 2053. In July 2010, the veteran filed a claim for, inter alia, "back pain/anxiety attacks," explaining that he had anxiety attacks because his back condition prevented him from working and supporting his family. R. at 2311, 2317. He stated that he had difficulty sleeping due to left shoulder pain. R. at 2314. In February 2011, a VA RO denied service connection for anxiety secondary to a low back condition, sleep difficulty, and service connection for psychosis under 38 U.S.C. § 1702. R. at 1918, 1925-26. Mr. Casey filed a Notice of Disagreement that same month, R. at 1674, 1894-95, and in September 2011, the RO issued a Statement of the Case (SOC), R. at 1711.

In October 2011, the veteran stated, as to the denial of service connection for psychosis, that he had spoken to a VA psychologist in 2006 regarding nightmares, "a fear that someone was after [him] to finish [him] off," and drinking, particularly when he was informed that fellow Marines had died. R. at 1606, 1617. Later that month, a report of general information indicates that VA contacted the veteran regarding the psychosis issue and Mr. Casey stated that he meant anxiety, not psychosis; he was confused because he thought his anxiety was his psychosis; and he intended to further appeal his anxiety claim. R. at 1605.

In May 2012, the veteran sent two letters to VA, one with documents related to the pending appeals for sleep difficulty and anxiety disorder and the other that included a claim for service connection for PTSD. R. at 1204, 1209. The veteran submitted a statement explaining that his PTSD symptoms included nightmares so severe they would wake him, of dead bodies he had seen while stationed in Haiti, and that he had trouble falling asleep knowing that he would see these

images. R. at 1199. In a May 2012 appeals review/deferral form, a VA rating veterans service representative noted that Mr. Casey's anxiety claim was pending and that anxiety could be a symptom of his claimed PTSD. R. at 1198.

A June 2012 VA examiner diagnosed the veteran with PTSD. R. at 1148, 1159. The examiner did not endorse the veteran having PTSD symptoms of difficulty falling or staying asleep, chronic sleep impairment, or anxiety. He indicated that the veteran experienced recurrent distressing dreams of stressor events that occurred while on deployment in Haiti, which were described as witnessing mutilated bodies, one without a head, and being shot at. R. at 1154, 1157-58. In July 2012, the RO granted service connection for PTSD with a 10% evaluation, effective May 2012. R. at 1134-35.

During a May 2013 Board hearing, Mr. Casey testified that he had trouble falling or staying asleep due to leg pain but that Pramipexole, a medication for restless leg syndrome, helped him sleep. R. at 965, 984-85. In regard to anxiety, the veteran stated he avoided crowds and did not like people walking behind him because while in Haiti he had been shot at in crowded places. R. at 986-87. In January 2014, the Board remanded the sleep disorder and anxiety claims, stating that, because the veteran had an insomnia diagnosis and was service connected for PTSD, a medical opinion as to the etiology of the sleep disorder and anxiety conditions was needed to determine whether they were separate disabilities or part of his PTSD. R. at 939, 955, 957.

During a March 2014 VA examination, the examiner completed a sleep apnea disability benefits questionnaire (DBQ) and noted that the veteran reported trouble falling asleep since service, that he occasionally woke up at night, use of over-the-counter medication to help him sleep, and that he had not been assessed for insomnia. R. at 255-257. The examiner noted that a sleep study had not been performed and opined that the veteran's "history does not indicate his sleep disorder is consistent with sleep apnea. Reports he can't get to sleep." R. at 257-58.

A March 2014 VA PTSD examination report indicated that the veteran's anxiety and sleep difficulty were related to PTSD. R. at 166, 170. A March 2014 treatment note stated that the veteran had nightmares related to PTSD. R. at 158, 160. Another March 2014 treatment note indicated that the veteran reported anxiety around others and in crowded places and difficulty falling asleep, all attributed to PTSD. R. at 221.

In August 2014, Mr. Casey filed a claim for sleep apnea, stating that, although he had not been tested for sleep apnea, a VA doctor advised him that his sleeping issues may be the result of sleep apnea. R. at 793. The veteran stated that since his last doctor's visit, his sleep disorder had worsened to the point of waking up several times throughout the night and feeling tired all day due to lack of a proper night's rest. *Id.* A September 12, 2014, VA examination request form indicated that the veteran's sleep apnea claim was deemed part of the sleep disorder claim already on appeal. R. at 511.

During an October 2014 VA examination, the examiner who conducted the March 2014 PTSD examination noted that the veteran had anxiety and chronic sleep impairment related to PTSD and stated that there was no evidence of aggravation of a sleep condition due to service or any diagnosable sleep disorder from non-mental-health causes. R. at 127-28. The examiner opined that anxiety and sleep problems were at least as likely as not directly caused by PTSD. *Id.*

In April 2015, the RO issued a Supplemental SOC (SSOC) continuing to deny service connection for a sleep disorder and anxiety, citing, inter alia, March 5, 2014, and September 30, 2014, VA examinations as evidence. R. at 73, 79. The RO found that the veteran's anxiety and sleep problems were related to service-connected PTSD and were not separate diagnoses. R. at 85. The SSOC did not mention the veteran's August 2014 sleep apnea claim or the September 12, 2014, VA examination request indicating that the sleep apnea claim should be considered part of the sleep disorder claim on appeal.

In April 2015, Mr. Casey filed a claim for an increased PTSD evaluation, stating that the October 2014 VA examination demonstrated that his symptoms had worsened. R. at 55. The veteran further explained that he had memory problems and isolated himself from others. *Id.*

In August 2015, the Board issued the decision on appeal. R. at 3. The Board noted that the veteran had filed an August 2014 claim for service connection for sleep apnea and that the RO had determined that that claim was part of the sleep disorder claim already on appeal. But the Board concluded to the contrary, indicating that the claim for service connection for sleep apnea was "an etiologically separate claim from his appealed claim for a sleep disorder." R. at 6. The Board noted that the RO had not adjudicated the issue of service connection for sleep apnea and the Board therefore did not have jurisdiction; it then referred the sleep apnea claim to the RO. *Id.* The Board

also denied service connection for anxiety and for a sleep disorder other than sleep apnea, because medical evidence indicated that those problems were symptoms of PTSD rather than separate disabilities. R. at 16. The Board ordered that symptoms of anxiety and a sleep disorder other than sleep apnea "will be included by the RO, to include in the adjudication of the [v]eteran's referred claim for an increased evaluation for PTSD."² *Id.* This appeal followed.

II. ANALYSIS

Mr. Casey argues that the Board erred by (1) failing to liberally construe his claims for anxiety and a sleep disorder as a reasonably raised claim for an increased PTSD evaluation; and (2) determining that it did not have jurisdiction over his sleep apnea claim and referring the claim to the RO for adjudication. Appellant's Brief (Br.) at 7-12. The Secretary disputes the veteran's arguments and urges the Court to affirm the August 2015 Board decision. Secretary's Br. 4-10.

A. Argument Regarding a Reasonably Raised Claim for an Increased PTSD Evaluation

As noted earlier, the veteran does not challenge the denials of service connection for a sleep impairment other than sleep apnea and anxiety. He argues only that an increased PTSD evaluation claim was reasonably raised by his July 2010 claim for service connection for anxiety and sleep problems and the subsequent finding that such conditions are attributable to PTSD. Appellant's Reply Br. at 2-3. The Court finds the veteran's argument unconvincing.

A primary reason for the argument's lack of persuasiveness is that in July 2012 the RO granted service connection for PTSD with a 10% evaluation, effective May 2012. R. at 1134-35. Although Mr. Casey argues that the issue of an increased PTSD evaluation was raised by worsening anxiety and sleep impairment, he references records dated July 2010 to May 2012 to support his claim of worsening. Appellant's Br. at 7-8. These documents pre-date the unappealed July 2012 grant of service-connection for PTSD that assigned a 10% evaluation. *See* Secretary's Br. at 9. To obtain an increased evaluation for a service-connected disability, a veteran must first be service connected. *See, e.g., Hazan v. Gober*, 10 Vet.App. 511, 520 (1997) (citing *Barrera v. Gober*, 122 F.3d 1030, 1033 (Fed. Cir. 1997) (Plager, J. concurring) (a finding of service connection is a

² It is unclear from the record of proceedings when that claim was referred to the RO.

predicate for considering disability evaluation and effective date of benefits). Thus, the Board did not err by not discussing whether evidence dated prior to the grant of service connection reasonably raised a claim for an increased PTSD evaluation. *See Talbert v. Brown*, 7 Vet.App. 352, 356 (1995) ("[t]he 'liberal reading' requirement does not require the Board to conduct an exercise in prognostication, but only requires that it consider all issues reasonably raised" by the appellant's submissions).

Further supporting the Court's conclusion is the progression of the claims at issue in this case. Mr. Casey apparently filed his claims for service connection for anxiety and a sleep disorder in 2010 and, when these claims were denied, he appealed. In May 2012, while those claims were on appeal, he filed a claim for service connection for PTSD. The PTSD claim was granted in July 2012 and PTSD was assigned a 10% evaluation, effective May 2012. R. at 1134-35. Mr. Casey had the opportunity to challenge both the evaluation assigned as to PTSD and the effective date of service connection. However, he apparently did not file an NOD as to that decision and it became final. *See* 38 U.S.C. § 7105 (if an NOD is not filed within the specified time period, generally within one year from the date notice was mailed, the action or determination becomes final). He thereafter filed a claim for an increased PTSD evaluation, which is currently pending. He now argues that the Board decision on appeal addressing the appealed issues of service connection for anxiety and a sleep disorder, pending since 2010, should have addressed whether those were in fact a claim for an increased PTSD evaluation.

However, as noted, he was not service connected for PTSD in 2010 and any decision as to whether his 2010 claims for service connection for anxiety and a sleep disorder were in fact claims for an increased PTSD evaluation would entail a collateral attack on the unappealed July 2012 RO decision that assigned a 10% evaluation and effective service connection date of May 2012, for PTSD. Collateral attacks on final unappealed decisions are accomplished via the filing of a clear and unmistakable error (CUE) motion. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000) (a CUE motion is a collateral attack on a final RO or Board decision). Thus, because the Board was not obligated to discuss whether evidence dated prior to the grant of service connection reasonably raised a claim for an increased PTSD evaluation, and because the arguments raised appear to involve a collateral attack on the final, unappealed July 2012 decision, the Board did not

err by not addressing whether an increased PTSD evaluation claim was reasonably raised.

Finally, as the Secretary indicates, the veteran filed a formal claim for an increased PTSD evaluation in April 2015, stating that the October 2014 VA examination demonstrated that his symptoms had worsened. R. at 55; Secretary's Br. at 8. It appears that this claim is currently pending, *see* R. at 16 (Board decision indicating that the RO is adjudicating an increased PTSD evaluation claim), and the Board instructed the RO to consider the aforementioned anxiety and sleep disorder symptoms when deciding that claim, *id.* In connection with that pending claim, the veteran may submit additional evidence and argument, including the evidence and argument cited in his initial and reply briefs, and may appeal any decision as to the evaluation assigned and the effective date of any increase in evaluation.

B. Referral versus Remand of the Sleep Apnea Issue

Mr. Casey argues that the Board erred by determining that it did not have jurisdiction over his sleep apnea claim and referring the claim to the RO for adjudication. Appellant's Br. at 9-12. He asserts that, if the Board were uncertain whether sleep apnea and sleep disorder are distinct disabilities, it should have remanded, rather than referred, the matter for further development. *See* Appellant's Br. at 11; Appellant's Reply Br. at 5. The Secretary argues that, because the issue of service connection for sleep apnea has not been the subject of an initial RO decision or final Board decision, the matter is not properly before the Court. Secretary's Br. at 7 (citing *Jarrell v. Nicholson*, 20 Vet.App. 326 (2006)).

The Court has jurisdiction to review issues referred to the RO by the Board to the extent that the appellant argues that remand, rather than referral, was appropriate. *Young v. Shinseki*, 25 Vet.App. 201, 202 (2012) (en banc order) (holding that the Court has limited jurisdiction to review the propriety of referring rather than remanding a claim where the appeal is otherwise properly before the Court). Because the issue raised by the veteran is whether referral or remand was appropriate, the Court has jurisdiction. *See id.*

"[R]eferral of a matter is appropriate only when the Board lacks jurisdiction over the matter being referred; remand is the appropriate action when the Board has jurisdiction over the matter, but further development is needed." *Id.* Here, the Board found that it lacked jurisdiction because the RO had not adjudicated service connection for sleep apnea, which the Board stated was an

"etiologically separate claim from [the veteran's] appealed claim for a sleep disorder." R. at 6. Mr. Casey asserts that the symptoms he referenced in his August 2014 sleep apnea claim were those he reported in connection with his sleep disorder claim, over which the Board clearly had jurisdiction. Appellant's Br. at 10-11; Appellant's Rely Br. at 4. He argues that *Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009), applies. *Id.*; see *Clemons*, 23 Vet.App.at 5 (although a claim may identify a specific condition, "it cannot be a claim limited only to that diagnosis, but must rather be considered a claim for any . . . disability that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim.").

In the August 2014 claim for service connection for sleep apnea, Mr. Casey explained that a VA doctor had advised him that his sleeping issues may be a result of sleep apnea, but he had never undergone testing, and that his sleep disorder has worsened to the point of waking up several times throughout the night and feeling tired all day due to lack of a proper night's rest. R. at 793. Throughout the appeal period, the veteran has complained of sleep problems to include waking during the night. In his July 2010 claim for service connection for sleep problems, which is currently on appeal and over which the Board indisputably had jurisdiction, the veteran stated that he had "difficulty sleeping" and attributed it to shoulder pain. R. at 2314. At various times, Mr. Casey claimed that his difficulty sleeping was related not only to shoulder pain but also to PTSD or sleep apnea. Although he is competent to describe his symptoms of sleep problems, he does not have the medical expertise to assess the cause of such problems or to diagnose himself. See *Jandreau v. Nicholson*, 492 F.3d 1372, 1376–77 (Fed. Cir. 2007) (noting general competence of laypersons to testify as to symptoms, but not to provide a medical diagnosis); *Clemons*, 23 Vet.App. at 5 (veteran did not have the legal or medical knowledge to "narrow the universe of his claim or his current condition to PTSD").

Because the veteran is a layperson and not a medical expert, he did not have the medical knowledge to ascertain the genesis of his sleep problems or to diagnose himself and narrow his claim to sleep apnea alone. Therefore, the veteran's August 2014 description of sleep problems and filing of a claim for sleep apnea was part and parcel of his pending sleep disorder claim and was properly before the Board on appeal. See *Clemons*, 23 Vet.App. at 5. In fact, the RO recognized this in

September 2012 when it indicated that Mr. Casey's sleep apnea claim was considered part of the sleep disorder claim on appeal. R. at 511. Thus, the Board should have remanded, rather than referred, that matter to the RO for further development, *see Young*, 25 Vet.App. at 203-05, and the Court will modify the Board decision to reflect remand, rather than referral, of the claim for service connection for sleep apnea, *see* 38 U.S.C. § 7252 (empowering this Court to modify a Board decision "as appropriate").

The Court rejects the Secretary's argument that *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008), dictates that the claim for service connection for sleep apnea must be considered a separate and distinct claim and thus must be referred. Secretary's Br. at 6-7. In *Clemons*, the Court made clear that *Boggs* stands for the narrow proposition that, "if there is a final agency decision denying a claim based on a particular diagnosis, and subsequently a new and different diagnosis is submitted for VA's consideration, the second diagnosis must be considered factually distinct from the first and must be considered to relate to a separate claim." 23 Vet.App. at 7-8. Unlike in *Boggs*, there has been no final, unappealed decision as to the veteran's sleep disorder claim that would impose the jurisdictional constraints underlying the *Boggs* decision. *See id.* at 8 (distinguishing *Boggs* on the basis that, "when no previous and final Board decision exists, the finality requirement of [38 U.S.C. §] 7104(b) and the exception provided in [38 U.S.C. §] 5108 are inapplicable, and any jurisdictional constraints with regard to the scope of the claim are absent"). Because "Boggs did not state a general rule that each new diagnosis presented prior to a final agency decision pertains to an entirely separate claim," *id.*, it is inapposite and the Secretary's argument must fail. In closing, the Court notes also that here there is actually no "new and different diagnosis" of sleep apnea because Mr. Casey has not received a diagnosis of that condition.

The veteran is free on remand to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the portion of the August 21, 2015, Board decision referring the issue of service connection for sleep apnea is SET ASIDE and REMANDED to the RO for further development, if necessary, and adjudication consistent with this decision. The Board decision is further MODIFIED to reflect that the matter of service connection for sleep apnea is remanded to the RO. The appeal as to the balance of the Board decision, including the denial of service connection for a sleep disorder other than sleep apnea and anxiety, will be dismissed.

DATED: November 30, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)