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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0865

LEWIS R. PAGE, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Lewis R. Page, through counsel appeals an October 22, 2018, Board of Veterans' Appeals (Board) decision denying a disability rating in excess of 70% for post-traumatic stress disorder (PTSD) for the entire period on appeal. Record (R.) at 3-13. Additionally, the Board awarded a 70% initial disability rating for the period prior to November 19, 2015. This is a favorable finding that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part, dismissed in part sub nom. Medrano v. Shinseki*, 332 F. App'x 625 (Fed. Cir. 2009); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are adverse to a claimant."). The Board also remanded the issue of entitlement to a total disability rating based on individual unemployability. The remanded matter is not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). The Court previously formed a panel to consider a record

dispute in this case and issued an order on January 14, 2022, in part granting the Secretary's motion to amend the record before the agency (RBA) to include records that were constructively before the Board. *Page v. McDonough*, __ Vet.App. __, __, No. 19-0865, 2022 WL 169173, at *7 (Jan. 14, 2022) (per curiam order). However, the panel has decided that single-judge disposition of the merits is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision denying a disability rating in excess of 70% for PTSD and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from February 1963 to November 1965 and from January 1966 to August 1971. R. at 2285-86, 2289. In November 2007, he filed a claim for disability compensation for PTSD. R. at 4201. A VA regional office (RO) subsequently awarded benefits and assigned an initial 30% disability rating, effective October 22, 2007. R. at 4165-72. The appellant filed a Notice of Disagreement, R. at 4145, and, after the RO increased the initial disability rating to 50%, R. at 4116-19, the appellant perfected an appeal as to the assigned rating, R. at 4092; *see* R. at 4101-15. In November 2011, the Board remanded the matter for additional development, including a new VA examination, which was provided in November 2015. R. at 3484-90, 4006-14.

An internal VA deferred rating decision dated in April 2017 reflects that the appellant's claims file was lost, and procedures to rebuild the claims file were initiated at that time. R. at 2788. A September 2017 deferred rating decision indicates that, in addition to the rebuild development initiated in April, the rating board was instructed to upload outpatient records from the Philadelphia, Pennsylvania, VA Medical Center "for treatment beginning 2/25/2013 through February 21, 2017[,] and 8/29/2017[,] to present." R. at 2750. The record contains VA medical treatment records from August 2001 to April 2018, including records that were scanned into the Veterans Health Information Systems and Technology Architecture (VistA) Imaging system in January 2015 and May 2018. R. at 114-1773, 2320, 2367-729, 2751-86, 2796-3474, 3584-4004, 4224-496. In July 2018, the RO increased the PTSD disability rating to 70%, effective November 19, 2015. R. at 73-78.

On October 22, 2018, the Board awarded a 70% disability rating for the period prior to November 19, 2015, but the Board denied a higher rating for any period on appeal. R. at 3-13. This appeal followed.

II. ANALYSIS

A. Parties' Arguments

The appellant argues that VA failed to satisfy its duty to assist him in developing his claim because the Board failed to obtain and consider fee-basis treatment records that had been scanned into the VistA Imaging system in January 2015 and May 2018. Appellant's Brief (Br.) at 5. He also argues that the Board was on notice that he was hospitalized at Jefferson Hospital in Stratford, New Jersey, from January 31 to February 3, 2018, for stroke-like symptoms, and thus the Board erred by failing to remand his claim to provide him with a release for records and to obtain those hospitalization records. *Id.* at 6-7. He avers that the Jefferson Hospital records are relevant because "treatment for a suspected stroke reasonably could be expected to include psychological evaluations, which would include updated information on the severity of his PTSD symptoms." *Id.* at 7. Additionally, he asserts that, if those records reflect a worsening of symptoms, VA would be required to provide a contemporaneous examination, which in turn could lead to an increased disability rating. *Id.* Next, he contends that the Board erred by failing to obtain a new VA examination. *Id*. at 8-9. In that regard, he states that VA lost his claims file during the period between the November 2015 VA examination and the October 2018 Board decision on appeal and that VA was unable to determine if there was missing information. *Id.* at 8-9. He acknowledges that the age of an examination alone does not necessitate a new examination, but he alleges that the "loss of records properly heightened the duty to assist," beyond "the typical duty," such that a new examination was required. *Id.* at 9. Finally, he maintains in the alternative that the Board failed to adequately explain why it implicitly found the duty to assist, including its heightened duty, to have been satisfied. *Id.* at 9-10.

Prior to filing his responsive brief, the Secretary moved to amend the RBA and sought leave to include documents that were scanned into VistA in January 2015 and May 2018. Secretary's Nov. 27, 2019, Motion; *see* Secretary's July 20, 2021, Motion. The Court, as noted above, subsequently granted the Secretary's motion, and on January 21, 2022, the Secretary served on the appellant an amended RBA including those records.

In his brief, the Secretary first asserts that the appellant abandoned his appeal of that part of the Board's decision denying a 100% rating prior to November 19, 2015. Secretary's Br. at 2. Regarding the Jefferson Hospital records, the Secretary counters that VA was not required to obtain them because the appellant has not shown that the treatment was authorized by VA or that the records are relevant to the claim. *Id.* at 9-10. And, even if relevancy is not determinative of VA's duty to assist in obtaining those records, the Secretary argues that the appellant has not shown prejudice on appeal because the Jefferson Hospital records are absent of PTSD-related symptoms and do not reflect total occupational and social impairment. *Id.* at 10-13. The Secretary also indicates that those records were constructively before the Board. *Id*. at 13-14. As to a new VA examination, the Secretary responds that the evidence does not reflect a material change in the disability when comparing the appellant's symptoms in 2015 to 2018, nor is there any indication that there are records still missing from the claims file or an allegation in that regard from the appellant. *Id*. at 14-18.

In reply, the appellant first clarifies that he did not abandon his appeal of the Board's denial of a higher rating prior to November 19, 2015. Reply Br. at 1-2. Regarding the Jefferson Hospital records, he maintains that relevancy is not required to trigger VA's duty to assist him in obtaining those records. *Id.* at 5-7. Further, to the extent that those records were constructively before the Board, he contends that they are unreviewable by the Court because they are badly distorted, they are incomplete because they do not contain records from January 2015, and they are prohibited from the Court's review as being extrarecord evidence. *Id.* at 7-8. Regarding VA's duty to provide a new examination, he asserts that the Secretary's responses are impermissible post-hoc rationalizations, that there is no confirmation that all of his records were reacquired when his claims file was rebuilt, and that he could not be expected to know if any were missing. *Id.* at 3-5. Further, he asserts that he cannot now in his brief identify missing records or assert worsened symptoms because such a statement was not before the Board and thus would not be reviewable by this Court. *Id.* at 3. And, he avers that the Court cannot in the first instance make the factual finding that his symptoms in 2018 were the same in severity as those in 2015. *Id.* at 4.

B. Law

To trigger VA's duty to provide a contemporaneous reexamination, "the [appellant] must come forward with at least some evidence that there has in fact been a material change in his or her disability when that [appellant] seeks a rating increase." *Glover v. West*, 185 F.3d 1328, 1333

(Fed. Cir. 1999); 38 C.F.R. § 3.327 (2021) ("Generally, reexaminations will be required if . . . evidence indicates there has been a material change in a disability or that the current rating may be incorrect."); *see also Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994) (finding that the Board in 1990 erred in finding a 1988 examination sufficiently contemporaneous to inform its decision because the appellant presented postexamination evidence suggesting that his condition had worsened). Neither a "bald, unsubstantiated claim for an increase in disability rating," *Glover*, 185 F.3d at 1333, nor the "mere passage of time," *Palczewski v. Nicholson*, 21 Vet.App. 174, 182 (2007), is sufficient evidence of a material change to trigger VA's duty.

When service records are presumed lost or destroyed, the Board is under a heightened duty to assist, which includes advising the claimant to submit alternative forms of evidence and assisting the claimant in obtaining that alternative evidence. *Washington v. Nicholson*, 19 Vet.App. 362, 370 (2005). Further, the Board has a heightened duty "to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt." *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991).

The Board's determination of whether the Secretary has fulfilled his duty to assist is generally a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009). A finding of 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); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

C. Discussion

Here, the parties make competing arguments as to whether the Secretary was required to provide a contemporaneous examination based on a heightened duty to assist. *See* Appellant's Br. at 8-10; Secretary's Br. at 14-18; Reply Br. at 3-5. The Court, however, cannot address whether the Board erred when it adjudicated the appellant's claim without obtaining a contemporaneous medical examination because the Board made no findings concerning VA's duty to assist. *See* R. at 4-11. The Court's review is frustrated by the Board's failure to make the necessary factual findings in the first instance. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate

tribunals are not appropriate fora for initial fact finding."); *see also* 38 U.S.C. § 7261(c). In that regard, resolving this issue would require the Court in the first instance to determine whether the appellant's claims file was rebuilt in full, whether any heightened duty to assist was triggered or satisfied, and whether a new examination was required. The Court may not resolve these factual disputes or evaluate their potential effect on the Board's findings. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("[T]he evaluation and weighing of evidence are factual determinations committed to the discretion of the factfinder—in this case, the Board.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) ("[T]he Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, 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, 372-73 (1999) (per curiam order). The Court reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 22, 2018, decision denying a disability rating in excess of 70% for PTSD is VACATED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: February 24, 2022

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