

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1515

JOSEPH HARVEY, JR.,

APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Judge*.

ORDER

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

Veteran Joseph Harvey, Jr., appeals a January 14, 2016, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for sleep apnea and denying the reopening of a claim for service connection for tinnitus.

The record of proceedings (ROP) contains a December 4, 2014, document submitted by Mr. Harvey's representative, Mr. David Anaise, in support of his appeal. R. at 82-89. In this document, Mr. Anaise made several references to enumerated "exhibits", *e.g.* R. at 84 ("He provided the following assessment [EXHIBIT 8].") (bracket and capitalization in original), and indicated in the signature block that he included enclosures with the document, R. at 89 ("Enclosures (see attached chart for numerical list of exhibits)") (parentheses in original). However, the ROP does not contain a list of exhibits and appears to only include what Mr. Anaise referred to as "EXHIBIT 9", an article by Dr. Vincent Mysliwiec entitled *Sleep Disorders and Associated Medical Comorbidities in Active Duty Military Personnel*. See R. at 86, 98-105. Therefore, it is unclear whether the ROP contains the entirety of Mr. Anaise's December 2014 submission from the record before the agency. See U.S. VET. APP. R. 28.1(a)(1)(B) (directing the Secretary to prepare and file a record of proceedings containing "any document from the record before the agency cited in a brief, *in its entirety*, with any associated envelope or date stamp if relevant") (emphasis added).

In the decision on appeal, the Board relied on August 2009 and April 2013 VA examination reports to find that "the weight of the competent evidence demonstrates that there is no relationship between the [v]eteran's claimed sleep apnea and either active service or a service-connected disability." R. at 25. However, the ROP does not contain either medical opinion. See U.S. VET. APP. R. 28.1 (a)(1)(C) (directing the Secretary to prepare and file a record of proceedings containing "any other documents before the Secretary and the Board *that are relevant to the issues*

before the Board that are on appeal to the Court or relevant to issues otherwise raised in the appeal") (emphasis added).

Accordingly, the Court will order the Secretary, within 15 days after the date of this order, to supplement the ROP with the entirety of the December 2014 document submitted by Mr. Harvey's representative, including all enclosures, and the August 2009 and April 2013 medical opinions, as well as any other opinions relevant to the Board's sleep apnea determination. If no such documents exist, the Secretary must file a response stating that fact. *See* U.S. VET. APP. R. 28.1(a)(1)(B), (a)(1)(C), (c) ("The Court may direct any party to file additional record material").

Upon consideration of the foregoing, it is

ORDERED that the Secretary, within 15 days from the date of this order, shall supplement the ROP in a manner consistent with this order.

DATED: September 1, 2017

PER CURIAM.

Copies to:

David Anaise, Esq.

VA General Counsel (027)