Vet. App. No. 18-3011

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PETER J. BLACKMON,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellant,	)	
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v.	)	Vet App. No. 18-3011
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Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should vacate and remand the decision of the Board of Veterans' Appeals (Board or BVA), dated May 29, 2018, that denied entitlement to service connection for a traumatic brain injury (TBI) where the Board did not provide an adequate statement of reasons or bases for its decision pursuant to 38 U.S.C. § 7104(d)(1).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252.

B. Factual and Procedural History

Appellant served on active duty in the U.S. Army from January 1968 until January 1970, including service in Vietnam. (R. at 1409). Service decorations include the Vietnam Service Medal, the Vietnam Campaign Medal, and the Republic of Vietnam Gallantry Cross. *Id.*

Appellant's service medical records (SMRs) are negative for any report of head injury or neurological disorder. (R. at 3673-3736).

A December 1969 separation examination indicated a normal neurological examination. (R. at 3720-21). Upon completing a report of medical history in December 1969, Appellant checked "no" to having ever experienced frequent or severe headache, dizziness or fainting spells, history of head injury, loss of memory or amnesia, or periods of unconsciousness. (R. at 3718-19).

In a May 2003 posttraumatic stress disorder (PTSD) questionnaire, Appellant reported "combat situations," including "intense heavy bombing." (R. at 3470-79).

In June 2003, Appellant underwent a VA PTSD examination wherein the examiner noted that Appellant was "in combat in Vietnam." (R. at 3457-61). The examiner further noted that Appellant "reports being in front of line and having to see people injured and dead. . .he had near death experience. . .he talked about one soldier, he had with him, on the last week of duty when he tried to cheat death and then he was actually killed." (R. at 3457). The examiner diagnosed Appellant

with PTSD and indicated that his PTSD symptoms are "related by time and cause to his time in service." (R. at 3460).

A June 2003 rating decision granted service connection for PTSD and indicated "[w]e have granted service connection for posttraumatic stress disorder (PTSD) because the VA examiner concluded that this condition resulted from your military service." (R. at 3443-52).

A September 2006 VA PTSD examination (R. at 2324-27) indicates that Appellant "did see combat. . .[h]e reports being shot at, as well as being bombed, in addition to mortar fire." (R. at 2324).

An October 2010 VA medical examination (R. at 1541-46) describes the primary stressor(s) related to PTSD as "direct combat experiences." (R. at 1545).

Appellant filed a claim seeking service connection for TBI in April 2012. (R. at 1082-90). Appellant contended that he received a TBI "while enduring combat mortar rounds blasting all around me while on the front line on the battlefield." (R. at 1090).

A July 2013 rating decision denied Appellant's claim for entitlement to service connection for a TBI. (R. at 983-90). Appellant filed a Notice of Disagreement (NOD) in August 2013. (R. at 972-76). A Statement of the Case (SOC) was issued in September 2014 which continued the denial of Appellant's claim. (R. at 862-92). The SOC indicated that "[s]ometimes TBI symptoms and mental disorder symptoms overlap. You are service connected for posttraumatic stress disorder which may be the source of some of the nerve and emotional

symptoms you are indicating." (R. at 891). Appellant filed a VA Form 9 appealing to the Board in September 2014. (R. at 715-720).

An April 2015 VA examination for posttraumatic stress disorder (PTSD) indicates that the Appellant reported a TBI but the examiner did not find it in the Appellant's medical records. (R. at 673-79).

A Supplemental Statement of the Case (SSOC) was issued in September 2017. (R. at 34-42). A written brief presentation was submitted on Appellant's behalf by a veterans' service representative in October 2017. (R. at 26-31). The written brief presentation reflected Appellant's contention that he received a TBI in Vietnam due to mortar blasts, (R. at 27-28), noting further that "[v]ery rarely did a servicemen (sic) in combat in Vietnam have treatment in the service treatment records as SSOC points out." (R. at 28-29).

The Board issued its decision on May 29, 2018 denying Appellant's claim and finding that it was unnecessary to seek a VA medical examination or opinion concerning TBI. The Board did not address 38 U.S.C. § 1154(b) in its decision. (R. at 3-9). This appeal ensued.

III. SUMMARY OF ARGUMENT

The Board's May 29, 2018, decision that denied entitlement to service connection for a traumatic brain injury (TBI) should be vacated and remanded for the Board to provide an adequate statement of reasons or bases for its decision concerning the potential applicability of 38 U.S.C. § 1154(b). Specifically, the Board's reasons and bases were not adequate because the Board did not provide

a credibility determination concerning Appellant's lay statements, discuss whether the provisions of 38 U.S.C. § 1154(b) are applicable, or adequately address whether a VA examination was warranted.

Pursuant to 38 U.S.C. § 5103A(d)(1)-(2) and 38 C.F.R. § 3.159(c)(4)(i)(A)-(C), the duty to assist requires that the VA provide a claimant with a VA medical examination when the record does not contain sufficient competent medical evidence to decide the claim but A) contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability; B) Establishes that the veteran suffered an event, injury or disease in service, and C) indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability*. Id.*

In *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006), this Court held that the third element of 38 C.F.R. § 3.159 requires only that the evidence "indicates" that there "may" be a nexus between the other two elements, and that "[t]his is a low threshold." *Id.*

In this case, there is evidence of record to indicate that Appellant has experienced symptoms of a current disability, which he contends is attributable to a TBI. There is also evidence that suggests that Appellant experienced an in-service event, to include mortar fire during combat, which could cause a TBI. The Board did not provide a credibility determination on these matters or discuss whether the provisions of 38 U.S.C. § 1154(b) are applicable to this claim. If

Appellant is deemed credible on these matters, or if the presumptions of 38 U.S.C. § 1154(b) apply, Appellant may be entitled to a VA examination. The Board did not provide an adequate statement of reasons or bases on these matters, and remand is therefore warranted.

IV. ARGUMENT

The Board's May 29, 2018 decision denying Appellant's claim for entitlement to service connection should be vacated and remanded, because the Board did not provide an adequate statement of reasons or bases for its determination as required by 38 U.S.C. § 7104(d)(1). Specifically, the Board did not provide a credibility determination concerning Appellant's lay statements, discuss whether the provisions of 38 U.S.C. § 1154(b) are applicable, or adequately discuss whether a VA examination was warranted.

Each decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1).

In making its statement of findings, the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. In providing its reasons or bases, the Board must include in its decisions the precise basis for that decision, and the Board's response to the various arguments advanced by the claimant. This must include

an analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran in support of his or her claim and a statement of the reasons or bases for the implicit rejection of this evidence by the Board. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) (internal citations omitted).

The purpose behind the requirement that the Board provide an adequate statement of reasons or bases for its decision is 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).

Pursuant to 38 U.S.C. § 5103A(a)(1), VA shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim. Such assistance shall include providing a medical examination or obtaining a medical opinion when it is necessary to make a decision on the claim. 38 U.S.C. § 5103A(d)(1).

The Secretary shall treat a medical examination as being necessary to make a decision on a claim if the evidence of record before the Secretary, taking into account all information and lay or medical evidence (including statements of the claimant) A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of a disability; and B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but C) does not contain sufficient medical evidence for the Secretary

to make a decision on the claim. 38 U.S.C. § 5103A(d)(2)(A)-(C), 38 C.F.R. § 3.159(c)(4)(i)(A)-(C).

In *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006), this Court noted that the third element of 38 C.F.R. § 3.159 requires only that the evidence "indicates" that there "may" be a nexus between the other two elements. The Court held that "[t]his is a low threshold." *McLendon*, 20 Vet.App. at 83. The Court went on to hold in that case that a Board determination that the evidence was insufficient to establish medical causation did not mean that the evidence was necessarily insufficient to establish that there was no indication that there may be a nexus between the in-service event and the disability. *McLendon*, 20 Vet.App. at 84.

In this case, although the Board found that it was unnecessary to provide a VA examination to adjudicate Appellant's claim for service connection for TBI, the Board did not provide adequate reasons and bases on this matter, and remand is warranted.

Though the Board found that Appellant does not have a diagnosis of TBI, (R. at 5-6), and therefore it was not required to provide a VA examination, it is not necessary for the Appellant to have a diagnosis of the claimed condition to warrant a VA examination and opinion. 38 U.S.C. § 5103A(d)(2)(A) (a medical examination may be warranted where there is a competent evidence of a disability, *or persistent or recurrent symptoms of a disability*.)

Appellant has alleged that he experiences symptoms of a TBI, including emotional problems and nerve damage. (R. at 1090). Notably, VA regulations

acknowledge that residuals of TBI include three main areas of dysfunction, to include cognitive, emotional/ behavioral, and physical. 38 C.F.R. § 4.124a (Diagnostic Code 8045).

VA regulations further reflect that TBI residuals may overlap with other mental, neurologic, or physical disorders. 38 C.F.R. § 4.124a (Diagnostic Code 8045). In fact, the Regional Office (RO) noted in a 2014 SOC that "[s]ometimes TBI symptoms and mental disorder symptoms overlap. You are service connected for posttraumatic stress disorder which may be the source of some of the nerve and emotional symptoms you are indicating." (R. at 891).

The RO thus recognized the symptoms that Appellant was reporting, and indicated that such symptoms could be related to a TBI, but assumed, without obtaining a VA medical examination or an opinion, that such symptoms were attributable to PTSD. *Id.* VA regulations also suggest that symptoms such as those described by the Appellant could be indicative of a TBI. 38 C.F.R. § 4.124a (Diagnostic Code 8045).

The record also reflects evidence that the symptoms reported by the Appellant may be associated with the claimant's active military service. 38 U.S.C. § 5103A(d)(2)(B). Appellant reports serving in combat, to include experiencing mortar fire, at which time he experienced a TBI. (R. at 1068). Appellant was granted service connection for PTSD based on examination reports which reflect combat service. (R. at 3443-52, 3457).

Though the Board found that there was no indication of a TBI in VA treatment records, (R. at 5), and Appellant's SMRs and separation examination do not reflect a head injury or TBI, (R. at 3673-3736, 3718-21), the Appellant's written brief presentation argued that "[v]ery rarely did servicemen in combat in Vietnam have treatment in the service treatment records." (R. at 28-29).

The Board did not deem Appellant incompetent or incredible concerning his assertions of having experienced mortar fire and combat while in service. There is no indication that Appellant would not be competent to report such occurrences, or symptoms that he experienced afterwards that are capable of lay observation. 38 C.F.R. § 3.159(a)(2) ("Competent lay evidence" is any evidence not requiring that the proponent have specialized education, training or experience, but is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person). No credibility determination was provided as to these matters, however.

Moreover, the Board did not otherwise consider the provisions of 38 U.S.C. § 1154(b) or their applicability, despite evidence of record that Appellant engaged in combat. Pursuant to those statutory provisions, if a veteran engaged in combat with the enemy during a period of war, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in such service by satisfactory lay or other evidence of service incurrence of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such

incurrence in such service, and to that end, shall resolve every reasonable doubt in favor of the veteran. 38 U.S.C. § 1154(b). *See also, Reeves v. Shinseki*, 682 F.3d 988, 999 (Fed. Cir. 2012) (38 U.S.C. § 1154(b) may be invoked to show that certain events occurred in service, and/ or that the disability itself occurred in service).

If Appellant's contentions are credible or if the events described by Appellant or the disability itself is presumed to have occurred pursuant to 38 U.S.C. § 1154(b), this may provide sufficient indicia between Appellant's claimed symptoms and his military service to warrant a VA examination and opinion regarding the presence and etiology of TBI pursuant to the Court's decision in *McLendon*.

In short, it is unclear from the Board's reasons or bases whether there was sufficient medical evidence for the Secretary to make a decision on the claim, such that, as the Board concluded, a VA examination concerning TBI is not necessary pursuant to 38 U.S.C. § 5103A(d)(2)(C). The Board must provide an adequate statement of reasons or bases as to matters of credibility and the application of 38 U.S.C. § 1154(b) in order to assess whether a VA medical examination is needed; without such a statement, judicial review is frustrated.

Remand is warranted so that the Board might provide an adequate statement of reasons or bases as to the credibility of Appellant's lay statements, the application of 38 U.S.C. § 1154(b), and whether a VA examination is warranted pursuant to applicable statutes, regulations, and case law.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully requests that the Board's May 29, 2018, decision that denied entitlement to service connection for a TBI be vacated and remanded for the reasons described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury of the laws of the United States of America, that on March 28, 2019, a copy of the foregoing was mailed, via first class U.S. mail, postage pre-paid to:

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/s/ Angela-Marie C. Green
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