United States Court of Appeals for Veterans Claims

Vet. App. No. 19-746

HUGH J. DAVIS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

Byron M. Moore
Barton F. Stichman
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, D.C. 20006-2833
(202) 621-5721

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, OTHER AUTHORITIES, AND RECORD BEFORE THE AGENCY

Cases

Statutes

Regulations and Other Authorities

Record Before the Agency

STATEMENT OF THE ISSUES

I. THE BOARD ERRED IN FINDING THAT VA SATISFIED ITS DUTY TO ASSIST MR. DAVIS IN SUBSTANTIATING HIS CLAIM FOR SERVICE CONNECTION FOR SLEEP APNEA BY RELYING UPON AN INADEQUATE DECEMBER 2015 VA MEDICAL OPINION AND FAILING TO SEEK RELEVANT PRIVATE MEDICAL RECORDS.

II. THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF MR. DAVIS' SLEEP APNEA CLAIM, INCLUDING ITS RELIANCE ON THE FLAWED DECEMBER 2015 VA MEDICAL OPINION.

STATEMENT OF THE CASE

The appellant, Mr. Hugh J. Davis ("Mr. Davis" or the "Veteran"), appeals the October 12, 2018, decision by the Board of Veterans' Appeals ("Board") that denied his claim of entitlement to service connection for sleep apnea. Record Before the Agency ("R.") at 4–12. The Court of Appeals for Veterans Claims ("Court") has jurisdiction over this case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

STATEMENT OF THE FACTS

Mr. Davis served on active duty from October 1986 to September 1990. R. at 373. He seeks service connection for sleep apnea. *See* R. at 4–12; R. at 829. This appeal focuses on the Board's assessment of the lay evidence of record and its analysis of the VA medical opinions of record.

Mr. Davis' Service

Mr. Davis entered active duty in October 1986. R. at 374. According to an individual who served with Mr. Davis, during basic training, he "would snore every night to the point that no one wanted to be his bunk mate . . . [or] to be in the same room with

him while he slept." R. at 833. The individual who served with Mr. Davis also noted that he made choking noises, and that he "would stop breathing follow[ed] by a very LOUD gasping noise." *Id*. And the individual noted that Mr. Davis "never reported his problem sleeping, and being tire[d] all the time during the day [] because he was concerned that he would be remove[d] from his pending Officer Candidate School (OCS) class date." *Id*.; *see* R. at 374.

In December 1988, during his military service, Mr. Davis married his current wife. R. at 831. According to Mrs. Davis, she had "never witnessed anyone with such snoring and gasping for air problem[s]." *Id*. She "begged him to see a doctor, however, being an [i]nfantry officer, [] he refused." *Id*. In fact, she "told him that he should definitely see a specialist for this snoring problem," but Mr. Davis told her that she "would eventually get used to it." *Id*.

Mr. Davis left active duty in September 1990. R. at 373. A contemporaneous Report of Medical Examination does not note Mr. Davis as suffering from sleep apnea. R. at 330–31. His Report of Medical History contains similar findings. R. at 332–33. But according to Mrs. Davis, her husband continued to snore and gasp for air in his sleep after his discharge. *See* R. at 831.

Mr. Davis' Current Service Connection Claims

In or about 2005, Mr. Davis was first diagnosed with sleep apnea.[1] R. at 817 (817–21); R. at 831; R. at 1254–55. Hurricane Katrina prevented Mr. Davis from

[1] In September 2005, Mr. Davis provided VA with authorization to obtain records from Ochsner Clinic, along with the clinic's address, as part of VA's development of his prior

receiving a sleep study, and as a result of that hurricane, Mr. Davis lost his continuous positive airway pressure ("CPAP") machine along with his other possessions. R. at 831. Three years later, after he resettled in Texas, he underwent a sleep study. R. at 826–28. A report produced following the sleep study notes that Mr. Davis presented "with a history of restless and disturbed sleep, heavy snoring associated with sudden gasping episodes, [and] holding breath while asleep," among other symptoms. R. at 826 (826–28). He was again diagnosed with sleep apnea and prescribed a CPAP machine. R. 828 (826–28).

In July 2013, Mr. Davis applied for entitlement to service connection for sleep apnea. R. at 829. Months later, VA provided Mr. Davis with a VA examination to assess the nature and cause of his disability. R. at 817–21. The author of a corresponding examination report noted that Mr. Davis had "problems while in [s]ervice[.] Diagnosed with [] Sleep Apnea in 2005 by Ochsner Clinic in Louisiana. . . . Patient had loud snoring, stop breathing for several seconds, loud gasping and choking noises. Co-workers concerned about his sleeping problems." R. at 817 (817–21). The examiner initially opined that Mr. Davis' sleep apnea was not secondary to his acquired psychiatric disorder or aggravated by his acquired psychiatric disorder. R. at 797–801. In an addendum opinion, the examiner discussed the direct relationship between Mr. Davis' sleep apnea and his service:

---

hearing loss and tinnitus claims. R. at 1281. It does not appear that VA sought further authorization from Mr. Davis to obtain his sleep apnea records from Ochsner Clinic, that VA actually sought Mr. Davis' sleep apnea records from Ochsner Clinic, or that VA otherwise reviewed Ochsner Clinic records related to Mr. Davis' sleep apnea when adjudicating his claim. *See* R. at 1–1297.

> Hx: 13 yr gap of medical data post service till formal dx of OSA made in 2008. Or 2005?
> See medical opinion formally done.
> MO
> It is less likely than not...rationale
> No continuity or chronicity is of evidence nor c file data to show a nexus.

R. at 795. The regional office (RO) with prior jurisdiction denied Mr. Davis' sleep apnea claim later that same month. R. at 759–64. Mr. Davis filed a notice of disagreement with the RO's denial of his claim shortly thereafter. R. at 754.

VA provided Mr. Davis with a new medical opinion to address the nature and cause of his sleep apnea in December 2015. R. at 440–45. The examiner opined that Mr. Davis' sleep apnea "was less likely than not (less than 50% probability) incurred in or caused by the claimed in-service injury, event or illness." R. at 442 (440–45). The author of the medical opinion found that "the signs and symptoms reported by the veteran, his wife and fellow service member as occurring during the veteran's period of active duty are not diagnostic of obstructive sleep apnea (OSA) and lack causation." R. at 442 (440–45). The examiner also noted:

> Studies have shown that patients with diagnosed OSA can have periods of snoring, pauses in their breathing and gasping; these particular signs and symptoms are sensitive[2] for OSA, but studies have shown poor specificity[3] of these signs and symptoms in diagnosing OSA, and no studies have established causation for these signs and symptoms.

---

[2] According to Dorland's Illustrated Medical Dictionary, "sensitivity" refers to "the conditional probability that a person having a disease will be correctly identified by a clinical test." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1692 (32nd ed. 2012).

[3] According to Dorland's Illustrated Medical Dictionary, "specificity" refers to "the conditional probability that a person **not** having a disease will be correctly identified by a clinical test." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1742 (32nd ed. 2012) (emphasis added).

Id. The author of the December 2015 VA Medical Opinion also stated that Mr. Davis' 2005 sleep apnea diagnosis was "fifteen years after the veteran's separation from service," and found that there was "no established chronicity of condition or treatment stemming from any in-service injury, illness, or event during the veteran's service." R. at 442 (440–45). VA issued a Statement of the Case in December 2005, and continued its denial of Mr. Davis' claim. R. at 405–32. Mr. Davis timely filed a formal appeal. R. at 404.

Proceedings Before the Board

In an October 2018 decision, the Board denied Mr. Davis' claim of entitlement to service connection for sleep apnea. R. at 4–12. Discussing the September 2013 VA examination report, and the October 2013 VA medical opinion, the Board found "these opinions inadequate, as the Veteran's submitted lay statements were not considered in these opinions," and stated that "[a]n adequate rationale was also not provided." R. at 6 (4–12).

The Board found the December 2015 VA Medical Opinion to be adequate, and relied on the opinion for the proposition that the "sign and symptoms" described by Mr. Davis, his wife, and the individual with whom he served, "are not specific to diagnosing OSA." R. at 8 (4–12). The Board also noted that "[t]he lay opinions in this regard are insufficient to establish causal nexus, particularly when weighed against the VA examiner's medical opinion and cogent rationale." *Id*. Ultimately, the Board concluded that the preponderance of the evidence was against his claim. *Id*.

SUMMARY OF THE ARGUMENT

The Board committed reversible error when it: (1) failed to ensure that Mr. Davis received an adequate VA medical opinion to address the relationship between his sleep apnea and his service; (2) failed to seek relevant private medical records; and, (3) failed to provide an adequate statement of reasons or bases for its denial of his claim, including its reliance on a flawed VA medical opinion and failure to otherwise discuss VA's duty to assist. 38 U.S.C. § 7104(d)(1).

First, the December 2015 VA Medical Opinion relied upon by the Board was inadequate because the medical opinion failed to address the significance of Mr. Davis' continued symptoms of snoring, gasping for air and pauses in breath during his sleep, failed to explain the clinical significance of the gap in time between the conclusion of his service and the date of his sleep apnea diagnosis, and impermissibly relied on a lack of contemporaneous medical records. *See* R. at 440–45. Vacatur and remand are required for the Board to provide an adequate medical opinion, pursuant to its duty to assist. 38 U.S.C. § 5103A. At the very least, vacatur and remand are warranted for the Board to provide an adequate statement of reasons or bases for its reliance on the medical opinion. 38 U.S.C. § 7104(d)(1).

Moreover, VA failed to seek relevant private treatment records. But the Board did not address VA's failure to seek records identified by Mr. Davis, relating to his sleep apnea, or otherwise discuss VA's duty to assist Mr. Davis. Vacatur and remand are required for VA to seek relevant private medical records related to Mr. Davis' sleep apnea. 38 U.S.C. § 5103A. At the very least, vacatur and remand are warranted for the

Board to provide an adequate statement of reasons or bases discussing whether VA fulfilled its duty to assist Mr. Davis despite its failure to seek those records. 38 U.S.C. § 7104(d)(1).

And the Board failed to provide adequate reasons or bases when it did not address the above errors, applied the wrong standard of proof, and failed to weigh the lay evidence of record along with the relevant medical evidence of record. *See* R. at 4–12. At the very least, vacatur and remand are warranted for the Board to provide an adequate statement of reasons or bases to discuss the above errors, to analyze Mr. Davis' claim under the correct standard of proof, and to weigh all of the evidence of record.

ARGUMENT

I. THE BOARD ERRED IN FINDING THAT VA SATISFIED ITS DUTY TO ASSIST MR. DAVIS IN SUBSTANTIATING HIS CLAIM FOR SERVICE CONNECTION FOR SLEEP APNEA BY RELYING UPON AN INADEQUATE DECEMBER 2015 VA MEDICAL OPINION AND FAILING TO SEEK RELEVANT PRIVATE MEDICAL RECORDS.

VA has a statutory duty to assist a claimant in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a). This duty requires VA to obtain a medical opinion "whenever such an [] opinion is necessary to make a decision on the claim," and requires VA to obtain relevant private medical records. 38 U.S.C. § 5103A(b), (d). In appropriate cases, the Board is tasked with determining whether VA has satisfied its duty to assist the claimant and providing appropriate remedies when VA has failed its duty. *See id*. The Court reviews Board determinations as to whether VA satisfied its duty to assist under

the "clearly erroneous" standard described in 38 U.S.C. § 7261(a)(4). *See Nolen v. Gober*, 14 Vet. App. 183, 184 (2000).

Here, the Board erred when it found that VA satisfied its duty to assist Mr. Davis in substantiating his claim of entitlement to service connection for sleep apnea when it failed to: (1) obtain an adequate medical opinion to address the link between Mr. Davis' sleep apnea and his service, and (2) seek Mr. Davis' relevant private treatment records.

A. The record lacks a single adequate VA medical opinion that addresses the link between Mr. Davis' sleep apnea and his service.

An adequate VA medical opinion "must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (citing *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007)). Moreover, "it is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion." *Id*. at 304. The medical opinions that address Mr. Davis' sleep apnea do not meet this standard.

As noted by the Board, the September 2013 VA Examination Report, along with its October 2013 Addendum Medical Opinion, was flawed in several ways. *See* R. at 8 (4–12). Specifically, neither the report nor the addendum opinion addressed the relevance of the information contained in the competent and credible lay statements of record, or contained a rationale for the negative nexus opinion rendered. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007) (citing *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994) for the proposition that an "opinion is adequate when based on consideration of

veteran's prior medical history and examinations and also describes disability in sufficient detail so that Board's evaluation will be fully informed"); *Nieves-Rodriguez*, 22 Vet. App. at 304 ("Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions.")

The December 2015 VA Medical Opinion, which the Board held had cured the deficiencies it found in the prior medical opinions of record, was also flawed. The examiner opined that Mr. Davis' sleep apnea "was less likely than not (less than 50% probability) incurred in or caused by the claimed in-service injury, event or illness[,]" but failed to provide a logical supporting rationale.

The opinion begins by noting that the signs and symptoms reported by Mr. Davis, his wife, and the individual he served with, "are not diagnostic of obstructive sleep apnea (OSA) and lack causation[,]" but relies on "studies" for the proposition that the symptoms described in the lay statements of record, while "sensitive" for sleep apnea, show "poor specificity . . . in diagnosing OSA[.]" R. at 442 (440–45); R. at 831; R. at 833. To the extent that the examiner relies on the distinction between "sensitivity" and "specificity" for the proposition that correlation does not equal causation, or, that those who suffer from sleep apnea may "experience snoring, pauses in breathing and gasping," but not all individuals who experience these symptoms suffer from sleep apnea, the examiner's rationale fails to support the nexus opinion provided. *Id.* The fact that individuals who "experience snoring, pauses in breathing and gasping" *may* not suffer

from sleep apnea does not address the probability that Mr. Davis, *who was diagnosed with sleep apnea*, suffered from the disability during his service.

Because Mr. Davis experienced snoring, pauses in his breathing, gasping, and sleep apnea at the time he was diagnosed with the disability, the question at issue was whether he also suffered from snoring, pauses in his breathing, gasping, and sleep apnea during his service. R. at 442 (440–45); *see also* R. at 826 (826–28). In relying on a generalization about the clinical distinction between individuals who "experience snoring, pauses in breathing and gasping," and individuals who suffer from sleep apnea, which does not appear to have applied to Mr. Davis because he suffered from both, the examiner failed to address whether his history of suffering from "snoring, pauses in breathing and gasping," culminating in an eventual diagnosis of sleep apnea, meant that it at least as likely as not that he suffered from sleep apnea during or as a result of his service. *See Ardison*, 6 Vet. App. at 407.

Moreover, the remainder of the examiner's opinion does not contain a permissible rationale:

> The veteran states that he was diagnosed with OSA in 2005 and started on CPAP, but he did not have a sleep study performed because Katrina interfered. However, he was diagnosed on [*sic*] at a sleep study conducted in 2008. 2005 is fifteen years after the veteran's separation from service. There is no established chronicity of condition or treatment stemming from any in-service injury, illness, or event during the veteran's service. Nexus has not been established.

R. at 442 (440–45). This rationale suffers from two independent defects. First, the examiner's implicit reliance on the lack of an in-service diagnosis of sleep apnea is insufficient, by itself, to support the conclusion that there is no nexus between a post-

service diagnosed condition and the period of military service. *See Dalton v. Nicholson*, 21 Vet. App. 23, 39-40 (2007) (noting "the medical examiner cannot rely on the absence of medical records corroborating [an] injury to conclude that there is no relationship between the appellant's current disability and his military service"). Second the examiner also failed to explain the clinical significance of the gap in time between the end of Mr. Davis' service and the date he was *diagnosed* with sleep apnea. R. at 442 (440–45). In particular, the examiner failure to address the fact that there was lay evidence of continuous symptoms form the end of his period of military service to the date he received a diagnosis of sleep apnea. This failure was particularly prejudicial because the Board conceded that Mr. Davis suffered from symptoms "sensitive" for sleep apnea during the described time period, and he was eventually diagnosed with sleep apnea after years of suffering from those symptoms. *See* R. at 831; R. at 833; R. at 826–28; R. at 1254–55.

In summary, the record lacks a medical opinion that adequately addresses the relationship between Mr. Davis' sleep apnea and his service. Absent "a reasoned medical explanation" for the examiner's opinion, and a rationale that suggests that "the medical expert [was] informed of sufficient facts upon which to base an opinion relevant to the problem at hand," the December 2015 VA Medical Opinion was inadequate. *Nieves-Rodriguez*, 22 Vet. App. at 302. As such, vacatur and remand are warranted for the Board to obtain an adequate VA medical nexus opinion.

B. VA failed to make reasonable attempts to obtain relevant private treatment records related to the Mr. Davis' sleep apnea diagnosis.

Ochsner Clinic records related to Mr. Davis' sleep apnea, referenced in the September 2013 VA Examination Report and December 2015 VA Medical Opinion, are not of record. *See* R. at 817 (817–21); R. at 444 (440–45). VA previously requested treatment records from that private medical provider through a VA Form 21-4142, which authorized the release of documents related to Mr. Davis' hearing loss and tinnitus. *See* R. at 1259; R. at 1281. The record contains an Ochsner Clinic treatment record that notes Mr. Davis as suffering from sleep apnea, as part of a series of checkboxes addressing his different bodily systems. R. at 1254–55. But VA did not seek Ochsner Clinic records specifically related to Mr. Davis' sleep apnea. This raises a question as to whether VA fulfilled its duty to assist by "making reasonable efforts to obtain [the Veteran's] relevant [private medical] records," as required under 38 C.F.R. § 3.159(c)(1). The existing record provides constructive notice of outstanding, and potentially relevant, private evidence. *See Solomon v. Brown*, 6 Vet. App. 396, 401 (1994) (outlining VA's duties to obtain non-federal records). And VA failed to satisfy the duty to assist when it did not take additional steps to determine whether relevant private treatment records remained outstanding. As such, vacatur and remand are warranted for VA to seek relevant private treatment records from Ochsner Clinic.

II. THE BOARD FAILED TO PROVIDE ADEQUATE REASONS OR BASES FOR ITS DENIAL OF MR. DAVIS' SLEEP APNEA CLAIM, INCLUDING ITS RELIANCE ON THE FLAWED DECEMBER 2015 VA MEDICAL OPINION.

In the alternative that the Court does not vacate the Board decision and order the Secretary to obtain an adequate medical nexus opinion on remand, for the reasons set forth above in Section I of this brief, the Court should vacate the Board decision because it failed to provide an adequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d). Although "there is no reasons or bases requirement imposed on examiners," the Board must provide adequate reasons and bases as part of its decision-making process. *Acevedo v. Shinseki*, 25 Vet. App. 286, 293 (2012); *see Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Under 38 U.S.C. § 7104(d)(1), a Board decision must 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[.]" This requirement is fundamental to enabling "a claimant to understand the precise basis for the Board's decision, as well as to facilitate review of this Court." *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008) (citing to *Gilbert*, 1 Vet. App. at 57). The Board must also "analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *Id.* (citing to *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995)).

Specifically, the Board failed to provide adequate reasons or bases for its denial of Mr. Davis' claim of entitlement to service connection for sleep apnea based on the

inadequate December 2015 VA medical opinion. *See Owens v. Brown*, 7 Vet. App. 429, 433 (1995) (noting that the Board must provide an adequate statement of reasons or bases for its reliance on a medical opinion). In the decision on appeal, the Board focused on two findings contained in the December 2015 VA Medical Opinion: (1) the fact that his symptoms of snoring, pauses in his breathing, and gasping were "sensitive" for sleep apnea, but not specific to diagnosing sleep apnea, and (2) the gap in time between the Mr. Davis service and the first time that his sleep apnea was diagnosed. R. at 7 (4–12).

But the Board failed to explain why it relied on this opinion despite the flaws identified above in Section I. In addition, the Board held Mr. Davis' claim to an impermissible standard of proof. In a VA claim for benefits, "the benefit of the doubt as to 'any issue material to resolution of the claim' goes to the veteran if the evidence is in equipoise." *Jones v. Shinseki*, 23 Vet. App. 382, 388 n.1 (2010) (citation omitted); *see also* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102. The benefit-of-the-doubt standard of proof "is lower than any other in contemporary American jurisprudence and reflects 'the high esteem in which our nation holds those who have served in the Armed Services.'" *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014) (quoting *Gilbert*, 1 Vet. App. at 54). And the Court has noted that the benefit-of-the-doubt standard is lower than the clinical standard of medical certainty. *Jones*, 23 Vet. App. at 388 n.1 ("the legal standard of evidentiary preponderance is not to be confused with the clinical standard of medical certainty"); *see also Wise*, 26 Vet. App. at 530-532 (noting that the benefit-of-doubt standard is lower than the standard of "General Acceptance in the Medical Community"). This is because "Congress, through the enactment of section 5107(b)'s low standard of proof for all

issues material to a claim for veterans benefits, has authorized VA to resolve a scientific or medical question in the claimant's favor so long as the evidence for and against that question is in 'approximate balance.'" *Wise*, 26 Vet. App. at 531.

In this case, the Board applied a standard of proof akin to the clinical standard of medical certainty when it relied upon the December 2015 VA Medical Opinion.

The December 2015 VA Medical Opinion posits:

> [T]he signs and symptoms reported by the veteran, his wife and fellow service member as occurring during the veteran's period of active duty are not diagnostic of obstructive sleep apnea (OSA) and lack causation. Studies have shown that patients with diagnosed OSA can have periods of snoring, pauses in their breathing and gasping; these particular signs and symptoms are sensitive for OSA, but studies have shown poor specificity of these signs and symptoms in diagnosing OSA, and no studies have established causation for these signs and symptoms.

R. at 442 (440-45). Essentially, the opinion suggests that the signs and symptoms described by Mr. Davis, his wife, and an individual he served with, are not relevant to the exercise of determining whether he suffered from sleep apnea during his service because "studies," or "General Acceptance in the Medical Community," found that the symptoms suffered by Mr. Davis *generally* showed "poor specificity" in diagnosing sleep apnea. R. at 442 (440-45); *Wise*, 26 Vet. App. at 531. The Board erred when it adopted the December 2015 VA Medical Opinion as part of its reasons and bases, without discussing whether the opinion's rationale relied on "a level of acceptance in the scientific community greater than the level of proof required by the benefit of the doubt rule." *Wise*, 26 Vet. App. at 532.

At issue in this case was the extent to which Mr. Davis' continued symptoms demonstrated that he suffered from sleep apnea during his service, or as a result of his service, not whether his symptoms served as clinical proof of the proposition. *See id*. The law at issue required Mr. Davis to satisfy the benefit-of-the-doubt standard of proof in order to obtain service connection, and the Board erred when it held his claim to a higher standard. *See id*.

Moreover, the Board relied on the gap in time between Mr. Davis' service and his diagnosis of sleep apnea without discussing the impact of the lay evidence indicating that he suffered from continuous symptoms following his service. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (noting that the Board must provide a factual foundation based on "all of the evidence including the availability of medical records, the nature and course of the disease or disability, the amount of time that elapsed since military service, and any other relevant facts," when it cites the passage of time as evidence against a claim); *see also Horn v. Shinseki*, 25 Vet. App. 231, 240 n.7 (2012). In this case, the Board did not discuss the nature and course of sleep apnea. And critically, the Board failed to address Mr. Davis' evidence of continued symptomatology. Absent establishing a factual foundation based on "all of the evidence," the Board failed to lay a proper foundation for relying on the passage of time. *Maxson*, 230 F.3d at 1333.

The Board also erred insofar as it noted that the lay statements of record were competent, but failed to weigh whether those statement made it more likely than not that Mr. Davis suffered from sleep apnea due to his service. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) ("[T]he Board's statement of reasons or bases must account for the

evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence."). It was not enough for the Board to dismiss the lay statements of record as "lay opinions" as to the issue of nexus. R. at 8 (4–12). Ultimately, the Board was required to weigh the lay evidence of record along with the relevant medical evidence of record, and its failure to do so was particularly prejudicial given that the record lacks an adequate medical opinion. *Allday v. Brown*, 7 Vet. App. 517, 527 (1995).

CONCLUSION

For the foregoing reasons, Mr. Davis respectfully requests that the Court vacate and remand that the Board's October 12, 2018, decision. Mr. Davis further respectfully requests that the Court remand his sleep apnea claim for the Board to provide a new medical opinion and adequate reasons and bases for its decision.

Respectfully submitted,

FOR THE APPELLANT

/s/ Byron M Moore
Byron M. Moore
Barton F. Stichman
National Veterans Legal Services Program
1600 K Street NW, Suite 500
Washington, DC 20006
(202) 621-5721