

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

Vet. App. No. 19-0673

LEROY D. ANDERSON,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee

APPELLANT'S BRIEF

**John S. Berry,
Attorney for Appellant**

**Stephani M. Bennett
Attorney for the Appellant**

**Cameron Kroeger
Attorney for the Appellant**

**BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444**

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I. STATEMENT OF THE ISSUES

- A. Whether the Board provided an adequate statement of reasons or bases when it determined that the VA was not required to provide an examination for sleep apnea.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant, Leroy D. Anderson (Appellant), invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252.

B. Nature of the Case / Result Below

Appellant appeals the Board's October 3, 2018 decision that denied his claim of entitlement to service connection for sleep apnea. R. 4-8 (October 2018 Board Decision). The Board denied Appellant's claim, finding that "the weight of the evidence is against finding that sleep apnea had its clinical onset during service, or that it is otherwise related to service." *Id.* The Board cited to service treatment and separation records, which were silent for complaints of sleep apnea. *Id.*

C. Relevant Facts

Appellant is a U.S. Army veteran with honorable service from September 23, 1966 to September 20, 1968. R. 2789 (September 1968 DD 214).

In August 2009, Appellant underwent a sleep study, which revealed a diagnosis of moderate obstructive sleep apnea. R. 990 (August 2009 Sleep Evaluation Note). In an August 2009 pulmonary sleep medicine note, Appellant's doctor listed being overweight as a medical condition relevant to Appellant's sleep disorder and suggested that he needed to "work on gradually losing weight." R. 2064 (2064-65) (August 2009 Sleep Medicine Note).

Appellant filed an original claim for service connection for sleep apnea on July 18, 2017. R. 185-86 (July 2017 VA Form 21-526b). The VA denied the claim in a decision dated August 31, 2017, stating that service connection could not be granted because the evidence did not show that sleep apnea started or was caused by service. R. 136-37 (August 2017 Rating Decision). The VA did not provide an examination. *Id.* Appellant filed a Notice of Disagreement alleging, in part, that the VA had a duty to assist Appellant by providing a medical examination. R. 112-21 (September 2017 Notice of Disagreement). The VA continued the denial without providing an examination. R. 57-69 (October 2017 Statement of the Case). Appellant appealed his service connection claim to the Board of Veterans' Appeals on both a direct and secondary basis. R. 35 (November 2017 VAF9); 17 (June 2018 VAF8).

III. SUMMARY OF THE ARGUMENT

The Board erred when it denied Appellant's claim for service connection for sleep apnea. Specifically, the Board concluded that Appellant did not meet the threshold requirements to trigger the VA's duty to provide an examination. The Board failed to address evidence in the record linking Appellant's sleep apnea to in-service weight gain, and therefore provided an inadequate statement of reasons or bases for the conclusion that an examination was not warranted.

IV. ARGUMENTS & AUTHORITIES

A. The Board failed to ensure that the duty to assist was satisfied by providing an examination for the claim of sleep apnea and failed to provide an adequate statement of reasons or bases for doing so.

The Board acknowledged that Appellant was not afforded an examination for his sleep apnea and concluded, "Although the record contains a current diagnosis of sleep apnea, a VA examination is not required in this case because there is no evidence demonstrating that the Veteran had an injury or disease in service and there is no competent evidence even suggesting that the currently diagnosed sleep apnea may otherwise be associated with service or a current service-connected disability." R. 7 (4-8) (October 2018 Board Decision).

The VA must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit," including

“providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.” 38 U.S.C. § 5103A(a)(1), 38 U.S.C. § 5103A(d)(1); see *Loving v. Nicholson*, 19 Vet.App. 96, 102 (2005). The Secretary's duty to assist requires that he provide a VA medical examination to a claimant when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service or, for certain diseases, manifestation of the disease during an applicable presumptive period for which the claimant qualifies; and (3) an indication that the disability or persistent or recurrent symptoms of the disability may be associated with the veteran's service or with another service-connected disability; but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim. 38 U.S.C. § 5103A(d)(2); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-57 (Fed. Cir. 2003); *Wells v. Principi*, 326 F.3d 1381, 1384 (Fed. Cir. 2003); *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); 38 C.F.R. § 3.159(c)(4)(I) (2019).

The Board conceded that Appellant suffers from currently diagnosed sleep apnea, satisfying the first prong of the test laid out in *McLendon* that there be competent evidence of a current disability or persistent or recurrent symptoms of

a disability. R. 7 (4-8) (October 2018 Board Decision); *McLendon*, 20 Vet.App. at 81. However, the Board found that Appellant did not meet the second or third prongs of the *McLendon* test because it found “no evidence demonstrating that the Veteran had an injury or disease in service” nor “competent evidence even suggesting that the currently diagnosed sleep apnea may otherwise be associated with service or a current service-connected disability.” *Id.* Regarding the second and third prongs, the Board failed to consider Appellant’s weight gain, which began in service, as a causal or aggravating factor for Appellant’s sleep apnea.

In an August 2009 pulmonary sleep medicine note, Appellant’s doctor listed being overweight as a medical condition relevant to Appellant’s sleep disorder. R. 2064 (2064-65) (August 2009 Sleep Medicine Note). In a note on how to relieve symptoms of sleep apnea, the author of the sleep medicine note said Appellant needed to “work on gradually losing weight.” R. 2065 (2064-65) (August 2009 Sleep Medicine Note). These notations link Appellant’s sleep apnea to his being overweight, suggesting that his weight is a problem associated with sleep apnea and that losing weight would help alleviate symptoms of sleep apnea.

When he entered the military in 1966, Appellant weighed 203 pounds. R.

2713 (2711-2713) (September 1966 Report of Medical Examination). When he left the military in 1968, Appellant weighed 212 pounds. R. 2742 (2739-42) (August 1968 Report of Medical Examination). After separation, Appellant continued to gain weight steadily, reaching 237 pounds in March 2010. R. 972-75 (March 2010 Move Patient Initial Assessment).

The Board neglected to adequately address the theory, raised by the record, that Appellant's in-service weight gain caused or aggravated his sleep apnea. See *DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011) ("the Secretary generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing"); *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (the Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record), aff'd sub nom. *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Service medical record show weight gain, satisfying the second *McLendon* element of evidence establishing that an event, injury, or disease occurred in service. *McLendon*, 20 Vet.App. at 81; 2713 (2711-2713) (September 1966 Report of Medical Examination); 2742 (2739-42) (August 1968 Report of Medical

Examination). Regarding the third requirement, the above-discussed medical evidence discussing Appellant's weight in relation to his sleep apnea raises the reasonable possibility that Appellant's in-service weight gain may serve as a link between his current sleep apnea and an in-service cause. R. 2064-65 (August 2009 Sleep Medicine Note).

As the Court held in *McLendon*, the requirements to meet the third prong of the test for when an examination is necessary is a "low threshold" and relevant types of evidence include "medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits." *Id.* In addition, the determination must take into consideration "all information and lay or medical evidence [of record] (including statements of the claimant)." 38 U.S.C. § 5103A(d)(2). Considering the low threshold necessary to meet the third *McLendon* prong, the link between Appellant's in-service and continuing weight gain and his sleep apnea should be enough to satisfy the requirement. *McLendon*, 20 Vet.App. at 83.

By failing to discuss the link between Appellant's weight gain and sleep apnea, the Board provided an inadequate statement of reasons or bases for concluding that Appellant's sleep apnea was not caused by an event in service. The Board's failure to address this favorable evidence renders its statement of

reasons or bases inadequate. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). As a consequence of failing to discuss the evidence linking Appellant's sleep apnea to in-service weight gain, the Board also failed to provide adequate reasoning for its determination that VA satisfied its duty to assist with respect to whether a VA examination is needed to adjudicate these claims. Remand is necessary for the Board to determine whether a medical examination is warranted in the first instance as to Appellant's sleep apnea, or, if not, for the Board to provide adequate reasons or bases for its determination. See *McLendon*, 20 Vet.App. at 84-86; see *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

CONCLUSION

The Board committed remandable error when it failed to provide adequate reasons or bases for determining that the VA discharged its duty to assist even though they failed to provide a medical examination exploring the link between Appellant's in-service weight gain and his diagnosed sleep apnea. The decision on appeal must be vacated and the matter remanded for the Board to properly

apply the law, consider the relevant evidence of record, and issue a decision supported by adequate reasons or bases.

Respectfully submitted,

Leroy D. Anderson, Appellant

By: /s/ Stephani Bennett
Stephani Bennett, Esq.
BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444
(402) 466-1793 / Fax
stephani@jsberrylaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

Jennifer Mensah, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on November 11, 2019.

/s/ Stephani Bennett
Attorney for Appellant