IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 19-1638

FRANCIS J. SAMPSON, JR.,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

BRIEF FOR APPELLANT

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CLAIM ON APPEAL

Mr. Sampson seeks an earlier effective date for sleep apnea.

ISSUE PRESENTED

Sympathetic review. Mr. Sampson was already diagnosed with sleep apnea when he filed a claim for PTSD in 2000. In a 2001 PTSD C&P exam, the VA examiner diagnosed Mr. Sampson's sleep apnea symptoms. Despite this, the VA did not develop Mr. Sampson's claim to account for his sleep apnea that was caused by his PTSD. Did the VA fully and sympathetically develop Mr. Sampson's claim to its optimum before deciding on its merits when it did not develop Mr. Sampson's sleep apnea claim?

STATEMENT OF THE CASE

I. Preliminary Statement

Francis Sampson appealed the Board's February 22, 2019 decision on March 11, 2019.[1] The Court has jurisdiction to hear this appeal under 38 U.S.C. § 7252.

II. Facts and Procedural History

A. Mr. Sampson's Service

Mr. Sampson served as a combat infantryman in the United States Army during the Vietnam War, where he earned the Bronze Star with V Device for valor in combat.[2] While in Vietnam, Mr. Sampson "spent a lot of time on

[1] *See* 38 U.S.C. § 7266(a); Vet. App. R. 4(a).
[2] R. 873.

river patrols and in treacherous conditions" where he "witnessed many combat situations with friends and enemies and civilians being killed."[3] The Army honorably discharged Mr. Sampson in 1969.[4]

B. Mr. Sampson's Treatment and Claims History

Mr. Sampson relived, and continues to relive, his harrowing experiences through nightmares, flashbacks, anxiety, and panic from witnessing hand grenades and RPGs ripping apart civilians and his fellow soldiers.[5] Although Mr. Sampson began experiencing PTSD symptoms in 1968, he didn't become aware that he had PTSD until 1998 or 1999, and only then after he watched a 60 Minutes special on PTSD.[6] About that time, Mr. Sampson was also first diagnosed with sleep apnea[7] even though he had suffered sleep problems since his time in service.[8]

On August 31, 2000, Mr. Sampson filed a claim for service-connected PTSD.[9] On February 23, 2001, physicians treated Mr. Sampson in the emergency room, stating he had "significant obstructive and central sleep

[3] R. 2589-2590.
[4] R. 873, 2930.
[5] R. 1417-1420 at 1420.
[6] *See* R. 2659-2666 at 2659.
[7] *See* R. 2110-2118 at 2114.
[8] R. 2578-2600 at 2578.
[9] R. 2679.

apnea" and had been using a Biphasic Positive Airway Pressure (BIPAP) machine for "five or six months."[10] During Mr. Sampson's March 22, 2001 PTSD examination, a VA examiner noted that Mr. Sampson had "trouble both getting asleep and staying asleep" because of his PTSD.[11] On June 6, 2001, the VA granted Mr. Sampson's PTSD claim without addressing Mr. Sampson's sleep apnea.[12]

On August 29, 2003, Mr. Sampson filed for an increase in his PTSD rating.[13] On February 10, 2004, another VA examiner noted that:

> [Mr. Sampson] describes ongoing symptoms consistent with PTSD. He has intrusive memories, *occasional nightmares*, flashbacks. He avoids thoughts, feelings activities that are associated with Vietnam. He feels estranged from most people. *He has difficulty sleeping*, some irritability, difficulty concentrating, and hypervigilance.[14]

The medical examiner did not examine Mr. Sampson's medical records related to his sleep apnea condition.[15] On May 3, 2004, the VA denied that rating request without addressing Mr. Sampson's sleep apnea.[16]

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[10] R. 2114.
[11] R. 2589-2590.
[12] R. 2642-2646 at 2642.
[13] R. 2613.
[14] R. 2578-2600 at 2579 (emphasis added).
[15] R. 2578-2600.
[16] *Id.*

On January 4, 2008, Mr. Sampson's physician diagnosed Mr. Sampson with sleep apnea and worsening PTSD.[17] On June 9, 2009, the VA increased Mr. Sampson's PSTD rating to 70%, effective August 6, 2007, again without addressing Mr. Sampson's sleep apnea.[18]

On August 28, 2013, Mr. Sampson filed a claim for service-connected sleep apnea.[19] The VA granted Mr. Sampson a 50% rating for sleep apnea—secondary to his PTSD—with an effective date of March 31, 2014. The VA based its decision on:

- A 5/23/14 report from Dr. Thomas that expressed a causal link between Mr. Sampson's service-connected PTSD and his sleep apnea.
- A 9/4/14 VA exam stated Mr. Sampson has a diagnosis of mixed apnea in 1998 requiring the use of a BIPAP machine.
- Service connection for sleep apnea has been established as related to the service-connected PTSD.

Mr. Sampson appealled the effective date the VA assigned for his sleep apnea on December 17, 2018.[20]

[17] *See* R. 2659-2666 at 2659.
[18] R. 2325-2329 at 2325.
[19] R. 1058-1060 at 1058.
[20] R. 95.

C. The Board's Decision

On Feb 22, 2019, the Board granted Mr. Sampson an effective date of March 31, 2013, but denied an earlier effective date because "there [was] no unadjudicated claim for sleep apnea prior to November 2014."[21] The Board noted that although:

> [Mr. Sampson] had a diagnosis of sleep apnea at the time of his August 2000 claim for PTSD…the mere presence of medical evidence of a disability does not show an intent on [Mr. Sampson]'s part to seek service connection and therefore does not constitute a claim; rather, the [Mr. Sampson] must assert a claim either expressly or impliedly.[22]

The Board explained that "while the Veteran eventually was granted service connection for sleep apnea as secondary to the service-connected PTSD, this was after he submitted a medical opinion in support of his claim" and that "while he submitted numerous claims over the years prior to March 2014, he did not mention his sleep apnea, and there is no unadjudicated claim for sleep apnea prior to November 2014."[23]

ARGUMENT SUMMARY

Mr. Sampson had PTSD and sleep apnea when he filed his claim for disability benefits in 2000. While his written claim was only for PTSD, the

[21] R. 5-8.
[22] R. 7.
[23] R. 7.

VA had a duty to fully and sympathetically develop Mr. Sampson's claim before deciding on its merits. The VA should have adjudicated all potential claims raised by his evidence even if Mr. Sampson did not individually label them. Mr. Sampson's claim for PTSD was also a claim for his secondary sleep apnea secondary to his PTSD. His diagnosis of sleep apnea—and his sleep apnea symptomology diagnosed as part of his PTSD picture by various VA examiners in PTSD exams—was sufficient for the VA to have included sleep apnea as part of Mr. Sampson's PTSD claim.

ARGUMENT

I. The VA erred by not fully and sympathetically developing Mr. Sampson's claim for disability benefits and by not adjudicating his claim for sleep apnea.

The VA must "fully and sympathetically develop the veteran's claim to its optimum before decision on its merits."[24] Developing a claim "to its optimum" must include determining all potential claims raised by the evidence and applying all relevant law and regulations raised by that evidence, regardless of how the claim is identified.[25] With regards to *pro se* pleadings such as Mr. Sampson's, the VA must give a sympathetic reading to Mr. Sampson's filings by "determin[ing] all potential claims raised by the

[24] *Norris v. West*, 12 Vet. App. 413, 420 (1999).
[25] *Id.*

evidence, applying all relevant laws and regulations."[26] In deciding what disabilities, conditions, or symptoms that the claim-stating documents are sympathetically understood to be identifying, VA must look beyond the four corners of the claims form.[27] Furthermore, federal regulations require the Board to consider evidence of a claim for secondary service connection even though the veteran had not specifically raised secondary service connection.[28]

Mr. Sampson filed a claim for disability benefits due to his PTSD symptoms from his combat experience[29] after learning about PTSD from watching a television special about it.[30] Mr. Sampson did not state that he was also seeking disability benefits for sleep apnea, but he did not have to. *DeLisio* qualified this regulation, saying, "[i]f a claimant attempts to identify a diagnosis in his claim for VA disability benefits, his claim is not limited necessarily to benefits for that diagnosis."[31] This is because a "self-represented layperson… ha[s] neither the legal or medical knowledge to narrow the universe of his claim…. [He does] not file a claim to receive

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[26] *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004).
[27] *Shea v. Wilkie*, 926 F.3d 1362, 1369 (Fed. Cir. 2019)
[28] *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015); *See Robinson v. Shinseki*, 557 F.3d 1355, 1361-1362 (Fed. Cir. 2009)*; see also Rivera v. Shinseki*, 654 F.3d 1377, 1382 (Fed. Cir. 2011)
[29] R. 2679.
[30] R. 2659.
[31] *DeLisio v. Shinseki*, 25 Vet App 45, 53 (2011).

benefits only for a particular diagnosis, but for the affliction his… condition, whatever that is, causes him."[32] That is, "a claimant is not required to identify a precise medical diagnosis or the medical cause of his condition; rather, he sufficiently files a claim for benefits by referring to a body part or system that is disabled or by describing symptoms of the disability."[33] Here, PTSD and central sleep apnea both involve the same body part or system—the brain—and Mr. Sampson's PTSD caused his sleep apnea.

Doctors had already diagnosed Mr. Sampson with sleep apnea before he made his claim for PTSD.[34] The 2001 VA examiner diagnosed "trouble falling and staying asleep" as a PTSD symptom.[35] And the 2004 VA examiner diagnosed his sleep apnea symptoms as part of his PTSD, separate and apart from the nightmares he suffered because of PTSD:

> [Mr. Sampson] describes ongoing symptoms consistent with PTSD. He has intrusive memories, *occasional nightmares*, flashbacks. He avoids thoughts, feelings activities that are associated with Vietnam. He feels estranged from most people. *He has difficulty sleeping*, some irritability, difficulty concentrating, and hypervigilance.[36]

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[32] *Id.*
[33] *Id.*
[34] R. 2114.
[35] R. 2589-2590.
[36] R. 2579 (emphasis added).

The sleep disturbances in the PTSD rating criteria refered to nightmares.[37] If not, sleep apnea would never be rated as secondary to PTSD. The VA examiner stated that Mr. Sampson suffered occasional nightmares.[38] The VA examiner also found separately that Mr. Sampson had trouble falling and staying asleep;[39] those sleep disturbances refer to Mr. Sampson's sleep apnea. Mr. Sampson's sleep apnea is secondary to his PTSD. Because Mr. Sampson's sleep apnea symptoms were discussed and diagnosed in his PTSD exam as being part of his PTSD, Mr. Sampson's claim included a claim for sleep apnea.[40] The VA should have looked to Mr. Sampson's medical records to address his sleep apnea, identified in his 2001, 2004, and 2006 PTSD examinations as a PTSD symptom.[41]

II. The Court should remand for the Board to adjudicate Mr. Sampson's 2000 sleep apnea claim.

Remand is the appropriate remedy when the Board misinterprets the law and fails to make the relevant factual findings.[42] The Board denied Mr. Sampson's claim because "the Veteran must assert a claim either expressly or

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[37] *See* 38 C.F.R. § 4.130, DC 9411.
[38] R. 2579.
[39] *Id.*
[40] *See Shea v. Wilkie*, 926 F.3d 1362, 1369 (Fed. Cir. 2019).
[41] R. 2578, 2589-2590, 2659.
[42] *See Deloach v. Shinseki* 704 F. 3d 1370, 1380 (2013).

impliedly" and although "[Mr. Sampson] submitted numerous claims over the years prior to March 2014, he did not mention his sleep apnea, and there is no unadjudicated claim for sleep apnea prior to November 2014."[43]

Mr. Sampson did not submit a claim prior to November 2014 explicitly identifying sleep apnea, but the record sufficiently raised it.[44] Mr. Sampson's sleep apnea was diagnosed prior to his PTSD claim and the PTSD examiners diagnosed Mr. Sampson's sleep apnea symptoms—trouble falling and staying asleep—as being secondary to his PTSD.[45] When Mr. Sampson claimed service connection for PTSD, his claim included all expertly diagnosed symptoms from PTSD, including his sleep apnea. He was neither a medical expert nor an expert in VA law. The Board failed to adequately discuss Mr. Sampson's sleep apnea diagnosis in 2001 or mention that the VA PTSD examiners diagnosed Mr. Sampson's sleep problems separately from nightmares and as part of his PTSD.[46] With regard to Mr. Sampson's sleep apnea diagnosis, the Board simply dismisses it because "the mere presence of medical evidence of a disability does not show an intent on the Veteran's part to seek service connection and therefore does not constitute a claim; rather,

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[43] R. 7.
[44] *See, e.g.*, *Shea* at 1369 and *DeLisio* at 53.
[45] R. 2578, 2589-2590, 2659.
[46] 38 U.S.C. § 7104(d)(1).

the Veteran must assert a claim either expressly or impliedly." Here, however, the VA examiners consistently included Mr. Sampson's sleep apnea symptoms as part of Mr. Sampson's PTSD's picture. Mr. Sampson is not asking the VA to "conjure up issues"[47] that he had not raised. The VA is required to sympathetically read Mr. Sampson's claim such that it "includes all claims raised by the evidence."[48] And the veteran is "not required to identify a precise medical diagnosis or the medical cause of his condition."[49] The Board's inadequate discussion on its findings and holdings makes it impossible to understand why the Board found no sleep apnea claim before 2014. [50] This warrants remand in its own right.[51]

In the pro-claimant, non adversarial VA adjudication system, the VA had a duty to sympathetically read Mr. Samposon's PTSD claim to include sleep apnea. The VA should have looked to the medical records—including PTSD records—detailing Mr. Sampson's sleep apnea. The Court should remand this

[47] *Talbert v. Brown*, 7 Vet. App. 352, 356-357 (1995).
[48] *Norris* at 420.
[49] *DeLisio* at 53.
[50] *See Sanders v. West*, 13 Vet. App. 491, 494 (2000) ("[W]hen the reasons for the Board's decision are unclear, the Court will not guess at the theory underlying the Board's action"); *see also Parker v. Principi*, 15 Vet. App. 407, 411 (2002).
[51] *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

case back to the Board for the Board to review Mr. Sampson's 2000 sleep apnea claim.

THE BOARD'S ERRORS WERE NOT HARMLESS

The Court must account for harmless error.[52] After finding an error, the Court must look at the entire appeal—in light of the error—and determine the likelihood that the appellant would have succeeded in his appeal but for the error.[53] The Court must perform its prejudicial review considering the unique pro-claimant, non-adversarial VA adjudication in which the appearance of fairness carries significant weight.[54]

Harmless error review hypothetically evaluates what could have happened had the Board not erred. The Court should weigh evidence under the benefit of the doubt standard because harmless error review places the Court in the Board's shoes.[55] For example, the Court views unobtained evidence that abides by the benefit of the doubt standard. The Court is barred—as a matter of law—from guessing at the unobtained records' substance and legal value.[56]

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[52] 38 U.S.C. § 7261(b)(2).
[53] *Vogan v. Shinseki*, 24 Vet. App. 159, 162–64 (2010).
[54] *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).
[55] *See* 38 U.S.C. § 5107(b).
[56] *Moore v. Shinseki*, 555 F.3d 13 (Fed. Cir. 2009); *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008)*; Sullivan v. McDonald*, 815 F.3d 786 (Fed. Cir. 2016).

In reviewing for prejudicial error, the Court must view unobtained records as if they would have favored the appellant.[57]

Prejudicial error review does not require that the result would have been manifestly different, only that the error affected the appeals process's "essential fairness."[58] The threshold for finding prejudice in veterans' cases must be low to adhere to the Veterans Law principles set forth by Congress.[59] After an error is found, harmless error review at the Veterans Court should be a three-prong test:

1) **Novel evidence or arguments.** But for the error, would additional material evidence or argument been added to the record? The Court should review this prong under *Moore, McGee, and Sullivan*. If the answer is yes, the Court should find the error prejudicial. If the answer is no, the Court should move to the next inquiry.

2) **Fairness.** Does the error cause the adjudication to be unfair or to appear unfair? The Court should review this prong under the *Mayfield* "essential fairness" standard. If the answer is yes, the Court should find the error prejudicial. If the answer is no, the Court should move to the final inquiry.

3) **Outcome.** If the error never occurred, could the outcome have been different? The Court should review for harmless error at this stage under the substantial evidence standard of review. If a plausible basis exists for determining that the error changed the Board's decision, the Court should find the error prejudicial. In

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[57] *See Moore*, 555 F.3d at 1375.

[58] *Mayfield v. Nicholson*, 19 Vet. App. 103, 115 (2005), *rev'd in part by Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

[59] *Cf. Shade v. Shinseki*, 24 Vet. App. 110 (2010) (holding that the threshold to reopening a claim is purposely set low).

> the uniquely pro-claimant system, the possibility of a different result must be sufficient to find an error prejudicial.

The answer to first prong is no. The VA found that "it is indisputable that the Veteran had a diagnosis of sleep apnea at the time of his August 2000 claim."[60] The VA has also found that Mr. Sampson's sleep apnea is in fact secondarily service-connected. Thus, the issue at hand—whether Mr. Sampson made a claim for sleep apnea when he filed his claim for PTSD—is a threshold question and there is no need for further evidence, novel or otherwise, to support his claim.

Regarding the second prong—whether the error causes the adjudication to be unfair or to appear unfair—the answer is yes. At the heart of *Shea*, *Scott*, *Robinson*, and *DeLisio* is that it is fundamentally unfair to require veterans without legal representation to accurately and completely diagnose themselves in order to be awarded disability benefits for a disability incurred while serving their country.

Regarding a possible change in outcome, remanding this case back to the Board would change the outcome since it would result in an earlier effective date. This is especially true since the VA has already determined that Mr.

[60] R. 7.

Sampson had sleep apnea since at least 2000, and the VA has already service-connected Mr. Sampson's sleep apnea in 2013.

CONCLUSION

Mr. Sampson has had sleep apnea due to his PTSD since at least 2000. His sleep apnea was secondarily service-connected to his PTSD in 2013. But a sympathetic reading of Mr. Sampson's 2000 PTSD claim also encompassed Mr. Sampson's sleep apnea. Because the VA failed to sympathetically review Mr. Sampson's 2000 and 2004 claims, the Court should remand this case back to the Board to revisit whether Mr. Sampson is due an earlier effective date for his sleep apnea.

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