UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-4957

CHARLES E. BROWN,

Appellant,

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

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B. Whether the Board of Veterans' Appeals commits remandable or reversable error when it fails to provide an adequate statement of reasons and bases for failure to sympathetically read the veteran's claim.

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Charles E. Brown (Brown) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252.

B. Nature of the Case / Result Below

Brown appeals the March 28, 2019, Board of Veterans' Appeals decision denying his claims for service connection for gastroesophageal reflux disease and fibromyalgia; and denying his claim to reopen a lumber pine disability. [R 2-17 (Board decision)]

Appellant's lumbar spine disability was first denied in a May 2006 decision. [R 5059-5077 (May 2006 RD)]

In February 2014, Appellant filed new claims of service connection for fibromyalgia and acid reflux, and he moved to reopen his lumbar spine claim. [R 4992-4993 (February 2014 Form 4138)]

Appellant's claims for fibromyalgia, gastroesophageal reflux disease, and

degenerative disc disease of the lumbar spine were denied on an August 2015 decision. [R 3919-3976 (August 2015 RD)] His claims have been pending on appeal since that denial. [R 3897-3912 (December 2015 NOD); 871-905 (August 2017 SOC); 849-850 (August 2017 VAF-9); 842-843 (September 2017 VAF-8)]

C. Relevant Facts

Appellant is a U.S. Marine Corps veteran with honorable active duty service from March 10, 1975, to March 12, 1979. [R 5301-5305 (DD-214, DD-214C)]

He appeals the March 28, 2019, Board of Veterans' Appeals decision denying his claims to reopen lumbar spine disability; service connection for gastroesophageal reflux disease; and service connection for fibromyalgia. [R 2-17 (Board decision)]

III. ARGUMENTS & AUTHORITIES

A. The Board provided an inadequate statement of reasons or bases for why it discounted or ignored favorable evidence.

B. The Board provided an inadequate statement of reasons and bases for why it did not sympathetically read the veteran's claim.

FIBROMYALGIA

The Board denied service connection for Appellant's fibromyalgia, by finding that the appellant does not have a current disability. The Board erroneously found that the appellant has no diagnosis for fibromyalgia; and no studies or testing determine whether he has fibromyalgia or a related or similar

disease process. [R 2-17 (Board decision)]

However, the Board's conclusion ignores evidence of the record; and the Board does not give an adequate statement of reasons or bases for why it ignored this favorable evidence.

The record shows that a psychological pain evaluation found that the appellant experiences fatigue as a result of his depression. [R 4031-4034 (April 2007 Psychological pain evaluation)] This finding should be sufficient as a diagnosis of fatigue, as the veteran's lay testimony supports a later diagnosis by a medical professional. *Jandreau v. Nicholson,* 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). Furthermore, medical treatises state that fatigue is a symptom of fibromyalgia. *Merck Manual* 269-270 (Robert S. Porter, MD et al. eds., 20th ed., Merck, Sharp & Dohme Corp. 2018).

The fatigue finding from the veteran's pain evaluation is especially relevant, considering how the appellant's fibromyalgia is claimed as secondary to his psychiatric disorder. [R 4992-4993 (February 2014 Form 4138)]

Additionally, the evidence that the appellant's fatigue is related to his psychiatric disorder, a claim remanded by the Board, raises the question of why the Board did not discuss whether the appellant's fibromyalgia claim should be remanded along with his major depressive disorder claim as an inextricably intertwined issue; *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991). The Board also did not give an adequate statement of reasons and bases for why it did not

discuss this remand possibility, in addition to erring by not explaining why it ignored the evidence of the veteran's fibromyalgia symptoms in the first place, *See Lathan v. Brown*, 7 Vet. App. 359 (1995).

LUMBAR SPINE DISABILITY

The Board declined to reopen Appellant's lumbar spine disability claim by finding that the evidence submitted, since his May 2006 denial, does not raise a reasonable possibility of substantiating the claim; and that this evidence was duplicative. [R 2-17 (Board decision)]

However, the Board incorrectly discounts favorable evidence when reaching this conclusion, considering how the veteran's service treatment records are lost, and the records that exist are largely illegible; the evidence submitted since the denial, which corroborates Appellant's in-service injury and subsequent back pain; and the rules requiring a sympathetic reading of appellant's claim. The Board also errs in not discussing what evidence outside of lay evidence would be sufficient to establish the in-service event; when medical evidence should not be required.

Appellant was first denied service connection for his low back pain in a May 2006 decision. [R 5059-5077 (May 2006 RD)] Appellant stated that he hurt his back in July of 1976 while he was in service; and that he has had back pain ever since. [R 5189 (January 2006 Form 4138); 5059-5077 (May 2006 RD)]

However, the VA found that VA treatment records showed that the

appellant complained of low back pain with radiculopathy from a job-related injury in 1999 or 2000; and thus, denied him service connection for that reason. [R 5059-5077 (May 2006 RD)]

It is notable that the veteran's service treatment records could not be located [R 5091 (May 2006 Memorandum)]; and that the military personnel record that is included in his file is largely illegible. [R 5321-5359 (Military Personnel Record)]

Since the 2006 decision, the appellant has submitted a buddy statement from his brother, supporting the appellant's own statements that the he injured his back in service, and that his back pain began in service. [R 3884 (Buddy statement received June 24, 2014, labeled exhibit 7)]. *See also* [R 3872-3873, 3883 (two 4138 Forms dated February 8, 2014); 3894 (4138 Form received December 14, 2015)].

When evaluating the buddy statement, the Board found that it was duplicative, and not sufficient to reopen Appellant's claim. [R 2-17, 9-10 (Board decision)]

However, the original VA denial was due to lack of evidence of an in-service injury. When considering the sparsity of evidence available to the VA at the time of the first denial, the additional buddy statement is favorable evidence of the appellant's in-service injury and subsequent back pain.

Furthermore, considering how the appellant's service treatment records

are lost, and his personnel record is largely illegible, it is not clear how he could corroborate his in-service injury, absent evidence outside of government records. The appellant has provided this evidence, with a buddy statement from his brother. Additionally, back pain is not a disability that would require medical treatment, so the record's lack of private treatment records should not be considered negative evidence. *Kahana v. Shinseki,* 24 Vet. App. 428 (2011). The Board finds that lay evidence is not sufficient to establish Appellant's in-service injury, but it does not tell us what evidence would be sufficient to establish the injury. If the Board implies that Appellant must submit medical evidence to establish the event, this is error, as the veteran's back pain would not require medical treatment. Appellant cannot create medical records that never existed.

The reason for the May 2006 denial of service connection for appellant's lumbar spine disability was due to lack of evidence of an event in service causing the veteran's back pain. The veteran now provides evidence corroborating his in-service injury, and subsequent back pain. Since the appellant now submits evidence establishing his in-service back injury, and the original reason for denial was due to lack of evidence of his in-service injury, the evidence should be new and material, and sufficient to reopen his claim. The evidence is not cumulative or redundant, and it pertains to an unestablished fact necessary to substantiate the claim. *See Shade v. Shinseki,* 24 Vet. App. 110 (2010); 38 U.S.C. § 5108; 38 C.F.R. § 3.156(a). The Board errs by not giving an adequate statement of

reasons and bases for why it discounted or ignored this favorable evidence, in finding it "duplicative," when it is not clear what other type of evidence Appellant could submit; and it fails to sympathetically read the veteran's claim, as it would obviously be very difficult if not impossible for the veteran to establish his in-service injury, absent lay statements; and as medical treatment for his back pain would not be required, and thus the lack of treatment should not be considered as negative evidence. *See Cook v. Principi,* 318 F.3d 1334, 1340-41 (Fed. Cir. 2002).

To the extent that the Board finds the appellant's back injury was due to an injury from a civilian job in 1999, a subsequent after-service injury does not preclude the fact that the appellant also injured himself in service, and that the subsequent injury may have only aggravated his in-service injury. For this reason, the after-service injury is not relevant to show that the appellant had in fact injured his back in service; when the appellant does provide lay evidence that he did injure his back in service.

It also appears that the VA has never given the appellant an examination for his back injury. The Board should have remanded the claim to provide the appellant an examination in accordance with *McLendon v. Nicholson,* 20 Vet. App. 79, 81 (2006). The *McLendon* elements are fulfilled, as the evidence of record is sufficient to show that the appellant's back disability may be related to service, and medical expertise is needed to determine whether the appellant's

back disability is related to his in-service injury, or if it was aggravated by his 1999 injury. (*McLendon* notes that the VA must fulfill its duty to assist by providing an examination, when there is an indication that the appellant's disability may be associated with service, but there is a lack of sufficient competent medical evidence on file for the VA to make a decision on the claim; *id.*) The Lance concurrence in *Shade* also finds that in cases where medical evidence is necessary to prevail, the relationship between the new and material evidence standard to reopen a claim and the standard triggering the Secretary's duty to assist is the same. Thus, if the new evidence when viewed with the old, would be sufficient to trigger a medical examination, then the evidence is sufficient to reopen, and a medical examination must be provided; *Shade,* 24 Vet. App. at 123-124.

The Board errs in incorrectly discounting the appellant's favorable evidence, *Lathan*, 7 Vet. App. 359; incorrectly weighing the evidence to disfavor the appellant; 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; and failing to sympathetically develop his claim by presuming his current back injury is not related to his in-service injury, *Cook v. Principi,* 318 F.3d 1334, 1340-41 (Fed. Cir. 2002).

GERD

The Board denied service connection for Appellant's GERD, by finding that the appellant does not have a diagnosis of GERD or acid reflux; and that there

are no statements put forward describing symptoms or indicating a diagnosis or treatment. [R 2-17 (Board decision)]

However, the record does show evidence that the appellant takes an over-the-counter antacid. The appellant takes a “tums (antacid)” at bedtime. [R 1728 (March 2017 Physician Patient Notes)]

Additionally, the same Board decision remanded the appellant’s claims for major depressive disorder or PTSD. The Board also does not give an adequate statement of reasons and bases explaining why it did not remand the appellant’s GERD claim along with the remanded mental health claims. Appellant’s GERD claim is also inextricably intertwined with his remanded claims for major depressive disorder or PTSD, as the appellant claims that his GERD or acid reflux may be related to these disabilities. [R 3872-3873 (Form 4138 dated February 8,2014)] The issues are so closely tied together, that a final decision on Appellant’s GERD cannot be rendered until a decision on his major depressive disorder or PTSD is made, *Harris,* 1 Vet. App. at 183.

The Board fails to give an adequate statement of reasons and bases for why it ignores this favorable evidence of a disability, *Lathan*, 7 Vet. App. 359; and for not explaining why a remand is not necessary for the appellant’s GERD on an inextricably intertwined basis, considering this favorable evidence.

CONCLUSION

Absent adequate reasons and bases explaining why the Board discounted

or ignored favorable evidence, and for failing to sympathetically develop the appellant's claims, appellant and the Court are denied an opportunity for meaningful judicial review. *See* 38 U.S.C. § 7104(d).

The Board created remandable or reversable error. The Court should remand or reverse the above issues.

Respectfully submitted,

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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:

Clifton A. Prince, Esq.
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on January 6, 2020.

/s/ Cameron Kroeger
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