

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

JOHN D. WILSON, JR.,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

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Vet. App. No. 19-3037

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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**BRIEF OF THE APPELLEE
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I. ISSUE PRESENTED

Whether the Court should vacate the August 31, 2018, decision of the Board of Veterans' Appeals (Board), which found that the criteria for entitlement to service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder (PTSD), had not been met, where the Board did not provide an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, John D. Wilson, Jr., appeals the August 31, 2018, Board decision that found that the criteria for entitlement to service connection for an acquired psychiatric disorder, to include PTSD, major depressive disorder, alcohol

dependence (in remission), and a personality disorder, including as secondary to service-connected disabilities, had not been met. [Record Before the Agency (R.) at 4 (1-16)].

C. Statement of Facts and Procedural History

Appellant served on active duty in the United States Navy from January 1986 to January 1990, and from January 1992 to March 1994. [R. at 2973-2975]. In February 2000, Appellant submitted a claim to the Department of Veterans Affairs (VA), alleging entitlement to disability benefits based on service connection for a “present mental condition.” [R. at 6761-6762]. Appellant noted that he was “currently in jail[.]” *Id.* In October 2000, the VA Regional Office (RO) found that entitlement to service connection for an acquired psychiatric disorder was not warranted. [R. at 6725-6726]; [6735-6738]. Appellant submitted a statement in support of claim and a claim for entitlement to increased compensation based on individual unemployability via VA Form 21-8940 in March 2001. [R. at 6716-6721]. VA issued a Statement of the Case in August 2003, seemingly interpreting Appellant’s Form 21-8940 as a Notice of Disagreement. [R. at 5495-5506]. Appellant perfected his appeal to the Board by submitting a VA Form 9 in September 2003. [R. at 5469-5477]. In September 2007, the Board issued a decision denying entitlement to service connection for an acquired psychiatric condition. [R. at 4621-4637].

In November 2009, the parties entered into a Joint Motion for Remand (JMR), agreeing that the Board did not adequately consider Appellant’s lay

statements that the pain caused by his service-connected physical disabilities caused psychiatric disabilities, [R. at 4273-4282], which the Court granted that same month. [R. at 2976]. In December 2010, the Board remanded Appellant's claim to allow VA to provide Appellant with a Compensation and Pension (C&P) examination regarding whether Appellant had any current psychiatric disability and, if so, whether his service-connected physical disabilities caused or aggravated such disability or disabilities. [R. at 2682-2688].

Regarding PTSD, the Board requested that, if the examiner diagnosed that condition, the examiner also assess whether the DSM-IV criteria were met and whether a specific stressor was identified. *Id.* Appellant received a VA examination in January 2012. [R. at 3898-3923]. The examiner noted that Appellant had not been diagnosed with PTSD, further opining that his current "symptoms do not meet the diagnostic criteria for PTSD under DSM-IV criteria." [R. at 3898 (3898-3923)]. The examiner diagnosed "Depressive Disorder [Not Otherwise Specified]" and "Alcohol Dependence, in a controlled environment," *Id.*, and opined that no condition was more likely than not due to service or due to Appellant's service-connected physical conditions. [R. at 3921-3922 (3898-3923)].

In February 2012, a Supplemental Statement of the Case continued the denial of Appellant's claim for entitlement to service connection for any psychological disability. [R. at 3873-3878]. The Board again denied Appellant's claim for service connection on August 20, 2013. [R. at 3595-3612]. Appellant appealed this decision to the Court, and on December 5, 2014, the Court

remanded the case for additional development, including for a determination of whether or not Appellant suffers from PTSD, and, if so, whether or not it relates to service. [R. at 2841-2845]. Following this, Appellant received another C&P examination on October 3, 2016, in which the examiner found that his mental health complaints cannot be linked back to service. [R. at 1443-1445]. A Supplemental Statement of the Case issued March 31, 2017, again denied Appellant's claim. [R. at 1078-1108]. On August 30, 2017, the Board once again remanded the case for additional medical development in relation to Appellant's personality disorder. [R. at 447-450]. Appellant received another C&P examination on April 30, 2018, addressing whether Appellant's personality disorder was due to, or aggravated by, his service-connected disabilities. [R. at 75-88]. Following this, on August 31, 2018, the Board denied Appellant's claim for an acquired psychiatric disorder, to include PTSD, major depressive disorder, alcohol dependence (in remission), and a personality disorder, including as secondary to service-connected disabilities. [R. at 1-16]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should vacate the Board's decision because the Board failed to provide adequate reasons or bases addressing Appellant's noted service awards and a witness lay statement.

IV. ARGUMENT

A. Remand is Required for the Board to Consider Potentially Favorable Evidence, Including a Lay Witness Statement and Noted Service Awards

Appellant contends that the Board did not consider a witness lay statement relating to his claimed in-service stressor. *Appellant's Brief* at 2-3, 14-25 (1-28). The Secretary agrees that remand is warranted in this case because the Board failed to address evidence which is potentially favorable to Appellant. See 38 U.S.C. § 7104(d)(1); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board's statement of reasons or bases must explain the Board's reasons for discounting favorable evidence). Specifically, the Board did not address a February 5, 2010, note from Mr. Larry Lipton, relating to Appellant's time in service, including Mr. Lipton's assertion that Appellant received injuries to his head and back while on patrol, which caused him to suffer "some sort of mental blockage." [R. at 4127].

Further, although Appellant does not identify this error in his brief, upon a sympathetic reading of the evidence, the Secretary concedes that remand is also warranted for the Board to provide adequate reasons or bases in relation to any combat participation or awards of heroism incurred by Appellant during service. See *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with respect to all *pro se* pleadings, VA must give a sympathetic reading by "determining all potential claims raised by the evidence, applying all relevant laws and regulations") (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir.

2001)). Specifically, in finding that Appellant is not a reliable historian, the Board stated that “[t]he Veteran’s DD Form 214 does not indicate any award of heroism.” [R. at 7]. Further, the Board found that Appellant’s “assertions of combat participation in any form, much less his alleged decorations for bravery in such actions, are unfounded.” [R. at 7].

However, the Board failed to adequately address Appellant’s DD-214, which states that Appellant received: “National Defense Service Medal; Arctic Service Medal; Navy Expeditionary Medal,” [R. at 2973], along with the “Enlisted Submarine Qual Insignia; Strategic Deterent Patrol Pin w/1 Silver Star, Battle ‘E’ Award, Sea Service Ribbon with 2 Bronze Stars.” [R. at 2974].

Although this evidence is potentially favorable to Appellant, see 38 C.F.R. § 4.85, the Board did not discuss it. Therefore, the Secretary concedes that remand is required for the Board to adequately address this evidence. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board provides an inadequate statement of reasons or bases).

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should vacate and remand the August 31, 2018, decision of the Board, which denied entitlement to service connection for an acquired psychiatric disorder, to include PTSD, major depressive disorder, alcohol dependence (in remission), and a personality disorder, including as secondary to service-connected disabilities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that on January 23, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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/s/ Natasha D. Reed
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