

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

CHARLES A. WATSON,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

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

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CHARLES A. WATSON,)
)
 Appellant,)
)
 v.) Vet.App. No. 19-2509
)
 ROBERT L. WILKIE,)
)
 Secretary of Veterans Affairs)
)
 Appellee.)

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

Whether the Court should vacate and remand the February 12, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for sleep apnea, to include as secondary to service-connected posttraumatic stress disorder (PTSD), because of a lack of substantial compliance with the Board's August 2017 remand

II. STATEMENT OF CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims has jurisdiction over this appeal under 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final Board decisions.

B. Nature of the Case

Appellant *pro se*, Charles A. Watson, appeals the Board's February 12, 2019, decision, which denied entitlement to service connection for sleep apnea, to include as secondary to service-connected PTSD. (R. at 2-9).

C. Statement of Facts

Appellant served honorably on active duty for training from June 1995 to December 1995 (as well as several other periods), and active duty from October 2003 to February 2005. (R. at 458-59, 525)

In May 2006, VA determined that Appellant's service treatment records were unavailable. (R. at 879-80).

Appellant was diagnosed with mild obstructive sleep apnea after a sleep study in August 2009. (R. at 137 (136-44)).

Appellant filed a service connection claim for sleep apnea in April 2011 with the Department of Veterans Affairs (VA). (R. at 633-36). The VA Regional Office (RO) denied service connection for sleep apnea in a September 2011 rating decision. (R. at 578-79 (574-79)).

Appellant filed a Notice of Disagreement in February 2012 and attached an August 2008 statement from Dr. Jabbour stating that PTSD may aggravate sleep apnea even if it does not cause sleep apnea. (R. at 583 (583-86)). Appellant also submitted an article from About.com written by a Dr. Tull describing a correlation between soldiers with PTSD and sleep apnea. (R. at 584).¹

The RO continued the denial of service connection in a July 2013 Statement of the Case (SOC). (R. at 543 (532-45)). Appellant perfected his appeal, and in March 2014, the Board remanded the claim. (R. at 526-29).² The Board acknowledged the article by Dr. Tull and the statement from Dr. Jabbour, but the Board found that neither submission offered an opinion specific to Appellant as to whether PTSD caused or aggravated his sleep apnea. (R. at 527 (526-29)). The Board then ordered a new VA examiner to provide a nexus opinion on whether Appellant's service-connected PTSD caused or aggravated his sleep apnea. (R. at 528).

In July 2014, a VA examiner opined that sleep apnea was less likely than not caused by or aggravated by the service-connected PTSD. (R. at 330 (328-336)). She explained that PTSD did not cause or aggravate Appellant's mild obstructive sleep apnea (OSA) because the etiology of OSA is due to a mechanical mechanism of airway obstruction and not a neuropsychic or neuro

¹ The NOD form is not of record although the Dr. Jabbour's statement and Dr. Tull's article are of record.

² The VA Form 9 is also not of record.

behavioral mechanism. (R. at 330, 331). She also noted that there was no evidence in the claims file that the severity of Appellant's OSA increased beyond a mild state since it was diagnosed in August 2009. (R. at 331).

The RO continued to deny service connection for sleep apnea in an August 2014 Supplemental SOC (SSOC). (R. at 315-16 (307-20)).

In May 2015, the Board remanded the claim again because it found a lack of substantial compliance with its March 2014 remand instructions. (R. at 297 (295-99)). The Board explained that it had remanded the claim to afford Appellant an examination and to obtain an opinion as to whether his diagnosed sleep apnea was secondary to his service-connected PTSD, but instead VA obtained an opinion without an examination. *Id.* The Board observed that the lack of compliance was potentially prejudicial to Appellant because secondary service-connection could be based on aggravation and absent an examination it could be difficult to assess the current level of disability. *Id.* Significantly, the Board also noted that the VA examiner did not discuss the evidence submitted by Appellant and that the claims file appeared to be missing records such as the NOD, the substantive appeal, and statements by other Veterans. *Id.* The Board also noted that lay statements from fellow service members might be helpful because Appellant's service treatment records are unobtainable. (R. at 297). The Board remanded the claim for a new examination report and afforded Appellant the opportunity to submit additional evidence. (R. at 298-99).

Appellant underwent a VA examination in September 2015. The examiner acknowledged the August 2009 sleep apnea diagnosis but noted that a September 2015 sleep study showed snoring with no evidence of sleep apnea. (R. at 287-88, 289 (286-91)). Appellant reported that he had been working the third shift for around 15 years and that while he slept for around six hours, his sleep was interrupted. (R. at 287).

The RO continued to deny service connection for sleep apnea in a November 2015 SSOC. (R. at 277-78 (268-80)).

In January 2016, the Board remanded the claim once more because it found a continued lack of substantial compliance with its prior remand orders. (R. at 168 (166-72)). The Board found that the claims file continued to lack the NOD, the substantive appeal, and other servicemember statements (should Appellant decide to submit them). (R. at 168). The Board also noted that the electronic record did not contain Dr. Jabbour's August 2008 statement and the About.com article written by Dr. Tull. *Id.* The Board also ordered a new VA examination because of conflicting medical findings of whether Appellant had a current diagnosis of sleep apnea. (R. at 169). The Board requested that a VA examiner determine whether Appellant has a current diagnosis of sleep apnea and whether military service caused or aggravated the sleep apnea or whether the service-connected PTSD caused or aggravated the sleep apnea. *Id.*

In March 2016, the RO requested copies of the NOD, the substantive

appeal, the August 2008 statement by Dr. Jabbour, and the About.com article by Dr. Tull from Appellant. (R. at 158-60). The record does not contain a response to the RO's request.

Appellant underwent another examination in April 2016. (R. at 136-53). The examiner noted that Appellant was diagnosed with sleep apnea in 2009 and that there is no longer a diagnosis of sleep apnea because sleep testing in September 2105 was negative for sleep apnea and positive for primary snoring. (R. at 137). The examiner also noted that Appellant had worked the third shift for many years, which can contribute to daytime sleepiness. *Id.* The examiner determined that Appellant does not currently have any findings, signs, or symptoms attributable to sleep apnea. *Id.* The examiner explained that Appellant's diagnosis for mild sleep apnea in August 2009 was not due to his active service and reasoned that the Veteran did not have a diagnosis for sleep apnea until four years after service separation. (R. at 149). The examiner also determined that Appellant's diagnosed sleep apnea (for the periods from 2009 to 2014) was not caused or aggravated by PTSD. *Id.* The examiner explained that Appellant's obstructive sleep apnea was due to a mechanical process and stated that Appellant did not have a diagnosis for sleep apnea at the time of the examination. *Id.* Importantly, the examiner addressed the About.com article written by Dr. Tull, but she found it was based on a small study that did not present substantial, consistently reliable evidence of sleep apnea secondary to PTSD. (R. at 152-53). Instead, the examiner attributed

Appellant's sleep disturbance to a 15-year history of shift work. (R. at 153). The examiner did not comment on Dr. Jabbour's statement.

The RO continued to deny service connection for sleep apnea in an April 2016 SSOC. (R. at 109 (92-112)).

The Board remanded the claim again in August 2017 because the claims file still did not contain the records identified in its prior remand orders. (R. at 86 (83-88)). The Board also observed that Appellant did not respond to the RO's request for those documents and that VA had satisfied its duty to assist in this aspect. *Id.* However, the Board requested that the RO send a medical release form to Appellant for Dr. Jabbour so the RO could obtain the statement directly from the doctor. (R. at 86-87). *Id.* Finally, the Board observed that while the April 2016 VA examiner discussed Dr. Tull's article, she did not discuss Dr. Jabbour's statement. The Board requested an addendum opinion should the RO obtain Dr. Jabbour's statement. (R. at 87).

In August 2017, the RO sent a general release to Appellant so it could obtain the statement directly from Dr. Jabbour. (R. at 72-81). The Appeals Management Center (AMC) attempted to obtain the four missing documents from the Agency of Original Jurisdiction (AOJ). (R. at 82). The AOJ reported that they were not in possession of the documents. (R. at 44).

In October 2017, the prior VA examiner reported that she could not locate Dr. Jabbour's statement and therefore she could not provide the requested opinion. (R. at 59-62).

The RO issued an SSOC in December 2018 that continued to deny service connection for sleep apnea. (R. at 26 (17-29)).

In February 2019, the Board denied entitlement to service connection for sleep apnea, to include as secondary to service-connected PTSD. (R. at 2-9). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Secretary concedes that the Court should vacate and remand the Board's February 2019 decision that denied entitlement to service connection for sleep apnea, to include as secondary to service-connected PTSD, because the Board failed to ensure substantial compliance with its August 2017 remand directives by obtaining a VA medical opinion that commented on Dr. Jabbour's August 2008 statement.

IV. ARGUMENT

A. Standard of Review

The Board's determination of service connection is a question of fact that the Court reviews under the deferential clearly erroneous standard. 38 U.S.C. § 7261(a)(4); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). The Court reviews the Board's finding of substantial compliance under the clearly erroneous standard of review. See *Gill v. Shinseki*, 26 Vet.App. 386, 392 (2013).

B. Remand is warranted to ensure substantial compliance with the Board's August 2017 remand instructions

Pursuant to VET.APP. R. 28(b)(2), the Secretary concedes that the Board did not ensure that VA satisfied the duty to assist. A remand by the Board confers on the claimant a legal right to substantial compliance with the remand order. *Stegall v. West*, 11 Vet.App. 268 (1998); *Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010). When a claim is remanded to provide the claimant with a VA medical examination or opinion, the Secretary must ensure that the examination or opinion provided is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). The Board's failure to ensure substantial compliance with a remand order, including its failure to ensure that an ordered medical examination or opinion is adequate, constitutes a basis for remand. *Donnellan*, 24 Vet.App. at 176.

In its August 2017 remand decision, the Board observed that while the April 2016 VA examiner discussed Dr. Tull's article, she did not discuss Dr. Jabbour's statement. The Board requested an addendum opinion should the RO obtain Dr. Jabbour's statement. (R. at 87). In October 2017, a VA examiner reported that she could not locate Dr. Jabbour's statement in the file and was therefore unable to provide the requested opinion and that the RO was unable to help her. (R. at 59-62). However, it appears Dr. Jabbour's August 2008 statement was of record.

The appearance of Dr. Jabour's statement in the record appears to have been problematic. It was not listed in the evidence that the RO reviewed when

issuing the September 2011 rating decision, (R. at 577), but Dr. Jabbour's statement appears in the list of evidence that the RO reviewed when it issued the July 2013 SOC. (R. at 534). The next mention by VA of Dr. Jabbour's statement is in the March 2014 Board remand. (R. at 527). There, the Board found that neither Dr. Tull's article, nor Dr. Jabbour's statement, was specific to Appellant's medical history and whether his PTSD may have caused or aggravated his sleep apnea. (R. at 527). The Board then remanded for a VA examination, and in May 2015 the Board found the July 2014 VA opinion inadequate, in part, because it did not discuss the supporting evidence submitted by Appellant, namely Dr. Tull's article and Dr. Jabbour's statement. (R. at 297). The next specific mention of Dr. Jabbour's statement is in January 2016, when the Board observed that the electronic record did not contain the statement. (R. at 168). Yet, by April 2016, Dr. Tull's article, at least, was in the record, and the April 2016 VA examiner commented on the article. (R. at 152). But in August 2017, the Board observed that neither Dr. Tull's article, nor Dr. Jabbour's statement was part of the record and it remanded for a new opinion should Appellant submit Dr. Jabbour's statement. (R. at 86). In October 2017, the VA examiner noted that she could not locate Dr. Jabbour's statement.

It appears, based on Exhibit A of Appellant's brief, that his NOD is dated February 10, 2012, and he timely submitted the NOD within the one-year period following the September 2011 rating decision. And based on Appellant's Exhibit A, he had attached Dr. Jabbour's August 2008 statement and Dr. Tull's About.com

article to his NOD. The record contains the attachments to the NOD, namely Dr. Tull's article and Dr. Jabbour's statement, but not the NOD. (R. at 583-84). To the extent that the Board may have believed that the record contained an additional statement from Dr. Jabbour beyond his August 2008 statement, there is no indication in the record that Appellant submitted additional comments or statements from Dr. Jabbour or that Dr. Jabbour directly submitted additional statements.

In its August 2017 remand instructions, the Board stated that a VA examiner should comment on Dr. Jabbour's "letter" should Appellant or Dr. Jabbour submit the "letter." Although neither individual submitted "the letter" it appears that the Board intended to obtain a VA medical opinion to consider Dr. Jabbour's statement, which have may have been of record at the time. Dr. Jabbour's opinion is of record now and attached to Appellant's informal brief, and the Board's intent can now be effectuated. Remand is therefore required for an opinion that addresses Dr. Jabbour's August 2008 letter to ensure substantial compliance with the Board's August 2017 remand instructions. (R. at 87). *Stegall*, 11 Vet.App. at 268; *Donnellan*, 24 Vet.App. 176.

While the Secretary concedes that remand is warranted, he disagrees with certain arguments of Appellant. Appellant argues, based on his citation to an unrelated Board decision, that he may have been granted service connection by a different Veterans Law Judge. Appellant's Brief, Attachment 2. It is well established that Board decisions are of no precedential value before the Court or

the Board and the Board is required to apply the law to the facts of the case. 38 C.F.R. § 20.1303 (nonprecedential nature of Board decisions); *see Hillyard v. Derwinski*, 1 Vet.App. 349, 351 (1991) (noting that Board decisions are not precedential and are only binding with regard to the specific case in each decision); *accord Lynch v. Gober*, 11 Vet.App. 22, 27 (1997) (“It is well established that [Board] decisions are of no precedential value before the [Board] or this Court”). Each case is decided based on the individual facts and the application of relevant law and regulations, and any prior VA or Board decision does not compel the conclusion that the facts in this case necessarily warrant an award of benefits.

The Court has consistently held that a Board decision in one Veteran’s case, with a limited exception, may not serve as precedent—and by extension, evidence—to support or cast doubt upon a Board decision in another Veteran’s case. *Hillyard*, 1 Vet.App. at 351, *Lynch*, 11 Vet.App. at 27. See 38 C.F.R. § 20.1303 (“Prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case, but each case presented to the Board will be decided on the basis of the individual facts of the case in light of applicable procedure and substantive law.”).

V. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Secretary of Veterans Affairs, respectfully urges the Court to vacate and remand the Board’s February 12, 2019 decision that service connection for sleep apnea, to include as secondary

to service-connected PTSD, so that Board may obtain an opinion that complies with its prior remand instructions.

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 March 6, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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/s/ Lance Steahly
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