

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

Vet. App. No. 19-1907

JOHN STANLEY PEARSON,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

MR. PEARSON’S REPLY BRIEF

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REPLY SUMMARY

The VA service connected Mr. Pearson's PTSD with a 50% rating in September 2008.¹ In July 2011, he filed for an increased PTSD rating, and it is that claim that is on appeal.²

Mr. Pearson underwent a PTSD C&P exam in August 2017 in which the examiner classified Mr. Pearson's occupational and social impairment as reduced reliability and productivity.³ The August 2017 examiner found Mr. Pearson experienced:

- Persistent negative emotional state such as fear, horror, anger, guilt, or shame;
- Feelings of detachment or estrangement from others;
- Irritable behavior and angry outbursts—with little or no provocation—typically expressed as verbal or physical aggression toward people or objects; and
- Difficulty in adapting to stressful circumstances, including work or a worklike setting.⁴

The examiner also found Mr. Pearson's PTSD symptoms "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning."⁵ But the examiner did not discuss these symptoms in

¹ R. at 3120-3127.

² R. at 2628.

³ R. at 198-202.

⁴ R. at 201-202.

⁵ R. at 201.

her narrative opinion.

Mr. Pearson submitted letters to the Board—in October 2017 and January 2019—arguing the August 2017 exam was inadequate because the examiner’s narrative opinion contradicted the exam results and challenged the examiner’s competency and qualifications.⁶

The Board denied Mr. Pearson’s claim for an increased PTSD rating in its January 2019 decision.⁷ Mr. Pearson appealed.

In his opening brief, Mr. Pearson argues the Board’s finding that Mr. Pearson’s disability did not warrant an increased rating was clearly erroneous. He asserts that the August 2017 exam was inadequate because the examiner’s premises did not align with her conclusion. And he argues the Board prohibited him from arguing against the examiner’s competency by not providing any evidence of her expertise after he began his challenge.

The Secretary responded by arguing that the Board’s finding that Mr. Pearson’s PTSD symptoms warranted only a 50% rating was not clearly erroneous. He continues by arguing that even if the examiner’s findings do not match her conclusion, it requires medical expertise to determine the findings are contradictory to the conclusion. Finally, he circularly argues the

⁶ R. at 165, 24.

⁷ R. at 4-18.

Board's failure to provide evidence of the examiner's qualifications was harmless error because the Secretary determined the examiner was qualified.

ARGUMENT

I. 38 U.S.C. § 7261(a)(4) requires this Court to review the Board's findings.

The Secretary argues the Court must uphold the Board's finding that Mr. Pearson's disability did not warrant a rating in excess of 50%.⁸ The Secretary asserts Mr. Pearson cannot challenge the Board's finding that his disability manifested as occupational and social impairment with reduced reliability. Mr. Pearson is not merely disagreeing with how the Board weighed the evidence. Mr. Pearson is asking the Court to review a Board finding. This Court must—under 38 U.S.C. § 7261(a)(4)—set aside and reverse clearly erroneous Board findings.

Mr. Pearson argues the August 2017 exam supported finding Mr. Pearson's disability manifested as occupational and social impairment with deficiencies in most areas.⁹ Mr. Pearson did not cherry-pick findings from the August 2017 exam. Instead, he showcased how the medical evidence contradicted the Board's conclusion. Contrary to the Secretary's assertion, the

⁸ SB at 8-11.

⁹ Appellant's Brief at 9-11.

Board never considered the favorable findings in the August 2017 exam.¹⁰ Specifically, the Board did not consider Mr. Pearson's persistent negative emotional state exemplified by fear, horror, anger, guilt, or shame; his feelings of detachment or estrangement from others; or his irritable behavior and angry outbursts—with little or no provocation—typically expressed as verbal or physical aggression toward people or objects.¹¹ Mr. Pearson explained how each symptom aligned with finding occupational and social impairment with deficiencies in most areas.¹²

Mr. Pearson did not have to exhibit every symptom in the higher rating criteria to be granted that higher rating. A higher evaluation will be assigned when the disability more nearly approximates the criteria required for that rating.¹³ Mr. Pearson's disability more closely reflects the rating criteria for a 70% rating.

The Board's finding that Mr. Pearson's PTSD caused occupational and social impairment with reduced reliability—was clearly erroneous, and this Court must set aside and vacate that finding.

II. The Board misapplied the medical evidence to the rating criteria. Mr. Pearson's argument is not his own medical opinion.

¹⁰ SB at 8-9.

¹¹ R. at 8-13.

¹² Appellant's Brief at 9-11.

¹³ 38 C.F.R. § 4.7 (2017).

The Secretary argues Mr. Pearson's analysis of the August 2017 exam was Mr. Pearson asserting his own medical opinion.¹⁴ Mr. Pearson was not providing a medical opinion but, instead, applying the medical evidence from the August 2017 exam to the rating criteria in 38 C.F.R. § 4.130.

Mr. Pearson's application of the symptoms found in the August 2017 exam does not cherry-pick findings.¹⁵ The August 2017 examiner found Mr. Pearson suffered from multiple symptoms that aligned with at least a 70% rating, but failed to discuss those symptoms in her narrative remarks.¹⁶ The August 2017 exam was inadequate because the examiner's findings and narrative remarks did not align. The Board could not rely on the inadequate exam without making its own medical judgments.

III. The Board's analysis of the medical examiner's qualifications was not harmless error.

The Secretary concedes the Board erred when it set forth the wrong standard for evaluating Mr. Pearson's challenge to the August 2017 medical examiner's qualifications.¹⁷ The Secretary, however, is wrong that the Board's error was harmless. First, the Board failed to provide the evidence

¹⁴ SB at 9.

¹⁵ See SB at 9.

¹⁶ R. at 198-202.

¹⁷ SB at 12.

necessary for Mr. Pearson to complete his challenge to the examiner's competency. Then, the Board's analysis did not address Mr. Pearson's explicit challenges or the competency of this individual examiner.

In *Francway*, the Federal Circuit held a veteran was required to raise the issue to nullify the presumption of competency. Mr. Pearson did that, twice.¹⁸ Once a veteran raises the issue of competency, the VA must satisfy its burden of persuasion as to the examiner's qualifications.¹⁹ It is the role of the Board to make factual findings about the examiner's qualifications and provide reasons and bases for its determination of whether the examiner was competent to provide the opinion.²⁰ The duty to assist mandates that a veteran have access to the information he needs to complete a challenge to the examiner's qualifications—including the curriculum vitae and other information about the qualifications of the examiner.²¹ The VA did not provide this information to Mr. Pearson.

The Board did not fulfill its duty to assist Mr. Pearson. Mr. Pearson challenged the August 2017 examiner's qualifications —specifically asserting Mr. Pearson needed to be evaluated by a psychiatrist specializing in PTSD.²²

¹⁸ *Francway v. Wilkie*, 940 F.3d 1304, 1308 (2019); R. at 24, 165.

¹⁹ *Francway* at 1308.

²⁰ *Id.*

²¹ *Id.*; see 38 U.S.C. § 5103A.

²² R. at 24, 165.

After using the wrong standard to evaluate Mr. Pearson's claim, the Board stated, "the examiner who performed the Veteran's August 2017 V.A. Examination is a Licensed Clinical Psychologist with a Ph.D. degree."²³ Contrary to the Secretary's argument, this statement did not address the examiner's competency any more than saying the examiner is a psychologist. The Board did not provide analysis as to why this specific psychologist was qualified to issue a medical opinion in Mr. Pearson's specific complex PTSD case. The VA's position in its brief is that all psychologists are competent.

The Board stated the examiner had also "conducted the Veteran's original PTSD examination in June 2008, and, as such, she is familiar with the Veteran's condition overtime."²⁴ This fact does not prove the examiner was competent to evaluate Mr. Pearson. A competency finding is based on the examiner's qualifications—not how many times she examined Mr. Pearson. An incompetent examiner cannot become competent by examining a veteran multiple times.

The Secretary also tried to bolster the examiner's qualifications by adding evidence to the record.²⁵ Setting aside whether the Court is allowed to review the extra-record evidence, the sparse website referenced by the Secretary also

²³ R. at 16.

²⁴ R. at 16-17.

²⁵ SB at 14.

does not address the challenge raised by Mr. Pearson. There is no evidence proving the August 2017 examiner specialized in PTSD and was competent to examine Mr. Pearson. The record does not contain information on where the examiner went to school, how long she has been practicing, or her experience with PTSD. The Board was required to respond to Mr. Pearson's challenge, and it did not. This Court is not the appropriate forum to find whether the examiner was qualified. Remand is required.

This was not harmless error. The Board's failure to respond to Mr. Pearson's challenge of the August 2017 examiner's qualifications meant Mr. Pearson was deprived of fundamental fairness. He asserted a challenge and was substantially harmed when the Board did not provide the evidence necessary to complete his challenge nor address the challenge he raised. If the Board can state general information about an examiner that does not address a specific challenge raised by a veteran, the veteran's tool to challenge an examiner's qualifications is useless. The Board must answer the particular issue raised if a challenge is to hold any weight. A veteran deserves to know any examiner evaluating him is competent.

CONCLUSION

Mr. Pearson is entitled to a 70 or 100% PTSD rating. The August 2017 examiner's findings support at least a 70% rating. By applying the findings to

the rating criteria, Mr. Pearson did not supply his own medical opinion, but instead, evaluated the rating criteria and applied the medical findings to it.

The Board's error in addressing Mr. Pearson's challenge to the medical examiner's qualifications was not harmless error. The Board failed to address the specific challenge raised by Mr. Pearson and, as a result, substantially harmed Mr. Pearson.

The Court must vacate the Board decision and remand for a new medical exam with a psychiatrist specializing in PTSD, to consider all Mr. Pearson's symptoms in its evaluation.

March 30, 2020

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