Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 19-0673

LEROY D. ANDERSON, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

BARTLEY, *Chief Judge*: Veteran LeRoy D. Anderson appeals through counsel an October 3, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for sleep apnea. Record (R.) at 4-8. For the reasons that follow, the Court will affirm the October 2018 Board decision.

I. FACTS

Mr. Anderson served honorably in the U.S. Army from September 1966 to September 1968. R. at 2789. Service examination reports reflect that Mr. Anderson weighed 203 pounds at service entrance, R. at 2713, and 212 pounds at service separation, R. at 2742. In an August 1968 Report of Medical History, contemporaneous with service separation, Mr. Anderson, as relevant, denied "recent gain or loss of weight" and "frequent trouble sleeping." R. at 2739.

In July 2009, Mr. Anderson established medical care with VA. *See* R. at 1000. At that time, he reported a "recent unintentional weight gain," and his weight was recorded at 244.6 pounds. R. at 1002. The physician indicated that Mr. Anderson reported that he stops breathing at night and referred him for a sleep study. R. at 1002-03.

Following an August 2009 VA sleep study, Mr. Anderson was diagnosed with moderate obstructive sleep apnea. R. at 990. A contemporaneous sleep medicine consultation report identified Mr. Anderson's being "overweight" as a medical condition that "play[s] into" his sleep apnea. R. at 2064.

A March 2010 VA dietetic consultation report reflects that Mr. Anderson's weight was 237.7 pounds, R. at 972, and that he reported that he "gained weight gradually over the years," R. at 974. The report also indicated that Mr. Anderson's goal was to lose 40 pounds. R. at 973.

In July 2017, Mr. Anderson filed a claim for service connection for sleep apnea, R. at 184-86, which was denied by a VA regional office in August 2017, R. at 136-39. In September 2017, Mr. Anderson filed a Notice of Disagreement (NOD), R. at 112-21, and, following an October 2017 Statement of the Case, R. at 53-70, he perfected an appeal to the Board in November 2017, R. at 34-35.

In the October 2018 decision on appeal, the Board denied service connection for sleep apnea, finding that, although Mr. Anderson presented with a current diagnosis of sleep apnea, "the weight of the lay and medical evidence shows no sleep apnea symptoms or sleep apnea diagnosis until approximately 2009, over 40 years after service separation." R. at 7. The Board noted that, although Mr. Anderson "generally asserts that he is entitled to service connection for sleep apnea[, n]either he nor his representative [has] provided any lay or medical evidence as to why [he] believes his sleep apnea is related to his active duty service." R. at 6. In addition, the Board noted that, although Mr. Anderson had not been provided a VA examination, the duty to assist did not require providing him one, as he failed to satisfy the criteria set forth in *McLendon v. Nicholson*, 20 Vet.App. 79 (2006). R. at 7. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Anderson's appeal is timely and the Court has jurisdiction to review the October 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determinations regarding service connection and whether the duty to assist has been satisfied are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Nolen v. Gober*, 14 Vet.App. 183, 184 (2000); *Davis v. West*, 13 Vet.App. 178,

184 (1999). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Board is required to consider theories of entitlement to benefits that are either raised by the claimant or reasonably raised by the record. *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) (recognizing that the Board, "[a]s a nonadversarial adjudicator," has an "obligation to analyze claims [that] goes beyond the arguments explicitly made," but holding that that obligation "does not require the Board to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision"), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The Court has jurisdiction to determine, in the first instance, whether the record reasonably raised a particular theory of entitlement. *See Barringer v. Peake*, 22 Vet.App. 242, 244 (2008).

III. ANALYSIS

Mr. Anderson argues that the Board erred in denying service connection when it found VA's duty to assist did not require providing an examination and failed to otherwise provide adequate reasons or bases supporting its duty-to-assist determination. Appellant's Brief (Br.) at 3-8. Specifically, he argues that the Board failed to address the reasonably raised theory that his in-service weight gain caused or aggravated his sleep apnea. *Id*. at 5-6. The Secretary urges the Court to affirm the Board decision, arguing that the theory of service connection advanced on appeal was neither explicitly raised by Mr. Anderson nor reasonably raised by the record.

Secretary's Br. at 6. He additionally argues that the Board provided adequate reasons or bases for its decision and that the Board's findings are consistent with the record. *Id*. at 4-8.

The Court concludes that the theory of entitlement Mr. Anderson advances in his brief to this Court was neither explicitly raised nor reasonably raised by the record. Mr. Anderson does not argue that he expressly raised the theory that his sleep apnea was caused by the 9-pound weight gain during service. In fact, as noted by the Board, neither Mr. Anderson nor his representative advanced any theory linking his sleep apnea to his military service. R. at 6.; *see* R. at 184-86 (July 2017 claim), 112-21 (September 2017 NOD), 34-35 (November 2017 VA Form 9).[1]

Mr. Anderson argues, instead, that the particular theory of service connection he advances was reasonably raised by the record. Appellant's Br. at 5-6. To support this argument, he points to service entrance and separation examination reports, reflecting a 9-pound weight gain, and to August 2009 and March 2010 VA medical records. *Id*. However, his argument must fail.

First, there is no indication that the 9-pound weight gain during service rendered Mr. Anderson overweight, that it was the beginning of a tendency to be overweight, or that it was accompanied by sleep issues. In fact, upon service separation Mr. Anderson indicated that he had no recent weight gain and also denied trouble sleeping. R. at 2739; *see* R. at 2741-42. Second, although he points to the August 2009 sleep medicine report that his being overweight "play[s] into" his sleep apnea, that statement alone does not signify a link to service, since the record contains no indication that a tendency to be overweight or to have any trouble with weight began during service. Third, although Mr. Anderson seems to allege that the March 2010 dietetic consultation report supports his argument that this theory was reasonably raised, Appellant's Br. at 6 (citing R. at 974), that record says nothing more than that he gained weight gradually over the years, with no mention of any particular time period, including his period of service. And his interpretation of the March 2010 report would ignore that in July 2009 he reported his weight gain as recent. R. at 1002.

In short, Mr. Anderson argues that the fact that his recorded weight at service discharge was nine pounds heavier than it was at service entrance, combined with his diagnosis of sleep apnea years later when he was overweight, reasonably raised the theory that his current sleep apnea

[1] The Court notes that Mr. Anderson has been represented by the same law firm since he filed the sleep apnea claim in July 2017.

is linked to service. As noted, however, his argument is unpersuasive and the Court cannot agree that this theory was reasonably raised. As the Board is not obliged to consider a theory with no foundation in the record, *see Robinson*, 557 F.3d at 1361, the Board did not err in not addressing this theory.

But even were this theory of service connection reasonably raised by the record, the Court concludes that Mr. Anderson fails to demonstrate prejudicial error in the Board's failure to consider it. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *see also Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Simmons v. Wilkie*, 30 Vet.App. 267, 279-80 (2018). Mr. Anderson fails to persuasively demonstrate that, even if the theory of service connection advanced for the first time on appeal was reasonably raised below, VA's duty to assist required providing him an examination with respect to sleep apnea.

The duty to assist includes providing the veteran with a medical examination or opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the veteran qualifies; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability; and (4) insufficient competent evidence on file for the Secretary to make a decision on the claim. *McLendon*, 20 Vet.App. at 81; *see* 38 U.S.C. § 5103A(d)(2); *Waters v. Shinseki*, 601 F.3d 1274, 1276-77 (Fed. Cir. 2010); 38 C.F.R. § 3.159(c)(4)(i) (2019).

In its duty-to-assist analysis, the Board found that Mr. Anderson demonstrated a current sleep apnea disability, thus satisfying the first *McLendon* element. R. at 7. Even assuming, without deciding, that Mr. Anderson's 9-pound weight gain during service satisfies the second *McLendon* element, the record before the Court is devoid of evidence indicating that his current sleep apnea may be associated with service, thus failing to establish the third *McLendon* element.

Mr. Anderson argues that the August 2009 sleep medicine report suffices to establish the third *McLendon* element. The Court disagrees. Although Mr. Anderson is correct that the third *McLendon* element carries a "low threshold," Appellant's Br. at 7; *see McLendon*, 20 Vet.App. at 83, the August 2009 report does not indicate, even read sympathetically, that his current sleep apnea "may be associated" with an event in service, to include his 9-pound weight gain. The 2009

VA report, as noted, mentions that his current overweight condition plays into his current sleep apnea. But the statement merely identifies Mr. Anderson's current status as overweight—it doesn't identify weight gain during service, much less suggest that any in-service weight gain may be associated with his current overweight status or his sleep apnea. Thus, this statement does not satisfy the third *McLendon* element, particularly as 40 years elapsed between Mr. Anderson's service and his sleep apnea diagnosis, and his weight during the claim and appeal period is approximately 33 pounds greater than his weight when he was discharged. *See* R. at 1002.[2]

The Court concludes that, because the theory he now explicitly raises to the Court was neither explicitly nor reasonably raised below, the Board did not err in not addressing it. The Court agrees with the Secretary that the Board provided adequate reasons or bases for its determination that service connection for sleep apnea was not warranted. *See Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506. The Board's analysis was plausible in light of the record and sufficiently detailed to inform Mr. Anderson of the reasons for its determination that service connection was not warranted, and to facilitate judicial review. Accordingly, the Court will affirm the October 2018 decision.

IV. CONCLUSION

Upon consideration of the foregoing, the October 3, 2018, Board decision is AFFIRMED.

DATED: April 27, 2020

Copies to:

Stephani M. Bennett, Esq.

VA General Counsel (027)

---

[2] The Court notes that the Board found the third *McLendon* element not met because the record contained "no *c*ompetent evidence even suggesting that the currently diagnosed sleep apnea may otherwise be associated with service." R. at 7. The Board's notation that "competent" evidence is needed to satisfy the third *McLendon* element imposes a higher standard of proof than required. *See Waters*, 601 F.3d at 1277; *see also Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (Fed. Cir. 2010). However, the Board noted that neither Mr. Anderson nor his representative provided any lay evidence suggesting a link between sleep apnea and his military service, R. at 6, a finding consistent with the evidence of record, *see* R. at 34-35, 112-21, 184-86. Therefore, although the Board misstated the standard required for the third *McLendon* element, in the absence of *any* evidence suggesting that Mr. Anderson's sleep apnea may be related to his military service, the Board's error in this particular situation is harmless.