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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1079

STEVEN L. LANKFORD, APPELLANT,

v.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Air Force veteran Steven L. Lankford appeals a December 4, 2018, Board of Veterans' Appeals decision that denied, for compensation purposes, service connection for a dental condition, characterized by tooth loss and claimed as a residual injury due to fractured teeth.¹ This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether the Board should have obtained a medical examination that addressed the relationship between the veteran's tooth loss and an in-service trauma. Because the Board did not address this reasonably raised issue, its statement of reasons or bases is inadequate. Thus, we will set aside that part of the Board's December 2018 decision that is here on appeal and remand the matter for further proceedings.

¹ The Board also remanded the matter of service connection for dental treatment purposes. We lack authority to address that nonfinal matter. *See* 38 U.S.C. § 7252(a) (Court has "exclusive jurisdiction" to review final Board decisions); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

I. ANALYSIS

Mr. Lankford argues that the Board erred in not obtaining a medical examination or explaining why one was not needed to address whether his tooth loss was related to bone loss resulting from an in-service trauma. Compensation for the loss of teeth is warranted when the loss is due to the loss of substance of the body of the maxilla or mandible through trauma or disease. 38 C.F.R. § 4.150, Diagnostic (DC) 9913 (2019).

The duty to assist includes providing a medical examination and 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 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 v. Nicholson*, 20 Vet.App. 79, 81 (2006); *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).

For all its material determinations of fact and law, the Board must provide a written statement of the reasons or bases that is understandable and facilitates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 1 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that 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). In matters requiring medical judgment, however, the Board "must consider only independent medical evidence to support their findings rather than provide their own medical judgment in the guise of a Board opinion." *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1990).

Here, the Board denied compensation because it found "no competent evidence in either VA records or any private record that the claimant's current edentulous state was due to [his] in-service accident," and "no evidence of any anatomical loss or mandibular injury that is not due to edentulous atrophy or periodontal disease." Record (R.) at 5-6. In making this determination, the Board found that the veteran's account of a relationship between his tooth loss and service lacked

probative weight because "as a lay person untrained in the fields either dentistry or medicine, he is not competent to offer an opinion linking his current condition to service." *Id.*

The Board's explanation does not facilitate judicial review. Although the Board's rejection of the veteran's lay testimony suggests that medical evidence was needed to show the required link between tooth loss and an in-service trauma, the Board did not address the duty to assist or explain why a medical examination was not needed. And, although the Board referred to "a VA examination in June 2016," the record does not include a medical examination that addressed etiology. At best, the record includes a VA medical note from an imaging study that, in passing, confirms the veteran's loss of teeth. But, given the veteran's account of problems with his teeth, the uncontested tooth loss and in-service trauma—which the Diagnostic Codes include as a compensable cause of tooth loss, the matter of a medical examination was reasonably raised by the record so that the Board should have discussed it. *See McLendon*, 20 Vet.App. at 81; *see also Robinson v. Peake*, 21 Vet.App. 545, 557 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). If it wanted to deny the veteran a medical examination, the Board would need to explain why the veteran's in-service trauma and subsequent tooth loss did not warrant an examination considering the note in DC 9913 that expressly identifies trauma as a potential cause. *See* 38 C.F.R. § 4.150, DC 9913 at Note 1.

The Board's failure to explain why a medical examination was not warranted frustrates judicial review. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); *Allday*, 7 Vet.App. at 527. Remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has failed to provide an adequate statement of reasons or bases); *see also Henlsey v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (when a court of appeals reviews a lower court's decision, it may remand the case if the previous adjudicator failed to make findings of fact essential to the decision). Although the veteran also argues in favor of reversal, we find that remand is the appropriate remedy because the Board's failure to provide an adequate statement of reasons or bases frustrates judicial review. *See Tucker*, 11 Vet.App. at 374.

Because the claim is being remanded, the Court need not address Mr. Lankford's additional arguments that would result in no broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, the veteran will be free to submit additional argument

and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

II. CONCLUSION

Accordingly, that part of the Board's December 4, 2018, decision that addressed service connection for a dental condition for compensation purposes is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: April 27, 2020

Copies to:

Glenn R. Bergmann, Esq.

VA General Counsel (027)