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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1547

MARLENE STERN, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The pro se appellant, Marlene Stern, surviving spouse of veteran Howard S. Stern, appeals a November 9, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to (1) service connection for obesity; an acquired psychiatric disability, to include depression and anxiety; a respiratory disability; and a heart disability; (2) compensation under 38 U.S.C. § 1151 for gallbladder surgery residuals, to include fistula and sutures in the stomach; and (3) a temporary 100% rating based on hospitalization for treatment of a service-connected disability. Record (R.) at 4-26.

The Board also reopened the appellant's previously denied, final claims for entitlement to service connection for a psychiatric disability, to include anxiety and depression, and for obesity. R. at 4. These are favorable findings that the Court will not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant's husband, veteran Howard S. Stern, served on active duty in the U.S. Air Force from April 2, 1968, to October 4, 1968. R. at 221. His lungs, chest, heart, and psychiatric condition were all evaluated as normal at his separation examination. R. at 4178-79. The Air Force originally discharged the veteran under "other than honorable conditions," *id.*, but in December 1968 the Air Force changed the character of the veteran's discharge to "under honorable conditions," R. at 4321.

In February 1974, October 1978, and July 2000 decisions, the VA regional office (RO) denied the veteran's claims for service connection for a psychiatric condition and obesity. R. at 4192-93, 4228-31, 4287. In 1977, the veteran was involved in an automobile accident and injured his spine. R. at 4248-49; *see* R. at 4259. In August 1978, he related to a VA examiner he had been depressed since his accident the previous year. R. at 4241-42. The examiner concluded that the veteran was extremely obese, noted evidence of minimal depressive features, and gave a diagnosis of personality disorder, inadequate type. R. at 14. An x-ray taken in conjunction with the examination showed that his lungs were clear and that his heart was normal. R. at 4240, 4233-34.

Private treatment records from September 2004 noted a diagnosis of asthmatic bronchitis and that although the veteran no longer smoked, he had been a smoker who smoked four packs a day. R. at 19. A 2007 medical record also noted that the veteran started smoking in 1970. R. at 3976. Additional treatment records from November 2007 and October 2008 show the veteran's significant family history of coronary artery disease, specifically, that both the veteran's parents died from complications of heart disease. R. at 19. Private treatment records from May 2008 document that the veteran was hallucinating and on medication for anxiety and depression, and that the veteran had reported a similar occurrence approximately 10 years earlier. R. at 15. Treatment records from March 2009 note diagnoses of coronary artery disease, congestive heart failure, and shortness of breath. R. at 19. A June 2009 treatment record shows that the veteran was treated for heightened fever and for diabetes, providing a history of smoking, obstructive sleep apnea, COPD, obesity, tracheostomy, hypertension, diabetes, and diabetic neuropathy. *Id.*

In March 2010, the veteran filed an application to reopen his previously denied claims for a psychiatric disorder and obesity, and he also filed claims for a heart condition and a respiratory condition. R. at 4123-24. The veteran stated that he had been depressed since service, and that despite his desire to remain in service, he was medically discharged as a result of depression. *Id.*

He further noted that since that time he had seen mental health professionals to treat his depression. *Id.* He also reported that he was at a "moderate" weight when he entered service, but because of his depression, he had been overweight for the last 30 years. *Id.* He further stated that he was on oxygen 24 hours a day, 7 days a week, that he did not have breathing problems before service, and that he had had "bouts" of pneumonia and a heart attack. *Id.* He concluded that he firmly believed his conditions were related to service, because he did not have them before service. *Id.*

In September 2011, the veteran filed a claim for benefits under 38 U.S.C. §1151, asserting that his 1977 gallbladder surgery at the Brooklyn VA medical center had resulted in complications of an "ultra[-]long stay [and] . . . [a] fistula at the surgical site." R. at 1750-51.

An October 2011 letter authored by the veteran's treating cardiologist stated that the veteran was a patient "who once served in the military," "suffered from severe depression while in the military," and "started overeating." R. at 15. The cardiologist further noted that the veteran eventually "became obese and developed gallstones." *Id.*

In September 2012, responding to a VA medical records request, the RO reported that though it had searched the Brooklyn and St. Albans VA facilities and the Ryerson/Chapel Street VA outpatient care facility, it had been unable to locate any records relating to the veteran. R. at 599. In October 2012, the RO formally found that the veteran's VA medical records of his asserted gallbladder surgery were unavailable. R. at 500. The RO subsequently denied entitlement to compensation under 38 U.S.C. § 1151. R. at 490-99. In an October 2013 Notice of Disagreement (NOD), the veteran appealed "the rejection of [his] disability claims." R. at 477.

In January 2013, the appellant informed VA of the veteran's death and filed an application for accrued benefits. R. at 459-70. Following an additional attempt to obtain medical records of the veteran's asserted gallbladder surgery at a VA medical facility, the RO received another response, a February 2014 letter, from the VA New York Harbor Healthcare System, explaining that "a search of our records showed no indication of [the veteran] being registered at the [VA] Medical Centers, even after an extensive search." R. at 274. The letter also noted that the healthcare system's "electronic system began in the late [19]90's" but there was no "hard copy medical record or evidence of this patient ever being treated here." *Id.*

In June 2016, the RO permitted the appellant to be substituted for the veteran in his appeal. R. at 139-40. The RO issued a Statement of the Case (SOC) the same month, R. at 98-137, and the

appellant then perfected her appeal to the Board. R. at 47-48. In November 2018, the Board issued the decision here on appeal.

II. ANALYSIS

In her informal brief, the appellant recounts that before the Board issued the decision on appeal, VA had issued multiple denials of benefits, and she asserts that twice the veteran had not received notice of those decisions before VA closed her husband's case. Appellant's Brief (Br.) at 1-2; Reply Br. at 1. She also generally requests "[a]pproval of VA benefits" for all claims here on appeal. *Id.* Finally, the appellant attached to her informal brief a letter entitled "Notice of Disagreement," which appears to be an informal brief to the Court regarding claims unrelated to those of the veteran. *Id.* at 3-4. The appellant also attached to her informal reply a document entitled "My Informal Closing Arguments to the U.S. Court of Appeals Federal Circuit Court," which appears to be a veteran's informal brief to the Federal Circuit regarding claims unrelated to those of the veteran.

The Secretary asserts that the appellant has not presented any arguments or referred to any evidence relevant to the claims on appeal and thus has failed to demonstrate any error in the Board's decision. Secretary's Br. at 2.

A. Notice of Prior Decisions Denying Service-Connected Benefits

The appellant first asserts that VA twice closed the veteran's case without notifying him that it had denied claims. Appellant's Br. at 1-2; Reply Br. at 1. However, the Court concludes that this argument is without merit. Although the Court reads the pro se appellant's briefs liberally and sympathetically, the appellant, as the Secretary notes, does not explain how notice of previous denials relates to the matters here on appeal. *See* Secretary's Br. at 5; *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of persuasion on appeal), *aff'd per curiam* 232 F.3d 908 (Fed. Cir. 2000); *see also De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (stating that the Court liberally interprets informal briefs by pro se appellants). Moreover, the Court further agrees with the Secretary that, even if notice of the prior final denials is relevant to the issues on appeal, the appellant provides no argument to rebut the presumption of regularity to show that any of the VA decisions of record denying the veteran's claims were improperly delivered to him. *See Crumlich v. Wilkie*, 31 Vet.App. 194, 205-06 (2019) (the presumption of regularity may be rebutted by producing clear evidence that VA did not follow its

regular mailing practices or that its practices were not regular); *Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (applying the presumption of regularity to the RO's mailing of its decision to a veteran). Further, the record does not reflect any evidence that the notices of the RO's decisions were not mailed to him in the regular manner. *See* R. at 4287 (February 1974 rating decision); R. at 4228-31(October 1978 rating decision and notice letter); R. at 4192-93 (July 2000 notice letter denying request to reopen a previously denied claim based on veteran's failure to submit any new and material evidence).

Finally, to the extent the appellant is arguing that VA should have notified the veteran when the rating decisions became final, again, as the Secretary notes, VA is not required to provide notice of finality. Rather, a rating decision becomes final when a veteran fails to appeal the decision within 1 year. *See* 38 U.S.C. § 7105 (a Notice of Disagreement shall be filed within 1 year from the date of the mailing of notice of the decision of the agency of original jurisdiction); *DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006) ("[W]hen a case or issue has been decided and an appeal has not been taken within the time prescribed by law, the case is closed, the matter is ended, and no further review is afforded."). Accordingly, the appellant's argument that VA closed the veteran's case without a notice of denial must fail.

B. Entitlement to Service-Connected Benefits, Compensation Under 38 U.S.C. § 1151, and a Temporary 100% Disability Rating

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) a disability or injury incurred in or aggravated during the period of service; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1315 (Fed. Cir. 2009); *Smith v. Shinseki*, 24 Vet.App. 40, 44 (2010); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Court reviews the Board's factual findings regarding entitlement to service connection under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). A finding of fact is clearly erroneous when there is no plausible basis for it in the record and the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). In every decision, the Board must include a written statement of the reasons or bases for its findings and conclusions

on all material issues of fact and law presented on the record adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Veterans who believe that they have sustained additional disability resulting from treatment in a VA facility may seek compensation under 38 U.S.C. § 1151. Section 1151 awards compensation for a qualifying additional disability "in the same manner as if such additional disability were service connected." 38 U.S.C. § 1151(a). To obtain such compensation, a claimant must show, in pertinent part: (1) A "qualifying additional disability," (2) actually caused by the treatment furnished by VA, and (3) a proximate or direct cause that is either a fault on the part of VA or an event not reasonably foreseeable. 38 U.S.C. § 1151(a); 38 C.F.R. § 3.361(c)(1), (d)(1) (2019); *see Halcomb v. Shinseki*, 23 Vet.App. 234, 238 (2009).

In this case, the Court concludes after a review of the Board's decision and the record on appeal that the Board did not clearly err and provided adequate reasons or bases for its decision. *See Gilbert*, 1 Vet.App. at 52, 56-57; *see also Allday*, 7 Vet.App. at 527. Regarding the claim for service connection for obesity and acquired psychiatric disorder, the Board found that an October 2011 letter from the veteran's private cardiologist constituted new and material evidence sufficient to reopen the claim. R. at 5-7. However, the Board found that the veteran's psychiatric disorder and obesity were not related to his service. R. at 15-16. The Board determined that the cardiologist's October 2011 letter that "indicates that [the veteran] suffered severe depression while in the military that resulted in overeating leading to obesity" lacked probative value because the letter was "contradictory to the competent and credible documented evidence from his time in service." R. at 15. The Board noted evidence, contrary to the October 2011 letter, that the veteran admitted he had been overweight since childhood, that his enlistment examination showed he was overweight at entry to service, and that he lost 25 pounds during his 6 months of military service. R. at 16; *see Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the Board's responsibility to determine the credibility and probative value of evidence).

The Board further noted that the veteran did not report any psychological problems until 1978 and that, nevertheless, the veteran's 1978 personality disorder diagnosis is not subject to service connection in the absence of a superimposed disease or injury related to service. *Id.*; *see* 38 C.F.R. § 3.303(c) (2019).

The Board also considered the veteran's lay assertions that he had had psychiatric symptoms that began in service and had continued since that time. But the Board found the assertions inconsistent and not thus credible because at his August 1978 VA examination, the veteran related his depression and anxiety to a car accident and because no other medical evidence related his psychiatric problems, for which treatment is clearly documented in the record, to his military service. R. at 16; *see Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that whether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board); *Buchanan v. Nicholson*, 451 F.3d 1331, 1334-37 (Fed. Cir. 2006) (holding that if the disability is of the type for which lay evidence is competent, the Board must weigh that evidence against the other evidence of record in determining the existence of a service connection); *Owens*, 7 Vet.App. at 433.

Regarding the claims for respiratory and heart disabilities, the Board found that the veteran's disabilities were not incurred in service or otherwise etiologically related to service. R. at 18-20. The Board noted that the veteran complained of dyspnea at separation but that on physical examination, his lungs were normal. R. at 18. The Board further noted that the August 1978 examination revealed normal lungs, including on x-ray examination, and that numerous medical records showed he had risk factors of a history of smoking four packs per day and a family history of coronary artery disease. R. at 19. The Board considered the veteran's lay statements that his respiratory and heart conditions were related to service, but concluded that all the competent evidence was against a finding of nexus to service because "no medical professional linked the [v]eteran's disabilities to his military service, but rather, to years of smoking, and a family history of coronary artery disease and other heart problems, hypertension, and diabetes." R. at 20; *see Jandreau*, 492 F.3d at 1377; *Buchanan*, 451 F.3d at 1334-37.

Regarding the appellant's claim for section 1151 compensation due to an asserted gallbladder surgery that resulted in complications of an abdominal fistula, the Board found that, "there is absolutely no medical evidence of the [v]eteran's surgery despite multiple attempts to obtain those records." R. at 24. The Board recounted VA's efforts to obtain the records and noted that the RO had formally concluded the records were unavailable. R. at 23. Thus, the Board concluded that the duty to assist had been satisfied but that the claim must be denied based upon the complete lack of evidence that the veteran's surgery ever took place. R. at 24; *see* 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c)(2), (3) (2019) (the Secretary must make reasonable efforts to

assist a claimant in obtaining evidence necessary to substantiate the claim for a benefit, which includes a duty to obtain records in the custody of a Federal department or agency that may assist in substantiating the claim.); *see also Golz v. Shinseki*, 590 F.3d 1317, 1320 (Fed. Cir. 2010) (VA's duty to assist "is not boundless in its scope.").

Finally, the Board denied a temporary 100% rating due to hospitalization because the veteran had no service-connected disabilities upon which to base such a claim. R. at 25-26; *see* 38 C.F.R. §§ 3.401(h)(2), 4.30 (2019).

Before the Court here, the appellant generally requests "[a]pproval of VA benefits" for all claims here on appeal, Appellant's Br. at 1-2. Although, again the Court notes that it reads the pro se appellant's briefs liberally and sympathetically, the appellant's vague disagreement with the Board's denial of benefits and failure to cite any evidence in support of her argument is insufficient to demonstrate that the Board's findings were clearly erroneous or otherwise inadequately explained. *See* 38 U.S.C. § 7261(a)(4); *Hilkert*, 12 Vet.App. at 151; *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (the appellant "always bears the burden of persuasion on appeals"); *see also De Perez*, 2 Vet.App. at 86. Consequently, the Court will affirm the Board's decision.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Court AFFIRMS the portion of the Board's November 9, 2018, decision denying entitlement to (1) service connection for obesity; an acquired psychiatric disability, to include depression and anxiety; a respiratory disability; and a heart disability; (2) compensation under 38 U.S.C. § 1151 for gallbladder surgery residuals, to include fistula and sutures in the stomach; and (3) a temporary 100% rating based on hospitalization for treatment of a service-connected disability.

DATED: April 29, 2020

Copies to:

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