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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6537

JOSEPH A. SCHULLER, JR., 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 Joseph A. Schuller, Jr., appeals through counsel a September 20, 2018, Board of Veterans' Appeal (Board) decision denying an effective date earlier than December 18, 2013, for service connection for post-traumatic stress disorder (PTSD). Record (R.) at 4-7. For the reasons set forth below, the Court will set aside the September 2018 Board decision and remand the matter for readjudication consistent with the decision.

I. FACTS

Mr. Schuller served honorably on active duty in the U.S. Marine Corps from August 1966 to August 1968, including service in Vietnam. R. at 6926. On January 28, 1994, Mr. Schuller filed a claim for service connection for, inter alia, PTSD. R. at 6847-50.

In April 1994, a VA regional office (RO) denied service connection, finding no evidence reflecting a PTSD diagnosis and no history of stressful events in service. R. at 6916-17. Mr. Schuller timely filed a Notice of Disagreement (NOD), R. at 6908-09, and in December 1994, the RO issued a Statement of the Case (SOC) continuing the denial of the claim, R. at 6899-904. Mr. Schuller did not perfect an appeal to the Board as to that decision and it became final.

In May 1999, Mr. Schuller sought to reopen the claim for service connection for PTSD. R.

at 6893-909. He also submitted correspondence detailing several traumatic experiences in service. *Id*. He indicated that it was "the first time [he had] ever talked, wrote, or spoke a bit about the war." R. at 6877. In May 1999, the RO again denied service connection for PTSD, based on a lack of diagnosis; the RO did not address Mr. Schuller's stressor statement. R. at 6837-39. Mr. Schuller did not appeal that decision and it became final.

On December 18, 2013, Mr. Schuller again sought to reopen his claim for PTSD. R. at 6829-34. In May 2014, Mr. Schuller underwent a VA PTSD examination. R. at 6624-31. The examiner diagnosed PTSD, R. at 6624, and found that the veteran demonstrated occupational and social impairment with deficiencies in most areas, including work, school, family relations, judgment, thinking and mood, R. at 6625. In a May 2014 decision, the RO granted service connection for PTSD based on fear of hostile military or terrorist activity, assigning a 70% disability evaluation with an effective date of December 18, 2013. R. at 6605-17; *see* R. at 6616 (May 2014 codesheet noting that service connection was granted based on "[n]on-[c]ombat/[f]ear [e]asing [s]tandard"), 6627-28 (May 2014 examiner's notation that the veteran's stressors were based on fear of hostile military or terrorist activity).

In June 2014, Mr. Schuller filed an NOD as to the effective date assigned, asserting that he had been diagnosed with PTSD in 2007 at a VA medical clinic. R. at 6601-04. In January 2016, the RO issued an SOC continuing the December 2013 effective date, R. at 6388-419, and Mr. Schuller perfected an appeal to the Board, R. at 6358. In May 2018, Mr. Schuller testified at a Board hearing, R. at 6122-66, where he described several traumatic in-service incidents, R. at 6126-31.

In September 2018, the Board issued the decision on appeal denying entitlement to an effective date earlier than December 18, 2013, for the award of service connection for PTSD. R. at 4-7. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Schuller's appeal is timely and the Court has jurisdiction to review the September 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 Secretary has a duty "to assist a claimant in obtaining evidence necessary to substantiate . . . [a] claim for [VA benefits]," 38 U.S.C. § 5103A(a)(1), which includes making "as

many requests as are necessary to obtain relevant records from a Federal department or agency," 38 C.F.R. § 3.159(c)(2) (2019). "VA will end its efforts to obtain [such] records . . . only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile." *Id*.

If VA is unable to obtain records in the custody of a Federal department or agency after "conclud[ing] that it is reasonably certain they do not exist or further efforts to obtain them would be futile," it must notify the claimant of that fact. 38 C.F.R. § 3.159(e)(1). Board determinations as to whether the Secretary has fulfilled the duty to assist are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7271(a)(4); *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000). "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)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its factual determinations with adequate reasons or bases that enable the claimant to understand the precise basis for that determination and facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Cantrell v. Shulkin*, 28 Vet.App. 382, 388 (2017); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). 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). It must also discuss all provisions of law and regulation that are made "potentially applicable through the assertions and issues raised in the record." *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (requiring the Board to address all issues explicitly raised by the claimant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

III. ANALYSIS

VA is required to reconsider a claim when relevant service department records are newly associated with the claims file. 38 C.F.R. § 3.156(c)(1) (2019); *see Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014); *Emerson v. McDonald*, 28 Vet.App. 200, 207 (2016). If

reconsideration results in an award of benefits based all or in part on the newly associated service department records, the effective date of the award is the date entitlement arose or the date VA received the previously denied claim, whichever is later. 38 C.F.R. § 3.156(c)(3); *see Blubaugh*, 773 F.3d at 1313-14; *Emerson*, 28 Vet.App. at 207.

As the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) explained, "[s]ubsection (c)(1) is a separate and distinct provision from subsection[ ] (c)(3)" and "requires [ ] VA to reconsider only the *merits* of a veteran's claim whenever it associates a relevant service department record with [the] claims file." *Blubaugh*, 773 F.3d at 1314; *see Emerson*, 28 Vet.App. at 207. In contrast, "[o]nly if [ ] VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1), must it consider an earlier effective date under subsection[ ] (c)(3)." *Blubaugh*, 773 F.3d at 1314; *see Emerson*, 28 Vet.App. at 207. As the Court explained in *Emerson*, subsection (c)(1) provides a single limitation to when reconsideration is warranted—at any time after VA issues a decision on a claim. *Emerson*, 28 Vet.App. at 207. Accordingly, the Court held that § 3.156(c)(1) requires VA to reconsider a previous denial even where service connection was granted prior to receipt of relevant service department records. *Id*. at 207-11.

Mr. Schuller argues, inter alia, that the Board failed to provide adequate reasons or bases for finding that VA had satisfied its duty to assist when it did not obtain additional service records, including service personnel records and unit histories, to corroborate his reports of combat. Specifically, he asserts that the Board made no findings regarding whether the duty to assist was satisfied. Appellant's Brief (Br.) at 9-19. Mr. Schuller contends that these records are pertinent to his appeal as they are service records not previously reviewed by VA and support entitlement to an earlier effective date for PTSD under § 3.156(c). The Secretary asserts that these records are not relevant to the veteran's claim for an earlier effective date and could not substantiate an earlier diagnosis for PTSD. Secretary's Br. at 5-15. The Court agrees with the veteran.

The Board did not discuss its duty to assist and made no findings about whether that duty was satisfied. The Board concluded that there was no basis upon which to award an earlier effective date as it found that the veteran's 1994 and 1999 claims for service connection for PTSD were finally adjudicated. R. at 6.

In his brief, the Secretary asserts that VA was not required to obtain Mr. Schuller's service personnel records or unit histories because they are not relevant to the earlier effective date claim. Secretary's Br. at 7-13. The Secretary's argument, however, puts the cart before the horse. Without

reviewing the outstanding records, the Court cannot conclude that those records would not contain evidence or information that would have altered the Board's analysis. *See Moore v. Shinseki*, 555 F.3d 1369, 1375 (Fed. Cir. 2009) ("We fail to understand how the government, without examining the [ ] records [at issue], can have any idea as to whether they would, or would not, support [the appellant's] claim."); *McGee v. Peake*, 511 F.3d 1352, 1358 (Fed. Cir. 2008) (explaining that section 5103A "simply does not excuse the VA's obligation to fully develop the facts of [a] claim based on speculation as to the dispositive nature of relevant records"); *Quartucchio v. Principi*, 16 Vet.App. 183, 188 (2002) (noting that the possibility that outstanding records could contain relevant evidence "cannot be foreclosed absent a review of those records").

Moreover, as the Federal Circuit explained in *Jones v. Wilkie*:

> Section 5103A does not allow the VA to avoid the duty to assist in obtaining records based on a mere belief that the likelihood of finding a record substantiating a veteran's claim is "low" or "extremely low." Rather, the applicable standard is whether "*no reasonable possibility exists* that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2) (emphasis added). Thus, to trigger VA's duty to assist, a veteran is not required to show that a particular record exists or that such a record would independently prove his or her claim.

918 F.3d 922, 926 (Fed. Cir. 2019). In so holding, the Federal Circuit refused to accept the Government's argument that unobtained records could not substantiate the veteran's claim because, absent the finding required by section 5103A(a)(2), that court was "unwilling to assume what the contents of the remaining records would show." *Id.* at 927; *accord Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (explaining that "[i]n close or uncertain cases, the VA should be guided by the principles underlying this uniquely pro-claimant system" and holding that, "[a]s long as a reasonable possibility exists that the records are relevant to the veteran's claim, VA is required to assist the veteran in obtaining [them]"). That analysis applies with equal force to this case. Absent a finding by the Board that "no reasonable possibility exists" that the evidence would aid in substantiating Mr. Schuller's direct appeal of his assigned effective date, the Secretary's conclusion that these records are not relevant is premature. *See* 38 U.S.C. § 5103A(a)(2).

Moreover, the Court is prohibited by statute from making factual findings in the first instance. 38 U.S.C. § 7261(c); *see Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must *review* the Board's weighing of evidence; it may not weigh any evidence itself."). The Board's failure to explain whether the duty to assist was satisfied prevents the veteran from understanding the precise basis

for the Board's finding in that regard, and frustrates judicial review of that issue. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57. Viewed in this light, the Secretary's assertion is an impermissible "post-hoc rationalization" for agency action that the Court need not accept. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel's "post-hoc rationalizations" for agency action and are advanced for the first time on appeal); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2001) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.").

Accordingly, the Court concludes that the Board provided inadequate reasons or bases for denying an effective date earlier than December 18, 2013, for service connection for PTSD, necessitating remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *Gilbert*, 1 Vet.App. at 57.

On remand, Mr. Schuller is free to submit additional arguments and evidence, including the arguments raised in his brief to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the [Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and that it must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the September 20, 2018, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: April 29, 2020

Copies to:

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