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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0746

HUGH J. DAVIS, 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 Hugh J. Davis, Jr., appeals through counsel an October 12, 2018, Board of Veterans' Appeals (Board) decision denying service connection for sleep apnea. Record (R.) at 4-10.¹ For the reasons that follow, the Court will set aside that portion of the October 2018 Board decision and remand that matter for further development and readjudication consistent with this decision.

I. FACTS

Mr. Davis served on active duty in the U.S. Army from October 1986 to September 1990. R. at 373-74. He denied frequent problems sleeping, shortness of breath, and frequent or severe headaches in May 1988, September 1990, and September 1993 reports of medical history. R. at 332, 356, 369. Prior to his claim for service connection for sleep apnea, Mr. Davis submitted a May 2005 Ochsner Clinic audiogram showing a medical history involving nasal obstruction,

¹ In the same decision, the Board awarded service connection for erectile dysfunction and voiding dysfunction. R. at 8-9. Because these determinations are favorable to Mr. Davis, the Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

snoring, or obstructive sleep apnea to support a service-connection claim for hearing loss and tinnitus. R. at 1254.

In July 2013, Mr. Davis filed a claim for service connection for sleep apnea, submitting statements from his wife and Norman Barnes, a fellow service member. R. at 829. Mr. Barnes reported that Mr. Davis had problems with his sleep in service and that no one wanted to share a room with him because of his snoring. R. at 833. Mr. Barnes recalled that Mr. Davis would stop breathing for several seconds, then resume breathing with loud gasping. *Id.* Mr. Davis's wife specified that they had been married for over 25 years, that his sleep apnea has been present for their entire marriage, and that they sleep in separate rooms due to his snoring and gasping. R. at 831. Her statement detailed that Mr. Davis was diagnosed with sleep apnea and used a CPAP machine prior to Hurricane Katrina in 2005, lost the CPAP machine when they moved to Houston following the storm, and had a second sleep study done after establishing care with a doctor in Houston. *Id.* With his claim, Mr. Davis submitted a copy of a December 2008 sleep study showing a diagnosis of obstructive sleep apnea and a recommendation to use a CPAP machine. R. at 826-28.

An October 2013 VA examiner noted the December 2008 diagnosis for sleep apnea. R. at 819. Mr. Davis reported to the examiner that he had been scheduled for a sleep study prior to Hurricane Katrina, due to symptoms of loud snoring, pauses in breathing, gasping, and choking, but was unable to attend the sleep study due to the storm. R. at 817. The examiner offered that sleep apnea is not likely related to his service-connected mental health condition, explaining that there is no medical literature linking sleep apnea to mental health conditions. R. at 798-99. In an addendum, the examiner opined that sleep apnea is not likely directly related to Mr. Davis's service, citing the gap between service and the 2008 formal diagnosis of sleep apnea. R. at 795

The VA regional office (RO) denied service connection for sleep apnea in an October 2013 rating decision. R. at 776-81. Mr. Davis appealed, reporting that his sleep apnea problems began in basic training. R. at 754. The RO sought an addendum medical opinion, stating that the October 2013 opinion did not address the lay statements corroborating sleep symptoms during service. R. at 434. In December 2015, a VA examiner offered that the signs and symptoms described by Mr. Davis and his wife are not diagnostic of obstructive sleep apnea and lack causation. R. at 435. That examiner noted Mr. Davis's report of using a CPAP machine in 2005, prior to his 2008 diagnosis, but also noted that this is still 15 years following service. *Id.* The RO issued a December

2015 Statement of the Case continuing the denial of service connection, R. at 407-32; Mr. Davis perfected his appeal, reporting sleep apnea symptoms since active duty, R. at 404.

In the October 2018 decision on appeal, the Board noted the 2008 sleep study report diagnosing sleep apnea and Mr. Davis's statements reporting that his sleep apnea began in service and had continued since service. R. at 5-6. The Board found the October 2013 VA opinion inadequate for failure to consider the lay statements. R. at 6. The Board considered the lay statements filed by the veteran, his wife, and Mr. Barnes competent to describe observed symptoms but not competent to diagnose or determine the etiology of sleep apnea. R. at 7-8. The Board ultimately weighed the December 2015 examiner's opinion more heavily than the lay statements and relied on it to find that Mr. Davis's sleep apnea did not begin in service and is not related to service. R. at 7-8. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Davis'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 in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The duty to assist includes providing a medical examination or obtaining a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. 38 C.F.R. § 3.159(c)(4) (2019); *see* 38 U.S.C. § 5103A(d). When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012). *See also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) ("[A]n adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question and facilitate the Board's consideration and weighing of the report against any contrary reports."); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must

contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

The Board's determinations regarding service connection and the adequacy of a medical examination or opinion are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Davis v. West*, 13 Vet.App. 178, 184 (1999); *see also Ardison*, 6 Vet.App. at 407 (holding that the Board errs when it relies on an inadequate medical examination). "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)).

With any finding on a material issue of fact and law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *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).

III. ANALYSIS

Mr. Davis argues that VA failed to provide an adequate examination and that the Board provided inadequate reasons or bases for relying on the December 2015 examiner's opinion. Appellant's Brief (Br.) at 6. He specifies that the December 2015 opinion is inadequate because it failed to address the significance of his post-service continued symptoms of snoring and gasping in his sleep and to explain the clinical significance of the gap in time between service and his sleep apnea diagnosis. Appellant's Br. at 10-11. The Secretary responds that the record shows no chronicity of the condition or treatment from service to diagnosis in the early 2000s, supporting the December 2015 examiner's opinion. Secretary's Br. at 8. The Court agrees with the veteran.

As outlined above, the record contains Ms. Davis's statement that she and Mr. Davis have been married since he was in the Army, and that his sleep apnea has been present for their entire marriage, R. at 831; and Mr. Davis's Substantive Appeal describing sleep apnea symptoms since

active duty, R. at 404. The December 2015 examiner noted the lay statements reporting signs and symptoms of sleep apnea during service, but ultimately concluded that there is no established chronicity of the condition or treatment because Mr. Davis was not diagnosed with sleep apnea until 2005, 15 years following service. R. at 435. This opinion, however, fails to address Mr. and Ms. Davis's statements as to the continuity of these signs and symptoms from service to the present.

An adequate medical opinion must be based on an accurate factual premise and on consideration of the veteran's prior medical history and examinations. *Ardison*, 6 Vet.App. at 407. Although an examiner is not required to consider every piece of favorable evidence, the examiner must rely on an accurate factual history. *Monzingo*, 26 Vet.App. at 106 ("There is no requirement that a medical examiner comment on every favorable piece of evidence in a claims file."); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) ("An opinion based upon an inaccurate factual premise has no probative value."). Additionally, VA examiners should consider a veteran's description of symptoms during and after service, *Barr*, 21 Vet.App. at 311; and a medical opinion that fails to consider a veteran's lay statements and relies on the absence of contemporaneous medical evidence to conclude that there is no link between a veteran's in-service injury and current disability may be inadequate, *Miller v. Wilkie*, No. 18-2796, 2020 WL 236755, at *5 (Vet. App. Jan. 16, 2020); *McKinney v. McDonald*, 28 Vet.App. 15, 30 (2016); *Dalton v. Nicholson*, 21 Vet.App. 23, 40 (2007).

It is apparent from the examiner's rationale that he did not consider the lay statements as to the veteran's continued symptoms following service and that his opinion was instead focused solely on the reports of signs or symptoms of sleep apnea during service. *See* R. at 435. Although the examiner acknowledged Ms. Davis's statement, he stated only that the couple was married in 1988 and that the veteran reported symptoms of snoring and gasping for air; the examiner did not address Ms. Davis's assertion that those symptoms had continued since service. R. at 444. Moreover, the examiner's review of the claims file did not list Mr. Davis's Substantive Appeal, R. at 443-45, and the opinion itself make no reference to the veteran's statements of continued symptoms in that document, R. at 435. On remand, the December 2015 examiner, or a new VA examiner, will have the opportunity to address those statements. *See Miller*, No. 18-2796, 2020 WL 236755, at *5; *McKinney*, 28 Vet.App. at 30.

The Secretary asserts that the December 2015 examiner did not *solely* rely on the lack of diagnosis between service and the early 2000s, highlighting Mr. Davis's denials of breathing and

sleeping problems prior to 2005. Secretary's Br. at 9-10. Although the examiner noted that the veteran's September 1990 report of medical history was "unremarkable," R. at 442-43, he did not mention that evidence in his negative linkage opinion or otherwise factor it into his analysis. Nor did he discuss that evidence in relation to Mr. and Ms. Davis's later statements of continued symptoms since service. See *Buchanan v. Nicholson*, 451 F.3d 1131, 1336 (Fed. Cir. 2006); *Barr*, 21 Vet.App. at 311 (finding a medical opinion inadequate where the examiner "did not indicate whether he considered [the veteran's] assertions of continued symptomology"). Although an examiner is not obligated to weigh or resolve conflicting evidence, *Delrio v. Wilkie*, 32 Vet.App. 232, 242 (2019), "[t]he examiner must address the veteran's lay statements to provide the Board with an adequate medical opinion," *Miller*, No. 18-2796, 2020 WL 236755, at *7. The December 2015 examiner's failure to do so deprived the Board of the information it needed to make a decision on the veteran's claim, rendering the opinion inadequate. See *Monzingo*, 26 Vet.App. at 105; *Acevedo*, 25 Vet.App. at 293; *Stefl*, 21 Vet.App. at 123; *Ardison*, 6 Vet.App. at 407.

The Court therefore concludes that the Board clearly erred in the implicit finding that the December 2015 VA medical opinion was adequate. See 38 U.S.C. § 7261(a)(4); *D'Aries*, 22 Vet.App. at 103; *Gilbert*, 1 Vet.App. at 52. Accordingly, the Court will remand the matter for a new medical examination. *Hicks v. Brown*, 8 Vet.App. 417, 421 (2005) (holding that the Board's reliance on an inadequate medical examination is cause for remand).

Given this disposition, the Court need not address Mr. Davis's additional argument that VA failed to assist him in obtaining outstanding private treatment records from the Ochsner Clinic. Appellant's Br. at 12. On remand, he is free to submit this argument, as well as any additional arguments and evidence, to the Board 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 must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the portion of the October 12, 2018, Board decision denying service connection for obstructive sleep apnea is SET ASIDE and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: April 29, 2020

Copies to:

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