Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1477

CYNTHIA FRANKLIN, APPELLANT,

V.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, Cynthia Franklin, surviving spouse of deceased veteran Christopher F. Franklin, through counsel appeals a January 11, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to (1) service connection for the cause of the veteran's death, (2) dependency and indemnity compensation (DIC), (3) disability compensation for a back disorder and bilateral hip disorder, for accrued benefits purposes, (4) disability ratings in excess of 50% for major depressive disorder (MDD), in excess of 10% for a left knee disability, and in excess of 10% for a right knee disability, and a total disability rating based on individual unemployability (TDIU), all for accrued benefits purposes, and (5) death pension benefits. Record (R.) at 6-25. The appellant expressly limits her arguments on appeal to the Board's denial of entitlement to service connection for the cause of the veteran's death, DIC, a disability rating in excess of 50% for MDD, and TDIU. *See* Appellant's Brief (Br.) at 1, 3, 7-30. Therefore, the Court finds that she has abandoned her appeal of the Board's denial of entitlement to disability benefits for a back disorder and a bilateral hip disorder, a disability rating in excess of 10% for a left knee disability, an initial disability rating in excess of 10% for a right knee disability, and death pension benefits, and the Court will dismiss the appeal as to the abandoned issues. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

This appeal is timely, and the Court has jurisdiction to review the Board's 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). For the following reasons, the Court will vacate the Board's denial of service connection for the veteran's cause of death and DIC, entitlement to a disability rating in excess of 50% for MDD, and entitlement to TDIU, and remand the vacated matters for further proceedings consistent with this decision.

I. BACKGROUND

The veteran served on active duty in the U.S. Army from May 1986 to August 1987. R. at 288. He reported chest pain in June 1986 and was assessed with a muscular strain. R. at 269-73. In January 1987, he was hospitalized and diagnosed with MDD. R. at 194-98. A VA regional office (RO) granted his application for disability benefits for MDD and assigned a 50% disability rating, effective the day after his separation from service in August 1987. R. at 2880-83; *see* R. at 2889-90. In October 2001, the veteran applied for increased compensation, stating that "[he was] not able to work due to numerous [doctors] appointments and side effects of medication," R. at 2738; the RO denied entitlement to a higher disability rating for MDD and TDIU, he did not appeal the denial, and the decision became final, R. at 2537-41.

He applied again for an increased disability rating for MDD and entitlement to TDIU in March 2012, R. at 2522; the veteran had been unemployed since 2001, R. at 1796, 2105, 2189, 2552. In April 2012, VA afforded him a mental health examination, R. at 1794-803; the examiner noted his diagnosis of MDD and that he endorsed symptoms of depressed mood, anxiety, panic attacks that occur weekly or less often, flattened affect, impaired judgment and abstract thinking, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and neglect of personal appearance and hygiene. R. at 1795, 1801-02. Additionally, the examiner remarked that, "[a]lthough he denied suicidal ideation, [he] endorsed thinking about being dead more frequently than weekly," R. at 1802, and opined that he had "[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress," R. at 1797-98. Regarding employability, the examiner commented that "there is no evidence that [he] would be incapable of performing sedentary self-paced work given his mental condition[, . . . and

that the veteran] thought he could handle some kinds of jobs, but could not do what he used to." R. at 1802.

In July 2012, the RO denied entitlement to an increased disability rating for MDD and TDIU; granted his claim for a right knee disability, assigning a 10% disability rating; and increased his disability rating for a service-connected, non-compensable left knee disability to 10%, effective March 2012. R. at 621-41. His combined disability rating was 60%. R. at 635.

The veteran died on July 30, 2012; his death certificate reflects an immediate cause of death of cardiovascular disease. R. at 594. The appellant filed an informal DIC claim in December 2012, R. at 595, and filed a formal application for DIC, death pension, and accrued benefits, and benefits for the cause of the veteran's death in August 2013, R. at 586-94; the RO denied her service-connection claim for the veteran's cause of death and entitlement to accrued benefits in December 2013 and the appellant disagreed, R. at 300-02, 549-53.

VA subsequently obtained medical opinions from a physician and psychologist, in April and May 2016, respectively, regarding the relationship between the veteran's service-connected disabilities and the cause of his death. R. at 151-52, 155-57. The April 2016 physician concluded that it was less likely as not that the veteran's service-connected knee disabilities and MDD, including the effects of prescribed medication, contributed to his cause of death. R. at 156. The physician reasoned that, although he had chest pain while in service, "[i]t was determined to not be cardiac related . . . . [and] no heart[-]related symptoms were noted at the time of discharge," *id.*; further, the physician explained:

> The veteran had several risk factors for the development of [coronary artery disease (CAD)] that were not related to service. The only treatment he was receiving for a service[-]related condition that has any influence on heart disease is taking [nonsteroidal anti-inflammatory drugs (NSAIDs)] for his patellofemoral pain. The risk from NSAIDs is small enough that it is much less likely as not to have caused or contributed to his development of CAD. None of his service[-]related conditions[,] nor the medication used to treat them[,] would have had any effect on his ability to resist the effects of his CAD.

Id.

The May 2016 psychologist also opined that "it is less likely as not that . . . service-connected [MDD] contributed to the veteran's death." R. at 152. The psychologist reasoned "that there was no present[] connection between conditions in [the veteran's] mental health records or current research." *Id.* In this regard, she explained:

> While depression and other mental health concerns can co-occur and are thought to have a bidirectional influence with physical conditions, existing research has not been able to determine that mental health conditions including depression have a causal connection with physical conditions like cardiovascular disease.

Id.

In June 2016, the RO issued a Statement of the Case that continued the prior denial, and the appellant perfected her appeal to the Board. R. at 84-85, 86-150. The appellant submitted a private medical opinion from July 2017, in which the physician opined that "it is as likely as not [that] the veteran's service[-]connected [MDD] aided in the development of and permanently aggravated his hypertension and cardiovascular disease." R. at 35; *see* R. at 35-57. The physician cited three medical articles and reasoned that "[r]esearch has shown anxiety and depression are predictive of later incidence of hypertension and prescription treatment for hypertension." R. at 35; *see* R. at 37-56. The physician acknowledged that other factors contributed to the development of the veteran's heart disorder, such as the fact that "[t]he veteran was also a smoker, used cocaine, and used alcohol . . . . [and that h]is family history also shows coronary artery disease with his father," but stated that "it would be impossible to determine the bigger aggravator." R. at 36. He thus concluded that "it is as likely as not [that] the veteran's service[-]connected [MDD] contributed both substantially and materially to [his] cause of death." *Id.*

The Board issued the decision on appeal on January 11, 2019, denying entitlement to service connection for the cause of the veteran's death, DIC, a disability rating in excess of 50% for MDD, and TDIU. R. at 6-25. This appeal followed.

II. ANALYSIS

The appellant argues that the Board provided an inadequate statement of reasons or bases for relying on the 2016 VA opinions, and not the private 2017 opinion, in determining that the veteran's service-connected disabilities did not contribute to the cause of his death. Appellant's Br. at 7-8, 11-20. Further, she contends that the VA opinions are inadequate, partially because the medical professionals "applied an improperly high evidentiary standard." *Id.* at 8-9, 15, 23-26. Next, the appellant maintains that the Board failed to discuss the veteran's symptoms of MDD, such as suicidal ideation and explosive anger, that were present in his medical records and, rather, only considered the symptoms he exhibited during the April 2012 VA examination to deny a disability rating in excess of 50%. *Id.* at 9, 20-22. Finally, she argues that the issue of entitlement

to TDIU is inextricably intertwined with the issue of a higher disability rating for MDD and, accordingly, should also be remanded. *Id.* at 10, 26-29.

The Secretary concedes that remand is warranted with regard to whether a higher disability rating was proper for the veteran's service-connected MDD because the Board failed to consider the veteran's symptoms of suicidal ideation and indications of violent behavior. Secretary's Br. at 8-9. The Secretary otherwise disputes the appellant's arguments and urges the Court to affirm the Board decision. *Id.* at 9-28.

A. Relevant Law

Pursuant to 38 U.S.C. § 1310, when a veteran dies from a service-connected disability, the surviving spouse may qualify for DIC. A veteran's death will be considered service connected where a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a) (2019). A service-connected disability is the principal cause of death when that disability "was the immediate or underlying cause of death or was etiologically related thereto." 38 C.F.R. § 3.312(b). For a service-connected disability to be a contributory cause of death, "it must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death." 38 C.F.R. § 3.312(c)(1). Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019).

Under 38 U.S.C. § 5103A(a), the Secretary is required to provide a medical opinion to a DIC claimant when the opinion is "necessary to substantiate the claimant's claim for a benefit." *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008); *see DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008) (holding that the Secretary may have a duty to provide a medical opinion in connection with a DIC claim under section 5103A(a) as part of his duty to assist). "[O]nce the Secretary undertakes the effort to provide an examination [or opinion,] . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A 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, if any,

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)) (internal quotation marks omitted), 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) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

TDIU may be assigned to a veteran who meets certain disability percentage thresholds and is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a) (2019). If a veteran fails to meet the percentage standards set forth in § 4.16(a) but is "unemployable by reason of service-connected disabilities," the matter should be submitted to the Director of the Compensation Service (Director) for extraschedular consideration. 38 C.F.R. § 4.16(b).

The Board's determinations of whether the record establishes entitlement to service connection, whether a medical opinion is adequate, whether a disability rating is proper, and whether a veteran is unable to secure or follow substantially gainful employment are findings of fact, which the Court reviews under the clearly erroneous standard. *See* 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001); *Buckley v. West*, 12 Vet.App. 76, 81 (1998); *Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when 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); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

B. Cause of Death and DIC

The Board noted the veteran's complaint of chest pain during service but highlighted that the appellant did not contest that "[t]here is [] no evidence of complaints, treatment, or diagnosis of cardiovascular disease until many years after service." R. at 10. The Board acknowledged the appellant's assertion that the veteran's service-connected disabilities contributed to his death; noted

the reasoning and findings of the April and May 2016 VA physicians; and summarized the findings of the July 2017 private physician. R. at 11-12. The Board ultimately "afford[ed] greater weight to the VA opinion[s] than the private opinion," because the VA opinions "were the products of reliable principles and methods reliably applied to sufficient facts and data" and the private opinion was not persuasive. R. at 11. The Board then concluded that, "[a]s the preponderance of the evidence weighs against a finding that any service-connected disability caused the [v]eteran's death, service connection for the cause of death must be denied." R. at 12.

The appellant asserts that the Board's reasons or bases for finding that the veteran's service-connected disabilities did not contribute to his cause of death are inadequate. Appellant's Br. at 1-2, 11-20. Specifically, she asserts that the Board "merely adopt[ed]" the negative 2016 VA opinions, without explaining why it found that they "'were the products of reliable principles and methods reliably applied to sufficient facts and data,'" *id*. at 12 (quoting R. at 11), and without addressing positive evidence of record other than the 2017 private opinion, *id.* at 12-15. She includes a list of "positive evidence that substantiated the [v]eteran's service-connected disabilities . . . contributed to his death," *id.* at 15-18 (citing the veteran's prescription history relating to his knee disability; symptoms related to MDD; and symptoms related to a heart disorder, including symptoms in service and after service); and asserts that the evidence "(1) was not considered by the Board[,] (2) is relevant to the question on appeal[,] and (3) is positive evidence, favorable to [her] claim." Appellant's Reply Br. at 10.

The Court agrees with the appellant that the Board inadequately explained its reliance on the VA medical opinions. In that regard, the Board did not identify any information in those reports suggesting that the opinions "were the products of reliable principles and methods reliably applied to sufficient facts or data" or otherwise support that conclusion. R. at 11. Rather, the Board simply summarized the opinions and concluded without any analysis that they were entitled to great weight. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("The Court has long held that merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases."); *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992) (holding that the Board's statement of reasons or bases is inadequate if the Board merely lists the pertinent evidence, but does not "'account for the evidence which it finds to be persuasive or unpersuasive' and provide reasons or bases for its rejection of evidence" (quoting *Gilbert*, 1 Vet.App. at 57)). Remand is therefore warranted for the Board to provide a more thorough statement of reasons or bases for

relying on the VA opinions of record. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy."). Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant regarding the adequacy of the Board's reasons or bases or the adequacy of the 2016 VA opinions. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order).

C. Disability Rating in Excess of 50% for MDD

The appellant contends, and the Secretary agrees, that the Board provided an inadequate statement of reasons or bases for denying a disability rating in excess of 50% because it failed to consider all favorable evidence of record, including evidence of suicidal ideation and explosive anger. *See* Appellant's Br. at 20-22 (citing R. at 194, 1796-97, 2358, 2452-54, 2544-45, 2638, 2641-42, 2768, 2881-83, 2935-37, 2962-63, 3000, 3037-38, 3251, 3255, 3677-78, 3809, and 3835, for a history of suicidal ideation; R. at 544-47, 3181-83, 3835, 3864, and 3866, for a history of violence); Secretary's Br. at 8-9. In that regard, the Board found that a disability rating for MDD in excess of 50% was not warranted because "[t]he record, including the April 2012 VA examination report," showed that "the [v]eteran did not display symptoms such as suicidal ideation; . . . impaired impulse control; . . . [or] difficulty in adapting to stressful circumstances." R. at 15. The Board concluded that "the totality of the evidence fails to show that the symptoms of the [v]eteran's psychiatric disability produce occupational and social impairment with deficiencies in most areas" or total social impairment. R. at 15-16.

The Court agrees that the Board's statement of reasons or bases is inadequate and will accept the Secretary's concession that remand is warranted for the Board to consider all favorable evidence of record, including evidence of suicidal ideation and violence, which may warrant a higher disability rating. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must analyze the credibility and probative value of the material evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see also* 38 C.F.R. § 4.130, Diagnostic Code 9434 (2019). Accordingly, remand is necessary. *See Tucker*, 11 Vet.App. at 374.

D. TDIU

The appellant argues that entitlement to TDIU is inextricably intertwined with her appeal for a higher disability rating for MDD and asserts that readjudication of the appropriate disability rating for MDD may affect the Board's analysis regarding TDIU. Appellant's Br. at 26-29. The Secretary counters that the two matters are not necessarily intertwined and that, under the facts of this case, an increased schedular rating for MDD will not warrant a different result concerning the veteran's ability to secure or follow a substantially gainful occupation. Secretary's Br. at 9-13.

Claims are "inextricably intertwined" when a decision on one claim would have a "significant impact" on the other and "could render any review by this Court of the decision on the . . . claim meaningless and a waste of judicial resources." *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet.App. 31 (2012) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013). This Court has discretion to determine whether a claim denied by the Board is so inextricably intertwined with a matter pending before VA that the denied claim should be remanded to VA to await disposition of the pending claim. *See Tyrues*, 23 Vet.App. at 178-79; *see also Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (holding that, where the facts underlying two claims are "intimately connected," the interests of judicial economy and of avoiding piecemeal litigation require the claims to be appealed together).

Here, the Court concludes that, because the veteran's MDD is rated based on the degree of social and occupational impairment it causes, the Board in denying TDIU relied primarily on the April 2012 examiner's opinion that the veteran exhibited no more than mild or transient symptomatology, and as discussed above, both parties agree that the Board generally overlooked favorable evidence of more severe symptoms of MDD, reconsideration of the positive evidence may affect the Board's determination that the veteran's "service-connected disabilities were not so severe as to preclude gainful employment." R. at 22. Accordingly, the Court will remand the matter of entitlement to TDIU as inextricably intertwined with the matter of entitlement to a disability rating in excess of 50% for MDD.

E. Remand

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of the Board's January 11, 2019, decision denying entitlement to disability benefits for a back disorder and a bilateral hip disorder, a disability rating in excess of 10% for a left knee disability, an initial disability rating in excess of 10% for a right knee disability, and death pension benefits is DISMISSED. After consideration of the parties' pleadings and a review of the record, the Board's decision denying entitlement to service connection for the veteran's cause of death and DIC, a disability rating in excess of 50% for MDD, and TDIU is VACATED and the matters are REMANDED for further proceedings consistent with this decision.

DATED: April 29, 2020

Copies to:

Adam G. Werner, Esq.

VA General Counsel (027)