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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-2240

JOSEPH E. RUSSELL, 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*: Self-represented veteran Joseph E. Russell appeals a March 21, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for anxiety and post-traumatic stress disorder (PTSD). Record (R.) at 3-13.<sup>1</sup> For the reasons that follow, the Court will set aside the portion of the March 2019 Board decision denying service connection for PTSD and remand the matter for further development, if necessary, and readjudication consistent with this decision. The balance of the appeal will be dismissed.

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<sup>1</sup> In the same decision, the Board found that new and material evidence had been received sufficient to reopen the claims for anxiety and PTSD. R. at 6-8. Because those determinations are favorable to the veteran, 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."). The Board also determined that Mr. Russell's appeal did not encompass a claim of service connection for depression or an unspecified depressive disorder. R. at 5. Because Mr. Russell has not challenged this portion of the Board decision, the appeal as to that matter will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

## I. FACTS

Mr. Russell served on active duty in the U.S. Army from July 1981 to November 1991, including service in Southwest Asia during the Gulf War. R. at 1681; *see* R. at 2183.

In October 2000, Mr. Russell sought VA treatment for stress management. R. at 2538-41. In March 2001, Mr. Russell sought service connection for anxiety. *See* R. at 7. In August 2001, Mr. Russell again sought VA treatment for stress management; he also reported insomnia and anxiety. R. at 2568-70. He was prescribed medication to treat anxiety. R. at 2569. That same month, a VA regional office (RO) denied his claim for anxiety. *See* R. at 7. He did not appeal, and that decision became final.

In December 2003, Mr. Russell was referred by his primary care providers for a VA psychiatric assessment. *See* R. at 246. The examiner, a psychiatrist, opined that there were "no distinct symptoms characteristic of a PTSD disorder." *Id.* Instead, the psychiatrist diagnosed depression, not otherwise specified, and "rule out" cyclothymia. R. at 250. In July 2006, the RO denied a claim seeking service connection for PTSD. *See* R. at 8. Mr. Russell did not appeal, and that decision was final.

In July and August 2014, Mr. Russell underwent VA psychiatric testing. *See* R. at 378. In a September 2014 diagnostic evaluation, a VA clinical psychologist explained that Mr. Russell presented symptoms consistent with both PTSD and a mixed anxiety and depression disorder. R. at 380. But because he met all the relevant diagnostic criteria of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), the clinical psychologist assigned a PTSD diagnosis. *Id.* From July 2014 to September 2014, Mr. Russell underwent PTSD individual and group therapy with a VA resident psychologist working under supervision. R. at 388-89; 414-16; 420-21; 439-46.

In November 2014, Mr. Russell sought to reopen his previously denied claim seeking service connection for PTSD, explaining that his in-service stressor was the threat of hostile military or terrorist activity while serving in Southwest Asia. R. at 1412. Mr. Russell underwent a VA examination in April 2015. R. at 1321-31. The VA examiner, a psychologist, acknowledged that Mr. Russell's claimed stressor satisfied criterion A for a PTSD diagnosis. R. at 1326. However, she opined that he did not meet the other diagnostic criteria for that diagnosis. *Id.*; *see also* R. at 1327 (explaining that the notation that no response was provided regarding the other

criteria meant that no listed symptoms were present). Instead, she offered a diagnosis of unspecified depressive disorder. R. at 1321.

In a May 2015 rating decision, the RO reopened the anxiety and PTSD claims and denied those, and a new claim for unspecified depressive disorder, on the merits. R. at 1203-07. The RO found that the unspecified depressive disorder was not related to Mr. Russell's service, R. at 1205, and that there was no evidence of any persistent anxiety or PTSD disability, R. at 1206. Mr. Russell filed his Notice of Disagreement that same month, specifying that he disagreed with the denial of service connection for PTSD and anxiety. R. at 108-09. The RO continued the denial of service connection for both conditions in a September 2016 Statement of the Case. R. at 61-76. In Mr. Russell's October 2016 Substantive Appeal, he again specified that his disagreement was with the denial of service connection for PTSD and anxiety. R. at 57.

In the March 2019 decision on appeal, the Board found that Mr. Russell did not initiate an appeal with respect to an unspecified depressive disorder, R. at 5, but agreed with the RO that Mr. Russell had submitted new and material evidence sufficient to reopen his previously denied claims for anxiety and PTSD, R. at 6-8. In considering those claims on the merits, the Board determined that the April 2015 VA examiner's opinion, which excluded PTSD and anxiety diagnoses, was entitled to "the most significant weight," R. at 12, and found that he did not have a diagnosed PTSD or anxiety condition, R. at 11. In so doing, the Board acknowledged the September 2014 diagnosis of PTSD by the VA clinical psychologist. *Id.* However, the Board explained that the September 2014 diagnosis "was given by a resident"; therefore, her opinion was not "entitled to the same probative weight as that of the VA examiner, who is a psychologist," and, "by definition," more experienced than a resident. *Id.* Consequently, the Board denied the claims. R. at 3-4. This appeal followed.

## **II. JURISDICTION AND STANDARD OF REVIEW**

Mr. Russell's appeal is timely, and the Court has jurisdiction to review the March 2019 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).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability.

*Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). The Court reviews the Board's service-connection determinations as findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Davis v. West*, 13 Vet.App. 178, 184 (1999); *see also Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (Board's assignment of greater probative weight to one medical opinion than to another is subject to the "clearly erroneous" standard of review). "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 service-connection 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); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *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 rejecting any 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

As a preliminary matter, Mr. Russell raises no argument pertinent to the Board's denial of service connection for anxiety. *See* Appellant's Informal Brief (Br.) at 1 (arguing that the Board incorrectly determined that he does not have a current PTSD diagnosis); 3 (stating that the requested relief is service connection for PTSD). Accordingly, the Court deems that matter abandoned and will dismiss that portion of the appeal. *See Pederson*, 27 Vet.App. at 281-85; *Cacciola*, 27 Vet.App. at 48.

As for entitlement to service connection for PTSD, under a liberal construction of his brief, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992), Mr. Russell argues that the Board erred in determining that he does not have a PTSD diagnosis entitled to probative weight. Appellant's Informal Br. at 1. The Secretary concedes that remand of the PTSD matter is warranted because "the Board misstated the qualifications of the September 2014 VA clinician." Secretary's Br. at 7. Specifically, the Secretary acknowledges that the Board erred in concluding that the September 2014 VA clinical psychologist was a resident, *id.* at 8, and speculates that the Board may have confused that clinician with the psychology resident who provided group and individual treatment, *id.* at n.1. The Secretary concedes that "the Board failed to adequately analyze the probative value of" the September 2014 evaluation because it relied on inaccurate facts in assigning it less weight. *Id.*

The Court agrees with the Secretary and concludes that the Board's March 2019 decision is not supported by adequate reasons or bases because it inaccurately stated that the VA clinical psychologist who provided the September 2014 evaluation was an inexperienced resident working under supervision and relied on that inaccuracy in assigning her PTSD diagnosis less weight than the evaluation by the April 2015 VA examiner, also a psychologist. *See Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506. And in addition, our caselaw provides that opinions from experts with a variety of backgrounds and experience may provide adequate and probative opinions, *see Cox v. Nicholson*, 20 Vet.App. 563, 569 (2007) (citing 38 C.F.R. § 3.159(a)(1) (2006) ("competent medical evidence" is defined as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.")); *see also Williams v. Brown*, 4 Vet.App. 270, 273 (1993) ("Nowhere is it provided in law or regulation that opinions by the examining psychiatrists are inherently more persuasive than that of other competent medical professionals."), and the Board must provide adequate reasons or bases for relying on one competent opinion over another, *see Owens*, 7 Vet.App. at 433. Therefore, remand is warranted for the Board to provide adequate reasons or bases for its determination as to whether Mr. Russell is entitled to service connection for PTSD, as well as to conduct any necessary additional development. *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").

In accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), Mr. Russell is free to submit any additional arguments and evidence on remand, including any additional arguments he made to this Court; 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 March 21, 2019, Board decision denying service connection for PTSD is SET ASIDE and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: April 29, 2020

Copies to:

Joseph E. Russell

VA General Counsel (027)