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

No. 19-3123

DOUGLAS E. LEE, 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 Douglas E. Lee appeals through counsel a February 26, 2019, Board of Veterans' Appeals (Board) decision denying service connection for an acquired psychiatric disability, including post-traumatic stress disorder (PTSD) and major depressive disorder (MDD). Record (R.) at 5-14. For the reasons set forth below, the Court will set aside the February 2019 Board decision and remand the matter for readjudication consistent with this decision.

**I. FACTS**

Mr. Lee served honorably on active duty in the U.S. Air Force from January 1955 to January 1962. R. at 4777-78. His DD 214 reflects overseas service and that during the Cold War he worked as an administrative clerk with the Air Force Office of Special Investigation in Berlin, Germany, holding a top secret security clearance, and was awarded the Army Occupation Medal. *Id.* The Board determined that the evidence of record "suggests that he engaged in covert activities while in Berlin." R. at 9. The December 1961 service separation examination report indicates no defects or diagnoses related to his psychiatric or neurologic condition. R. at 4838-39; 4861-62. The veteran's service treatment records do not indicate any psychiatric diagnosis or symptoms. R.

at 4833-4900. The record contains an October 1961 letter from Mr. Lee requesting separation to pursue a course of study at the Free University in West Berlin. R. at 4974-4975.

In November 2014, Mr. Lee filed a claim for service connection for, inter alia, PTSD and depression. R. at 5039-40. In March 2015, a VA regional office (RO) issued a decision denying service connection. R. at 4796-4808, 4812-17. Mr. Lee did not appeal that decision, and it became final.

Three months later, Mr. Lee filed a PTSD stressor statement. R. at 4914-15. In the stressor statement, Mr. Lee recounted that in November 1961, Major Oniko, a Russian pilot, struck him in the head with a metal pipe, resulting in memory loss and severe headaches. R. at 4915. He further alleged that he was taken by ambulance to an Army Hospital in Berlin, where physicians determined that, due to his head injury, he was no longer fit for service. *Id.* He stated that VA could contact his commanding officer, Lt. Col. Archie Burdette, for confirmation of these events. Mr. Lee stated that he was honorably discharged from the Air Force two weeks later. *Id.*

In October 2015, Mr. Lee sought to reopen the claim for service connection for PTSD and depression. R. at 4782-85. That same month, the RO denied reopening of the claim, finding that the veteran had not submitted new and material evidence. R. at 4715-19. Mr. Lee timely filed a Notice of Disagreement (NOD), alleging that during service he worked with British, French, and Russian officers while living in a safe house provided by the U.S. Air Force and State Department. R. at 4696. He stated that the safe house was in the Russian combat zone in Berlin, and that in December 1961 a Russian officer, Major Ononprinko, struck him in the head with a pipe, resulting in a severe head injury, depression, memory loss, and PTSD. *Id.* He later clarified that his active duty assignment in Berlin was top secret. R. at 2662. Mr. Lee claimed that VA had failed to obtain relevant records from his active duty service, as his records were lost in a 1973 fire at the National Personnel Records Center. *Id.*

Following a March 2016 Statement of the Case (SOC), Mr. Lee perfected an appeal to the Board. R. at 4084. He also submitted a letter dated February 5, 2003, addressed to Colonel Douglas Lee from CIA director George J. Tenet. R. at 4047. The letter stated that the Pentagon and State Department accused Colonel Lee of questionable military covert activities in Berlin during the Cold War while on active military duty. *Id.* The letter further stated that the Pentagon and State Department had credible and persuasive evidence against Colonel Lee supporting charges of conduct unbecoming a commissioned officer and command pilot for foreign intelligence and

counter-intelligence, espionage, and counter-espionage. *Id.* The letter indicated that Colonel Lee was awarded three honorable discharges, a Purple Heart, Bronze Star, Silver Star, Legion of Merit, and Distinguished Flying Cross for his service, as well as the German Iron Cross by the German government. *Id.* Finally, the letter related that Colonel Lee had been court-martialed as a cadet at West Point, and that those charges had been dismissed for national security reasons. *Id.*

In August 2017, Mr. Lee submitted a letter from nurse practitioner Marion C. Creasap. R. at 135-36. Ms. Creasap reported that from August to October 2015, Mr. Lee received inpatient treatment at the Montrose VA Residential Clinic for PTSD. R. at 135. She indicated that he exhibited symptoms of PTSD and opined that "it is more likely than not that Mr. Lee's PTSD is caused by his traumatic experiences in the service." *Id.* Ms. Creasap stated that Mr. Lee had a history of being shot at and struck in the head with a metal pipe, in addition to being the victim of a kidnapping attempt. *Id.* In December 2017, the Board remanded Mr. Lee's claim to obtain a VA psychiatric examination. R. at 4034-35, 4025-37.

In January 2018, a VA examiner diagnosed dementia and MDD and reported that Mr. Lee showed loss of motivation, chronic depressed mood and sleep deprivation, severely limited activity and social interaction, and passive suicidal ideation. R. at 2722. The examiner opined that "all of the above symptoms can also be seen in dementia and may be a result of this veteran's dementia." *Id.* The examiner noted that "dementia makes taking a reliable history impossible." R. at 2723. On the St. Louis University Mental Status (SLUMS) examination, Mr. Lee scored 3 points. R. at 2722. The examiner noted that a normal score on the SLUMS examination is 25-30 points out of 30 and that Mr. Lee's score was consistent with his dementia diagnosis.<sup>1</sup> The examiner flagged a "suggestion of delusion" in Mr. Lee's reports of his educational, pre-military, military, and post-military history. *Id.* The examiner noted that Mr. Lee tried to be engaged in the interview, but "frequently lost his way or resorted to delusional thinking and repetitive reporting about [the] traumatic event." R. at 2727. The examiner indicated that Mr. Lee repeated his account of being hit in the head with an iron pipe while in Berlin. R. at 2725.

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<sup>1</sup> The SLUMS examination is a 30-point screening questionnaire that tests for orientation, memory, attention, and executive function. Studies have demonstrated the examination has "very high sensitivity and specificity in a VA population." DEVAN KANSAGARA, VA EVIDENCE-BASED SYNTHESIS PROGRAM CENTER, A SYSTEMATIC EVIDENCE REVIEW OF THE SIGNS AND SYMPTOMS OF DEMENTIA AND BRIEF COGNITIVE TESTS AVAILABLE IN VA 31-32 (2010); *see also* SAINT LOUIS UNIVERSITY SCHOOL OF MEDICINE, VAMC SLUMS EXAMINATION, [http://medschool.slu.edu/agingsuccessfully/pdfsurveys/slumsexam\\_05.pdf](http://medschool.slu.edu/agingsuccessfully/pdfsurveys/slumsexam_05.pdf).

In March 2018, VA obtained an addendum opinion by a second VA examiner. R. at 2715-16. That examiner reviewed the veteran's electronic record, met with Mr. Lee, spoke with Ms. Creasap, and reviewed the January 2018 examination. R. at 2715. The examiner opined that it was less likely than not that Mr. Lee's PTSD and MDD had onset in service, or in the year following service, or were due to an in-service disease, injury, or event. R. at 2716. The examiner noted Ms. Creasap's August 2017 letter indicating her belief that the veteran had a diagnosis of PTSD due to military service, with the stressor being the experience of being kidnapped by the KGB and struck over the head with a pipe while being shot at; however, the examiner observed that Ms. Creasap was diagnosing "for treatment purposes, without requirement to verify any stressor." R. at 2715. The examiner opined, "[the veteran] has symptoms consistent with 1) Dementia, unspecified; 2) [MDD]; and 3) Other Specified Trauma and Stressor Related Disorder (symptoms consistent with PTSD but stressor unable to be verified)[;] . . . the above disorders have overlapping symptoms that are reinforcing and inextricably intertwined." R. at 2715. The examiner concluded that it was less likely than not that these diagnoses were due to service. R. at 2716.

Neither the January 2018 nor the March 2018 examiner was able to diagnose PTSD "due to the claimed stressor being unable to be verified." *Id.*

In April 2018, Mr. Lee submitted a CIA secrecy agreement with Colonel Douglas E. Lee, R. at 2661, as well as a list of the names of individuals he worked with in Berlin, R. at 2665-2656.

In May 2018, the RO issued a Supplemental Statement of the Case (SSOC) continuing to deny service connection for PTSD and MDD. R. at 2697-2713.

In May 2018, the Board issued a decision remanding both claims. R. at 2697-2713. The Board ordered the RO to obtain from the Air Force Office of Special Investigations (AFOSI) any outstanding medical treatment records from Berlin relevant to Mr. Lee's claim and to obtain an addendum medical opinion from the March 2018 examiner if such records were obtained. R. at 2652. In October and November 2018, AFOSI issued letters stating that it was unable to locate any records for Mr. Lee. R. at 71, 87. The RO subsequently issued another SSOC continuing the denial of Mr. Lee's claims. R. at 42-54.

In the February 2019 decision on appeal, the Board denied entitlement to service connection for MDD and PTSD. R. at 5-14. This appeal followed.

## II. JURISDICTION AND STANDARD OF REVIEW

Mr. Lee's appeal is timely and the Court has jurisdiction to review the February 2019 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 Board's determination regarding service connection is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see Davis v. West*, 13 Vet.App. 178, 184 (1999). "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 adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence 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

Generally, establishing service connection 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. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004); *Caluza*, 7 Vet.App. at 506. However, service connection for PTSD requires (1) a current medical diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor occurred; and (3) medical evidence establishing a link between the claimed in-service stressor and the current symptoms of PTSD. *See Molitor v. Shinseki*, 28 Vet.App. 397, 402 (2017); *Cohen v. Brown*, 10 Vet.App. 128, 138 (1997); 38 C.F.R. § 3.304(f) (2019). The regulation's subsections identify situations where the veteran's lay testimony or evidence from sources other than the veteran's service records may establish the

occurrence of an in-service stressor. 38 C.F.R. § 3.304(f)(1)-(5); *see Hall v. Shinseki*, 717 F. 3d 1369, 1372-73 (Fed. Cir. 2013). One of the situations where the veteran's lay testimony alone is sufficient to corroborate a claimed stressor is when the stressor was "related to the veteran's fear of hostile military or terrorist activity." 38 C.F.R. § 3.304(f)(3). Specifically, § 3.304(f)(3) provides:

If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

*Id.* In its decision, the Board denied service connection for PTSD because it found insufficient evidence that the claimed in-service PTSD stressor occurred. R. at 8-13. Further, the Board found that no evidence established that the veteran's MDD was incurred in service. R. at 13.

The Board failed to provide an adequate statement of reasons or bases for its decision because it did not adequately explain why § 3.304(f)(3) did not apply to Mr. Lee's claim. The Board's entire analysis on that issue is as follows:

The Board has also considered whether the [v]eteran's claimed in service stressor is related to a fear of military or terrorist activity. However, he has not alleged as much and the Board finds his lay statements are not credible and insufficient to establish the occurrence of the claimed in[-]service stressor.

R. at 10. However, an assault by a Russian officer in East Berlin during the Cold War, and top secret activities in East Berlin during the Cold War, as described repeatedly by Mr. Lee over the years, if credible, would appear to qualify as "fear of hostile military or terrorist activity" as it is defined in 3.304(f)(3), and, at a minimum, could resemble the examples of events or circumstances involving actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, enumerated in the regulation. *See* 38 C.F.R. § 3.304(f)(3) (providing a

nonexhaustive list of examples of events that qualify under that subsection); Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed.Reg. 39843, 39,846 (July 13, 2010) (explaining that § 3.304(f)(3) "eliminates the need for corroborating evidence of the event if the requirements of the rule are met"). The Board's conclusory statement that § 3.304(f)(3) did not apply to the instant claim is therefore insufficient to inform Mr. Lee and the Court of the precise basis for that determination and renders the Board's statement of reasons or bases inadequate. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (holding that the Board is required to consider and discuss all "potentially applicable" provisions of law and regulation to provide an adequate statement of reasons or bases for its decision); *Gilbert*, 1 Vet.App. at 57.

Moreover, the Board did not adequately explain why it found the PTSD diagnosis of record insufficient to support an award of service connection for that condition. *See* R. at 7. There is a presumption that a diagnosis of PTSD made by a mental health professional was "made in accordance with the applicable DSM<sup>2</sup> criteria as to both adequacy of the symptomatology and the sufficiency of the stressor," absent evidence to the contrary. *Cohen*, 10 Vet.App. at 140. As the Court explained in *Cohen*, "[m]ental health professionals are experts and are presumed to know the DSM requirements applicable to their practice and to have taken them into account in providing a PTSD diagnosis." *Id.* Yet, the Board did not identify any evidence of record that suggests that the PTSD diagnosis of record did not conform with the DSM criteria and appears to have ignored the *Cohen* presumption altogether. This deficiency frustrates judicial review and renders the Board's statement of reasons or bases inadequate. *See Gilbert*, 1 Vet.App. at 57.

The above error is sufficient to warrant remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations "). Given this disposition, the Court need not address Mr. Lee's remaining arguments, which could not result in a remedy greater than remand.

However, the Court will provide guidance to the Board for readjudication of the claim on remand. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009). The Court notes inconsistency in the Board's treatment of the 2003 CIA director's letter. R. at 9-10. Initially, the Board seems to

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<sup>2</sup> The diagnostic criteria for PTSD are detailed in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5). *See* 38 C.F.R. § 4.125(a) (2019) (requiring diagnoses of mental health disorders to conform to the requirements of the DSM-5).

treat the letter as reliable evidence that confirms elements of the veteran's service: "the evidence detailed above confirms the [v]eteran had a top-secret clearance and suggests he engaged in covert activities while in Berlin." R. at 9. However, after seeming to find the letter reliable evidence, the Board goes on to detail discrepancies between the letter and the veteran's service. R. at 10. Among other things, the Board notes that the letter stated that the Colonel Lee referred to in the letter was charged with conduct unbecoming an officer and was court-martialed as a cadet at West Point Military Academy, while Mr. Lee's DD-214 does not support officer status and instead reflects that he separated from service as an enlisted airman, with a rank of E-3 (Airman First Class). R. at 9. The Court reminds the Board that inconsistent treatment of evidence frustrates judicial review. *See Gilbert*, 1 Vet.App. at 57.

Mr. Lee is free on remand to present any additional arguments and evidence relevant to the remanded claim to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *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 February 26, 2019, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: April 30, 2020

Copies to:

Kenneth S. Beskin, Esq.

VA General Counsel (027)