

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5183

LARRY D. JAMERSON, 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 Larry D. Jamerson appeals through counsel a February 23, 2018, Board of Veterans' Appeals (Board) decision denying service connection for an acquired psychiatric disorder, including anxiety and depression. Record (R.) at 1-12. For the reasons set forth below, the Court will set aside the February 2018 Board decision and remand the matter for further development, if necessary, and readjudication consistent with this decision.

I. FACTS

Mr. Jamerson entered active duty service in the U.S. Army in November 1975. R. at 750. He was honorably discharged one month later. R. at 750.

The veteran's November 1975 enlistment examination report indicates no defects or diagnoses related to his psychiatric or neurologic condition. R. at 378-79. However, a report of medical history taken that same month shows the veteran's endorsement of, inter alia, depression or excessive worry, frequent trouble sleeping, frequent or severe headaches, and dizziness or fainting spells. R. at 380. The physician noted Mr. Jamerson's reports of depression, insomnia, and tension headaches related to worry. R. at 381. Service treatment records (STRs) indicate that the veteran sought treatment for headaches; notes from one medical clinic visit state that Mr.

Jamerson was "nervous—wants out of service." R. at 386. Mr. Jamerson waived his right to a separation examination. R. at 390.

A July 1975 medical examination from Lincoln University, where Mr. Jamerson was enrolled before service, noted that he was well adjusted psychologically and socially and fit to attend the university. R. at 845.

In February 1976, two months after separation, Mr. Jamerson filed a claim for service connection for high blood pressure and pains in the head. R. at 883. That claim was denied by a VA regional office (RO), which found that evidence of record clearly indicated a pre-service history of headaches with dizziness, as well as insomnia and depression. R. at 875. Mr. Jamerson filed a Notice of Disagreement (NOD) stating that he did not start having head pain until he entered service. R. at 868-69. In August 1976, the RO issued a Statement of the Case (SOC) continuing to deny Mr. Jamerson's claims. R. at 864-66. Mr. Jamerson did not timely perfect an appeal of the RO's decision. R. at 804, 858.

In January 1983, Mr. Jamerson submitted a vocational report to the Social Security Administration (SSA) in support of his application for Social Security benefits. R. at 88-93. In that report, he stated that his disability was worsened by service: "I have had headache[s] and dizzy spells all my life but the army hurt me more than boxing or the janitor's job." R. at 93. In a February 1983 Colorado Department of Social Services report compiled as part of his SSA application, the examiner noted Mr. Jamerson's statement that "he had no trouble with headaches until being asked to participate in vigorous basic training in the Army and he began having severe occipital and frontal headaches . . . [that] get worse when his 'nerves' get bad." R. at 207. The examiner also opined that "during periods of mental stress or activity [Mr. Jamerson's] blood pressure may in fact even go to extremely high levels and in fact may be contributory or even causative [of] this patient's headaches which don't seem to have any other organic basis." R. at 208.

In November 1983, a clinical psychologist reported that testing revealed "a good deal of depression and a fairly high level of anxiety," as well as "evidence of some unusual thinking and some significant paranoid ideation." R. at 762. The psychologist noted that there was evidence of "some kind of neurological impairment" and possible central nervous system dysfunction, possibly related to his participation in boxing for approximately 7 years. R. at 764.

In January 1984, another psychiatrist diagnosed severe anxiety neurosis with depressive features. R. at 760. The psychiatrist reported Mr. Jamerson's belief that a "chronic lifelong pattern

of poverty and its influences has disturbed his life deeply." *Id.* The psychiatrist also noted Mr. Jamerson's statements that his brother had tried to kill him as a child and that his mother was psychologically abusive. R. at 758, 760.

In July 1994, an SSA administrative law judge noted that Mr. Jamerson indicated his "mental problems began in 1984, when one of his friends was killed." R. at 160. Mr. Jamerson also stated that this incident precipitated his withdrawal from college. *Id.*

In January 1996, a psychiatrist noted Mr. Jamerson's report that his problems began while he was a student at Lincoln University, when another student was murdered in the dormitory. R. at 155. The psychiatrist observed that Mr. Jamerson was socially isolated and described paranoia, irritability, mood swings, and depression. R. at 155-56. The psychiatrist diagnosed atypical, not otherwise specified bipolar affective disorder, mixed with psychotic features, possible generalized anxiety disorder (GAD), and paranoid personality disorder. R. at 156.

In February 1998, a VA clinician observed that Mr. Jamerson has a psychiatric history dating back to high school, when he was first treated for suicidal ideation. R. at 691. The veteran also reported treatment for anxiety and paranoia in college. *Id.*

In June 1998, a psychiatrist diagnosed recurrent and severe major depression, as well as anxiety, and indicated that the disabilities began in November 1975, during service. R. at 779.

In a March 2000 statement, Mr. Jamerson stated that he had preexisting conditions of anxiety and depression at enlistment and that the stress from service had worsened his mental condition. R. at 756.

In March 2010, Mr. Jamerson filed a claim for service connection for, inter alia, depression and anxiety. R. at 752-55. In a statement submitted one month later, Mr. Jamerson reported that he was receiving mental health treatment through VA and that his physician would confirm that stress, like that he experienced in service, would worsen his condition. R. at 696. The RO denied Mr. Jamerson's claim in October 2010, R. at 505-11, and he filed an NOD, R. at 495-96. In his NOD, Mr. Jamerson explained that his depression and anxiety were aggravated by being forced to maintain a push-up position for an hour during basic training. R. at 495. He also submitted a lay statement from a college classmate. R. at 491. The classmate indicated that Mr. Jamerson had recounted the experience of being forced to maintain a push-up position for an hour and had told his classmate that the incident was when his pain started. *Id.* The RO issued an SOC in November 2012, R. at 419-41, and Mr. Jamerson timely appealed, R. at 414-15.

In March 2017, Mr. Jamerson testified at a Board hearing, R. at 286-94, and provided a detailed account of the in-service push-up incident. R. at 288-89. Mr. Jamerson reported that he had anxiety and depression from childhood, R. at 289, and that those disabilities were worsened by his experience during service, R. at 290-91. Specifically, Mr. Jamerson stated that as a result of being forced to hold a push-up, his blood pressure goes up in response to exercise. *Id.* He also stated that his anxiety was worsened by the resulting inability to exercise. R. at 291.

In September 2017, the Board remanded the claim to obtain records and a VA examination. R. at 251-61.

In October 2017, a VA examiner diagnosed GAD and major depressive disorder (MDD). R. at 58-59. The examiner noted that Mr. Jamerson alleged worsening of a pre-existing depression. R. at 58. Specifically, Mr. Jamerson stated that, as a result of his inability to exercise, he was unable to relieve his anxiety with physical activity, which permanently worsened his depression and anxiety. *Id.* The examiner noted that Mr. Jamerson described himself as the product of a rape and was neglected and physically abused throughout childhood. R. at 60. The examiner also noted that Mr. Jamerson described abuse by his older brother, as well as his statement that he "lived in fear." R. at 61. The veteran described boxing as an adolescent and reported that the activity gave him a support system and helped him to feel better about himself. *Id.* Mr. Jamerson stated that he left college because he found it too overwhelming. *Id.* The examiner noted that Mr. Jamerson reported periodic drug use and described witnessing the death of his friend in 1984. R. at 63.

The examiner reviewed Mr. Jamerson's statement about the push-up incident during basic training, R. at 61, and opined:

[the] veteran contends that his anxiety and depression were permanently worsened by the stressor statement that he described. In his treatment records, however, there are significantly more factors that contribute to the worsening of his symptoms . . . it is likely that the veteran's stressor statement is a part of his worsening condition. However, it is more likely than not that it is not the only condition that has resulted in the permanent worsening of his pre-existing anxiety and depression. It is not reasonable to conclude based on this present interview and a thorough review of [the] veteran's records that his depression and anxiety [were] permanently worsened beyond the natural progression of his disease based on one single factor.

R. at 63.

In December 2017, the RO issued a Supplemental SOC, continuing the denial of Mr. Jamerson's claim. R. at 35-49.

In February 2018, the Board issued the decision on appeal denying entitlement to service connection for an acquired psychiatric disorder. R. at 1-12. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Jamerson's appeal is timely and the Court has jurisdiction to review the February 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).

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 v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). "With respect to aggravation, "[a]ny increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected." 38 C.F.R. § 3.310(b)(2019).

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)).

"[E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment" 38 U.S.C. § 1111; *see also* 38 C.F.R. § 3.304(b) (2019). When no preexisting medical condition is noted upon entry into service, a veteran is presumed to have been sound in every respect. *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). This statutory provision is referred to as the "presumption of soundness." *Horn v. Shinseki*, 25 Vet.App. 231, 234 (2012). If the presumption of soundness applies, the burden falls on VA to rebut the presumption with clear and unmistakable evidence that an injury or disease that manifested in service was both preexisting and not aggravated by service. *See* 38 U.S.C. § 1111

(stating that a veteran will not be presumed to have entered service in sound condition "where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by service"); *see also Wagner*, 370 F.3d at 1096; *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991). The presumption of soundness ordinarily operates to satisfy the second element of service connection without further proof, meaning the presumption "strongly favors the conclusion that any occurrence of injury or disease during service establishes that the in-service medical problems were incurred in the line of duty." *Horn*, 25 Vet.App. at 236. Although the Court reviews de novo the Board's determination of the adequacy of the evidence offered to rebut the presumption of soundness, *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009), the Court reviews the Board's application of the "clear-and-unmistakable-evidence" standard to the facts found under the deferential "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard, *Vanerson v. West*, 12 Vet.App. 254, 261 (1999).

As with any finding on a material issue of fact or law presented on the record, the Board must support its service-connection determination, as well as its determination that the presumption of soundness was rebutted, with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. 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, 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 rejecting material evidence favorable to the claimant. *Caluza*, 7 Vet.App. at 506.

III. ANALYSIS

In the decision currently on appeal, the Board first found that there was clear and unmistakable evidence that Mr. Jamerson's acquired psychiatric disorder preexisted service.¹ R. at 7-10. It then turned to the issue of whether the psychiatric disorder was aggravated by service. R. at 10-12. The Board contrasted the veteran's lay statements with the October 2017 examiner's opinion, as well as that examiner's conclusion that aggravation of the veteran's acquired psychiatric

¹ Mr. Jamerson does not challenge the Board's finding that the record contained clear and unmistakable evidence that he had a psychiatric disorder that preexisted service; in fact he appears to concede that point. Appellant's Brief (Br.) at 10.

disorders was caused by a variety of events and that it was less likely than not that they were not permanently worsened beyond their natural progression by service. R. at 11. The Board found the October 2017 examiner's opinion to be more probative. *Id.*

Mr. Jamerson argues that the Board provided inadequate reasons or bases for its analysis of the aggravation prong of the presumption of soundness because it did not adequately address the internal inconsistency within the October 2017 examiner's opinion. Appellant's Br. at 8-11. Mr. Jamerson further contends that the Board appears to have applied an improper standard in evaluating evidence as to aggravation. *Id.* at 14-17. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 8-20.

In its decision, the Board found the October 2017 VA examiner's opinion to be the most probative competent opinion. R. at 11-12. The Board stated that the examiner described the veteran's diagnosed acquired psychiatric disorders, reviewed the record, and supported her rationale with medical evidence. *Id.* A review of the record does not support the Board's finding as to adequacy.

As noted, the examiner acknowledged that the veteran's service bore some relationship to his acquired psychiatric disorder: "it is likely that [the] veteran's stressor statement is a part of his worsening condition." R. at 56. However, the examiner went on to conclude "it is more likely than not that [the in-service stressor] is not the only condition that has resulted in the permanent worsening of his pre-existing anxiety and depression." *Id.* In support of her opinion, the examiner offers that, based on her interview of the veteran and a thorough review of the record, it is not reasonable to conclude that the veteran's psychiatric condition was permanently worsened beyond its natural progression "by one single factor." R. at 56-57. The fact that the veteran's psychiatric condition could be worsened by other factors does not, as the examiner intimated, extinguish the possibility that his acquired psychiatric disorder was aggravated by service. *Id.* Although the examiner noted that pre- and post-service records showed a history of psychiatric symptoms and trauma, *id.*, and the veteran reported a similar history at the examination, R. at 53-55, the examiner appears to have equated these pre- and post-service psychiatric symptoms with the absence of aggravation. R. at 57. At best, the examiner failed to explain this conclusion in light of the veteran's acknowledgment that his psychiatric disorder preexisted service; at worst, the opinion appears internally inconsistent. *See Jones v. Shinseki*, 23 Vet.App. 382, 392 (2010) (finding that the Board clearly erred in relying on an internally inconsistent medical opinion that "[f]or [] short of setting

forth any clear conclusions"). In either event, her negative aggravation opinion cannot be considered adequate for adjudication purposes. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (holding that, although a medical examination report need not "explicitly lay out the examiner's journey from the facts to a conclusion" to be adequate, the Court must be able to discern the examiner's reasoning from that report to sanction the Board's reliance on it).

The October 2017 medical examination did not contain adequate supporting rationale. It was therefore inadequate for adjudication purposes, and the Board clearly erred in relying on it to deny service connection for an acquired psychiatric disorder. *See D'Aries*, 22 Vet.App. at 104, *Ardison*, 6 Vet.App. at 407 (holding that the Board errs when it relies on an inadequate medical examination report or opinion). Remand is warranted for the Board to obtain an adequate medical opinion addressing aggravation of the current acquired psychiatric disorder. *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 the record is otherwise inadequate"); *see also Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("[O]nce the Secretary undertakes the effort to provide an examination . . . , he must provide an adequate one, or at a minimum, notify the claimant why one will or cannot be provided.").

On remand, Mr. Jamerson 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 February 23, 2018, Board decision is SET ASIDE and the matter is REMANDED for further development, if necessary, and readjudication consistent with this decision.

DATED: April 30, 2020

Copies to:

Michael W. Melito, Esq.

VA General Counsel (027)