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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0041

PHILLIP L. POOLE, 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, Phillip L. Poole, through counsel appeals an October 10, 2018, Board of Veterans' Appeals (Board) decision that dismissed as moot the issue of entitlement to benefits for an acquired psychiatric disorder, including post-traumatic stress disorder (PTSD) and a mood disorder, and remanded the matter of entitlement to an effective date earlier than December 7, 2015, for the award of benefits for PTSD with major depressive disorder and episodic psychosis. Record (R.) at 3-11. The Board also remanded the issue of entitlement to benefits for hepatitis C. The remanded matters are not before the Court at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction"); *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). Finally, the Board referred the matter of the appellant's spouse-payee's request to be removed as fiduciary. The Court has jurisdiction to review referred matters only to the extent that the appellant argues that remand, rather than referral, was appropriate, which is not the case here. *See Young v. Shinseki*, 25 Vet.App. 201, 203 (2012) (en banc order).

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 reverse the portion of the Board decision that dismissed as moot the issue of entitlement to benefits for an acquired psychiatric disorder, including PTSD and a mood disorder, and remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from September 1973 to September 1975. R. at 990. In January 1992, he filed a claim for benefits for major depressive disorder. R. at 2674-79. A VA regional office (RO) denied his claim in July 1993. R. at 2576-78. Of note, the RO stated that "[n]o service medical records of any kind can be located, despite multiple attempts." R. at 2576. The appellant did not appeal that decision, and it became final.

A new claim stream began in August 2007, when the appellant submitted a statement in support of his claim asserting his belief that he was entitled to a total disability rating based on a mental disorder. R. at 2385. The RO construed this statement as a claim for benefits for PTSD with drug and alcohol abuse, R. at 2377-84, and denied the claim in August 2008, R. at 2212. Although the RO noted that the appellant's "[m]ilitary personnel file" had been received in May 2007 and that service medical records remained unavailable, R. at 2216-17, the RO also determined that new and material evidence had not been submitted to reopen the previously denied claim for benefits for major depressive disorder, R. at 2212. The appellant filed a Notice of Disagreement (NOD) with that decision, R. at 2209, and the RO reopened the appellant's claim for benefits for major depressive disorder in a March 2009 Statement of the Case (SOC) but denied it on the merits and continued the denial of benefits for PTSD, R. at 1856-80. The appellant perfected his appeal to the Board. R. at 1727-30.

The Board issued decisions in January 2011 and February 2012 remanding the appellant's claim, which it characterized as entitlement to benefits for "an acquired psychiatric disability, variously diagnosed as [PTSD], major depression, a mood disorder, bipolar disorder, schizophrenia, and drug and alcohol abuse," for further development. R. at 1437, 1647. In an April 2014 decision, the Board first determined that, although the appellant had not appealed the July 1993 rating decision, "certain records from his military personnel file were first associated with the claims file in August 2008," and, therefore, "VA must reconsider the claim on its merits" pursuant to 38 C.F.R. § 3 156(c). R. at 1214. The Board then found that there was no evidence

that the appellant had a PTSD diagnosis, nor did he have an acquired psychiatric disability that was related to service. R. at 1215. In doing so, the Board reviewed post-service records dated between May 1985 and June 2012, in addition to service personnel records. *See* R. at 1223-26.

After the appellant appealed the April 2014 Board decision to the Court, the parties entered into a joint motion for remand (JMR), which the Court granted in March 2016. R. at 980. The parties agreed that remand was necessary for the Board "to consider in the first instance whether [the a]ppellant submitted a timely motion for reconsideration of its April 4, 2014, decision."¹ R. at 973. In an October 2016 letter, the Board advised the appellant that the June 2014 communication was not a timely motion for reconsideration because he failed to "clearly and specifically set forth an alleged error of fact or law in the . . . April 2014 decision." R. at 668. The Board advised the appellant that he had 120 days from the date of the letter to appeal the April 2014 Board decision to the Court, R. at 669, and he did so.

On the second appeal to the Court, the parties again entered into a JMR, R. at 47-52, which the Court granted in May 2018, R. at 53. They agreed that the Board committed two errors: "The first error encompasses whether VA's duty to assist required obtaining potentially relevant third-party records in this case. The second error is in regard to a misinterpretation of [the a]ppellant's personnel records in the Board's statement of reasons or bases, but not factually accurate as found in the record." R. at 47-48. The second error pertained to the appellant's demotion in rank prior to his discharge. R. at 49-50.

A third claim stream began while the second was on appeal to the Court. In November 2016, the appellant filed, through current counsel, a request to reopen the previously denied claim for benefits for an acquired psychiatric disorder, including PTSD, depression, and psychosis. R. at 662. In the cover letter, the appellant's counsel noted that the Board's denial of benefits for this issue was then pending before the Court. R. at 661. The RO declined to reopen the claim in June 2017, finding that new and material evidence had not been submitted. R. at 225-30. The appellant filed an NOD with that decision, R. at 191-92, and the RO granted his claim in October 2017, assigning a 100% disability rating for PTSD with major depressive disorder and episodic psychosis, effective December 7, 2015, the date VA received his intent to file a claim. R. at

¹ Attached to the JMR was a copy of the potential motion for reconsideration: a June 2014 VA Form 9, Appeal to Board of Veterans' Appeals, in which the appellant wrote, "I just did not start having problems after my service. . . . I did not invent what happened [to me]." R. at 979.

178-83. The appellant filed an NOD with the effective date assigned, again noting that his appeal of the April 2014 Board decision was then before the Court and that "[s]uccess on th[at] appeal will entitle [him] to an earlier effective date for his condition." R. at 87.

When the matter returned to the Board as a result of the Court's May 2018 remand, the appellant, through current counsel, submitted written argument to the Board. He wrote:

The issue before the Board is service connection for an acquired psychiatric disorder, to include PTSD. Importantly, the Board, i[n] its April 2014 decision, determined that new and relevant service records had been associated with the claims file since the 1993 denial. Therefore, this appeal is a reconsideration of [my] January 24, 1992, claim.

R. at 39. He further argued: "Upon reconsideration, the Board must award service connection. The RO has already determined the evidence is sufficient to award service connection. Also, the RO has already informed us that the award is based, in part[,] on the new service records." R. at 41 (citation omitted).

In the October 2018 decision on appeal, the Board dismissed as moot the issue of entitlement to benefits for an acquired psychiatric disorder, including PTSD and a mood disorder, finding that the claim had been granted by the RO in October 2017 and, accordingly, there remained "no issue on which the Board could grant the [appellant] relief." R. at 6. The Board then determined that "[t]he issue of whether an earlier effective date for the grant of service connection [is warranted] remains on appeal and is remanded below."² *Id.* (citing *Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997), for the proposition that a separate NOD must be filed to initiate appellate review of "downstream" elements such as the effective date assigned). Specifically, the Board noted that the appellant had filed an NOD with the effective date assigned by the RO in October 2017 and remanded for issuance of an SOC. R. at 7 (citing *Manlincon v. West*, 12 Vet.App. 238, 240-41 (1999)). This appeal followed.

² In his reply brief, the appellant advises the Court that the RO issued a decision in October 2019 assigning an earlier effective date of August 15, 2007, based on his August 2007 construed claim for benefits for PTSD. Reply Brief (Br.) at 1. It is not clear to the Court whether that decision was a result of the Board's October 2018 remand or the appellant's NOD to the October 2017 RO decision. In any event, the appellant states that he filed an NOD with the October 2019 RO decision, and the matter remains pending before VA. *Id.*

II. ANALYSIS

A. Parties' Arguments

On appeal, the appellant argues that the Board erred in determining that it did not have jurisdiction over his request for reconsideration of the January 1992 claim. Appellant's Br. at 2-6. This is so, he contends, because the claim stream that resulted in the October 2018 Board decision on appeal stems from his August 2007 request to reopen his January 1992 claim, which he characterizes as a request for reconsideration of the 1992 decision under 38 C.F.R. § 3.156(c). *Id.* at 3. He argues that the benefit at issue in that claim stream "is compensation payments beginning in 1992." *Id.* He further asserts that the RO decision granting service connection was in relation to the 2016 claim stream and could not have resolved his appeal in relation to the 2007 claim stream that was pending at the Board. *Id.* at 3-4 (citing *Warren v. McDonald*, 28 Vet.App. 214 (2016)). He asks the Court to reverse the Board's decision and remand with instructions for the Board to reconsider his January 1992 claim for benefits. *Id.* at 6.

For his part, the Secretary asks the Court to either dismiss the appellant's appeal or affirm the Board's decision. Secretary's Br. at 10. He argues that "[t]here is no dispute" that the appellant has already been granted benefits for an acquired psychiatric disability, that he seeks an earlier effective date, and that the Board did not adjudicate that downstream element. *Id.* at 7. Accordingly, he asserts that there is "no justiciable issue before the Court," *id.*, and that the Court lacks jurisdiction over the remanded effective date matter, *id.* at 8. Further, the Secretary rejects the appellant's argument that there are "two claims in play," and argues that "the benefit sought was the same, which is entitlement to payment of compensation benefits due to a service-connected psychiatric disability." *Id.* Because that claim has been granted, the Secretary asserts, the Board acted properly in dismissing the service-connection claim and remanding the matter of the proper effective date. *Id.* at 8-9.

B. Law

Ordinarily, if a claim is finally denied and later reopened and granted based on the submission of new and material evidence, the effective date of benefits will be the date that the claimant filed the application to reopen. 38 U.S.C. § 5110(a)(1) (effective to Aug. 22, 2017); 38 C.F.R. § 3.400(b)(2)(i), (r) (2019). However, § 3.156(c) provides an exception to this rule. Paragraph (c)(1) provides, in pertinent part, that, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that

existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1). Paragraph (c)(3) further provides that "[a]n award made based all or in part on the records identified by paragraph (c)(1) . . . is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3). Finally, paragraph (c)(4) permits a retroactive evaluation of disability in certain circumstances. 38 C.F.R. § 3.156(c)(4).

In *Blubaugh v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) underscored that § 3.156(c) "serves to place a veteran in the position he [or she] would have been had . . . VA considered the relevant service department record before the disposition of [the] earlier claim." 773 F.3d 1310, 1313 (Fed. Cir. 2014). The Federal Circuit noted that paragraph (c)(1) "is a separate and distinct provision from [paragraphs] (c)(3) and (c)(4)" and that "[t]he language and overall structure of § 3.156(c) strongly suggest that § 3.156(c)(1) requires . . . VA to reconsider only the merits of a veteran's claim" whenever newly acquired relevant service records are associated with the claims file, and that "[o]nly if [] VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1) must it consider an earlier effective date under subsections (c)(3) and (c)(4)." *Id.* at 1314.

This Court further emphasized the distinction between paragraph (c)(1) and paragraphs (c)(3) and (c)(4) in *Emerson v. McDonald*, stating that the operative clause in § 3.156(c)(1) "mandates that 'VA will reconsider the claim'" at any time after it issues a decision on a claim, if it receives relevant service department records not previously associated with the claims file. 28 Vet.App. 200, 208 (2016) (quoting 38 C.F.R. § 3.156(c)(1)). More recently, in *George v. Shulkin*, the Court explained that "reconsideration" under paragraph (c)(1) requires VA to reassess its original decision "in light of the new service records" and noted that this may also include the development of additional evidence. 29 Vet.App. 199, 205 (2018), *vacated on other grounds sub nom. George v. Wilkie*, 782 F. App'x 997 (Fed. Cir. 2019). The Court further stated that, had the Board "skipped past § 3.156(c)(1), which demands reconsideration of the original claim, and [gone] straight to § 3.156(c)(3), which deals with the effective date of a claim granted via reconsideration," that would "indicate that [the Board] did not understand the relevant legal framework." *Id.* 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 v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

C. Discussion

After summarizing the procedural history of this case, the Board stated:

As the RO granted service connection for the [appellant's] acquired psychiatric disorders, including PTSD, [major depressive disorder], and episodic psychosis, there remains no issue on which the Board could grant [him] relief. The entire benefit which he sought in his appeal (entitlement to service connection) was granted. Therefore, the issue of service connection before the Board is moot and the appeal is dismissed. The issue of whether an earlier effective date for the grant of service connection remains on appeal and is remanded below.

R. at 6. In remanding the issue of the proper effective date, the Board stated:

In October 2017, the [appellant] submitted a[n NOD] with the assigned effective date of the grant of service connection for PTSD with [major depressive disorder] and episodic psychosis. A[n SOC] addressing the NOD has not been issued to him. The Court has directed that[,] where a veteran has submitted a timely NOD with an adverse decision and the [agency of original jurisdiction (AOJ)] has not subsequently issued an SOC addressing the issue, the Board should remand the issue to the AOJ for preparation of an SOC.

R. at 7 (citing *Manlincon*, 12 Vet.App. at 240-41). The Board did not address the arguments the appellant raised in his June 2018 submission regarding reconsideration under § 3.156(c). *See* R. at 39-42.

As the appellant notes, the Court encountered similar circumstances in *Warren*. Appellant's Br. at 3-4. There, as the result of a VA error, two claim streams for the same benefit existed. *See Warren*, 28 Vet.App. at 215-17. In one, as in the 2007 claim stream in this case, the appellant's 2008 claim for benefits was denied and he appealed to the Board. *Id.* at 216-17. In the other, as in the 2016 claim stream here, the RO treated a 2010 submission as a new claim for the same benefit, granted the claim, and assigned an effective date.³ *Id.* at 217. When the first claim stream reached the Board, the Board characterized the issue on appeal as entitlement to an effective date earlier than the one assigned by the RO in the second claim stream, despite acknowledging that the appeal arose as a result of the denial of the appellant's 2008 claim for benefits. *Id.* The Board then affirmed the effective date assigned by the RO in the second claim stream. *Id.*

³ There was no indication in *Warren* that the appellant appealed the RO decision that granted benefits. *See Warren*, 28 Vet.App. at 216.

The Court, after reversing the error that resulted in two claim streams, determined that the Board lacked jurisdiction to affirm the RO's assignment of an effective date, because that determination was made in the second claim stream, while the matter before the Board stemmed from the first claim stream and was correctly characterized as service connection for the appellant's disability based on the 2008 claim. *Id.* at 220. Because there had been no effective date determination in the first claim stream, the Board could not consider that question in the first instance. *Id.* (citing *Jarrell v. Nicholson*, 20 Vet.App. 326, 330-32 (2006) (en banc)). Additionally, the Court concluded that, because the appellant had perfected an appeal to the Board as to the 2009 RO denial in the first claim stream, "only a Board decision" could resolve that claim stream. *Id.* at 221.

As in *Warren*, the Court here holds that the August 2007 claim stream is separate from the November 2016 claim stream and the issue before the Board at the time of its October 2018 decision was, based on the appellant's August 2007 claim, entitlement to benefits for an acquired psychiatric condition, which may include the explicitly raised issue of reconsideration of the January 1992 claim. *See id.* at 220-21; *see also Blubaugh*, 773 F.3d at 1313-14. Because the appellant timely appealed the August 2008 RO decision denying his August 2007 claim, only a Board decision can resolve the August 2007 claim stream. *See Warren*, 28 Vet.App. at 221 (citing *Jones v. Shinseki*, 23 Vet.App. 122, 125 (2009) (holding that, where a claim is placed in appellate status by virtue of the filing of an NOD, a subsequent RO decision does not resolve the appeal), *aff'd*, 619 F.3d 1368 (Fed. Cir. 2010); *Juarez v. Peake*, 21 Vet.App. 537, 543 (2008) (citing *Myers v. Principi*, 16 Vet.App. 228 (2002), for the proposition that, once an NOD has been filed, further RO decisions cannot resolve the appeal that remains pending before the Board; only a subsequent Board decision can resolve an initiated, but not completed, appeal)).

Similarly, the October 2017 RO decision could not resolve the appellant's appeal of his August 2007 claim for benefits for an acquired psychiatric disability because, by virtue of his appeal, the Board, not the RO, had jurisdiction over it. *See id.* "The decision of the lower adjudicative body, the RO, cannot finally decide an issue already on appeal to the Board, the higher administrative appellate body." *Id.* (citing *Jones*, 23 Vet.App. at 125).

Finally, as in *Warren*, the Court concludes that, although the November 2016 claim stream also involved a claim for benefits for an acquired psychiatric disability, albeit based on a purported request to reopen, the resulting October 2017 RO decision was only able to grant service

connection for sleep apnea effective December 7, 2015.⁴ *See id.*; *see also* 38 U.S.C. § 5110(a) (the effective date that applies to a reopened claim for benefits is the date VA received the reopened claim or the date entitlement to the benefit arose, whichever is later) (effective to Aug. 22, 2017). Although a Board decision was required to resolve the appellant's appeal of his August 2007 claim stream, the Board in the October 2018 decision on appeal did not address the relevant issue on appeal on the merits, based on its incorrect finding that the issue was moot. Accordingly, the Board's dismissal of the appellant's claim for benefits for an acquired psychiatric disability was improper. The Court will therefore reverse the Board's decision that the issue of entitlement to benefits for an acquired psychiatric disorder was moot and remand the matter for the Board to address the issue before it: entitlement to benefits for an acquired psychiatric disability based on the 2007 claim stream, which may include reconsideration of the appellant's January 1992 claim under § 3.156(c). *See Blubaugh*, 773 F.3d at 1313-14.

On remand, the appellant is free to submit additional evidence and argument on the remanded matter, 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

After consideration of the parties' pleadings and a review of the record, the portion of the Board's October 10, 2018, decision dismissing as moot the issue of entitlement to benefits for an acquired psychiatric disorder is REVERSED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 4, 2020

⁴ Again, as noted above, after the appellant filed an NOD with the October 2017 decision, the RO granted an effective date of August 15, 2007.

Copies to:

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