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

No. 19-2953

MARLON V. PHILLIPS, APPELLANT,

v.

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

Before DAVIS, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

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

DAVIS, *Senior Judge*: Veteran Marlon V. Phillips served the United States in the U.S. Marine Corps. He appeals a February 19, 2019, Board of Veterans' Appeals decision that denied service connection for a psychiatric disorder other than PTSD, and for a cannabis and alcohol abuse disorder, claimed as secondary to the psychiatric disorder.<sup>2</sup> Because the Board failed to adequately explain its determination regarding Mr. Phillips's psychiatric condition other than PTSD, the Court will set aside the February decision and remand that matter for readjudication. Additionally, because Mr. Phillips has claimed that his alcohol and cannabis abuse disorders are secondary to his depression, the Court will remand those matters as well.

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<sup>1</sup> Judge Davis is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 03-20 (Jan. 2, 2020).

<sup>2</sup> Record (R.) at 5-16. The Board also found that new and material evidence had been submitted to reopen a previously denied PTSD claim. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board, however, adjudicated the PTSD claim and denied service connection. Because the appellant presents no argument as to this matter, the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it). Lastly, because the Board remanded the matters of entitlement to a higher rating for right and left knee patellofemoral syndrome, these matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

## I. ANALYSIS

The Court reviews the Board's credibility determinations under the "clearly erroneous" standard of review.<sup>3</sup> "A 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."<sup>4</sup>

As always, the Board must support its determinations with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court.<sup>5</sup> The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence,<sup>6</sup> discuss all issues raised by the claimant or the evidence of record,<sup>7</sup> and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record."<sup>8</sup>

In February 2019, the Board denied Mr. Phillips service connection for a psychiatric disorder because it found the "preponderance of the lay and medical evidence of record weighs against the service connection claim."<sup>9</sup> The Board also found Mr. Phillips's lay testimony not credible because the testimony was inconsistent and did not align "with more contemporaneous histories and notations in the service treatment records."<sup>10</sup>

Mr. Phillips primarily argues that the Board erred in its treatment of the lay testimony he and his mother provided.<sup>11</sup> The Secretary argues that the Board did not err in finding the lay testimony not credible and thus contends that the determinations regarding service connection should be affirmed.<sup>12</sup>

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<sup>3</sup> *Arneson v. Shinseki*, 24 Vet.App. 379, 382 (2011); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995); *Wood v. Derwinski* 1 Vet.App. 190, 193 (1991).

<sup>4</sup> *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

<sup>5</sup> 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57 (1990).

<sup>6</sup> *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

<sup>7</sup> *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009).

<sup>8</sup> *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

<sup>9</sup> R. at 14.

<sup>10</sup> R. at 11.

<sup>11</sup> Appellant's Brief (Br.) at 7-19.

<sup>12</sup> Secretary's Br. at 6-13.

The Court concludes that the Board did not provide an adequate statement of reasons or bases for denying service connection for a psychiatric disorder.<sup>13</sup> Although the Board stated that the preponderance of the medical and lay evidence weighed against service connection, it is unclear what lay evidence the Board relied upon to make this finding.<sup>14</sup> The lay evidence cited by the Board did not weigh against service connection.<sup>15</sup> Additionally, the Board erred by framing the absence of symptoms within service records as negative evidence, because it did not highlight the foundation within the record that demonstrates that such an absence "has a tendency to prove or disprove a relevant fact."<sup>16</sup> Remand is required to correct these errors.<sup>17</sup>

Relatedly, the Board should on remand reassess its credibility determination, because it is unclear why it found the lay testimony inconsistent.<sup>18</sup> As discussed above, without a proper foundation showing that the psychiatric symptoms would have been revealed in the service records had they been present, the absence of these symptoms cannot be used as negative evidence.<sup>19</sup>

Additionally, the Board failed to address the reasonably raised claim of whether Mr. Phillip's service-connected ankle and knee conditions caused his psychiatric condition.<sup>20</sup> Because the veteran stated that his disabilities caused his depression, the Board must on remand address whether Mr. Phillips is entitled to secondary service connection for his psychiatric condition.<sup>21</sup>

Lastly, the Court will also remand Mr. Phillips's alcohol and cannabis abuse disorder claim as inextricably intertwined with the psychiatric disorder claim.<sup>22</sup> Notably, the Board denied service

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<sup>13</sup> See 38 U.S.C. § 7104(d)(1).

<sup>14</sup> R. at 11.

<sup>15</sup> R. at 11-12. The only lay evidence found in the record was from Mr. Phillips and his mother, who both provided positive lay evidence for service connection.

<sup>16</sup> See *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); *Horn v. Shinseki*, 25 Vet.App. 231, 239 n.7 (2012); *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011).

<sup>17</sup> *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).

<sup>18</sup> See R. at 13.

<sup>19</sup> See *Fountain*, 27 Vet.App. at 272; *Horn*, 25 Vet.App. at 239 n.7; *Buczynski*, 24 Vet.App. at 224.

<sup>20</sup> *Robinson*, 21 Vet.App. at 552..

<sup>21</sup> *Id.*; see also R. at 2241.

<sup>22</sup> *Harris (Robert) 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, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013).

connection for these disorders as a matter of law and did not address whether these conditions are related to the veteran's diagnosed psychiatric disorder.<sup>23</sup> Because these disorders may be secondary to the remanded psychiatric condition, they must also be remanded.

## **II. CONCLUSION**

On consideration of the foregoing, the Court SETS ASIDE the Board's February 19, 2019, decision relating to service connection for a psychiatric disorder, as well as an alcohol and cannabis disorder and REMANDS those matters for further development consistent with this decision. The remainder of the decision on appeal is DISMISSED.

DATED: May 5, 2020

Copies to:

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<sup>23</sup> R. at 14.