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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1907

JOHN S. PEARSON, 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, John S. Pearson, through counsel appeals a January 22, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 50% for post-traumatic stress disorder (PTSD) and alcohol use disorder. Record (R.) at 4-20. 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 vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from March 1969 to April 1971, including service in Vietnam. R. at 4167. In April 2008, he filed a claim for benefits for PTSD, R. at 3828, that a VA regional office (RO) granted in September 2008, assigning a 50% disability rating effective April 16, 2008, R. at 3548-55. He did not appeal that decision, and it became final.

In July 2011, the appellant sought an increased disability rating for PTSD, R. at 2628, and underwent a VA PTSD examination in November 2011, R. at 2449-59. After reviewing the appellant's claims file and conducting an examination, the examiner concluded that his PTSD

resulted in occupational and social impairment with reduced reliability and productivity. R. at 2452. In a December 2011 decision, the RO continued the assigned 50% disability rating for PTSD. R. at 2361. The appellant, through former counsel, submitted a Notice of Disagreement with that decision, R. at 2332-39, and later appealed to the Board through a non-attorney representative, R. at 1421-36. The Board remanded the appellant's claim for additional development in October 2013. R. at 1406-08.¹

After several years of development and adjudication, including an August 2016 remand from the Court, R. at 630-33, the Board again remanded the appellant's claim in May 2017, R. at 528-33. The appellant underwent a VA PTSD examination in August of that year. R. at 203-07. The examiner, who identified herself as having a Ph.D., R. at 207, diagnosed the appellant with PTSD and alcohol use disorder, noting that his condition manifested in symptoms of anxiety, suspiciousness, chronic sleep impairment, mild memory loss, difficulty in establishing and maintaining effective work and social relationships, and difficulty adapting to stressful circumstances, including work or a worklike setting, R. at 203, 207. She determined that the appellant's PTSD resulted in "[o]ccupational and social impairment with reduced reliability and productivity." R. at 204. Finally, she offered the following conclusion:

[T]he [appellant's] PTSD is resulting in moderate to considerable impairment and does not render him unable to secure and maintain substantially gainful employment; given his problems with irritability, concentration, and sleep, he would perform best in a job in which he works with a limited number of people, one with few competing job demands, and one with few interruptions.

R. at 207.

In October 2017, the appellant, through current counsel, submitted correspondence to the Board arguing that the August 2017 VA PTSD examination was inadequate for two reasons. First, because the "exam[ination] results (boxes checked) contradict the examiner's ultimate opinions that the [appellant] has reduced reliability in occupational and social settings and can maintain employment." R. at 167. Second, "the examination was not performed by an expert with adequate training" because, "[w]ith such severe PTSD and relating to an increase dating back to 2011, a psychiatrist specializing in PTSD symptoms should have been chosen to assist the RO and Board

¹ The copy of this document contained in the record of proceedings (ROP) is incomplete. See R. at 1408; U.S. VET. APP. R. 28.1(a)(1)(B) (requiring that the ROP contain any document cited in a party's brief in its entirety).

in its determination." *Id.* The appellant, through current counsel, reiterated these arguments to the Board in a January 2019 statement. R. at 24.

In the January 2019 decision on appeal, the Board found that the evidence supported no more than a 50% disability rating for PTSD. R. at 17. In doing so, the Board addressed the appellant's arguments regarding the August 2017 VA examination, finding the examiner competent and the examination adequate. R. at 16-17. This appeal followed.

II. ANALYSIS

On appeal, the appellant raises three arguments. First, he contends that the Board clearly erred in finding that his PTSD warrants no more than a 50% disability rating because it overlooked some of his symptoms that demonstrate that his condition is more severe than contemplated by that rating. Appellant's Brief (Br.) at 9-11. Second, he asserts that the Board erred in relying on the August 2017 VA PTSD examination report, which he maintains is inadequate because it is internally inconsistent—that is, the examiner's medical findings contradict her ultimate conclusion. *Id.* at 11-15. Third, he argues that the Board failed to adequately address his challenge to the August 2017 VA examiner's competency because it erroneously shifted the burden of demonstrating her incompetence to him, instead of the Board bearing its burden of establishing her competence. *Id.* at 15-20. The Secretary generally disputes these arguments and seeks affirmance of the Board decision. Secretary's Br. at 8-15. Of note, the Secretary concedes that the Board erred in shifting the burden to the appellant with respect to his challenge to the VA examiner's competence, but he argues that the error is harmless because the Board made the necessary factual findings to establish the examiner's competence. *Id.* at 12-14 (citing *Francway v. Wilkie*, 940 F.3d 1304, 1307 (Fed. Cir. 2019)).

It is the appellant's third argument that the Court finds persuasive. "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)). However, "once the [appellant] raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications." *Francway*, 940 F.3d at 1308. There is no dispute that the appellant expressly raised a challenge to the August 2017 VA PTSD examiner's qualifications. *See* R. at 24,

167. Accordingly, the Board was required to "make factual findings regarding the qualifications and provide reasons [or] bases for concluding whether [] the medical examiner was competent to provide the opinion." *Francway*, 940 F.3d at 1308.

Here, the Board relied in part on the August 2017 examination report to deny a rating in excess of 50% for PTSD. R. at 15. In addressing the appellant's challenge to that examiner's competency, the Board stated:

[A] VA examiner is presumed to be competent. The [appellant] has not provided clear evidence that the examiner was not competent to rebut this presumption. Specifically, there is no evidence that the examiner lacked education, training, or experience to offer medical diagnoses, statements, or opinions. In fact, the examiner who performed the [appellant's] August 2017 VA examination is a Licensed Clinical Psychologist with a Ph.D. degree. Moreover, the Board notes that she was the examiner who conducted [his] original PTSD examination in June 2008, and, as such, she is familiar with [his] condition over time.

R. at 16-17 (citations omitted). As the Secretary concedes, the Board erred in shifting the burden to the appellant to show that the examiner was not competent. *See Francway*, 940 F.3d at 1307 ("Although it is referred to as a presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue."); Secretary's Br. at 12-13.

The Court is unable to find this error harmless, as the Secretary urges. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). As the appellant points out, the Board did not identify the discipline in which the examiner earned her Ph.D. (and therefore provided no information that the appellant did not already have), nor did the Board discuss whether she had specific training in PTSD as he contended was necessary.² Appellant's Br. at 17-18. Because the Board did not make

² The Court also notes that, although the Board found that the August 2017 examiner was a licensed clinical psychologist with a Ph.D., the Board did not discuss whether—and there is no indication in the record that—VA provided the information necessitated by the appellant's challenge to her qualifications. *See Francway*, 940 F.3d at 1308 (holding that a claimant's burden in challenging an examiner's credentials must be offset by the "ability to secure from the VA the information necessary to raise the competency challenge").

the necessary factual findings to address the appellant's challenge, *see Francway*, 940 F.3d at 1308, and because the Court may not find facts in the first instance, *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (stating that "appellate tribunals are not appropriate fora for initial fact finding"); *see* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."), the Court's review of the Board decision is frustrated and remand is required. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

Given that the appellant's remaining arguments rest primarily on the August 2017 VA PTSD examination, the adequacy of which may be affected by the Board's consideration of the remanded issue, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). 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 Board's January 22, 2019, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 6, 2020

Copies to:

Britney Sutton, Esq.

VA General Counsel (027)