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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2303

BOBBY E. BENSON, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Bobby Benson served the Nation honorably in the United States Army. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a January 31, 2019, decision of the Board of Veterans' Appeals that denied him service connection for (1) right ankle arthritis; (2) a back disability; (3) pain/swelling of the bilateral lower extremities; (4) left foot drop; (5) a right foot disability associated with his left foot drop; (6) a cervical spine/neck disability; (7) residuals of a left tibia fracture; (8) right ear hearing loss; (9) an allergic condition; (10) asthma; (11) dermatitis; and (12) an acquired psychiatric disability, including PTSD.[2] Because the Board's decision contains numerous errors that collectively affect all the claims on appeal, we will set aside the decision in its entirety and remand for further proceedings.

I. ANALYSIS

This is a complicated appeal that raises many arguments about the multiple service-connection claims the Board denied. Before addressing the merits, the Court wishes to express its

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[2] Record (R.) at 5-38. Before denying them on the merits, the Board reopened appellant's claims seeking service connection for right ankle arthritis, a back disability, pain/swelling of the bilateral lower extremities, and left foot drop. The decisions to reopen these claims are favorable findings that the Court may not review. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

appreciation for the excellent briefing from both counsel. Counsels' efforts have greatly assisted the Court in resolving the matters on appeal.

Appellant argues that the Board erred when it denied service connection for all 12 claims at issue in this appeal. Some arguments cut across all the claims while others are more targeted. The Secretary concedes that the Board erred in certain ways but defends the Board's actions in other respects. We will first consider the two arguments appellant advances that affect all the claims on appeal. Thereafter, we will discuss the more claim-specific arguments.

While we will generally discuss relevant legal principles in connection with each argument we consider, there are some general points that frame our discussion. Establishing service connection generally 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 nexus between the claimed in-service disease or injury and the present disability.[3] Additionally, secondary service connection is appropriate when either a service-connected disability causes another disability or a service-connected disability proximately causes the worsening of a preexisting disability.[4] The Court reviews the Board's findings regarding service connection for clear error.[5] The Court may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and we are "left with the definite and firm conviction that" the Board's decision was in error.[6] As factfinder, the Board has the responsibility to assess and weigh the evidence.[7] Finally, for all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.[8]

A. Arguments Affecting All Claims on Appeal

Appellant advances two arguments that, if meritorious, affect the Board's decision concerning all of the 12 service-connection claims on appeal in one respect or another. We will address each argument in turn.

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[3] *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

[4] 38 C.F.R. § 3.310(a) (2019).

[5] *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

[6] *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

[7] *See D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008).

[8] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 53.

1. Failure to Obtain In-Service Hospitalization Records

Appellant argues first that the Board failed to ensure that VA satisfied its statutory duty to assist him when it did not obtain all his service medical records. Specifically, he asserts that VA did not obtain records of his hospitalization at Brooke Army Medical Center (BAMC) located on Fort Sam Houston.[9] The Secretary doesn't really defend how the Board addresses these records (more on that in a moment), but rather asserts that "[a]ny error relating to obtaining these records is harmless."[10] As we will explain, the Board's statement of reasons or bases concerning VA's attempts to obtain these records is inadequate, requiring remand.[11]

The Secretary has a duty to assist a claimant in obtaining evidence necessary to substantiate the claims.[12] That duty to assist includes making "reasonable efforts to obtain relevant records . . . that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain."[13] If the records are maintained by a Federal department or agency, "efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile."[14] And while the Board's determination about whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews for clear error,[15] the Board must support its finding with an adequate statement of reasons or bases.[16]

The Board's discussion concerning the records from BAMC is perplexing in several respects. The Board accepted that appellant experienced an in-service accident that required hospitalization.[17] And it acknowledged records "may be" missing.[18] But then it stated:

> There are records of admission for treatment following the type of fall the [v]eteran described in the service treatment records; however, it is not clear that they are from the same hospital the [v]eteran has identified and so there may be outstanding private

[9] *See* Appellant's Brief (Br.) at 10-14.

[10] Secretary's Br. at 13.

[11] *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

[12] 38 U.S.C. § 5103A(a)(1).

[13] 38 U.S.C. § 5103A(b)(1); *see Moore v. Shinseki*, 555 F.3d 1369, 1372-75 (Fed. Cir. 2009).

[14] 38 U.S.C. § 5103A(b)(3); 38 C.F.R. § 3.159(e) (2019).

[15] *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 120 (2009).

[16] 38 U.S.C. § 7104(d)(1); *see Gilbert*, 1 Vet.App. at 53.

[17] R. at 14.

[18] R. at 10.

> treatment records. However, the [v]eteran reported during the Board hearing that these records are unavailable. As such, the Board concludes that a remand to attempt to obtain such records would not be futile.[19]

To begin with, the Board's statement contains a typographical error when it included the word "not" in the final sentence. Appellant places emphasis on this mistake, and argues that we should remand on that basis.[20] In an otherwise persuasive brief, appellant pushes too far on this argument. It is clear as day that the Board's inclusion of "not" in the final sentence was an error and appellant's counsel wasted time trying to base an argument on that mistake. But that mistake is not entirely irrelevant. When combined with what we will turn to now, it adds support to the notion that the Board did not carefully consider the issue of the BAMC records.

The Board inexplicably characterized the BAMC records as being "private" in nature[21] and then cited to the portion of the regulation concerning private records.[22] We have no idea why the Board thought these were private records. The record is replete with references to the BAMC, which is clearly a military facility.[23] We can't tell how this error affected the Board's reasoning, and, therefore, this mistake alone would require remand.

Next, the Board did not address the fact that the BAMC records were not normal service treatment records but rather hospitalization records. VA recognizes that military hospitalization records need to be obtained through means different from normal service treatment records.[24] As appellant points out,[25] there are specific reference codes that need to be used to obtain the hospitalization records, and it does not appear that those codes were used.[26] Perhaps the Board did not discuss this issue because it was laboring under the misimpression that the records at issue were private. We just can't tell. The Board must address this matter on remand.

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[19] R. at 10-11 (citations omitted).

[20] *See* Appellant's Br. at 11.

[21] R. at 10.

[22] R. at 11 (citing 38 C.F.R. § 3.159(c)(1)).

[23] *See, e.g.,* R. at 43-44, 722, 991, 993.

[24] *See, e.g.,* VA ADJUDICATION PROCEDURES MANUAL (M21-1), pt. III, subp. iii, ch. 2, § A.1.e.

[25] *See* Appellant's Br. at 13-14; Appellant's Reply Br. at 2-3.

[26] R. at 941.

Third, the Board's conclusion that appellant had indicated during a Board hearing that the records were not available is clearly wrong.[27] Appellant did not say the records were unavailable. Rather, he stated that he had been told they had been sent to St. Louis.[28] As appellant points out, when one understands that we are talking about military records, this statement is a clear reference to the National Personnel Records Center in St. Louis.[29] Again, the Board's mistaken belief that the records at issue were private seems to have affected its analysis about their availability.

Finally, we reject the Secretary's argument that these errors were harmless. The Secretary is correct that the Board repeatedly said that any missing records would not affect the outcome.[30] But it also repeatedly said that there was no evidence showing any complaints, symptoms, or treatment for the various conditions at issue during service.[31] We can't understand how the Board could make the latter statement without knowing what is in the missing records. And we just don't know. So, remand is required for the Board to either explain adequately why VA has complied with its obligations to obtain these records (which seems unlikely on this record) or ensure that VA makes the efforts necessary to get them.

2. Deficient Board Hearing

Appellant next argues that the Board member who conducted his hearing failed to comply with the responsibilities imposed on such an officer.[32] With one exception discussed below concerning appellant's right ear hearing loss claim,[33] the Secretary defends the Board member's conduct at the hearing and urges that we reject appellant's broader argument.[34]

The duties of a Board member conducting a hearing are set out in 38 C.F.R. § 3.103(c)(2). In relevant part, that regulation states:

> It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which

[27] R. at 10 ("[T]he [v]eteran reported during the Board hearing that these records are unavailable.").

[28] R. at 52.

[29] *See* Appellant's Br. at 12-13.

[30] R. at 14, 17, 19, 22, 24, 27.

[31] *See, e.g.*, R. at 14, 17, 19, 26.

[32] *See* Appellant's Br. at 17-20.

[33] *See* Secretary's Br. at 11-12.

[34] *See id*. at 14-15.

> are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony.[35]

Section 3.103(c)(2) imposes two duties on the Board member during a hearing: to explain the issues fully, and to suggest that the claimant submit evidence that might have been overlooked.[36] Importantly, the Board member must suggest submitting evidence "material to substantiating the claim when the record is missing any evidence on that issue or when testimony at the hearing raises an issue for which there is no evidence in the record."[37] And the Board member "must suggest submission of evidence when testimony during the hearing indicates that it exists (or could be reduced to writing) but is not of record."[38]

Here, we conclude that the Board member did not fulfill her duties at the hearing in two respects (leaving aside the hearing loss claim to which we will return). The first reason is related to the in-service hospitalization records discussed above. When discussing military hospitalization records, the Board member stated: "Well, I'm pretty sure that VA already has everything that there is to get from that side . . . ."[39] But as we discussed above, that does not appear to have been the case. So, this statement not only shows a failure to suggest the submission of evidence, but affirmatively implied that nothing more was needed. This is a *Bryant* violation.

Second, the Board member did not suggest that appellant submit evidence concerning the nexus between any of his claimed conditions and an in-service event or occurrence. The Board member focused on the in-service element of service connection. She stated that "[s]o I haven't even got any question about the relationship between your current disorders and service."[40] And she continued by discussing the VA examinations that had taken place and noted that they "are going to be largely speculative because the doctor is going to have no idea whether your current disorder is related to service because there's no evidence of your injury in service."[41] But when the

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[35] 38 C.F.R. § 3.103(c)(2) (2019).

[36] *Bryant v. Shinseki*, 23 Vet.App. 488, 492 (2010).

[37] *Id.* at 496.

[38] *Id.* at 496-97.

[39] R. at 53.

[40] R. at 52.

[41] R. at 53.

Board member rendered the decision on appellant's claim, she conceded the in-service event[42] and denied most of the claims based on a lack of nexus.[43] The conduct at the hearing concerning nexus is also a *Bryant* violation because, similar to the issue with the hospitalization records, the Board member did not suggest the submission of nexus evidence and appeared to direct appellant away from that issue. On remand, should appellant request another hearing, the Board member should ensure that it is conducted in compliance with *Bryant* and § 3.103(c)(2).

B. Claim-Specific Arguments

Appellant makes several arguments focused on individual claims or groups of claims. We discuss those arguments in this section of our decision.

1. Right Ankle Arthritis, Back Disability, Bilateral Lower Extremity Pain/Swelling; and Left Foot Drop

Appellant argues that the Board erred when it did not provide him with a medical examination concerning his service-connection claims for his right ankle arthritis, back disability, bilateral lower extremity pain/swelling, and left foot drop.[44] The Secretary concedes that the Board erred in connection with its decision not to afford appellant examinations for these conditions.[45] The dispute between the parties concerns the appropriate remedy for the Board's error.

The Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination is necessary to make a decision on the claim."[46] A medical examination is necessary when there is (1) "competent evidence of a current disability or persistent or recurrent symptoms of a disability," (2) evidence establishing an in-service "event, injury, or disease," and (3) an "indication" that the disability or symptoms "may" be associated with service, "but (4) insufficient medical evidence of record for the Secretary to" decide the claim.[47] The threshold requiring a medical examination is not a high one.[48] The Court uses the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard to

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[42] R. at 14, 16, 18-19, 21, 24, 26.

[43] R. at 15, 18, 20,22-23, 25, 27-28.

[44] *See* Appellant's Br. at 15-16.

[45] *See* Secretary's Br. at 10-11.

[46] 38 U.S.C. § 5103A(d).

[47] *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d)(2).

[48] *See McLendon*, 20 Vet.App. at 81-82.

review the ultimate question of whether an examination is necessary.[49] We review embedded questions of fact for clear error.[50]

The Board found that appellant had diagnoses of each of these four conditions and that he had experienced an in-service accident.[51] It denied the claims because it concluded there was "no competent and credible medical evidence of record that even suggests a link between" the conditions and military service.[52] Yet, the Board also specifically discussed appellant's lay statements that related the diagnoses to the in-service accident.[53] Appellant suggests that these statements are sufficient to trigger the duty to provide a medical examination.

The Secretary agrees that appellant's lay statements could satisfy the low threshold for an examination under *McLendon*, but he maintains that the Board must first make a credibility finding about the statements.[54] Appellant counters that our recent decision in *Miller v. Wilkie* stands for the proposition that the Board has already made such a credibility determination, albeit implicitly, and we should order VA to provide appellant with medical examinations for these four conditions.[55]

This appeal is different from the one the Court considered in *Miller*. In *Miller*, the Board discussed certain statements from appellant in a way that would not make sense if it had considered those statements to be incredible.[56] Here, the Board's discussion is far more equivocal. It could be read to be like the discussion in *Miller*, but it could also be read as making a *negative* credibility determination.[57] In other words, the Board's statement of reasons or bases is woefully inadequate about this critically important question. Certainly, if the Board meant to make a negative credibility determination, its discussion is deficient, but it is both confusing and highly conclusory. On remand, the Board must assess appellant's lay statements that, if deemed credible, satisfy the low

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[49] *Id.* at 81; *see also Kent v. Principi*, 389 F.3d 1380, 1384 (Fed. Cir. 2004) (noting a previous holding that this standard of review "contemplates *de novo* review of questions of law").

[50] *McLendon*, 20 Vet.App. at 81-85.

[51] R. at 14, 16, 18-19, 21.

[52] R. at 15, 18, 20, 22-23.

[53] *See, e.g.,* R. at 13-14, 17, 19, 22.

[54] *See* Secretary's Br. at 10-11.

[55] *See* Appellant's Reply Br. at 4-5 (discussing *Miller v. Wilkie*, 32 Vet.App. 249 (2020)).

[56] *Miller*, 32 Vet.App. at 262-63.

[57] *See, e.g.,* R. at 14.

threshold for an examination under *McLendon*. When doing so, the Board must remember that if it makes a negative credibility determination, it has an obligation to provide a full statement of its reasoning for reaching such a conclusion.

2. Right Foot Disability

The Secretary concedes that appellant's claim seeking service connection for a right foot condition should be remanded because it is dependent on the claim for a left foot drop that he has conceded should be remanded.[58] The Board recognized that the right foot disability was related to the left foot condition.[59] The Court agrees these conditions are inextricably intertwined. As we have explained, "where a decision on one issue would have a 'significant impact' upon another and that impact in turn 'could render any review by this Court of the issue [on the other claim] meaningless and a waste of judicial resources' the two claims are inextricably intertwined."[60] That is the case here, so remand is appropriate for appellant's claim seeking service connection for a right foot disability.

3. Residuals of a Left Tibia Fracture

The Board denied service connection for residuals of a left tibia fracture because it found that there was a "lack of medical evidence demonstrating . . . in-service tibia facture."[61] This finding is clearly erroneous. Appellant's separation examination explicitly and unambiguously stated that there was evidence of a "healed f[racture] l[eft] tibia."[62] And the evidence is equally clear that appellant's entrance examination did not note a left tibia fracture or any residuals of such an injury.[63] On remand, the Board must proceed to adjudicate appellant's claim for residuals of a left tibia fracture with a correct understanding of the facts about the existence of the in-service fracture.

4. Right Ear Hearing Loss

[58] *See* Secretary's Br. at 23.

[59] R. at 23-25.

[60] *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)).

[61] R. at 29.

[62] R. at 3136.

[63] R. at 3142-43.

The Secretary concedes that the Board erred with respect to appellant's claim for service connection for right ear hearing loss.[64] Specifically, the Secretary agrees with appellant that the Board member incorrectly stated at the hearing in this matter that the evidence showed that he did not meet the VA threshold for hearing loss in his right ear.[65] The Board member also stated that appellant should agree that his claim needed to be denied on that ground.[66] The Board member was clearly wrong because the evidence shows repeatedly that appellant's right ear hearing loss qualifies as a disability for VA purposes under 38 C.F.R. § 3.385.[67] The Board member's misstatements corrupted the hearing and, quite likely, impacted the evidence appellant elected to submit. This conduct violated the Board member's duties at the hearing and should be corrected on remand should appellant be provided with another hearing.[68]

Appellant also argues that the Board erred with respect to his right ear hearing loss claim when it relied on April 2015 and March 2017 VA medical examination reports that he asserts were inadequate.[69] The Secretary defends the Board's reliance on these examination reports.[70]

A medical opinion is adequate when it's "based upon consideration of the veteran's . . . medical history and examinations and also describes the disability in sufficient detail" so that the Board's "evaluation of the claimed disability will be a fully informed one."[71] "It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."[72] The Court also reviews Board determinations about the adequacy of medical opinions for clear error.[73] But this deferential standard of review does not relieve the Board of its obligation to provide an adequate statement of reasons or bases.[74]

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[64] *See* Secretary's Br. at 11-12.

[65] R. at 65-66.

[66] R. at 66.

[67] R. at 193 (Aug. 2017 VA examination); 707 (Mar. 2017 VA examination); 2650 (April 2015 examination).

[68] *See* 38 C.F.R. § 3.103(c)(2); *Bryant*, 23 Vet.App. at 492.

[69] Appellant's Br. at 16-17.

[70] Secretary's Br. at 15-17.

[71] *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

[72] *Nieves-Rodriguez*, 22 Vet.App. at 304.

[73] *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *see Gilbert*, 1 Vet.App. at 52.

[74] 38 U.S.C. § 7104(d)(1); *see Gilbert*, 1 Vet.App. at 53.

The Board's statement of reasons or bases for relying on the April 2015 and March 2017 VA hearing examination reports is deficient. First, the evidence indicates that there was a 15 decibel change in appellant's hearing between his pre-induction examination and his separation examination.[75] The Board does not address the hearing examiners' conclusions that there wasn't a "permanent positive threshold shift" in hearing given the 15 decibel shift in hearing.[76] It should do so on remand.

Second, the Board did not address the April 2015 examiner's apparent reliance on the fact that appellant's separation examination did not show hearing loss for VA purposes as the basis for a negative nexus determination.[77] While that fact can be relevant to the analysis, it is not categorically dispositive.[78] Of course, that may not have been what the examiner did. The Board should make this assessment in the first instance on remand. In addition, the Board should carefully consider our recent decision in *McCray v. Wilkie* when addressing this examination report.[79]

5. Allergic Condition

Appellant argues that the Board erred when it did not afford him the presumption of soundness with respect to an allergic condition.[80] The Secretary disputes appellant's contention and urges that we affirm the Board's denial of service connection for this condition.[81] Appellant has the better of the argument.

The statutory presumption of soundness provides that:

> [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 disordered noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service. [82]

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[75] *Compare* R. 3143 (pre-induction examination) *with* R. 3137 (separation examination).

[76] *See* R. at 716 (Mar. 2017 examination report), 2657 (April 2015 examination report).

[77] R. at 716.

[78] *See Hensley v. Brown*, 5 Vet.App. 155, 160 (1993).

[79] 31 Vet.App. 243 (2019).

[80] Appellant's Br. at 26-27.

[81] Secretary's Br. at 20-22.

[82] 38 U.S.C. § 1111.

VA's implementing regulation further states that "[o]nly such conditions as are recorded in examination reports are to be considered as noted."[83]

The Board found that the presumption did not apply because "moderate hay fever with occasional shortness of breath was noted upon his pre-induction examination in December 1965."[84] The Board clearly erred in making that determination. The pre-induction examination report does not "note" hay fever or any allergic condition.[85] Rather, a separate document – a report of medical history – discusses hay fever.[86] This document is *not* an examination report, and that is what matters for the presumption of soundness.[87] On remand, the Board must proceed on the basis that the presumption of soundness applies to appellant's claim seeking service connection for an allergic condition.

The Secretary argues, in part, that any error the Board may have made concerning the presumption of soundness is harmless because "[t]he Board also found that [a]ppellant's STRs were negative for any complaints, symptoms, or treatment for any allergic condition at any time during service, and that [a]ppellant reported he did not receive treatment for his allergic condition during service."[88] To begin with, it's not clear that the Board was consistent about the presence of allergy symptoms during service because in another part of its decision it stated that the "evidence shows that the [v]eteran did experience allergies during service. . . ."[89] But even if we leave that confusion aside, we can't say that the error was harmless. Once the presumption of soundness applies, VA faces a heightened evidentiary burden to rebut it.[90] By not affording appellant the presumption of soundness, the Board skewed the evidentiary analysis and that establishes prejudice.[91]

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[83] 38 C.F.R. § 3.304(b).

[84] R. at 32.

[85] R. at 3142-43.

[86] R. 3140-41.

[87] *See* 38 C.F.R. § 3.304(b); *see also Crowe v. Brown*, 7 Vet.App. 238, 245 (1994).

[88] Secretary's Br. at 22.

[89] R. at 33.

[90] *See* 38 U.S.C. § 1111 (providing that the presumption may be rebutted by clear and unmistakable evidence); *see also Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Horn v. Shinseki*, 25 Vet.App. 231, 234 (2012).

[91] *See Simmons v. Wilkie*, 30 Vet.App. 267, 281-83 (2018).

6. Asthma

Appellant argues that his claim for service connection for asthma should be remanded because it is inextricably intertwined with his claim for an allergic condition.[92] The Secretary implicitly concedes this is the case, although he argues against remand because he asserts that we should affirm the denial of service connection for an allergic condition.[93] As we described above, we are remanding the claim seeking service connection for an allergic condition. So, we will also remand the claim seeking service for asthma.[94]

7. Dermatitis

The Secretary concedes that appellant's claim seeking service connection for dermatitis should be remanded because it is inextricably intertwined with his claim for pain/swelling of the bilateral lower extremities.[95] The Court agrees with the Secretary's concession. There is evidence in the record that suggests a link between appellant's dermatitis and his leg pain/swelling.[96] So, remand is required.[97]

8. Acquired Psychiatric Disability

We also conclude that we must remand appellant's claim seeking service connection for an acquired psychiatric condition. The record contains a July 6, 2015, VA medical note that states that appellant was "[v]ery anxious over healthcare and multiple problems" and that he had requested a follow-up appointment "asap for . . . anxiety."[98] The Board did not address this document. This record may suggest a connection between appellant's mental health condition and the other matters at issue in this appeal. Because we are remanding appellant's claims for these other conditions, we will also remand the psychiatric disability claim because a decision on those claims may affect the Board's assessment of the July 2015 medical record and, thereby, his claim for service connection for an acquired psychiatric disability.[99]

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[92] R. at 29.

[93] *See* Secretary's Br. at 23-24.

[94] *See Henderson*, 12 Vet.App. at 20.

[95] *See* Secretary's Br. at 23.

[96] R. at 2636.

[97] *See Henderson*, 12 Vet.App. at 20.

[98] R. at 1134-36.

[99] *See Henderson*, 12 Vet.App. at 20 (discussing inextricably intertwined claims).

C. Appellant's Rights on Remand

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.[100] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[101] The Board must consider any such additional evidence or argument submitted.[102] The Board must also proceed expeditiously.[103]

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the January 31, 2019, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: May 6, 2020

Copies to:

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VA General Counsel (027)

[100] *See Best v. Principi*, 15 Vet.App. 18, 20 (2001).

[101] *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

[102] *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

[103] 38 U.S.C. §§ 5109B, 7112.