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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3037

JOHN D. WILSON, JR., APPELLANT,

V.

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

Before SCHOELEN, *Senior Judge*.[1]

MEMORANDUM DECISION

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

SCHOELEN, *Senior Judge*: The pro se appellant, John D. Wilson, Jr., through counsel, appeals an August 31, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for an acquired psychiatric disorder, including post-traumatic stress disorder (PTSD), major depressive disorder, alcohol dependence (in remission), and a personality disorder, including as secondary to service-connected disabilities. Record of Proceedings (R.) at 3-16. Because the Board failed to provide adequate reasons or bases for its decision, the Court will vacate the August 2018 Board decision and remand the matter for further adjudication consistent with this decision.

I. BACKGROUND

The appellant served in the U.S. Navy from January 1986 to January 1990, and from January 1992 to March 1994. R. at 2973-75. In February 2000, the appellant filed a disability compensation claim for a "present mental condition." R. at 6761-62. In October 2000, the regional office (RO) denied service connection for an acquired psychiatric disorder. R. at 6725-26; 6735-

[1] Judge Schoelen is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 04-20 (Jan. 2, 2020).

38. In a September 2007 decision, the Board also denied entitlement to service connection for an acquired psychiatric disorder. R. at 4621-37.

In a November 2009 joint motion for remand (JMR), the parties agreed that the Board failed to consider the appellant's lay statements that pain caused by his service-connected physical disabilities caused psychiatric disabilities. R. at 2976, 4273-82. A February 2010 eyewitness submission from Mr. Larry Lipton noted that, while in service, the appellant responded to a "major fire" while on patrol, and that the appellant became "withdrawn and antisocial after the fire and after the patrols". R. at 4127. In December 2010, the Board remanded the appellant's claim to determine "whether any currently manifested psychiatric disability is proximately due to, the result of, or aggravated by his service-connected disabilities." R. at 2686.

During a January 2012 VA examination, the examiner noted that the appellant did not meet the criteria for PTSD under the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), but diagnosed the appellant with depressive disorder and "alcohol dependence, in a controlled environment." R. at 3898-923. The examiner opined that his disabilities were not more likely than not due to service or caused by his service-connected disabilities. R. at 3921-22.

In August 2013, the Board again denied the appellant's service-connection claim for an acquired psychiatric disability. R. at 3595-612. On December 5, 2014, the Court remanded the matter for additional development. R. at 2841-45. In October 2016, the appellant underwent another VA examination, during which the examiner found that the appellant's mental health disabilities could not be linked back to service. R. at 1443-45.

In an August 2017 decision, the Board once again remanded the matter for additional development. R. at 447-50. The appellant underwent another VA examination on April 2018. R. at 75-88.

In the August 2018 decision on appeal, the Board denied the appellant's service-connection claim for an acquired psychiatric disorder, including PTSD, major depressive disorder, alcohol dependence (in remission), and a personality disorder, including as secondary to service-connected disabilities. R. at 3-16. This appeal followed.

II. ANALYSIS

Before deciding a claim, the Board is required to consider all relevant evidence of record and to consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. § 7104(a); *Weaver v. Principi*, 14 Vet.App. 301, 302 (2001) (per curiam order). In addition, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 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).

When reviewing Board decisions, the Court liberally construes arguments made by pro se appellants. *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992). However, like other parties, pro se appellants must raise specific arguments demonstrating perceived error in the Board's decision. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 Fed.Appx. 371 (Fed. Cir. 2008); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments). Similarly, pro se appellants "bear[ ] the burden of persuasion on appeals to this Court." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The pro se appellant makes several related arguments: The Board (1) provided inadequate reasons or bases for its denial of his acquired psychiatric disorder claims; (2) erred by "giving the examining physician 'total weight' . . . and totally discounted 'treating physician' opinions, without stating an adequate reason or basis"; (3) erred by totally disregarding the treating physician over the opinion of the examiner; and (4) failed to consider eyewitness lay evidence pertaining to the triggering event of his PTSD.[2] Appellant's Brief[3] (Br.) at 1-17.

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[2] The appellant contends that the Board committed "clear and unmistakable error (CUE)"; however, a request to revise a *final* RO or Board decision based on CUE is a collateral attack on that decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000). Keeping in mind this Court's command to construe the pro se appellant's submissions liberally, *De Perez*, 2 Vet.App. at 86, we are content that he uses the term "CUE" to argue that the Board erred in the decision on appeal and seeks review of that decision on a direct basis. Therefore, the Court will not address assertions of "CUE" any further, but will instead review the decision on appeal for clear error and for adequate reasons or bases.

[3] The appellant's brief is divided into two parts: his three page, handwritten informal brief and an attached 17-page, typed legal brief detailing his full arguments. Both documents are separately numbered. For the sake of clarity, the Court's citations to the "Appellant's Brief" will refer to his 17-page attachment.

The Secretary concedes that remand is warranted. Specifically, the Secretary notes that the Board did not address a February 5, 2010, eyewitness submission from Mr. Lipton, who asserted that the appellant had received injuries to his head and back while his patrol responded to a "major fire," which caused him to suffer "some sort of mental blockage." Secretary's Br. at 5 (quoting R. at 4127). The Secretary also concedes a remandable error that the pro se appellant did not assert in his brief: that the Board erred by finding that "[t]he Veteran's DD Form 214 does not indicate any award of heroism," and that "assertions of combat participation in any form, much less his alleged decorations for bravery in such actions, are unfounded." *Id.* at 6 (quoting R. at 7). The Secretary notes that the Board's statements regarding the appellant's DD-214 were factually wrong, as the document indicates awards of the National Defense Service Medal, Arctic Service Medal, Navy Expeditionary Medal, Enlisted Submarine Qualification Insignia, Strategic Deterrent Patrol Pin with 1 Silver Star, Battle "E" Award, and Sea Service Ribbon with 2 Bronze Stars. *Id.* (citing R. at 2973-74).

The Court agrees with the Secretary that the Board provided insufficient reasons or bases to facilitate judicial review. Specifically, we agree with the Secretary's concession that the Board improperly failed to discuss the February 5, 2010, eyewitness submission from Mr. Lipton, which discussed in detail the appellant's alleged stressor (responding to a "major fire" while on patrol), as well as the appellant's shift in demeanor in the aftermath ("[Mr. Wilson] had become withdrawn and antisocial after the fire and after the patrols"). It is the province of the Board to assess and weigh the evidence of record in the first instance, not this Court's. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (stating that as finder of fact, the Board has the duty to weigh the evidence in the first instance); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). Accordingly, because the Board wholly failed to address and weigh this favorable evidence in the first instance, the Court will remand the matter for the Board to provide an adequate statement of reasons or bases. *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 where the record is otherwise inadequate").

Additionally, the Court agrees with the Secretary that the Board provided inadequate statements regarding the appellant's service medals and awards. In the decision on appeal, the

Board stated that the appellant "described being on [a] classified mission in the Navy aboard a submarine, and stated that he received the Bronze Star and Silver Star Medal for heroism in combat situations. He asserts that he was involved in the firing of ballistic missiles from submarine platforms against enemy targets." R. at 7. After recounting the appellant's description, the Board stated that the appellant's DD-214 "does not indicate any award for heroism." *Id.* The Board thus concluded that "the [appellant's] assertions of combat participation in any form, much less his alleged decorations for bravery in such actions, are unfounded." *Id.* This statement of reasons or bases is insufficient to facilitate judicial review because the Board's statements appear to directly conflict with the appellant's DD-214, which noted a "Strategic Deterrent Patrol Pin with 1 Silver Star . . . and Sea Service Ribbon with 2 Bronze Stars." R. at 2973-74. Therefore, the Court agrees with the Secretary that it is unclear how the Board reached its conclusion regarding the appellant's in-service awards, and the Court should sufficiently address the matter on remand.

Given this disposition, the Court will not address the other arguments and issues raised by the appellant.[4] *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). The appellant is free on remand to submit additional evidence and argument, including the arguments raised in his briefs 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 must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

[4] To the extent that the appellant contends that the Board provided inadequate reasons or bases by giving "total weight" to the opinion of the VA examiner, we will not address the substance of his arguments, but remind the appellant that it is the Board's duty to weigh the evidence of record in the first instance, *see Buchanan*, 451 F.3d at 1336; *Owens*, 7 Vet.App. at 433, and that mere disagreement does not demonstrate that the Board failed to adequately explain the basis of its decision. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 53 (the Court is prevented from overturning a Board decision where there is a "plausible" basis in the record for its factual determinations).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and after a review of the record, the Board's August 31, 2018, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 7, 2020

Copies to:

John D. Wilson, Jr.

VA General Counsel (027)