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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1007

DONALD STEVEN GIPSON, 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 Donald Gipson served the Nation honorably in the United States Navy. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a November 9, 2018, decision of the Board of Veterans' Appeals that denied his request to reopen a previously denied claim seeking service connection for bilateral hearing loss.[2] Because the Board did not support its decision with an adequate statement of reasons or bases, we will set aside the decision on appeal and remand this matter for further proceedings.

I. ANALYSIS

The Board denied reopening appellant's claim for service connection for bilateral hearing loss because it concluded that the evidence appellant had submitted to reopen his claim was cumulative of evidence already considered in connection with a November 2006 unappealed rating

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

[2] R. at 4-12. The Board reopened appellant's previously denied claim seeking service connection for tinnitus and then granted service connection for that condition. These are favorable determinations that we may not review. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

decision denying that claim.[3] Appellant challenges that determination. The Secretary defends the Board's decision and urges that we affirm.

As applicable to this appeal,[4] a claimant who seeks to reopen a previously denied claim may do so by submitting new and material evidence.[5] VA defines "new and material" as follows:

> New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.[6]

Whether evidence is new and material for the purposes of reopening a finally disallowed claim is a finding of fact we review for clear error.[7] A factual finding is clearly erroneous when the Court is "left with the definite and firm conviction that a mistake has been committed."[8] And 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.[9]

The Board's statement of reasons or bases for declining to reopen appellant's claim seeking service connection for bilateral hearing loss is inadequate. In his Notice of Disagreement (NOD) with the rating decision starting the road to this appeal, as well as in his Substantive Appeal following the issuance of a Statement of the Case, appellant explained that he suffered from hearing loss while in service even though he did not have hearing loss before he joined the

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[3] R. at 6.

[4] As part of the passage of the Veterans Appeals Improvement and Modernization Act of 2017, VA no longer reopens claims based on "new and material evidence." Pub. L. 115-55, 131 Stat. 1105 (Aug. 23, 2017). That language is derived from the pre-Act version of the applicable regulation. *See* 38 C.F.R. § 3.156(a) (2019); 38 C.F.R. § 3.2400 (2019) (explaining that claims before the effective date of the Act are "legacy appeals" to be analyzed under VA's traditional process and claims after that date are to be adjudicated under a modernized appeal system); 84 Fed. Reg. 2449 (Feb. 7, 2019) (stating that the effective date of the Act is February 19, 2019). Instead, claimants can file supplemental claims based on "new and relevant evidence." 38 U.S.C. § 5108(a). Appellant's claim was adjudicated under the legacy appeals system and, thus, the "new and material evidence" standard applies here.

[5] *Emerson v. McDonald*, 28 Vet.App. 200, 206 (2016).

[6] 38 C.F.R. § 3.156(a) (2019).

[7] 38 U.S.C. § 7261(a)(4); *Elkins v. West*, 12 Vet.App. 209, 217-18 (1999) (en banc).

[8] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

[9] 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

military.[10] Strangely, the Board did not mention these statements at all in its decision concerning hearing loss. Instead, it stated that "[e]vidence received since [the unappealed November 2006 rating decision] includes audiological treatment records that show the [v]eteran has a hearing loss disability."[11] That might be so, but the evidence also included these lay statements that the Board entirely ignored.

And there is a twist here that augments the inadequacy of the Board's reasoning concerning the hearing loss issue. Appellant also sought to reopen his claim seeking service connection for tinnitus that had also been denied in the unappealed November 2006 rating decision. The Board granted the request to reopen that claim and then granted service connection on the merits.[12] In its discussion about reopening the tinnitus claim, the Board acknowledged appellant's lay statements concerning tinnitus beginning during service and credited them as new and material evidence sufficient to reopen the claim.[13] These statements appear in the same documents that contain appellant's quite similar lay statements about hearing loss, the statements the Board entirely ignored.[14] It's not clear to the Court why the statements about tinnitus and hearing loss are different for purposes of reopening, especially because the November 2006 rating decision denied service connection for both hearing loss and tinnitus on precisely the same basis.[15] Perhaps there is a difference, but we would be guessing about the Board's reasoning if we tried to craft an explanation.

The Secretary attempts to defend the Board's decision by arguing, in part, that the Board is presumed to have considered all the evidence and is under no obligation to discuss every piece of evidence.[16] That is certainly true.[17] But the evidence that the Board did not discuss here was the central evidence for determining whether appellant's claim for service connection for hearing loss should be reopened. No matter how deferential our standard of review, we can't *review* the Board's

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[10] R. at 43 (Substantive Appeal); 65 (NOD).

[11] R. at 6.

[12] R. at 7-9.

[13] R. at 7.

[14] *See* R. at 43 (Substantive Appeal); 65 (NOD).

[15] *See* R. at 3023.

[16] *See* Secretary's Brief at 7.

[17] *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

determination that appellant's lay statements were not new and material evidence if the Board never makes such a determination in the first place.[18] On remand, the Board must consider appellant's lay statements concerning the onset of his hearing loss, determine whether they qualify as new and material evidence, and fully explain the reasoning for this determination. And the Board should carefully consider the reasoning it has already set forth for the similar statements concerning tinnitus that the Board determined were new and material evidence.

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.[19] On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.[20] The Board must consider any such additional evidence or argument submitted.[21] The Board must also proceed expeditiously.[22]

III. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the November 9, 2018, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: May 7, 2020

Copies to:

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VA General Counsel (027)

[18] *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013).

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

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

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

[22] 38 U.S.C. §§ 5109B, 7112.