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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0096

ARTURO MALDONADO, APPELLANT,

V.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Arturo Maldonado appeals a December 4, 2018, Board of Veterans' Appeals decision that denied benefits for (1) diabetes mellitus, type 2, including as secondary to service-connected bilateral knee disabilities or depression; and (2) an acquired psychiatric disorder other than depression.[1] This appeal is timely, the Court has jurisdiction to review the Board's decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

For diabetes, we are asked to address whether the Board erred in not addressing the veteran's theory of service connection and in relying on inadequate medical examinations. For the acquired psychiatric disorder, we are asked to decide whether the Board erred in finding that the veteran's anxiety was part of his service-connected depression. We agree with the parties that the Board erred regarding diabetes, and we find that the Board inadequately explained its determinations regarding anxiety. Thus, we will set aside that part of the Board's December 4, 2018, decision that addressed diabetes and an acquired psychiatric disorder, and we will remand those matters for further proceedings.

[1] The Board remanded the matters of service connection for a low back disability and obstructive sleep apnea. The Court lacks authority to address these nonfinal matters. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

I. ANALYSIS

A. Diabetes

Mr. Maldonado argues that the Board erred in not addressing his explicitly raised theory that his service-connected knee disabilities prevented him from engaging in proper exercise, which in turn caused him to become overweight and develop diabetes. The Secretary agrees.

The Board is required to support its decision with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009); and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Here, as the parties agree, the Board's statement of reasons or bases is inadequate because the Board did not address an explicitly raised theory of service connection. In a 2009 statement in support of claim, Mr. Maldonado argued that his diabetes was related to service because his service-connected disabilities led to the obesity that caused his diabetes. R. at 4110. He reiterated this theory at a 2015 Board hearing. R. at 2244. In the decision on appeal, however, the Board did not address the veteran's explicitly raised theory. Its failure to do so renders its statement of reasons or bases inadequate. *See Robinson*, 21 Vet.App. at 552. Remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has failed to provide an adequate statement of reasons or bases).

Mr. Maldonado also argues, and the Secretary agrees, that remand is warranted because the Board relied on inadequate medical examinations. The duty to assist includes the duty to conduct an adequate medical examination. 38 U.S.C. § 5103A; *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations" and "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id*. (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). We review for clear error the Board's determination that the duty to assist has been met. *Nolen v. Gober*, 14 Vet.App.

183, 184 (2000) (Board's determination whether the Secretary has fulfilled his duty to assist generally is a finding of fact that the Court reviews under the "clearly erroneous" standard of review); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) ("'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.'" (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))).

As the parties agree, the 2016 and 2017 examinations relied upon by the Board are not detailed enough to inform the Board's decision because they were based on improper standards. The 2016 examiner imposed too high of a standard when opining that "it is not possible to opine that [obesity] is the cause of [diabetes] to a probability of [greater than] 50%." R. at 1445. The evidentiary standard used by the Board in deciding a veteran's claim is the "at least as likely as not standard." *Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010). And, the 2017 examiner addressed only whether there had been "permanent aggravation" of the veteran's service-connected depression. R. at 1224. As we recently held in *Ward*, the proper standard in an aggravation inquiry is not whether there was "permanent worsening" but, rather, "any increase" in disability. *Ward v. Wilkie*, 31 Vet.App. 233, 241-42 (2019).

Because the examiner's opinions were based on incorrect standards and did not include information relevant to the standards used by the Board to decide the veteran's claim, they were not detailed enough to fully inform the Board's decision. *See Stefl*, 21 Vet.App. at 123. We therefore agree with the parties that the Board relied on inadequate examinations, and we conclude that that the Board clearly erred in finding the duty to assist had been met. *See id.*; *see also Nolen*, 14 Vet.App. at 184. Remand is warranted for the Board to obtain an adequate examination or explain why one is not necessary.

B. Anxiety

We also will remand the Board's decision regarding an acquired psychiatric disorder other than depression. This claim arose as part of the veteran's claim for benefits based on depression. R. at 2210, 4112. After awarding the veteran a 10% disability rating for depression, a rating that does not include anxiety, VA decided to separately evaluate his anxiety symptoms to determine whether they were evidence of an independent disability. R. at 2214. In the decision on appeal, the Board denied service connection for anxiety because it found, based on new medical examinations,

that the veteran suffered from a single condition, diagnosed as depression-with-anxiety, rather than merely depression. R. at 20.

However, in determining that the veteran's diagnosis had changed from depression to depression-with-anxiety, the Board did not address regulations regarding a change in diagnosis. *See* 38 C.F.R. §4.125(b) (2019). This is an important analysis because, on its face, it looks like either the RO shortchanged the veteran, by not including his anxiety as a compensable symptom, or the Board refused to grant service connection for a disability despite a positive medical opinion. As the veteran notes, the diagnostic criteria in the *Diagnostic and Statistical Manual of Mental Disorders* for his service-connected disability and his newly diagnosed disability are different.

What's more, even accepting that the veteran's anxiety symptoms were part of his service-connected depression, the Board did not discuss how the veteran is being compensated for those symptoms. The Secretary has the duty to maximize a claimant's benefits and the Board should have explained how VA is compensating the veteran for all his symptoms, including the service-connected anxiety symptoms. *See Bradley v. Peake*, 22 Vet.App. 280, 294 (2008) ("The Secretary is required to maximize benefits."); *see also Schafrath*, 1 Vet.App. at 592.

VA rated the veteran at 10%in May 2016, but within months of that decision—and certainly within the limit of a year—it received new evidence suggesting that his psychiatric disability was more severe. The Board acknowledged as much when it remanded the service-connection claim in 2017 to obtain clarifying opinions. This raises the possibility that the veteran's rating never became final. *See Turner v. Shulkin*, 29 Vet.App. 207, 219 (2018). Yet, this is a possibility that the Board left unexplored when it left the veteran uncompensated for his anxiety symptoms. Given the unique procedural posture of this case—a bifurcation seemingly resulting in uncompensated service-connected symptoms, VA's duty to maximize benefits, and the broad authority VA has when developing claims, *see* 38 U.S.C. § 5103A(i) ("Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate."), the Board needed to have done more than deny the claim without further explanation. *See Allday*, 7 Vet.App. at 527.

At the end of the day, the veteran's claim has been about compensation for his symptoms, which include anxiety, and VA has decided that these symptoms are part of his service-connected depression. Yet, despite multiple avenues, VA has not addressed how the veteran will be

compensated for this symptom. The Board's failure to do so and to address all reasonably raised regulations frustrates judicial review and renders its statement of reasons or bases inadequate. *See Schafrath*, 1 Vet.App. at 592. Remand is warranted. *See Tucker*, 11 Vet.App. at 374; *see also Hensley* v. West, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000) (when a court of appeals reviews a lower court's decision, it may remand the case if the previous adjudicator failed to make findings of fact essential to the decision). Although Mr. Maldonado also asks us to reverse the Board's decision, the Board's failure to make necessary determinations in the first instance prevents us from doing so. *See Hensley*, 212 F.3d at 1263 ("appellate tribunals are not appropriate fora for initial fact finding").

C. Other Arguments

Because the claim is being remanded, the Court need not address Mr. Maldonado's additional arguments that would result in no broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

II. CONCLUSION

Based on the above, that part of the Board's December 4, 2018, decision that addressed diabetes and an acquired psychiatric disorder are SET ASIDE and those matters are REMANDED for further proceedings.

DATED: May 8, 2020

Copies to:

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