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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2133

ALBERT C. WASHINGTON, 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*: Self-represented Army veteran, Albert C. Washington appeals a June 14, 2018, Board of Veterans' Appeals decision denying service connection for coronary artery disease (CAD), with recurrent cellulitis, and for hepatitis/liver disease; a rating above 10% for gastroesophageal reflux disease (GERD); and compensation under 38 U.S.C. § 1151 for stomach and esophageal abnormalities, as a result of esophagogastroduodenoscopies (EGD) performed by VA on February 4 and August 5, 2008. The appeal is timely; the Court has jurisdiction to review the Board 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). As we explain, we accept the Secretary's concession that the Board decision should be set aside and remanded to readjudicate all the claims.

I. ANALYSIS

As finder of fact, the Board has the duty to weigh the evidence in the first instance. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). We review the Board's weighing of the evidence under the "clearly erroneous" standard. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Under that standard, we may not reverse a Board finding unless, on review of the entire record, we are left with the definite and firm conviction that a mistake has been

committed. *Id.* at 1378-79. The appellant bears the burden of showing that the Board finding is clearly erroneous. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc); *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

Additionally, the Board is required to support its decision with a written statement of its 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 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).

The Secretary concedes that remand of all claims is appropriate. He explains that remand of the CAD claim is appropriate because the Board denied secondary service connection without a medical opinion that correctly addressed whether medication for the veteran's service-connected disabilities aggravates his CAD. In November 2014, VA had the appellant examined to address his claimed heart, esophageal, and hepatitis/liver conditions. R. at 995-1015. As the Secretary points out, that examination is inadequate under 38 C.F.R. § 3.310(a) because it fails to address whether medication for the veteran's service-connected disabilities aggravates his CAD.

What's more, the Board also appears to have missed the appellant's arguments about the adequacy of that examination. The appellant argued that the November 2014 VA examiner failed to address his previous diagnoses of arrhythmia and failed to note that he had a pacemaker implanted. On remand, the Board should address these contentions, *see Robinson*, 21 Vet.App. at 552, and it must obtain an adequate medical examination addressing secondary service connection.¹

The Secretary also concedes that remand is warranted for the Board to explain why the veteran's GI bleeding and anemia, noted when he was hospitalized in September 2017, do not warrant a higher rating for his GERD. The Board denied a rating above 10% when it determined

¹ The appellant is concerned with the Secretary's contention that he has limited his appeal to only secondary service connection. But despite his raising this point, the Secretary has asked us to remand the CAD claim in its entirety. Thus, the appellant need not concern himself with the issue; the entire claim is going back.

that the veteran did not have symptoms that could warrant a higher rating under 38 C.F.R. 4.114, Diagnostic Code 7346. R. at 44-46. But DC 7346 contemplates anemia and bleeding issues as symptoms that warrant a 30 or 60% ratings. *See* 38 C.F.R. 4.114, DC 7346 (2019). At minimum, the hospitalization and associated symptoms raise a question of whether the veteran's disability is productive of considerable or severe impairment of health. *See id.* Thus, the Secretary is correct that remand is warranted for the Board to provide an adequate statement of reasons or bases addressing these symptoms. *See Allday*, 7 Vet.App. at 527.

Next, the Secretary concedes that remand of the liver disability claim is warranted because the Board found that the veteran did not have a current liver disability based on the November 2014 examination, despite November 2008 imaging studies suggesting that he did. The November 2008 imaging noted a mildly enlarged fatty and borderline cirrhotic liver. R. at 1277-78. Yet, the November 2014 examination concluded that the veteran did not have a liver disability. This discrepancy potentially stems from the fact that the 2014 examination did not include imaging studies. R. at 1014. The Board did not address this discrepancy. And the Secretary is correct that its failure to do so requires remand. *See Allday*, 7 Vet.App. at 527.

Finally, the Secretary concedes that remand of the appellant's claim for compensation under section 1151 is warranted. Although there appears to be confusion about whether the appellant raised this claim, the Secretary is correct that the appellant's contentions about injuries he suffered from VA treatment fall under this statute. Under section 1151, a veteran may be compensated for a disability proximately caused by VA hospital care or surgical treatment. 38 U.S.C. § 1151(a); 38 C.F.R. § 3.361 (2019). The appellant has argued that his stomach and esophageal abnormalities were caused by EGD procedures performed by VA. And he has argued that these disabilities were caused by medication prescribed by VA. The Secretary correctly explains that the Board did not address the appellant's contention about whether his medication caused these problems. Because the Board must address all theories raised by a claimant, the claim must be remanded. *See Robinson*, 21 Vet.App. at 552.

The Secretary notes that the appellant had raised arguments about an eye claim that was not before the Board. The Secretary is correct that this falls outside our jurisdiction. *See* 38 U.S.C. § 7252(a). We note that VA received a Notice of Disagreement from the appellant mentioning that his eye problems are related to VA medication and GERD on March 17, 2015. R. at 460. As VA received this document before March 24, 2015, the amendments to 38 C.F.R. § 3.155(a) that

eliminated informal claims, in favor of an "intent to file" system, do not apply and VA should treat the March submission as an informal claim. *See* 79 Fed. Reg. 57,660, 57,664 (Sept. 25, 2014). Even so, there is no question that this claim, formal or not, is outside our jurisdiction and that the appellant should press it with the agency. *See Payne v. Wilkie*, 31 Vet.App. 373, 392 n 9 (2019).

If the appellant intended to raise additional arguments, we find that they are too vague and unsupported to permit judicial review. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Evans v. West*, 12 Vet.App. 22, 31 (1998) ("Absent evidence and argument, the Court will give no further consideration to this unsupported contention."). In pursuing his claim on remand, however, the veteran will be free to submit any such 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

For these reasons, the Board's June 14, 2018, decision is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: May 11, 2020

Copies to:

Albert C. Washington

VA General Counsel (027)