Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3199

MARIO B. TOMSICH, 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 Mario Tomsich served the Nation honorably in the United States Army. In this appeal, which is timely and over which the Court has jurisdiction,[1] he challenges a January 15, 2019, decision of the Board of Veterans' Appeals that denied him service connection for sleep apnea, including as secondary to his service-connected major depressive disorder (MDD).[2] Because the Board's decision is not clearly erroneous, is based on a correct understanding of the governing law, and is supported by an adequate statement of reasons or bases, we will affirm.

I. ANALYSIS

Appellant argues that the Board erred when it denied him service connection for sleep apnea, including as secondary to MDD. He raises two arguments, although they are functionally the same. He first asserts that the Board relied on an inadequate October 2018 VA medical examination report. He also claims that the Board did not ensure that VA substantially complied

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

[2] Record (R.) at 5-9.

with a prior Board remand because it did ensure that the October 2018 medical opinion was adequate. The Secretary defends the Board's decision in full. He urges us to affirm.

A. The Legal Landscape

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]

The Court also reviews Board determinations about the adequacy of medical opinions for clear error.[8] 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."[9] "It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."[10]

A claimant has the right to compliance with a remand from either the Board or this Court.[11] The Secretary has an affirmative duty "to ensure compliance with the terms of the remand."[12] The

---

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

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

[8] *Id*. at 104; *see Gilbert*, 1 Vet.App. at 52.

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

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

[11] *Stegall v. West*, 11 Vet.App. 268, 271 (1998).

[12] *Id*.

Secretary fulfills this duty by substantially complying with the order, because we have recognized that absolute compliance is not necessary.[13] We have held in an analogous situation involving substantial compliance as a standard that the "general legal concept [is] that substantial compliance means actual compliance with . . . essential objectives."[14]

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.[15]

B. Appellant's Arguments Lack Merit.

The medical professional who examined appellant and prepared the October 2018 VA medical opinion determined that appellant's sleep problems did not meet the definition of a diagnosable sleep disorder.[16] Instead, the examiner concluded that appellant's "sleep dysfunction is a symptom of his [MDD] and cannot be considered to be a separate or discrete sleep disorder."[17] The examiner reached these determinations after personally examining appellant, assessing his medical records, and reviewing medical sources providing the relevant diagnostic criteria for sleep disorders.[18] The examiner's reasoning is understandable and complete. The Board's relied on the examination to deny the claim because appellant lacked a diagnosed sleep disorder.[19]

Appellant generally argues that the October 2018 opinion contained an inadequate rationale for the conclusions.[20] He asserts that the examiner incorrectly characterized his sleep difficulties as symptoms of his MDD instead of as a standalone sleep disorder. But appellant's argument in this respect is entirely underdeveloped, something that can be fatal to an appeal.[21] To the extent

---

[13] *See, e.g., Dyment v. West*, 13 Vet.App. 141, 146-47 (1999); *Evans v. West*, 12 Vet.App. 22, 31 (1998).

[14] *Missouri Veterans Comm'n v. Peake*, 22 Vet.App. 123, 127 (2008).

[15] 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

[16] R. at 25.

[17] *Id*.

[18] R. at 24-27.

[19] R. at 6-7.

[20] *See* Appellant's Brief (Br.) at 6-8.

[21] *See, e.g.*, *Woehlaert v. Nicholson*, 21 Vet.App. 456, 462-63 (2007); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Evans v. West*, 12 Vet.App. 22, 31 (1998); *Marciniak v. Brown*, 10 Vet.App. 198, 201 (1997); *Parker v. Brown*, 9 Vet.App. 476, 481 (1996); *see also Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (noting that the courts of appeal are "not required to manufacture appellant['s] argument); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 372 (8th Cir. 1993) (holding that, where an appellant has failed to demonstrate error, a court isn't required to search the

we understand the argument from what limited information appellant provides, it amounts to nothing more than a disagreement with the conclusion the examiner reached. That is insufficient to establish error.

Appellant mounts a second attack on the opinion. He argues that "[t]he examiner also failed to explain how the [a]ppellant's MDD caused his chronic sleep impairment when his records indicated that his trouble sleeping predated his claim for MDD."[22] He doesn't provide any additional explanation for why he thinks this is unusual. And as far as we can see, there is no relevance to when appellant *filed his claim* for MDD in terms of the examiner's opinion about sleep disturbances. We won't consider this argument further.

Next, appellant suggests that the examiner erred by rendering her opinion without obtaining a sleep study. To begin with, appellant, who was represented by the same counsel at the Agency who represents him before this Court, did not make this argument to the Board. This is so even though his counsel submitted a letter challenging the adequacy of the October 2018 examination on other grounds.[23] This failure deprived the Board of the opportunity to address this argument. As such, we decline to consider it beyond making one observation.[24] Appellant provides no support for the need for a sleep study to render the opinion the examiner provided in October 2018. His lay musings are not enough to show error even if we were to address the argument.

Finally, in an argument made only in a single paragraph, appellant suggests that the Board failed to ensure substantial compliance with an earlier Board remand.[25] While he is less than clear in his brief (and he did not file a reply brief), it seems fairly certain that he is referring to the Board's June 2018 remand order ordering a new examination.[26] Appellant is certainly correct that he is entitled to substantial compliance with the June 2018 remand.[27] However, it appears that appellant's substantial compliance argument is nothing more than a repackaged version of the

---

record for an error).

[22] Appellant's Br. at 7.

[23] *See* R. at 11-12.

[24] *See Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000).

[25] *See* Appellant's Br. at 8.

[26] *See* R. at 454-57.

[27] *See Stegall*, 11 Vet.App. at 271.

argument we have already rejected concerning the adequacy of the October 2018 examination. Therefore, it fares no better. We reject this iteration as we did its alternate incarnation.

In sum, we have carefully reviewed the Board's decision. The Board applied the correct law, fully explained its conclusions, and did not commit clear error as to its factual determinations. Appellant has not met his burden of demonstrating error.[28] Thus, we will affirm.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the January 15, 2019, Board decision.

DATED: May 11, 2020

Copies to:

Jerusha L. Hancock, Esq.

VA General Counsel (027)

[28] *See Hilkert*, 12 Vet.App. at 151.