

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1045

ALBERT B. ANDERSON, 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 appellant, Albert B. Anderson, through counsel, appeals a January 10, 2019, Board of Veterans' Appeals (Board) decision that denied his claims for service connection for bilateral plantar fasciitis with right heel spur and obstructive sleep apnea. Record of Proceedings (R.) at 7-15. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matters for readjudication.

I. BACKGROUND

The appellant served honorably in the U.S. Army from May 1970 through January 1972 as a medical corpsman. R. at 1738. In November 1971, he was treated for plantar warts. R. at 2027. During his December 1971 separation examination, he reported frequent trouble sleeping, and the examining physician noted that the appellant had reported having had sleeping difficulty for many years. R. at 2050-52. The appellant also reported that he had foot problems in service; the examiner

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).

stated that the foot problems referred to the appellant's plantar warts and, on examination, found his feet normal. *Id.*

Shortly after his separation from service, the appellant was awarded service connection for a bilateral knee disability, effective January 1972. R. at 1989-90. In February 2007, the appellant was awarded service connection for a low back disability. R. at R. at 1350-54. The regional office (RO) found, based on January 2007 VA examination, that the appellant's low back disability was caused by his service-connected bilateral knee disability because his "altered gait secondary to the service[-]connected knee disability would put a strain on [his] back and could very well lead to osteoarthritis of the lumbar spine." R. at 1351; *see also* R. at 1387-92 (Jan. 2007 Examination Report).

The appellant underwent a sleep study in April 2008. R. at 217-23. He reported that he had been experiencing "snoring and cessation of breathing during sleep for [years]." R. at 217. The physician noted that the appellant "snores extremely loudly, every night, and has likely done so for most of his adult life; it has gotten worse over time." R. at 220. The examiner also noted that the appellant's wife reported that he stops breathing while asleep. *Id.* He was diagnosed with obstructive sleep apnea. R. at 223.

During a September 2009 examination for his knee condition, the appellant reported that he had an altered gait as a result of his knee disabilities. R. at 1223-28. On examination, his gait was within normal limits. R. at 1224. In November 2009, the appellant was seen at a VA facility for heel pain and diagnosed with plantar fasciitis. R. at 1047. The examiner noted the appellant's knee disabilities and observed that he walked with a minimal limp. *Id.*

The appellant submitted claims for service connection for sleep apnea and plantar fasciitis in June 2010. R. at 1121-24. He alleged that his sleep apnea, as demonstrated by his snoring, began in January 1972, R. at 1124, and that his plantar fasciitis was secondary to his service-connected knee disabilities, R. at 1121.

At a VA examination in December 2010, the appellant informed the examiner that he believed his plantar fasciitis was caused by "an altered gait and stance," secondary to his service-connected knee disabilities. R. at 1092-95. He also reported tightness in his heel cords for the previous several years. *Id.* The examiner opined that the appellant's plantar fasciitis was less likely than not caused or permanently aggravated by his knee disabilities. R. at 1095. Her rationale for this opinion was that the appellant's "gait and stance are both normal and plantar fasciitis is a

common condition not typically associated with knee osteoarthritis." *Id.* Instead, she attributed his condition to his tight heel cords. *Id.*

The RO issued a decision in June 2011 denying service connection for obstructive sleep apnea and bilateral plantar fasciitis. R. at 1029-36. The appellant appealed the RO's decision to the Board. R. at 918-20, 936-49, 1023-26. The appellant's representative argued that the December 2010 VA medical opinion was inadequate, and that VA should have provided him an examination for his obstructive sleep apnea. R. at 823-27.

The appellant testified at a hearing before the Board in April 2018. R. at 404-23. He stated that the sleep issues he complained about in service included snoring, disrupted sleep, stopping breathing during snoring episodes, and daytime fatigue. R. at 408. He reported that those symptoms continued after service, until he was ultimately diagnosed with sleep apnea in 2008 and given treatment. R. at 409-10. A friend also testified at the hearing on the appellant's behalf and reported that he had witnessed the appellant's snoring and apnea episodes during their friendship, which began in 1975. R. at 411. The appellant's representative argued that, as a result of the appellant's service-connected disabilities, the appellant "did not walk in a manner that stretched the heel cords, resulting in a tightening of the cord and the associated problems of fasciitis, heel pain, and ultimately a heel spur." R. at 423. In support of his claims, the appellant also submitted letters from his daughters and a coworker. R. at 399-401. One of his daughters reported hearing the appellant's snoring "from childhood" and the other recounted a particularly loud snoring episode when she was a teenager; his co-worker reported witnessing his symptoms over the course of their 20-year acquaintance. *Id.*

In June 2018, the Board remanded the appellant's claims. R. at 393-96. The Board found that the December 2010 VA examination was inadequate because the examiner did not state whether she had considered the evidence of an abnormal gait from a previous VA examination or the possibility that his service-connected bilateral knee arthritis caused or aggravated his tight heel cords. R. at 393. The Board also found that a VA examination was required for the appellant's sleep apnea claim. *Id.*

The appellant was afforded the requested examinations in July 2018. R. at 137-62. The VA examiner opined that the appellant's plantar fasciitis was not related to his service-connected back and knee disabilities. R. at 149. She explained that the "weight of the medical literature does not support any of these conditions as etiologies of or aggravations to [the] condition of plantar

fasciitis." *Id.* The examiner stated that it would be "mere speculation" for her to opine as to the influence of the appellant's abnormal gait observed at the January 2007 examination because she was not present at that examination, but that "the weight of medical literature lacks support for a relationship between altered gait and plantar fasciitis." *Id.*

Regarding his obstructive sleep apnea, the examiner opined that the appellant's sleep apnea was not related to service and was more likely associated with his obesity. R. at 152-53. The examiner opined that the notation on the appellant's separation examination noting a history of sleep trouble was "far too vague to assume the existence of any particular condition." R. at 151. Although the examiner noted the appellant's description of his symptoms since service and the three additional lay statements regarding his snoring and breathing issues, the examiner concluded that his "records are silent for any complaints/symptoms/associated conditions . . . [or] continuity of ongoing sleeping difficulties from 1971 [to] 2008 in available medical records despite multiple visits to two primary care providers." R. at 153.

The appellant submitted a statement in support of his claim in October 2018 wherein he argued that he had not sought treatment for his sleep difficulties after service because he was unaware that they could be treated. R. at 37-38. He also argued that his plantar fasciitis was related to his service-connected knee disabilities and the prolonged standing that was required by his military occupational specialty. *Id.*

In the January 2019 decision here on appeal, the Board denied the appellant's claims for service connection for plantar fasciitis and sleep apnea. R. at 6-17. The Board found the appellant's lay statements regarding his plantar fasciitis pain competent and credible, but that an opinion as to medical nexus requires medical training. R. at 10-11. The Board also found the appellant's statements, as well as the statements of his daughters and coworker, regarding his snoring and breathing difficulties to be competent and credible, but the Board found the VA examiner's opinion more probative. R. at 14. This appeal followed.

II. ANALYSIS

"[O]nce the Secretary undertakes the effort to provide an examination [or opinion,] . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes

the disability, if any, 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)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06. "Whether a medical [examination or] opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam).

In every decision, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *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 57.

The appellant argues that the Board failed to provide an adequate statement of reasons or bases for relying on both July 2018 VA medical opinions. Regarding his sleep apnea claim, he argues, among other things, that the Board failed to explain its conclusion that the VA examiner considered the lay statements provided by the appellant. Appellant's Brief (Br.) at 17. The appellant correctly points out that the examiner discussed only that the separation examination's note of a history of sleep difficulty was far too vague. However, although she acknowledged the lay statements, she failed to consider the further explanations of that notation offered by the appellant and the additional lay testimony of his symptoms. The Board specifically found the lay statements competent and credible. Nevertheless, the Board failed to reconcile its competence and credibility determinations with the VA examiner's failure to address whether those statements established that it was more likely than not that the appellant's sleep apnea symptoms began during service. Accordingly, the Court agrees that the Board's statement of reasons or bases for relying on the July 2018 sleep apnea examination and remand is required. *Allday*, 7 Vet.App. at 527.

Regarding the plantar fasciitis claim, the appellant argues, among other things, that the Board failed to sufficiently explain its reliance on the July 2018 examination because neither the Board nor the examiner addressed the appellant's statements that he often had an altered gait and his theory that his altered gait led to his tight heel cords and that caused his plantar fasciitis. Appellant's Br. at 12-15. The examiner stated that "it would be mere speculation for [her] to determine the cause at the time of that examination [because she] was not present" and that there are "several other entries throughout the records of normal gait suggesting it wasn't a chronic problem." R. at 149. She then concluded that medical literature did not support that an altered gait caused plantar fasciitis. *Id.*

The Board found the appellant's lay statements regarding his pain competent and credible, but that his opinion as to the etiology of his plantar fasciitis is a medical issue that requires medical training. R. at 10-11. The Board did not mention, however, that the appellant does have medical training. *See* R. at 565. Moreover, he is competent to state that he had difficulty walking as a result of knee and back pain, and that the pain altered the way he walked, because those symptoms are both within his ability to observe and experience. *See Layno v. Brown*, 6 Vet.App. 465, 470 (1994) ("A lay witness may testify as to his or her observations of the features or symptoms that a claimant exhibited."). Also, as the Board previously held, the evidence of an altered gait is conceded and previously found by VA to have caused his lumbar spine condition. R. at 393 (June 2018 Board Remand).

The Board relied on the July 2018 examiner's opinion that medical literature did not support a connection between an altered gait and plantar fasciitis. R. at 10. The Board, however, failed to address whether the examiner fully considered the evidence of an altered gait and, in particular the appellant's testimony, his medical background, and the theory that the altered gait caused tight heel cords that ultimately led to plantar fasciitis. R. at 10-11. Accordingly, the Court finds that the Board failed to provide an adequate statement of its reasons or bases for relying on the July 2018 opinion to deny the appellant's claim and remand is required. *Allday*, 7 Vet.App. at 527.

Given this disposition, the Court will not now address the other arguments and issues raised by the appellant. *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"). On remand, the appellant is free to submit additional evidence and argument

on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). "A remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's January 10, 2019, decision denying service connection for sleep apnea and plantar fasciitis with right heel spur is VACATED and the matters are REMANDED for readjudication consistent with this decision.

DATED: May 15, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)