

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

BARBARA J. HOWARD,)	
)	
Appellant,)	
)	
)	v. Vet.App. No. 21-1261
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27(a) and 45(g)(2), Appellant, Barbara J. Howard, and Appellee, Denis McDonough, Secretary of Veterans Affairs, through their representatives, respectfully move the Court to vacate the January 29, 2020, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for sleep apnea and remand the matter for readjudication in accordance with the terms of this motion. [Record before the agency (R.) at 15-24].

BASES FOR REMAND

The parties agree that vacatur and remand are warranted in this case because the Board erred when it failed to ensure that the Secretary's duty to assist was satisfied and when it failed to provide an adequate statement of reasons or bases.

When the Department of Veterans Affairs (VA) undertakes to provide a medical examination, it “must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided.” *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination is adequate where it is “based upon consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board’s ‘evaluation of the claimed disability will be a fully informed one.’” *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). In addition, the examination must “sufficiently inform 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).

Here, the parties agree that the issue of entitlement to service connection for sleep apnea must be remanded because the September 2016, November 2017, and March 2018 VA examinations/medical opinions are inadequate. See [R. at 1175-80] (September 7, 2016, VA Medical Opinion); [R. at 944-49] (November 21, 2017, VA Medical Opinion); [R. at 889-90] (March 9, 2018, Medical Opinion).

As previously conceded by the Board, the September 2016 VA medical opinion was inadequate as the examiner failed to address the lay evidence of record. R. at 1078 (1076-81). The November 2017 examiner acknowledged the lay evidence but improperly based her opinion solely upon a lack of contemporaneous medical evidence. [R. at 945 (944-49)] (“There is no sufficient

medical evidence of symptoms consistent with obstructive sleep apnea.”). See *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (noting that VA’s examiner’s opinion, which relied on the absence of contemporaneous medical evidence, “failed to consider whether the lay statements presented sufficient evidence of the etiology of [the veteran’s] disability such that his claim of service connection could be proven”); *Dalton v. Nicholson*, 21 Vet.App. 23, 29 (2007) (finding a medical examination inadequate where the examiner “impermissibly ignored the appellant’s lay assertions that he had sustained a back injury during service.”).

Finally, the March 2018 opinion is also inadequate. First, the examiner improperly rejected the lay evidence based upon a lack of contemporaneous medical evidence. R. at 889-90. Second, the examiner found that “[t]he STR are negative for any sleep issues or complaints suggestive of sleep apnea and separation exam done January 1986 is negative for sleep issues or fatigue.” R. at 889 (889-90). However, the Report of Medical History completed at separation in January 1986 indicates reports of headaches and frequent trouble sleeping. R. at 2027 (2027-28). The Court has held that “[a]n opinion based upon an inaccurate factual premise has no probative value.” *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993). Third, the examiner failed to provide a full rationale for her opinion. While the examiner noted multiple risk factors for the development of sleep apnea, she failed to indicate whether the veteran had any of those risk factors. See *Monzingo*, 26 Vet.App. at 105 (requiring the examiner to provide “the essential rationale for

[her] opinion”). As such, remand is warranted for a new or addendum opinion that addresses whether Appellant’s sleep apnea began during or is otherwise related to her military service and provides a full rationale with consideration of the lay evidence of record.

In addition to ensuring that the duty to assist was satisfied, the Board’s decision must be based on all the evidence of record, and the Board must provide a “written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). “The statement must be 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).

Here, the parties agree that the issue of entitlement to service connection for sleep apnea must also be remanded because the Board failed to provide an adequate statement of reasons or bases. The Board found that the veteran’s service treatment records were “silent for any treatment or complaint of any sleep condition or distress during active or reserve service and up until January 2010, over 24 years after service ended” and stated that “[a] negative inference may be drawn from the absence of complaints or treatment for an extended period.” R. at 22 (15-24). However, the veteran’s Report of Medical History at separation specifically documented headaches and frequent trouble sleeping [R. at 2027 (2027-28)], and the record contains lay evidence indicating the veteran’s sleep symptomatology began during and has continued since service, which the Board

found to be competent and did not find to be otherwise not credible. [R. at 1857] (February 24, 2011, Statement from Veteran's Husband); [R. at 1538-60] (October 26, 2015, Hearing Transcript); [R. at 28] (August 15, 2019, Statement from Veteran's Husband); [R. at 21 (15-24)] (January 29, 2020, Board Decision). Thus, the Board's findings are inconsistent with the evidence of record rendering its reasons or bases inadequate. See *Allday*, 7 Vet.App. at 527. As such, remand is warranted for an adequate statement of reasons or bases that properly addresses the evidence of record, to include the in-service reports of sleep symptomatology.

Finally, the parties agree that remand is warranted for the Board to address whether an opinion is warranted regarding whether the veteran's sleep apnea is related to her service-connected psychiatric disorder. In denying entitlement to service connection, the Board repeatedly noted that the veteran's sleep issues have been linked to her psychiatric disorder; however, the Board failed to address whether an opinion was needed to determine whether the sleep apnea was caused or aggravated by the veteran's service-connected psychiatric disorder. Accordingly, the Board failed to provide an adequate statement of reasons or bases in support of its findings. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) (requiring that the Board provide sufficient explanation to enable the claimant and the Court to understand the basis of its decision and permit judicial review).

The parties agree that this joint motion for remand (JMR) and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the

interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matters being remanded, except the parties' right to appeal the Court's order implementing this JMR. Pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of, and any right to appeal, the Court's order on this joint motion and respectfully ask that the Court enter mandate upon the granting of this joint motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. Upon remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Appellant shall be free to submit additional evidence and arguments in support of her claims. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

WHEREFORE, the parties respectfully move the Court to vacate the January 29, 2020, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for sleep apnea and remand the matter for readjudication in accordance with the terms of this motion.

Respectfully submitted,

FOR THE APPELLANT:

Date: July 13, 2021

/s/ Krystle D. Waldron

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