

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

---

Vet. App. No. 23-2508

---

  
Appellant,

v.

**DENIS MCDONOUGH,**  
Secretary of Veterans Affairs,  
Appellee.

---

APPELLANT'S BRIEF

---

Derek E. Dee, Attorney  
VA Disability Group PLLC  
7837 S. Sprinkle Rd.  
Portage, MI 49002  
Phone: (844) 838-5297  
Email: [derek@vadisabilitygroup.com](mailto:derek@vadisabilitygroup.com)

TABLE OF CONTENTS

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 2

STANDARD OF REVIEW.....2-3

ARGUMENT.....3-7

    I)    The Board of Veterans’ Appeals (Board) erred when it failed to provide an adequate reasons or bases to understand how the mental health DBQ does not provide credible evidence sleep apnea may be associated with an in-service condition..... 3-6

    II)   II).. The Board of Veterans’ Appeals (Board) erred when it failed to address the credibility and probative value of material evidence favorable to Mr. Travis..... 6-7

CONCLUSION ..... 7

TABLE OF AUTHORITIES

CASES

*Brambley v. Principi*, 17 *Vet.App.* 20, 22-23 (2003)..... 3

*Butts v. Brown*, 5 *Vet.App.* 532 (1993) (*en banc*)..... 3

*Caluza v. Brown*, 7 *Vet.App.* 498, 506 (1995), 78 *F.3d* 604 (*Fed. Cir.* 1996) ..... 4

*DeLisio v. Shinseki*, 25 *Vet.App.* 45, 55 (2011). ..... 4

*Gilbert v. Derwinski*, 1 *Vet.App.* 49, 52 (1990) ..... 3, 4  
*Livesay v. Principi*, 15 *Vet.App.* 165, 170 (2001)..... 3

STATUTES

38 U.S.C. § 5103A(d)(2) ..... 5  
38 U.S.C. § 7104(c) ..... 2  
38 U.S.C. § 7104(d)(1) ..... 3, 7  
38 U.S.C. § 7261(a)(1) ..... 3

REGULATIONS

CITATIONS TO THE RECORD BEFORE THE AGENCY

R at 5-18 (Board of Veterans’ Appeals Decision) ..... 1, 4, 6  
R at 345 (Mental Health DBQ) ..... 4  
R at 1090-1093 (Medical Treatment Record) ..... 6  
R at 2136 (VA Form 9)..... 2  
R at 2160-2182 (Statement of Case)..... 1  
R at 2501-2502 (Notice of Disagreement)..... 1  
R at 2539-2544 (VA Rating Decision) ..... 1  
R at 2862 (DD214) ..... 1  
R at 3058-3061 (VA Form 526EZ)..... 1

### **STATEMENT OF THE ISSUES**

**I)** The Board of Veterans' Appeals (Board) erred when it failed to provide an adequate reasons or bases to understand how the mental health DBQ does not provide credible evidence sleep apnea may be associated with an in-service condition. The credible evidence leads to a Duty to Assist error because the Board does not have the examination necessary to state with sleep apnea is related to mental health.

**II)** The Board of Veterans' Appeals erred when it failed to address the credibility and probative value of material evidence favorable to Mr. Travis. Mr. Travis stated that he had been having symptoms of sleep apnea since 1986 during a medical treatment examination in 2000. This supports the later statement addressed by the Board, but the Board does not address the cumulative effect of the two statements made two decades apart.

### **STATEMENT OF THE CASE**

Mr. Travis served in the United States Navy from September 4, 1986 to August 3, 1990. R at 2862.

He filed an application for disability benefits (form 21-526EZ) July 24, 2017. R at 3058-3061. A decision denying service-connection was issued October 4, 2017. R at 2539-2544. On December 15, 2017, a Notice of Disagreement was filed. R at 2501-2502. The Statement of Case was issued August 23, 2018. R at 2160-2182. The subsequent Form 9 appealing to the Board of Veterans' Affairs was filed September 25, 2018. R at 2136. The Board issued the decision that is herein appealed February 23, 2023. R at 5-18.

## **SUMMARY OF THE ARGUMENT**

Mr. Travis filed an application for disability benefits for sleep apnea. This request was denied because the condition was found not to have started in service nor be connected to any condition that started in service. However, the denial did not explore nor recognize the connection between sleep apnea and mental health. This connection was made by the doctor performing the VA examination for mental health. They stated that sleep apnea was a diagnosis relevant to understanding or managing his mental health. This satisfies the low-threshold requirement indicating there may be a nexus between the service-connected mental health condition and sleep apnea. Given the low-threshold requirement is met, the Board was required to request a medical opinion to determine by a medical professional whether or not sleep apnea was connected to service, either directly, secondary to another service-connected condition, or through aggravation.

Additionally, the VA fails to address all relevant evidence regarding sleep apnea. Mr. Travis made a statement May 2000. This statement indicates that he has been experiencing symptoms that may be associated with sleep apnea since 1986. The Board failed to address the credibility of that statement or provide a reason that the piece of material evidence is rejected.

## **STANDARD OF REVIEW**

The Court reviews findings of fact under the clearly erroneous standard. 38 U.S.C. § 7104(c). The Court has held that 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.” *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Findings regarding the degree of impairment resulting from a disability are findings of fact. *Brambley v. Principi*, 17 Vet.App. 20, 22-23 (2003). Findings regarding the proper effective date of an award are also reviewed under the clearly erroneous standard. *Livesay v. Principi*, 15 Vet.App. 165, 170 (2001). This Court also reviews claimed legal errors by the Board under the *de novo* standard, where the previous Board decision is not entitled deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Butts*, at 538.

## ARGUMENT

**I) The Board of Veterans’ Appeals (Board) erred when it failed to provide an adequate reasons or bases to understand how the mental health DBQ does not provide credible evidence sleep apnea may be associated with an in-service condition.**

When the Board sets forth to provide a decision, it is required to provide a written statement of reasons or bases for its 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 allow the claimant to understand the reasons for the Board’s decision. The statement also facilitates review by the Court. *Gilbert*, 1 Vet.App. at 57. In order 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).

Mr. Travis was provided with medical examinations to determine the severity of his mental health as it is related to service. In an examination for mental health, the doctor addressed headaches, obstructive sleep apnea, and TBI as “Medical diagnoses relevant to understanding or management of the Mental Health Disorder.” R at 345. This evidence is in contrast to the Board finding that there is “no credible evidence of record indicating the Veteran’s current sleep apnea may be associated with an in-service injury or event.” R at 9. The evidence provided triggers the Duty to Assist and requirement to get a medical opinion determining if the recognized obstructive sleep apnea is related to the service-connected mental health disorder.

The court addressed this previously in *DeLisio v. Shinseki*

When a claim is “pending” and information obtained reasonably indicates that the claimed condition is caused by a disease or other disability that may be associated with service, the Secretary generally must investigate the possibility of secondary service connection; and, if that causal disease or disability is, in fact, related to service, the pending claim reasonably encompasses a claim for benefits for the causal disease or disability, such that no separate filing is necessary to initiate a claim for benefits for the causal disease or disability, and such that the effective date of the benefits for the causal disability can be as early as the date of the pending claim. 25 Vet.App. 45, 55 (2011).

Because the DBQ indicated that obstructive sleep apnea is relevant to understanding or management of the mental health disorder, it is incumbent upon the Board to investigate whether or not the sleep apnea is caused by mental health. If no analysis is performed regarding whether sleep apnea is caused by mental health, the Board never gets to the point

of deciding whether there is a claim for benefits with no separate filing needed. According to the previous finding, the Secretary is required to investigate whether the Veteran's obstructive sleep apnea is secondary to his service-connected mental health condition.

Mr. Travis also relies on 38 U.S.C. § 5103A(d)(2) that outlines the requirements for when the Duty to Assist is triggered.

if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant):

- (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and
- (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but
- (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

Here, Mr. Travis has medical evidence (the DBQ) as well as lay evidence (his statements, including those not addressed by the Board and included in a later argument) that his obstructive sleep apnea (diagnosed) *may* be associated with his service (either directly started in service or secondary to/aggravated by mental health), but does not contain sufficient medical evidence for the Board to make a decision on the claim (no medical opinion on an issue that is beyond the competence of the Board to address). As indicated above, the Board must get a medical opinion to address the information left in question.

Here, the Veteran has evidence in his records that was not addressed by the Board. The evidence connects his mental health condition to sleep apnea. This evidence has not been analyzed by the Board, as is indicated by their statement, "there is no credible evidence of record indicating the Veteran's current sleep apnea may be associated with an in-service injury or event." R at 9. The failure to recognize this evidence triggers duties for



the Court to require the Board to acquire a medical opinion addressing the connection between sleep apnea and mental health.

**II) The Board of Veterans' Appeals (Board) erred when it failed to address the credibility and probative value of material evidence favorable to Mr. Travis.**

Mr. Travis has two pieces of evidence that support his finding that he was experiencing symptoms of obstructive sleep apnea in service. The Board addresses the May 2022 statement. R at 7. However, it does not address the medical record from May 2000. R at 1090-1093.

There, Mr. Travis states he has had symptoms related to obstructive sleep apnea since 1986. *Id.* While the Board states Mr. Travis' lay statement is not credible, it clearly does not recognize that there is another statement from the medical records. Additionally, the Board states that Mr. Travis' statements are not credible because he does not change course at separation when he is no longer trying to make a career of the Navy. However, a single explanation by the Board does not address all possible reasons why Mr. Travis may not have addressed his sleep issues at separation, including not wanting to delay out-processing.

At the time of his statement in May 2000, Mr. Travis was not represented by an attorney, nor had he filed a claim for disability benefits. The records there are based on what was most important at that moment, which was getting treated for his sleep issues. This is exactly what is happening at separation, Mr. Travis is addressing what is most important at that time, which is getting out of the Navy.

Mr. Travis requests the Court remand the decision to deny service-connection for obstructive sleep apnea to address this second statement of material evidence which corroborates the May 2022 statement.

### **CONCLUSION**

The Board's Decision does not meet the criteria for an adequate reasons or bases. In any decision the Board must provide an adequate reasons or base on all material issues of fact and law. 38 U.S.C. § 7104(d)(1). The Board fails to explain why the Duty to Assist is not triggered by the DBQ stating obstructive sleep apnea is relevant to understanding his mental health diagnosis. Also, the Board does not address all favorable evidence and address its credibility. Therefore, Mr. Travis requests the Court remand to the Board to address these oversights.

Respectfully Submitted,

FOR THE APPELLANT

/s/ Derek E. Dee

Derek E. Dee, Attorney  
VA Disability Group PLLC

2974 Business One Drive

Kalamazoo, MI 49048

Phone: (844) 838-5297

Email: derek@vadisabilitygroup.com