

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 23-7557


Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I) The Board of Veteran's Appeals (Board) erred when it failed to consider and address the credibility of the Veteran's lay evidence in support of his claimed in-service stressor, incurrence, or event as related to his military occupational specialty (MOS) and failed to provide adequate reasons and bases. The Veteran has consistently and continuously provided lay evidence of his in-service stressor, incurrence or event alleging that his mental health condition had its onset in service because of his MOS as an Aviation Boatswain's Mate, the hazardous nature of the work that he performed, and overall dangers of being on the flight deck. Here the Board dismisses the lay statements without providing any discussion about the credibility as related to his MOS in-service stressor claims. The Board's treatment of this evidence lacks adequate reasons or bases.

II) The Board of Veterans' Appeals (Board) erred when it failed to provide an adequate reasons or bases for its determination. In its decision the Board states, "Such competent evidence concerning the nature and extent of the Veteran's psychiatric disorders, has been provided by the medical personnel who treated him during the current appeal. Their findings directly address the criteria under which these psychiatric disorders are diagnosed. The VA medical professionals explained their reasoning based on an accurate characterization of the evidence. Therefore, the Board attaches greater probative weight to the clinical findings than to his lay statements regarding etiology." R-7.

The language and reasoning in the Board's decision is unclear, confusing, and contradictory. This requires clarification regarding what competent medical evidence exists and is being referenced as, to date, no VA examination has been conducted and no medical

opinion has been obtained. Absent clarification and further explanation the Veteran cannot reasonably understand the Board's determination that existing medical evidence weighs against his claim for service connection. The Board's decision should be remanded for further clarification so that proper case development can be conducted for the Veteran's mental health claim.

STATEMENT OF THE CASE

The Appellant is a Veteran of the Vietnam Era having served in the Navy from March 7, 1968 to December 16, 1969. R-2067. The Veteran submitted an application for disability compensation for PTSD/Anxiety/Depression on October 7, 2019. R-1483. The Veteran submitted a statement in support of his claim on VA Form 21-0781 on October 10, 2019. R-1472-1474. The Veteran submitted an additional statement supporting his claim on November 6, 2019. R-1429-1431. VA issued a rating decision on December 19, 2019 denying service connection for post traumatic stress disorder. R-1384. On February 4, 2020 the Veteran filed a Notice of Disagreement appeal to the Board and elected the Hearing docket. R-1380. A hearing was held before the Board in June 2022. R-613-624. The Board issued a decision on September 13, 2023 denying service connection for an acquired psychiatric disorder. R-4-12. This decision was appealed to this Court.

SUMMARY OF THE ARGUMENT

The Board of Veteran's Appeals (Board) erred when it failed to consider and address the credibility of the Veteran's lay evidence in support of his claimed in-service stressor, incurrence, or event as related to his military occupational specialty (MOS) and failed to provide adequate reasons and bases. The Veteran has consistently and continuously

provided lay evidence of his in-service stressor, incurrence or event alleging that his mental health condition had its onset in service because of his MOS as an Aviation Boatswain's Mate, the hazardous nature of the work that he performed, and overall dangers of being on the flight deck.

The Court has established four key duty to assist elements with regard to making a determination as to the need for a medical exam. These four elements include 1) Competent evidence of a current disability or persistent or recurrent symptoms of a disability; 2) In-service event, injury, or disease or symptoms of a disease manifesting during an applicable presumptive period; 3) Evidence indicates that a disability, or persistent or recurrent symptoms of disability "may be associated" with service; and 4) Insufficient competent medical evidence on file to make a decision without providing an examination. *Mclendon v. Nicholson*, 20 Vet.App. 79 (2006). In making its determination that the threshold to warrant a VA examination under *Mclendon*, the Board erred as it failed to consider and address the credibility of the Veteran's lay evidence in support of his claimed in-service incurrence or event as it relates to his military occupational specialty (MOS) as an Aviation Boatswain's Mate and failed to provide adequate reasons and bases.

The Board's decision does not meet the criteria for an adequate reasons or bases. The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusion on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517,

527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). In its decision the Board states, “No VA examination has been obtained, which the Veteran claimed was a duty to assist violation. Considering the lack of in-service stressor or other incurrence, the threshold to warrant a VA examination under *McLendon v. Nicholson*, 20 Vet.App. 79 (2006) has not been shown. As such, the medical evidence weighs against the claim for service connection.” R-4. The language and reasoning in the Board’s decision is unclear, confusing, and contradictory as it correctly indicates that the VA examination has not been obtained, but then relies on evidence from VA medical professionals. Absent clarification and further explanation, the Veteran cannot reasonably understand the Board’s determination that existing VA medical evidence weighs against his claim for service connection.

STANDARD OF REVIEW

The Court reviews findings of fact by the Board under the clearly erroneous standard. Service connection and effective date determinations are issues of fact. *Futch v. Derwinski*, 2 Vet.App. 204, 206 (1992). *Quarles v. Derwinski*, 3 Vet.App. 129, 135 (1992). 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). This Court also reviews de novo whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet.App. 36, 42-46 (2005). 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*, 5 Vet.App. at 538.

The Court should determine whether the Board’s decision is in accordance with the law.

ARGUMENT

- I) The Board of Veteran’s Appeals (Board) erred when it failed to consider and address the credibility of the Veteran’s lay evidence in support of his claimed in-service stressor, incurrence, or event as related to his military occupational specialty (MOS) and failed to provide adequate reasons and bases.**

The Court has established four key duty to assist elements with regard to making a determination as to the need for a medical exam. These four elements include 1) Competent evidence of a current disability or persistent or recurrent symptoms of a disability; 2) In-service event, injury, or disease or symptoms of a disease manifesting during an applicable presumptive period; 3) Evidence indicates that a disability, or persistent or recurrent symptoms of disability “may be associated” with service; and 4) Insufficient competent medical evidence on file to make a decision without providing an examination. *Mclendon v. Nicholson*, 20 Vet.App. 79 (2006). In making its determination that the threshold to warrant a VA examination under *Mclendon*, the Board erred as it failed to consider and address the credibility of the Veteran’s lay evidence in support of his claimed in-service incurrence or event as it relates to his military occupational specialty (MOS) as an Aviation Boatswain’s Mate and failed to provide adequate reasons and bases.

The Board decision states, “As to a medical nexus, the Veteran submitted an August 2022 private medical opinion during an evidence submission window; however, the rationale is premised on in-service stressors that have not been verified. No VA

examination has been obtained, which the Veteran claimed was a duty to assist violation. Considering the lack of in-service stressor or other incurrence, the threshold to warrant a VA examination under *Mclendon v Nicholson*, 20 Vet.App. 79 (2006) has not been shown.” R-7. The Board incorrectly states that there is lacking a verifiable in-service stressor or in-service incurrence. The Veteran has in fact provided multiple lay statements and offered testimony describing in-service occurrences as related to his MOS. The Board decision provides that, “In November 2019 correspondence the Veteran also described feeling that his life was at risk from unloading and offloading bombs.” R-5. In the 2022 private medical opinion the Veteran states that “when stationed on the USS Independence between 1968-1969 he began to suffer from anxiety, feelings of nervousness, frequently worried with no known triggers.” R-555. He further stated that “the flight deck was dangerous all of the time.” R-555. The private medical opinion also noted that “During his service, Veteran also reports when working on the flight deck he was exposed to aircraft fumes, at times having to “hide behind another plane wheel” to avoid getting blasted by the plane’s exhaust.” R-555. The Veteran also references his working on the flight deck in a statement submitted in December 2022. R-264. The Veteran has consistently and continuously alleged that his claimed mental health condition had its onset in service, particularly in relation to his role as an Aviation Boatswain’s Mate, the hazardous nature of the work that he performed, and overall dangers of being on the flight deck. In terms of the stressor being consistent with the veteran's Military Occupational Specialty (MOS) and duties of service, this is a key factor in determining the credibility of the claimed stressor. The

claimed stressor must be consistent with the circumstances of the veteran's service, including the places, types, and circumstances of their service. *Sanchez-Navarro v. McDonald*, 774 F.3d 1380 (2014).

The Veteran's MOS was ABE (7060/000), or Aviation Boatswain's Mate. R-2067. According to the My Navy HR website, "The duties performed by ABE's include: maintaining and performing organizational maintenance on hydraulic and steam catapults, barricades, arresting gear and arresting gear engines; operating catapult launch and arresting consoles, firing panels, water brakes, blast deflectors and cooling panels; performing aircraft-handling duties related to the operation of launching and recovery of naval aircraft. Most of the work in this rating is performed outdoors on the deck of aircraft carriers, in all climatic conditions, in fast-paced and often potentially hazardous environments." My Navy HR, <https://www.mynavyhr.navy.mil/Career-Management/Community-Management/Enlisted/Aviation/ABE/#:~:text=ABE&text=Aviation%20Boatswain's%20Mates%20play%20a,take%2D%20off%20and%20after%20landing>. (June 6, 2024).

The Board decision states, "The Board has considered the Veteran's lay statements that a psychiatric disorder was caused by service. While he is competent to report symptoms as this requires only personal knowledge as it comes to him through his senses, he is not competent to offer an opinion as to the etiology of the current disorder due to the medical complexity of the matter involved." R at 7. The Board goes on to say that "[s]pecifically, the Veteran's statements about current psychiatric disorders being caused by incidences in service in 1968 and 1969 are not competent medical evidence of

a medical nexus.” R-7. Pursuant to 38 C.F.R. § 3.159(a)(2) “Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.” While the Board analyzed the Veteran’s lay statements in reference to providing a medical nexus, the Board failed to analyze and address the credibility and probative value of the lay evidence for its persuasive or unpersuasive nature as it relates to an in-service stressor, incurrence or the onset of the Veteran’s condition as related to his MOS. Regulation 38 C.F.R. § 3.304(f) requires that a non-combat Veteran seeking service connection for PTSD provide “credible supporting evidence that the claimed in-service stressor occurred.” The Court has previously held that the requirement of corroborating evidence under 38 C.F.R. § 3.304(f) “only requires, as to stressor corroboration, ‘credible supporting evidence’ that the claimed in service stressor occurred.” *Pentecost v. Principi*, 16 Vet.App. 124, 129 (2002).

Here, the Veteran provided numerous accounts of his in-service stressors corroborating the same with the verifiable evidence of his MOS. The Court has determined that a layperson is competent to report on continuity of his current symptomatology and “may provide sufficient support for a claim of service connection”. *Layno v. Brown*, 6 Vet. App. 465, 469 (1994). The Court has emphasized the importance of lay evidence, including statements from the veteran and lay witnesses, in corroborating the occurrence of in-service stressors and events that may have contributed to the development of anxiety-related conditions holding that lay statements should be given

due consideration alongside medical evidence when evaluating anxiety claims. *Buchanan v. Nicholson*, 451 F.3d 1331 (2006). The Court has also addressed the importance of considering lay testimony, particularly when it is consistent with the overall evidence in the case. *Barr v. Nicholson*, 21 *Vet. App.* 303 (2007). The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran. *Caluza v. Brown*, 7 *Vet.App.* 498, 506 (1995). Here the Board dismisses the lay statements without providing any discussion about the credibility as related to his MOS in-service stressor claims. The Board's treatment of this evidence lacks adequate reasons or bases.

II) The Board of Veterans' Appeals (Board) erred when it failed to provide an adequate reasons or bases for its determination.

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 precise reasons for the Board's decision. The statement also facilitates review by the Court. *Gilbert v. Derwinski*, 1 *Vet.App.* 49, 57 (1990). 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).

In its decision the Board states, “No VA examination has been obtained, which the Veteran claimed was a duty to assist violation. Considering the lack of in-service stressor or other incurrence, the threshold to warrant a VA examination under *McLendon v. Nicholson*, 20 Vet.App. 79 (2006) has not been shown. As such, the medical evidence weighs against the claim for service connection.” R-4. The Board further states, “Such competent evidence concerning the nature and extent of the Veteran’s psychiatric disorders, has been provided by the medical personnel who treated him during the current appeal. Their findings directly address the criteria under which these psychiatric disorders are diagnosed. The VA medical professionals explained their reasoning based on an accurate characterization of the evidence. Therefore, the Board attaches greater probative weight to the clinical findings than to his lay statements regarding etiology.” R-7.

The language and reasoning in the Board’s decision is unclear, confusing, and contradictory as it correctly indicates that the VA examination has not been obtained, but then relies on evidence from VA medical professionals. This requires clarification regarding what competent medical evidence exists and is being referenced as, to date, no VA examination has been conducted and no medical opinion has been obtained. Absent clarification and further explanation the Veteran cannot reasonably understand the Board’s determination that existing medical evidence weighs against his claim for service connection. A remand is the appropriate remedy, “where the Board has...failed to provide an adequate statement of reasons and bases for its determinations...” *Tucker v. West*, 11 Vet.App. 369, 374 (1998). The Board’s decision should be remanded for further

clarification and so that proper case development can be conducted for the Veteran's mental health claim.

CONCLUSION

For the above-referenced reasons, the Court should vacate the Board's Decision dated September 13, 2023 and remand the Board's decision for further adjudication and case development.

Respectfully Submitted,
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