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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 08-2334

WOODROW BRADLEY, JR., APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Chief Judge.*

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

GREENE, *Chief Judge*: Woodrow Bradley Jr., appeals, pro se, an October 26, 2007, decision of the Board of Veterans' Appeals (Board) that denied (1) VA service connection for a deviated nasal septum; (2) service connection for a disability manifested by night sweats, claimed pursuant to 38 U.S.C. § 1117 as an undiagnosed illness resulting from service in the Persian Gulf war; (3) disability ratings greater than 10% from November 1, 2000, to August 29, 2002, and 30% thereafter for a nose scar; (4) a disability rating greater than 10% for chronic fatigue syndrome from October 31, 2003; and (5) an effective date earlier than October 31, 2003, for his grant of service connection for chronic fatigue syndrome. The Board also denied service connection for gingivitis, but granted service connection for polyarthralgia. Mr. Bradley raises no assertion of error regarding the Board's adjudication of those matters. Accordingly, any issues concerning those matters are deemed abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (claims not argued on appeal are deemed abandoned); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). For the reasons that follow, the October 26, 2007, Board decision will be affirmed in part and vacated in part, and certain matters will be remanded for readjudication consistent with this decision.

A. Deviated Septum Claim

In denying service connection for a deviated septum, the Board noted that Mr. Bradley had provided lay statements and testimony concerning an in-service injury to his nose. Record (R.) at 22; *see* R. at 334-35, 448, 915. The Board failed to consider those statements, stating that "[a]lthough the veteran is competent to testify as to his symptomatology, a lay person is not competent to make a medical diagnosis or relate a medical disorder to a specific cause." R. at 22. The Secretary concedes that the Board's statement of reasons or bases for disregarding Mr. Bradley's lay statements is insufficient. The Court agrees. As the finder of fact, it is the Board's province to determine the credibility and probative weight of the evidence. *Prillaman v. Principi*, 346 F.3d 1362, 1367 (Fed. Cir. 2003) (determination of witness credibility is "a quintessential fact-finding function"); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005). The Board did not reject Mr. Bradley's statements as not credible but rather determined only that they were not probative because they were given by a lay person. However, in *Davidson v. Shinseki*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that when considering evidence supporting a service-connection claim, the Board must consider, on a case-by-case basis, the competence and sufficiency of lay evidence offered to support a finding of service connection. *Davidson*, 581 F.3d 1313, 1316 (Fed. Cir. 2009) (reiterating that "'[l]ay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional.'") (quoting *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007)).

In this case, the Board's categorical rejection of Mr. Bradley's lay evidence of diagnosis and medical etiology of a disability contravenes the Federal Circuit's holding in *Davidson. Id.* (vacating decision that "stated categorically that a 'valid medical opinion' was required to establish nexus, and that [a lay person] was 'not competent' to provide testimony as to nexus."). Thus, the Board not only erred by failing to make a credibility determination, but it also erred by not addressing whether Mr. Bradley's statements, as lay evidence, were competent and probative to diagnose and provide an etiology opinion concerning his specific low-back disability. *See Jandreau,* 492 F.3d at 1377 ("Whether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed

by the Board rather than a legal issue to be addressed by the [Court of Appeals for Veterans Claims]); *McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006) (competent testimony "can be rejected only if found to be mistaken or otherwise deemed not credible, a finding . . . the Court cannot make in the first instance").

Accordingly, the Secretary was correct to concede error and remand of the matter is required for the Board to provide an adequate statement of reasons or bases for its decision, which takes into account all applicable provisions of law. *See* 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) (Board required to include written statement of reasons or bases for findings and conclusions on all material issues of fact and law presented on the record adequate to enable appellant to understand precise basis for decision and to facilitate informed review in this Court); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (where "Board has . . . failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

Mr. Bradley further contends that 34 pages of his service medical records (SMRs) are missing from his claims file. He states that the missing pages constitute the "back sides of physical examination and doctors' notes." Appellant's Brief at 18. The Secretary asserts that, on remand, the Board should ensure that all of Mr. Bradley's SMRs are contained in the claims file. The Court agrees. Because on remand Mr. Bradley is free to submit additional evidence and arguments to the Board in support of the remanded matter, if he has in his possession the additional SMRs he may submit them to the Board. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

B. Night Sweats Claim

Pursuant to 38 U.S.C. § 1117, "a Persian Gulf veteran with a qualifying chronic disability," that manifests to a degree of 10% or more before December 31, 2011, may be entitled to VA compensation. 38 U.S.C. § 1117(a)(1); 38 C.F.R. § 3.317(a)(1) (2009). VA has defined a medically unexplained chronic multisymptom illness as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii).

Mr. Bradley argues that the Board erred by failing to consider his evidence of night sweats as part of his Gulf War Syndrome. The Secretary concedes that remand of the matter is required for the Board to consider a February 2005 VA medical opinion. A review of the record reveals that in a February 15, 2005, addendum to a September 29, 2004, VA examination report, a VA examiner opined that Mr. Bradley's "night sweats are not related to any known diagnosis[; t]hey do indicate that the vet[eran] does have Gulf War Syndrome." R. at 785. In denying Mr. Bradley service connection for a disability manifested by night sweats, the Board found that there was "no clinical medical evidentiary finding to support a finding of nigh[t] sweats that have existed for six months of more" and "no objective evidence capable of independent verification that the veteran has chronic night sweats." R. at 25. However, given the conclusory nature of the Board's analysis and the failure to discuss any of the evidence of record regarding Mr. Bradley's night sweats, including the February 2005 VA examiner's opinion, the Court cannot discern the precise basis for the Board's decision.

Accordingly, the Secretary was correct to concede error, and the matter will be remanded for the Board to provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record that considers all relevant evidence of record. *See* 38 U.S.C. § 7104(d)(1); *Allday, supra*; *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *Gilbert, supra*; *see also Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (reversal is appropriate remedy only in cases in which sole permissible view of evidence is contrary to Board's decision).

C. Chronic Fatigue Syndrome Claim

1. Increased Rating

Pursuant to 38 C.F.R. § 4.88b, diagnostic code (DC) 6354, a 10% disability rating is warranted for chronic fatigue syndrome with "[d]ebilitating fatigue, cognitive impairments (such as inability to concentrate, forgetfulness, confusion), or a combination of other signs and symptoms[, w]hich wax and wane but result in periods of incapacitation of at least one but less than two weeks total duration per year." A 20% disability rating is warranted for chronic fatigue syndrome with "[d]ebilitating fatigue, cognitive impairments (such as inability to concentrate, forgetfulness, confusion), or a combination of other signs and symptoms[, w]hich are nearly constant and restrict routine daily activities by less than 25 percent of the pre-illness level, or; which wax and

wane, resulting in periods of incapacitation of at least two but less than four weeks total duration per year." 38 C.F.R. § 4.88b, DC 6354 (2009).

Here, the Board found that Mr. Bradley's level of debilitating fatigue more nearly approximated the criteria for a 10% disability rating. R. at 25. In so concluding, the Board relied, in part, on the finding of a "September 2004 VA general medical examination, which shows that the veteran complained of suffering from fatigue after cutting his lawn, requiring him to rest for one to two *hours*." *Id.* (emphasis added). A review of the September 2004 medical report reveals, however, that Mr. Bradley reported that "his fatigue gets worse on exertion with simple activities like riding the lawnmower" and that "he has to take a rest for two *days* after his lawnmowing duty." R. at 792 (emphasis added). The Secretary concedes that the Board's mischaracterization of the duration of Mr. Bradley's reported fatigue constitutes remandable error in light of the criteria for a 20% disability rating under DC 6354, requiring "periods of incapacitation of at least two but less than four weeks total duration per year." 38 C.F.R. § 4.88b, DC 6354.

Thus, as conceded by the Secretary, the Board's failure to correctly address Mr. Bradley's lay statements, as recorded by the September 2004 VA examiner, renders its statement of reasons or bases inadequate. *See* 38 U.S.C. § 7104(d)(1) ("Decisions of the Board shall be based . . . upon consideration of all evidence and material of record"). Accordingly, the Secretary was correct to concede error and remand of the matter is required for the Board to provide an adequate statement of reasons or bases for its decision, which takes into account all relevant evidence. *See* 38 U.S.C. § 7104(d)(1); *Allday* and *Gilbert*, both *supra*; *see also Tucker*, 11 Vet.App. at 374 (stating that remand is appropriate remedy where "Board has . . . failed to provide an adequate statement of reasons or bases").

Because Mr. Bradley's other argument would result in a remedy no greater than vacatur and remand, and because on remand the evidentiary context may change and remand necessitates that the Board provide a new decision, the Court will not address his other argument regarding this matter at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) ("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");

see also Dunn v. West, 11 Vet.App. 462, 467 (1998) (remand of appellant's claim under one theory moots remaining theories advanced on appeal).

2. Earlier Effective Date

Here, the Board determined that the proper effective date for Mr. Bradley's award of service connection for chronic fatigue syndrome was October 31, 2003, as that was the date that he first sought service connection for the condition. R. at 27; *see* 38 U.S.C. § 5110(a) ("[T]he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation . . . or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor."). Mr. Bradley contends that VA should have considered his October 2000 claim for Gulf War Syndrome and his 2002 Notice of Disagreement (NOD) describing fatigue as claims for entitlement to service connection for chronic fatigue syndrome. The Board found that Gulf War Syndrome and chronic fatigue syndrome are not the same conditions and, therefore, Mr. Bradley's October 2000 claim for Gulf War Syndrome did not encompass a claim for chronic fatigue syndrome. R. at 30. The Secretary submits that the Board's conclusion is contrary to the medical evidence of record and argues that remand of the matter is necessary for the Board to consider whether Mr. Bradley's October 2000 claim for benefits could be construed to include a claim for chronic fatigue syndrome. Again, the Court agrees.

In September 2004, a VA examiner diagnosed Mr. Bradley with chronic fatigue syndrome. R. at 791-92. In his February 2005 addendum, the examiner opined that Mr. Bradley's chronic fatigue was not related to any known diagnosis and that "indicate[d] that the vet[eran] does have Gulf War Syndrome." R. at 784-85. Thus, as conceded by the Secretary, the record before the Board contained medical evidence relating Mr. Bradley's chronic fatigue to Gulf War Syndrome, for which he had applied for service connection in October 2000 (R. at 982-84). *See Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009) (holding that pro se claim for particular mental condition "cannot be a claim limited only to that diagnosis, but must rather be considered a claim for any mental disability that may reasonably be encompassed by several factors . . ."). Further, in April 2002, Mr. Bradley filed an NOD as to a VA regional office's denial of service connection for night sweats, in which he stated that he had suffered from fatigue since about 1996 and that his fatigue had become progressively worse since service. R. at 913-14.

A "claim" is defined as "a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement to a benefit." 38 C.F.R. § 3.1(p) (2009). Any written communication indicating an intention to apply for an identified benefit may be considered an informal claim. *See Rodriguez v. West,* 189 F.3d 1351, 1353 (Fed.Cir.1999); 38 C.F.R. § 3.155(a) (2009). Although Mr. Bradley clearly asserted that he suffered from fatigue prior to his October 31, 2003, formal claim for chronic fatigue syndrome, the Board failed to discuss either the October 2000 application for benefits or the April 2002 NOD when it determined that the evidence was "devoid of a finding[] that the appellant in fact filed a claim for *chronic fatigue syndrome* before October 31, 2003." R. at 30.

Accordingly, the Board's statement of reasons or bases is insufficient to enable Mr. Bradley to understand the basis of its decision. Thus, the Secretary was correct to concede error, and a remand of the matter is necessary for the Board to discuss whether the April 2002 NOD can suffice as an informal claim and also to consider Mr. Bradley's October 2000 application for VA benefits in light of the VA examiner's statement relating his chronic fatigue to Gulf War Syndrome. *See* 38 U.S.C. § 7104(d)(1); *Allday* and *Gilbert,* both *supra*.

D. Nose Scar Claim

Mr. Bradley argues that the Board erred by failing to consider his nasal obstruction and left alar collapse as part of its determination of the appropriate rating for his service-connected nose scar. In April 2001, a VA examiner diagnosed Mr. Bradley as having a nasal obstruction associated with his rhinitis. R. at 967. The examiner stated that the first line of therapy would be to treat Mr. Bradley's rhinitis, but indicated that he might be a candidate for septo-rhinoplasty in the future to address septal deviation and left alar collapse. *Id.* Thus, contrary to Mr. Bradley's assertion, the evidence he relies upon to show a relationship between his left-alar collapse and nasal obstruction and his nose scar does not establish a link between those conditions. Rather, the medical evidence appears to associate his left alar collapse and nasal obstruction with either his rhinitis or deviated septum. Thus, Mr. Bradley has not demonstrated that the April 2001 VA examination report is relevant to his nose scar rating. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (Board not required to discuss all evidence of record but must discuss relevant evidence); *Schafrath, supra* (Board must discuss all relevant evidence and all "potentially applicable" law and regulations).

Consequently, Mr. Bradley has not demonstrated that the Board erred when determining the rating for this award of service connection. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating Board error).

E. Conclusion

Upon consideration of the foregoing analysis, the record on appeal, and the parties' pleadings, that part of the October 26, 2007, Board decision that denied (1) service connection for a deviated septum and night sweats and (2) a rating greater than 10% and an effective date earlier than October 31, 2003, for Mr. Bradley's chronic fatigue syndrome is VACATED. Those matters are remanded to the Board for further development and readjudication consistent with this decision. On remand, Mr. Bradley is free to raise additional arguments to the Board in support of the remanded matters, and the Board must address them. *Kay, supra*; *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Court). The remainder of the Board decision is AFFIRMED.

DATED: April 27, 2010

Copies to:

Woodrow Bradley, Jr.

VA General Counsel (027)