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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-3683

GWENDOLYN L. CONYERS, APPELLANT,

v.

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

Before KASOLD, *Judge*.

MEMORANDUM DECISION

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

KASOLD, *Judge*: Persian Gulf War Veteran Gwendolyn L. Conyers appeals pro se that part of an October 31, 2008, decision of the Board of Veterans' Appeals (Board) that denied disability compensation for the following conditions because they are not service connected: (1) Disability manifested by joint pain; (2) eye disability, claimed as the residuals of a right-eye injury and conjunctivitis; (3) disability manifested by muscle pain; (4) disability manifested by sleep disturbance; (5) disability manifested by fatigue; and (6) headaches. The Board also denied all of the aforementioned disabilities claimed as secondary to participation in the Persian Gulf War in accordance with 38 C.F.R. § 3.317. Ms. Conyers asserts generally that the Board erred with regard to its factual findings. The Secretary disputes this contention. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Board's decision will be set aside and the matters remanded for further adjudication.

With regard to Ms. Conyers's claim for benefits for joint pain and eye disability conditions, the Board noted that disability compensation was denied for both conditions in an unappealed rating decision from August 2001, and further noted that the prior adjudication raised issues of finality and the need for notification that Ms. Conyers had to submit new and material evidence to reopen the

claim, which apparently had not been provided. The Board nevertheless adjudicated the claim based upon its finding that de novo adjudication by the regional office did not prejudice Ms. Conyers.

Prejudice, however, is not the only matter the Board (or the Secretary) must consider before proceeding to adjudicate a claim to reopen. New and material evidence must be submitted in order to establish the Board's jurisdiction. *Jackson v. Principi*, 265 F.3d 1366, 1369 (Fed. Cir. 2001) ("the Board has a jurisdictional responsibility to consider whether it was proper for a claim to be reopened."); *Barnett v. Brown*, 83 F.3d at 1383, 80 ("[T]he Board does not have jurisdiction to consider a claim which it previously adjudicated unless new and material evidence is presented, and before the Board may reopen such a claim, it must so find.").

Although in some circumstances based on the totality of the Board's decision it might be fairly read that the Board found new and material evidence sufficient to reopen a claim without specific mention of such finding, *cf., e.g., Burr & Forman v. Blair*, 470 F.3d 1019, 1035 n. 38 (11th Cir. 2006) (noting that the district court "presumably considered" whether it had jurisdiction because federal courts, which are creatures of federal statute (like the Board), are "duty bound" to consider it), a fair reading of the Board decision on appeal is that the Board never considered whether the evidence warranted a reopening. Accordingly, that part of the decision denying benefits for joint pain and eye disability will be set aside and the matters will be remanded for the Board to consider these matters in the first instance. *Compare Suaviso v. Nicholson*, 19 Vet.App. 532, 533 (2006) ("[T]he new-and-material-evidence determination is often 'fact intensive' and often requires 'the weighing of conflicting evidence and testimony'" (quoting *Prillaman v. Principi*, 346 F.3d 1362, 1367 (Fed. Cir. 2003)) with *Voracek v. Nicholson*, 421 F.3d 1299, 1305 (Fed. Cir. 2005) (deciding as a matter of law that the appellant's statement failed to meet the definition of materiality under § 3.156(a) because that "single statement that his condition worsened does not, on its face, relate in any way to his condition during the pendency of his original claim or to any other unestablished fact necessary to substantiate his original claim") (internal quotations omitted). *See also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate when, inter alia, the Board "failed to provide

an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").¹

With regard to the other matters on appeal, the Board's statement of reasons or bases is wholly inadequate. Specifically, as to muscle pain, the Board's statement has separately titled sections for joint pain and muscle pain, but in its discussion about muscle pain it consistently refers to joint pain, and it fails to distinguish between muscle and joint pain. Although the Board states that there is no evidence that the level of disability is at least 10%, it fails to explain how this is determined, as no criteria or diagnostic code (DC) is discussed against which the evidence might be assessed. *See* 38 C.F.R. § 3.317(a)(ii) (compensation for an undiagnosed illness from the Gulf War is warranted if, inter alia, qualifying signs or symptoms manifest "to a degree of 10 percent or more not later than December 31, 2011"). Moreover, the Board's finding that there are no reports of joint pain (or muscle pain) prior to November 1995 is clearly erroneous, as there are at least two reports that reflect such pain or at least warranted discussion by the Board as to why these reports do not amount to such pain. *Compare* Record (R.) at 19 *with* R. at 465 (October 1992 record states "legs ache"), and 481 (December 1993 record states "back pain").

As to sleep impairment, although the Board cites to lay statements noting Ms. Conyers's sleep pattern problems and the record reflects, inter alia, complaints of fatigue, the Board rejects Ms. Conyers's claim for benefits because there is no clinical evidence of sleep impairment. The Board's basis for rejecting the claim might be accurate, but it wholly ignores the duty to assist and whether a medical examination was warranted to see whether there is clinical evidence of sleep impairment. 38 U.S.C. § 5103A. Such an examination seems particularly warranted when the asserted disability is the type that might be compensable as an undiagnosed illness due to participation in the Gulf War. 38 C.F.R. § 3.317(b)(1)-(13) (2009) (listing "sleep disturbances" as signs or symptoms of an undiagnosed illness in Persian Gulf veterans); 38 C.F.R. § 3.317(a)(ii) (for Persian Gulf veterans, disability compensation for objective indications of chronic disabilities is awarded if, inter alia, "[b]y

¹ The parties and Board are cautioned that no inference as to the sufficiency of the evidence to warrant reopening Mr. Conyers's claim should be drawn from the *need* to remand this matter for the Board to address that issue in the first instance, as stated in the text accompanying this footnote.

history, physical examination, and laboratory tests [the objective indications] cannot be attributed to any known clinical diagnosis").

The Board's discussion on fatigue is filled with conclusory statements, frustrating judicial review. Its finding that the level of disability is not at least 10% is not supported by any analysis or assessment against stated criteria or a DC. Its reliance on the fact that fatigue has been related to a "viral syndrome" or medication, etc., lacks any explanation as to why the multiple causes are not indicative of there actually being no appropriate diagnosis. Moreover, the Board fails to explain just what is a "viral syndrome," why it is not indicative of an undiagnosed illness, or why the "viral syndrome" itself is not related to Ms. Conyers's service in the Gulf War. The Board's statement also suffers from the lack of any discussion about the need for the Secretary to provide a medical examination, which potentially is raised by the evidence of, inter alia, fatigue, multiple diagnoses, and the fact that fatigue is a disability recognized as a possible undiagnosed illness associated with Gulf War participation. 38 C.F.R. § 3.317(b)(1)-(13) (listing "fatigue" as a sign or symptom of an undiagnosed illness in Persian Gulf veterans); *see also* 38 U.S.C. § 5103A; *Schafrath v. Derwinski*, 1 Vet.App. 589 (1991) (Board must consider and discuss all applicable provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record").

Similarly, the Board's discussion of headaches is filled with conclusory statements that frustrate judicial review. Its statement that there is no competent evidence on file showing current chronic headaches evinces a possible misunderstanding as to whether Ms. Conyers is competent to testify to her own headaches. *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (holding that a veteran is competent to provide lay evidence regarding those matters that are within his personal knowledge and experience). As above, the Board notes that Ms. Conyers's headaches have been treated over time as part of multiple disorders, including a "viral disorder" or sinusitis, yet the Board fails to discuss the obvious possibility that multiple and varied diagnoses over time, including an unidentified "viral disorder," might well indicate that her headaches are from an undiagnosed illness. Also as above, the Board fails to address the possible need for a VA medical examination, even though the issue otherwise reasonably is raised by the evidence.

Overall, the Board's statement suggests an incomplete review of the record, and a lack of understanding of the role of lay testimony, the Secretary's duty to assist, and the Board's requirement to provide an adequate statement of reasons or bases for its findings and conclusions. The Board's statement is sorely inadequate on each of these issues, frustrating judicial review. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board's 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"). Remand is warranted. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate when "the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, Ms. Conyers may present, and the Board must consider, any additional evidence and argument in support of the matters remanded. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The remanded matters are to be provided expeditious treatment in accordance with 38 U.S.C. § 7112.

Upon consideration of the foregoing, the Board's October 31, 2008, decision is SET ASIDE and the matters REMANDED for readjudication.

DATED: May 28, 2010

Copies to:

Gwendolyn L. Conyers

VA General Counsel (027)