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

NO. 11-2787

ROBERT A. SHEPARD, APPELLANT,

V.

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

Before DAVIS, *Judge*.

**MEMORANDUM DECISION**

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

DAVIS, *Judge*: U.S. Navy veteran Robert A. Shepard appeals through counsel from a September 7, 2011, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than December 6, 1999, for a grant of disability benefits for post-traumatic stress disorder (PTSD). For the reasons stated below, the Court will reverse the September 2011 Board decision, and remand the matter for proper application of 38 C.F.R. § 3.156(c) (allowing that any time after VA issues a decision on a claim, if VA receives new and material evidence in the form of "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim," and any award "based all or in part on the records . . . is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later").

**I. BACKGROUND**

Mr. Shepard served on active duty from August 1972 to September 1974. On April 23, 1973, he was aboard the nuclear-powered submarine U.S.S. *Guardfish* when she "sustained [] damage[] to her engineering plant . . . . As a result of that, ten crewmen had contamination to their skin and four crewmen were monitored for internal radioactivity." Record (R.) at 490. Mr. Shepard asserts

that, during that time, he and a large number of crewmates were sealed in a forward compartment of the submarine for approximately a day. Shortly thereafter, he was diagnosed with claustrophobia and disqualified from submarine duty.

In September 1980, Mr. Shepard sought disability benefits for claustrophobia and nerves. In February 1981, a regional office (RO) decision appeared to acknowledge in-service symptoms and a "submarine incident," but denied the claim, stating that "available facts do not provide a basis for weaving a web of association between the military incident and the current condition." R. at 723. Mr. Shepard did not appeal the decision and it became final.

In December 1999, Mr. Shepard sought service connection for PTSD. The RO initially denied that claim in 2000 on the basis that it could not verify Mr. Shepard's claimed stressor. *See* R. at 594. At some point, three documents at issue in this appeal were added to the claims file: (1) a June 29, 2001, record from the Department of the Army, U.S. Armed Services Center for Research of Unit Records, confirming the incident aboard the U.S.S. *Guardfish*, and stating that command histories could not be provided due to the U.S.S. *Guardfish* being a nuclear submarine (*see* R. at 490); (2) a May 18, 2001, letter from the Department of the Navy, confirming the incident aboard the U.S.S. *Guardfish* (*see* R. at 508); and (3) a 1973 "Record of Occupational Exposure to Ionizing Radiation" recording the amount of radiation detected on Mr. Shepard (00.000) (*see* R. at 585). VA granted the claim in 2004, effective as of December 1999, on the basis that the "evidence establishe[d] that [Mr. Shepard had] been diagnosed with [PTSD] which is shown to have resulted from a stressful event aboard a submarine in April 1973 which has been confirmed by the service department. . . . Service connection for [PTSD] has been established as directly related to military service." R. at 309.

Mr. Shepard appealed the assigned effective date. During one of the appeals before the Court, in 2009, the Secretary agreed in a joint motion for remand that the May 2001 letter from the Department of the Navy and the 1973 radiation exposure log "was part of the evidence underlying the grant of service connection for PTSD and was not part of the record during the 1981 adjudication of Appellant's claim." R. at 148. During a subsequent appeal to this Court, the Court noted that the grant of service connection was "based in part on Army, Navy, and U.S. Armed Services Center for Unit Records Research records obtained after the 1999 claim was filed," but remanded the claim for

the Board to determine whether the 1999 claim for PTSD was one to reopen the 1980 claim for claustrophobia and nerves. R. at 41. If so, the Court noted, the Board was required to address § 3.156(c).

In its decision here on appeal, the Board determined that the 1999 claim was indeed one to reopen rather than a new claim. As such, § 3.156(c) could potentially allow an effective date to the date of the claim (1980) or the date entitlement arose. The Board determined, however, that § 3.156(c) would not provide an earlier effective date in this case, because the eventual grant of service connection was not based in whole or in part on service department records added to the file after the date of the first denial. The Board reasoned that "[t]he evidence lacking in 1981 was not evidence that a stressor occurred, but, rather, was evidence that the Veteran had a current psychiatric disorder linked to his service. The Veteran's account of a stressful incident in service was of record as of 1981, and was not in dispute at that time." R. at 15. The Board determined that the radiation exposure log was of record in 1981 and that the information provided by the Department of the Army and Navy did not provide the basis for the grant of service connection because in 1981, "the element which was missing was a diagnosis of PTSD or medical opinion that the Veteran had a psychiatric disorder related to his service." R. at 16. This appeal ensued.

## II. ANALYSIS

Mr. Shepard argues that the Board erred in ignoring the Secretary's express concessions, ignoring a ruling of this Court, and by implying that § 3.156 applies only to claimants who were harmed by the absence of service records. He further asserts that, contrary to the Board's determination, his claim was ultimately granted on the basis of official service department records that confirmed his stressor.

The Board's finding regarding the basis of the 2004 RO decision is reviewed for clear error, and its application of § 3.156(c) to Mr. Shepard's factual circumstances is reviewed under the "arbitrary and capricious" standard. *See Burger v. Brown*, 5 Vet.App. 340, 343 (1993) (Board findings of fact are reviewed under the "clearly erroneous" standard); *see also Burden v. Shinseki*, 25 Vet.App. 178, 187 (2012) (Board's application of law to fact is "reviewed under the 'arbitrary and capricious' standard").

Here, the Court concludes that, as previously conceded by the Secretary, and as noted by the Court, the 2004 grant of service connection was based, at least in part, on the additional service department records. Even assuming that the Board was free to ignore the Court and Secretary's prior determinations, for several reasons, the Board's determination that the 2004 grant of service connection was not based in whole or in part on service department records cannot withstand scrutiny. First, although the Board took great pains to assert that in 1981, the RO conceded that Mr. Shepard's stressor was confirmed, the 1981 RO decision made no such concession. Even if it had, § 3.156(c) is not predicated on the bases of the previous denial in 1981; rather, its application hinges on whether service department records formed the basis for the ultimate grant of service connection in 2004.

To that extent, by 2000, the RO clearly had its doubts as to whether Mr. Shepard's claimed stressor had occurred. In the 2000 rating decision, the RO expressly stated that the claim was being denied because Mr. Shepard's stressor could not be confirmed based on the available evidence. *See* R. at 594. Moreover, the author of a 2001 deferred rating decision hand wrote: "Vet. needs to submit documentation of the alleged in service stressor." R. at 519. A March 2001 VA letter to Mr. Shepard provided in accordance with the Veterans Claims Assistance Act of 2000, in a section titled, "What Information or Evidence Do We Still Need From You?" expressly stated: "Need to submit documentation of the alleged in service stressor." R. at 515. And once service department records were associated with the claims file, the RO decision ultimately granted service connection, stating that the "stressful event aboard a submarine . . . has been confirmed by the service department." R. at 309.

In light of this evidence, the Court is convinced that the Board clearly erred in its determination that the ultimate grant of service connection was not based, at least in part, on service department records consisting of one, or all of the following: The June 2001 Army letter, the May 2001 Navy letter, and the 1973 radiation log. *See Burger, supra*. Its finding to the contrary will be reversed.

However, the Court cannot, at this time, require the Board to grant Mr. Shepard an earlier effective date. That is because § 3.156(c) applies only where service connection is ultimately granted based on service department records that were in existence at the time of the initial denial

and not previously associated with the claims file. With regard to the only document at issue that clearly was in existence at the time of the 1981 decision (i.e., the 1973 radiation log), there appears to be some dispute as to when it was associated with the claims file. The Board stated that it was in the record at the time of the 1981 decision, but the Secretary previously stated that it was not. *Compare* R. at 12, *with* R. at 148. This is a factual matter that must be resolved on remand. As to the two 2001 service department letters, although the letters themselves were clearly not in existence at the time of the 1981 decision, the content of the letters – confirming the incidents aboard the U.S.S. *Guardship* – were most certainly based on service department records in existence at the time of the 1981 decision; however, the letters did not cite their sources. Whether the letters were based on service department records in existence at the time of the 1981 decision, and if so, whether that fact is sufficient to invoke the provisions of 3.156(c), will also require initial fact finding. Thus, remand for the Board to address these matters in the first instance is required.

### **III. CONCLUSION**

On consideration of the foregoing, the Court REVERSES the Board's September 7, 2011, decision that the 2004 grant of service connection for PTSD was not based at least in part on some or all of the above-named service department records, and REMANDS the claim for proper application of 38 C.F.R. § 3.156(c). In pursuing his claim on remand, Mr. Shepard will be free to submit additional evidence and argument in support of his claim, and the Board is required to consider any such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

DATED: March 25, 2013

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