

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 13-125

WALTER M. PEOPLES, APPELLANT,

v.

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

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, Walter M. Peoples, through counsel, appeals a September 21, 2012, Board of Veterans' Appeals (Board) decision that reopened his claim for entitlement to service connection for narcolepsy and denied it on the merits. Record (R.) at 2-28. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will reverse that part of the Board's September 21, 2012, decision finding that an October 2, 1957 service medical record (SMR) does not contain a notation of a prescription for "Dexedrine," vacate the September 21, 2012, decision, and remand the matter for further proceedings consistent with this decision.

On appeal, the appellant, in pertinent part, contends that the Board erred when it failed to give him the benefit of the doubt on a question of material fact. Appellant's Brief (Br.) at 8, 22-26; Reply Br. at 3-7. Specifically, he asserts that the Board should have found the evidence at least in equipoise and applied the benefit of the doubt rule to find that an October 2, 1957, SMR contained a notation that he was prescribed Dexedrine, an amphetamine that was apparently a common treatment for narcolepsy at the time. Appellant's Br. at 22-26; Reply Br. at 3-7; R. at 429. The Secretary responds that, indeed, the case "largely turn[s] on whether the October 2, 1957, [SMR]

constituted evidence of treatment for narcolepsy" such that a "treating physician prescribed [the a]ppellant . . . Dexedrine." Secretary's Br. at 10. However, the Secretary avers that "the benefit of the doubt doctrine applies when VA considers the totality of the evidence relevant to the adjudication of an issue, not as VA considers whether each individual piece of evidence is favorable." Secretary's Br. at 19-24.

"The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary" and, "when there is an approximate balance of positive and negative evidence regarding *any issue material to the determination of a matter*, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b) (emphasis added); *see Douglas v. Shinseki*, 23 Vet.App. 19, 23 (2009) (holding that the benefit-of-the-doubt rule applies after careful consideration of all procurable data); 38 C.F.R. § 3.102 (2013) (stating that when, "after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, *or any other point*, such doubt will be resolved in favor of the claimant") (emphasis added).

Here, the Board did not merely decide whether the October 1957 SMR is favorable, but rather evaluated *multiple other* pieces of evidence to make a determination as to *what* the October 1957 evidence actually shows. As reflected by the Secretary's concession that this case "largely turn[s]" on the determination of whether the appellant was prescribed Dexedrine in October 1957, this is exactly the kind of "issue material to the determination of a matter" or "any other point" that is contemplated by the benefit-of-the-doubt doctrine articulated in section 5107(b) and § 3.102.¹ And, this is precisely the kind of factual evaluation that the Board is charged with. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (reaffirming "that the evaluation and weighing of evidence are factual determinations committed to the factfinder—in this case, the Board").

The Board's analysis of the October 1957 SMR is simply untenable. Initially, the Board is inconsistent in its own findings of fact. Although it first found that "the exact names of . . . [the

¹See Notice of Proposed Rule Making - VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,041, 71,059, 71,166 (Nov. 27, 2013) (providing, "[W]e are not substantively changing the provisions in current § 3.102. Instead, we are rewording and reorganizing them to make them easier for the reader to understand" and "5.3(b) (3) Benefit of the doubt rule. When the evidence is in equipoise regarding a *particular fact or issue*, VA will give the benefit of the doubt to the claimant and the *fact or issue* will be resolved in the claimant's favor.") (emphasis added)

medications prescribed] are not immediately clear to the Board's review," R. at 11, and "the October 1957 treatment notation's list of medications is illegible," R. at 21, it went on to determine that "nothing written there otherwise appears like 'Dexedrine' either," *id.* The Board cannot have it both ways: either it can decipher the notation or it cannot. Moreover, to the extent that the Board believes it is competent to determine in the first instance what the notation says, it does not explain why it found the appellant *not* competent to do so or otherwise not credible in his report of what he was prescribed or what treatment he received. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) ("Lay 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."); *see generally Kahana v. Shinseki*, 24 Vet.App. 428, 438 (2011) (Lance, J., concurring) (noting that "any given medical issue is either simple enough to be within the realm of common knowledge for lay claimants and adjudicators or complex enough to require an expert opinion").

Moreover, to the extent that the Board apparently found that medical evidence was required to answer the question, it relied upon a May 2012 Veterans Health Administration (VHA) medical opinion report. R. at 21. It stated that this opinion, which was obtained "for a competent physician to analyze the October 1957 treatment note and attempt to understand its inscrutable writing, similarly resulted in finding that Dexedrine was never prescribed." *Id.* In fact, this is a complete mischaracterization of the May 2012 VHA opinion. What the examiner *in fact* said was that "[t]he care giver's hand writing is poorly legible, and a prescription of Dexedrine or another amphetamine or another stimulant cannot be determined," R. at 48, and that in summary, "[i]t *cannot be determined* whether Dexedrine or another amphetamine or another stimulant was prescribed during the patient's military service from 1954 to 1958." R. at 50 (emphasis added). Therefore, contrary to the Board's reliance on it, the May 2012 VHA opinion provides neither positive *nor* negative support on the issue of whether the appellant was prescribed Dexedrine. *See Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009); *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) ("The probative value of evidence is its 'tendency . . . to establish the proposition that it is offered to prove.'" (quoting *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985))).

Likewise, the other medical opinions that the Board found "constit[uted] the decisive and determinative medical evidence in this case" did not actually comment on the October 1957 notation. R. at 20; *see* R. at 635-38 (November 2001 VA examination report), 657-58 (October 2000 examination report); *see also* *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) ("[T]he Board may not consider the absence of evidence as substantive negative evidence.").

In contrast, four separate medical professionals reviewed the SMR from October 2, 1957, and concluded that the appellant *was* prescribed Dexedrine. A July 1990 opinion from Dr. Mary Hamilton states "I have read his military records" and "[h]e was given Dexedrine [in October 1957]." R. at 414. In a May 1996 report, Dr. Jimmie McAdams indicates that "I cannot decipher the [doctor's] handwriting in regards to his impressions, but it appears one of his prescriptions was Dexidrine [sic] (#2)." R. at 417. Additionally, a June 2002 report from Dr. Wayne Mosier states that, "[a]ccording to the medical records available to me, Mr. Peoples was prescribed Dexidrine [sic] on October 2, 1957." R. at 571-72. Finally, Dr. D.L. Trent, in a June 2002 report, states, "[b]y careful examination of the medical records that we have available, both of the V.A. and the private physicians that [the appellant] has seen over the years, it is noted that on the dates of October 02, 1957, at which time he was in active service, he was prescribed Dexidrine (an amphetamine) which was a common treatment modality of the time for narcolepsy" and "[d]ue to the poor manuscript of the prescribing physician it was unclear as to his impressions and reasoning for the use of this medication." R. at 607-08.

Given the record before it, the Court is compelled to hold that the Board clearly erred when it determined that the October 1957 SMR did not reflect that the appellant had been prescribed Dexedrine. *See Mariano v. Principi*, 17 Vet.App. 305, 313 (2003) (applying "clearly erroneous" standard to assess Board's application of 38 U.S.C. § 5107(b) "equipoise standard"); *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) ("The Court reviews factual findings under the 'clearly erroneous' standard such that it will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect"). Moreover, this error is prejudicial to the appellant, as the Board relied in part on this determination to discount the appellant's positive private medical nexus opinions as based upon an inaccurate factual premise. *See* Appellant's Br. at 23-24; R. at 21-22.

The Court will, therefore, reverse the Board's finding that the October 1957 treatment record did not contain the notation of a prescription for "Dexedrine" and remand this case for further proceedings. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (reversal is the appropriate remedy when the Board's decision is clearly erroneous because the "only permissible view of the evidence is contrary to the Board's decision"). Although the appellant argues for reversal of the Board's ultimate decision as to entitlement to service connection, the Court finds that remand is necessary in this case to enable the Board to re-assess the evidence of record based on a changed factual predicate, to include the adequacy and probative value of the existing medical opinions. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where 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").

The Court will not at this time consider the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B, 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, that part of the Board's September 21, 2012, decision finding that the October 2, 1957, SMR does not contain a notation of a prescription for "Dexedrine" is REVERSED, the Board's September 21, 2012, decision is VACATED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: February 25, 2014

Copies to:

Ronald L. Smith, Esq.

VA General Counsel (027)