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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-0817

ROBERT L. REAVES, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Robert L. Reaves appeals through counsel a December 4, 2012, Board of Veterans' Appeals (Board) decision denying an effective date earlier than August 22, 2000, for the grant of service connection for post-traumatic stress disorder (PTSD). Record (R.) at 3-18.¹ This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will set aside the December 2012 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

At the outset, the Court notes that Mr. Reaves's claims folder was lost and rebuilt sometime around August 1995. R. at 2671. According to the Board decision on appeal: "Many of the rating actions and medical records [that were of record] prior to that time are not available." R. at 6; *see*

¹ The Board noted that the veteran's motion to revise a June 1990 Board decision on the basis of clear and unmistakable error was the subject of a separate Board decision. R. at 3; *see* R. at 50-56.

also R. at 53, 968. The veteran served on active duty in the U.S. Army from July 1966 to July 1969, including service in Vietnam. R. at 1832. His DD Form 214, "Certificate of Release or Discharge from Active Duty," indicates that he received the Army Commendation Medal, the Air Medal, the National Defense Service Medal, the Vietnam Service Medal, and the Republic of Vietnam Campaign Medal. *Id.* His military occupation specialty is listed as utility helicopter mechanic. *Id.* A service department Record of Assignments shows that, at various times, his principal duties were helicopter crew chief and senior utility helicopter repairman. R. at 2492.

According to a June 1990 Board decision, service medical records (SMRs) showed that Mr. Reaves complained of weakness, nervousness, nausea, and headaches in May 1968 and was diagnosed with anxiety reaction. R. at 2447. In May 1969 he complained of depression and was diagnosed with depressive reaction. *Id.* In June 1969, after disobeying orders and using drugs for a number of months, Mr. Reaves was referred for psychiatric evaluation; he was diagnosed with situational reaction, and the examiner found no psychiatric illness present. *Id.* The July 1969 separation examination is not in the record before the Court, but the 1990 Board decision stated that no psychiatric complaints were made nor psychiatric disorders noted at that time. *Id.*

During an April 1981 VA psychiatric assessment, Mr. Reaves stated he was a helicopter crew chief and door gunner in Vietnam and that he took enemy fire and saw friends killed. R. at 2494. After taking a history and performing an examination, the examiner diagnosed substance abuse, atypical depression, and anti-social personality. R. at 2496. As detailed in the December 2012 Board decision, over the years following service Mr. Reaves suffered from alcohol and drug abuse, depression, and erratic behavior, and was diagnosed at various times with antisocial personality, chronic depressive reaction, character disorder with hysterical conversion, and undifferentiated schizophrenia. R. at 8-13.

In August 1981, the veteran filed a claim for service connection for a nervous condition, which the VA regional office (RO) denied in January 1982.² *See* R. at 2667. A February 1982 Supplemental Statement of the Case (SSOC) found that situational reaction and personality disorder were not considered compensable psychiatric diseases and that depressive reaction observed in

² The January 1982 rating decision is not in the record before the Court.

service was acute and resolved without disabling residuals. R. at 2669. He appealed, and the Board in March 1983 likewise denied the claim. R. at 2659-64.

In March 1984, Mr. Reaves sought to reopen his claim for service connection for a "post traumatic" nervous condition, but the request was denied in July 1984. *See* R. at 2554. Although Mr. Reaves submitted an August 1984 statement addressing "his experiences in the military service," VA notified him in August 1984 of "the continued denial of service connection for [PTSD]." *See id.* His appeal was denied. *See* R. at 2555-56.

A December 1986 private psychiatric evaluation indicated that Mr. Reaves had been discharged recently from a VA hospital after being admitted for "depression with suicidal ideas and post-traumatic stress syndrome." R. at 2557. The veteran stated that he had served in Vietnam in an "active combat support unit for 9 months" during the war and had used alcohol and "all kinds of street drugs[] to treat himself[] and to cope with pain and stresses." *Id.* The examiner diagnosed dysthymic disorder, alcohol and drug abuse, and "R/O" chronic PTSD.³ R. at 2558.

In October 1986, Mr. Reaves presented at a VA-affiliated facility with complaints that included fear of losing control, nightmares regarding family problems and Vietnam events, intrusive thoughts of Vietnam, problematic interpersonal relations, and substance and alcohol abuse. R. at 2498, 2501-02. Although the examiner indicated that Mr. Reaves was somewhat vague about in-service traumas, the veteran reported experiencing mortar and rocket-propelled grenade attacks near him on his base and having a tracer-round explode a few feet from him while serving as a helicopter door gunner. R. at 2499-2500. The examiner found "no clear indication of [PTSD] and diagnosed substance abuse and a passive aggressive personality disorder. R. at 2506.

Mr. Reaves was hospitalized in October and November 1987 at a VA facility with a "chief complaint" listed as PTSD. R. at 2508. The discharge summary states he reported that he had stopped abusing drugs recently and "that he came out of a drug haze and began having more nightmares about flames and bodies being torn apart by bullets, soldiers being decapitated, and shooting enemy soldiers from his Vietnam experience." *Id.* The veteran opined that this, in turn,

³ The abbreviation "r/o" means "rule out," which "is typically used to identify an alternative diagnosis that is being actively considered, but for which sufficient data has not yet been obtained." ALVIN E. HOUSE, DSM-IV DIAGNOSIS IN THE SCHOOLS 33 (2002). It is "a reminder or instruction to continue seeking the information which would allow a diagnosis to be conclusively identified or eliminated from consideration (for the present)." *Id.*

led to discord with his family and suicidal and homicidal ideation, which resulted in his hospital admission. R. at 2508-09. During his hospitalization, Mr. Reaves complained of frequent nightmares of Vietnam. R. at 2510. His overall situation improved and he was discharged with diagnoses of PTSD, dysthymic disorder, marital conflict, and polysubstance abuse. R. at 2508.

A January 1988 assessment update noted that Mr. Reaves had been referred by VA following release from hospitalization for suicidal ideation, Vietnam nightmares, substance abuse, and a possible PTSD diagnosis. R. at 2514. The author indicated that Mr. Reaves had depressed mood and expressionless affect and complained of increased anxiety and stress, especially relating to family discord and legal troubles. R. at 2514. Substance abuse, passive aggressive personality disorder, dysthymic disorder, and malingering were diagnosed. R. at 2515.

A June 1988 SSOC reviewed this evidence but continued to deny entitlement to service connection, finding that "[PTSD] is not shown to exist." R. at 2549-51. In November 1989, after the veteran had appealed to the Board, the Board Chairman requested advisory medical opinions as to whether "the recent [October 1986] diagnosis of [PTSD] [is] supported by the record and, if not, does the veteran have any other acquired psychiatric disorder which may reasonably be traced to service." R. at 2535-36.

Two opinions were obtained in response to the Chairman's request. The first, a January 1990 opinion from VA physician Craig Morin, diagnosed PTSD and stated that this diagnosis was supported by the evidence of record. R. at 2540. In support of his opinion, Dr. Morin cited Mr. Reaves's complaints of frequent recollection and war nightmares, loss of control, sleep disturbances, startle reaction to loud noises, avoidance of combat stimuli, and a restricted range of affective response. *Id.* Dr. Morin further wrote:

Mr. Reaves did have significant and life threatening stress namely from combat in Vietnam as a helicopter door gunman (left door gun UH-1D). Several notes mention his being shot at with rocket propelled grenades and mortar rounds landing near to him. A tracer shell exploded two feet from his face, while on a helicopter mission. Mr. Reaves was in combat while he was a teenager.

Id. Finally, Dr. Morin opined that Mr. Reaves's substance abuse, marital discord, domestic violence, and difficulty "verbalizing his recollections of combat" are "commonly seen accompanying" PTSD. *Id.*

A second February 1990 opinion was obtained from Dr. Paul Errera, Director of the Mental Health and Behavioral Sciences Service within VA. R. at 2538. Dr. Errera also diagnosed PTSD on the basis that Mr. Reaves experienced life-threatening stresses in combat while in service as a helicopter door gunner. *Id.* As did Dr. Morin, Dr. Errera indicated that Mr. Reaves experienced a range of symptoms—difficulties with substance abuse, marital discord, domestic violence, and trouble verbalizing recollections of combat—that were associated and consistent with PTSD. *Id.*

In June 1990, the Board denied service connection for PTSD. After reviewing the extensive evidence (R. at 2446-54), the two-member majority noted that "[f]or years, on those occasions when the veteran mentioned his service experiences to health care providers, he did not relate typical symptoms of PTSD and did not allege combat or similar stressful events." R. at 2456. Only in the 1980s, the majority found, did "the veteran beg[i]n to recite the well publicized list of PTSD symptoms and . . . allege that he had life-threatening experiences in Vietnam." *Id.* "These presentations appear unspontaneous, improperly motivated, in conflict with findings and history contained in extensive earlier records, and generally unreliable." *Id.* Although Mr. Reaves reported suffering enemy attacks while protecting his helicopter and a near hit by a tracer round while operating a door gunner (R. at 2452), the Board found that he was not credible regarding allegations of life-threatening stressors (R. at 2456).

The Board assigned more probative value to the October 1986 VA opinion that found "no clear indication of [PTSD]" and diagnosed substance abuse and a passive aggressive personality disorder" (R. at 2506) than to the 1990 VA opinions diagnosing PTSD because the former opinion was made by "[a] clinician[] in the field, who ha[s] personally dealt with the veteran and ha[s] a more intimate knowledge of his background and credence," whereas the 1990 opinions appeared "premised on *historical accounts* and symptoms recently offered by the veteran which [the Board did] not find credible." R. at 2457 (emphasis added). Among the findings of fact the Board made were that Mr. Reaves "did not experience stressors of such a nature or gravity as might reasonably lead to the development of [PTSD]" and that the record did not show "[PTSD] related to service . . . [or] a supportable diagnosis of such disorder." R. at 2457-58.

One Board member dissented. He criticized the majority for "attack[ing] the veteran's credibility[and] suggesting that his accounts of military service were either inadvertent distortions

or deliberate lies to support his claim for compensation." R. at 2390. The dissenting member went on to indicate that he believed that Mr. Reaves had "described several incidents that occurred during Vietnam service, which qualify as adequate stressors for the development of [PTSD]." R. at 2391 (2375-92). Furthermore, he found the advisory opinions obtained by the Board Chairman "compelling" given the stature of the experts offering the opinions, stating that at the very least there existed a reasonable doubt that should have been resolved in Mr. Reaves's favor. *Id.*

In June 1993, Mr. Reaves moved for Board Chairman reconsideration of the June 1990 Board decision. R. at 2422-36. As an exhibit attached to the motion, the veteran submitted a November 1968 service record from the 101st Assault Helicopter Battalion that certified to "Operations" that Mr. Reaves was "medically qualified to perform duty as a aerial gunner" and gave medical clearance. R. at 2529. The motion referred to this exhibit as a "new military record[]." R. at 2423; *see also* R. at 2436. The motion also argued that, under 38 U.S.C. § 1154(b), Mr. Reaves's lay statements should have been accepted as sufficient to establish in-service stressors. R. at 2434-36. In August 1996, the Board Chairman denied reconsideration, stating that the June 1990 Board decision disallowed service connection for PTSD because the evidence did not show a current PTSD diagnosis; as such, consideration of evidence regarding stressors was irrelevant because it "could not change the outcome" of the Board decision. R. at 2110; *see* R. at 2109-11.

A few years later (although precisely when is not clear), Mr. Reaves applied to the Army Board for Correction of Military Records (ABCMR) for the "correction of his records to show the authorities for [the] award of the Air Medal and the Army Commendation Medal." R. at 1598. In January 1997, the ABCMR found that Mr. Reaves was entitled to (1) the Army Commendation Medal as a member of the 101st Airborne Division pursuant to a March 27, 1969, order; (2) the Air Medal for the period of November 29, 1968, to January 22, 1969; and (3) the Vietnam Civil Actions Honor Medal First Class Unit Citation. R. at 1600. A DD Form 215, "Correction to DD Form 214," was issued in February 1998. R. at 1951. As a basis for this correction, the ABCMR determined that Mr. Reaves "provided documents showing that he was cleared to perform duty as an aerial gunner from 29 November 1968 to 22 January 1969" and concluded that the Air Medal, which was awarded in times of war based upon the number and types of missions or hours, was properly awarded to Mr. Reaves. R. 1599. Specifically, the ABCMR wrote:

U.S Army Vietnam Regulation 672-1 provided, in pertinent part, guidelines for award of the Air Medal. It established that passenger personnel who did not participate in an air assault were not eligible for the award based upon sustained operations. It defined terms and provided guidelines for the award based upon the number and types of missions or hours. Twenty five Category I missions (air assault and equally dangerous missions) was the standard established for which sustained operations were deemed worthy of recognition by an award of the Air Medal. However, the regulation was clear that these guidelines were considered only a departure point and that nothing created an entitlement to the award. . . .

The Board notes that the applicant was assigned to an aviation unit and was assigned helicopter aerial gunnery and crew chief duties. Based on previous cases of a similar nature, the Board has determined that the applicant met the requirement for sustained operations, that he would easily have qualified for award of an Air Medal in [two] months of service as a door gunner or crew chief, and that it would be an injustice to deny issuance of this award due to lack of orders, particularly when it is already shown on his DD Form 214. Therefore, the Board finds that the applicant is entitled to an award of the Air Medal for meritorious service during the period 29 November 1968 to 22 January 1969.

R. at 1599; *see* R. at 1951 (DD Form 215). The Acting Director of ABCMR then issued a memorandum to the Commander of the U.S. Army Reserve Personnel Center in St. Louis, Missouri, stating: "Under the authority of Title 10, United States Code, section 1552, . . . it is directed that all of the Department of the Army records of the individual concerned be corrected as shown under Recommendation in the Proceedings of the ABCMR in this case." R. at 1596.

On August 22, 2000, Mr. Reaves filed a request to reopen the claim for service connection for PTSD. R. at 1798-1815. He claimed stressors such as taking anti-aircraft fire while serving as a helicopter door gunner, seeing fellow service members wounded, and receiving enemy fire at various Army installations. R. at 1805-14. The RO denied the request in December 2001, finding that new and material evidence had not been submitted to reopen the claim. R. at 1693-97. The RO stated that "[a] credible verified stressor is not of record" and that "[p]ast records did not indicate a clear diagnosis of [PTSD]." R. at 1694. The veteran filed a Notice of Disagreement (NOD) as to this decision. R. at 1646. When in September 2002 the RO again found new and material evidence to reopen a PTSD service connection claim had not been submitted (R. at 1585-89), he appealed to the Board (R. at 1561-62, 1578).

In January 2005, the Board found that evidence submitted since the prior final June 1990

Board decision—private and VA treatment records and numerous lay statements—were new and material. Consequently, the Board reopened the claim for PTSD service connection and remanded the matter for the RO to schedule a VA examination as to whether PTSD was a current disability linked to service. R. at 1467-77.

Mr. Reaves underwent the ordered examination in April 2005. The examiner recounted the veteran's psychiatric and substance abuse history and symptoms such as avoidance, social isolation, flashbacks, intrusive memories, difficulty sleeping, violence, and suicide attempts. R. at 1455-57. The examiner then opined: "I believe that the veteran does meet DSM-IV [*Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*] stressor criteria. . . . [and] one of the difficulties that he has had with previous reviews is his difficulty in communicating with the examiners what actually happened to him. He has difficulty focusing on the bigger picture and gets bogged down in describing details." R. at 1457. The examiner noted one Vietnam incident where Mr. Reaves reported being 30 feet from a building when it was bombed. R. at 1455. "I am convinced," the examiner stated, "that he did experience events that are outside the normal range of human experience. He found witnessing those events traumatic and they have affected the quality of his life since he left the military." R. at 1457. Thus, the examiner concluded that Mr. Reaves suffered from PTSD attributable to service. R. at 1458-59.

In August 2005, the RO granted service connection for PTSD and assigned a 50% evaluation effective December 11, 2001, the date VA received the request to reopen. R. at 1447-54. Under "EVIDENCE," SMRs from July 29, 1966, through July 18, 1969, were listed; the April 2005 VA examination; and the VCAA letter sent to the veteran. R. at 1450. The RO stated that "[t]he April 2005 examiner noted you meet the DSM-IV stressor criteria." R. at 1452. Mr. Reaves filed a February 2006 NOD as to the evaluation and effective dates assigned. R. at 1377-79. The RO issued an August 2006 Statement of the Case assigning an August 22, 2000, effective date but no earlier for the award of service connection for PTSD. R. at 1186-1206. In November 2010, the Board denied entitlement to an effective date earlier than August 22, 2000. R. at 962-72.

On appeal to this Court, the parties filed a joint motion for partial remand, agreeing that the Board failed to consider 38 C.F.R. § 3.156(c) when determining whether Mr. Reaves was entitled to an earlier effective date for the award of service connection for PTSD. R. at 286-94. Specifically,

the parties noted that "corrected service records—which existed in January 1997, before being associated with the claims file in February 2000—relate to [the veteran's] claimed in-service stressors as a door gunner." R. at 290; *see also* R. at 292. The Court granted the motion in August 2011. R. at 285. Mr. Reaves submitted argument to the Board in November 2011, in which he asserted that his claim for service connection for PTSD "was reopened and granted, in part, based on service records which indicate that he is a combat veteran" and that "the Department of the Army corrected Mr. Reaves' service records to show that he was awarded and authorized to wear the Air Medal and the Army Commendation Medal." R. at 285.

In the December 2012 decision on appeal, the Board denied entitlement to an effective date earlier than August 22, 2000, for the award of service connection for PTSD. The Board found that the August 2005 grant of service connection for PTSD was based on the April 2005 VA diagnosis and opinion that PTSD was connected to service. R. at 44. "The examiner did not provide much detail as to the specifics of the [v]eteran's claimed stressors," the Board remarked, but "[s]he noted how the events of the [v]eteran's service in Vietnam affected him and that she felt he met the criteria for a diagnosis of PTSD." *Id.* The Board also noted that "the [v]eteran's duties as a crew chief and door gunner are not mentioned in the [decision]." *Id.* The Board determined that, in contrast, the June 1990 Board decision denied service connection because "the weight of the evidence was against a finding of a clear diagnosis of PTSD, a requirement for the grant of service connection." *Id.*; *see also* R. at 43 ("The [v]eteran was denied service connection for PTSD in June 1990 because the Board found that the evidence of record did not establish a diagnosis of PTSD."). A clear PTSD diagnosis supported by a detailed history of stressful events or by certain awards indicative of combat, the Board observed, was mandated by paragraph 50.45 of *VA Adjudication Procedures Manual (M21-1)*, which applied to PTSD claims at the time. R. at 42-43

The Board found that "the grant of service connection for PTSD in August 2005 was not related, in any way, to the correction of the [v]eteran's military records as indicated in the ABCMR [decision] of January 1997" and that the veteran "was noted to have an Air Medal on his DD 214 at the time of the prior decisions in this case." R. at 44. The ABCMR decision, thus, "did not make any difference in the evaluation of the [v]eteran's claim." *Id.* In making this determination, the Board stated that "the stressors associated with his service that resulted in his receiving the Air

Medal were of record" at the time of the June 1990 Board decision. R. at 45. Ultimately, then, the Board distinguished this case from others where § 3.156(c) operated to award an earlier effective date. R. at 44-45. This appeal followed.

II. ANALYSIS

Mr. Reaves argues that the Board offered inadequate reasons or bases for denying entitlement to an earlier effective date for the award of service connection for PTSD based on § 3.156(c). Generally, he contends that the Board did not explain the basis for its finding that the June 1990 Board decision did not dispute his claimed stressors or combat service; indeed, Mr. Reaves asserts that this finding is clearly contradicted by the 1990 decision and that if such were acknowledged then service department records newly associated with his file after June 1990, and partially leading to the 2005 award of service connection, would require an earlier effective date under § 3.156(c). Appellant's Brief (Br.) at 18-27. More specifically, the veteran argues that the Board failed to address the November 1968 service department record stating he was medically qualified to serve as an aerial gunner and, alternatively, to the extent that the Board considered and tacitly found that this document was already in the record at the time of the June 1990 Board decision, failed to support this finding. *Id.* at 23-24. Also, Mr. Reaves contends that the Board provided an inadequate explanation for finding that the August 2005 award of service connection for PTSD was not related to the January 1997 ABCMR decision. *Id.* at 25-26. He asks that the Board decision be set aside and the matter remanded for readjudication and an adequate statement of reasons or bases. *Id.* at 27.

The Secretary disputes these contentions. He argues that the Board explained that "both the legal criteria for establishing service connection for PTSD and [Mr. Reaves's] psychiatric condition changed since the 1990 denial." Secretary's Br. at 9. According to the Secretary, the grant of service connection was based on the 1993 promulgation of 38 C.F.R. § 3.304(f) (specifying the criteria for a PTSD service connection claim) and the April 2005 VA examiner's diagnosis of PTSD, not the November 1968 service department record or the January 1997 ABCMR decision. The Secretary also disagrees with the veteran's contention that the November 1968 service department record showing that he received medical clearance to perform duty as an aerial gunner was not before the Board in 1990. *Id.* at 9-10, 12-14. Finally, the Secretary argues that the Board correctly found that

the 1990 Board decision did not dispute Mr. Reaves's claimed stressors or combat status but rather doubted that the stressors, as reported, were sufficient to support a PTSD diagnosis. *Id.* at 10-12. Mr. Reaves, in turn, disputes these arguments. Reply Br. at 1-10.

The effective date for an award of service connection based on a reopened claim is usually the date that the request to reopen was received or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i), (r) (2014). Therefore, the general rule is that "the effective date of an award of service connection is not based on the date of the earliest medical evidence demonstrating a causal connection, but on the date that the application upon which service connection was eventually awarded was filed with VA." *Lalonde v. West*, 12 Vet.App. 377, 382 (1999). *See generally* *Sears v. Principi*, 349 F.3d 1326, 1328-32 (Fed. Cir. 2003) (upholding VA's regulatory determination that the effective date for an award made pursuant to a request to reopen generally cannot predate the request).

However, there is an exception to this rule. If at any time after a claim is denied VA receives or associates with the claims file service department records that existed but had not been associated with the claims file at the time VA first decided the claim, VA will reconsider the claim. 38 C.F.R. § 3.156(c)(1) (2014). If VA thereafter makes an award based in whole or in part on these newly associated service department records, the assigned effective date will be "the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3); *see Mayhue v. Shinseki*, 24 Vet.App. 273, 279 (2011) ("[A] claimant whose claim is reconsidered based on newly discovered service department records may be entitled to an effective date as early as the date of the original claim."). "In this sense,' the Court has said of the operation of § 3.156(c), 'the original claim is not just re-opened, it is reconsidered and serves as the date of the claim and the earliest date for which benefits maybe granted.'" *Stowers v. Shinseki*, 26 Vet.App. 550, 554 (2014) (quoting *Vigil v. Peake*, 22 Vet.App. 63, 66-67 (2008)).

In all cases, the Board must provide an adequate statement of reasons or bases for its findings on all material issues of fact and law presented. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of material evidence favorable to the claimant.

Allday v. Brown, 7 Vet.App. 517, 527 (1995); *Caluza v. Brown*, 7 Vet.App. 498, 507 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). When a claimant's file is lost, VA has a heightened duty to assist the veteran in developing evidence from alternate or collateral sources. *Cromer v. Nicholson*, 455 F.3d 1346, 1351 (Fed. Cir. 2006); *see Washington v. Nicholson*, 19 Vet.App. 362, 370 (2005) ("[W]hen VA is unable to locate a claimant's records, it should advise him to submit alternative forms of evidence to support his claim and should assist him in obtaining sufficient evidence from alternative sources."). The Board also has a heightened obligation to explain the reasons or bases for its findings and conclusions and to consider the benefit of the doubt rule. *Washington*, 19 Vet.App. at 371; *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991). The benefit of the doubt applies to "any issue material to the determination of a matter" when "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b).

A. November 1968 Service Department Record

The parties dispute whether the November 1968 service department record that showed that Mr. Reaves was cleared to perform duty as an aerial gunner was associated with the claims file at the time of the June 1990 Board denial of service connection for PTSD. The Board decision on appeal mentions this record (R. at 24, 32) but does not discuss whether it was associated with the claims file in June 1990 and, if it was so associated, whether it formed a partial basis for the 2005 award of service connection. R. at 45; *see* 38 C.F.R. § 3.156(c).

The veteran argues that evidence shows that the 1968 service department record was not before the Board at the time of the June 1990 decision. He cites the fact that the June 1993 motion for Board Chairman reconsideration of the June 1990 Board decision describes the submitted November 1968 document as a "new military record[]" (R. at 2423), as well as the fact that the June 1990 Board decision stated merely that Mr. Reaves "report[ed] he had other duties such as door gunner" (R. at 2388), rather than indicating that service record evidence established this duty (as it did for helicopter repairman duties). Appellant's Br. at 23-24. The Secretary states that "[i]t is not clear whether this particular record was before the Board [in June 1990] because the Board did not mention it . . . and because [the] claims file had to be rebuilt in August 1995." Secretary's Br. at 13. According to the Secretary, however, the question is irrelevant because the 1990 Board decision did not dispute whether Mr. Reaves served as an aerial gunner in Vietnam, only whether adequate

stressors to support a PTSD diagnosis had been shown. *Id.*

When determining the applicability of § 3.156(c), a key preliminary inquiry is whether the service department record under consideration has been newly associated with the claims file. 38 C.F.R. § 3.156(c)(1). However, the Board decision on appeal failed to discuss the November 1968 service department record in its § 3.156(c) analysis and therefore did not discuss evidence that suggests the November 1968 record was associated with the claims file only in 1993, as part of the June 1993 motion for Board Chairman reconsideration and not prior to that time. *See, e.g.,* R. at 2423; *see also* R. at 1832, 2492 (the veteran's DD 214 and a service department record of assignment listing utility helicopter mechanic, helicopter crew chief, and senior utility helicopter repairman), 2388 (June 1990 Board decision suggesting that door gunner duties were substantiated only by the veteran's statements). This is potentially favorable evidence that the Board must discuss in ordinary circumstances. *See Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 507.

But, because Mr. Reaves's claims file was lost and rebuilt between the time of the June 1990 Board denial and the 2005 reopening, the Board was under a heightened obligation to explain the reasons or bases for its findings and conclusions, as well as to consider the benefit of the doubt rule. *See Washington*, 19 Vet.App. at 371; *O'Hare*, 1 Vet.App. at 367. The Board's failure to address the 1968 service department record in the effective date decision here under consideration and to offer adequate reasons or bases regarding the date that it was first associated with Mr. Reaves's claims file and the import of that record on the later award of service connection requires remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that, when the Board's reasons or bases are inadequate, remand in the proper remedy).

Given the heightened Board obligation, the Court is surprised at the Secretary's suggestion that the lack of clarity regarding whether the November 1968 record was before the Board in June 1990 should be resolved against the veteran. *See Secretary's Br.* at 13. It is difficult to see how such resolution would be consistent with the "benefit of the doubt" standard of proof. *See* 38 U.S.C. § 5107(b). Certainly the Court cannot make in the first instance any determination as to when that record was associated with the veteran's file. *See Kyhn v. Shinseki*, 716 F.3d 572, 575 (Fed. Cir. 2013). On remand, the Board must address whether the November 1968 service department record was newly associated with the claims file after the June 1990 Board denial and, if so, whether the

later grant of service connection was based in whole or in part on that record, addressing all evidence mentioned herein and resolving reasonable doubt in the veteran's favor.

B. Board Reasons or Bases as to Whether the 2005 Award Was Partially Based on Any Newly Associated Service Department or Corrected Service Department Records

The Board found that the June 1990 Board decision "did not dispute [Mr. Reaves's] claimed stressors or his combat experience," and, therefore, that any SMR that demonstrated or supported that he participated in combat could not have been a partial basis for the 2005 grant of service connection. Rather, the Board found that the 1990 decision denied service connection because the Board was dubious of claimed PTSD symptoms and determined there was no "clear diagnosis of PTSD." R. at 44. The veteran contends that the Board failed to support its finding that the 1990 decision did not dispute stressors and combat experience, noting that it specifically found that "[d]uring service he did not experience stressors of such a nature or gravity as might reasonably lead to the development of [PTSD]." R. at 2389; *see* Appellant's Br. at 22. And he argues that, because the "only" records added to the claims file between the June 1990 Board decision and the August 2005 RO decision granting service connection for PTSD were service records, they must have formed the basis for the grant of service connection.⁴ Appellant's Br. at 22-23. In response, the Secretary contends that in the decision on appeal the Board plausibly found that "the 1990 decision did not find that the stressor events reported by [the veteran] did not occur, but only that they were not of such severity or nature so as to support a finding of PTSD." Secretary's Br. at 11. This was consistent with the "high bar to establishing a PTSD diagnosis" in 1990, the Secretary asserts. *Id.* at 11-12. The Court agrees with Mr. Reaves.

It is clear to the Court that the June 1990 Board decision impugned the veteran's credibility both as to whether stressors occurred and as to his description of the stressors. According to the 1990 Board decision, Mr. Reaves's reports of "life-threatening experiences in Vietnam" were "unspontaneous, improperly motivated, in conflict with findings and history contained in extensive earlier records, and generally unreliable." R. at 2456. Therefore, although the Secretary argues to

⁴ Although the Court notes that the November 1968 service department record was not the "only" record added to the claims file between the June 1990 Board decision and that an April 2005 VA examination report was also added (R. at 1455-59), the Court also observes that § 3.156(c) only requires that a newly associated record be at least a partial basis for an award, not the sole basis for an award.

the contrary, the Court finds that the June 1990 Board decision clearly disputed that the claimed stressors occurred.

It is true that at the time of the 1990 Board decision there was a "high[er] bar to establishing a PTSD diagnosis" than there is now, in that in 1990 a PTSD diagnosis required exposure to a stressor, inter alia, "markedly distressing to almost anyone," whereas in 2005 the requirement was more individualized. *Compare* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247 (3d ed., rev. 1987) [hereinafter DSM-III-R] *with* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed., text rev. 2000) (requiring that the individual exhibit an emotional response that involves intense fear, helplessness, or horror). But it is difficult to understand how Mr. Reaves's alleged stressors, if believed in 1990, would not have met the higher requirement of being markedly distressing to almost anyone. *See, e.g.*, R. at 2499-2500 (veteran's October 1986 report of suffering, inter alia, mortar and rocket-propelled grenade attacks while on base at Camp Eagle and having a tracer-round explode a few feet from him while serving as a helicopter door gunner). Thus, the Court cannot accept the Secretary's argument or the December 2012 Board determination (R. at 44) that the June 1990 Board decision did not dispute the occurrence of Mr. Reaves's alleged stressors.

The Board decision on appeal is unsuccessful in attempting to separate the 1990 Board's rejection of a credible stressor from its finding that there was not a clear diagnosis of PTSD. According to the DSM-III-R in effect in 1990, the essential feature of PTSD at that time was the "development of characteristic symptoms following a psychologically distressing event that is outside the range of human experience." DSM-III-R at 247; *see Cohen v. Brown*, 10 Vet.App. 128, 146 (1997) (noting that the sufficiency of a claimed in-service stressor is part of the medical diagnosis of PTSD). Therefore, if at the time of the June 1990 Board decision VA did not find that the veteran had been exposed to such an event or events, there could be no diagnosis of PTSD.

This is clear from the fact that a private January 1990 medical opinion and a February 1990 VA medical opinion both diagnosed Mr. Reaves with PTSD (R. at 2538, 2450), but the Board *rejected these diagnoses* because they were "premised on *historical accounts* . . . recently offered by the veteran which [the Board did] not find credible." R. at 2457 (emphasis added); *see also* R. at 2390 (dissenting 1990 Board member criticizing the majority for "attack[ing] the veteran's

credibility[and] suggesting that his accounts of military service were either inadvertent distortions or deliberate lies to support his claim for compensation").

As to the Secretary's argument that it is "illogical" to conclude that the addition of the November 1968 service department record led to a finding that Mr. Reaves's alleged stressors were consistent with a PTSD diagnosis because no specific stressor was identified in the August 2005 decision granting service connection, the Court is unpersuaded. *Id.* at 12-13. The Secretary overlooks that if the 1968 service department record showed or convinced VA that Mr. Reaves participated in combat, and he had alleged the development of PTSD due to combat, no specific stressor event would need to be identified. Where VA determines that a veteran engaged in combat with the enemy and claimed stressors are related to such combat, the veteran's lay testimony regarding claimed stressors are accepted as conclusive as to their occurrence and no further development for corroborative evidence will be required, provided that lay testimony is satisfactory, consistent with circumstances of service, and not contradicted by clear and convincing evidence. 38 U.S.C. § 1154(b); *see also Cohen*, 10 Vet.App. at 146; 38 C.F.R. § 3.304(f)(2) (2014); Direct Service Connection (Post-Traumatic Stress Disorder), 57 Fed. Reg. 34,536 (Aug. 5, 1992) ("[W]hen service department records indicate that the veteran engaged in combat or was awarded a combat citation and the claimed stressor is related to the combat experience, further development to document the occurrence of the claimed stressor is unnecessary."); VA ADJUDICATION PROCEDURES MANUAL (M21-1), Part VI, para. 7.46e (Dec. 21, 1992).

In this case, however, because the Board did not discuss whether the November 1968 service department record was newly associated with the file, it also failed to address whether that record, in conjunction with Mr. Reaves's lay statements, established combat participation or convinced VA of that participation, which would obviate the need for verification of a particular stressor event. If the August 2005 RO decision granting service connection for PTSD relied on the 1968 record to conclude that Mr. Reaves participated in combat, then, contrary to the Secretary's assertion (Secretary's Br. at 12-13), it would not have been necessary for VA to identify a specific stressor event.

Thus, the Board decision requires remand because it failed to discuss whether the November 1968 service department record, if newly associated with the file, established combat participation

or convinced VA that he had participated in combat such that the RO in 2005 was relieved of having to obtain verification of a particular stressor, and therefore was a partial basis for the grant of service connection. *See Hamilton v. Derwinski*, 2 Vet.App. 671, 675 (1992) (remanding for the Board to determine whether evidence of service in combat zone established engagement in combat with the enemy, thereby requiring acceptance of alleged stressor). In addition, even if the November 1968 service department record were not sufficient to establish combat participation, the Board failed to adequately discuss whether the record corroborated a specific stressor or stressors, leading to the August 2005 grant of service connection for PTSD.

Consequently, the Court is persuaded that the Board decision on appeal did not adequately explain its reasons or bases for finding that the June 1990 Board decision denied service connection for PTSD based solely on the lack of a PTSD diagnosis. In undertaking the required analysis on remand, the Board should explicitly discuss relevant facts that it appears it did not consider.

First, the Board should consider that, although Mr. Reaves may have alleged being an aerial gunner prior to submission of the June 1996 motion for Board Chairman reconsideration, there appears to be no service record evidence of combat participation, so the grant of service connection may have been based in part on the November 1968 service department record medically clearing Mr. Reaves for door gunner duty. *Compare* R. at 1451 (August 2005 RO decision stating: "Review of your [SMRs] show you were stationed in the Republic of Vietnam as a door gunner on a helicopter for eight months."), *with* R. at 1574 (February 2003 SSOC stating that PTSD stressors are not confirmed).

Second, although the January 2005 Board decision reopened the PTSD service connection claim based on new diagnoses of PTSD (R. at 1467-77), the August 2005 RO decision granting service connection noted that the evidence it considered included, in addition to the April 2005 VA examination, SMRs dated July 1966 through July 1969 (R. at 1450). As explained in *Stowers*, newly associated service department records that provide at least a partial basis for a favorable medical opinion that leads to a grant of service connection may entitle a veteran to reconsideration of a prior decision and an earlier effective date under § 3.156(c). 26 Vet.App. at 554-55; *see* New and Material Evidence, 70 Fed. Reg. 35,388, 35,389 (June 20, 2005). Remand is necessary for the Board to address all these issues. *See Tucker*, 11 Vet.App. at 374.

On remand, the Board must also provide adequate reasons or bases for rejecting the probative value of the January 1997 ABCMR decision. The Board stated that the January 1997 ABCMR decision did not "correct" any service department record but merely corrected an internal Army irregularity that could not find support for the Air Medal listed on the veteran's DD 214. R. at 42. This statement fails to acknowledge the findings made by the ABCMR, namely, that the Air Medal was awarded for sustained operations, which constituted 25 "air assault or equally dangerous missions"; that passenger personnel were ineligible for an Air Medal awarded on this basis; and that based on Mr. Reaves's duty as a door gunner he met the requirement of sustained operations. R. at 1599. The January 1997 ABCMR decision therefore determined that "it would be appropriate to correct [Mr. Reaves's] records" to reflect these findings and, pursuant to 10 U.S.C. § 1552, ordered correction accordingly. *Id.* The Acting Director of ABCMR then issued a memorandum to the Commander of the U.S. Army Reserve Personnel Center in St. Louis, Missouri, stating: "Under the authority of Title 10, United States Code, section 1552, . . . it is directed that all of the Department of the Army records of the individual concerned be corrected as shown under Recommendation in the Proceedings of the ABCMR in this case." R. at 1596.

It is difficult for the Court to discern, given the plain terms of the January 1997 ABCMR decision, the Board's basis for finding that the 1997 action was not a correction of military records. Moreover, in light of the Court's previous determination that the 1990 Board decision clearly impugned the veteran's credibility as to the type and severity of stressors, which stemmed from reported combat participation, the Court is unable to accept as sufficient the bare statement in the decision on appeal that the June 1990 Board decision did not question the veteran's military awards and conditions of service. R. at 42. Thus, after considering the findings set forth in the January 1997 ABCMR decision, the Board must reconsider the probative value assigned to the record correction decision and adequately explain its determination.⁵

Finally, the Court observes that, although adjudication and arguments have focused on § 3.156(c), neither the Board nor the parties addressed, alternatively, whether the January 1997

⁵ The Secretary contends that the January 1997 ABCMR decision does not provide evidence of actual events in Mr. Reaves's service. Secretary's Br. at 14. However, the Board never addressed this question, and the Court declines to speculate on it in the first instance. *See Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000).

ABCMR decision might entitle Mr. Reaves to an earlier effective date for service connection under 38 U.S.C. § 5110(i) and 38 C.F.R. 3.400(g). Where a claim is disallowed but subsequently reopened and benefits are granted based on new and material evidence resulting from the correction, change, or modification of a military record by a service department pursuant to 10 U.S.C. § 1552, the effective date of benefits may be the latest of (1) the date the application for correction was filed with the service department, (2) the date of receipt of the disallowed claim, or (3) one year prior to the date the disallowed claim was reopened. 38 U.S.C. § 5110(i); 38 C.F.R. 3.400(g) (2014). On remand, the Board should consider whether the January 1997 ABCMR decision apparently correcting, changing, or modifying a service department record could provide an earlier effective date under § 3.400(g), keeping in mind that claimants are generally presumed to be seeking the maximum benefit allowed by law, *AB v. Brown*, 6 Vet.App. 35, 38 (1993), and that § 3.156(c) would appear to offer maximum benefits for Mr. Reaves. See *Jones v. Shinseki*, 23 Vet.App. 122, 126 (2009) ("The Board is required to discuss all relevant evidence and all 'potentially applicable' laws and regulations." (citing 38 U.S.C. § 7104(d))).

Thus, in addition to providing reasons or bases as to its consideration of the November 1968 service department record, the Board must also address the issues the Court has identified in its consideration of the January 1997 ABCMR decision. On remand, Mr. Reaves is free to present additional arguments and evidence to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the December 4, 2012, Board decision is SET ASIDE, and the matter is remanded for readjudication consistent with this decision.

DATED: October 21, 2014

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