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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-2175

RONALD L. PROFFER, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Ronald L. Proffer, appeals through counsel a May 10, 2013, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits for an acquired psychiatric disorder. Record (R.) at 3-15. This appeal is timely and the Court has jurisdiction over the claim on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will reverse the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from March 1970 until August 1972. R. at 305. The examiner who performed the appellant's service entrance medical examination found him to be psychiatrically "normal." R. at 293. Early in his service, the appellant performed his duties in a manner described as "consistently above average." R. at 248. His superiors wrote that he had "an orderly mind," completed his tasks "in harmony with military and civilian co-workers alike," and demonstrated "ability, dedication and aggressiveness to get the job done" that "is unusual to find." R. at 250.

As the appellant's service progressed, he began showing signs of maladjustment. R. at 248. Although he continued to "get[] along extremely well with all personnel," his "personal appearance" fell below "Air Force standards." R. at 252-53. By March 1972, the appellant became "laxed in all respects of military bearing and appearance," and began to "possess an indifferent and Don't-Care attitude when it comes to meeting the standards of the Air Force." R. at 369. In the final months of his service, he was frequently "late for duty without legitimate reasons," was "reprimanded a number of times for his military appearance, which still has not improved at all," and was labeled "a very unreliable person . . . unable to handle assigned responsibility." R. at 367.

In April 1972, the appellant became "emotionally upset" and "made self-inflicted superficial lacerations to [his] left arm with a hunting knife." R. at 247. He was admitted to a military hospital for treatment. *Id.* The appellant reported that "mounting pressure in the military," his wife's pregnancy, and "multiple problems in the extended family" caused him to lose control of his emotions. *Id.* He stated that "he has experienced difficulty in handling his temper prior to military service but never to this degree or extreme."[1] *Id.*

The appellant's care provider diagnosed him with an "acute anxiety reaction in an emotionally unstable personality, with explosive features." *Id.* The care provider opined that the appellant was no longer able to serve in the military and stated that "I . . . cannot too strongly recommend administrative separation." *Id.* The judge advocate supported the care provider's recommendation, and the appellant's commander accepted it. R. at 358, 362.

In September 2008, the appellant filed a claim for entitlement to disability benefits for an acquired psychiatric disorder. R. at 233-44. In October 2012, a VA medical examiner diagnosed the appellant with intermittent explosive disorder and personality disorder not otherwise specified with schizoid and paranoid traits.[2] R. at 34. The examiner stated that "[d]espite the diagnostic name changes, his current diagnoses remain consistent with his in-service diagnoses for which he was discharged in 1972." R. at 41. The examiner also reported that the appellant suffered from acute

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[1] A clinical record indicates that the appellant also complained that "harassment on the job" caused his emotional state. R. at 414. The appellant asserted that "he did not have this type of difficulty prior to service." *Id.*

[2] VA obtained this opinion after it rejected two previous medical opinions. R. at 47, 87-88. It is the only medical opinion in the record that figures into the Board's decision.

manifestations of his disorders on "numerous" occasions between the date he left active service and the date of his examination. R. at 42.

The examiner stated that the appellant's "intermittent explosive disorder diagnosis is considered secondary to the personality disorder. Their origins both stem to early childhood." R. at 35. The examiner further opined that appellant's psychiatric disorders "were clearly and unmistakably apparent prior to service entrance" and that "service enlistment did NOT result in aggravation of these preexisting conditions." R. at 41.

On May 10, 2013, the Board issued its decision here on appeal. R. at 3-15. The Board concluded the appellant's current psychiatric disorder "was not incurred in or permanently aggravated by his period of active service." R. at 14.

II. ANALYSIS

The October 2012 VA medical examiner diagnosed the appellant with a personality disorder and intermittent explosive disorder caused by his personality disorder. R. at 34. The Board noted that the appellant may not receive disability compensation for his personality disorder. R. at 8; *see* 38 C.F.R. § 4.127 (2014). However, a mental disorder "that is superimposed upon . . . a personality disorder may be service-connected." 38 C.F.R. § 4.127. The question in this case, then, is whether the appellant is entitled to disability benefits for his intermittent explosive disorder.

Establishing service connection for a claimed disorder, and thus entitlement to disability benefits, generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) A current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinkseki,* 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson,* 492 F.3d 1372, 1376-77 (Fed. Cir. 2007); *Hickson v. West,* 12 Vet.App. 247, 253 (1999).

The Board specifically determined that the appellant has a current psychiatric disability. R. at 9. The Board, however, determined that the appellant's disorder was not incurred in or aggravated by his service. R. at 14. Because this finding was sufficient to deny the appellant's claim, the Board did not explicitly reach the nexus element of the test for service connection.

According to the appellant's service entrance medical examination, he was psychologically "normal" when he began his period of active service. R. at 273. This evidence entitles the appellant to benefit from a statutory rule commonly referred to as the presumption of soundness. 38 U.S.C. § 1111. When applied to this appeal, the presumption of soundness mandates that the appellant "shall be taken to have been" psychologically sound when he entered active service. *Id.*

Evidence in the record indisputably reveals that the appellant had an acquired psychiatric disorder during his service. R. at 41, 247. Acting in combination with the presumption of soundness, this evidence strongly supports the appellant's assertion that he meets the second requirement for entitlement to service connection for his intermittent explosive disorder. *Davidson*, 583 F.3d at 1316.

The presumption of soundness, however, is not unassailable. It is rebutted when "clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment [in the military] and was not aggravated by such service." 38 U.S.C. § 1111. In this case, the Board found that the evidence establishes that the appellant's intermittent explosive disorder both began prior to his active service and was not aggravated by his service. R. at 12-15. The Board thus concluded that the presumption of soundness is rebutted and that the appellant is not entitled to the disability benefits he seeks. *Id.*

Rebutting the presumption of soundness is a very serious matter. A rebuttal implies that the personnel responsible for examining the appellant and deciding whether to admit him into the military administered their responsibilities in an utterly incompetent manner, and it entitles the Board to ignore evidence clearly in the appellant's favor. As a consequence, when the Board attempts to rebut the presumption of soundness, it carries the burden of proof, it is held to an exacting standard, and the Court reviews its decision with great care to make sure that it is entirely correct. *Horn v. Shinseki*, 25 Vet.App. 231 (2012).

For its rebuttal of the presumption of soundness to stand, the Board must have supported its application of the standard found in section 1111 with clear and unmistakable evidence. *Id.* at 234. "The Court reviews de novo a Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness, while giving deferential treatment to the Board's underlying factual findings and determinations of credibility." *Id.* at 236 (quoting *Miller v. West*, 11 Vet.App.

345, 347 (1998)). The Court's review "extends beyond the findings of the Board to all the evidence of the record." *Id.*

The only evidence the Board relied upon to rebut the presumption of soundness was the October 2012 examiner's opinion. R. at 12-15. The parties are in agreement that the Board's decision cannot stand. The dispute in this case is about the appropriate remedy. The Secretary asserts that the Board's rebuttal of the presumption of soundness is ineffective because the October 2012 examination report is laden with ambiguities. He argues that the Court should remand this case so that the Board can ask the October 2012 examiner to clarify her position. The appellant argues that the examiner's opinion is perfectly good evidence. He asserts that the Court should review it and the rest of the record de novo and he is confident that once the Court does so, it will be convinced that it should reverse the Board's decision.

The Secretary's argument is restricted to the portion of the October 2012 examiner's opinion addressing the aggravation prong of the presumption of soundness rebuttal criteria. He does not dispute the clarity of the examiner's description of the period when the appellant's intermittent explosive disorder likely began. The Court, therefore, may uncontroversially give deference to the Board's determination that the October 2012 examiner's date of onset discussion is adequate and proceed to analyze whether that part of the examiner's findings along with other evidence in the record clearly and unmistakably establishes that the appellant's disorder began prior to his service. 38 U.S.C. § 1111; *Horn*, 25 Vet.App. at 234.

The October 2012 examiner determined that the appellant's current intermittent explosive disorder and the psychological disorder he experienced during his service are one in the same. R. at 41. The primary symptomatological indication that a person has intermittent explosive disorder is repeated emotional outbursts. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) 466 (5th ed. 2013). If intermittent explosive disorder is present, these outbursts "are not premeditated," "are not committed to achieve some tangible objective," and are "grossly out of proportion to the provocation or to any precipitating psychosocial stressors." *Id.* Also, these outbursts result in "either marked distress in the individual or impairment in occupational or interpersonal functioning, or are associated with financial or legal consequences." *Id.*

A psychiatric specialist should diagnose a patient with intermittent explosive disorder when at least twice weekly over a period of three months that patient is verbally or physically aggressive in a manner that "does not result in damage or destruction of property and does not result in physical injury to animals or other individuals". Intermittent explosive disorder is also the proper diagnosis when a person has "[t]hree behavior outbursts involving damage or destruction of property and/or physical assault involving physical injury against animals or other individuals occurring within a 12-month period." *Id.*

The record indicates that the appellant did not have *any* outbursts of the kind described in this diagnostic criteria prior to his service, much less outbursts that occurred with the frequency necessary to warrant a diagnosis of intermittent explosive disorder. On the other hand, the record contains plenty of evidence indicating that the appellant did not behave in a manner consistent with someone suffering from intermittent explosive disorder until the later stages of his active service.

According to the October 2012 examiner, the appellant stated that before he entered active service he was "a quiet young man" who "didn't ask questions; I just did what they told me to do." R. at 36. He changed schools frequently and handled the accompanying social disruptions by "keeping his mouth shut and his nose out of trouble." R. at 37. He first obtained employment at the age of 15, and was "a good employee" who "regularly went to work and did his job without difficulty" and "got along with his coworkers." *Id.* He graduated from high school on schedule and "was never fired from a position" that he held before he entered the military. *Id.* He had no "legal problem[s] as a boy," "tried not to screw up," kept "his emotions bottled up as a kid," and "denied significant blow[] ups as a kid." R. at 39. The appellant engaged in "some fights" as a child, but there is no evidence that these fights resulted from unpremeditated, unprovoked outbursts. R. at 37; DSM at 466.

During the early days of his service, the appellant performed his duties exceptionally well and enjoyed good relationships with those around him. R. at 37, 248, 250. Later, when he began to "experience[] urges to hit his commanders," he was able to resist these urges, and "instead, kept his mouth shut." R. at 38. It was not until the final months of his service that he began to exhibit behaviors that approach the diagnostic criteria for intermittent explosive disorder. R. at 247, 252-53, 367, 369. He stated in April 1972 that "he has experienced difficulty in handling his temper prior

to military service but never to this degree or extreme," and he indicated that the stressful conditions created by his service and his family caused his in-service outburst. R. at 247.

The October 2012 examiner does not account for the trajectory of the appellant's symptoms. She seems to do little more than assume that because the appellant began to manifest symptoms of his personality disorder prior to his service, his intermittent explosive disorder began at that time as well. R. at 41-42.

"'Clear and unmistakable evidence,' . . . has been interpreted to mean evidence that 'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (quoting *Vanerson v. West*, 12 Vet.App. 254, 258-59(1999)). As the record material cited above plainly reveals, the evidence in this case does not clearly and unmistakably indicate that the appellant's intermittent explosive disorder began prior to his service. Consequently, the Board's decision to rebut the presumption of soundness must be reversed. 38 U.S.C. § 1111.

As a result of this finding, the first two elements in the general test for service connection are established. *Horn*, 25 Vet.App. at 236. All that remains is the nexus element. The Board clearly accepted the October 2012 examiner's conclusion that the acquired psychiatric disorder that the appellant experienced during his service and his present intermittent explosive disorder are the same. R. at 10-14. The Board also accepted the October 2012 examiner's statement that in the time between the appellant's service and the date of his examination, "there have been numerous experiences that continue to reflect his unstable personality temperament and secondary explosive behavioral outbursts." R. at 12-13, 42. Based on these factual findings, the Court concludes that the nexus element for service connection is established and that the Board's decision to deny the appellant entitlement to disability benefits for an acquired psychiatric disorder is clearly erroneous. *See* 38 U.S.C. § 7261(a)(4); *Rose v. West,* 11 Vet.App. 169, 171 (1998). The Court has a "definite and firm conviction" that the appellant is entitled to the disability benefits that he seeks. *Hersey v. Derwinski,* 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the Board's May 10, 2013, decision is REVERSED.

DATED: October 31, 2014

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