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

No. 14-1665

TIMOTHY S. HAVILAND, APPELLANT,

V.

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

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

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

GREENBERG, *Judge*: The appellant, Timothy S. Haviland, appeals through counsel that part of a February 26, 2014, Board of Veterans' Appeals (Board) decision that denied entitlement to (1) benefits based on service connection for a sleep disorder, including as secondary to service-connected post-traumatic stress disorder (PTSD) and (2) a higher evaluation for PTSD, to include whether reduction of the disability rating for PTSD from 70% to 30%, effective from April 1, 2010, was proper.<sup>1</sup> Record (R.) at 3-38. The appellant argues that the Board (1) relied on an inadequate examination and otherwise provided an inadequate statement of reasons or bases when it denied the appellant's sleep disorder claim; (2) failed to ensure that the duty to assist was satisfied; and (3) failed to provide an adequate statement of reasons or bases for finding that the rating reduction for

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<sup>1</sup>The Board also found that new and material evidence had been submitted sufficient to reopen claims for benefits based on service connection for (1) a sleep disorder, on a direct basis; and (2) right eye hemifacial and blepharospasm. The Court will not disturb these favorable findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also dismissed the matter of entitlement to a total disability rating based on individual unemployability. The appellant does not challenge this and the Court deems this matter abandoned. *See Pederson v. McDonald*, \_\_\_ Vet.App. \_\_\_, \_\_\_, No. 13-1853, 2015 WL 590779 (Feb. 13, 2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it). The Board also remanded the appellant's claims for benefits based on service connection for (1) headaches and (2) right eye hemifacial spasm and blepharospasm. These matters are not currently before the Court. *See* 38 U.S.C. § 7266(a) (stating that the Court reviews only final decisions of the Board).

PTSD was proper. Appellant's Brief at 6-14. Review by a single judge is authorized by 38 U.S.C. § 7254(b) and is appropriate for this appeal. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). As noted by Justice Alito in the Supreme Court's decision in *Henderson v. Shinseki*, the Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, \_\_\_, 131 S. Ct. 1197, 1201 n.2 (2011); *see* 38 U.S.C. § 7261. For the following reasons, the Court will reverse that part of the Board's February 2014 decision pertaining to the propriety of the PTSD rating reduction and remand that matter for VA to reinstate the appellant's 70% disability rating for PTSD, effective April 1, 2010. The Court will also vacate that part of the Board's February 2014 decision pertaining to the appellant's sleep disorder and remand that matter for readjudication.

The appellant served on active duty in the U.S. Marine Corps from April 1987 to May 1991 as an organizational automotive mechanic. R. at 743 (DD-214). In June 2007, the appellant was granted service connection for PTSD and was awarded a 70% disability rating, effective July 28, 2006. R. at 941. The decision also denied entitlement to service connection for a sleep disorder. R. at 945-46. The appellant did not appeal this determination.

In September 2009, VA proposed to reduce the appellant's PTSD rating from 70% to 30%. R. at 535-37. In January 2010, the regional office effectuated the reduction in the appellant's PTSD rating from 70% to 30%, effective April 1, 2010. R. at 496-97. The appellant appealed this determination. R. at 317-23.

In November 2013, a medical opinion was obtained to address whether the appellant's sleep apnea was related to his active duty or his PTSD, wherein the examiner opined that the appellant's sleep apnea was not proximately a result of his PTSD. R. at 72. The examiner explained that, although PTSD can cause insomnia, which can result in fatigue, it does not cause sleep apnea. R. at 72. The examiner further opined that the appellant's sleep apnea was not aggravated by his PTSD. R. at 72. In that regard, the examiner explained that nightmares and sleeplessness as a result of the appellant's PTSD "may work in conjunction with sleep disturbance precipitated by sleep apnea to produce more fatigue but it does not worsen the severity of his sleep apnea." R. at 72. He explained that the two conditions "*can work together to produce more fatigue than either condition would produce separately*" and stated that "*in that sense, one could make a case that there is an*

*aggravation of the sleep apnea.*" R. at 72-73 (emphasis added). Nonetheless, the examiner suggested that it would be speculative to assume that the appellant's sleep apnea had been aggravated by his PTSD. R. at 73.

In February 2104, the Board issued the decision currently on appeal, wherein it found that the reduction of the appellant's PTSD rating from 70% to 30%, effective April 1, 2010, was proper. R. at 18-30. In reaching this determination, the Board noted that the "proposed reduction was initially triggered largely by the findings expressed in an August 2009 VA examination." R. at 19. In finding that the reduction was proper, the Board relied on evidence that post-dated the reduction and pertained to a time period that was after April 1, 2010. *See* R. at 18-27. For example, the Board stated, in regard to the appellant's employment, that "that the Veteran *presently* works behind the counter at an auto parts store." R. at 25 (emphasis added). The Board also stated that, "whereas the Veteran's demonstrated symptoms appeared to warrant the assignment of a [Global Assessment of Functioning (GAF)] score of 44 at the time that the pre-reduction 70[%] rating was assigned, the GAF scores *assigned since then* range generally from 55 to 73, with assigned scores ranging most frequently in the mid-60s." R. at 26 (emphasis added).

The Board also denied the appellant's claim for sleep apnea on both a direct and secondary basis. R. at 12-17. In finding that the appellant's PTSD did not aggravate his sleep apnea, the Board relied entirely on the November 2013 medical opinion.

The Court determines that the Board provided an inadequate statement of reasons or bases for finding the reduction of the appellant's PTSD rating proper, specifically because the Board failed to explain how evidence pertaining to a time period post-dating the reduction is relevant to the propriety of the reduction. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). The Board noted that the reduction was in large part based on the August 2009 VA examination (R. at 19), but proceeded to find the reduction proper based on the appellant's condition *after* the reduction, citing to evidence of his current employability, medical evidence that post-dates the reduction, and a comparison of his pre-reduction GAF scores with GAF scores recorded after the reduction. *See* R. at 18-27.

Although the Board adjudicated both whether the appellant was entitled to a claim for increased rating the date the reduction became effective and the propriety of the reduction of the rating together, it is unclear why the Board did not confine its analysis of the evidence post-dating the reduction to the claim for an increased rating. The Board, in error, offered no explanation for this treatment of the evidence. Because the Board affirmed a reduction in rating without following the applicable law, the reduction is void ab initio. *See Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995) ("Where . . . the Court finds that the [Board] has reduced a veteran's rating without observing applicable laws and regulation, such a rating is void ab initio and the Court will set it aside as not in accordance with law."); *see also King v. Shinseki*, 26 Vet.App. 484 (2014).

The Court agrees with the appellant that the Board also provided an inadequate statement of reasons or bases for relying on the November 2013 examination as evidence against a theory that the appellant's PTSD aggravated his sleep apnea. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. Although the examiner concluded that the appellant's PTSD did not aggravate his sleep apnea and that it would be speculation to suggest otherwise, the rationale for the examiner's opinion indicates otherwise. The examiner found that the appellant's service-connected PTSD and his sleep apnea essentially aggravated each other, and created an overall worse condition. *See* R. at 72. In fact, he even admitted "*in that sense, one could make a case that there is an aggravation of the sleep apnea.*" R. at 73 (emphasis added).

Although the Board relied on the "definitively stated opinion" (R. at 15) by the examiner that the appellant's PTSD did not aggravate his sleep apnea, when read as a whole, *see Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2010), the examination appears to be favorable to the appellant and the examiner merely misunderstood the legal standard for aggravation. Remand is required for the Board to provide an adequate statement of reasons or bases for its reliance on this examination as negative evidence against the appellant's claim.

Because the Court is remanding, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410, n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and

meritorious [veterans], whom [C]ongress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, the Court REVERSES the Board's February 26, 2014, decision pertaining to the propriety of the PTSD rating reduction, and REMANDS that matter for VA to reinstate the appellant's 70% disability rating for PTSD, effective April 1, 2010. The Court also VACATES that part of the February 26, 2014, decision pertaining to the appellant's sleep disorder claim, and REMANDS that matter for readjudication.

DATED: May 27, 2015

Copies to:

John S. Berry, Esq.

VA General Counsel (027)