



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

[REDACTED]

SS XXX XX [REDACTED]

Docket No. 220725-263234

Represented by

Gordon A. Graham, Agent

DATE: October 18, 2024

ORDER

Service connection for obstructive sleep apnea as secondary to service-connected posttraumatic stress disorder (PTSD), with alcohol use disorder, AUD, additionally, claimed as sleep disturbances, is granted.

FINDING OF FACT

Competent and probative medical evidence demonstrates that the Veteran's obstructive sleep apnea (OSA) is caused or aggravated by his service-connected PTSD.

CONCLUSION OF LAW

The criteria for entitlement to service connection for OSA have been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. §§ 3.102, 3.310.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from April 1997 to April 2001 and December 2005 to November 2006.

A rating decision denying service connection for OSA was issued in April 2021 and constitutes an initial decision; therefore, the modernized review system, also known as the Appeals Modernization Act (AMA), applies.

In January 2022, the Veteran submitted a VA Form 20-0995, Decision Review Request: Supplemental Claim, and requested readjudication. The agency of original jurisdiction (AOJ) confirmed and continued the previous denial in a March 2022 rating decision.

In March 2022, the Veteran submitted a VA Form 20-0996, Decision Review Request: Higher-Level Review (HLR), and requested review of the March 2022 decision. Although the Veteran initially requested Higher-Level Review, the Higher-Level Reviewer determined that there had been a duty to assist error and transferred the claim to the Supplemental Claim decision review option for additional development.

In July 2022, the AOJ issued the supplemental claim decision on appeal, which found that new and relevant evidence had been received and denied the claim based on the evidence of record at the time of that decision. In a July 2022 VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), the Veteran elected the Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the decision on appeal.

If the Veteran would like VA to consider any evidence that was submitted that the Board could not consider, the Veteran may file a Supplemental Claim (VA Form 20-0995) and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

Service connection for OSA, secondary to service-connected PTSD with alcohol use disorder, AUD, additionally, claimed as sleep disturbances, is granted.

The Veteran contends his OSA is related to his active service or secondary to his service-connected PTSD.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

Service connection may be granted on a secondary basis for a disability that is due to or aggravated by an established service-connected disability. 38 C.F.R. § 3.310; see also *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (en banc); *Spicer v. McDonough*, 61 F.4th 1360, 1364 (Fed. Cir. 2023) (invalidating the requirement of "proximate cause" and instead holding "but for" causation or aggravation is enough to show entitlement to secondary service connection).

Obesity is not a disability for VA compensation purposes and thus service connection for obesity itself, either on a direct or secondary basis, cannot be granted. However, obesity resulting from a service-connected disability can be an intermediate step in establishing secondary service connection for a nonservice-connected current disability. See VAOPGCPREC 1-2017 (Jan. 6, 2017).

In this case, the AOJ has rendered several favorable findings: the Veteran is diagnosed with a disability based on VA examination reports dated in October 2020 and February 2022; and his claimed primary disabilities (PTSD with alcohol use disorder and allergic rhinitis) are service-connected.

Thus, the question becomes whether the current OSA disability is related to service or a service-connected disability. On this question there are probative opinions in favor of and against the claim.

In making determinations, VA is responsible for ascertaining whether the evidence supports the claim. See 38 U.S.C. § 5107; 38 C.F.R. § 3.102. If the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt. *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021) (en banc). If the evidence persuasively favors one side or the other, there is not an approximate balance, and therefore the benefit-of-the-doubt rule does not apply. *Id.*; *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990).

The evidence in favor of the claim includes a January 2021 private medical opinion from Dr. M.R. This opinion was received in February 2022. Dr. M.R. reviewed the

entire claims file and a personal statement from the Veteran. She opined that it is more likely than not that the Veteran's sleep apnea is related to military service and his service-connected PTSD. In support of her opinion, she specifically noted that the Veteran reported a progressive worsening of his loud snoring and apneic spells, non-restorative sleep, and excessive daytime sleepiness over the past 10 to 15 years. In support of her opinion, Dr. M.R. summarized relevant medical research regarding an association between PTSD and OSA. She also acknowledged that the cause of sleep apnea is not completely understood, but she pointed out that 'a strong predictor of OSA is the patient's self-reported complaints.' She noted that delays in diagnoses of sleep can be quite lengthy and up to 40 years.

The Board acknowledges the Veteran's lay statement that 10 to 15 years prior (which would have been beginning in 2006 while he was still on active duty), his wife noticed a gradual onset of loud snoring and apneic spells, and that he also noticed a gradual onset of non-restorative sleep and excessive daytime sleepiness when driving. This is lay evidence in favor of the claim.

The evidence against the claim includes VA medical opinions.

During an April 2021 VA examination, the Veteran reported that 10 to 15 years prior, his wife noticed a gradual onset of loud snoring and apneic spells. The Veteran reported that he also noticed a gradual onset of non-restorative sleep and excessive daytime sleepiness when driving. He reported that these symptoms had progressively worsened. The VA examiner opined that it is less likely than not that the Veteran's sleep apnea is related to a specific exposure event experienced by the Veteran during service in Southwest Asia. As rationale, the VA examiner noted that a specific, toxic, environmental exposure event in Southwest Asia would not cause sleep apnea.

The Veteran was provided a VA sleep apnea examination in February 2022. The VA examiner opined that the Veteran's sleep apnea was less likely than not incurred in or caused by the claimed in-service, injury, event, or illness. As rationale, the VA examiner explained that medical records show that the Veteran was diagnosed with sleep apnea several years after active service.

In a March 2022 addendum opinion, that same VA examiner opined that the claimed condition is 'less likely than not proximately due to or the result of' the Veteran's service-connected condition. As rationale, the VA examiner explained that medical literature does not support an association between sleep apnea and PTSD. The examiner further explained that sleep apnea results from a collapse of the upper airways during sleep. The VA examiner did not provide an opinion as to whether the Veteran's sleep apnea was aggravated by his service-connected PTSD.

In a May 2022 addendum opinion, that same VA examiner opined that the OSA is 'less likely than not proximately due to or the result of' his service-connected disabilities. As rationale, the examiner stated medical records fail to show that the conditions of PTSD and allergic rhinitis aggravated the Veteran's OSA w/obesity and medical records fail to show the association of these conditions during active duty with OSA.

In a June 2022 addendum opinion, a different VA examiner provided an opinion that the Veteran's service-connected PTSD and allergic rhinitis did not cause or aggravate the Veteran's OSA, including from obesity as an intermittent step. The examiner explained, in part, that the service-connected PTSD and allergic rhinitis did not cause or aggravate the Veteran's obesity; he was unable to opine as to whether the Veteran's OSA would have occurred but for his obesity; and that obesity is the majority cause of sleep apnea.

The Board finds the Veteran's April 2021 lay statement that 10 to 15 years prior (which would have been beginning in 2006 while he was still on active duty), his wife noticed a gradual onset of loud snoring and apneic spells, and that he also noticed a gradual onset of non-restorative sleep and excessive daytime sleepiness when driving, to be competent and credible.

The Board finds the January 2021 private medical opinion to be adequate and probative because the clinician reviewed the claims file, considered the Veteran's lay contentions, discussed relevant treatise evidence, and provided supporting rationale for the conclusions reached. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295 (2008); *Barr v. Nicholson*, 21 Vet. App. 303 (2007); *Stefl v. Nicholson*, 21 Vet. App. 120 (2007).

The Board finds the April 2021 VA opinion is not persuasive because the examiner does not appear to have adequately considered the Veteran's lay statements regarding onset of his symptoms. Although VA medical examiners are not required to comment on every piece of favorable evidence, they must consider relevant lay evidence. *Miller v. Wilkie*, 32 Vet. App. 249, 258 (2020).

The Board finds that the March 2022 VA opinion is not adequate for decision making purposes because the examiner did not provide an opinion as to whether the Veteran's sleep apnea is aggravated by his service-connected PTSD or allergic rhinitis. In that regard, the Board notes that an opinion to the effect that one disability "is not caused by or a result of" another disability does not answer the question of aggravation. *See El-Amin v. Shinseki*, 26 Vet. App. 136, 140-41 (2013). The May 2022 rationale did not fully explain why the Veteran's service-connected PTSD and rhinitis did not cause or aggravate his OSA with obesity as an intermediate step consistent with *Walsh v. Wilkie*, 32 Vet. App. 300, 307 (2020).

The analysis for whether secondary service connection can be granted under this theory, is: (1) whether the service-connected disability/disabilities in question either caused or aggravated the Veteran's obesity; (2) if so, whether the obesity as a result of the service-connected disability/disabilities was a substantial factor in causing the claimed current disability; and (3) whether the claimed current disability would not have occurred but for obesity caused by the service-connected disability or disabilities. *Walsh*.

The June 2022 VA opinion appears to be adequate and probative. However, it only serves to place the competent and persuasive medical nexus evidence in approximate balance. If the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt. *Lynch*.

Accordingly, after careful review of the relevant medical and lay evidence, the Board finds that service connection for OSA, secondary to the Veteran's service-connected PTSD, is warranted. 38 U.S.C. § 5107; 38 C.F.R. §§ 3.102, 3.310.

Service connection for OSA, secondary to the Veteran's service-connected PTSD is granted.



D. JOHNSON
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

B. G. LeMoine, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.