



BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF

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DOCKET NO. 11-09 193

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DATE

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FEB 28 2014

On appeal from the
Department of Veterans Affairs Regional Office in Detroit, Michigan

THE ISSUE

Entitlement to service connection for sleep apnea.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Catherine Cykowski, Counsel

INTRODUCTION

The Veteran had active duty service from January 1971 to October 1972.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a December 2009 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Detroit, Michigan.

In March 2012, the Veteran testified at a videoconference hearing before the undersigned Veterans Law Judge. A transcript of the hearing is of record and has been reviewed.

FINDING OF FACT

The evidence is in equipoise as to whether the Veteran's sleep apnea is aggravated by service-connected PTSD.

CONCLUSION OF LAW

The criteria for secondary service connection for PTSD have been met. 38 U.S.C.A. §§ 1110, 5107(b) (West 2002 & Supp. 2013); 38 C.F.R. § 3.310 (2013).

REASONS AND BASES FOR FINDING AND CONCLUSION

Duties to Notify and Assist

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), the United States Department of Veterans Affairs (VA) has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2013). In this case, the Board is granting in full the benefit

sought on appeal. Accordingly, assuming, without deciding, that any error was committed with respect to either the duty to notify or the duty to assist, such error was harmless and will not be further discussed.

Analysis of Claim

Service connection may be established on a secondary basis for a disability that is proximately due to or the result of a service-connected disease or injury. 38 C.F.R. § 3.310(a) (2013). Establishing service-connection on a secondary basis requires evidence sufficient to show (1) that a current disability exists and (2) that the current disability was either (a) caused by or (b) aggravated by a service-connected disability. *See* 38 C.F.R. § 3.310(a); *see also Allen v. Brown*, 7 Vet. App. 439 (1995) (en banc). When aggravation of a Veteran's non-service-connected condition is proximately due to or the result of a service-connected condition, the Veteran shall be compensated for the degree of disability over and above the degree of disability existing prior to the aggravation. *Allen, supra*. To prevail on the issue of secondary service causation, generally, the record must show (1) medical evidence of a current disability, (2) a service-connected disability, and (3) medical nexus evidence establishing a connection between the current disability and the service-connected disability. *Wallin v. West*, 11 Vet. App. 509, 512 (1998); *Reiber v. Brown*, 7 Vet. App. 513, 516-17 (1995).

Competency of evidence differs from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered by the trier of fact, while credibility is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown*, 10 Vet. App. 67, 74 (1997); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); *see also Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility of testimony, it does not affect competency to testify").

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim must be denied.

38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102, *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, all of the evidence submitted by the Veteran or on his behalf. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (finding that the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis herein focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claim. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000) (holding that the law requires only that the Board address its reasons for rejecting evidence favorable to the Veteran).

The Veteran asserts that sleep apnea is causally related to service-connected PTSD. The Veteran has not asserted that sleep apnea is directly related to service, and as such, the Board will not discuss direct service connection.

In a July 2009 statement, a private psychologist opined that it is more likely than not that the Veteran's sleep apnea is aggravated by his PTSD. The private psychologist submitted several journal articles supporting her opinion regarding a secondary relationship between sleep apnea and PTSD.

The Veteran submitted a statement from a private physician, Dr. D.D. Dr. D.D. stated that he had researched how sleep apnea relates to PTSD. Dr. D.D. stated that research has shown that his sleep apnea is directly related to his PTSD. He noted that there are case studies relating these two entities. The studies were not specified or included with the opinion.

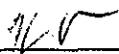
The Veteran had a VA examination in October 2009. The Veteran reported sleep apnea with an onset two to three months earlier. The VA examiner opined that, per medical literature review, sleep apnea is not caused by or aggravated by the Veteran's PTSD. The VA examiner stated that the basis of the opinion was the review of medical literature. The literature was not specified.

At the Board hearing in March 2012, the Veteran testified that his therapist has told him that PTSD aggravates sleep apnea because he has nightmares and dreams in his sleep. The Veteran testified that he has anxiety attacks in his sleep that keep him from catching his breath. The Veteran testified that he has used a CPAP machine for about four years.

In this case, there is positive medical evidence which links the Veteran's current sleep apnea to service-connected PTSD via aggravation. The most probative opinion is that of Dr. T which not only provided a link between the Veteran's PTSD and sleep apnea (by aggravation) but also was supported by submitted medical literature. Despite the negative VA opinion, in light of the positive medical opinions from the private psychologist, the Board finds the evidence is at least in equipoise regarding whether the Veteran's sleep apnea is aggravated by service-connected PTSD. Accordingly, resolving all reasonable doubt in the Veteran's favor, service connection for sleep apnea is warranted. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); 38 U.S.C.A. § 5107(b).

ORDER

Secondary service connection for sleep apnea is granted.



K. PARAKKAL

Veterans Law Judge, Board of Veterans' Appeals

END OF EXHIBIT