*Designated for electronic publication only*

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

NO. 15-2411

RANDOLPH L. HARTLEY, APPELLANT,

V.

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

Before HAGEL, *Senior Judge.*[1]

**MEMORANDUM DECISION**

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

HAGEL, *Senior Judge*: Randolph L. Hartley appeals through counsel that part of an April 9, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 50% for the period prior to May 23, 2016, and to a total disability rating based on individual unemployability prior to June 23, 2009.[2] Mr. Hartley's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Board failed to adequately explain its determinations, the Court will vacate that part of the April 2015 Board decision on appeal and remand the matter for readjudication consistent with this decision.

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[1] Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 09-16 (Oct. 13, 2016).

[2] The Board also denied entitlement to a disability rating in excess of 70% from May 23, 2012. In his briefs, Mr. Hartley raises no arguments regarding that portion of the Board's decision, and the Court therefore deems any appeal of that issue abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it); *Cacciola v. Gibson*, 27 Vet.App. 45, 57 (2015) (holding that, when an appellant expressly abandons an appealed issue or declines to present arguments as to that issue, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

## I. FACTS

Mr. Hartley served on active duty in the U.S. Army from from September 1968 to March 1972, including service in Viet Nam.

In February 2007, Mr. Hartley filed a claim for benefits for post-traumatic stress disorder. He was afforded a VA examination in November 2007, conducted by clinical psychologist Paul Lysaker, Ph.D. Dr. Lysaker noted that Mr. Hartley's relationship with his wife was strained by his irritability, he had few acquaintances and few social contacts, and he had few hobbies, with the exception of golf. Mr. Hartley reported difficulty leaving his home due to anxiety. Dr. Lysaker recorded that Mr. Hartley endorsed an anxious, agitated, dysphoric mood and suicidal ideation. Mr. Hartley reported that he could not concentrate long enough to read anything lengthy that involved new ideas and that he felt exhausted from having to concentrate on anything. Dr. Lysaker noted that Mr. Hartley reported inappropriate behavior, such as verbally attacking others when he was frustrated, and that his motivation or mood was affected because he lost his temper easily, lashed out verbally, and endorsed withdrawal. Mr. Hartley reported feelings of hopelessness and some suicidal thoughts, specifically that "death might bring peace." Record (R.) at 1059-60. Dr. Lysaker noted an inability on Mr. Hartley's part to maintain minimum personal hygiene. He concluded that Mr. Hartley's post-traumatic stress disorder resulted in difficulties with co-workers and resolving conflicts at work, difficulties forming new friendships and enjoying leisure time pursuits, and conflicts in both his past and current marriages. He also noted that Mr. Hartley's post-traumatic stress disorder symptoms resulted in deficiencies in thinking, family relations, work, and mood.

In December 2007, a VA regional office granted Mr. Hartley's claim for benefits for post-traumatic stress disorder and assigned a 30% disability rating, effective February 7, 2007, the date of his claim. Mr. Hartley filed a Notice of Disagreement with the disability rating assigned and requested a hearing before a decision review officer. In support of his appeal, Mr. Hartley submitted an April 2008 letter from his treating licensed clinical social worker at the Indianapolis, Indiana, Veterans Center, Charles Leitner. Mr. Leitner stated that he had treated Mr. Hartley since June 2000, with the exception of a two-year period in which he was assigned to a different veterans center. He wrote:

> Mr. Hartley endorses every symptom of [post-traumatic stress disorder] in the [*Diagnostic and Statistical Manual*, Fourth Edition],[3] and struggles mightily with depression as well. He suffers from extremely high levels of anxiety on a continuous basis (scored at the "extreme anxiety/panic" level on the Burns Anxiety Inventory, among other measures). Given that anxiety is the "sine qua non" symptom of [post-traumatic stress disorder], it would follow that his [post-traumatic stress disorder] is severe. I can verify from direct observation over an extended period of time that Mr. Hartley's [post-traumatic stress disorder] is, indeed, severe. It is so severe that he must rely on benzodiazepines[4] to be able to leave his home most of the time. He is often unable to leave home or be around people for days at a time, even with the benzo[diazepine]s. I would rate his [Global Assessment of Functioning score] in the 35-40 range, with major impairment in the areas of work (retired due to his inability to deal with co-workers and managers), judgment (e.g., severe road rage), thinking (e.g., suicidal thought, frequently and easily misinterprets events around him as hostile or dangerous), and mood (e.g., anxiety, depression, anger).
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> In my judgment, Mr. Hartley's present level of service connection does not come close to reflecting the reality of his condition or level of impairment. I would *strongly* support an increase in his serviced[-]connected rating from the present level to–at a minimum–the 70% level.

R. at 1038.

In June 2009, Mr. Hartley perfected his appeal to the Board, requested a hearing before a Board member, and indicated that he wished to be considered for a total disability rating based on individual unemployability. Also in June 2009, the decision review officer increased Mr. Hartley's disability rating to 50%, effective February 7, 2007, but that decision was not mailed to Mr. Hartley until July 2009.

In developing Mr. Hartley's request for a total disability rating based on individual unemployability, VA sent VA Form 21-4192, Request for Employment Information in Connection with Claim for Disability Benefits, to his former employer, identified on the form only as "O.D." R. at 677. Mr. Hartley's former employer returned the form to VA in June 2010, indicating that Mr.

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[3] *The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, was, at the time of this letter and until 2013, the standard classification of mental disorders used by mental health professionals in the United States. The fifth edition was issued in 2013.

[4] Benzodiazepines are "any of a group of compounds having a common molecular structure and acting similarly as depressants of the central nervous system, their actions including antianxiety, sedative, hypnotic, amnestic, anticonvulsant, and muscle relaxing effects." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 209 (32d ed. 2012).

Hartley retired on December 31, 2001, after more than 30 years. The employer wrote "N/A" for not applicable in the fields for "amount earned during 12 months preceding last date of employment," "time lost during 12 months preceding last date of employment," "number of hours worked" (both daily and weekly), "type of work performed," "concessions (if any) made to employee by reason of age or disability," "date of last payment," "gross amount of last payment," and "date paid." *Id.* The only other specific information Mr. Hartley's former employer provided was that he is in receipt of lifetime retirement benefits from his former employer.

In July 2010, the regional office issued a decision granting Mr. Hartley a total disability rating based on individual unemployability effective June 23, 2009, the date VA received his request for that benefit. Mr. Hartley did not appeal that decision.

In December 2011, Mr. Hartley and his wife testified at a hearing before a Board member. Mr. Hartley stated that his current post-traumatic stress disorder symptoms were high levels of "anxiety and anger," hypervigilance, and sleep troubles. R. at 243. He reported that he does not drive very much because he has "tremendous fear of road rage." *Id.* He explained that his wife, daughters, and friends do not like to ride with him when he drives because of his anger. He stated that he is often afraid to leave his house. Mr. Hartley testified that he "made the decision to retire early" because he "started demonstrating a propensity for wanting to choke supervisors and other people who were doing stupid things." R. at 244. He reported that he sometimes thinks it would be better if he weren't alive because he would not have to experience his pain and anguish, but stated that he "can't do that" to his wife and daughters. R. at 246. Mr. Hartley also stated that he no longer cooks and so only eats one meal a day that his wife cooks and that he has to force himself to shower at least once a week. Mr. Hartley's wife testified that her husband has high anxiety, is hypervigilant, has continuous panic attacks, and does not bathe, shower, shave, or brush his teeth regularly. She stated that Mr. Hartley "has a hard time completing sentences in a manner that makes sense to most people. He leaves out words, stops in midsentence without completing his thought, skips around the subject, and comes up with cryptic references that usually mean nothing to anyone except him." R. at 247. She stated that his propensity for angry outbursts makes her feel like she has to walk on eggshells around him.

In May 2012, the Board remanded Mr. Hartley's claim for further development, including a VA examination to determine the severity of his post-traumatic stress disorder. Later that month, Mr. Hartley underwent the requested post-traumatic stress disorder examination, conducted by clinical psychologist Jennifer Fray, PsyD. Dr. Fray opined that Mr. Hartley's post-traumatic stress disorder caused persistent intrusive ideation, decreased interest and pleasure in activities, detachment, prominent irritability, avoidance of driving due to road rage, hypervigilance (he worried about "the people coming out of the jungle coming after" him), and an exaggerated startled response that resulted in his keeping his doors shut. R. at 216. She further noted that Mr. Hartley had markedly diminished interest in activities, feelings of detachment or estrangement from others, irritability or outbursts of anger, and difficulty concentrating. Dr. Fray recorded that the duration of these post-traumatic stress disorder symptoms was "more than [one] month." R. at 223. Dr. Fray determined that Mr. Hartley's condition resulted in occupational and social impairment with deficiencies in most areas. She explained that the overall occupational impact from Mr. Hartley's post-traumatic stress disorder symptoms was "significant" and noted that Mr. Hartley had not worked since 2001 due to stress. R. at 218.

In June 2012, VA received Mr. Hartley's treatment records from the Indianapolis Veterans Center from February 1, 2009, to the present.

In November 2012, the regional office increased Mr. Hartley's disability rating for post-traumatic stress disorder to 70%, effective May 23, 2012, the date of the most recent VA examination. The matter returned to the Board where, in August 2014, the Board denied entitlement to an initial disability evaluation for post-traumatic stress disorder in excess of 50% percent from February 7, 2007, to May 22, 2012, and in excess of 70% from May 23, 2012. Mr. Hartley appealed that decision to the Court and, in February 2015, the Court granted the parties' joint motion for remand in which they agreed that the Board failed to adequately explain its decision.

In April 2015, the Board issued the decision on appeal denying, in relevant part, entitlement to a disability rating in excess of 50% for post-traumatic stress disorder prior to May 23, 2012, and to a total disability rating based on individual unemployability prior to June 23, 2009. This appeal followed.

## II. ANALYSIS

### A. Post-traumatic Stress Disorder

#### *1. Law*

For the purposes of determining the appropriate disability rating, Mr. Hartley's post-traumatic stress disorder is measured against the rating criteria described in 38 C.F.R. § 4.130, Diagnostic Code 9441, which directs the rating specialist to apply the general rating formula for mental disorders. According to the general rating formula, a 50% disability rating is warranted where the evidence demonstrates:

> Occupational and social impairment with reduced reliability and productivity due to such symptoms as a flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g. retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; or difficulty in establishing and maintaining effective work and social relationships.

38 C.F.R. § 4.130, Diagnostic Code 9411 (2016). A 70% disability rating is warranted where the evidence demonstrates:

> Occupational and social impairment, with deficiencies in most areas such as work, school, family relations, judgment, thinking or mood, due to such symptoms as suicidal ideation; obsession rituals which interfere with routine activities; speech that is intermittently illogical, obscure or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately, and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); or the inability to establish and maintain effective relationships.

*Id.*

Because the symptoms enumerated in § 4.130 are not an exhaustive list, the Court has held that VA must consider "all the evidence of record that bears on occupational and social impairment" and then "assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering." *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002). The United States Court of Appeals for the Federal Circuit explained that evaluation under § 4.130 is "symptom-driven," meaning that "symptom[s] should be the fact-finder's primary focus when

deciding entitlement to a given disability rating" under that regulation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). "[A] veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id.* To qualify for a particular disability rating, § 4.130 requires "not only the presence of certain symptoms[,] but *also that those symptoms have caused occupational and social impairment in most of the referenced areas*." *Id.* at 118 (emphasis added); *see* 38 C.F.R. § 4.130, Diagnostic Code 9411.

*2. Discussion*

a. Veterans Center Records and Letter from Mr. Leitner

Mr. Hartley first argues that the Board erred by failing to give any probative weight to Mr. Leitner's April 2008 letter, finding it inconsistent with the contemporaneous Veterans Center treatment records from 2000 on. The Court disagrees.

With respect to that evidence, the Board found:

> Vet[erans] Center counseling notes beginning a year prior to [Mr. Hartley's] planned retirement did not show any complaints or findings of any problems at work, or that [he] experienced any increased psychiatric symptoms related to his job, his co-workers[,] or his managers. On the contrary, the counseling notes showed that [he] was not looking forward to retirement (see January 2001 note). Other treatment notes showed that [Mr. Hartley] and [Mr. Leitner] discussed his pending retirement and the "grief and loss issues to come, as well as slow withdrawal from friendships at work." In December 2001, [Mr. Hartley] announced his upcoming retirement to the group and invited everyone to his retirement ceremony and dinner. In this case, the Board finds [Mr. Hartley's] description of symptoms and the circumstances of his retirement recorded at the time of the actual events to be more probative and persuasive than his recollections made many years after the fact for the purpose of obtaining increased compensation benefits.
>
> Similarly, the Board finds that [Mr. Leitner's] description of the severity of [Mr. Hartley's] symptoms and the circumstances of his retirement in a 2008 letter[] are not only inconsistent with, but contradict[,] his description of [Mr. Hartley's] symptoms and the actual events recorded in his clinical notes years earlier. As noted above, [Mr. Leitner's] clinical notes showed that [Mr. Hartley's] retirement was planned for at least a year and that they discussed grief issues associated with the loss of work-related friendships. [Mr. Leitner's] notes documented instances when [Mr. Hartley] reported increased symptoms, his issues with ongoing health problems[,] and the various topics discussed during counseling sessions, but made no mention of any personal conflicts with co-workers or any other work-related problems. That

> [Mr. Hartley] would experience and [Mr. Leitner] observe[] "extreme levels of anxiety on a continuous basis" so severe that [Mr. Hartley] contemplated physical violence at work, but that [Mr. Leitner] would not document a single episode in any of his numerous treatment records[] raises serious questions concerning not only his proficiency as a healthcare provider, but [also] the accuracy and reliability of his recollections.
>
> When considered with the recorded observations of other clinical psychologists and psychiatrists in the numerous medical reports during the same time periods, which do not show or otherwise suggest such "extreme" or "severe" symptoms, the Board finds that [Mr. Leitner's] contemporaneously recorded clinical notes are more reliable and probative than his recollections reported several years after the actual events and submitted for the specific purpose of obtaining compensation benefits for [Mr. Hartley]. Given the facts in this case, the Board declines to assign the social worker's 2008 letter any meaningful evidentiary weight.

R. at 21-23.

Mr. Hartley contends that it was error for the Board to only consider counseling notes from the Veterans Center for the one year prior to his December 2001 retirement because, in so limiting its review, the Board failed to account for evidence of difficulties at work caused by his post-traumatic stress disorder. In support of this argument, Mr. Hartley cites a single July 2000 Veterans Center treatment note that indicates that he discussed several problems at work that were making him depressed. At that time, Mr. Leitner diagnosed Mr. Hartley with depression due to "frustration overload." R. at 822. The remainder of the treatment records (including the only two others dated more than one year before Mr. Hartley's retirement), as the Board correctly stated, do not indicate any difficulties at work and suggest that, in fact, Mr. Hartley enjoyed his work and was sad to retire. The Court concludes that Mr. Hartley has not carried his burden of demonstrating that the Board's failure to expressly account for a single treatment note is prejudicial error. *See Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"). Moreover, the Court concludes that the Board clearly and adequately explained its determination that Mr. Leitner's April 2008 letter was not entitled to probative weight, and Mr. Hartley has not demonstrated that the Board's conclusion in that regard is clearly erroneous. *See* 38 U.S.C. § 7104(d)(1); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

To the extent that Mr. Hartley contends that the Board also erred in finding his own later statements as to the reason for his retirement not credible, the Court again finds that the Board's determination is not clearly erroneous and is supported by adequate reasons or bases. *See id.*

b. Reasons and Bases for Denying a 70% Disability Rating

Mr. Hartley next argues that the Board "failed to properly consider or discuss favorable material evidence of record that [he] endorsed symptoms enumerated within the higher rating criteria, which resulted in significant impairment in most areas, which would warrant an increased rating"–specifically 70%–for the period before May 23, 2012.[5] Appellant's Brief (Br.) at 16. The Court agrees.

As Mr. Hartley points out, "[t]he 70[%] disability rating regulation contemplates initial assessment of the symptoms displayed by the veteran, and if they are of the kind enumerated in the regulation, an assessment of whether those symptoms result in occupational and social impairment with deficiencies in most areas." *Vazquez-Claudio*, 713 F.3d at 118. Here, instead of assessing whether Mr. Hartley's post-traumatic stress disorder symptoms cause *deficiencies* in most areas, consistent with the requirements for a 70% disability rating, the Board appeared to focus on the fact that Mr. Hartley's post-traumatic stress disorder symptoms do not cause *total impairment* in any area, which is a requirement for a 100% disability rating. In considering the proper disability rating for Mr. Hartley's post-traumatic stress disorder prior to May 23, 2012, the Board stated:

> While [Mr. Hartley] now alleges that his anxiety makes it "nearly impossible" for him to leave his house, that he is essentially "hiding from the world" and has a "bunker mentality," the evidence prior to May 2012, showed that he maintained a fairly active life style and traveled to various cities throughout the United States each year to attend a reunion of fellow [Army Security Agency] servicemen. In fact, in 2007, [Mr. Hartley] was elected president of the [Army Security Agency] group and served a one[-]year term without any reported problems. That he accepted the nomination and was elected president by the other members of the group is not consistent with someone claiming to be "hiding from the world[,]" nor does it show a deficiency in his cognitive functioning, such as[] judgment, thinking[,] or mood which interfere with routin[e] activities. That he served his one[-]year term without any reported problems also suggests that he was able to maintain effective work and social relationships and function appropriately and effectively. At the very least, the evidence showed a capacity for adjustment during periods of remission.

[5] Mr. Hartley does not contend that a 100% disability rating is warranted for the period prior to May 23, 2012.

> Similarly, while [Mr. Hartley] reported that he doesn't like to be around crowds and rarely interacts with friends, the evidence showed that he went on vacation with friends to Disney World for eight days in October 2008[] and reported to a VA psychiatrist more than a month later[] that he had a good time when he was on vacation. In the Spring of 2009, [he] traveled to Pennsylvania to attend another [Army Security Agency] reunion and traveled to Texas later that year to attend an Auto Warranty Arbitration conference. [He] also reported that he had been doing arbitration work for a number of years and that he served on an arbitration panel several times a year. That [Mr. Hartley] traveled to one of the most crowded tourist attractions in the world with friends, attends annual reunions of fellow servicemen, and enjoys vacationing at the beach each year is inconsistent with his allegations of avoiding crowds and interacting with friends. Moreover, the fact that he travels to various cities, interacts with friends and fellow servicemen, and finds relaxation at one of the most crowded beaches on the east coast (Myrtle Beach) shows that he is able to adapt to stressful situations and has good coping skills. The fact that he serves on arbitration panels several times a year is not reflective of an impairment of judgment, thinking[,] or an [in]ability to function independently or appropriately. While the Board does not dispute that [Mr. Hartley's] psychiatric symptoms cause some occupational and social impairment, they were not shown to cause deficiencies in most areas of his life, or that he had difficulty adapting to stressful circumstances (including work or work-like settings) at anytime prior to May 2012.

R. at 19-21.

The Board focused almost exclusively on Mr. Hartley's social relationships to the exclusion of evidence of impaired mood, judgment, and thought. Moreover, the Board's conclusion that Mr. Hartley's ability to travel and interact with friends is indicative of no impairment in social functioning is suspect; that evidence shows only that he was not *totally* deficient in the area of maintaining social relationships, which is a requirement for a 100% disability rating, not the 70% disability rating he seeks for the period prior to May 23, 2012. The Board only accounted for evidence that demonstrates that Mr. Hartley is able to socialize under some circumstances, but failed to address evidence that shows that he has difficulty with social or family relationships. *See* R. at 1062, 191, 1019, 1057.

The Board also erred in failing to account for evidence of Mr. Hartley's strained familial relationships, along with evidence of impaired, illogical speech and deficiencies in judgment, thinking, and mood, again focusing only on evidence that showed that Mr. Hartley was not totally deficient in those areas.

The Board further erred in stating that "there is not a single notation in any of the medical reports to substantiate" the assertion that Mr. Hartley does not maintain appropriate hygiene. R. at 23. First, that is simply not true; both the November 2007 and May 2012 VA examiners noted Mr. Hartley's neglect of personal hygiene. *See* R. at 198, 1059. Second, the record contains numerous statements from Mr. Hartley and his wife regarding the state of his personal hygiene; the Board did not account for that evidence or explain why it was not relevant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Additionally, the Board determined that many of Mr. Hartley's symptoms were mediated by the use of post-traumatic stress disorder medications. The rating schedule for mental disorders does not permit the Board to account for the ameliorating effects of medication in determining whether a 70% disability rating is warranted. *See Jones v. Shinseki,* 26 Vet.App. 56, 61 (2012); *Massey v. Brown*, 7 Vet.App. 204, 208 (1994); 38 C.F.R. § 4.130.

Finally, the Board failed to account for the possibility that the symptoms Mr. Hartley demonstrated at the May 2012 examination–on the basis of which Mr. Hartley was granted a 70% disability rating–existed prior to the date of that examination, such that an earlier effective date for that disability rating is warranted. Dr. Fray specifically noted that many of Mr. Hartley's symptoms had lasted more than one month, necessarily raising the issue of the proper effective date for a rating based on her examination. *See* 38 U.S.C. § 5110(a); *Robinson v. Shinseki*, 557 F.3d 1355, 1361-62 (Fed. Cir. 2009) (holding that the Board is obligated to consider arguments or issues raised by the record).

In light of the above discussion, the Court concludes that the Board failed to adequately explain its determination that Mr. Hartley is not entitled to a disability rating in excess of 50% for the period prior to May 23, 2012, and remand is necessary. *See* 38 U.S.C. § 7104(d)(1).

B. Total Disability Rating Based on Individual Unemployability

In denying entitlement to an earlier effective date for the award of a total disability rating based on individual unemployability, the Board stated:

> [I]n *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the Court held that a claim for a total rating based on individual unemployability (TDIU) is part of an increased rating claim when such claim is expressly raised by the Veteran or reasonably raised by the record. The Court further held that[,] when evidence of unemployability is submitted

> at the same time that the Veteran is appealing the initial rating assigned for a disability, the claim for TDIU will be considered part and parcel of the claim for benefits for the underlying disability. *Id*
>
> In this case, [Mr. Hartley] was granted TDIU by the [regional office] in July 2010 based on all of his service-connected disabilities[,] effective from June 23, 2009, the date of his TDIU claim. [Mr. Hartley] did not appeal that decision or the effective date assigned. Thus, the question in this case, is whether the [his post-traumatic stress disorder], alone, was of such severity so as to preclude substantially gainful employment from the date of his reopened claim in June 2007 to June 23, 2009, under the holding in *Rice*.
>
> As discussed above, the evidence showed that [Mr. Hartley] voluntarily retired from his employment with a government agency in 2001. Although [he] now claims that he retired because of conflicts with co-workers and managers due to entirely to [sic] psychiatric symptoms associated with his [post-traumatic stress disorder], the Board finds that his current allegations are inconsistent with his prior statements and the objective evidence of record and is not reliable or credible. For the reasons discussed above, the Board finds that[Mr. Leitner's] 2008 assessment and opinion as to the severity of [Mr. Hartley's] psychiatric symptoms was inconsistent with his contemporaneously recorded descriptions of symptomatology in his clinical notes and was unreliable. Thus, the Board found the 2008 letter was not an accurate assessment or reliable opinion and declined to assign it any evidentiary weight.
>
> Despite [Mr. Hartley's] contentions to the contrary, the evidence shows that he [is] not confined to his home and that he travels all over the country, most of the time by car, attending reunions and·arbitration conferences on a regular basis. As recent[ly] as September 2009, the evidence showed that [Mr. Hartley] served on arbitration panels several times a year and had been doing arbitration work for several years. Moreover, the medical reports during the pendency of this appeal do not suggest that his psychiatric symptoms, alone, preclude substantially gainful employment[] prior to June 23, 2009. Accordingly, further consideration of entitlement to [a total disability rating based on individual unemployability] is not warranted.

R. at 26-27.

Mr. Hartley objects to the Board's reliance on evidence that, as recently as September 2009, he had served on arbitration panels to deny entitlement to a total disability rating based on individual unemployability for the period prior to June 23, 2009. The Court agrees. The Board did not explain how evidence that post-dates the June 2009 effective date already assigned for the award of a total disability rating based on individual unemployability has any bearing on Mr. Hartley's entitlement

to that benefit prior to June 2009. *See* 38 U.S.C. § 7104(a)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

The Court also finds that the Board's heavy reliance on the June 2010 VA Form 21-4192 provided by Mr. Hartley's former employer is not supported by a sufficient explanation. The Board makes much proverbial hay out of the fact that the form shows no concessions made to Mr. Hartley on the basis of his disability, that he missed no time from work in the last 12 months of his employment, and that he had no conflicts with coworkers. R. at 21 ("[I]nformation received from the agency where [Mr. Hartley] worked for over 20 years, made no mention of any personality issues or conflicts at work and showed that he did not lose any time at work during the 12 months prior to retirement, or that any concessions were made for him for any disability."); R. at 26. The employer's responses, however, do not support the weight the Board attempts to place on them, given that the employer answered "not applicable" to nearly every question on the form, even questions that ought to be a simple matter of reviewing Mr. Hartley's payroll information, such as "type of work performed,""date of last payment," "gross amount of last payment," and "date paid." R. at 677. The Board afforded great weight to the employer's notations of "not applicable" without accounting for the fact that the employer was apparently unable to provide almost any other specific information regarding Mr. Hartley's employment.

In light of the Board's inadequate explanation of its reliance on September 2009 arbitration work and its failure to account for the uninformative nature of the Mr. Hartley's former employer's statement, the Court concludes that the remand is warranted to reconsider the issue of the proper effective date for the award of a total disability rating based on individual unemployability. *See* 38 U.S.C. § 7104(d)(1).

Finally, Mr. Hartley argues that the Board's denial of an earlier effective date for the award of a total disability rating based on individual unemployability "rests on a misinterpretation of the term 'substantially gainful employment,'" as that term is used in 38 C.F.R. § 4.16. Appellant's Br. at 14. Specifically, he contends that, to the extent that his arbitration work is relevant, "it is unclear how much arbitration work [he] completed or what his compensation was for such work, and the Board failed to explain how such evidence would constitute a substantially gainful occupation." *Id.* In light of the Court's determination that the Board failed to adequately explain its denial of

entitlement to an earlier effective date for the award of a total disability rating based on individual unemployability, the Court need not address this particular argument at this time. Suffice it to say that, on remand, in reconsidering the proper effective date for the award of a total disability rating based on individual unemployability, the Board will expressly address the issue of substantially gainful employment, now that Mr. Hartley has expressly raised it. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) ("[W]hen the facts of the case reasonably raise the issue of whether the veteran's ability to work might be limited to marginal employment, the Board . . . must address this issue and, when appropriate, explain why the evidence does not demonstrate that the veteran is incapable of more than marginal employment."); *see also Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). The Board will also specifically address the evidence provided in the November 2007 VA examination that pertains to Mr. Hartley's ability to work.

As always, on remand, Mr. Hartley is free to submit additional evidence and argument 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). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

## III. CONCLUSION

Upon consideration of the foregoing, that part of the April 9, 2015, Board decision on appeal is VACATED, and the matter is REMANDED for readjudication consistent with this decision.

DATED: November 9, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)