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

IN THE APPEAL OF C[redacted]
JAMES O. EMERSON

DOCKET NO. 11-06 466) DATE *November 3, 2016*
) *QLJ*
)

On appeal from the
Department of Veterans Affairs Regional Office in North Little Rock, Arkansas

THE ISSUES

1. Entitlement to an initial compensable evaluation for posttraumatic stress disorder (PTSD) prior to April 24, 2008.

2. Entitlement to an initial evaluation in excess of 10 percent for PTSD on or after April 24, 2008.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

The appellant

ATTORNEY FOR THE BOARD

A. Shawkey, Counsel

INTRODUCTION

The Veteran served on active duty from November 1963 to November 1967.

This matter comes before the Board of Veterans' Appeals (Board) on an appeal from an August 2009 rating decision of the Department of Veterans Affairs (VA) Regional Offices (ROs) in Huntington, West Virginia. In that decision, the RO granted service connection for PTSD and assigned a noncompensable evaluation effective from August 25, 2004, and a 10 percent evaluation effective from April 24, 2008.

The Veteran testified before a Veterans Law Judge at an August 2012 hearing. However, that Veterans Law Judge is no longer employed at the Board. The Board has informed the Veteran and offered him the opportunity to testify before a different Veterans Law Judge at another hearing; however, he responded that he did not want a second hearing.

The Board remanded the case for further development in September 2014. That development was completed, and the case has since been returned to the Board for appellate review.

The Board notes that the RO denied a claim for service connection for rectal cancer in a September 2015 rating decision and that the Veteran submitted a notice of disagreement (NOD) with that decision in September 2016. However, the Veterans Benefits Management System (VBMS) and the Veterans Appeals Control and Locator System (VACOLS) indicate that the RO is continuing to work on that matter. As the RO has acknowledged receipt of the NOD and VACOLS indicates that further action is pending at the RO, this situation is distinguishable from *Manlincon v. West*, 12 Vet. App. 238 (1999), where a NOD had not been

recognized. Therefore, the Board will not take any action at this juncture, as the claim remains under the jurisdiction of the RO at this time.

This appeal was processed using the Virtual VA and VBMS paperless claims processing system.

FIINDINGS OF FACT

1. Prior to April 24, 2008, the Veteran's PTSD was not productive of occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication.

2. Since April 24, 2008, the Veteran's PTSD has not been productive of occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks.

CONCLUSIONS OF LAW

1. The criteria for an initial compensable evaluation for PTSD for the period prior to April 24, 2008, have not been met. 38 U.S.C.A. §§ 1155, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1-4.14, 4.130, Diagnostic Code 9411 (2015).

2. The criteria for an initial evaluation in excess of 10 percent for PTSD on or after April 24, 2008, have not been met. 38 U.S.C.A. §§ 1155, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.321, 4.1-4.14, 4.130, Diagnostic Code 9411 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Upon receipt of a substantially complete application for benefits, VA must notify the claimant of what information or evidence is needed in order to substantiate the

claim and it must assist the claimant by making reasonable efforts to get the evidence needed. 38 U.S.C.A. §§ 5103 (a), 5103A; 38 C.F.R. § 3.159 (b); *see Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002). The notice required must be provided to the claimant before the initial unfavorable decision on a claim for VA benefits, and it must (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant about the information and evidence that VA will seek to provide; and, (3) inform the claimant about the information and evidence the claimant is expected to provide. 38 U.S.C.A. §§ 5103 (a); 38 C.F.R. § 3.159 (b)(1); *Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004).

In *Dingess v. Nicholson*, 19 Vet. App. 473 (2006), the United States Court of Appeals for Veterans Claims (Court) held that, upon receipt of an application for a service connection claim, 38 U.S.C. § 5103 (a) and 38 C.F.R. § 3.159 (b) require VA to review the information and the evidence presented with the claim and to provide the claimant with notice of what information and evidence not previously provided, if any, will assist in substantiating, or is necessary to substantiate, each of the five elements of the claim, including notice of what is required to establish service connection and that a disability rating and an effective date for the award of benefits will be assigned if service connection is awarded.

With regard to claims for increased disability ratings for service-connected conditions, the law requires VA to notify the claimant that, to substantiate a claim, the claimant must provide, or ask VA to obtain, medical or lay evidence demonstrating a worsening or increase in severity of the disability. 38 U.S.C.A. §5103 (a); 38 C.F.R. § 3.159 (b); *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008), *vacated and remanded sub nom. Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009). The claimant must be notified that, should an increase in disability be found, a disability rating will be determined by applying relevant Diagnostic Codes, which typically provide for a range in severity of a particular disability from noncompensable to as much as 100 percent (depending on the disability involved), based on the nature of the symptoms of the condition for which disability compensation is being sought, their severity and duration. Finally, the notice must provide examples of the types of medical and lay evidence that the veteran may

submit (or ask the VA to obtain) that are relevant to establishing his or her entitlement to increased compensation. However, the notice required by section 5103(a) need not be specific to the particular veteran's circumstances; that is, VA need not notify a veteran of alternative diagnostic codes that may be considered or notify of any need for evidence demonstrating the effect that the worsening of the disability has on the particular veteran's daily life. *Vazquez-Flores v. Shinseki, supra.*

In this case, the Veteran is challenging the initial evaluations assigned following the grant of service connection for his PTSD. In *Dingess*, the Court held that, in cases where service connection has been granted and an initial disability rating and effective date have been assigned, the typical service-connection claim has been more than substantiated, it has been proven, thereby rendering section 5103(a) notice no longer required because the purpose that the notice is intended to serve has been fulfilled. Id. at 490-91. *See also* VAOPGCPREC 8- 2003 (December 22, 2003). Thus, VA's duty to notify has been satisfied.

In addition, the duty to assist the Veteran has also been satisfied in this case. The Veteran's service treatment records and all identified, relevant, and available post-service medical records have been associated with the claims file and were reviewed by both the RO and the Board in connection with the claim. The Veteran has not identified any other outstanding records that are pertinent to this case. Indeed, the Veteran testified at the August 2012 hearing that he was not seeing a psychiatrist or psychologist, and the September 2015 VA examiner indicated that the Veteran was not receiving any mental health treatment.

The Veteran was also afforded VA examinations in April 2008 and September 2015. As discussed below, the Board finds that the VA examinations in this case are adequate, as they are predicated on a review of the Veteran's medical history as well as on an examination, and they fully address the rating criteria that are relevant to rating the Veteran's PTSD.

Moreover, there is no objective evidence indicating that there has been a material change in the severity of the Veteran's PTSD since he was last examined in

September 2015. The duty to assist does not require that a claim be remanded solely because of the passage of time since an otherwise adequate VA examination was conducted. VAOPGCPREC 11-95.

Thus, there is adequate medical evidence of record to make a determination in this case. Accordingly, the Board finds that VA's duty to assist with respect to obtaining a VA examination or opinion with respect to the issues on appeal has been met. 38 C.F.R. § 3.159 (c)(4) (2015).

The Veteran also testified at a hearing before a Veterans Law Judge in August 2012. The Veterans Law Judge and his representative set forth the issues to be discussed, sought to identify pertinent evidence not currently associated with the claims folder, and elicited further information when appropriate. The hearing focused on the elements necessary to substantiate the claims, and the Veteran, through his testimony and questioning by his representative, demonstrated his actual knowledge of the elements necessary to substantiate the claims. As such, the Board finds that VA complied with the duties set forth in 38 C.F.R. 3.103 (c)(2) and *Bryant v. Shinseki*, 23 Vet. App. 488, 492 (2010). There has been no allegation otherwise. Moreover, as noted above, the Veteran was offered the opportunity to testify at a second hearing, but he declined.

The Board also finds that there has been substantial compliance with the September 2014 remand directives. Specifically, the AOJ obtained additional VA treatment records and provided him the September 2015 VA examination. Moreover, there has been no allegation that the AOJ did not comply with the prior remand.

For these reasons, the Board concludes that VA has fulfilled the duty to assist the Veteran in this case. Hence, there is no error or issue that precludes the Board from addressing the merits of this appeal.

Law and Analysis

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities, found in 38 C.F.R., Part 4. The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The ratings are intended to compensate, as far as can practicably be determined, the average impairment of earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. 38 C.F.R. § 4.7.

In considering the severity of a disability, it is essential to trace the medical history of the veteran. 38 C.F.R. §§ 4.1, 4.2, 4.41. Consideration of the whole-recorded history is necessary so that a rating may accurately reflect the elements of disability present. 38 C.F.R. § 4.2; *Peyton v. Derwinski*, 1 Vet. App. 282 (1991). While the regulations require review of the recorded history of a disability by the adjudicator to ensure a more accurate evaluation, the regulations do not give past medical reports precedence over the current medical findings.

Where a veteran appeals the denial of a claim for an increased disability rating for a disability for which service connection was in effect before he filed the claim for increase, the present level of the veteran's disability is the primary concern, and past medical reports should not be given precedence over current medical findings. *Francisco v. Brown*, 7 Vet. App. 55, 57-58 (1994). However, where, as here, the question for consideration is a higher initial rating since the grant of service connection, evaluation of the medical evidence since the grant of service connection to consider the appropriateness of "staged rating" (assignment of different ratings for distinct periods of time, based on the facts found) is required. *Fenderson v. West*, 12 Vet. App. 119, 126 (1999); *see also Hart v. Mansfield*, 21 Vet. App. 505 (2007).

The Veteran's PTSD is currently assigned a noncompensable evaluation prior to April 24, 2008, and a 10 percent disability evaluation thereafter, pursuant to 38 C.F.R. § 4.130, Diagnostic Code 9411.

Under Diagnostic Code 9411, a 10 percent rating is warranted when the psychiatric disorder results in occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication.

A 30 percent rating is warranted when the psychiatric disorder results in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood; anxiety; suspiciousness; panic attacks (weekly or less often); chronic sleep impairment; mild memory loss (such as forgetting names, directions, recent events).

A 50 percent rating is warranted when the psychiatric disorder results in occupational and social impairment with reduced reliability and productivity due to such symptoms as: 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; difficulty in establishing and maintaining effective work and social relationships.

A 70 percent rating is warranted when the psychiatric disorder results in 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; obsessional rituals which interfere with routine activities; speech 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 work-like setting); inability to establish and maintain effective relationships.

A 100 percent rating is warranted when the psychiatric disorder results in total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

The use of the term "such as" in the general rating formula for mental disorders in 38 C.F.R. § 4.130 demonstrates that the symptoms after that phrase are not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects, that would justify a particular rating. *See Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002). It is not required to find the presence of all, most, or even some, of the enumerated symptoms recited for particular ratings. *Id*. The use of the phrase "such symptoms as," followed by a list of examples, provides guidance as to the severity of symptoms contemplated for each rating, in addition to permitting consideration of other symptoms, particular to each veteran and disorder, and the effect of those symptoms on the claimant's social and work situation. *Id.*

In *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013), the Federal Circuit stated that "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." It was further noted that "§ 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."

The Board notes that the regulations were recently revised to incorporate the Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) rather than the Fourth Edition (DSM-IV). However,

these provisions only apply to cases received by or pending before the AOJ on or after August 4, 2014. The change does not apply to cases certified to the Board prior to that date. In this case, the Veteran's claim was certified to the Board prior to August 4, 2014; therefore, the regulations pertaining to the DSM-IV are for application.

Psychiatric examinations frequently include assignment of a Global Assessment of Functioning (GAF) score. According to the DSM-IV, GAF is a scale reflecting the "psychological, social, and occupational functioning on a hypothetical continuum of mental health illness." There is no question that the GAF score and interpretations of the score are important considerations in rating a psychiatric disability. *See, e.g., Richard v. Brown*, 9 Vet. App. 266, 267 (1996); *Carpenter v. Brown*, 8 Vet. App. 240 (1995). However, the GAF score assigned in a case, like an examiner's assessment of the severity of a condition, is not dispositive of the evaluation issue; rather, the GAF score must be considered in light of the actual symptoms of the Veteran's disorder, which provide the primary basis for the rating assigned. *See* 38 C.F.R. § 4.126 (a).

In this case, an October 2004 VA mental health consultation report shows that the Veteran was being seen for an assessment at his doctor’s recommendation and that his doctor thought he may have PTSD. His reported symptoms included feelings of helplessness, decreased energy, and poor appetite. He also reported having nightmares related to his military service, as well as excessive worry, insomnia, irritability, intrusive memories, avoidance, and hyperarousal. The Veteran further indicated that the teachers who worked under him told him that he is “touchy” at times.

On examination, the Veteran was well groomed and was pleasant and cooperative. He had good eye contact, and his mood was described as “general; not bad, not good.” His affect was calm and stable, and his speech had regular rate, rhythm, and intonation. His thought process was logical and goal directed, and he had no delusions or suicidal or homicidal ideation. The Veteran was assigned a global assessment of functioning (GAF) score of 71. The examiner indicated that the Veteran’s career had not been affected by any of his symptoms and that he had a

full range of affect and seemed to have no sense of foreshortened future. The Veteran reported that he had managed his symptoms for 40 years and that there was no reason at that time to suspect that he could not continue to manage his symptoms. The examiner stated that, while the Veteran reported many significant symptoms of an anxiety disorder, no functional impairment could be ascertained from the diagnosed interview. He also noted that medication was not necessary at that time.

The Veteran testified at a hearing before the Board in October 2006 regarding his service connection claim for PTSD. At that time, he reported that his psychiatric symptoms included sleep problems and nightmares of service. He also stated that he slept with a loaded gun near his head and felt secure working in a controlled environment where there were guards present. He indicated that he was working as a teacher in a juvenile detention center.

The Veteran was afforded a VA psychiatric examination in April 2008 at which time he reported that he had not received any mental health treatment and that he was not taking psychotropic medications. He indicated that he did not think he had any mental health problems that he could not handle, but the examiner indicated that it became evident during the evaluation that he did have some problems. The Veteran reported having nightmares of his military service in Ethiopia, which caused him to awaken and be nervous, but he denied having any intrusive thoughts. He also reported being easily startled and indicated that he sits with his back to the wall when he goes out to eat. The Veteran stated that he had been married to his wife for over 30 years and felt close to her. He also reported that he has spent his career in education and was presently working as a teacher in a juvenile detention center. He indicated that, when he was not working, he did chores around the house, but there were not a lot of things from which he derived pleasure. On examination, the Veteran was casually groomed and fully cooperative, although he had a tendency to minimize the extent of any psychiatric problems he was having. His mood was somewhat depressed, and his affect was appropriate to content. His speech was within normal limits regarding rate and rhythm. His thought processes and associations were logical and tight with no looseness of associations or confusion. The Veteran's memory was grossly intact, and he was oriented in all

spheres. He had no hallucinations or delusional material. His insight was limited, and his judgement was adequate. He denied having homicidal or suicidal ideation.

The April 2008 VA examiner diagnosed the Veteran as having PTSD and assigned a GAF score of 59. He believed that the Veteran's symptoms were fairly mild and had persisted for 40 years. He did not find evidence that the symptoms precluded the Veteran's employment, but said that they may have contributed to some possible interpersonal difficulties on his job. He also indicated that he found no evidence of any other psychiatric disorders and that his anxiety and depression were part of his PTSD symptomatology. The examiner reiterated his findings and opinion in an addendum report in December 2008.

In a June 2009 addendum opinion, the VA examiner who performed the April 2008 VA examination stated that, after reviewing the Veteran's claims file and prior examination report and upon further reflection, he would probably have given the Veteran a GAF rating slightly higher than what he gave him at the April examination. He indicated that he certainly thought that the situation that the Veteran reported was analogous to that of veterans who were felt to be in situations where they were highly vulnerable without any means of defending themselves in other military actions where PTSD has been conceded.

In December 2009, the Veteran presented to a mental health clinic for a diagnostic assessment after being told at a VA examination that he needed to tell his primary care physician that he had PTSD and depression and that he needed medication. He added that he had been seen at a mental health center in 2004, but that it was an "unpleasant experience" and that he was not prescribed medication. He indicated that he had been depressed for several years, but that it worsened after he was " 'eased' out of his job as superintendent of a school." His complaints included having a depressed mood, little energy, low motivation, little pleasure in doing things, and nightmares on a regular basis. He denied having any suicidal or homicidal ideation. The Veteran stated that he had been married to his wife for 35 years and had two grown children, and reported that he hunted and attended church. It was noted that he was dressed in crisply pressed clothing and was immaculately groomed. He maintained good eye contact, and his thoughts were rational and goal

directed. There was no evidence of hallucinations. His mood was depressed and at times and a bit irritable. He was assessed as having PTSD and major depression and was assigned a GAF score of 50. The report notes that he was to be evaluated by another physician for medication.

The Veteran testified at a hearing before the Board in August 2012 at which time he reported that he was taking medication prescribed by his primary care physician for PTSD. He indicated that he was not under the care of a psychiatrist or psychologist. He also stated that he maintained a good relationship with his wife of 39 years and his family, but he did not like to socialize much. He further noted that he has trouble remembering names of people other than close relatives and that he has to write things down. He added that he can become upset and lose his temper at times, but he denied having panic attacks. He also denied having to leave work due to his mental state.

The Veteran was later provided another VA examination in September 2015 at which time he reported that he had been married for over 40 years and had two children and one granddaughter. He stated that he had good relationships with his family. It was also noted that he was a full-time teacher at a juvenile detention center where he had been working for 13 years. He had a total of 45 years of employment in education, including working as a teacher, counselor, and principal. He denied receiving any current mental health treatment. The Veteran indicated that he works at trying not to become depressed, and he mows the lawn, watches TV, and fishes and hunts occasionally. He stated that he used to go to church, but he stopped going when no one came to visit him when he was hospital. It was noted that he was casually dressed and well groomed. He was cooperative throughout the interview and had normal speech with respect to rate and rhythm. His mood was dysphoric, and his affect was appropriate to content. His thought processes and associations were logical and tight with no loosening of associations or confusion noted. The Veteran was oriented in all spheres, and there was no evidence of delusions or hallucinations. He also denied having suicidal or homicidal ideations. The Veteran had no other symptoms attributable to his PTSD. The examiner remarked that the Veteran continued to meet the diagnostic criteria for PTSD and had mild symptoms. He assessed the Veteran as having PTSD with

occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by medication.

I. Prior to April 24, 2008

In considering the evidence of record under the laws and regulations as set forth above, the Board concludes that the Veteran is not entitled to an initial compensable evaluation prior to April 24, 2008.

The pertinent evidence for this period consists of the Veteran's statements and testimony and an October 2004 VA mental health consultation report. Aside from the October 2004 VA mental health consultation report, there are no other pertinent psychiatric treatment records. Indeed, the Veteran denied any previous psychiatric diagnoses or hospitalization at the October 2004 consultation.

The Veteran's reported symptoms in October 2004 included nightmares related to service, insomnia, feelings of helplessness, excessive worry, low energy, irritability, intrusive memory avoidance, and hyperarousal. He also indicated that he had been married for over 30 years and had a good relationship with his family. The findings on examination were unremarkable with good eye contact, a calm affect, and normal speech, and thought processes. The Veteran reported that he was not taking medication at that time for PTSD, nor does the evidence show that he was prescribed medication at any point prior to April 24, 2008. Rather, he has indicated that he began taking medication for his PTSD when he was assigned the 10 percent rating for PTSD, which was in August 2009.

With respect to occupational impairment, it was noted in October 2004 that the Veteran's career in education had not been affected by any of his symptoms. Moreover, the Veteran had reported that he had managed his symptoms for 40 years and stated that there was no reason to suspect that he could not continue to manage his symptoms. The examiner also indicated that, while the Veteran reported many

significant symptoms of an anxiety disorder, no functional impairment could be ascertained from the diagnostic interview and medication was not necessary.

In addition, the Veteran was assigned a GAF score of 71 in October 2004. GAF scores from 71 to 80 represent no more than slight impairment of in social, occupational, or school functioning. *See* 38 C.F.R. § 4.130 (incorporating by reference the VA's adoption of the American Psychiatric Association: DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS, Fourth Edition (DSM-IV), for rating purposes).

When all of the evidence and findings contained therein are considered in totality, the Board finds that that the Veteran has been shown to have occupational and social impairment occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication. Indeed, the Veteran acknowledged that he was not taking medication during this time period, and he has maintained full-time employment. In October 2004, it was noted that his career had not been affected by any of his symptoms. Accordingly, the Board concludes that the preponderance of the evidence is against a finding that the criteria for a compensable evaluation has been met or approximated prior to April 24, 2008, and the benefit of the doubt rule is not applicable. *See* 38 U.S.C.A. § 5107 (b); *Gilbert*, 1 Vet. App. at 54-56.

II. On or after April 24, 2008

In considering the evidence of record under the laws and regulations as set forth above, the Board concludes that the Veteran is not entitled to an initial evaluation in excess of 10 percent for his PTSD on or after April 24, 2008.

As noted above, examinations during this time period revealed that the Veteran was well-groomed and appropriately dressed, and he displayed appropriate interaction and behavior. He was fully oriented to person place, place, and time, and he did not have any panic attacks, hallucinations, delusions, thought disorder, impairment of

communication, impairment of judgment, or impairment of impulse control. He also denied having suicidal or homicidal ideation or plan, as well as obsessive or ritualistic behavior. It was also demonstrated that he had the ability to carry out activities of daily living.

In terms of social impairment, the Veteran reported that he does not socialize much. However, it was also noted that he has been married to his wife for over 40 years and that they have a close and supportive relationship. He also has a close relationship with his two adult children and his granddaughter. Moreover, the Veteran reported that he fished and hunted on occasion.

Regarding occupational impairment, the Veteran was noted to have worked in the public school system for almost 45 years as a teacher, counselor, and principal, and he currently works full-time as a teacher in a juvenile detention center where he had been for the past 13 years. There is simply no indication from the evidence that the Veteran's psychiatric symptoms have caused occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. Rather, the April 2008 VA examiner reported that he did not find evidence that the Veteran's symptoms precluded the Veteran's employment, although he may have contributed to some possible interpersonal difficulties on the job. Moreover, at the August 2012 hearing, the Veteran denied having to leave work due to his mental state.

Additionally, the September 2015 VA examiner indicated that the Veteran only had mild symptoms of PTSD. The examiner also assessed him as having only occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by medication.

In reaching this determination, the Board has considered the GAF scores of 59 and 50 that reflect serious to moderate symptomatology. However, consideration has also been given to the April 2008 VA examiner's addendum opinion that, upon reflection, he would have assigned a slighter higher GAF score, as well as the assessment of the Veteran's psychiatric symptoms by the April 2008 and September

2015 VA examiners as "mild." Moreover, the Board notes that the Veteran has not been under regular psychiatric care for his PTSD.

In light of the evaluation findings and discussion above which shows that the Veteran's PTSD symptoms are not of sufficient severity to result in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, the weight of evidence is against a rating in excess of 10 percent on or after April 24, 2008. As the weight of evidence is against a higher than 10 percent rating for PTSD for the entire period from April 24, 2008, the benefit of the doubt doctrine is not for application and the claim to this extent is denied. 38 U.S.C.A. § 5107 (b).

III. Extraschedular Consideration

In reaching this decision, the potential application of various provisions of Title 38 Code of Federal Regulations have been considered, whether or not they were raised by the Veteran. *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991). In particular, the Board has considered the provisions of 38 C.F.R. § 3.321(b)(1). However, in this case, the Board finds that the record does not show that the Veteran's PTSD disability is so exceptional or unusual as to warrant the assignment of a higher rating on an extra-schedular basis. See 38 C.F.R. § 3.321 (b)(1).

The threshold factor for extraschedular consideration is a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate. See Thun v. Peake, 22 Vet. App. 111 (2008). In this regard, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability. If the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule and the assigned schedular evaluation is therefore adequate, and no extraschedular referral is required. *Id.*, see also VAOGCPREC 6-96 (Aug. 16, 1996). Otherwise, if the schedular evaluation does not contemplate the claimant's

level of disability and symptomatology and is found inadequate, VA must determine whether the claimant's exceptional disability picture exhibits other related factors, such as those provided by the extraschedular regulation (38 C.F.R. § 3.321 (b)(1)) as "governing norms" (which include marked interference with employment and frequent periods of hospitalization).

The evidence in this case does not show such an exceptional disability picture that the available schedular evaluation for the service-connected disability is inadequate. A comparison between the level of severity and symptomatology of the Veteran's assigned rating with the established criteria found in the rating schedule shows that the rating criteria reasonably describe the Veteran's disability level and symptomatology. The manifestations of the Veteran's PTSD are contemplated by the schedular criteria set forth in the General Rating Formula for Mental Disorders. Indeed, the rating criteria for mental disorders contemplate the overall effect of all of his symptomatology on his occupational and social functioning. As discussed above, there are higher ratings available under the diagnostic code, but the Veteran's disability is not productive of such manifestations.

The Board further notes that, under *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), a veteran may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the individual conditions fails to capture all of the service-connected disabilities experienced. However, the Court has also held that "[a]lthough the Board must consider any combined effects resulting from all of a claimant's service-connected disabilities insofar as they impact the disability picture of the disabilities on appeal, it lacks jurisdiction to consider whether referral is warranted solely for any disability or combination of disabilities not in appellate status, just as it lacks jurisdiction to examine the proper schedular rating for a disability not on appeal." *Yancy v. McDonald*, 27 Vet. App. at 496. In this case, the Veteran has not asserted, and the evidence of record does not show or suggest, any combined effect or collective impact from multiple service-connected disabilities that create such an exceptional circumstance to render the schedular rating criteria inadequate. *See Yancy*, 27 Vet. App. at 495 (holding that "[n]othing in Johnson changed the long-standing principle that the issue of whether referral for extraschedular consideration

is warranted must be argued by the claimant or reasonably raised by the record"). Thus, this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the Veteran for a disability that can be attributed only to the combined effect of multiple conditions.

Based on the foregoing, the Board finds that the requirements for an extraschedular evaluation for the Veteran's service-connected PTSD under the provisions of 38 C.F.R. § 3.321 (b)(1) have not been met. *Bagwell v. Brown*, 9 Vet. App. 337 (1996); *Shipwash v. Brown*, 8 Vet. App. 218 (1995); *Thun v. Peake*, 22 Vet. App. 111 (2008).

ORDER

Entitlement to an initial compensable evaluation for PTSD for the period prior to April 24, 2008, is denied.

Entitlement to an initial evaluation in excess of 10 percent for PTSD on or after April 24, 2008, is denied.

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J.W. ZISSIMOS
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).