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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3493

FRANK C. DISHMAN, APPELLANT,

V.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Frank C. Dishman, appeals through counsel a July 9, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU). Record (R.) at 3-13. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. RELEVANT FACTS

The appellant served on active duty in the U.S. Army from April 1969 to November 1970. R. at 803. He receives compensation benefits for service-connected anxiety disorder not otherwise specified (NOS) (previously rated as post-traumatic stress disorder (PTSD)), with a 70% disability rating effective November 4, 2011; service-connected actinic keratosis, with a 10% disability rating effective November 15, 2006; and service-connected tinnitus, with a 10% disability rating effective September 6, 2011. R. at 77.

In August 2011, the appellant underwent an initial VA PTSD examination, R. at 417-23, during which he reported that he had vocational training as a machinist and was last employed at a General Electric (GE) glass factory for 30 years, R. at 419. The examiner found that the appellant's PTSD symptoms had worsened since his retirement and that he had occupational and social impairment with reduced reliability and productivity. R. at 418.

In May 2012, the appellant underwent another VA examination for his PTSD. R. at 209-18. He reported that he retired in 2006 from GE after working various low-skill factory jobs, such as making glass headlights and doing janitorial work, and that he was currently unemployed. R. at 214. On his Occupational Difficulties Questionnaire, he indicated an inability to use problem-solving in unforeseen situations, work with peers, or accept supervision or correction from supervisors. *Id.* The examiner found him to have occupational and social impairment with reduced reliability and productivity due to his mental disability. *Id.* at 213. The examiner further concluded that the appellant's PTSD symptoms of social avoidance, tendency to isolate, anxious and depressed mood, panic, low frustration tolerance, and sleep impairment created moderate to severe impairment in his occupational functioning. *Id.* at 218.

In November 2012, the appellant submitted an application for a TDIU rating. R. at 151-52. He indicated that his service-connected disabilities affected his full-time employment beginning in 2006. *Id.* at 151.

During a November 2012 VA PTSD examination, the examiner found that the appellant's symptoms no longer met the diagnostic criteria for PTSD but instead met the criteria for anxiety disorder NOS. R. at 166-76. The appellant reported that he hunted during deer season, helped care for his elderly parents as needed, supported his wife during painful visitations to a relative at a nursing home, and was active with the Special Olympics, his church, and the Disabled American Veterans (DAV) honor guard. R. at 168, 170, 174. The examiner noted that, although the appellant had some difficulties in social and occupational functioning, he was generally functioning well and had close, meaningful relationships. R. at 168. The examiner concluded that the appellant had occupational and social impairment due to mild or transient PTSD symptoms that decreased work efficiency and ability to perform occupational tasks only during periods of significant stress or that his symptoms are controlled by medication. R. at 169.

The examiner further noted that the appellant's current disability rating indicates deficiencies in most areas but that current examination results indicate that the appellant functions with only occasional decrease in work efficiency and rare periods of inability to perform occupational tasks and generally functions satisfactorily with routine behavior, self-care, and normal conversation. R. at 175-76. The examiner explained that "[o]ne possible explanation for the discrepancy between this and the previous examination findings is that the previous report seems to have been based almost exclusively on a face-valid self-report instrument [] which is not consistent with the veteran's current symptom presentation." *Id.* at 176.

Thereafter, the RO requested an addendum opinion from two psychologists to reconcile the appellant's differing psychiatric diagnoses found in the August 2011, May 2012, and November 2012 examination reports. R. at 90-92. In February 2013, two psychologists, one of whom was the examiner who conducted the November 2012 examination, provided a VA opinion. R. at 83-87. The examiners reviewed the August 2011, May 2012, and November 2012 examinations and noted that it is not unusual for PTSD symptoms to improve over time, particularly if the individual has a stable support system, does not abuse substances, and has a structured lifestyle with involvement in significant activities, such as the appellant's involvement with DAV, church, and caring for his parents. R. at 84-85. The examiners found that, when comparing the appellant's most recent examination with his second examination, his symptoms had clearly and significantly improved. *Id.* They found that the most recent examination produced copious details of his active and productive lifestyle, demonstrating that his functioning is consistent with his Global Assessment of Functioning (GAF) score and level of occupational and social impairment. R. at 85-86. The examiners concluded that the appellant's psychiatric disorder had a mild impact on his employment based on his current work-like activities of taking care of his parents and substantially contributing to several organizations, including DAV and the Special Olympics. *Id.*

In March 2013, the regional office (RO) issued a rating decision denying TDIU. R. at 70-78. The appellant filed a Notice of Disagreement (NOD) the following month. R. at 67-68. The RO issued a Statement of the Case (SOC) continuing the denial of TDIU in November 2012. R. at 42-61. The appellant filed a Substantive Appeal the following month. R. at 40-41. He indicated that he was not revealing the true severity of his condition during examinations because he does "not like

anyone to think there is anything wrong with [him]." R. at 41. He stated that he "get[s] excited very easily," "fl[ies] off the handle at family and friends and [has] [t]o go back and apologise to them for my actions," and that he "know[s] without a reasonable doubt that a[n] employer would not [l]et me work for them if I had one of my fits and told someone off if everything did not [s]uit me." *Id.*

In December 2014, the appellant was afforded a VA mental disorders examination. R. at 833-37. The examiner found the appellant to have occupational and social impairment with occasional decrease in work efficiency and intermittent periods of an inability to perform occupational tasks, although generally functioning satisfactorily with normal routine behavior, self-care, and conversation. R. at 834. The appellant reported that he has been retired since 2006 and now spends most of his time taking care of his disabled step-son and attending medical appointments for his parents, wife, and himself. R. at 835. He also reported spending his free time fishing, gardening, four-wheeling, and being active with church, the DAV, and the Lion's Club. *Id.* He indicated that he enjoys spending time with these organizations and reported that he had no major difficulties with his social life and functioning. *Id.* The examiner concluded that, since his last examination in 2012, the appellant has shown the ability to maintain steady functioning in many domains, including social functioning and employment. R. at 837. The examiner stated that the appellant "noted many of symptoms are manageable and controlled through his own adaptive coping skills." *Id.* He concluded that the appellant's "level of impairment is currently mild with limited impairment." *Id.*

In a December 2014 rating decision, the RO proposed to reduce the appellant's disability rating for anxiety disorder NOS from 70% to 30%. R. at 829-32. In the July 2015 decision on appeal, the Board denied the appellant entitlement to TDIU. R. at 3-13.

II. ANALYSIS

The appellant contends that the Board did not adequately explain its reliance on the February 2013 VA medical opinion as the most probative evidence of record regarding his psychiatric symptoms and their effects on his employability. Appellant's (App.) Brief (Br.) at 19. The Court agrees.

The Board must support its determination of the appropriate degree of disability with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert*, 1 Vet.App. at 57.

In this case, the Board found the February 2013 VA opinion the "most probative" examination of record "because it included a review of the record and [a] clear rationale for [the] findings expressed." R. at 10; *see* App. Br. at 19. This sentence, as far as the Court can discern, is the Board's entire rationale for its finding that the February 2013 opinion is the most probative opinion of record. However, as the appellant points out, the Board did not find that the other psychiatric examination reports of record, which include the August 2011, May 2012, November 2012, and December 2014 reports, were, by comparison, lacking in these areas. *See id.* Further, in the decision on appeal, the Board provides five pages of text summarizing the contents of each of these examination reports, and these summaries indicate that each of the examiners considered all of the evidence of record and provided clear and reasoned explanations for their conclusions. R. at 4-9. Finally, a review of the record by the Court reveals that these examiners all indicated that they reviewed the claims file and the relevant medical evidence contained therein and that each provided a clear rationale for the findings expressed. *See* R. at 417-23 (August 2011 report); R. at 209-18 (May 2012 report); R. at 166-76 (November 2012 report); R. at 83-87 (February 2013 VA opinion); R. at 833-37 (December 2014 VA report). Therefore, the Board's explanation fails to adequately distinguish why it found the February 2013 examination report to have more probative value than the other reports of record. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that "credibility determinations must be supported by adequate reasons or bases"); *Caluza*, 7 Vet.App. at 506.

Accordingly, the Court will vacate the Board's decision and remand the matter of entitlement to TDIU for the Board to provide adequate reasons or bases for its determination regarding the probative values of the psychiatric examination reports and opinions of record. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations . . . ").

The Court will not at this time consider the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) ("It is well settled that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion."); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him."). In pursuing the matter on remand, the appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the Board's July 9, 2015, decision denying entitlement to a rating of TDIU is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: December 22, 2016

Copies to:

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