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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4829

EVERETT BALLARD, APPELLANT,

v.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Everett Ballard appeals through counsel an October 16, 2015, Board of Veterans' Appeals (Board) decision that granted a 50% initial disability evaluation, but no higher, for service-connected depression. Record (R.) at 2-16. Single-judge disposition is appropriate. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a) and 7266(a). For the reasons that follow, the Court will set aside the October 2015 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Ballard served on active duty in the U.S. Army from March 1976 to June 1993. R. at 1359-60. He was diagnosed with mixed adjustment disorder with anxiety and depression and was hospitalized for homicidal ideation in September 2008. R. at 1027-34; *see also* R. at 1811-13. In December 2008, the VA regional office (RO) granted service connection for several orthopedic conditions but denied service connection for depression. R. at 1934-45.

In June 2009, the veteran again sought service connection for depression. R. at 1059-60; *see* R. at 1718-21 (April 2009 VA treatment record in which he reported depressed mood, feelings of

worthlessness, difficulty concentrating, and irritability with anger outbursts). VA treatment records between October and December 2009 document that the veteran "blew up" at coworkers and contain a diagnosis of major depressive disorder. R. at 954-60. In April 2010, the RO confirmed its prior denial of service connection for depression. R. at 861-66, 965-74. Mr. Ballard disagreed with this decision. R. at 856.

The veteran underwent a June 2010 VA intake assessment for therapy, wherein he reported feelings of hopelessness; endorsed past feelings of homicidal ideation, though denied any current ideation; and stated that he was not close to his children, extended family, or friends. R. at 923-34. Although a VA psychiatrist opined in May 2011 that major depressive disorder was stable and resolved, R. at 849-52, Mr. Ballard reported in December 2011 that symptoms of sadness and frustration with his chronic pain and limited mobility were worsening, R-1534-39. During a January 2012 VA examination, he endorsed the following symptoms: depressed mood, anxiety, suspiciousness, chronic sleep impairment, mild memory loss, flattened affect, impaired judgment, difficulty establishing and maintaining effective work and social relationships, difficulty adapting to stressful circumstances, inability to establish and maintain effective relationships, and impaired impulse control. R. at 824-25. The examiner diagnosed recurrent major depressive disorder and opined that this was at least as likely as not related to the veteran's general medical condition, including service-connected disabilities. R. at 819-20, 826. The examiner also checked a box indicating that the veteran experienced occupational and social impairment with reduced reliability. R. at 821; *see also* R. at 21-23, 26-27 (January and February 2012 private psychology reports noting symptoms of impaired attention and concentration, impaired short-term memory, irritable mood, diminished ability to feel pleasure, disturbed sleep, and diminished energy).

In February 2012, a decision review officer granted service connection for depression secondary to general medical conditions and assigned a 30% evaluation, but no higher, from June 30, 2009. R. at 803-13. Mr. Ballard disagreed with the evaluation assigned. R. at 799-800. Meanwhile, in 2012 and 2013 VA treatment records, the veteran continued to endorse guarded attitude, irritability and anger "flare ups," depressed mood, and mildly constricted affect. R. at 1418-26, 1519-25, 1540-48.

Mr. Ballard underwent a VA examination in January 2014. The veteran denied hopelessness and current suicidal and homicidal ideation, reported having close friends and attending church, and stated that group therapy resulted in "some remission of symptoms." R. at 1390. The examiner recorded the certain symptoms—depressed mood, anxiety, chronic sleep impairment, and disturbances of motivation and mood—and indicated that the veteran did not have any symptoms other than these. R. at 1391. Overall, the examiner concluded that Mr. Ballard experienced occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily. R. at 1388-89. In February 2014, the RO continued to deny an initial evaluation in excess of 30% for depression, R. at 601-19, and the veteran appealed to the Board, R. at 599.

Testifying at a May 2015 Board hearing, Mr. Ballard stated that he had angry outbursts "[p]retty much every day," that he threw or shoved things, and that he avoided public spaces. R. at 42-43. He further stated that he experienced memory loss with respect to employment-related tasks—such as fastening his seatbelt and how to close the rear door of his truck—R. at 44-45, and that anxiety interferes with his sleep, R. at 49. He averred that he did not socialize with his coworkers or have any friends other than his wife and son. R. at 45. Mrs. Ballard testified that her husband was "almost like a hermit" and that she had to motivate him to go to work and to maintain his personal hygiene. R. at 51-52.

In the October 2015 decision on appeal, as discussed below, the Board granted a 50% evaluation, but no higher, for depression from June 30, 2009. This appeal followed.

II. ANALYSIS

Mr. Ballard argues on appeal that the Board provided inadequate reasons or bases for denying a depression evaluation in excess of 50%. Specifically, he asserts that, in denying a 70% evaluation, the Board, while acknowledging the presence of some 70% symptoms, focused too much on the absence of other symptoms listed in the 70% rating criteria and overlooked other favorable evidence indicating a more severe depression disability picture. Appellant's Brief (Br.) at 5-12; Reply Br. at 1-6. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 5-16. The veteran's arguments are persuasive.

Depression is evaluated as 50% disabling when it causes:

[o]ccupational 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.

38 C.F.R. § 4.130, Diagnostic Code (DC) 9422 (2016) (other specified somatic symptom and related disorder). The criteria for the next higher evaluation of 70% are:

[o]ccupational 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 worklike setting); inability to establish and maintain effective relationships.

Id.

Use of the term "such as" in the criteria indicates that the list of symptoms that follows is "non-exhaustive," meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign that evaluation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *Sellers v. Principi*, 372 F.3d 1318, 1326-27 (Fed. Cir. 2004); *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). "[I]n the context of a 70[%] 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." *Vazquez-Claudio*, 713 F.3d at 117. Thus, assessing whether a 70% evaluation is warranted requires a two-part analysis: "The . . . regulation contemplates[: (1)] initial assessment of the symptoms displayed by the veteran, and if they are of the kind enumerated in the regulation[: (2)] an assessment of whether those symptoms result in occupational and social impairment with deficiencies in most areas." *Id.* at 118; *see also* 38 C.F.R. § 4.21 (2016) ("In view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified.").

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). With any findings on a material issue of fact and law presented on the record, the Board must support its determinations with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting 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). In other words, "[t]he Board must explain, in the context of the facts presented, the rating criteria used in determining the category into which a claimant's symptoms fall; it is not sufficient to simply state that a claimant's degree of impairment lies at a certain level without providing an adequate explanation." *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011).

As relevant to the present appeal, the Board stated:

The Board also finds the weight of the lay and medical evidence demonstrates that the criteria for a disability rating of 70[%] have not been met or more nearly approximated for any portion of the initial rating period. The evidence does not show that for this period the [v]eteran experienced 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 worklike setting); inability to establish and maintain effective relationships. The evidence of record reflects that the [v]eteran, while endorsing some symptoms, such [as] difficulty in adapting to stressful circumstances including work or a worklike setting and an inability to establish and maintain effective relationships, has consistently denied suicidal or homicidal ideation, endorses having some close friends, and participates in church. *See* January 2014 VA examination report. Therefore, the Board finds that the [v]eteran's symptom[s] does not more nearly approximate occupational and social impairment with deficiencies in most areas.

R. at 12-13. For several reasons, the Court agrees that this does not constitute adequate reasons or bases to deny a 70% evaluation.

First, the Board's discussion consisted mainly of listing a few signs and symptoms characterizing or not characterizing the veteran's disability picture and then announcing its conclusion that the 70% criteria were not met. "[M]erely listing evidence before stating a conclusion does not constitute an adequate statement of reasons and bases." *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992)).

Second, although the Board noted some characteristics of Mr. Ballard's depression that implicate a 70% evaluation—such as difficulty in adapting to stressful circumstances including work or a worklike setting and an inability to establish and maintain effective relationships—it failed to discuss others contemplated by that evaluation level. For example, the 70% evaluation criteria include "impaired impulse control (such as unprovoked irritability with periods of violence)," but the Board did not address the numerous references in the veteran's medical records to this problem. *See, e.g.*, R. at 1718-21 (April 2009 VA treatment record reporting irritability with anger outbursts), 956 (November 2009 report that the veteran "blew up" at coworkers), 1541 (April 2012 reports of regular "anger flare ups"), 42-43 (May 2015 testimony that the had angry outbursts "[p]retty much every day" and threw or shoved things). Similarly, Mrs. Ballard testified that she had to motivate her husband to maintain his personal hygiene. R. at 52. "[N]eglect of personal appearance or hygiene" is listed in the 70% evaluation, but the Board did not address this evidence. Moreover, the Board did not explicitly discuss whether the veteran demonstrated overall deficiencies in judgment or mood, even though evidence as to impairment in these areas was of record. *See, e.g.*, R. at 21-23, 26-27, 824-25, 1391, 1718-21. The Board's failure to discuss this evidence and whether, in light thereof, the veteran's disability picture more closely approximates a 70% evaluation renders its reasons or bases inadequate. *See Caluza*, 7 Vet.App. at 506; *see also Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

Additionally, the Board's reasons or bases with respect to the issue of social impairment are unclear. The Board recognized that the evidence in this case indicated an inability to establish and maintain effective relationships, a 70% criterion, but then went on to deny a 70% evaluation after

observing, inter alia, that Mr. Ballard "endorsed having some close friends[] and participat[ing] in church." R. at 13; *see* R. at 1390. Initially, the Court notes that the latter evidence came from the January 2014 VA examination and that the Board determined that this examination's "overall assessment as to degree of occupational and social impairment is of lesser probative value than the other evidence of record." R. at 12. The Court further notes that the Board also did not acknowledge in this part of its discussion the veteran's June 2010 statement that he was not close to his children, extended family, or friends or Mrs. Ballard's May 2015 testimony that the veteran was "almost like a hermit." R. at 51-52, 923-34. Even putting these matters aside, however, it appears that the Board cited Mr. Ballard's few close friendships and participation in church as bases for denying a 70% evaluation. If the Board considered these facts inconsistent with an "inability to establish and maintain effective relationships," the Court cannot understand why the Board found that Mr. Ballard endorsed such inability. Such ambiguity inhibits review by this Court. *See Gilbert*, 1 Vet.App. at 52.

In sum, although the Secretary disputes these shortcomings and any prejudicial effect they might have, *see* Secretary's Br. at 10-16, the Court concludes that the Board did not provide adequate reasons or bases as to why it found that Mr. Ballard did not have occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, such that an evaluation higher than 50% was not warranted, *see Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57; *see also Buczynski*, 24 Vet.App. at 224. Therefore, remand is necessary for the Board to address these matters. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, Mr. Ballard is free to present to the Board additional arguments and evidence in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the October 16, 2015, Board decision is SET ASIDE, and the matter is REMANDED for readjudication consistent with this decision.

DATED: January 31, 2017

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