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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0096

NOEL E. CERNY, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Noel E. Cerny, through counsel appeals a December 1, 2015, Board of Veterans' Appeals (Board) decision that denied disability compensation benefits for peripheral neuropathy of the lower extremities, to include as a result of in-service herbicide exposure and as secondary to a service-connected disability, and a disability rating in excess of 30% for post-traumatic stress disorder (PTSD) prior to July 3, 2012. Record of Proceedings (R.) at 1-28. The Board also remanded the issues of entitlement to a disability rating in excess of 50% for PTSD from July 3, 2012, and a total disability rating based on individual employability. R. at 25-26. The remanded issues are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). The appellant does not raise any argument concerning the Board's denial of disability compensation for peripheral neuropathy of the lower extremities. Appellant's Brief (Br.); Reply Br. The appellant has, therefore, abandoned his appeal of that issue and the Court will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate that part

of the Board's decision that denied a disability rating in excess of 30% for PTSD prior to July 3, 2012, and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Marine Corps from March 1966 to March 1968, which included service in the Republic of Vietnam. R. at 744. In August 2000, a VA regional office (RO) awarded disability compensation for PTSD and assigned a 10% disability rating, effective May 22, 1998. R. at 1471-74.

In July 2005, the appellant filed a claim for an increased disability rating. R. at 1339. That same month, the appellant's wife submitted a statement in support of his claim in which she stated that her husband was "extremely frightening" because she did not know when he would "turn on [her]." R. at 1341-45. She explained that the appellant had "held a gun to his head (making [her] watch) . . . for as little a thing as [her] going shopping with [her] mother [and] sister." *Id.* The appellant's wife stated that he had "attempted suicide [and] can be physically abusive to himself (slaps himself across the face)." *Id.* Mrs. Cerny further reported that the appellant had "threaten[ed] to kill [her] if [she] ever [went] out with another man" and that he believed her mother and sister "are going to take [her] away from him." *Id.* Mrs. Cerny reported that the appellant became angry if she talked on the telephone and did not like her to have friends. R. at 1341-43. She recounted that "[o]ne comment can set [the appellant] into rants and rages" and explained that he is "always on the defensive, no matter what, he takes everything personal." *Id.* Mrs. Cerny stated that the appellant is impossible to deal with at times, so she and the appellant try "to stay away from each other as much as possible." R. at 1343.

In September 2006, the RO denied an increased disability rating. R. at 1182-90. The appellant filed a timely Notice of Disagreement and reported that the appellant's PTSD caused sleep disturbances, nightmares, intrusive thoughts and "a lighting fuse temper," which "can be dangerous at times for all involved." *Id.*

A June 2009 mental health evaluation states that the appellant's affect was "blunted/restricted/constricted," and his mood was "angry" and "depressed." R. at 409. The appellant reported "periods of depression that last[] from hours to days." R. at 407. During these periods, he reported experiencing feelings of helplessness and hopelessness, social isolation, anhedonia, irritability and anger, sleep problems, hypervigilance, combat-related nightmares,

intrusive thoughts, anxiety, and exaggerated startle response. *Id.* He related that he had had suicidal thoughts 2 months ago and recalled attempting suicide 19 years ago after his wife told him she was going to leave him. *Id.* The appellant also reported that he had been married twice, with the first, a 21-year marriage with three children, ending in divorce. R. at 408. The appellant stated that he had been married to his second wife for 22 years and regarded their relationship as "good." *Id.* He also stated he had a "good" relationship with his youngest son, but no communication with his other two sons. *Id.* At the time of the examination, he denied having suicidal ideation and refused counseling. R. at 409.

At a July 2009 followup appointment, the appellant reported an improved mood and less irritability. R. at 405. The appellant still reported difficulty sleeping, but "for the most part" was sleeping 7 to 8 hours a night. *Id.* He denied any suicidal thoughts. *Id.*

One week later, the appellant underwent a VA PTSD examination. R. at 1145-49. The appellant complained of "difficulties with intrusive thoughts, sleep problems, anger, avoidance behaviors, detachment, hypervigilance, startle response[,] and concentration struggles." R. at 1145. The appellant reported that he had not slept in the same bed with his wife for 10 years because of his restlessness when sleeping. R. at 1145, 1147. He also acknowledged verbal altercations with coworkers and his wife, during which he slammed doors and threw things; he denied physical violence. R. at 1147.

The appellant also indicated that he felt "very detached from people." *Id.* Although he described his relationship with his wife as supportive, the appellant noted that he had not kept in contact with 2 of his 3 children in the past 6 years. R. at 1148. The appellant stated that he had 3 siblings, but he saw his brother only twice in the past 22 years and was not close to his oldest sister. *Id.* He reported having a "'few' friends" and "hang[ing] out with one person" one to two times per week. *Id.* The appellant acknowledged having had suicidal thoughts nearly 3 months ago, but denied suicidal ideation at the time of the examination. *Id.* The examiner observed that the appellant's "overall mood appeared dysphoric with periods of crying" and diagnosed chronic PTSD with "symptomatology and severity . . . in the moderate range." R. at 1149.

In August 2009, the RO issued a Statement of the Case that awarded a 30% disability rating effective July 29, 2005. R. at 1095-1130. In September 2009, the appellant filed a VA Form 9 perfecting his appeal to the Board. R. at 1064.

A September 2009 VA treatment record reflects that the appellant had complied with his medication regimen and was "feeling the benefit" – "[h]is mood [was] not depressed," his "affect [was] bright," and he reported no irritability or frustration. R. at 405. The appellant reported that he felt better able to deal with day-to-day situations and was excited about an upcoming job interview. *Id.* Nearly 2 years later, in July 2011, the appellant noted an increase in symptoms with aging and unemployment. R. at 365. He endorsed symptoms of depression and generalized anxiety disorder, but denied suicidal ideation. *Id.*

An August 2011 treatment record shows that the appellant had just returned from dealing with his sister's death. R. at 361-64. The appellant reported that his mood was "good" and he was "lightened inside by being able to connect with his surviving siblings, and reconnecting with his family." R. at 361. The staff psychiatrist noted that the appellant was in good spirits and pleased with how well he [was] doing and with support of spouse." R. at 363.

On July 3, 2012, the appellant underwent another VA PTSD examination to assess the current severity of his PTSD. R. at 1869-79. The appellant indicated that he was close to only one of his two living siblings and continued to be estranged from two of his three children, but maintained monthly contact with his third child. R. at 1875. He had been married for 24 years and, although he reported irritability "on his part," he stated "'we get along.'" *Id.* He reported limited interest in social activities, even with family members, and had "occasional passive [suicidal] ideation without plan." *Id.* The examiner noted that the appellant's symptoms included a depressed mood, anxiety, chronic sleep impairment, mild memory loss, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and suicidal ideation. R. at 1878. The examiner opined that the appellant was occupationally and socially impaired, occasionally working less efficiently and intermittently unable to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care, and conversation. R. at 1873-74.

Based on the July 2012 examination, in September 2012, the RO awarded a 50% disability rating effective July 3, 2012. R. at 886-92. In July 2013, the appellant testified at a Board hearing that his first marriage had ended in 1988. R. at 1812. He stated that before the marriage ended he "drank a lot" and "just walked out the door [and] left everything." *Id.* The appellant reported that he had seen 2 of his children twice in 8 years, he spoke to his youngest son every other month, and his grandchildren do not want to see him. R. at 1812-13.

On December 1, 2015, the Board issued its decision that denied a disability rating in excess of 30% for PTSD prior to July 30, 2012. R. at 1-28. This appeal followed.

II. ANALYSIS

Under the current rating schedule for mental disorders, including PTSD, a 30% disability rating is warranted when there is

[o]ccupational 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).

38 C.F.R. § 4.130, Diagnostic Code (DC) 9411 (2016). A 50% disability rating is warranted when there is

[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.

Id.

The phrase "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is nonexhaustive, meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *see Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). However, because "[a]ll nonzero disability levels [in § 4.130] are also associated with objectively observable symptomatology," and the plain language of the regulation makes it clear that "the veteran's impairment must be 'due to' those symptoms," "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." *Vazquez-Claudio*, 713 F.3d at 116-17. Section 4.130 "requires not only the presence of certain symptoms" but also that those symptoms have caused the level of occupational and social impairment associated with a particular disability evaluation. *Id.* at 117. Therefore, although the veteran's symptoms are the "primary

consideration" in assigning a disability evaluation under § 4.130, determining whether the veteran is entitled to a particular evaluation "also requires an ultimate factual conclusion as to the veteran's level of [occupational and social] impairment." *Id.* at 118.

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). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). When there is a question as to which of two evaluations apply, "the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7 (2016).

As with any finding on a material issue of fact and law presented on the record, the Board must support its degree-of-disability determination 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*, 1 Vet.App. 56-57; *see Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (explaining that the need for adequate reasons or bases is "particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders"). 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 its rejection of 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).

The appellant argues that the Board provided an inadequate statement of reasons or bases for its decision because it focused on the presence of certain symptoms and the number of relationships that he had, without discussing the severity of his symptoms – particularly, his depression, anger, irritability, and suicidal ideation – and the effects those symptoms had on his relationships. Appellant's Br. at 5-12. The appellant also argues that the Board incorrectly stated that he denied suicidal ideation "throughout this time period." *Id.* at 10-11 The Secretary responds that the appellant's contentions demonstrate nothing more than a disagreement with the way the

Board weighed the evidence and urges the Court to affirm the Board's decision. Secretary's Br. at 12-21.

In the decision on appeal, the Board recited the medical evidence of record from June 2009 through August 2011 and stated, based on the "objective evidence" that, prior to July 3, 2012, the appellant's PTSD symptoms "resulted in no more than occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." R. at 23. In support of that conclusion, the Board noted that the appellant had endorsed symptoms of depressed mood, anxiety, chronic sleep impairment, anger, irritability, avoidance behaviors[,] and some isolation," but found that he had been able to "maintain good relationships with his wife, one of his children, and one of his siblings." *Id.* The Board further noted that the appellant had a few friends, spent time with one friend once or twice per week, had reported being able to reconnect with his family in August 2011, and reported looking forward to a job interview. *Id.* Moreover, "[t]hroughout this time period, the [v]eteran denied suicidal and homicidal ideation and demonstrated good hygiene and self-care." *Id.* The Board stated that his Global Assessment of Functioning scores supported the assigned disability rating, noting that the scores reflected "moderate symptoms or moderate difficulty in social and occupational functioning." *Id.*

The Court finds the Board's statement of reasons or bases deficient in several respects. First, the Court agrees that the Board merely listed some of the symptoms experienced during the appeal period and reached a conclusion without assessing the frequency, severity, and duration of these symptoms and how they relate to the appellant's social and occupational functioning. *See Vazquez-Claudio*, 713 F.3d at 115-17; *see also Bankhead v. Shulkin*, No. 15-2404, 2017 WL 1131190, at *9 (U.S. Vet. App. Mar. 27, 2017) (stating that "VA must engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment"). The Board's recitation of the medical evidence in the pages preceding its conclusion does not suffice as a surrogate for an account of the evidence the Board found persuasive or unpersuasive. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("The Court has long held that merely listing evidence before stating a conclusion does not

constitute an adequate statement of reasons and bases." (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992))).

Second, the Board overlooked favorable evidence or failed to explain its rejection of favorable evidence. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Specifically, the Board stated that the appellant maintained a good relationship with his wife, but failed to discuss the appellant's wife's July 2005 statement, which described the marital relationship very differently than the appellant had reported. See R. at 1341-45. The appellant's wife's statement is also relevant to the Board's assessment of the appellant's mood, anger, and irritability. *Id.* For example, she described their situation as "extremely frightening" because she does not know "when he will turn on [her]," and because one comment can send him into "rants and rages," and she stated that because he is so difficult to deal with, they try "to stay away from each other as much as possible." *Id.*

Finally, the Board erroneously stated that the appellant denied suicidal ideation during the appeal period. However, the record reflects that the appellant reported suicidal ideation in 2009 and 2012. See R. at 407 (June 2009 mental health evaluation indicating that the appellant "last thought about suicide two months ago"), 1875 (July 2012 examination noting "occasional passive [suicidal] ideation"). The Secretary attempts to diminish the probative value of this evidence, arguing that it is not clear why the July 2012 examination, which resulted in assignment of a 50% disability rating, is relevant to the period prior to July 3, 2012, and that the appellant's thoughts in 2009 were cursory. Secretary's Br. at 19-20. These arguments are not persuasive. First, the appellant's July 2012 report that he experienced "occasional passive [suicidal] ideation" suggests retroactive symptomatology that the Board should have addressed. Second, the Secretary's assessment of the appellant's suicidal thoughts amounts to a post hoc rationalization of the evidence, which cannot make up for the shortcomings in the Board's analysis. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's '*post hoc* rationalizations' for agency action, advanced for the first time in the reviewing court.").

Where, as here, the Board failed to explain its assessment of the frequency, severity, and duration of the appellant's symptoms and overlooked favorable evidence, the Board's statement of reasons or bases for denying a higher disability rating is inadequate. See *Mittleider* and *Allday*,

both *supra*. Thus, remand is required to allow the Board to readdress the matter and to provide a new statement of reasons or bases that clearly explains its determination and adequately discusses the evidence of record. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here 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, a remand is the appropriate remedy.").

On remand, the appellant may submit additional evidence and argument on the remanded matters, 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 reminds the Board 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), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of the Board's December 1, 2015, decision that denied disability compensation for peripheral neuropathy of the lower extremities is DISMISSED. After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's December 1, 2015, decision that denied a disability rating in excess of 30% for PTSD prior to July 3, 2012, is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: April 10, 2017

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