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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4437

GEORGE STURGEON, 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 through counsel appeals the October 20, 2015, decision of the Board of Veterans' Appeals (Board) that denied his claim for a disability rating in excess of 50% for post-traumatic stress disorder (PTSD). Record (R.) at 2-20. The Board also remanded to the VA regional office (RO) for further development the appellant's claim of entitlement to a total disability rating based on individual unemployability (TDIU). Because a final Board decision has not been issued as to this matter, it is not before the Court. *Hampton v. Gober*, 10 Vet.App. 481, 483 (1997); *see Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) (Board remand does not constitute a final decision that may be appealed). The appellant filed a brief and a reply brief. The Secretary filed a brief. This appeal is timely and the Court has jurisdiction over the matter on appeal 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 reasons that follow, the Court will vacate the October 20, 2015, Board decision and the matter will be remanded for further proceedings.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from July 25, 1969, to July 23, 1971, including service in the Republic of Vietnam. R. at 1550. On February 15, 2007, the RO granted service connection for PTSD and assigned a 30% disability rating, effective August 21, 2006. R. at 1449-53. The RO based the disability rating on a January 2007 PTSD examination. R. at 1455-64. At the time of the 2007 examination, the appellant's PTSD symptoms included insomnia, recurrent and intrusive distressing recollections of the stressful events, efforts to avoid thoughts, feelings, or conversations associated with the trauma, markedly diminished interest or participation in significant activities, feelings of detachment or estrangement from others, irritability or outbursts of anger, difficulty concentrating, hypervigilance, exaggerated startle response, restricted range of affect, and a sense of foreshortened future. *Id.* The psychiatric examination revealed lethargic psychomotor activity, slow speech, constricted affect, depressed mood, homicidal and suicidal thoughts, and mild impairment with recent and immediate memory. R. at 1458-60.

The examiner noted that the appellant had married for a second time. R. at 1457. He had problems with his children from his first marriage. *Id.* Apart from the appellant's attendance at church, he was socially isolated. R. at 1458. The appellant avoided crowds. He was dependent on his wife to handle many responsibilities. *Id.* The appellant reported problems with activities of daily living, including performing household chores, shopping, dressing and undressing, traveling, driving, and performing recreational activities. R. at 1459. The examiner diagnosed PTSD and major depression, and assigned a Global Assessment of Functioning (GAF) score of 50. R. at 1462. The examiner opined that the appellant's depression was secondary to his PTSD. Further, the examiner opined that the appellant's PTSD resulted in deficiencies in most areas, including thinking, family relations, work, and mood. R. at 1463-64.

The appellant appealed the RO's 2007 assignment of the initial disability rating for PTSD to the Board. R. at 1348, 1364-76, 1434. In his Substantive Appeal, the appellant stated that he suffered from persistent delusions, hallucinations, panic attacks, depression, avoidance of crowds, and isolation. *Id.* at 1438. At a March 2011 Board hearing, the appellant testified that he had trouble concentrating, was forgetful, isolated himself from others, experienced panic attacks, and had thoughts of harming himself. R. at 1262-66.

In May 2011, the Board remanded the claim for additional development to include scheduling a VA examination. R. at 1244-46.

In July 2011, the appellant underwent a VA psychiatric examination. R. at 1204-08. The examiner noted that the appellant was taking an antidepressant and medication to control nightmares. R. at 1204. The appellant reported that he suffers from irritability and does not like to be around a lot of people. Consequently, he isolated himself in his own home. Further, he reported that he had a problematic relationship with his wife. R. at 1205. The appellant stated that he did, however, attend church weekly and reported that he gets along with others in his church. *Id.*

The psychiatric examination revealed a dysphoric mood, and attention disturbance. *Id.* The appellant's symptoms included occasionally hearing voices, recurrent and intrusive distressing recollections of the event, efforts to avoid thoughts, feelings, or conversations associated with the trauma, feeling detached or estranged from others, restricted range of affect, difficulty falling or staying asleep, and irritability or outbursts of anger. R. at 1206-07. The examiner diagnosed PTSD and assigned a GAF score of 57. R. at 1207. The examination report states that the appellant's PTSD signs and symptoms were transient or mild and that during times of stress, the appellant "may have mildly increased difficulty in focusing." R. at 1208.

VA treatment records from 2011 to 2013 state that the appellant's PTSD symptoms included sadness, anxiety, irritability, hypervigilance, flashbacks, depression, isolation, paranoid ideations, nightmares, intrusive thoughts, distrust, sleep disturbances, panic attacks, difficulty concentrating, and anger control problems. R. at 1057, 1192, 1270.

In May 2013, the Board remanded the PTSD claim to the RO for additional development to include having the July 2011 examiner identify those symptoms attributable to PTSD. R. at 1091-94. The examiner reported that the only symptoms attributable to PTSD were night sweats, dreams, and flashbacks. R. at 1080.

An April 2013 and 2014 social work psychosocial assessment noted that the appellant reported panic attacks, depression, mood swings, nightmares, daily depression, and loss of interest in some things, including hygiene. R. at 308, 969-70. The appellant stated that he sometimes goes 3 to 4 days without showering. R. at 970. Additionally, the appellant reported irritability, social isolation, sleep impairment, difficulty concentrating, and once or twice a week experiencing suicidal and homicidal thoughts. *Id.*

In June 2014, the Board increased the appellant's disability rating to 50%. R. at 291-302. The appellant appealed the Board's decision to the Court. R. at 153. The parties entered a joint motion to vacate the Board decision. R. at 159. On April 6, 2015, the Court granted the joint motion to vacate the Board decision and remand the matter to the Board for further proceedings. R. at 162.

In May 2015, the appellant underwent a private psychological examination. R. at 78-83. The examiner reviewed the appellant's claims file, administered a battery of psychological tests and interviewed the appellant's wife. R. at 78. A mental status examination revealed high levels of anxiety, depression, and alienation from others. R. at 80. The appellant reported symptoms of nightmares, flashbacks, startle response, hypervigilance, anxiety, and depression. R. at 81. One psychological test showed that the appellant was severely or totally impaired in most areas of functioning as a result of physical or mental symptoms or both. *Id.* The examiner concluded that the appellant suffered from severe occupational and social impairment with panic attacks and poor concentration. *Id.* The examiner opined that the appellant's PTSD resulted in occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, and mood. R. at 82-83. The diagnoses were PTSD, panic attacks, depressive disorder, and history of alcohol abuse. *Id.*

On October 20, 2015, the Board issued the decision here on appeal denying the appellant a disability rating more than 50%. R. at 2-20.

II. ANALYSIS

Under the current rating schedule for mental disorders, including PTSD, 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.

38 C.F.R. § 4.130, Diagnostic Code (DC) 9411 (2016). A 70% disability rating is warranted when there is

[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 a work like setting); inability to establish and maintain effective relationships.

Id.

Use of 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 70% disability rating. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *see also 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. "[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." *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 70% disability evaluation "also requires an ultimate factual conclusion as to the veteran's level of impairment in 'most areas.'" *Id.* at 118-19. Thus, it is not sufficient for the Board to simply match the symptoms listed in the rating criteria against those exhibited by a veteran. Rather, "VA must engage in a holistic analysis" of the severity, frequency, and duration of the signs and symptoms of the veteran's mental disorder, determine the level of occupational and social impairment caused by those signs and symptoms; and assign an evaluation that most nearly approximates that level of occupational and social impairment. *Bankhead v. Shulkin*, No. 15-2404, 2017 WL 1131190, at *9 (U.S. Vet. App. Mar. 27, 2017).

Further, VA regulations also provide that "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. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7 (2016). The assignment of a disability rating is a factual finding that the Court

reviews under the "clearly erroneous" standard of review. *Johnston v. Brown*, 10 Vet.App. 80, 84 (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). As with any finding on an issue of material fact or law, the Board must support its assignment of a disability evaluation with a statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. 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 the 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).

Here, the Board concluded that the appellant's PTSD did not cause occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking or mood, to warrant a 70% disability rating for PTSD. R. at 18. The Court agrees with the appellant that the Board's reasons or bases for denying an increased PTSD evaluation in excess of 50% are inadequate. The Board discussed the list of symptoms enumerated in the 70% rating criteria, and highlighted the absence of certain symptoms. R. at 12. Also, the Board's discussion of those symptoms that the appellant displayed that are listed in the 70% disability rating criteria is inadequate. For example, the Board discussed evidence of suicidal ideation but concluded that the appellant was not entitled to a 70% disability rating because the suicidal ideation was "fleeting." The Board based this conclusion, in part, on the fact that the appellant had no intent or plan to commit suicide. R. at 13. In *Bankhead*, the Court held that the language of the disability rating criteria for 70% indicates that the presence of suicidal ideation, alone, without an intent or plan, may cause occupational and social impairment with deficiencies in most areas. *Bankhead*, 2017 WL 1131190, at *6. Accordingly, the Board's reason for discounting the appellant's suicidal ideation is inadequate.

The Board proceeded to examine other symptoms (depression and irritability) that the appellant displayed that were listed in the 70% rating criteria. In doing so, the Board addressed why the particular symptom did not warrant a 70% disability rating. However, the Board failed to

conduct "an holistic analysis" of the severity, frequency, and duration of the full constellation of the appellant's PTSD's symptoms in order to determine the level of occupational and social impairment caused by those signs and symptoms. *Bankhead*, 2017 WL 1131190, at *9. Additionally, although the Board acknowledged that the appellant suffered from PTSD symptoms (intrusive thoughts, isolation, hypervigilance, exaggerated startle response, and flashbacks) that are not listed in the 70% disability rating criteria, the Board failed to discuss the effects of these symptoms upon the appellant's social and occupational functioning. *See Vazquez-Claudio*, 713 F.3d at 118 ("The 70[%] disability rating regulation contemplates initial assessment of the symptoms displayed by the veteran," and "an assessment of whether those symptoms result in occupational and social impairment with deficiencies in most areas.").

Finally, the appellant challenges the Board's rejection of the 2015 private psychologist's opinion that the appellant's PTSD results in deficiencies in most areas. The Board discounted the "probative value" of this opinion because it was offered "specifically for purposes of introducing evidence favorable to this VA claim." R. at 16. A claimant may submit his own medical evidence from a private physician. *Nieves-Rodriguez v. Peake* 22 Vet.App. 295, 301 (2008). Indeed, under 38 U.S.C. § 5125, VA is permitted, but not required, to accept a report provided by a private physician as sufficient to grant a claim without confirmation by a VA examination "'if the [private physician's report] is sufficiently complete to be adequate for the purpose of adjudicating the claim.'" *Id.* at 302 (quoting U.S.C. § 5125). Thus, the fact that the appellant submits favorable private medical evidence is not a sufficient reason to discount the medical evidence.

The Court is disturbed by the Board's ad hominem attack on the private psychologist who rendered the opinion. The Board's reasoning is wholly contrary to the nonadversarial nature of proceedings before VA. It is troubling that the Board would discount a medical opinion by resorting to a direct attack upon a medical professional's integrity, especially without a scintilla of evidence in the record to support the allegation. The Board failed to provide adequate reasons or bases for its inference that the psychologist may have some interest, pecuniary or otherwise, in the outcome of the case.

The Court finds it noteworthy that in addition to the ad hominem attack on the integrity of the examiner, the Board failed to recognize that the 2015 private psychologist's opinion that the appellant's PTSD caused deficiencies in most areas was virtually identical to the 2007 VA examiner's opinion. Like the private psychologist, the 2007 VA examiner opined that the

appellant's PTSD resulted in deficiencies in most areas, including thinking, family relations, work, and mood. R. at 1463-64. Yet, the Board fails to discuss the similarities in both opinions regarding the level of social and occupational impairment resulting from the appellant's PTSD. Because of the deficiencies in the Board's statement of reasons or bases, the Court will vacate the Board decision and remand the matter for further proceedings. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand warranted when the Board has, inter alia, provided an inadequate statement of reasons or bases).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the October 20, 2015, Board decision is VACATED and the vacated matter is REMANDED for further proceedings.

DATED: April 20, 2017

Copies to:

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