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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4461

ERNEST R. DUNIGAN, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
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 Ernest R. Dunigan appeals through counsel a September 24, 2015, Board of Veterans' Appeals (Board) decision denying an initial disability evaluation in excess of 30% for service-connected post-traumatic stress disorder (PTSD) and entitlement to a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 2-18. Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). 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 September 24, 2015, Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Dunigan served on active duty in the U.S. Army from September 1968 to September 1970, including service in Vietnam. R. at 645. In August 2004, the veteran sought to reopen a claim for service connection for PTSD. R. at 547. During an October 2004 VA mental health consult, a physician's assistant diagnosed PTSD and depressive disorder and noted the following symptoms: depression, short-temper, irritable, moody, easily emotional and startled, trouble

concentrating, loss of interest in favorite activities, crying spells, low energy, unrestful sleep, and panic. R. at 132-34. In November 2004 the VA regional office (RO), without addressing reopening, denied service connection for PTSD, R. at 531, and the veteran filed a Notice of Disagreement (NOD), R. at 527.

A December 2004 VA treatment record revealed a depressive disorder diagnosis and Mr. Dunigan reported he felt depressed and panicky; had low energy, a constricted affect, and "no desire to do anything"; and slept three to four hours per night. R. at 88-89. A February 2005 VA medical examiner diagnosed depressive disorder, not otherwise specified (NOS), and noted the following symptoms: low energy, depressed feelings, tiredness, no desire to do anything, forgetfulness, and occasional homicidal dreams. R. at 78-79. In August 2005, the RO issued a Statement of the Case (SOC) finding no new and material evidence sufficient to reopen the PTSD claim. R. at 498, 521-22. That same month, Mr. Dunigan perfected his appeal. R. at 492.

A January 2007 VA examiner diagnosed PTSD and stated that it was related to the veteran's Vietnam experiences. R. at 480, 483. The examiner noted the following symptoms: bad nerves, nightmares and night sweats once a month, intrusive thoughts and recurrent memories of Vietnam triggered by low-flying helicopters and loud noises, feeling uncomfortable around people, easy startle response, bad temper, being untrusting, and feeling on edge. R. at 481. The examiner noted that Mr. Dunigan stopped hunting because it reminded him of Vietnam. *Id.* The veteran stated that he had been married to his second wife for 18 years and described his relationship with his wife, mother, and siblings as "okay." R. at 481-82. The examiner indicated that the veteran appeared tense, anxious, and edgy during the examination and that his memory was slightly impaired. R. at 482. The examiner stated that Mr. Dunigan was injured at his coal mining job and his inability to work brought PTSD symptoms to the forefront. R. at 483.

In November 2007, the RO granted service connection for PTSD, evaluated as 30% disabling. R. at 232. The veteran filed an NOD as to that decision, R. at 457, the RO issued an SOC, R. at 402, and Mr. Dunigan perfected his appeal, stating that he thought about his Vietnam experiences "all the time," had a bad temper, and was impatient, R. at 357-58.

During an August 2009 VA examination, the veteran denied panic attacks and anxious or nervous feelings and the examiner noted the following symptoms: depression, tearfulness, flashbacks and nightmares, hypervigilance, feeling concerned around people, avoiding socializing, having decreased energy, irritability, trouble concentrating, and decreased interest in hobbies. R.

at 339-42. The examiner stated that the veteran was unable to work since a 1999 coal mining injury, but that he reported no employment-related interpersonal conflicts. R. at 341. The veteran stated that he got along fairly well with family members. *Id.* The examiner opined that PTSD affected Mr. Dunigan's mood and impacted him socially and economically. R. at 342.

In March 2012, the Board determined that there was a TDIU aspect to his initial higher evaluation claim and remanded the matter with the PTSD evaluation issue, ordering a new examination. R. at 319. A November 2013 statement from Mr. Dunigan's spouse indicated that the veteran was irritable; easily angered; had difficulty sleeping; experienced flashbacks; was anxious performing daily tasks, often resulting in episodes of intense frustration and anger; no longer enjoyed hunting and fishing; and had lost his desire for intimacy. R. at 300.

During a January 2014 VA examination, Mr. Dunigan reported that his support system consisted of family members and church members, he had difficulty with emotional intimacy and trust, and in 2001 he had been in a physical altercation with his brother-in-law. R. at 285, 288. The veteran reported decreased interest in hobbies over the past two years. R. at 288. The examiner noted that the following symptoms caused clinically significant distress or impairment in social, occupational, or other important areas of functioning: markedly diminished interest or participation in significant activities; feelings of detachment or estrangement from others; persistent inability to experience positive emotions; irritable behavior and angry outbursts with little or no provocation, typically expressed as verbal or physical aggression toward people or objects; hypervigilance; exaggerated startle response; and sleep disturbance. R. at 289-90. The examiner stated that the veteran experienced anxiety, suspiciousness, and disturbances of motivation and mood. R. at 290. Mr. Dunigan denied panic attacks and the examiner indicated good impulse control, no episodes of violence, and normal memory. R. at 291. The examiner opined that the veteran's symptoms were not severe enough to interfere with occupational and social functioning. R. at 286.

Regarding employability, the examiner stated that the veteran worked as a coal miner for 25 years until retiring in 2000 due to a neck injury and he did not report missing time from work, difficulty adjusting to a work-like setting, or significant occupational impairment due to mental health. R. at 293. The examiner opined that Mr. Dunigan did not display impairment that would significantly impact occupational functioning because he was able to care for himself and drive, had no gross cognitive impairment, denied disturbances of concentration, and did not report that

he was fired or written up at work. *Id.* The examiner concluded that the veteran would likely experience mild occupational impairment if he attempted to maintain gainful employment. *Id.*

In the September 2015 decision on appeal, the Board concluded that the veteran's PTSD symptoms caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, but no more, warranting a 30% PTSD evaluation. R. at 10-11. The Board denied entitlement to TDIU. R. at 14-16. This appeal followed.

II. ANALYSIS

Mr. Dunigan argues that the Board erred in failing to consider and reconcile favorable evidence when finding that a higher PTSD evaluation was not warranted, relying on an inadequate VA examination, and denying TDIU. Appellant's Brief (Br.) at 1-30. The Secretary disputes the veteran's arguments and urges the Court to affirm the September 2015 Board decision. Secretary's Br. at 8-24.

PTSD is evaluated as 30% disabling when it causes

[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, DC 9411 (2016). To qualify for the next higher evaluation of 50%, PTSD must manifest with

[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. And, a 70% evaluation is warranted where the evidence shows that PTSD causes

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

Id.

Use of the term "such symptoms as" in § 4.130 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 a particular evaluation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *see Sellers v. Principi*, 372 F.3d 1318, 1326-27 (Fed. Cir. 2004); *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.

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). 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, including providing reasons for rejecting evidence favorable to the claimant. 38 U.S.C. § 7104(d)(1); *Caluza v. Brown*, 7 Vet.App. 498, 505-06 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The September 2015 Board decision stated that Mr. Dunigan primarily reported symptoms consisting of monthly nightmares and night sweats, intrusive thoughts, feeling uncomfortable around others, bad temper, and being easily startled, and that his memory was slightly impaired during the January 2007 VA examination but normal in the January 2014 VA examination. R. at 10. The Board then concluded, with little analysis, that there was insufficient evidence of, *inter alia*, disturbances of motivation and mood, impaired judgment, and difficulty in establishing or

maintaining effective work and social relationships, and found that other symptoms did not result in the required level of impairment. R. at 10-11. The Board reiterated the January 2014 VA examiner's opinion that PTSD symptoms were not severe enough to interfere with occupational or social functioning and that the veteran would likely experience mild occupational impairment if attempting to maintain gainful employment. R. at 10-11. The Board concluded that PTSD caused occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, but no more, and that an evaluation in excess of 30% was not warranted. R. at 11.

The Court finds that the Board provided inadequate reasons or bases for its decision. The Board conclusorily stated that there was insufficient evidence of the 50% symptom of disturbances of mood and motivation, but appeared to disregard favorable evidence on that point. R. at 10. The August 2009 VA examiner opined that PTSD symptoms affected Mr. Dunigan's mood and noted depression and decreased energy. R. at 342. The January 2014 examiner reported disturbances of mood and motivation, R. at 290, and an October 2004 medical record noted that the veteran was moody, depressed, easily emotional, and had crying spells, R. at 133. The Board failed to address whether this evidence constituted disturbances of mood and motivation commensurate with a 50% PTSD evaluation. *See Caluza*, 7 Vet.App. at 505-06. The Board also disregarded evidence as to irritability, angry outbursts, and episodes of intense frustration, *see* R. at 133, 289, 300, 340, which appear relevant to 50% and 70% PTSD evaluation criteria. *See id.*; § 4.130, DC 9411. In addition, the Board failed to explain whether certain apparently favorable evidence supported Mr. Dunigan having difficulty in establishing or maintaining effective work and social relationships, commensurate with a 50% evaluation. *See* R. at 481 (January 2007 VA examination report noting that the veteran did not trust anyone); R. at R. at 340, 342 (August 2009 VA examination indicating that Mr. Dunigan felt concerned around people and avoided socializing); R. at 300 (Mrs. Dunigan's November 2013 statement that the veteran had lost his desire for intimacy); R. at 288-90 (January 2014 VA examination report noting that the veteran had difficulty with emotional intimacy and trusting others and stated that PTSD symptoms caused impairment in social and occupational functioning or clinically significant distress).

Furthermore, as the Court noted in *Bankhead v. Shulkin*, No. 15-2404, 2017 WL 1131190, at *8 (Vet. App. Mar. 27, 2017),

although the mental disorders rating schedule provides leeway for VA adjudicators to consider symptoms a veteran experiences that are not listed in the schedule, VA is not at liberty to create evaluation criteria out of thin air in an individual case and then use the absence of those criteria in the veteran's records to deny a particular mental disorder evaluation.

That is precisely what the Board did here by stating that a higher PTSD evaluation was not warranted because, *inter alia*, Mr. Dunigan had not received recent psychiatric treatment, a factor outside the evaluation criteria. *See id.*; R. at 10. The Board also found that the veteran was not entitled to an evaluation in excess of 30% because, *inter alia*, there was no impairment in activities of daily living, R. at 10, a symptom listed only with respect to a total disability evaluation.

In addition, the Board did not address an inherent discrepancy in the January 2014 VA examination report, despite relying in part on this examination to deny a PTSD evaluation in excess of 30%. R. at 10-11 (citing the January 2014 examination several times in its analysis). The January 2014 examiner stated that Mr. Dunigan's symptoms were not severe enough to interfere with occupational and social functioning, R. at 286, while simultaneously noting that PTSD symptoms caused impairment in social or occupational functioning or clinically significant distress, R. at, 289-90. The Board did not address the fundamental variance in these statements and remand will provide the Board the opportunity to address this issue and, if necessary, seek clarification or order a new examination.

Because of the aforementioned errors, the Court will remand this matter. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (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); *Caluza*, 7 Vet.App. at 505-06.

Finally, in regard to TDIU, remand will require reassessment of all evidence of record and may prompt further development, subsequently affecting the Board's understanding of whether and how Mr. Dunigan's service-connected disability affects employability. *Cf. Todd v. McDonald*, 27 Vet.App. 79, 90 (2014) (adjudication of TDIU and the issue of referral for extraschedular consideration both require a complete picture of how service-connected disabilities affect employability and should be remanded together); *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (where a decision on one issue would have a significant impact upon another, the two issues are inextricably intertwined); *Holland v. Brown*, 6 Vet.App. 443, 446 (1994) (holding that the issue of entitlement to TDIU "predicated on a particular service-connected condition is 'inextricably

intertwined' with a rating increase claim regarding the same condition"). Therefore, the Court will remand the issue of entitlement to TDIU.

The veteran is free on remand to submit additional evidence and argument, including the arguments raised in his briefs to this Court, 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 September 24, 2015, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: April 24, 2017

Copies to:

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