

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>DAVID A. EMSLEY,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-0136
	)	
<b>DAVID J. SHULKIN, M.D.,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**JOINT MOTION FOR PARTIAL REMAND**

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, David A. Emsley, and Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, by and through their representatives, respectfully move this Court to vacate, in part, the Board of Veterans' Appeals (Board) decision of September 21, 2016<sup>1</sup>, to the extent that it denied a claim of entitlement to a disability rating greater than 30 percent for an adjustment disorder with anxiety (also claimed as posttraumatic stress disorder (PTSD)).

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<sup>1</sup> The parties note that the Board issued two decisions on September 21, 2016 with one addressing the issues of entitlement to a disability rating greater than 30 percent for an adjustment disorder with anxiety (also claimed as PTSD) and to a total disability rating based on individual unemployability (TDIU). And the other addressing the issue of entitlement to payment or reimbursement of non-VA medical expenses for an emergency room visit at The Villages Regional Hospital, The Villages, Florida, on October 31, 2012. Both decisions, and all issues, are addressed by this joint motion.

The parties agree that the portion of the Board's decision that remanded the claim of entitlement to a TDIU is not before the Court for appellate review. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

The parties further agree that the Board's separate decision denying the claim of entitlement to payment or reimbursement of non-VA medical expenses for an emergency room visit at The Villages Regional Hospital, The Villages, Florida, on October 31, 2012, should not be disturbed.

#### **BASIS FOR REMAND**

The parties agree that vacatur, in part, and remand is warranted because the Board, in making its decision, erred by not providing an adequate statement of reasons or bases for its determinations as it pertains the Appellant's PTSD claim.

In rendering its decision, the Board is required to provide a written statement of its "findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board may commit remandable

error when it fails to provide an adequate statement of its reasons or bases. *Id.*

Here, the Board concluded that “a disability rating greater than 30 percent for an acquired psychiatric disability is not warranted.” R. at 45 (22-52). In reaching its determination, the Board noted that the record evidence shows “that this disability is manifested by, at worst, complaints of depression, irritability, hypervigilance, anxiety, and difficulty sleeping.” R. at 42 (22-52). The Board also stated that the record evidence “suggests that the Veteran’s continued drinking of alcohol to excess exacerbated his psychiatric symptomatology, despite being advised repeatedly to cut back or discontinue drinking alcohol by multiple VA clinicians.” *Id.*

The Board’s statement of reasons or bases for its finding, however, is problematic for several reasons. First, the Board was obligated to consider and discuss whether Appellant’s symptomatology more nearly approximated the next higher 50 percent rating criteria, but it failed to even mention the standard for the higher 50 percent rating much less discuss why Appellant’s symptomatology more nearly approximated the current 30 percent criteria as opposed to the higher 50 percent criteria. The Board’s error is even more disconcerting considering the evidence of record documenting homicidal and suicidal ideation, which is symptomatology first contemplated at the higher 70 and 100 percent levels.

In addition, while the Board acknowledged the Court's precedent as espoused in *Mauerhan v. Principi*, 16 Vet.App. 436 (2002) and *Vaquez-Claudio v. Shinseki*, 713 F. 3d 112 (Fed. Cir. 2013), it failed to fully comply with the law in that regard. Specifically, the Board noted that Appellant's symptoms included "depression, irritability, hypervigilance, anxiety, and difficulty sleeping." R. at 42 (22-52). Nonetheless, the Board statement of reasons or bases does not appropriately consider or discuss the effect of the symptoms specifically listed in the rating criteria or the frequency, severity, and duration of the similar symptoms not specifically listed in the rating criteria.

For example, the Board does not fully explain whether the severity of Appellant's noted depression more nearly approximates depressed mood as listed in the 30 percent rating criteria or near-continuous depression affecting the ability to function independently, appropriately, and effectively as listed in the higher 70 percent rating criteria. Similarly, the Board does not consider or discuss the frequency, severity, duration, or effect of Appellant's symptoms, such as irritability and hypervigilance, which are not specifically listed in either the 30 percent or 50 percent rating criteria as required by *Mauerhan* and *Vazquez-Claudio*.

Because the Board failed to provide an adequate statement of reasons or bases for its determination, the parties agree that remand is warranted. On remand, the Board should provide an adequate statement

of reasons or bases that considers and discusses whether a higher rating is warranted under the higher 50 percent rating criteria and that properly complies with the Court's caselaw as articulated in *Mauerhan* and *Vazquez-Claudio*.

As a final matter, and while the Secretary does not concede any error in this regard, Appellant alone asserts that the Board, in its extraschedular analysis, erred by making a conclusory statement that the schedular criteria are adequate without making any actual comparison of his actual symptoms to those delineated in the rating schedule. Additionally, Appellant alone challenges the application of the *Dickens* decision under the facts of this case. As such, it is requested that the Board address Appellant's contentions on remand.

Further on remand, Appellant will be free to submit additional evidence and argument regarding his claim and the Board may develop additional information, as deemed appropriate. See *Kutscherousky v. West*, 12 Vet.App. 369 (1999); *Colon v. Brown*, 9 Vet.App. 104, 108 (1996); *Holland v. Brown*, 6 Vet.App. 443 (1994); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992).

Additionally, if the Court grants this motion, the Board shall obtain a copy of the Court's order and this joint motion, and incorporate them into Appellant's claims file for appropriate consideration in subsequent decisions on this claim.

Finally, before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1983). The Board shall also afford Appellant's claim expeditious treatment, as required by 38 U.S.C. § 7112. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order").

### **CONCLUSION**

The parties respectfully move this Court to set aside the Board's decision of September 21, 2016, to the extent that it denied entitlement to a disability rating greater than 30 percent for an adjustment disorder with anxiety (also claimed as PTSD) and remand the matter for further proceedings consistent with this motion.

Respectfully submitted,

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