

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-4086

JAMES O. EMERSON,

Appellant,

v.

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

Appellee.

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ISSUE PRESENTED FOR REVIEW

The Board determined that a compensable rating prior to April 2008, and a rating in excess of 10 percent thereafter was not warranted for Mr. Emerson's PTSD. However, the Board's decision failed to adequately consider the frequency, severity, and duration of Mr. Emerson's nightmares, insomnia, depression, irritability, and memory impairment and their impact on his occupational and social functioning. Instead, the Board focused on the fact that Mr. Emerson was not taking medication for his symptoms and remained employed full time. Was the Board's denial of an increased rating arbitrary and unsupported by adequate reasons or bases?

STATEMENT OF THE FACTS

James Emerson served honorably in the United States Air Force from November 1963 to November 1967. R-1405. He received the National Defense Service Medal and the Vietnam Service Medal. *Id.* Mr. Emerson was stationed at an Air Force base in Ethiopia for two six-month tours. R-2095 (2095-2100). During this time, he slept in a tent alone without a uniform, guns, or external lights. *Id.* Mr. Emerson felt that he "lived in constant fear for six months for [his] life and whether [he was going to be] harmed in some way[.]" R-2013 (2001-17). Mr. Emerson feared stories of other servicemen of the "natives capturing and killing white visitors" and the natives stealing the water that was delivered by helicopter only once a month. R-2095. For as long as Mr. Emerson can remember he has felt changes in sleep, in his

interest level, along with feelings of worthlessness, helplessness, and decreased energy.

Id.

Mr. Emerson developed a “phobia that [he] never got over” and “still keep[s] a loaded gun by [his] bed at night.” R-2015. He suffered from OCD symptoms and became irritable when things were out of order. R-2097. He complained of excessive worry, nervousness, insomnia, and irritability. *Id.* The Veteran had very few peer group friends, and spent his spare time doing various chores around the house. R-2099. He reported that there were few things that he derived enjoyment from. R-1957.

The Veteran filed for service connection and VA compensation for post-traumatic stress disorder in August 2004. R-2227 (2225-28). The Regional Office denied service connection for post-traumatic stress disorder in January 2005. R-2090 (2088-94). Mr. Emerson appealed. R-2080-82 (March 2005 Notice of Disagreement); R-2053-74 (September 2005 Statement of the Case); R-2038-40 (September 2005 VA Form 9).

Upon consultation in October 2004, a medical student clinician felt that the Veteran did not present enough avoidance symptoms to qualify for a diagnosis of PTSD. R-2099. But he opined that the Veteran suffered from significant symptoms of an anxiety disorder. *Id.* The Veteran had managed his symptoms for 40 years, and the examiner felt that there was no reason he could not continue to do so. *Id.*

The Veteran testified before the Board in October 2006. R-2001-17. Mr. Emerson indicated he saw someone at the VA mental health clinic who informed him he had mild PTSD, but not severe enough to be prescribed medication. R-2016.

The Board issued a decision in September 2007 where it remanded the Veteran's claim for service connection for post-traumatic stress disorder. R-1984-2000. The Board ordered a VA psychiatric examination to determine if the Veteran had a diagnosable mental illness. R-1997.

Upon examination in 2008, despite the Veteran's report that he did not have any mental health problems he could not cope with, "it became clear that [Mr. Emerson] does have some problems." R-1956 (1956-59). Mr. Emerson had a tendency to minimize the extent of any psychiatric difficulties. R-1958. The Veteran would suffer from nightmares; upon waking from these nightmares, he would sometimes be able to return to sleep immediately, whereas other times it took one or two hours to return to sleep. R-1957. Mr. Emerson and his wife got along well, but "they each tend[ed] to do their own things." *Id.* The Veteran's PTSD was noted to have impaired his interpersonal relationships at work. R-1958. The Veteran felt he "was booted out" from his job as a superintendent due in part to his personality characteristics. R-1957.

The Board issued an additional decision in October 2008 where it again remanded the Veteran's claim in order to obtain an addendum opinion from the 2008 examiner addressing whether his psychiatric disorder was caused by his service. R-

1925 (1917-28). In the addendum opinion, the examiner again reiterated that he felt the Veteran had PTSD stemming from service. R-1900-01.

The Board again remanded the Veteran's claim in April 2009 in order for the April 2008 VA examiner to "review the record and the report of the examination and explain how the Veteran's in-service stressors accord with the DSM-IV definition of a traumatic event." R-1877 (1873-78). In June 2009, the same examiner indicated that the Veteran's stressor "was a sufficient stressor to meet the criterion in DSM4 of a traumatic event." R-1863 (1863-68).

An August 2009 DRO decision granted entitlement to service connection for PTSD at a noncompensable evaluation from 2004, and at a 10 percent evaluation from April 2008. R-1857 (1850-60). In June 2010, the Veteran submitted a notice of disagreement with the evaluation assigned. R-1835-38; R-1788-1802 (December 2010 Statement of the Case); R-1767-68 (February 2011 VA Form).

In August 2012, the Veteran reported that he was taking medication for PTSD that was prescribed by his primary care physician. R-1493 (1477-1505). The Veteran felt he had a good relationship with his wife because she was very understanding, but his kids felt he had irritable outbursts. R-1496. Mr. Emerson reported it was very easy for him to lose his temper and he had "to watch it and bite [his] tongue several times." R-1497. He also indicated that he had difficulty remembering names and had to write things down in order to remember to do it. *Id.* The Veteran is employed at a juvenile detention center and during fights in the classroom he has bouts of anxiety

where he “get[s] a little more shaky where sometimes [he] can[not] even write [his] own name.” R-1498. Mr. Emerson reported that he did not have any problems at work because he was “basically my own boss, I mean, you know no one wants to come around” a juvenile detention center. R-1501.

The Board again remanded the Veteran’s claim for an examination to establish the nature and severity of his PTSD in September 2014. R-1460 (1454-63). Upon examination in September 2015, the Veteran reported that he no longer went to church because “no one came to see him for the 18 days he was hospitalized” for colo-rectal cancer treatment. R-173 (171-75). Mr. Emerson endorsed symptoms of markedly diminished interest or participation in activities; feelings of detachment; problems with concentration; and sleep disturbances. R-174.

The Board issued the decision on appeal in November 2016 denying increased ratings for the Veteran’s PTSD. R-1-22. The Board found the Veteran symptoms were only mild or transient and Mr. Emerson was not taking medication during this time and maintained full-time employment. R-16. After 2008, the Board determined that the Veteran’s symptoms were only mild as demonstrated by his marriage for 40 years, his ability to participate in activities of daily living, and the fact he did not leave work due to his mental state. R-17. This appeal ensued.

SUMMARY OF THE ARGUMENT

Mr. Emerson suffers from nightmares, sleep impairment, irritability, OCD, and depression related to his service-connected PTSD. These symptoms cause him to

isolate himself and have interfered with his employment. In denying a compensable rating for Mr. Emerson's PTSD prior to 2008, and in excess of 10 percent thereafter, the Board failed to base its decision on any relevant standard found in the law. The Board listed evidence of record related to the Veteran difficulties with his sleep, memory, temper, and isolation, but failed to adequately analyze whether these symptoms entitled him to a higher rating during both periods of time. Because the Board's error likely denied Mr. Emerson compensation to which he was entitled, he was prejudiced and remand is warranted. *See* 38 U.S.C. § 7261(b)(2); *Arneson v. Shinseki*, 24 Vet.App. 379, 389 (2011) (finding prejudice when error "could have altered" the Board's determinations).

STANDARD OF REVIEW

A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact. *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

However, the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. at 538. The Court should determine whether the Board's

decision which applied an arbitrary standard in deciding his increased rating claim, and failed to support its decision with adequate reasons and bases, is not in accordance with the law.

ARGUMENT

The Board's denial of an increased rating for Mr. Emerson's PTSD symptomatology was arbitrary, as it was not based on any standard found in the law, and was unsupported by adequate reasons and bases.

The Board concluded that the Veteran was not entitled to an initial compensable evaluation prior to April 2008, or in excess of 10 percent thereafter. R-4. The Board determined that the Veteran's symptoms were only mild prior to 2008 as "he was not taking medication during this time period, and he has maintained full-time employment" and his career had not been affected by his symptoms. R-16. In reaching this determination the Board misinterpreted the law when it failed to discuss favorable evidence of record regarding the influence the Veteran's PTSD had on his previous employment, and the symptoms the Veteran does experience.

In regards to the second period of time, the Board noted the Veteran had been married for over forty years, had a good relationship with his children, and had never left work due to his mental state. R-17. It also relied on the VA examiner's opinion that the Veteran symptoms were only mild to determine a rating in excess of 10 percent was not warranted. *Id.* Again, the Board erred when it failed to discuss the frequency, duration, and severity of the Veteran's actual symptoms.

Since the rating criteria are not an exclusive list of requirements, the Board's reasons for assigning a particular disability rating must be thoroughly explained. *See Mittleider v. West*, 11 Vet.App. 181, 182 (1998). This analysis must address all of the Veteran's symptoms in terms of the severity, duration, and frequency of each symptom, and how these factors relate to the level of disability contemplated by the rating schedule for the various grades of disability. *See* 38 C.F.R. § 4.126 (2016); *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). Merely listing evidence before stating a conclusion does not make an adequate statement of reasons or bases. *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007).

Time Period prior to April 2008

The Board noted that the Veteran experienced nightmares, insomnia, feelings of helplessness, excessive worry, low energy, irritability, intrusive memory avoidance, and hyperarousal. R-15. Despite these symptoms, the Board determined that "the Veteran has been shown to have occupational and social impairment due to mild or transient symptoms." R-16. The record does not support this finding. In reaching this conclusion, the Board failed to discuss relevant favorable evidence and provide adequate reasons or bases for this determination. The Board did not adequately discuss the duration, severity, and frequency of these symptoms and how they impacted the Veteran's social and occupational ability. *Vazquez-Claudio*, 713 F.3d at 117.

Where the Board discussed individual symptoms, its analysis was cursory and it did not apply the standard found in the law. *See* R-11-18. The Board should have assessed whether Appellant's symptoms are similar to those enumerated by the higher rating criteria. Then the Board should have considered whether the symptoms Mr. Emerson did experience amounted to deficiencies in most areas due to their frequency, severity and duration. *See* 38 C.F.R. § 4.130.

During a 2004 mental health consultation, Mr. Emerson reported nightmares where he is more nervous and more cautious the day after a nightmare. R-2095. His wife informed him that he would shout "I'll kill you" in his sleep. *Id.* Mr. Emerson stated that this difficulty sleeping has been for "as long as he can remember." *Id.* Notably, chronic sleep impairment is specifically contemplated by the 30 percent rating criteria. 38 C.F.R. § 4.130. In its analysis, the Board should have discussed whether the Veteran's frequent nightmares that sometimes prevented him from returning to sleep for several hours warranted a higher rating than his currently assigned noncompensable evaluation. If the Board had discussed this symptom, it may have concluded that Mr. Emerson's frequent nightmares that resulted in sleep difficulties could have amount to a chronic sleep impairment that caused occupational and social impairment with occasional decrease in work efficiency or intermittent inability to perform occupational tasks. *See* 38 C.F.R. § 4.130.

Similarly, the 2004 examiner noted that the Veteran experienced significant symptoms of an anxiety disorder. R-2099. These symptoms included decreased

interest level, feelings of worthlessness and helplessness, decreased energy and poor appetite. R-2097. The Board did not provide adequate reasons and bases as to why it did not conclude that Mr. Emerson's *significant* feelings of helplessness, excessive worry, low energy, intrusive memory avoidance, and hyperarousal did not amount to at least a compensable rating. Again, depressed mood and anxiety that cause occasional decrease in performance are contemplated by the 30 percent rating criteria. 38 C.F.R. § 4.130. Mr. Emerson's symptoms contributed to a markedly diminished interest in participating in activities. R-174. Had the Board adequately considered that Mr. Emerson suffered from significant feelings of helplessness, worry, and low energy with a diminished interest in participating in activities it may have determined that these symptoms were severe enough to impact his social and occupational functioning more than his current noncompensable rating allowed.

These symptoms noted above are contemplated by higher ratings. "When VA adopted the General Rating Formula, it noted that the enumerated symptoms "characteristically produce a particular level of disability." 60 Fed. Reg. 54,825, 54,826 (Oct. 26, 1995); *see also* 61 Fed. Reg. 52,695, 52,697 (Oct. 8, 1996) ("The symptoms in the general rating formula for mental disorders are representative examples of symptoms that often result in specific levels of disability."); *see also Bankhead v. Shulkin*, 2017 WL 2200746, at *8 (holding "VA generally considers [suicidal ideation] indicative of a 70% evaluation"). Yet the Board relied on the fact that the Veteran was not taking medication during this time period and had maintained full-time

employment in order to deny the Veteran a higher rating without adequately discussing these symptoms. R-16; *see* 38 C.F.R. § 4.130. The Board needed to discuss these symptoms in the context of the difficulties that they created at work and in his social relationships.

During the time period on appeal, Mr. Emerson suffered from chronic sleep impairment, depressed mood, low energy, and minimal interest in social activities. R-2095. The Board's focus on the fact that Mr. Emerson was not medicated at this time led to its failure to analyze the symptoms Mr. Emerson did suffer from and whether these symptoms amount to social and occupational impairment.

Furthermore, the regulation does not require that the Veteran be unemployed for a compensable rating. R-16; 38 C.F.R. § 4.130. If the Veteran was not able to work due to his PTSD, he would be entitled to TDIU benefits. *See* 38 C.F.R. § 4.16. The rating criteria for PTSD, instead, contemplate varying degrees of occupational deficiencies. 38 C.F.R. § 4.130. The noncompensable evaluation currently assigned indicates the Board's belief that the Veteran's condition did not impair his ability to work at all. R-16. However, this ignores that the Veteran's PTSD was noted to have impaired his interpersonal relationships at work. R-1958. Mr. Emerson felt that due to these interpersonal struggles he "was booted out" from his previous job as a superintendent. R-1957. The Board relied, in part, on the October 2004 VA examiner's conclusion this career had not been affected by his symptoms. R-2099. However, in relying on this opinion, the Board failed to consider that there was

evidence of an impairment in his interpersonal relationships at work, which led to his job transition prior to this examination. R-1957-58. The Board did not address how these factors weighed into its analysis. R-16. Had the Board considered the other evidence of record which contradicted the examiner's conclusion it may have determined that there was occupational and social impairment. Mr. Emerson's difficulty maintaining and establishing interpersonal relationships with his co-workers are contemplated by the higher rating criteria and could exhibit occupational and social impairment with reduced reliability. 38 C.F.R. § 4.130.

The Board's determination that the evidence of record does not demonstrate that the Veteran was "entitled to an initial evaluation in excess of 10 percent for his PTSD" was unsupported. R-16. Nothing about the Board's analysis allows the Veteran to understand the precise reasons that he was denied entitlement to a higher rating. *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992)) (the Court "has long held that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases."). Thus, remand is necessary to address these deficiencies.

Time Period after April 2008

In its analysis of the Veteran's symptoms after 2008, the Board did not address the actual symptoms from which Mr. Emerson suffered. R-16-18. Instead, it noted that the Veteran was well-groomed, oriented to person, place, and time, and that he did not have panic attacks, hallucinations, delusions, thought disorder, impairment of

communication, impairment of judgment, impairment of impulse control, suicidal or homicidal ideations, or obsessive behavior. R-16-17. Not only does this cursory analysis fail to address the symptoms from which Mr. Emerson actually suffers, in some instances it is contrary to the record.

For example, the Board noted that the Veteran did not have impairment of judgment, impulse control, or obsessive behavior. R-17. However, a VA examiner indicated that Mr. Emerson suffered from OCD symptoms and became irritable when things were out of order. R-2097. Furthermore, Mr. Emerson complained of excessive worry, nervousness, insomnia, and irritability. *Id.* Mr. Emerson's children felt he had irritable outbursts. R-1496. On one occasion, Mr. Emerson lost it with a car salesman while with his daughter. R-1497. This episode led to his daughter's refusal to ever go back with him. *Id.* Mr. Emerson reported it was very easy for him to lose his temper and he had "to watch it and bite [his] tongue several times." *Id.* The Board noted that the Veteran did not have obsessive behavior or impaired impulse control. R-17. However, a VA examiner indicated that he did have OCD symptoms which led to the Veteran becoming irritable when things were out of order. R-2097. The Veteran may not have felt that he had irritable outbursts, but his children thought that he did and his outburst at a car dealership contradicts the Board's finding that the Veteran did not have impaired impulse control. R-17; R-1496-97. The Board's analysis fails to account for this symptomatology or explain why it does not indicate impaired judgment, impulse control, or obsessive behavior.

The Board noted that the Veteran does not socialize much, but countered that he had a supportive relationship with his wife, adult children, and granddaughter, and that he was able to fish and hunt on occasion. R-17. This analysis does not provide insight into the reasoning behind the Board's decision or indicate that its analysis of the Veteran's social impairment was particularly thorough. Mr. Emerson indicated that he had a good relationship with his wife because they each tended to do their own thing and she was very understanding. R-1495. His children felt that Mr. Emerson had a problem with his temper. R-1496. The fact that the Veteran's *family members* were supportive does not demonstrate the *Veteran's* level of social impairment. The Veteran does not go out, socialize, see movies, have any neighbors, and has tendency to isolate himself indicate that his social functioning is impaired. R-1500-01.

Moreover, his participation in solitary activities, such as hunting and fishing, does not indicate his ability to engage in effective social relationships. By 2015, Mr. Emerson's hobbies included mowing the lawn, walking, fishing and deer hunting on occasion, and watching TV. R-173. Notably, these activities are isolating. Mr. Emerson used to attend church, but stopped attending when no one visited him at the hospital. *Id.* The Veteran also testified that he and his wife lived alone out in the country. R-1503. From the record, it does not appear that Mr. Emerson is able to maintain or establish effective relationships and the Board did not discuss whether they were. This behavior indicates that he is not able to sustain social relationships which could amount to deficiencies in most areas. At the very least, it is indicative of

more severe symptomatology than the mild or transient symptoms contemplated by his currently assigned rating. 38 C.F.R. § 4.130.

The Board failed to adequately consider or discuss evidence that indicate Mr. Emerson's occupational functioning was also limited during the period on appeal more than his current 10 percent rating contemplates. For instance, the Board failed to explain how it factored into its analysis the fact that the Veteran was "eased out of his job as superintendent of a school, and he became more depressed thereafter." R-12; R-1957. Even though the Board noted this in its recitation of the facts of the case, it did not mention this fact in its analysis. R-13, 17. Instead, it focused on the fact that Mr. Emerson had been employed for 45 years. R-17. This does not address whether Mr. Emerson suffered from occupational impairment, even though he was able to maintain such employment.

Entitlement to TDIU is warranted where a veteran's service-connected disabilities prevent him from securing or following a substantially gainful occupation. 38 C.F.R. § 4.16(a) (2016). On the other hand, the application for the rating schedule is based on the average impairment of earning capacity. 38 U.S.C. § 1155. Thus, the fact that Mr. Emerson has been employed for 45 years is not proof that his disability does not impair his ability to function at work. Rather, it demonstrates that his PTSD does not completely preclude him from work. The Board's analysis should have focused on the extent that his disability impaired his occupational functioning.

For example, a VA examiner noted that Mr. Emerson's PTSD symptoms "may have contributed to some possible interpersonal difficulties on his job." R-1958. The Veteran felt safe and secure in his current position due to the guard presence. R-15. The Veteran also felt that he was "booted out" from his previous employment as a superintendent because of some of his own personality characteristics. R-1957.

Additionally, the Board's decision was arbitrary as there was no clear standard used. The Board acknowledged that the Veteran had interpersonal difficulties at work, but failed to explain why those deficiencies did not result in a higher level of occupational impairment. R-17; *See, e.g., South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) ("[P]atently inconsistent applications of agency standards to similar situations are by definition arbitrary."); *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 912 (6th Cir. 2000) ("[I]nconsistent application of a regulation is often a hallmark of arbitrary or capricious agency action."); *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary."). In *Cantrell v. Shulkin*, the Court recognized that "overly ambiguous standards almost inevitably lead to inconsistent application[.]" *Cantrell v. Shulkin*, 28 Vet.App. 382, 391 (2017). This Court's "statutory obligations require that [it] ensure the integrity of the procedures used by the Secretary to gather evidence necessary to substantiate a claim." *Martinak v. Nicholson*, 21 Vet.App. 447, 552 (2007). The same rationale applies here.

The Board analysis fails to indicate why information regarding the Veteran's occupational difficulties were made irrelevant by the Board's notation that the Veteran never had to leave work due to his mental state. R-17. As such, the Board's reasons or bases are inadequate to sufficiently determine the claim and remand is necessary.

CONCLUSION

The Board's decision regarding the degree of impairment caused by Appellant's PTSD is unsupported by adequate reasons and bases. The Board failed to conduct a proper analysis regarding the severity, frequency, and duration of Mr. Emerson's PTSD symptoms or explain how his symptoms of chronic sleep impairment, irritability, social isolation, and depression were contemplated by his noncompensable rating. The Board additionally erred when it conducted a cursory analysis of the Veteran's symptoms along with his social and occupational impairment due to his PTSD. The decision should be set aside as not in accordance with the requirements of 38 U.S.C. §§ 7104(a) and (d)(1). Because the Board's error likely denied Mr. Emerson compensation to which he was entitled, he was prejudiced and remand is warranted. *See* 38 U.S.C. § 7261(b)(2); *Arneson*, 24 Vet.App. at 389 (finding prejudice when error "could have altered" the Board's determinations).

Respectfully submitted,
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