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

No. 16-1130

PATRICK E. SULLIVAN, 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, Patrick E. Sullivan, through counsel, appeals a January 29, 2016, decision of the Board of Veterans' Appeals (Board) that determined that he was entitled to a 50% initial disability rating, but no higher, for post-traumatic stress disorder (PTSD) with major depressive disorder.<sup>1</sup> Record (R.) at 2-27. 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 January 29, 2016, Board decision and remand the matter for further adjudication.

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<sup>1</sup> The Board also remanded to the RO for further adjudication the issue of the appellant's entitlement to a total disability rating based on individual unemployability. Because a claim that is remanded by the Board has not been the subject of a final decision, the Court does not have jurisdiction to review an appeal as to that claim. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997); 38 U.S.C. § 7252(a).

## **I. BACKGROUND**

The appellant served in the U.S. Marine Corps from August 1966 through February 1969, with service in Vietnam as a combat engineer. R. at 418. In August 2010, the appellant filed a claim for disability compensation benefits for PTSD. R. at 467-77.

In October 2010, the appellant underwent a VA PTSD examination. R. at 418-25. The examiner stated that the appellant's PTSD symptoms included a sleep disorder with difficulty falling and staying asleep because of nightmares about Vietnam. R. at 419. Additionally, he experienced hypervigilance, exaggerated startle response, feelings of estrangement from others, difficulty concentrating, mild memory impairment, diminished interest in activities, avoidance of crowds, social isolation, irritability, and angry outbursts. *Id.*, 422. His angry outbursts resulted in road rage, yelling at his children and wife, and punching holes in the walls and throwing things at home. R. at 419. The appellant also suffered from depression manifested by a lack of interest in activities, insomnia, fatigue, feelings of worthlessness and guilt, difficulty concentrating at work, and generalized depression. *Id.* The appellant also had occasional panic attacks, with a racing heart beat, sweating, feeling as if he were losing control, and shortness of breath. R. at 422. The examiner opined that the appellant's symptoms were "severe, continuous, or ongoing." *Id.*

The examiner commented that during the examination the appellant was anxious. *Id.* Additionally, his attention, thought processes, and focus were impaired, "as he ha[d] difficulty understanding directions." R. at 422. The appellant denied homicidal or suicidal ideation. R. at 423. The examiner diagnosed the appellant with PTSD and major depressive disorder, which he concluded were related to service. *Id.* Additionally, the examiner stated that the appellant satisfied the diagnostic criteria for panic disorder with agoraphobia, but the examiner concluded that the appellant's panic was related to his PTSD stressors and was "subsumed" by his PTSD. *Id.* The VA examiner opined that the appellant's anger issues affected his family and work relationships and that decreased productivity and concentration affected his performance as a salesman. R. at 425.

In February 2011, the VA regional office (RO) granted the claim and assigned a 30% disability rating for PTSD with major depression, effective August 20, 2010, the date on which the appellant filed his claim. R. at 412. The appellant appealed the February 2011 RO decision to the Board. R. at 397.

In August 2011, the appellant was reexamined by the private psychologist who had initially examined him in 2010. R. at 398-405. The examiner stated that since his initial examination, the

appellant's sleep problems, irritability, poor energy, exaggerated startle response, and negative thoughts and feelings had become worse. R. at 401. Additionally, the appellant's nightmares and panic attacks were now weekly. *Id.* The examiner also noted that the appellant had suicidal ideation, which was not present in 2010. He complained of weekly suicidal thoughts and stated that "it might be better for his wife and family if [he] were not around." *Id.* The appellant reported that he did not have a current suicide plan, but he acknowledged that in the past he had thought of faking a hiking accident. *Id.*

The appellant continued to complain of persistent road rage and described his anger as "almost like a reflex." R. at 400. The appellant stated that he argued more frequently with his wife, and he realized that he was verbally abusive. R. at 398. He described his anger toward his wife as occurring in spikes followed by an escalation in marital conflict. *Id.* Because of his "edgy" moods, he did not spend as much time as he had in the past with his grandchildren. *Id.* One way that the appellant coped with his anxiety was by "over-exerting himself with exercise." R. at 401.

The appellant reported that he had recently left his job as a salesman. R. at 400. He was used to being unsupervised, but after the management of his company changed, he complained that "there were people in my face all the time telling me what to do. I couldn't take it." *Id.* He was unable to adjust to the new environment. *Id.* Tension between him and his new supervisor increased leading to diminished job performance. *Id.* Eventually, his new boss gave him an ultimatum, and the appellant resigned. *Id.*

In October 2011, the appellant underwent a VA PTSD examination. R. at 368-83. He continued to experience anxiety, depression, chronic sleep impairment, nightmares, hypervigilance, exaggerated startle response, dissociative behavior, emotional numbing, anger, and irritability. R. at 382. Additionally, the appellant reported that he had suicidal thoughts but stated that he had not formulated a plan to commit suicide. R. at 370.

During a February 2013 VA psychiatric examination, the appellant continued to report poor sleep, lack of motivation, verbal outbursts, impulsive behavior, and irritability. R. at 224. He denied current suicidal ideation, but he stated that he wondered whether he drove recklessly because he unconsciously wanted to hurt himself. *Id.*

Between July 2012 and December 2013, the appellant was treated on an outpatient basis at a VA medical center. During these visits, he complained of depressed mood, chronic sleep impairment, obsessional behavior, difficulty with memory and concentration, panic attacks,

frequent irritability, disturbances in motivation and mood, angry outbursts with road rage, and "yelling fits" directed towards his wife. R. at 217-18, 251, 259, 263, 337. Additionally, the appellant complained of passive suicidal ideation. R. at 165, 217-18, 337. In October 2012, a VA examiner noted that the appellant continued to have PTSD symptoms and that his temper was like a "short fuse" that was becoming worse. R. at 14.

On April 23, 2015, the appellant underwent a PTSD examination. R. at 103-10. The examiner stated that he had markedly diminished interest or participation in significant activity, feelings of detachment or estrangement from others, hypervigilance, exaggerated startle response, depressed mood, anxiety, chronic sleep impairment, and difficulty in establishing and maintaining effective work and social relationships. R. at 106-07. A mental status examination revealed that there was no impairment in the appellant's thought processes or communication. R. at 9. He had no suicidal or homicidal thoughts, ideation, plans, or intent. *Id.* The examiner opined that the appellant could function in a work setting with routine assignments, minimal supervision and minimal contact with the public. R. at 107.

On April 29, 2015, the RO increased the appellant's disability rating to 50%, effective April 23, 2015, the date of the most recent VA examination. R. at 81-87.

On January 29, 2016, the Board issued the decision here on appeal. The Board eliminated the staged ratings assigned by the RO and determined that the appellant was entitled to a 50% disability rating, but no higher, for the entire period that his PTSD claim had been pending.

## **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 (2017). 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 worklike 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 2200746, at \*9 (U.S. Vet. App. May 19, 2017).

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 warrant a 70% disability rating because he did not have 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 4-5. The Board discussed the list of symptoms enumerated in the 70% disability rating criteria and acknowledged that the appellant had "transient thoughts of suicidal ideation; however, he has indicated that he has made no attempts at suicide and he had not formulated a plan." R. at 23.

The appellant argues that the evidence in the record shows that the appellant's suicidal ideation was not merely transient as this symptom was repeatedly noted between 2011 and 2013. Additionally, he argues that the Board misapplied the 70% disability rating criteria because there is no requirement that suicidal ideation must be accompanied by a plan to commit suicide or a prior suicide attempt. Appellant's Brief (Br.) at 11. The Secretary does not specifically respond to this latter argument. 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 2200746, at \*7. Additionally, the Court held that the 70% disability rating criteria does not include the risk of actual self-harm, which is referenced in the criteria for a 100% evaluation as a "persistent danger of hurting self." *Id.* at \*8. Here, by requiring evidence of a suicide attempt, the Board failed "to differentiate between [the veteran's] suicidal ideation, which VA generally considers indicative of a 70% evaluation, and his risk of self-harm, the persistent danger of which VA generally considers indication of a 100% evaluation." *Id.* Consequently, the Board "conflat[ed] distinct concepts,"

preventing the appellant from understanding the Board's weighing of the evidence and frustrating judicial review. *Id.* It appears from the wording of the Board decision that its conclusion that the appellant's suicidal ideation must be accompanied by a plan or prior suicide attempt was integral to its finding that the appellant's suicidal ideation "transient." Accordingly, the Court holds that the Board's reasons or bases for finding that the appellant's suicidal ideation did not satisfy the 70% criteria was inadequate.

Given this disposition, the Court will not address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him").

On remand, the appellant is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). The Board shall proceed expeditiously, in accordance with section 302 of the Veterans' Benefits Improvement Act, Pub. L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994) (found at 38 U.S.C. § 5101 note) (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

### **III. CONCLUSION**

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the January 29, 2016, Board decision is VACATED and the vacated matter is REMANDED for further proceedings.

DATED: July 27, 2017

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