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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1138

JOSE A. MONTANEZ, JR., APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

PIETSCH, *Judge*: The appellant, Jose A. Montanez, Jr., appeals through counsel a February 25, 2016, Board of Veterans' Appeals (Board) decision in which the Board (1) granted him entitlement to a 50% disability rating, but no higher, for post-traumatic stress disorder (PTSD) for the period prior to September 17, 2010; (2) denied him entitlement to a disability rating greater than 70% for PTSD for the period beginning on September 17, 2010; (3) declined to refer his case to an appropriate agency official for extraschedular consideration; and (4) remanded his request for a total disability rating for individual unemployability (TDIU) for additional development. Record (R.) at 2-25.

The issue remanded by the Board is not before the Court and the Court may not review it at this time. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004); *see also Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000). The Board's decision to grant the appellant entitlement to a 50% disability rating for PTSD for the period prior to September 17, 2010, is favorable to him. The Court, therefore, will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

The appellant does not challenge the Board's decision to deny him entitlement to a disability rating greater than 70% for PTSD for the period beginning on September 17, 2010. That issue is therefore deemed to be abandoned on appeal. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal). The Court will dismiss

the appellant's appeal of the Board's disposition of that matter without reviewing the portion of the Board's decision addressing it. *See Cacciola v. Gibson*, 27 Vet.App. 45, 56-57 (2014).

This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's conclusions that the appellant is not entitled to a disability rating greater than 50% for PTSD for the period prior to September 17, 2010, and that his case should not be referred to an appropriate agency official for extraschedular consideration and it will remand those matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from February 1980 until February 1992. R. at 350. In May 2005, he filed a claim for entitlement to disability benefits for PTSD. R. at 1387. In December 2007, the VA regional office (RO) granted his claim and assigned his disorder a 30% disability rating effective May 7, 2005. R. at 1123-28.

On September 17, 2010, a VA medical examiner described the symptoms of the appellant's PTSD. R. at 713-20. In December 2012, the RO found that the examiner's statements indicate that the disability rating assigned to the appellant's disorder should be increased to 70% effective the date of the examination report. R. at 681-87.

On February 25, 2016, the Board issued the decision presently under review. R. at 2-25.

II. ANALYSIS

A. Period Prior to September 17, 2010

The Board assigned a 50% disability rating to compensate the appellant for the effects of his PTSD for the period prior to September 17, 2010, by applying the general rating formula for mental disorders set forth in 38 C.F.R. § 4.130 to the evidence in the record. According to § 4.130, a veteran suffering from a service-connected mental disorder is entitled to a 50% disability rating if his disorder produces:

[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 (2017).

A veteran is entitled to a 70% disability rating if the symptoms of his disorder cause

[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.

Both this Court and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) have issued precedential decisions that attempt to give some shape to the rating criteria quoted above. The Court first made it clear that the symptom lists affixed to the rating criteria are not meant to be comprehensive. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). Instead, they

are to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. Accordingly, any suggestion that the Board [is] required . . . to find the presence of all, most, or even some of the enumerated symptoms is unsupported by the plain language of the regulation.

Id.

The Board, the Court stated, should consider whether "the evidence demonstrates that a claimant suffers symptoms or effects that cause occupational or social impairment equivalent to what would be caused by the symptoms listed in the diagnostic code," and, if so, the "equivalent rating will be assigned." *Id.* at 443.

In *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013), the Federal Circuit determined that VA "intended the General Rating Formula to provide a regulatory framework for placing veterans on the disability spectrum based upon their objectively observable symptoms." Thus, "symptomatology should be the fact-finder's primary focus when deciding entitlement to a given disability rating" and "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." *Id.* Specifically addressing the criteria for a 70% disability rating, the Federal Circuit stated:

Entitlement to a 70 percent disability rating requires sufficient symptoms of the kind listed in the 70 percent requirements, or others of similar severity, frequency or duration, that cause occupational and social impairment with deficiencies in most areas such as those enumerated in the regulation. The 70 percent disability rating regulation contemplates initial assessment of the symptoms displayed by the veteran, and if they are of the kind enumerated in the regulation, an assessment of whether those symptoms result in occupational and social impairment with deficiencies in most areas.

Id. at 118.

The explanation that the Board gave for its conclusion that the appellant is not entitled to a 70% disability rating for the period prior to September 17, 2010, is deficient for a number of reasons. First, the Board listed symptoms that the "record does not show" that the appellant experienced prior to September 2010 and then apparently held the absence of those symptoms against him. R. at 14. That is a direct *Mauerhan* violation. The Board should have stated whether the appellant had symptoms prior to September 2010 equivalent to those attached to the rating criteria for a 70% disability rating and, if so, then determined whether those symptoms produced occupational and social impairment with deficiencies in most areas.

Second, the Board's conclusion that the "evidence of record does not show that he had suicidal ideation" prior to September 2010 is clearly erroneous. *Id.* In June 2006, the appellant reported that he thought about harming himself "more than half the days"; in October 2007, he reported that he had "occasional passive [suicidal ideation]"; and, in December 2007, he indicated that he had contemplated suicide. R. at 1029, 1069, 1239; see *Bankhead v. Shulkin*, 29 Vet.App. 10, 20 (2017) ("[T]he presence of suicidal ideation alone, that is, a veteran's thoughts of his or her own

death or thoughts of engaging in suicide-related behavior, may cause occupation and social impairment with deficiencies in most areas"). Also, in April 2006, a medical examiner stated that he "is a moderate risk of self harm." R. at 1109.

Third, the Board found that the severity of the appellant's anxiety and depression was not equivalent to the severity necessary to suggest that a 70% disability rating may be warranted. In support of that conclusion, the Board noted that the "medical records repeatedly indicate that he was attending classes." R. at 14. The Board failed to note in that portion of its analysis that the appellant left school in 2007. R. at 863, 875, 890, 1069.

Later, the Board found that the appellant "reported that he stopped attending his classes due to financial issues, rather than due to his PTSD." R. at 15. That finding is clearly erroneous and reveals that the Board misread the record. In September 2007, a physician recommended to the appellant that he "drop classes due to s[ymptoms]." R. at 890. In October 2007, the appellant told a care provider that he stopped attending classes "which has helped to lower his stress." R. at 875. In December 2007, the appellant stated that "he has stressed out and dropped out of classes." R. at 863. Lastly, in December 2007, the appellant stated that he "had to drop all my classes this past semester due to stress." R. at 1069.

"[F]inancial issues" did not cause the appellant to leave school. R. at 15. Rather, his decision to leave school caused his "financial issues." *Id.* The appellant stated that attending classes gave him "an additional \$600.00 . . . per month" and that "[n]ot receiving that extra money is putting mo[re] stress on my fin[anc]es." R. at 1069.

Fourth, the Board found that "[w]ith respect to occupational impairment . . . he was able to maintain employment." R. at 15. The question is not whether the appellant was able to work. The question is whether the appellant's disorder caused him "difficulty in adapting to stressful circumstances (including work or a worklike setting)." 38 C.F.R. § 4.130. There is evidence that it did. In April 2006, an examiner wrote that the appellant had left "several jobs, not due to overt fighting but possible rough way of expressing his opinion and creating adverse interpersonal situations." R. at 1109. In a July 2014 hearing before the Board, the appellant stated that he was "let go" from "one job because . . . my co-workers were afraid of me carrying a weapon." R. at 1839. The appellant also stated that "most of the jobs that I've held I've left because I can't stand or I don't

like them telling me how to do the job and stuff, but I don't tell them that, I come up with an excuse." R. at 1839. The Board should consider this evidence on remand.¹ See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant").

Fifth, the Board acknowledged that the appellant "did report withdrawal and isolation, including estrangement from his wife." R. at 15. It found, however, that he was able to establish and maintain effective relationships because "he continued to live with his wife, he was able to maintain relationships with his sons, as well as some friends." *Id.* The Board also noted that "he reported reconnecting with an old friend in October 2008 . . . [and] also participated with volunteer projects and was involved with VFW." *Id.*

The Board selected evidence that supported its position, ignored evidence that did not, and generally viewed the evidence that it selected in the light most favorable to the conclusion that it sought to reach. As the Board noted, the appellant and his wife "are basically estranged but living together." R. at 1148. It is unclear to the Court how this arrangement convinced the Board that he was able to maintain an effective marital relationship.

The only mention in the record of the appellant's volunteer activities dates to 2006. R. at 1107, 1159. It is unclear what evidence the Board relied on to conclude that the appellant continued his volunteer activities throughout the period in question. That is particularly noteworthy given that, in August 2007, a VA examiner stated that "several events happened that caused worsening" of the appellant's PTSD and that, by that time, the appellant had become "withdrawn and isolated most of the time." R. at 1145, 1148. The examiner further stated that the appellant's "relationships are quite limited and he has extreme limitation of recreational pursuits . . . [and has] lost interest in virtually everything." R. at 1148, 1150; see *Fenderson v. West*, 12 Vet.App. 119, 126 (1999) (allowing for staged disability ratings).

In the portion of its analysis explaining its conclusion that the appellant is entitled to a 50% disability rating for his disorder, the Board noted that the appellant "became estranged from his wife and reported continued social isolation from his family and non-family." R. at 14. The Board further

¹ This evidence is also pertinent to whether the appellant's anxiety causes him to act inappropriately or ineffectively.

noted that the appellant "was calmer while driving cross-country and reported increased stress upon returning home from his work trips." *Id.* In both tenor and content, these observations do not readily comport with the Board's later finding that the appellant was able to maintain productive relationships during the period in question.

Lastly, the Board should have considered evidence indicating that, at various times during the period on appeal, the appellant "leaves his home early in the morning to wander out on his property where no one knows his whereabouts," felt "detached or estranged from other people," and has "group activity intolerance except with other vets." R. at 1029, 1148, 1150; *see Thompson*, 14 Vet.App. at 188.

Sixth, the Board ignored symptoms that the appellant experienced that are not found in the symptom lists affixed to the rating criteria. That is an inappropriate way to deal with them. Once again, the Board should compare all of the appellant's symptoms to the symptom lists and determine whether any of those symptoms indicate that a 70% disability rating may be warranted.

On remand, the Board should specifically discuss evidence indicating that the appellant (1) experienced flashbacks, nightmares, other sleep disturbances, detachment, numbness, intrusive memories, an exaggerated startle response, and hypervigilance; (2) conducted "nightly perimeter checks"; (3) reported, in June 2007, that he experienced olfactory and auditory hallucinations, that he has "anxiety outdoors in open spaces," and that he has hyperarousal lasting for about 45 minutes each morning; and (4) stated, in February 2009, that he hears voices "at night or when I am by myself" and sees "faces when I close my eyes." R. at 811, 952, 1029, 1105, 1151, 1239, 1241, 1294, 1387; *see Thompson*, 14 Vet.App. at 188.

Finally, the RO relied on the September 2010 examination report to justify awarding the appellant entitlement to a 70% disability rating for his PTSD. The September 2010 examiner, in turn, supported his opinion by citing to evidence that dates to the period presently under consideration. The Board should, on remand, carefully review the September 2010 examiner's opinion and determine whether it indicates that the appellant's symptoms worsened prior to the date that he issued his report. *See McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (holding that "the date on which the evidence is submitted is irrelevant").

B. Extraschedular Referral

If the record contains "evidence of the collective impact of the claimant's service-connected disabilities," then the Board must consider whether the combined effects of those disabilities indicate that referral to an appropriate agency official for extraschedular consideration is warranted. *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016); *see also Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014).

The appellant is entitled to receive disability benefits for a lumbosacral spine disorder and related lower extremity peripheral neuropathy. R. at 402-03. The record plainly reveals that those disorders are related to his PTSD.

In April 2006, an examiner reviewing the appellant's PTSD symptoms stated that his back symptoms are "[o]f significant clinical attention" and that his chronic pain "is significantly impairing [his] . . . sense of self." R. at 1106, 1008. In June 2006, a care provider diagnosed the appellant with "ongoing symptomatic PTSD and depressive [symptoms] in the context of chronic pain." R. at 1159. In August 2007, a VA medical examiner indicated that "many problems with his back" had "caused worsening" of his PTSD. R. at 1145. The examiner explained that the appellant's "inability to work and loss of physical prowess had caused him to be extremely focused upon self and seen to participate in worsening of his PTSD symptomatology." *Id.* Further, he had "rather chronic feelings of depression about his physical problems." R. at 1150. In 2008, the appellant attributed his irritability to lower back pain and stated that his "back pain awakens him and then he begins to focus on his financial stress." R. at 842. The September 2010 examiner stated that "back pain . . . generally interfere[s] with his desire to engage" in activities that he enjoys. R. at 714. In March 2015, a VA medical examiner listed "back surgery" as a "medical diagnos[i]s relevant to the understanding or management of the Mental Health Disorder." R. at 78.

The Board only considered whether referral for extraschedular consideration is warranted for the appellant's PTSD. The evidence cited above reveals that the Board should have considered whether the collective effects of the appellant's PTSD, low back disorder, and related symptoms combine to create an unusual disability picture warranting referral of his case for extraschedular consideration.

C. Other Matters

The Court need not at this time address any other arguments that the appellant has raised. *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 on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portions of the Board's February 25, 2016, decision denying the appellant entitlement to a disability rating greater than 50% for PTSD for the period prior September 17, 2010, and declining to refer his case to an appropriate agency official for extraschedular consideration are VACATED and those matters are REMANDED for further proceedings consistent with this decision. The appellant's appeal of the Board's conclusion that he is not entitled to a disability rating greater than 70% for PTSD for the period beginning on September 17, 2010, is DISMISSED.

DATED: August 22, 2017

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