

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1655

HUBERT D. BONE, 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, Hubert D. Bone, through counsel, appeals a January 14, 2016, Board of Veterans' Appeals (Board) decision that, in part, granted an initial 30% disability rating for post-traumatic stress disorder (PTSD) from February 1, 2005, to May 20, 2015. The Board also remanded the issues of entitlement to a total disability rating based on individual unemployability and entitlement to an effective date earlier than May 20, 2015, for the award of special monthly compensation based on housebound criteria. Record (R.) at 26. The remanded matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court). This appeal is timely, and the Court has jurisdiction to review the Board's decision 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 following reasons, the Court will vacate that part of the Board's January 2016 decision on appeal and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served in the U.S. Marine Corps from November 1968 to November 1971. R. at 934. In January 2005, the appellant filed a claim for service connection for PTSD. R. at 56-62.

In a March 2005 VA examination, the examiner noted that the appellant was abusing alcohol and had not spoken to his family in several years because of a "family feud" over his ex-wife. R. at 70-71. The examiner also stated that the appellant felt a sense of survivor's guilt since returning from the war and used to enjoy hobbies and social activities, like golf, but plays less often now and goes out with only a few people. R. at 71. Additionally, the examiner noted that the appellant had "moments of anxiety and depression – related to the memories of the war and other situations from his life that have been stressful," but was "actively coping with these feelings through goal-directed behavior," such as participating in social and recreational activity, volunteering for the VFW, and driving a truck part time during the winter. *Id.* The examiner noted that the appellant had no suicidal thoughts, assigned a GAF score of 65, and opined that "[a]t this time, it appears less likely than not that he meets criteria for a diagnosis of PTSD." R. at 72.

In June 2005, the regional office (RO) denied the appellant's claim. R. at 830. The appellant subsequently filed a Notice of Disagreement (NOD). R. at 823.

In a private July 2005 treatment record, the examiner noted that the appellant reported significant mistrust of people, constant thoughts of killing himself and dying, crying for no reason, and feeling survivor's guilt. R. at 825-26. Additionally, the examiner stated that the appellant had not spoken to his mother in 7 years, "cannot stand people," and lost interest in golf because he does not want to be around people. *Id.* The examiner also noted that the appellant drinks until he falls asleep, experiences many nightmares, and only feels comfortable if there is a gun in his vicinity. *Id.* The appellant informed the examiner that he had a problem with authority and almost got fired four times because he was not following orders and attending work regularly. *Id.* The examiner assigned a GAF score of 39 and diagnosed the appellant with major depressive disorder as well as PTSD. R. at 828.

In an October 2006 VA examination, the appellant reported a "diminished sexual appetite" and again reiterated that he had lost interest in many of the activities he formerly enjoyed, such as golf, going out for dinner and drinks, and bowling. R. at 32. The examiner noted that the appellant had a "few casual friends" and had no close family relationships. *Id.* The examiner reported that

the appellant felt "listless, depressed and '[thought] of killing [himself].'" R. at 33. The appellant was diagnosed with depressive disorder as well as PTSD and assigned a GAF score of 60 when considering PTSD and depression. *Id.*

On February 22, 2007, the RO granted entitlement to service connection for PTSD with an initial rating of 10%, effective February 1, 2005. R. at 823. In January 2008, the appellant submitted a statement in support of claim, contesting the 10% rating. R. at 789.

At a March 2008 VA examination, the appellant reported that he had been a "functional alcoholic" most of his working life and drinks to help him fall asleep. R. at 770. The examiner indicated that the appellant drinks three to four times per week with a few friends, and is no longer interested in golf, has difficulty trusting others, and experiences survivor's guilt. *Id.* In addressing his work history, the appellant reported that he has problems with authority and was almost fired from Firestone Tire because he "had a mouth." After retiring from Firestone Tire, the appellant stated, he did seasonal work for the Illinois Department of Transportation and that he last worked for the department in 2005. R. at 772. The examiner noted that "[m]ild impairment in occupation functioning was evident during the interview secondary to symptom associated" with PTSD. *Id.* The examiner also stated that the appellant no longer had suicidal thoughts, diagnosing the appellant with PTSD and assigning a Global Assessment Functioning (GAF) score of 65 and a score of 70 considering PTSD alone. R. at 772-73.

The RO treated the appellant's statement in support of claim as a request for a higher rating and on June 5, 2008, granted an increase to 30%, effective January 11, 2008. R. at 756. In May 2009, the appellant submitted an NOD. R. at 746.

In a July 2009 VA examination, the appellant reported that his difficulty sleeping has become more frequent, that he drinks to fall asleep, and that he takes over-the-counter sleep medicine. R. at 712, 714. The appellant continued to report that he has no contact with his siblings, drinks several times per week with friends, and occasionally golfs with friends. R. at 714. The appellant again reported problems with authority and difficulty trusting others while he worked. R. at 715. The examiner diagnosed the appellant with PTSD and assigned a GAF score of 65 and a score of 70 when considering PTSD alone. R. at 715-16.

In a July 2010 statement, the appellant's son stated that the appellant "get[s] upset very easily" and is "very argumentative . . . and then [is] fine a minute later." R. at 668. The son also stated that the appellant is suspicious of people and "stays home and never gets out much to do

anything." *Id.* Additionally, the appellant's son reported that the appellant does not "have much of a relationship" with his girlfriend and that his friends no longer visit him because they do not want to be around him. R. at 668-70. Additionally, the son noted that appellant keeps weapons "loaded and ready" at his house, shuts his blinds so that no one can see in, and has problems with authority. R. at 668. The appellant's son also stated that when they go to a restaurant, the appellant sits with his back to the wall so he can see everything. *Id.* The appellant's stepson and friend also submitted statements, noting similar symptoms. R. at 665-66, 662-63.

In an April 2011 VA examination, the examiner noted that the appellant sees his son frequently, has a few friends, and enjoys golf. R. at 595. The appellant reported that his trouble with intimacy affected his marriage and his irritable outbursts caused problems with interpersonal relationships. R. at 599. The examiner diagnosed the appellant with PTSD and assigned a GAF score of 65. *Id.*

In August 2011, the RO issued a Statement of the Case, and the appellant perfected his appeal. R. at 329-30, 366.

June 2013 medical records state that the appellant is "paranoid," that he believes that people are "out to get him," "steal from him," and attack him. R. at 271. The appellant denied being suicidal and noted that he has gone out to dinner and to the movies with friends. R. at 272.

At a July 2013 Board hearing, the appellant testified that for a few years he has had no relationship with his family, but has "some of a relationship" with his son. R. at 1136-39. The appellant also stated that he golfs once or twice a year but no longer goes with his friend because they had a falling out. R. at 1141-42. The appellant also testified that he "maybe" socializes for holidays and does not participate in the VFW anymore even though a member. R. at 1156-58. In addressing his occupational history, the appellant stated that he was fired from the Illinois Department of Transportation because "[t]hey said I didn't know when to take a break[] and I'd leave my route." R. at 1144. The appellant then reported that he subsequently worked as a school bus driver for 2 years until he was fired because he was "[a]rgumentative and threatened a child." R. at 1145.

According to a September 2013 treatment record, the appellant reported that he loses his temper, feels "paranoid all the time due to being in Vietnam," and has nightmares about four times a week. R. at 264. An August 2014 treatment record states that the appellant reported having mood swings and yells, curses, and lashes out when angry. R. at 208.

In April 2015, at a VA clinic, the appellant cussed and yelled at staff and was noted to be uncooperative and aggressive. R. at 1024.

At a May 2015 VA examination, the examiner noted that the appellant has "[o]ccupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking and/or mood." R. at 125. The appellant reported avoiding his children and not answering their phone calls. R. at 126. Additionally, the appellant stated that he has "a couple friends with whom he maintains some social contact, but doesn't engage in any social activities." *Id.* In addressing the appellant's occupational history, the examiner noted that the appellant worked for the Illinois Department of Transportation from 2003 to 2005 but "did not continue his employment due to his PTSD symptoms." *Id.* The examiner also noted that the appellant has worked twice as a school bus driver. The appellant stated that he had worked part time as a school bus driver for a little over a year, but the employer "stopped calling him to return to work so he sought employment elsewhere." *Id.* The appellant stated he frequently argued with his coworkers. The appellant reported that he had worked again as a bus driver from 2011 to 2012 but was fired after threatening a child. *Id.* The appellant also indicated that while he worked as a driver from 2011 to 2012, he had struggled with managing stress, irritability, and anger. *Id.* The examiner noted that the appellant last worked in 2013 for approximately 1 year at a car wash and had difficulty interacting with customers because of poor stress tolerance and irritability. *Id.* The appellant stated that he quit this job because he was unable to manage the stress from regularly interacting with people. *Id.*

In July 2015, a Supplemental Statement of the Case was issued that among other things granted an increased rating of 70% effective May 20, 2015, and denied entitlement to a rating in excess of 30% for PTSD from January 11, 2008. R. at 116. The appellant perfected his appeal, R. at 92-93, and in January 2016, the Board denied a rating in excess of 30% for PTSD before May 20, 2015. R. at 26. This appeal followed.

II. ANALYSIS

The appellant argues that the Board provided an inadequate statement of reasons or bases because it failed to address how the appellant's "longitudinal history" of relationships with his family and friends does not demonstrate that he had difficulty establishing and maintaining effective relationships. Appellant's Brief (Br.) at 9-10. The appellant further argues that although

the Board justified limiting the appellant to a 30% rating based on his *ability* to establish and maintain effective work and social relationships, the 50% rating criteria requires that the appellant only have a *difficulty* in establishing and maintaining effective work and social relationships, not an *inability* to do so. *Id.* at 11.

Pursuant to the general rating formula for mental disorders, a 30% disability rating is warranted when the evidence indicates that a veteran's psychiatric symptoms cause

[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, Diagnostic Code (DC) 9411 (2017). To qualify for the next higher evaluation of 50%, a veteran's psychiatric symptoms must cause

[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. (emphasis added). A 70% disability rating is warranted when the evidence indicates that a veteran's psychiatric symptoms 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. (emphasis added).

The phrase "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is nonexhaustive, meaning that to assign a particular evaluation, VA is not required to find the

presence of all, most, or even some of the enumerated symptoms. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *see 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. When there is a question as to which of two evaluations apply, "the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7 (2017).

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. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57; *see Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (explaining that the need for adequate reasons or bases is "particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders"). 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 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).

In the decision here on appeal, the Board found "that the weight of the evidence supports a finding that, prior to January 11, 2008, the Veteran's . . . level of impairment resulting from the Veteran's psychiatric symptoms did not meet, or more nearly approximate, the level of impairment required for the next higher, 50 percent rating." R. at 17. The Board recited the medical evidence of record from March 2005 through December 2007 and noted "that the evidence of record supports a finding that the Veteran had some problems in establishing and maintaining effective work and social relationships. However, the Veteran reported going out with friends, playing golf, and volunteering with the VFW during this time." *Id.* The Board then determined that "[t]hese social activities indicate an ability to establish and maintain effective work and social relationships, despite the Veteran's other symptomatology." *Id.* Additionally, the Board stated that the appellant

was "able to take care of all household activities independently" and "worked at a part-time job during that time." *Id.*

In denying entitlement to a rating in excess of 30% from January 11, 2008, to May 20, 2015, the Board recited the medical evidence of record from March 2008 to April 2015 (R. at 18-21) and found that "at no pertinent point have the Veteran's PTSD symptoms and resulting impairment met, or more nearly approximated, the level of impairment contemplated in the next higher, 50 percent rating." R. at 22. In support of its determination, the Board acknowledged that "the evidence of record supports a finding that the Veteran has problems in establishing and maintaining relationships. However, it was noted that the Veteran went out to eat with his sons and friends on occasion and participated in golf as well," which "indicate[s] some ability to establish and maintain relationships." *Id.* The Board additionally noted that the appellant "sees his sons and others on occasions, such as holidays. He further still participates in golf as well. Furthermore, the Veteran held part-time jobs during this time period and indicated that he was unsure if he would be able to work despite his PTSD symptoms." R. at 22-23. Additionally, the Board stated that "[t]he VA examiners consistently found that, while his PTSD symptoms caused some limitations, they did not preclude employment." R. at 23.

In addressing whether the appellant's level of impairment resulting from his psychiatric symptoms meet a 50% disability rating prior to January 11, 2008, the Board appears to conflate the standard required for a 50% disability rating with the standard required for a 70% rating. The Board found, in part, that the appellant has "an *ability* to establish and maintain effective work and social relationships." R. at 17 (emphasis added). The Court notes, however, that a 70% rating contemplates an *inability*, while the criteria for a 50% rating contemplates only a *difficulty*, which is a less severe impairment. *Compare* 70% disability rating criteria ("inability to establish and maintain effective relationships"), *with* 50% criteria ("difficulty in establishing and maintaining effective work and social relationships"). At best, the Board fails to explain why "some problems" is not sufficient to demonstrate difficulty in establishing and maintaining effective work and social relationships. And at worst, the Board's analysis fails to appreciate the gradation between a 50% and 70% disability rating and appears to assess whether the appellant is entitled to a 50% rating under the 70% disability rating standard. Thus, the Board's determination that the appellant is not entitled to a 50% disability rating is not supported by an adequate statement of reasons or bases,

and remand is required for the Board to properly consider the appellant's symptoms in light of the actual language of the regulation.

Moreover, the Court notes that although the Board determined that the appellant's PTSD symptoms did not warrant a 50% disability before May 20, 2015, in part because the appellant worked part time, *see* R. at 17, 23, the Board fails to acknowledge that the appellant was fired from these jobs or quit because he had difficulty interacting with his coworkers or customers. Indeed, the appellant stated that he was fired from his part time position at the Illinois Department of Transportation because he "didn't know when to take a breaks" and would "leave [his] route." R. at 1144. The appellant indicated that he frequently argued with his coworkers in his first position as a part-time school bus driver and was fired from his second position as a school bus driver because he was argumentative and threatened a child. R. at 126, 1145-47. Additionally, the appellant stated that he quit his job at the car wash because he could not manage the stress from regularly interacting with customers. R. at 126. Thus, because the Board ignored this favorable evidence, remand is required in order for the Board to provide an adequate statement of reasons or bases. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that 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").

Given this disposition, the Court will not, at this time, 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, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought). The Board must proceed expeditiously in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

On consideration of the foregoing, the Court VACATES the part of the Board's January 14, 2016, decision that granted an initial 30% rating but no higher for PTSD from February 1, 2005, to May 20, 2015, and REMANDS the matter for further adjudication consistent with this decision.

DATED: October 18, 2017

Copies to:

Christopher J. Boudi, Esq.

VA General Counsel (027)