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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2547

LARRY G. KELSO, APPELLANT,

v.

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

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Judge*: Veteran Larry G. Kelso appeals through counsel a May 24, 2016, Board of Veterans' Appeals (Board) decision denying entitlement to an initial evaluation in excess of 50% for post-traumatic stress disorder (PTSD) with depressive disorder before September 23, 2011. Record (R.) at 24.¹ Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For the reasons that follow, the Court will set aside the portion of the May 24, 2016, Board decision denying an initial evaluation in excess of 50% for PTSD with depressive disorder before September 23, 2011, and remand the matter for readjudication consistent with this decision.

¹ The Board awarded a 70% PTSD evaluation, but no higher, from September 23, 2011, to September 1, 2015. R. at 23. To the extent that this finding is favorable to Mr. Kelso, the Court will not disturb it. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). As Mr. Kelso does not challenge the Board's denial of a PTSD evaluation in excess of 70% for that period, the appeal as to that matter will be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 281–86 (2015) (en banc) (declining to review the merits of an issue not argued on appeal and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same). The Board also remanded 15 other issues. R. at 23–48. Because remands are not final decisions of the Board subject to judicial review, the Court does not have jurisdiction to consider those matters at this time. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2017).

I. FACTS

Mr. Kelso served on active duty in the U.S. Army from March 1995 to January 2002 and from December 2003 to March 2005. R. at 2668–69.

In December 2007, the veteran filed a claim for service connection for depression and, in January 2008, he submitted a statement seeking to add PTSD to the claim. R. at 2652–67, 2411.

In April 2008, Mr. Kelso was provided a VA PTSD examination. R. at 2344–49. The examiner noted that the veteran's job satisfaction was good and, despite being put on temporary disability because of physical health problems, he enjoyed being a police officer. R. at 2348. His appearance that day was casual, neat, and clean, and he reported sometimes arguing with his wife of 12 years. *Id.* The examiner also noted that the veteran's thought processes contained no suicidal or homicidal ideation. *Id.* The examiner opined that there was not "sufficient current clinical symptomatology to establish a diagnosis of [PTSD]" and that the veteran's "symptomatology [was] in the low end of the mild range." R. at 2349.

In June 2008, a VA examiner noted that the veteran was on disability leave for physical health problems and could not yet go back to work; the examiner indicated that the veteran and his wife still argued, but there was less talk of separation; the veteran appeared clean, neat, and casual, had normal speech rate and volume, and he did not complain of short-term memory retention. R. at 2337–38. The examiner further noted that the veteran had no suicidal or homicidal ideation but reported feeling hopeless and worthless because of physical health problems. R. at 2337, 2339. The examiner opined that the veteran "did not meet the full DSM-IV [(Diagnostic and Statistical Manual of Mental Disorders, 4th ed.)] criteria for a diagnosis of [PTSD]" and that the veteran's "symptomatology . . . [were] in the moderate range." *Id.*

In September 2008, a private medical examiner diagnosed the veteran with PTSD noting that he struggled with psychological inwardness, withdrawal, a decreasing commitment to self-care, and depressed mood. R. at 486. Later that month, Mr. Kelso indicated that he was diagnosed with PTSD and was not working because of that disability. R. at 2286. In September 2008, a VA regional office (RO) granted service connection for PTSD, evaluated as 10% disabling effective September 5, 2008. R. at 2289–92. In October 2008, Mr. Kelso filed a timely Notice of Disagreement (NOD) as to the PTSD evaluation. R. at 2287–89.

In April 2009, a private psychological evaluation noted that the veteran enjoyed working as a police officer and received high performance reviews, despite work being stressful. R. at 2050. The examiner interviewed Mr. Kelso's wife, who stated that her husband was unable to be in large crowds, hear loud noises, or see bright flashing lights without suffering from a panic attack. R. at 2045. She noted a loss of consortium with her husband, that she had very little interaction with him, that he often ignored the children, and that family outings triggered him. R. at 2045–46. The examiner indicated that the veteran had no suicidal thoughts; however, the veteran believed that he would be lucky if he made it to the age of 50. R. at 2050. The examiner opined that Mr. Kelso was impaired in his occupation and totally disabled in societal functioning. R. at 2051–52.

During an April 2009 decision review officer hearing, Mr. Kelso testified that his psychiatric symptoms were worsening because of an increase in triggers. R. at 2107. A September 2009 VA treatment note indicated that Mr. Kelso reported no suicidal thoughts, that he continued to have anxiety and panic attacks a few times per week, that he experienced some anger, and that he had a depressed mood. R. at 1931. The note also indicated that the veteran was neatly dressed and had normal speech. *Id.* In October 2009, a VA treatment plan indicated that the veteran was jumpy most of the time; had intense anxiety when witnessing traffic accidents, fireworks, and crowds; became easily frustrated; and often yelled at his kids. R. at 442. The note also indicated that the veteran denied suicidal thoughts. *Id.*

During a June 2010 VA examination, Mr. Kelso stated that he still worked as a fulltime police officer, but was transferred to work in supply in 2009 and was given three reprimands in six months due to inability to perform. R. at 1643. Mr. Kelso indicated that he lost time from work but that this was not due to his mental health. *Id.* The veteran stated that he was separated from his wife and was "ok" with his children. *Id.* The examiner noted that the veteran spent most of his time at home and frequently did not shower because stress made grooming difficult. *Id.* He denied suicidal or homicidal ideation. *Id.* The examiner opined that the veteran's current depression was of moderate severity. *Id.*

The RO issued a Statement of the Case (SOC) and the veteran perfected his appeal to the Board. R. at 1705–10, 1757–83. In December 2012, the RO issued a rating decision granting Mr. Kelso an increased evaluation of 50%, effective December 20, 2007. R. at 1376–78. In December 2015, the RO granted Mr. Kelso a 100% PTSD evaluation from September 2, 2015. R. at 183.

In May 2016, the Board issued the decision on appeal, denying a PTSD evaluation in excess of 50% before September 23, 2011. This appeal followed.

II. ANALYSIS

On appeal, Mr. Kelso raises several arguments that the Board provided inadequate reasons or bases for its decision. Appellant's Brief (Br.) at 10–20. Specifically, he argues that the Board failed to explain why it found that his PTSD symptoms did not entitle him to an evaluation in excess of 50% before September 23, 2011, and that the Board's analysis lacked a proper discussion of the severity, frequency, and duration of his PTSD symptoms. *Id.* The Secretary argues to the contrary, asserting that the Board had a plausible basis in the record for denying an initial PTSD evaluation in excess of 50% and that its decision was not clearly erroneous or inadequately supported. Secretary's Br. at 6–21.

PTSD is evaluated as 50% disabling when it causes

[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). To qualify for the next higher evaluation of 70%, PTSD must manifest with

[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. Finally, a 100% evaluation is warranted where the evidence shows that PTSD causes

[t]otal occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to

perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Id.

Use of the term "such as" in § 4.130 indicates that the list of symptoms therein is nonexhaustive and not all of the symptoms listed within a certain disability evaluation level must be manifested for that evaluation to be assigned. *Vazquez–Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). When a veteran exhibits symptoms listed in the evaluation criteria or other symptoms comparable in severity, frequency, and duration, a corresponding disability evaluation will be assigned. *Vazquez–Claudio*, 713 F.3d at 116–17. In particular, "[e]ntitlement to a 70[%] disability [evaluation] requires sufficient symptoms of the kind listed in the 70[%] 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." *Id.* at 118.

The Board's determination of the proper disability level to be assigned is a finding of fact, which this Court reviews under the "clearly erroneous" standard. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, this Court may not substitute its judgment for that of the Board on issues of material fact where the Board points to a plausible basis in the record in support of its determination. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The Board must support its determination with an adequate statement of reasons or bases that enables a claimant to understand the precise basis for the finding and that facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). In its statement of reasons or bases, the Board must analyze the credibility and probative value of evidence, account for the persuasiveness of evidence, and provide reasons for rejecting 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). Remand is appropriate when the Board fails to provide an adequate statement of reasons or bases for its determinations. *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

First, Mr. Kelso's argument that the Board erred in relying on the fact that he remained employed as a fulltime police officer in determining that there was no significant work impairment is persuasive. Appellant's Br. at 13. Although total occupational and social impairment is required under the 100% evaluation, the 70% evaluation criteria only requires occupational and social impairment with deficiencies in most areas, one of those areas being work. 38 C.F.R. § 4.130; *Bankhead v. Shulkin*, 29 Vet.App. 10, 11 (2017). Thus, to the extent that the Board suggested that the fact that Mr. Kelso remained employed on a fulltime basis as a police officer until September 22, 2011, supported its denial of a 70% evaluation, it applied a higher standard than required by the 70% evaluation criteria. R. at 18. Additionally, the Board found that there was no significant work impairment tantamount to deficiencies in the area of work prior to September 23, 2011, even though the veteran experienced psychiatric symptoms at work. R. at 19. In this regard, the Board failed to explain its rejection of favorable evidence, such as Mr. Kelso often having panic attacks at work, experiencing thoughts of Iraq when work became stressful, and medical notes indicating occupational deficiencies and his experiencing a startling reflex when dealing with a supervisor at work, possibly demonstrating symptoms commensurate with a higher PTSD evaluation. R. at 516, 553, 1124, 2049, 2411. Thus, remand is warranted. *See Tucker*, 11 Vet.App. at 374; *Caluza*, 7 Vet.App. at 505–06,

Second, Mr. Kelso's argument that the Board erred by failing to explain why his PTSD symptoms were not sufficiently severe to result in an inability to establish and maintain effective relationships is supported by the record. Appellant's Br. at 15. The Board conceded that PTSD impaired his family relationships; however, the Board found that he was not deficient in most of the areas specified in the 70% evaluation criteria. R. at 18. The Board did not explain how evidence such as marital separation, discussions of divorce, or having a low tolerance for any activities involving his wife and children, and his physical altercation with his stepson resulting in an assault charge, did not show an inability to maintain effective relationships. R. at 14, 1620, 2046. Without further explanation, the Board concluded that several of these symptoms are adequately contemplated by the 50% evaluation. R. at 18–19. However, "merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons and bases." *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992)).

Finally, Mr. Kelso's argument that the Board erred in finding that his depression and panic attacks did not rise to the level of severity to affect his ability to function independently, appropriately, and effectively is supported by the record. Appellant's Br. at 18–19. The Board reviewed a June 2010 VA examination that noted that stress interfered with Mr. Kelso's ability to groom himself; clinical evaluations that showed Mr. Kelso was neat, clean, and casual; and GAF scores, most of which indicated moderate impairment. R. at 18–19. However, the Board failed to consider Mr. Kelso's statements that he often had anxiety attacks when he was exposed to certain stimuli. R. at 442, 1123, 1642, 2048. The Board was obligated to address this favorable evidence and offer reasons as to why it found some evidence persuasive and others not, and not simply conclude, without reference to this evidence, that Mr. Kelso's panic attacks and depression were not so severe as to affect his functionality. R. at 18. By failing to acknowledge these statements, the Board disregarded the veteran's more severe symptoms noted in the record without considering important favorable evidence.

Therefore, the Board's failure to sufficiently address these matters renders its reasons or bases inadequate. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57. As such, the matter must be remanded for readjudication. *See Tucker*, 11 Vet.App. at 374. The Secretary's arguments to the contrary are unavailing.

To the extent that Mr. Kelso has raised other arguments relating to the Board's decision in his brief, the Court need not address those arguments as it has already determined that remand is warranted, and the Board will necessarily render a new decision that addresses the appropriate evaluations for service-connected PTSD prior to September 23, 2011. On remand, the veteran is free to submit those arguments as well as any additional evidence and argument, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

III. CONCLUSION

Upon consideration of the foregoing, the portion of the May 24, 2016, Board decision denying a PTSD evaluation in excess of 50% before September 23, 2011, is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: October 19, 2017

Copies to:

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