IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DAVID M. ALVAREZ,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-1825
	)	
DAVID J. SHULKIN, M.D., Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. R. 27 and 45, Appellant and Appellee, through the undersigned counsel, respectfully move the Court to issue an order to vacate, in part, and remand the February 22, 2017, decision of the Board of Veterans' Appeals (BVA or Board) that: (1) denied an initial disability rating in excess of 30% for major depression with post-traumatic stress disorder (PTSD), prior to February 18, 2013; (2) denied an initial disability rating in excess of the granted 50% evaluation for major depression with PTSD from February 18, 2013; and (3) denied an initial rating in excess of 30% for vertigo. (Record (R.) at 1-23 (1-29)).

It should be noted that the Board, in making the above findings, found that Appellant was entitled to an initial disability rating of 50%, but no higher, for major depression with PTSD from February 18, 2013. (R. at 6-18). The parties specifically request that the Court not disturb that portion of the BVA decision that granted the 50% rating for major depression with PTSD from

February 18, 2013, but the issue of whether Appellant was entitled to a higher disability rating (at any time in the appeal period) for major depression with PTSD remains on appeal. *See Medrano v. Nicholson,* 21 Vet.App. 165, 170 (2007) (Court is not permitted to reverse Board's favorable findings of fact).

Additionally, the Board granted Appellant entitlement to a total rating based on individual unemployability due to service-connected disabilities (TDIU). (R. at 23-26). The parties specifically request that the Court not disturb that portion of the BVA decision. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (Court is not permitted to reverse Board's favorable findings of fact).

BASIS FOR REMAND

A. PTSD

The issue on appeal to the Board was entitlement to an initial rating in excess of 30% for major depression with PTSD. The Board found that: (1) the criteria for an initial disability rating in excess of 30% for major depression with PTSD prior to February 18, 2013, were not met; and (2) the criteria for an initial disability rating of 50%, but no higher, for major depression with PTSD were met from February 18, 2013. (R. at 6-20).

In rendering its decision, the Board is required to include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented in the record. *See* 38 U.S.C. § 7104(d)(1). That statement must be adequate to enable an appellant to

understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to Appellant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In *Mauerhan v. Principi*, the Court held that the symptoms listed in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411, are "not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects, that would justify a particular rating." 16 Vet.App. 436, 442 (2002). The Board is required to "consider all symptoms of a claimant's condition that affect the level of occupational and social impairment," not just those listed in the regulation. *Id.* at 443. Thus, when determining the appropriate disability evaluation to assign, the veteran's symptoms are the Board's "primary consideration." *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013). However, "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.* at 117. "The regulation's plain language highlights its symptom-driven nature," and "symptomatology should

be the fact-finder's primary focus when deciding entitlement to a given disability rating." *Id.* at 116-17. In addition to requiring the requisite level of symptomatology, § 4.130 also requires that the symptoms have caused a certain level of "occupational and social impairment." *Id.* at 117.

(1) Prior to 2-18-13, Major Depression PTSD rated at 30%

In the decision on appeal, the Board denied an initial rating in excess of 30% for major depression with PTSD. (R. at 9-20). However, in making this determination, the parties agree that remand is warranted because the Board erred when it did not adequately discuss potentially favorable evidence of the severity of Appellant's PTSD symptomology that could demonstrate he is entitled to an increased rating. *See* 38 C.F.R. § 4.130; *Vazquez-Claudio*, 713 F.3d at 118; *De la Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence).

Here, the Board, after reviewing the evidence of record, determined that an initial rating in excess of 30% for major depression with PTSD was not warranted based on the evidence of record. (R. at 15). However, the Board did not adequately address potentially favorable evidence that could demonstrate that he was entitled to a rating in excess of 30%. Specifically, the Board did not adequately address his May 2012 statement in which he stated the medication for his PTSD caused him to sleep 15-16 hours at a time, required he seek a reduced work schedule and renewed suicidal ideation (R.

at 3843) and that he reported auditory hallucinations (people calling his name and warning him) and "seeing visions in the past" (R. at 3846). Futhermore, upon remand, Appellant intends to argue that his following symptoms demonstrate his condition is more severe than assessed in the Board's decision: suicidal ideation in September 2010 (R. at 153), problems with memory, sleep or cognitive processing in December 2011 (R at 93, 1238), irritability with temper problems (R. at 153), cognitive difficulties, mood, temper and temperament problems in January 2012 (R. at 4735), his second divorce, concerns of domestic violence, and notes of a poisoned relationship with his ex-wife and daughter in February 2012 (R. at 3843), and that his mental health severely impacted his ability to work (R. at 3454).

Based on the foregoing, the parties agree that remand is warranted because the Board did not adequately address evidence that could potentially demonstrate that Appellant's symptoms were more severe than assessed in the Board's decision. As a result, the Board did not fulfill the requirement under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of the reasons or bases addressing its findings and conclusions on all material issues of fact and law presented on the record.

(2) <u>From to 2-18-13, Major Depression with PTSD rated at 50%</u>

Here, the Board, after reviewing the evidence, determined that Appellant was entitled to a 50% rating, but no higher, for major depression with PTSD, from February 18, 2013. (R. at 6-19). However, in making this

determination, the parties agree that remand is warranted because the Board erred when it did not adequately discuss potentially favorable evidence of the severity of Appellant's PTSD symptomology that could demonstrate he is entitled to an increased rating. *See* 38 C.F.R. § 4.130; *Vazquez-Claudio*, 713 F.3d at 118; *De la Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence). Specifically, the Board did not adequately address evidence in the February 1, 2013 examination report by Marie Hume Guilford, PhD, of auditory hallucinations (R. at 12, 584) and evidence of suicidal thought. (R. at 587). Based on the foregoing, the parties agree that remand is warranted because the Board did not adequately address evidence that could potentially demonstrate that Appellant's symptoms were more severe than assessed in the Board's decision. Futhermore, upon remand, Appellant intends to argue that his following symptoms demonstrate his condition is more severe than assessed in the Board's decision: constant depression in (R. at 584), absence of social interaction other than his children (R. at 586), going in and out of being suicidal (R. at 587), trouble starting and finishing simple self-care and inability to provide self-care, and limits on ability to function independently (R. at 158), poor concentration, forgetful of facts and events, recalling only 2 of 3 words at 5 minute (R. at 158-160), and a persistent danger of hurting himself due to frequent suicidal thoughts (R. at 160, 4314), inability to form effective relationships (R. at 4312. 4394), no

longer working due to his mental health condition (R. at 26, 115, 116, 4395), spending all day at home doing nothing, no joy and isolation (R. at 4395, 4402), poor appetite and over-eating half the days of a 2 week period (R. at 4314), the existence of a restraining order against him by his ex wife and charges or arrests for domestic violence in 2 states (R. at 76-77), deficiencies in most areas of work family and relationships (R. at 100), uncooperative and argumentative (R. at 75, 80).

As a result, the Board did not fulfill the requirement under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of the reasons or bases addressing its findings and conclusions on all material issues of fact and law presented on the record.

Additionally, upon remand, the parties agree that the documented suicidal ideation should be readdressed. Here, the Board found that Appellant's suicidal ideation was not severe because "it was not shown to ever result in a plan during the course of the appeal" (R. at 18), but the parties agree that upon remand the recent case of *Bankhead v. Shulkin*, 29 Vet.App. 10 (2017) should be adequately addressed. Also on remand, the parties agree that Board should adequately address Appellant's contention that the relied upon January 2016 VA opinion by Jessica Torres-Torres was inadequate. *See* Appellant's counsel's letter dated January 19, 2017.

B. Vertigo

When a veteran is found to have a service-connected disability that

does not align with an existing diagnostic code, the unlisted condition may be rated with a hyphenated diagnostic code as a closely related condition so long as the anatomical location and symptomatology are likewise closely analogous. *See* 38 C.F.R. § 4.20. When VA assigns a diagnostic code number to a condition rated by analogy, "the first 2 digits will be selected from that part of the schedule most closely identifying the part, or system, of the body involved; the last 2 digits will be '99' for all unlisted conditions." 38 C.F.R. § 4.27. To determine whether a diagnostic code listing is analogous to a veteran's condition, VA should consider the functions affected by the condition, the location of the condition, and the similarity of the symptoms of each condition. *See Lendenmann v. Principi*, 3 Vet.App. 345, 351 (1992).

The Board is given deference in its choice of diagnostic code (DC), *see Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (*en banc*), but where a condition is unlisted, the Board must explain adequately why other reasonably and potentially applicable DCs are not for application, especially where any such DCs would potentially result in a higher evaluation. *Vogan v. Shinseki*, 24 Vet.App. 159, 166 (2010) (holding that the Board's failure to discuss a potentially relevant DC when the service-connected condition is unlisted is not prejudicial only where it is apparent that a higher evaluation, under the facts of the case, would not result). These reasons or bases must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *See Gilbert v. Derwinski*, 1 Vet.App.

49, 56-57 (1990).

In January 2011, Appellant was granted service connection for vertigo at 10% disabling, effective October 16, 2010, under 38 C.F.R. § 4.87, Diagnostic Code (DC) 6299-6204; DC 6204 is used to evaluate peripheral vestibular disorders. (R. at 20, 4008). Thereafter, in a March 2013 rating decision, the disability rating of 10% for vertigo was increased to 30% from October 16, 2010, under DC 6299-6204. (R. at 21, 4642).

In the decision on appeal, the Board noted that Appellant's representative had argued that the disability would be more properly rated under the provisions of DC 6205 (Meniere's syndrome) instead of DC 6204 (peripheral vestibular disorders). (R. at 21). However, the Board found that DC 6205 did not apply in this case because Appellant was not diagnosed with Meniere's syndrome. (R. at 22-23).

The parties agree that remand is warranted for adequate consideration of the applicability of 38 C.F.R. § 4.87, DC 6205, given that Appellant's vertigo is rated by analogy. Thus, the parties agree that remand is warranted because the Board erred when it did not adequately consider whether DC 6205 was an appropriate diagnostic code for the service-connected vertigo, and if so, whether the evidence of record entitled Appellant to a higher disability rating under DC 6205 than DC 6204. As such, the parties agree that remand is warranted for consideration of DC 6205.

C. Miscellaneous

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matters being remanded.

Upon remand, Appellant will be free to submit additional evidence and argument on the questions at issue, and the Board shall "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *See Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991); *Kutscherousky v. West*, 12 Vet.App. 369 (1999); *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof and an opportunity to respond thereto. *See Thurber v. Brown,* 5 Vet.App. 119 (1993); *Austin v. Brown,* 6 Vet.App. 547 (1994). In any subsequent decision, the Board must provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of law and fact presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

Finally, the Board shall obtain copies of this Joint Motion and the

Court's order granting it and incorporate them into Appellant's claims file for appropriate consideration in subsequent decisions. VA must also provide for the expeditious treatment of this claim on remand from the Court. *See* 38 U.S.C. §§ 5109B, 7112. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order").

WHEREFORE, the parties respectfully move the Court to enter an order vacating, in part, and remanding the February 22, 2017, Board decision in accordance with the contents of this motion, applicable statutory and regulatory provisions, and decisions of this Court.

Respectfully submitted,

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