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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2355

DALE B. WILLIAMS, APPELLANT,

v.

ROBERT L. WILKIE,
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*: Dale B. Williams appeals through counsel a June 21, 2017, Board of Veterans' Appeals (Board) decision that denied a disability rating greater than 30% for bipolar disorder and denied referral to the Director of Compensation and Pension (Director) for consideration of a total disability rating based on individual unemployability (TDIU). 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 as the issue is 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 decision and remand the matter for readjudication consistent with this decision.

I. FACTS

The appellant served on active duty in the U.S. Navy from February 1977 to January 1982. R. at 453.

In October 2010, he filed a claim for an increased rating for his service-connected bipolar disorder. R. at 657. His VA vocational rehabilitation program records from the previous year show that he applied for services in October 2009, R. at 657, but withdrew his application in November

2009. R. at 1257. He again applied for vocational rehabilitation services in September 2010, R. at 1251, but his claim was suspended in October 2010 due to his failure to complete the required evaluation, R. at 1239-40. In November 2010, the appellant reported to his vocational rehabilitation counselor that he had mixed feelings about pursuing the program and felt that he was competing with people for a job. R. at 1238. He also stated that trying to complete the paperwork caused anxiety and was very intimidating. R. at 1238. He withdrew his claim the following day, "because he did not think he could handle pursuing the services." R. at 1234.

The appellant was provided with a VA mental disorders examination in February 2011. R. at 636-38. As to the "frequency, severity, and duration of symptoms," he reported problems with memory, sleep, and isolation, as well as hearing noises and seeing things. R. at 636. He also reported that he experienced his symptoms "weekly to daily in frequency, currently at an unknown severity, since his military service." *Id.* Concerning familial and social relationships, he reported that he had a good relationship with his daughter and could get along well with others when he had to. R. at 636-37. He stated that he had been unemployed since 2009 due to an altercation with his boss. R. at 637. He denied impairment in activities of daily living due to his mental disorder symptoms, as well as suicidal intent or planning, homicidal ideation, hallucinations, and delusions. *Id.* The examiner noted that the appellant was fully oriented, well groomed, friendly, and cooperative and that his attention, memory, and judgment were within normal limits. *Id.* Ultimately, the examiner opined that the appellant experienced occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks due to the bipolar disorder, based on his report of chronic sleep impairment. *Id.*

The RO denied an increased rating for bipolar disorder in an April 2011 rating decision, R. at 626-28, which the appellant appealed to the Board, R. at 623 (June 2011 Notice of Disagreement); 596-617 (January 2013 Statement of the Case); 590 (March 2013 VA Form 9).

The appellant's medical treatment records from January 2011 to March 2013 show that he continued to be treated for depression and that his condition was stable with medication. R. at 376, 389, 395, 406, 422. During that period, he was consistently noted to be adequately groomed and dressed for his appointments. R. at 368, 370, 391. He was also consistently noted to be alert and oriented, with no abnormalities in memory, judgment, speech or thought processes. R. at 368; 370-71; 389; 391. In February 2012, he reported that he was always tired and slept a lot. R. at 391.

At a psychological evaluation in February 2013, the appellant reported symptoms of anxiety, depression, mood swings, loss of motivation, feeling life is hardly worthwhile, little need to be with others, and being depressed about problems with transportation. R. at 370. The psychologist also noted that the appellant had left his last employment "because his age made him 'stand out' and be the brunt of other's jokes." *Id.* Appellant reported that he had applied twice for VA vocational rehabilitation services but then cancelled due to being unable to drive. He also reported not having close relationships and spending most of his time alone. *Id.*

A March 2013 treatment provider noted that the appellant had poor insight because he "does not seem to recognize his deflecting blame for his circumstance." R. at 368.

In an April 2015 decision, the Board remanded the appellant's bipolar disorder claim to obtain "the VA examination report with which the February 2011 [report] is associated" and to provide a new examination. R. at 560-61. The Board also found the issue of entitlement to TDIU reasonably raised by the record and intertwined with the bipolar disorder rating claim. R. at 559, 561.

The appellant's medical treatment records from June 2013 to September 2016 show that he continued treatment for bipolar disorder, including with medications. R. at 92, 165-66, 242, 299-300, 317, 366. In March 2015, he reported that he was not sleeping well. R. at 242. In June 2016, the appellant reported that "little things can really upset him," and he was experiencing mood lability, but also that his condition was "about the same it's always been, no flagrant manic episodes and no severe despondency." R. at 105. During this period, he was consistently noted to be neatly groomed for his appointments. R. at 105, 170; 235; 242. He was also consistently noted to be alert and oriented, with no abnormalities in insight, judgment, speech, or thought processes. R. at 105, 166, 235, 243, 281, 299, 316, 349, 363. The appellant reported memory problems throughout this period, but was consistently noted to have no gross cognitive or memory deficits. R. at 103, 105, 116, 166, 235, 243. Regarding social relationships, he reported that he saw his daughter (who lived in a different state) once or twice per month and that he lived alone and "in relative isolation." R. at 105, 242.

The appellant was provided with a VA mental disorders examination in October 2016, at which he reported symptoms of depressed mood, anxiety, chronic sleep impairment, and difficulty establishing and maintaining effective work and social relationships. R. at 439. Specifically, he

got short-tempered and would get so hyper that he could not sleep, but had "more depression than anything." *Id.* He also reported that he was divorced and he had one adult daughter with whom he didn't communicate often. R. at 438. He tended to stay in the house, did not engage in regular social activities, and been unemployed since 2009. *Id.* He denied hallucinations, suicidal ideation, and homicidal ideation. R. at 439. The examiner noted that the appellant essentially reported moderate symptoms of depression. *Id.*

The examiner noted that the appellant was casually dressed for the examination with adequate grooming and hygiene, and interacted in a calm, pleasant manner. R. at 439. He was able to communicate effectively, follow simple instructions, and complete routine tasks. *Id.* The examiner noted that the appellant's mood and affect were normal and appropriate to the situation, and his speech was spontaneous, normal, and easily understood. *Id.* The examiner also noted that the appellant was alert and oriented with intact judgment, and no evidence of psychosis or a thought disorder. *Id.*

The examiner opined that the appellant's bipolar disorder caused "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation." R. at 437. The examiner explained that such impairment "would likely be due to periods of anhedonia, fatigue because of lack of sleep, difficulty focusing for lengthy periods of time, and irritability." R. at 439. She also noted that there was no significant change or evidence of increase in severity since the last examination, and his symptoms appeared to have been stable for many years. *Id.*

The RO issued a Supplemental SOC in October 2016 denying a rating greater than 30% for bipolar disorder and denying entitlement to TDIU. R. at 74-82; *see* R. at 62 (October 2016 rating decision denying entitlement to TDIU). In November 2016, the appellant filed a formal application for TDIU, indicating that his bipolar disorder prevented employment. R. at 41-42. That same month, the appellant's sister submitted a letter. She explained that the appellant "isolated himself at home, [with] no friends . . . [and] only sees the immediate family." R. at 44. She noted that he was "more and more forgetful and totally dependent on [their] 90 year old Navy veteran Dad for transportation, trips to the grocery store, keeping him on track for his VA appointments, and making sure his VA documentation is processed on time." *Id.* She "truly believe[d] that [her]

brother d[id] not have a grasp on day-to-day reality." *Id.* In June 2017, the Board issued the opinion here on appeal.

II. ANALYSIS

A. Entitlement to a Disability Rating Greater than 30% for Bipolar Disorder

1. Diagnostic Criteria

Mental disorders, including bipolar disorder, are evaluated under the general rating criteria for mental disorders found at 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411. In evaluating mental disorders, the Board must consider all the evidence of record, determine the nature of the appellant's overall disability picture, and then look to the list of symptoms outlined in the diagnostic criteria as examples that can provide guidance in determining the severity of the appellant's condition. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). Under DC 9411, a 30% disability is warranted when a claimant's mental disorder results in

[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, DC 9411 (2018). A 50% disability rating is warranted when a claimant's mental disorder results in

[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. A 70% disability rating is warranted when a claimant's mental disorder results in

[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. Pursuant to a VA regulation, "where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7 (2018).

In *Vazquez-Claudio v. Shinseki*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that assignment of disability ratings under DC 9411 requires a two-part analysis of (1) an "initial assessment of the symptoms displayed [. . .] and if they are the kind enumerated in the regulation," and (2) "an assessment of whether those symptoms result in occupational and social impairment." 713 F.3d 112, 117-18 (Fed. Cir. 2013). In *Mauerhan*, the Court held that the symptoms listed in 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. at 442. 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*, 713 F.3d at 118. 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.

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Johnston v. Brown*, 10 Vet.App. 80, 84 (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)).

As with any finding on a material issue of fact or law presented on the record, the Board must support its determination of the appropriate degree of disability with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that finding and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Simon v. Derwinski*, 2 Vet.App. 621, 622 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert*, 1 Vet.App. at 57.

2. Board's Findings

In the decision on appeal, the Board noted that the appellant's bipolar disorder manifested by the symptoms of "depressed mood, anxiety, chronic sleep impairment, mild memory loss, disturbances of motivation and mood, and difficulty in establishing and maintaining effective work and social relationships." R. at 17. In determining the appropriate rating, the Board analyzed the evidence of record regarding each symptom, except for chronic sleep impairment and difficulty in establishing and maintaining effective work relationships, and explained why it found that a 30% rating was more appropriate for each. R. at 17-22.

Regarding depression, the Board acknowledged that the veteran "has endorsed symptoms of depression" and that a February 2013 VA treatment record documented loss of motivation, which is a symptom listed under the criteria for a 50% rating. R. at 18, 19. However, the Board found that, overall, the appellant's depression symptoms warranted a 30% rating because the appellant "also reported nothing was bothering him the following month in a March 2013 VA treatment record, and reported during the March 2015 VA mental health treatment that symptoms of bipolar disorder had improved a lot over the last several years." R. at 18.

The Board also acknowledged that the record contained evidence of problems with grooming and self-care but explained why it found that these symptoms more nearly approximated a 30% rating. The Board explained that "although the [v]eteran's sister disputes that the [v]eteran

is 'well-groomed,' the [v]eteran ha[s] consistently been observed by various VA examiners to have adequate hygiene." R. at 19. The Board further explained that, "with the exception of the February 2013 VA examiner's observation that the [v]eteran did not take pride in his personal appearance, the Veteran had generally been observed by various VA examiners to have adequate grooming." *Id.*

The Board also found the appellant's anxiety symptoms more nearly approximated the criteria for a 30% rating because the evidence did not show that his anxiety manifested in panic attacks that occurred once a week or more. R. at 17-18. The Board also explained why the evidence did not show that the appellant's depression and anxiety symptoms were of severity or frequency sufficient to warrant a 70% or 100% rating. R. at 19-20.

Further, the Board acknowledged that the appellant had "difficulties relating to others, as evidenced by his reports of self-isolation," R. at 19, and that the October 2016 VA examiner opined that the appellant had difficulty in establishing and maintaining effective work and social relationships, which is a symptom listed for a 50% rating, R. at 18. The Board also found that the appellant may have had "difficulty in adapting to stressful circumstances," a criterion listed for a 70% rating. R. at 19. However, the Board found that the appellant's symptoms regarding difficulty relating to others in a social setting more nearly approximated a 30% rating because the appellant "had reported during the February 2011 VA examination that he is able to get along well with other people when needed . . . [and] [t]he November 2016 lay statement from the [appellant's] sister asserts [that he] maintains relationships with immediate family members." R. at 18. The Board also explained why the evidence did not show that the appellant's symptoms regarding difficulty relating to others in a social setting were of severity or frequency sufficient to warrant a 70% or 100% rating. R. at 19-20.

Regarding symptoms of impaired memory, the Board acknowledged that the appellant "had repeatedly complained of impaired memory." R. at 18. The Board found that the severity of his impaired memory symptoms were more closely approximated by a 30% rating because "during the July 2016 cognitive communication evaluation, the [appellant] described impaired memory as occasionally losing train of thought when speaking and forgetting why he walked into a room" and also because "[t]he July 2016 VA treatment record also reflects the [appellant] denied any difficulty with remembering to take medication, managing finances, or scheduling or keeping

appointments." R. at 18. The Board explained that this evidence shows that the appellant's impaired memory "symptoms [] more nearly approximate mild memory loss (criteria for 30 percent rating), rather than impairment of short- and long-term memory (criteria for 50 percent rating)." *Id.* The Board also explained why the evidence did not show that the appellant's impaired memory symptoms were of severity or frequency sufficient to warrant a 70% or 100% rating. R. at 19-20.

Finally, the Board considered the appellant's GAF scores in its analysis of whether a higher rating was warranted. R. at 21.

3. Symptoms Not Discussed

On appeal, among other arguments, the appellant asserts that, although the Board found that his bipolar disorder caused chronic sleep impairment and difficulty in establishing and maintaining work relationships, it failed to discuss the effects of these two symptoms in its discussion of whether a 50, 70, or 100% rating was warranted. R. at 17-22. The Court agrees. The Board found that the appellant's bipolar disorder was manifested by the symptoms of "depressed mood, anxiety, chronic sleep impairment, mild memory loss, disturbances of motivation and mood, and difficulty in establishing and maintaining effective work and social relationships." R. at 17. For each of these listed symptoms, except for the symptoms chronic sleep impairment and difficulty in establishing or maintaining effective work relationships, the Board analyzed the evidence of record and explained why it found that the frequency and severity of each warranted 30% rating but no higher. *See* R. at 17-22. Yet the Board did not explain its reasons for omitting from its analysis the symptoms of chronic sleep impairment and difficulty in establishing or maintaining effective work relationships. *See id.*

As the appellant argues, the record shows that he applied for VA vocational rehabilitation in 2010, but withdrew his application because "he did not think he could handle pursuing" the program and because "trying to complete the paperwork cause[d] anxiety and [wa]s very intimidating." App. Br. at 18; R. at 1234, 1238. The record also documents that the appellant relied on his father to "keep him on track for his VA appointments," and to make "sure his VA documentation [wa]s processed on time." R. at 44; *see* App. Br. at 18. However, the Board failed to account for this favorable evidence when it found that the severity and frequency of the appellant's difficulties in establishing or maintaining effective work relationships warranted a 30% rating but no higher. *See* R. at 17-22. Similarly, despite noting that the appellant suffered from

chronic sleep impairment, the Board failed to discuss any of the evidence of record of chronic sleep impairment in explaining why a 30% rating, but no higher, was warranted. *See id.*

The Court therefore concludes that the Board's reasons or bases for assignment of a 30% rating are inadequate because the Board did not account for this favorable and material evidence in its explanation of why a 30% rating is warranted. *See Caluza*, 7 Vet.App. at 506. Remand is therefore required for the Board to account for the evidence of symptoms of chronic sleep impairment and difficulties in establishing or maintaining effective work relationships and explain how the evidence of these symptoms squares with its assignment of a 30% rating, or, alternatively, why a higher disability rating is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate where the Board has "failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate.").

As a note for consideration on remand, the Court points out that the appellant asserts that his "GAF scores demonstrated the prejudice of the Board's failure to adequately discuss his depressed mood in its analysis of whether a 50% rating was warranted." App. Reply Br. at 8. The Secretary counters that, per the Court's holding in *Golden v. Shulkin*, 29 Vet.App. 221, 224 (2018), the Board errs when it uses GAF scores to assign a rating in cases where the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM 5) applies but that any error on the part of the Board in discussing the GAF scores in this case was not prejudicial because such discussion was tangential to its "symptom-driven" analysis of the evidence. Sec. Br. at 15-16. The appellant replies that *Golden* is not for application in this case because, per the applicable regulation, his claim falls under the purview of the fourth edition, DSM IV, not the DSM 5. App. Reply Br. at 7-9. Although the Court declines to consider the appellant's argument concerning GAF scores at this time, the Board should consider which version of the DSM applies where, as here, the appellant's claim was certified to the Board in August 2013. *See* 80 Fed. Reg. 14,308 (Mar. 19, 2015).

B. Adequacy of October 2016 Examination

The appellant next argues that the Board relied upon an inadequate October 2016 VA examination to deny his claim for an increased disability rating for bipolar disorder. App. Br. at 21-23; App. Reply Br. at 10-11.¹

A medical examination is considered adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). Additionally, the opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions." *Stefl*, 21 Vet.App. at 124; see *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam) (noting that a medical examination must "sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion"); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); 38 C.F.R. § 4.2 (2018) ("[I]f [an examination] report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes."). The law does not impose any reasons-or-bases requirements on medical examiners, and the adequacy of medical reports must be based upon a reading of the report as a whole. *Monzingo*, 26 Vet.App. at 105-06.

The adequacy of a medical examination report is a question of fact, which is reviewable by this Court under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). "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)). The Court may not substitute its judgment for the factual

¹ The appellant withdrew his argument that the February 2011 VA examination report was inadequate. See App. Reply Br. at 10 n.1.

determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.*

In this case, the Court does not find the appellant's argument persuasive. A review of the record shows that the October 2016 VA examiner noted the appellant's relevant medical history and current symptomatology, and she recorded her observations of the appellant's behavior and her opinion on the level of severity of the appellant's bipolar disorder. R. at 437-40. Thus, in its decision, the Board found that the October 2016 VA examination was adequate, noting that the examiner "reviewed the claims file, personally interviewed and examined the [v]eteran, including eliciting a history, conducted in-person examinations with appropriate testing, and answered all relevant questions." R. at 7.

The appellant's specific argument is that the October 2016 examination report did not provide the Board with information regarding the severity, frequency, and duration of his bipolar disorder and that such information was necessary for the Board to adequately analyze his claim. App. Reply Br. at 10-11. However, this argument is without merit, as a review of the examination report shows that the examiner did address these matters, opining:

[the] [v]eteran[] continues to experience chronic symptoms of bipolar disorder without remission or significant change since his last exam /rating. He has been on medication for many years which appears to stabilize his symptoms (no full manic or major depressive episodes). There is no evidence of an increase in severity.

R. at 439.

Thus, when read as a whole, the Court finds that the October 2016 VA examination was adequate for rating purposes and does not contain clear error. *See Monzingo*, 26 Vet.App. at 105-06; *D'Aries v. Peake*, 22 Vet.App. at 104. Further, the Board's reliance on the examination was plausible and supported by adequate reasons or bases.

C. Entitlement to TDIU

Finally, the appellant argues that the Board misinterpreted and misapplied the law when it denied entitlement to TDIU. Appellant's Br. at 23-28; Reply Br. at 11-14.

TDIU will be awarded when a veteran is unable to secure or follow a substantially gainful occupation as a result of a service-connected disability or disabilities. 38 C.F.R. § 4.16(a) (2018); *see Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) ("Total disability ratings will be assigned 'when there is present any impairment of mind or body which is sufficient to render it

impossible for the average person to follow a substantially gainful occupation.'" (quoting 38 C.F.R. § 3.340(a) (2014)). An award of TDIU does not require a showing of 100% unemployability. *Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001).

Unlike the regular disability rating schedule, which is based on the average work-related impairment caused by a disability, "entitlement to TDIU is based on an individual's particular circumstances." *Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009). Therefore, to determine whether a TDIU rating is warranted in a given case, "VA conducts a holistic and individualized assessment of the veteran." *Withers v. Wilkie*, 30 Vet.App. 139, 144 (2018). When conducting a TDIU analysis, the Board "must take into account the individual veteran's education, training, and work history." *Id.* (quoting *Pederson*, 27 Vet.App. at 286). Whether the veteran can actually find employment is not determinative, as the focus of the inquiry is on "whether the veteran is *capable* of performing the physical and mental acts required by employment." *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993) (emphasis in original). The Board's determination whether a claimant is unable to secure or follow substantially gainful employment is a finding of fact that this Court reviews under the "clearly erroneous" standard. *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001).

In this case, the Board noted that the appellant's service-connected disabilities (consisting of bipolar disorder, hypertension, and a rectal polyp disorder) did not meet the schedular requirements for consideration of TDIU under 38 C.F.R. § 4.16(a). R. at 27-28. Accordingly, under § 4.16(b), the Board denied referral to the Director for extraschedular consideration of TDIU because it determined that "the primary reason for the [appellant's] inability to obtain employment or participate in VA's rehabilitation program is due to the inability to drive," rather than due to his bipolar disorder symptoms. R. at 29. The Board also reasoned that the evidence showed that the appellant's bipolar symptoms did not contribute to his unemployment because it found "the [v]eteran was no longer employed full time in 2009 following an altercation with a superior and being the subject of coworkers' jokes." *Id.* The appellant asserts that these two reasons given by the Board for denying referral to the Director for extraschedular consideration of TDIU were erroneous, arguing that the former reason is "factually wrong" and the latter "demonstrates a misinterpretation of law." App. Br. at 23-24.

The Court finds the appellant's argument persuasive. The Board has not provided an adequate discussion of how the appellant's service-connected disabilities have affected his ability

to obtain and maintain substantially gainful employment. As the appellant points out, the evidence of record shows that his reasons for leaving his employment in 2009 actually supported his claim. He left his last place of employment because of an "altercation with [his] boss" and perceived himself as "the brunt of other's jokes." R. at 370; R. at 623 (June 2011 Notice of Disagreement describing "a blow up with his employer"). The appellant has consistently reported difficulty establishing and maintaining effective work and social relationships due to his symptomatology. *See* R. at 439 (October 2016 VA examination report noting the symptom). Thus, the Board should have analyzed the appellant's reasons for leaving his employment in conjunction with the evidence that demonstrated that his bipolar disorder caused significant impairments with work relationships. Instead, it used this evidence against him to deny TDIU. R. at 28-29.

Further, just as the Board should have considered the evidence that the appellant had difficulty maintaining and establishing work relationships as part of its analysis of entitlement to an increased rating for bipolar disorder, the Board also was required to consider that evidence as part of its TDIU analysis. The record shows that he applied for VA vocational rehabilitation in 2010, but withdrew his application because "he did not think he could handle pursuing" the program and because "trying to complete the paperwork cause[d] anxiety and [wa]s very intimidating." R. at 1234, 1238. The record also documents that the appellant relied on his father to "keep him on track for his VA appointments," and to make "sure his VA documentation [wa]s processed on time." R. at 44. This evidence is relevant and material to the question of whether the appellant was capable of substantially gainful employment.

Finally, as the appellant asserts, the Board failed to fully consider all of the symptoms associated with his service-connected disabilities when determining if they render him unable to secure or follow a substantially gainful occupation. This failure renders the Board's statement of reasons or bases inadequate, and a remand is warranted. *See Withers*, 30 Vet.App. at 144; *see also* 38 U.S.C. § 7104(d)(1); *Allday*, 7 Vet.App. at 527.

Accordingly, the Board's reasons or bases for denial of entitlement to TDIU are inadequate, and the Court will remand the decision for the Board to adequately explain its TDIU determination. *See Tucker*, 11 Vet.App. at 374.

D. Additional Arguments

The appellant makes additional arguments concerning entitlement to an increased disability rating greater than 30% for bipolar disorder. At this time, the Court declines to address these arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining 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 may present, and the Board must consider, any additional evidence and argument in support of the matter remanded. *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). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the June 21, 2017, Board decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: November 30, 2018

Copies to:

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