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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4613

JERRY ORR, APPELLANT,

v.

ROBERT L. WILKIE,
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 Jerry L. Orr appeals through counsel an October 26, 2017, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for vertigo, to include as secondary to bilateral hearing loss and tinnitus, and an initial disability evaluation in excess of 50% for post-traumatic stress disorder (PTSD). Record (R.) at 2-26.¹ For the reasons that follow, the Court will set aside the portions of the October 2017 Board decision denying service connection for vertigo and an initial PTSD evaluation in excess of 50% and remand those matters for readjudication consistent with this decision.

¹The Board also increased the initial PTSD evaluation to 50% and awarded a 70% PTSD evaluation since December 16, 2011. R. at 12-18. Because those findings are favorable to Mr. Orr, the Court will not disturb them. *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."). In addition, the Board remanded for further development the issues of entitlement to (1) service connection for sleep apnea, to include as secondary to PTSD; (2) service connection for a left knee disorder; (3) service connection for bilateral carpal tunnel syndrome; and (4) a total disability evaluation based on individual unemployability (TDIU). R. at 19-26. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider the remanded issues. *See Howard v. Gober*, 220 F. 3d 1341, 1344 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2018).

I. FACTS

Mr. Orr served on active duty in the U.S. Air Force from July 1965 to August 1991. R. at 2003. During service, Mr. Orr received treatment for left ear pain, and an examiner diagnosed him with mild high frequency hearing loss when he left the Air Force. R. at 2144.

In June 2009, Mr. Orr submitted a claim for service connection for PTSD, reporting that his PTSD symptoms began in service in 1972 and had worsened over the last few years. R. at 3284, 3398-418. In June 2010, a VA examiner opined that Mr. Orr's psychiatric symptoms were severe and "cause occupation[al] and social impairment with occasional decrease in work efficiency and intermittent inability to perform occupational tasks although generally the person is functioning satisfactorily with routine behavior, self-care[,] and normal conversation." R. at 3284-89. The examiner indicated that Mr. Orr's irritability, moodiness, difficulty sleeping, and avoidance of crowds was constant and continuous. R. at 3284. He had no friends, was suspicious of others, and avoided developing relationships with anyone outside his immediate family. R. at 3286. His relationship with his sister was non-existent, and his irritability caused discord in his marriage, but he had a good relationship with his son. R. at 3285.

In August 2010, a VA regional office (RO) granted service connection for PTSD and assigned a 30% evaluation effective June 18, 2009, the date of his claim. R. at 3273. That same month, Mr. Orr filed a Notice of Disagreement (NOD), R. at 3252-54, and was afforded another VA examination in December 2011, R. at 1138-46. The examiner noted that Mr. Orr continued to suffer the same symptoms, in addition to suicidal ideation. R. at 1145. Around this time, Mr. Orr attempted suicide by taking a bottle of sleeping pills. R. at 747.

In April 2012, Mr. Orr filed a claim for service connection for dizziness and occasional staggering and stated that the condition began when he returned from Vietnam. R. at 3071-73. In July 2012, a VA examiner diagnosed Mr. Orr with benign paroxysmal positional vertigo (BPPV or vertigo) and the examiner opined that the condition was less likely than not related to service because BPPV is caused by "a dislodging of an otolith within the vestibular system," and that the cause of "the otolith dislodging is unknown, and has been attributed to many different conditions ranging from the common cold to head injury." R. at 1102. He further explained that BPPV is "a condition of the vestibular system only, and has no bearing or cause and effect relationship to hearing loss and tinnitus," because "hearing loss and tinnitus are due to injury to the hair cells in the cochlea and then the brain's interpretation of the hearing loss." *Id.*

In July 2012, the RO denied Mr. Orr's claim for service connection for vertigo, R. at 2985-91, to which he filed an NOD in September 2012, R. at 2887-90. Following an August 2013 Statement of the Case (SOC) continuing to deny his claim, R. at 2185-99, Mr. Orr appealed to the Board that same month, R. at 2181-82.

In February 2013, the RO denied an initial PTSD evaluation in excess of 30%, R. at 2253, and Mr. Orr appealed in March 2013, R. at 2209. In May 2016, the Board remanded both claims to obtain a new VA examination. R. at 1818. The ordered PTSD examination was performed in February 2017 and the examiner noted the same symptoms as the previous examinations. R. at 744-50. In April 2017, the RO increased Mr. Orr's PTSD evaluation to 70% effective February 27, 2017, the date of the most recent VA examination. R. at 111-18.

In the October 2017 decision currently on appeal, the Board denied entitlement to service connection for vertigo, to include as secondary to service-connected bilateral hearing loss and tinnitus. R. at 6-8. The Board also found that Mr. Orr was entitled to a 70% evaluation for his PTSD since December 16, 2011, and a 50% evaluation prior to that date. R. at 12-18. However, the Board determined that the evidence did not support evaluations in excess of 50% prior to December 16, 2011, or in excess of 70% thereafter. R. at 18.

II. JURISDICTION

Mr. Orr's appeal is timely and the Court has jurisdiction to review the October 2017 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

III. ANALYSIS

A. Vertigo

Mr. Orr first argues that the Board erred in relying on the July 2012 VA medical examination to deny direct service connection and secondary service connection for vertigo for two reasons. Appellant's Brief (Br.) at 8-17. Specifically, he argues that the examination was inadequate because the examiner failed to opine as to whether vertigo was directly related to service and whether it was aggravated by service-connected hearing loss or tinnitus. *Id.* The Secretary responds that the VA examiner adequately addressed the issues of direct causation and aggravation. Secretary's Br. at 13.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); 38 C.F.R. § 3.303 (2018). Secondary service connection is awarded when a disability "is proximately due to or the result of a service-connected disease or injury," 38 C.F.R. § 3.310(a) (2018), and an "[a]dditional disability resulting from the aggravation of a non-service-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a)," *Libertine v. Brown*, 9 Vet.App. 521, 522 (1996); *Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc).

Although the Secretary is not required to provide a medical examination in every case, "once [he] undertakes the effort to provide an examination when developing a service connection claim . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical opinion relied on by the Board to deny a benefit must be adequate to enable Board review. *See Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (a medical opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions"); *see also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008). An opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). An opinion regarding secondary service connection must address the issue of aggravation to be adequate. *El-Amin v. Shinseki*, 26 Vet.App. 136, 140 (2013). The Court reviews the Board's determination that a medical examination was adequate for clear error. 38 U.S.C. § 7261(a)(4). *D'Aries*, 22 Vet.App. at 104. "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)).

Every Board decision must include a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law; this statement must be adequate to enable

the claimant to understand the precise basis for the Board decision and to facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). 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*, 7 Vet.App. at 506.

In this case, the Court agrees with Mr. Orr that the July 2012 VA medical examination did not adequately address whether his vertigo was as likely as not caused by an injury during service. Appellant's Br. at 9. The examiner's rationale focused only on a potential "cause and effect relationship" between the veteran's vertigo and his hearing loss and tinnitus, without addressing linkage between the veteran's service and vertigo. *See Stefl*, 21 Vet.App. at 125 ("[A] mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign the doctor's opinion."). Although the examiner explained that vertigo is "caused by a dislodging of an otolith within the vestibular system," and that the "cause of the otolith dislodging is unknown, and has been attributed to many different conditions ranging from the common cold to head injury," the examiner failed to address whether he suffered an injury during service that could have caused the otolith to dislodge. R. at 1102; *see also Nieves-Rodriguez*, 22 Vet.App. at 301 ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). A VA medical examination is entitled to no weigh in a service-connection context if it contains only data and conclusions; rather, a reasoned medical explanation is required, which the July 2012 examiner failed to provide. *See Nieves-Rodriguez*, 22 Vet.App. at 302, 304. Remand is proper because the medical opinion was silent as to a relationship between vertigo and service and because the Board failed to obtain an adequate examination that addressed that issue before deciding entitlement to direct service connection. *See Barr*, 21 Vet.App. at 311.

The July 2012 VA opinion is also inadequate because the examiner failed to provide a rationale as to aggravation. *See Appellant's Br.* at 8. The Board found that, although the examiner did not specifically provide an opinion as to whether the veteran's vertigo was aggravated by hearing loss or tinnitus, the "opinion explains, in sufficient detail, that hearing loss has no bearing at all on the condition the [v]eteran has which causes vertigo, specifically BPPV." R. at 7. However, the text of the medical opinion does not support this finding. Although the medical examiner states that the dislodging of the otolith, which causes vertigo, "has no bearing or cause

and effect relationship to hearing loss and tinnitus," R. at 1102, the statement fails to explicitly address the issue of aggravation and does not contain the requisite reasoned medical explanation upon which the Board could reach a decision. The phrase "no bearing or cause and effect relationship to" cannot be expanded to be construed as encompassing aggravation—namely, whether a service-connected condition worsened the claimed condition. *See Allen*, 7 Vet.App. at 449. This Court has held that a medical opinion as to secondary service connection is inadequate to inform the Board's decision as to aggravation if the Board must draw an implicit inference in this manner. *El-Amin*, 26 Vet.App. at 140-41. Therefore, because the July 2012 examiner spoke only to whether Mr. Orr's hearing loss and tinnitus had a cause and effect relationship to his vertigo, R. at 1102, the opinion was inadequate to adjudicate a theory of secondary service connection based on aggravation. *See* 38 C.F.R. § 4.2 (2018) ("[I]f the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").

The Secretary attempts to distinguish *El-Amin* by observing that "the examiner clearly opined that there was no relationship *whatsoever* between Appellant's [hearing loss] or tinnitus and vertigo, the examiner's statement, unlike that of the examiner in *El-Amin*, unquestionably rules out the possibility that Appellant's service-connected [hearing loss] or tinnitus may aggravate to some degree his non-service-connected vertigo." Secretary's Br. at 14. However, as explained above, the general phrases used cannot be stretched to such a degree. The plain words make no reference to aggravation. *See El-Amin*, 26 Vet.App. at 140. The Secretary's argument is therefore unavailing.

Finally, to the extent that the Board determined that "as hearing loss and tinnitus have no relationship to the bodily system causing the [v]eteran's vertigo, remand for an aggravation opinion would not provide evidence favorable to the [v]eteran's claim," the Board impermissibly made its own medical conclusion in violation of *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991), which held that the Board "must only consider independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion." The Board did not explain the basis for its determination that another medical examination would not result in a favorable opinion, nor did it cite any independent medical evidence to justify its implicit assessment in that regard. *See Colvin*, 1 Vet.App. at 172. Remand is therefore warranted. *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").

B. PTSD Evaluation

Mr. Orr next argues that the Board provided inadequate reasons or bases for denying a PTSD evaluation in excess of 50% prior to December 16, 2011, because it did not account for all of his PTSD symptoms and did not properly assess their frequency, severity, and duration in accordance with *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013). Appellant's Br. at 17-29. These arguments are persuasive.

PTSD is evaluated as a 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 (2018). 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. And, the maximum 100% evaluation for PTSD is warranted where the evidence shows

[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 symptoms as" in § 4.130 indicates that the list of symptoms that follows is non-exhaustive, meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio*, 713 F.3d at 115; see *Sellers v. Principi*, 372 F.3d 1318, 1326-27 (Fed. Cir. 2004); *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 symptomology," 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. "[I]n the context of a 70[%] rating, § 4.130 requires not only the presence of certain symptoms but also that those symptoms have caused occupational and social impairment in most of the referenced areas." *Id.* at 117. Therefore, although the veteran's symptoms are the "primary consideration" in assigning a disability evaluation under § 4.130, the determination as to whether the veteran is entitled to a 70% disability evaluation "also requires an ultimate factual conclusion as to the veteran's level of impairment in 'most areas.'" *Id.* at 118. 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).

Here, the Board's reasons or bases for denying a PTSD evaluation in excess of 50% prior to December 16, 2011, are inadequate for two reasons. First, the Board did not adequately assess the severity, frequency, and duration of the various individual PTSD symptoms that seem to suggest more serious impairment than those symptoms it did address. For example, the Board did not discuss the record evidence that indicates that Mr. Orr's symptoms are "easily triggered by such things as seeing medical shows on television or seeing an actual doctor," and that he "frequently avoids medical care out of fear that it will trigger recollections of his experiences in Vietnam." R. at 3284. Nor did it address evidence that he "has difficulty doing normal social activities with his family, and has difficulty getting along with others at work and at home," R. at 3286; that he avoids "the development of intimacy with anyone other than the immediate family," *id.*; that he has not seen his sister in 8 years, his "relationship with his spouse is mixed with some difficulties due to his [PTSD]," R. at 3285; and that "his wife is frequently upset over his behavior," *id.* The Board also appears to have overlooked evidence of his need to "constantly [check] his

surroundings and locking doors, checking crowds, being unwilling to go into situations that he cannot easily monitor and being constantly aware of those around him," R. at 3288; that there are "outburst[s] of anger which continue to persist," R. at 3287; and that he felt "constantly nervous and tense, with poor ability to relax, and little enjoyment from any activities in his life for many years." R. at 3286.

Instead, the Board merely acknowledged that, at the June 2010 VA examination, Mr. Orr "was oriented to time and place and his appearance and hygiene were appropriate" and concluded that his symptoms did not affect his ability to function appropriately, independently, and effectively—one of the criteria for a 70% evaluation—because Mr. Orr's obsessional rituals "were not severe enough to interfere with routine activities." R. at 18. It is unclear from these statements and the Board did not explain why it found the examiner's singular assessment more probative of the level of social impairment than other evidence of record showing greatly limited functioning. The Board's conclusory finding that the veteran's difficulty maintaining relationships falls within the 50% PTSD evaluation criteria, without explaining why it did not amount to an inability to establish such relationships, does not sufficiently explain the Board's reasoning in that regard. *See Mittleider v. West*, 11 Vet.App. 181, 182 (1998); *Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 52.

Although the Board acknowledged that Mr. Orr suffered from difficulty concentrating and memory impairment, it did not discuss how Mr. Orr was affected personally or professionally by these symptoms. R. at 17. Although the Board is presumed to have considered all the evidence of record when making its decision, *see Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007), that presumption does not relieve the Board of its independent obligation to perform the analysis required by *Vazquez–Claudio*—that is, to assess the severity, frequency, and duration of psychiatric symptoms when determining the appropriate disability evaluation to assign for a service-connected mental disorder. 713 F.3d at 116-17. Where, as here, the Board fails to conduct that analysis and to address potentially favorable material evidence of record, the Court cannot conclude that the Board provided adequate reasons or bases for its decision. *See Caluza*, 7 Vet.App. at 506.

Second, the Board did not adequately explain its conclusion that Mr. Orr's PTSD symptoms caused occupational and social impairment with reduced reliability and productivity, rather than occupational and social impairment with deficiencies in most areas listed in the criteria for a 70%

evaluation. The Board did not discuss any of the listed areas individually and, to the extent that it addressed the veteran's level of occupational and social impairment at all, it did so only in the most general and conclusory terms. *See* R. at 18 ("The VA examiner indicated a level of social and occupational functioning less than occupational and social impairment with deficiencies in most areas, as required for a higher rating."). Remand is therefore warranted for the Board to more comprehensively address this relevant evidence in accordance with *Vazquez-Claudio*. *See Tucker*, 11 Vet.App. at 374.

The veteran is free on remand to present any additional arguments and evidence to the Board 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). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the portions of the October 26, 2017, Board decision denying service connection for vertigo and an initial PTSD evaluation in excess of 50% are SET ASIDE and those matters are REMANDED for readjudication consistent with this decision.

DATED: February 28, 2019

Copies to:

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