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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4553

WILLIAM H. PRATT, JR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Self-represented appellant William Pratt served the Nation honorably in the United States Army. In this appeal, which is timely and over which the Court has jurisdiction,¹ he contests an August 3, 2018, decision of the Board of Veterans' Appeals that denied him an initial disability rating greater than 30% for his service-connected PTSD and entitlement to a total disability rating based on individual unemployability (TDIU).² Because the Board's statement of its reasons or bases is inadequate to enable meaningful judicial review, we will set aside the decision and remand this matter for further proceedings.

I. ANALYSIS

Because appellant is proceeding pro se, he is entitled to both a sympathetic reading of his informal brief and a liberal construction of his arguments.³ But he still carries the burden of demonstrating error on appeal.⁴ Appellant insists that the Board erred both in declining to award

¹ See 38 U.S.C. §§ 7252(a), 7266(a).

² Record (R.) at 3-11.

³ See *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

⁴ *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

an initial disability rating greater than 30% for his service-connected PTSD as well as in refusing to grant him TDIU. Liberally construed, appellant challenges the Board's consideration of the evidence concerning his claims as well as the Board's reasoning supporting the decision on appeal. We address each issue separately.

A. Rating Greater than 30% for PTSD

The Court reviews the Board's determination of the proper level of impairment for a mental disorder for clear error⁵ while we review claimed legal errors de novo.⁶ Most relevant for this appeal, for all findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.⁷ To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant.⁸ If the Board failed to do so, remand is appropriate.⁹

Appellant's PTSD is measured against the rating criteria described in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411, which directs the rating specialist to apply the general rating formula for mental disorders. Per the general rating formula, a 30% disability rating is warranted where the evidence demonstrates

[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).^[10]

A 50% disability rating is warranted where the evidence demonstrates

[o]ccupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect;

⁵ *Johnson v. Brown*, 10 Vet.App. 80, 84 (1997).

⁶ *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc).

⁷ 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

⁸ *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

⁹ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹⁰ 38 C.F.R. § 4.130, DC 9411 (2019).

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.^[11]

Because the symptoms enumerated in § 4.130 are not an exhaustive list, the Court has held that VA must consider "all the evidence of record that bears on occupational and social impairment," and then "assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering."¹² The U.S. Court of Appeals for the Federal Circuit has explained that evaluation under § 4.130 is "symptom driven," meaning that "symptom[s] should be the fact finder's primary focus when deciding entitlement to a given disability rating" under that regulation.¹³ "[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."¹⁴ To qualify for a particular disability 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."¹⁵

Given the relevant law, the Board's statement of its reasons or bases for denying appellant a rating greater than 30% for his service-connected PTSD is not adequate for two principal reasons. *First*, the Board appeared to emphasize the symptoms appellant did *not* have to deny him a higher rating. For example, the Board recited the list of symptoms for a 50% rating and then concluded that appellant had only one of them.¹⁶ That consideration seemed to play a central role in the Board's decision.¹⁷ Such symptom counting as a basis for assigning a given rating for a mental disorder is not appropriate. As we have made clear:

Use of the term "such symptoms" in § 4.130 indicates that the list of symptoms that follows is non-exhaustive, meaning that VA is not required

¹¹ *Id.*

¹² *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

¹³ *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013).

¹⁴ *Id.* at 117.

¹⁵ *Id.*; *see* 38 C.F.R. § 4.130, DC 9411.

¹⁶ R. at 8.

¹⁷ *Id.*

to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation.¹⁸

The Board did precisely what we instructed can't be done. This error alone warrants remand.

To be clear, we are not saying that the absence of a symptom is irrelevant. It can be quite significant. But the Board must explain *why* it is citing such an absence. The Board did not do so here. On remand, the Board should be mindful of its obligation to assess the symptoms appellant displays (and their severity, duration, and frequency) and not make its determination based on symptoms that are not present. If the Board cites the absence of symptoms as part of its analysis, it must explain how the lack of symptoms plays into its analysis.

Second, the Board's discussion of the symptoms appellant does have is largely conclusory.¹⁹ It is simply not enough for the Board to list symptoms (or the absence of symptoms) and then state a conclusion. Rather, the Board must explain *why* those symptoms – assessing their severity, frequency, and duration – support its assignment of a particular rating.²⁰ As in math class, the Board must "show its work." Here, the Board fell victim to this all too common error in appeals involving mental-disorder ratings. After spending several pages reciting the evidence,²¹ the Board spent only a few paragraphs (really only a few sentences) supporting its rating determination.²² But that discussion did not explain what it was about the evidence the Board had listed that it thought supported the rating it eventually assigned. The Board on remand should pay particular attention to explaining why the symptoms it finds present justify a given rating given their effects on appellant's occupational and social functioning.

B. Denial of TDIU

The Board also denied appellant TDIU. It first concluded that he did not meet the schedular criteria for such an award under 38 C.F.R. § 4.16(a).²³ It then considered whether TDIU was

¹⁸ *Bankhead*, 29 Vet.App. at 18; *see Vazquez-Claudio*, 713 F.3d at 116-17.

¹⁹ *See, e.g.*, R. at 8.

²⁰ *See, e.g., Bankhead* 29 Vet.App. at 22.

²¹ R. at 6-8.

²² R. at 8.

²³ R. at 9.

warranted on an extraschedular basis under subsection (b) of that regulation, but concluded it was not.²⁴

We will set aside the Board's decision concerning TDIU because it is inextricably intertwined with the remanded claim seeking a higher rating for appellant's PTSD. As we have explained, "where a decision on one issue would have a 'significant impact' upon another and that impact in turn 'could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources' the two claims are inextricably intertwined."²⁵ That is certainly the case here because the assignment of a higher rating for PTSD could directly affect the reasoning the Board employed to deny TDIU. In addition, on remand the Board should carefully consider our recent decision in *Ray v. Wilkie* concerning what is required to satisfy the reasons-or-bases requirement with respect to TDIU.²⁶

C. Appellant's Rights on Remand

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.²⁷ On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's post-remand notice.²⁸ The Board must consider any such additional evidence or argument submitted.²⁹ The Board must also proceed expeditiously.³⁰

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and a review of the record, the Court SETS ASIDE the August 3, 2018, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: July 10, 2019

²⁴ R. at 10.

²⁵ *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991)).

²⁶ 31 Vet.App. 58, 67-74 (2019).

²⁷ *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

²⁸ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); see also *Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

²⁹ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

³⁰ 38 U.S.C. §§ 5109B, 7112.

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