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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5532

GLORIA M. DILLARD, 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 Gloria Dillard served the Nation honorably in the United States Army Reserve with active service in support of Desert Shield/Desert Storm. In this appeal, which is timely and over which the Court has jurisdiction,¹ she contests a September 27, 2018, decision of the Board of Veterans' Appeals that denied her an initial disability rating greater than 50% for major depressive disorder (MDD).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, she is entitled to both a sympathetic reading of her informal brief and a liberal construction of her arguments.³ But she still carries the burden of demonstrating error on appeal.⁴ Liberally construed, appellant challenges the adequacy of the

¹ See 38 U.S.C. §§ 7252(a), 7266(a).

² Record (R.) 3-12.

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

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

Board's assessment of the evidence in concluding that she is not entitled to a disability rating greater than 50% for her service-connected MDD. The Secretary concedes that the Board erred because it did not adequately explain the grounds for its decision and urges the Court to remand this matter.⁵

The Board must support all its material factual determinations and legal conclusions with a written statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."⁶ To do this, the Board "must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted . . . , and provide the reasons for its rejection of any such evidence."⁷

The Court reviews the Board's determination of the level of impairment resulting from a mental disorder for clear error.⁸ We may overturn the Board's finding only if there's no plausible basis in the record for the Board's decision and we are "left with the definite and firm conviction that" the Board's decision was in error.⁹ Appellant's MDD is measured against the rating criteria described in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9434, which directs the rating specialist to apply the general rating formula for mental disorders. Per the general rating formula, 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; 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.^[10]

A 70% rating requires evidence of

[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms

⁵ See Secretary's Brief (Br.) at 9-19.

⁶ *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

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

⁸ *Johnson v. Brown*, 10 Vet.App. 80, 84 (1997).

⁹ See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹⁰ 38 C.F.R. § 4.130, DC 9434 (2019).

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.^[11]

A 100% rating requires evidence of

[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.^[12]

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."¹³ 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.¹⁴ "[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."¹⁵ To qualify for a particular disability rating under § 4.130, a claimant must demonstrate "not only the presence of certain symptoms[,] but also that those symptoms have caused occupational and social impairment in most of the referenced areas."¹⁶

The Court agrees with the Secretary that the Board's statement of reasons or bases is inadequate. The principal reason is that the Board's discussion of appellant's symptoms is entirely

¹¹ *Id.*

¹² *Id.*

¹³ *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

¹⁴ *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013).

¹⁵ *Id.* at 117.

¹⁶ *Id.*; *see* 38 C.F.R. § 4.130, DC 9434.

conclusory.¹⁷ 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.¹⁸ 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,¹⁹ the Board essentially then did little more than state that appellant met the 50% rating criteria but did not meet those for a 70% or 100% rating.²⁰ The Board did not explain how the evidence the Board had listed supported the rating it assigned as opposed to higher ratings. 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.

The Secretary's brief articulates the ways in which the Board erred, almost all of which reflecting the conclusory nature of the Board's discussion.²¹ The Court agrees with the Secretary's arguments about the Board's specific deficiencies. The Court will order that the briefs be included in appellant's claims file to assist the Board on remand. The Board must ensure that it addresses the deficiencies the Secretary discusses when it reconsiders appellant's claim.

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.²² 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.²³ The Board must consider any such additional evidence or argument submitted.²⁴ The Board must also proceed expeditiously.²⁵

¹⁷ See, e.g., R. at 10-12.

¹⁸ See, e.g., *Bankhead* 29 Vet.App. at 22.

¹⁹ R. at 7-10.

²⁰ R. at 10-12.

²¹ See Secretary's Br. at 9-19.

²² *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

²³ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); see also *Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

²⁴ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

²⁵ 38 U.S.C. §§ 5109B, 7112.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the September 27, 2018, Board decision and REMANDS this matter for further proceedings consistent with this decision. The Court further directs that the briefs in this appeal be associated with appellant's claims file on remand.

DATED: October 16, 2019

Copies to:

Gloria M. Dillard

VA General Counsel (027)