

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

TOVANY N. FERNANDEZ,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-5619
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g)(2), Appellant, Tovany Fernandez, and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), by and through their attorneys, respectfully move the Court to vacate and to remand the May 1, 2019, Board of Veterans' Appeals (Board) decision that denied a rating above 50% for Appellant's service-connected post-traumatic stress disorder (PTSD) for the period beginning on November 15, 2012. [Record Before the Agency [R.] at 4-14].

BASES FOR REMAND

The parties agree that the Board erred by not providing an adequate statement of reasons or bases for its decision, as required by 38 U.S.C. § 7104(d)(1). The Board is required to provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of fact and law that enables the claimant to understand the precise basis for the Board's decision and facilitates review by the Court. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*

v. Derwinski, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejects evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

1. A rating above 50% for PTSD

The parties agree that the Board failed to fully discuss the effect of Appellant's symptoms on his social and occupational functioning and failed to adequately explain why Appellant was not entitled to a rating in excess of 50% in light of relevant evidence. When evaluating a rating for PTSD, the Board must provide "a holistic analysis" of the severity, frequency, and duration of the signs and symptoms of a veteran's mental disorder, determine the level of occupational and social impairment caused by those signs and symptoms, and assign an evaluation that most nearly approximates that level of occupational and social impairment. *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017); *see also Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). The Board must evaluate all the evidence of social and occupational impairment and not merely evaluate the symptoms listed in the diagnostic code. *See Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002).

Appellant's PTSD is rated under 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411. Under this DC, a 70% rating is warranted when symptoms result in "[o]ccupational and social impairment with deficiencies in most areas," and a 50%

rating is warranted when symptoms cause “[o]ccupational and social impairment with reduced reliability and productivity.”

In the decision on appeal, the Board determined that a rating above 50% is not warranted, in part, because Appellant’s “PTSD symptoms cause[] social and occupation impairment in *some* areas but not *most* areas.” [R. at 11]. In reaching this conclusion, however, the Board failed to reconcile its finding with that of the July 2014 VA examiner who determined that Appellant’s “symptoms impair his functioning and productivity at all levels of functioning.” [R. at 2403 (2396-403)]. Also, although the Board summarized the evidence showing that Appellant’s PTSD symptoms impair his occupational and social functioning, the Board failed to analyze the severity, frequency, and duration of such symptoms and their impact on Appellant’s overall functioning. See *Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007); *Mauerhan*, 16 Vet.App. at 442; *Vazquez-Claudio*, 713 F.3d at 117.

Accordingly, the parties agree that the Board failed to provide an adequate statement of reasons or bases for its finding that a PTSD rating in excess of 50% was not warranted. Remand, therefore, is warranted. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy where the Board provided an inadequate statement of reasons or bases); see also *Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506.

2. Request for a Board videoconference hearing

The parties also agree that the Board erred when it failed to address Appellant’s request for a Board videoconference hearing. Initially, on his VA Form

9, Appellant checked the box indicating that he did not wish to have a hearing before a Veterans Law Judge (VLJ). [R. at 1200-01 (June 2016 VA Form 9)]. The RO subsequently certified the appeal to the Board and also noted that Appellant did not express a desire for a BVA hearing. [R. at 1170 (January 2017 VA Form 8)]. The appeal was then certified to the Board and on December 5, 2017, the Board issued its 90-day letter. [R. at 1044]; see 38 C.F.R. §§ 19.36, 20.1304(a).

Appellant's appointed attorney representative mailed the Board a request for a video hearing on March 9, 2019. [R. at 49 (March 9, 2019, Letter from Matthew D. Hill requesting a videoconference hearing on the issue of an increased rating for PTSD)]. The parties agree that the Board erred when it did not acknowledge Appellant's request for a hearing. 38 C.F.R. §§ 3.103(c)(1), 20.1304(a). Additionally, 38 U.S.C. § 7107(b) requires that "the Board must provide a claimant an opportunity for a hearing before it decides every appeal, including after remand from the Veterans Court." *Cook v. Wilkie*, 908 F.3d 813 (Fed. Cir. 2018). Remand, therefore, is warranted for the Board to address this matter.

CONCLUSION

The parties agree that this Joint Motion for Remand (JMR) 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 except the parties' right to appeal the Court's order implementing this JMR. The parties agree to unequivocally waive any right to appeal the Court's order on this JMR and respectfully ask that the Court enter mandate upon the granting of this motion.

On remand, Appellant may submit additional argument and evidence, and the Board may seek any additional evidence it deems necessary for a timely resolution of the claim. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). Before relying on any additional evidence it develops, the Board shall ensure that Appellant is given notice thereof and an opportunity to respond thereto. *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. The Board is expected to "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). "The Court has held that '[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet.App. at 397)).

A copy of this JMR shall be associated with Appellant's VA file, along with a copy of the Court Order granting this motion, for appropriate consideration in subsequent decisions. In addition, on remand, the Secretary must also provide for

the expeditious treatment of these matters. 38 U.S.C. § 7112. The Court has held that a remand confers on the appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see also Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006).

WHEREFORE, the parties respectfully request that the Court vacate the May 1, 2019, Board decision that denied a rating above 50 percent for PTSD and remand the matter for action consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

DATE: 4/10/2020

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