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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-7042

PAUL G. CARPENTER, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran Paul G. Carpenter appeals through counsel a June 15, 2020, Board of Veterans' Appeals (Board) decision denying entitlement to an initial disability evaluation in excess of 50% for post-traumatic stress disorder (PTSD) and a total disability evaluation based on individual unemployability (TDIU). Record (R.) at 5-13.¹ For the reasons that follow, the Court will set aside those portions of the June 2020 Board decision and remand those matters for readjudication consistent with this decision.

I. FACTS

Mr. Carpenter served on active duty in the U.S. Navy from December 1963 to December 1967. R. at 6, 124, 297, 355, 463, 606, 939, 1280, 1580, 1644, 1688. Forty years following service, Mr. Carpenter filed a claim in March 2009 for service connection for PTSD. R. at 1804.

In June 2009, a VA psychologist diagnosed Mr. Carpenter with major depression but found no avoidance symptoms to support a PTSD diagnosis. R. at 1699-701. Mr. Carpenter reported a

¹ In the same decision, the Board awarded an increased initial evaluation for PTSD, from 30% to 50%, prior to May 19, 2016. Because that determination is favorable to Mr. Carpenter, the Court will not disturb it. *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.").

history of recurrent depression and anxiety, nightmares, and flashbacks. R. at 1694, 1698. He described a good relationship with his spouse and family, spending time at a friend's auto repair shop to help out and keep busy, and retiring in 2007 from his former job as an electrician due to the stress of work. R. at 1696, 1700. He reported drinking two to three times per week, four to five drinks on each occasion. R. at 1694. The examiner found no cognitive impairment, inappropriate behavior, obsessive rituals, panic attacks, suicidal ideation, or impaired impulse control and characterized the veteran's attention, concentration, and memory as intact. R. at 1697-98. The examiner concluded that depression was controlled with medication and not severe enough to interfere with occupational and social functioning. R. at 1701. In a June 2009 rating decision, a VA regional office (RO) awarded service connection for recurrent major depression with a 10% initial evaluation and denied service connection for PTSD. R. at 1688-90. He appealed the RO decision in October 2009. R. at 1655-59.

At a November 2009 VA examination, Mr. Carpenter reported symptoms of intrusive recollections, nightmares, flashbacks, and irritability. R. at 1593-94. The examiner explained that some of the veteran's symptoms were indicative of PTSD but concluded that they were insufficient to meet the criteria for a PTSD diagnosis. Instead, the examiner attributed symptoms of difficulty concentrating, decreased energy, guilt, past suicidal thinking, excessive worry, tension, and irritability to depressive disorder with associated anxiety and characterized them as causing occasional decrease in reliability and productivity. R. at 1593-94, 1597. The RO increased the 10% initial evaluation for major depression to 30% in a simultaneous December 2009 rating decision and Statement of the Case (SOC). R. at 1559-75, 1580-83. Mr. Carpenter timely perfected his appeal. R. at 1538.

At an August 2011 Board hearing, Mr. Carpenter testified that he retired in 2007 due to his mental health conditions and has no social interests or interactions with people beyond his family. R. at 1308-10. In March 2012, the Board remanded the case for VA to obtain VA treatment records and to afford the veteran a new examination. R. at 1279-85. The VA treatment records showed an October 2012 complaint of loneliness, isolation, and lack of energy and motivation. R. at 1185. In November 2012, the veteran noted moderate to severe stress but denied suicidal thoughts. R. at 1183-84. Later that month, a VA psychologist suggested a possible PTSD diagnosis. R. at 1143-44. Following group therapy in November 2012 and January 2013, a psychologist diagnosed PTSD. R. at 1136, 1142.

In June 2012, a VA examiner noted PTSD and anxiety symptoms in addition to depression, but characterized these symptoms as insufficient to meet the criteria for a second independent diagnosis. R. at 1199. However, the examiner felt that depression had worsened since 2009, finding occupational and social impairment with occasional decrease in work efficiency. R. at 1199-200. In June 2014, the Board noted the PTSD diagnosis following the June 2012 VA examination and remanded to obtain updated VA treatment records and a new PTSD examination. R. at 946-50.

In August 2014, a VA examiner concurred with the PTSD diagnosis, considered the veteran's depressive disorder to be part of PTSD symptomatology rather than a separate disorder, and characterized PTSD as causing occupational and social impairment with occasional decrease in work efficiency. R. at 810-11. Mr. Carpenter reported nightmares, flashbacks, avoidance, anger, and anxiety. R. at 815. He also reported drinking two to three drinks every day. R. at 816. The examiner noted depressed mood and anxiety but also noted intact concentration, attention, memory, insight, and judgment. R. at 815, 818.

In November 2014, VA awarded service connection for PTSD, reclassifying the veteran's service-connected depressive disorder as PTSD and continuing the existing 30% evaluation. R. at 804-06. Mr. Carpenter's spouse submitted a December 2014 statement describing his increased emotional detachment, communication problems, lack of motivation, memory problems, flashbacks, nightmares, and suspiciousness. R. at 792-93. She specified that the veteran drinks to excess, drives while drunk, and over-spends to the point of compromising their retirement accounts. R. at 792. She also specified that she must check that the veteran is dressed appropriately and wearing his false teeth before leaving the house. R. at 793. The case returned to the Board and, in March 2016, the Board remanded it again to obtain VA treatment records and afford the veteran a new examination. R. at 605-09.

At a May 2016 VA examination, the examiner characterized PTSD as causing occupational and social impairment with reduced reliability and productivity. R. at 486. Mr. Carpenter reported a good relationship with his spouse and son, weekly lunches with friends, and that he has not worked since his retirement in 2007. R. at 487-88. He reported PTSD symptoms of nightmares, anger, irritability, depression, avoidance, sleep problems, hypervigilance, and concentration problems. R. at 488. He also reported drinking three to six mixed drinks daily for the past two years. R. at 488. The examiner noted moderate PTSD symptoms of depressed mood, anxiety,

suspiciousness, chronic sleep impairment, and disturbances of motivation and mood. R. at 488, 490. The RO awarded an increased PTSD evaluation, from 30% to 50%, effective the date of the May 19, 2016, examination. R. at 463-65.

In August 2016, Mr. Carpenter applied for TDIU, reporting that he last worked as an electrician in April 2007 and stopped working due to his service-connected PTSD because he was having trouble functioning and could not work with others. R. at 358-60. His employer, Lincoln Electric System, confirmed that he retired in May 2007. R. at 311. Also in August 2016, the May 2016 examiner provided an addendum opinion that the veteran's PTSD would likely cause moderate occupational impairment and that, given the appropriate setting, support, and training, he would be able to perform occupational tasks appropriately. R. at 308. In October 2016, the RO denied entitlement to TDIU. R. at 297-98. Mr. Carpenter appealed, recalling that he took early retirement after 36 years due to the daily stress of working and reporting that his PTSD has improved since he stopped working. R. at 258-60. Following a February 2017 SOC, R. at 205-20, he perfected his appeal, R. at 193. In July 2018 the Board remanded the case. R. at 124-26.

In the June 2020 decision on appeal, the Board awarded an increased evaluation for PTSD, from 30% to 50%, prior to May 19, 2016, but denied an evaluation in excess of 50% for the entire period on appeal and entitlement to TDIU. R. at 5, 8, 11. The Board highlighted the veteran's close relationship with his family and lack of suicidal ideation, obsessional rituals, and impaired impulse control throughout the appellate period. R. at 9. The Board noted that the veteran's employer did not indicate that he had been unable to perform duties due to service-connected disability and required no concessions due to disability prior to retirement in 2007. R. at 11. The Board also reviewed the August 2016 addendum opinion suggesting that the veteran could work in the appropriate setting and noting his unpaid work in a friend's garage. R. at 12. The Board found that PTSD does not significantly impact the veteran's ability to work, noting that examiners and mental healthcare providers have consistently recorded his memory and concentration as normal. R. at 10, 12. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Carpenter's appeal is timely, and the Court has jurisdiction to review the June 2020 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determinations of the appropriate degree of disability and whether a veteran is unable to secure or follow substantially gainful employment are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Bowling v. Principi*, 15 Vet.App. 1, 6 (2001); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (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)); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) (explaining that the Court "is not permitted to substitute its judgment for that of the [Board] on issues of material fact" and therefore may not overturn the Board's factual determination "if there is a 'plausible' basis in the record for [those] determinations").

As with any finding on a material issue of fact and law presented on the record, the Board must support its degree-of-disability and TDIU determinations with adequate reasons or bases that enable the claimant to understand the precise basis for that determination and facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Cantrell v. Shulkin*, 28 Vet.App. 382, 388 (2017); *Gilbert*, 1 Vet.App. at 56-57; see *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (explaining that the need for adequate reasons or bases is "particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders"). 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board must also address all potentially favorable evidence. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order).

III. ANALYSIS

A. Entitlement to a PTSD Evaluation in Excess of 50%

Although his argument is somewhat unclear, Mr. Carpenter appears to argue that the Board erred in relying on inadequate VA medical examinations in denying entitlement to a PTSD evaluation in excess of 50%. Appellant's Brief (Br.) at 7. He also appears to argue that the Board overlooked symptoms described in his spouse's December 2014 statement and the May 2016 VA examination report that could support a 70% evaluation. The Secretary responds that the Board

clearly explained its determination as to the level of occupational and social impairment based on PTSD symptoms and that the veteran fails to identify symptoms supporting a 70% evaluation or symptoms that the Board failed to consider. Secretary's Br. at 13-14.

Mr. Carpenter's PTSD is evaluated under 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411. Under that DC, a 50% evaluation is warranted when evidence shows

[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, D.C. 9411 (2021). A 70% evaluation is warranted when evidence shows

[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.

Use of the term "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is nonexhaustive, 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 v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); 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 symptomatology," 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. In sum, VA is required to perform a "holistic analysis" in which it "assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of

occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment." *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

Mr. Carpenter argues that the examiner noted several symptoms in diagnosing PTSD, such as recurrent distressing dreams, avoidance, negative emotional state, diminished interest, irritability, angry outbursts, hypervigilance, concentration problems, and sleep disturbances but only reported symptoms of depressed mood, anxiety, suspiciousness, chronic sleep impairment, and disturbances of motivation and mood in assessing PTSD severity. Appellant's Br. at 10-11, Appellant's Reply Br. at 1-2. The Secretary responds that this method of recording symptoms did not render the examination inadequate and emphasizes that Mr. Carpenter is not claiming that the examiner failed to note any symptoms. Secretary's Br. at 11-12.

Mr. Carpenter's argument is not persuasive. The Board noted depression, anxiety, memory and concentration impairment, panic attacks, angry outbursts, impulse control problems, difficulty maintaining relationships, and disturbances of motivation and mood, chronic sleep impairment, nightmares, intrusive thoughts, and hypervigilance. R. at 8-9. The manner in which the examiner recorded these symptoms does not appear to have hindered the Board's consideration of them. Therefore, the Court cannot conclude that the May 2016 VA examination was inadequate.

However, the Court agrees with Mr. Carpenter that the Board otherwise provided inadequate reasons or bases for its PTSD evaluation. Although the Board catalogued many of the veteran's PTSD symptoms, its focus on the symptoms listed in the criteria for 30% and 50% evaluations caused it to overlook symptoms that may suggest a greater degree of occupational and social impairment. For example, the Board did not discuss record evidence of impaired impulse control, neglect of personal appearance, and difficulty in adapting to stressful circumstances such as work or a work-like setting, symptoms included in the criteria for a 70% evaluation. *See* 38 C.F.R. § 4.130.

The Board noted impulse control problems, R. at 8, but found no impaired impulse control, R. at 9, without discussing the veteran's increasing drinking, spending, or impaired driving. In June 2009, Mr. Carpenter reported drinking two to three times per week, R. at 1694, and but in August 2014, he reported drinking two to three drinks daily, R. at 816, and in May 2016 he reported drinking three to six mixed drinks daily, R. at 488. In December 2014, his spouse indicated that the veteran drinks to excess, drives while impaired, and over-spends to the point of compromising

their retirement accounts. R. at 792. She explained that he recognizes the danger of his actions but cannot stop himself without her intervention nor can he refrain from repeating the same behavior. *Id.* She further specified that she must check that the veteran is dressed appropriately and wearing his false teeth before leaving the house. R. at 793.

Moreover, in August 2016, the May 2016 examiner provided an addendum opinion that the veteran's PTSD would likely cause moderate occupational impairment and that, given the appropriate setting, support, and training, he would be able to perform occupational tasks appropriately. R. at 308. The Board considered the August 2016 addendum opinion regarding his employability for TDIU, R. at 12, but did not consider this as potentially favorable evidence showing difficulty in adapting to stressful circumstances including work or a worklike setting. Rather, the Board found no evidence that PTSD significantly impacts the veteran's ability to work, without discussing that opinion. R. at 10. The unexplained disparity between the foregoing evidence and the Board's findings suggests that the Board did not have an accurate and complete picture of the severity, frequency, and duration of Mr. Carpenter's PTSD symptoms. Although the Board is presumed to have considered all evidence of record when making its decision, *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; *see also Mittleider*, 11 Vet.App. at 182.

The Board's failure to resolve that discrepancy and to otherwise address this favorable evidence prevents Mr. Carpenter and the Court from understanding the Board's reasoning for its implicit rejection of that evidence and renders inadequate the Board's reasons or bases for denying a PTSD evaluation in excess of 50%. *See Bankhead*, 29 Vet.App. at 22; *Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 57. Remand of the claim 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. Entitlement to TDIU

As to TDIU, Mr. Carpenter repeats the argument that the Board failed to review evidence of record. Appellant's Br. at 12-13. He further argues that the May 2016 examiner failed to address

the standard for TDIU. *Id.* at 13. The Secretary counters these arguments. Secretary's Br. at 16-17.

Mr. Carpenter's argument regarding the examiner's failure to address the standard for TDIU is unpersuasive. There is no reasons-or-bases requirement imposed on VA examiners. *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). Moreover, with regard to TDIU specifically, "the authority to make the ultimate determination of whether a veteran meets the § 4.16 standards for TDIU belongs exclusively to the VA adjudicator and may not be delegated out to one of the agency's medical examiners." *Delrio v. Wilkie*, 32 Vet.App. 232, 243 (2019) (citing *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013), and *Floore v. Shinseki*, 26 Vet.App. 376, 381 (2013)). Consequently, the examiner's failure to discuss the standard for TDIU does not constitute error.

Nevertheless, the Court concludes that the issue of entitlement to TDIU must be remanded along with the PTSD claim because it is inextricably intertwined with entitlement to an increased initial evaluation for PTSD. Specifically, the Board's reevaluation of the potentially favorable evidence of difficulty adapting to stressful circumstances such as work may overlap with its analysis of whether PTSD precludes substantially gainful employment. Because the adjudication of the proper evaluation level for PTSD may impact his entitlement to TDIU, the two issues will be remanded together. *See Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (explaining that, "in the interests of judicial economy and avoidance of piecemeal litigation," claims that are "intimately connected" should be adjudicated together); *Tucker*, 11 Vet.App. at 374.

On remand, Mr. Carpenter is free to submit additional arguments and evidence, including the arguments raised in his briefs to this Court, in accordance with *Kutcherousky v. West*, 12 Vet.App. 369, 372-72 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *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 June 15, 2020, Board decision denying entitlement to a disability evaluation in excess of 50% for PTSD and entitlement to TDIU

are SET ASIDE and those matters are REMANDED for readjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: February 28, 2022

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