

In the

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MICHELLE A. CHRYSTAL

Appellant

v.

ROBERT A. McDONALD

*Secretary of Veterans Affairs
Appellee*

APPELLANT'S OPENING BRIEF
(Corrected)

DOCKET NO. 15-4104

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STATEMENT OF THE ISSUES

- A. Whether the Board's determination that the veteran was not eligible for higher mental disability ratings between January 1989 and March 1997 should be reversed given that substantial evidence of record shows total occupational impairment between March 1992 and March 1997 and severe impairment from January 1989 to February 1992, or remanded due to the Board's failure to substantially comply with previous remands?
- B. Whether the Board's determination that the veteran's service connected disabilities did not render him unemployable requires remand because its analysis did not comply with the requirements of 38 C.F.R. 4.16?

STATEMENT OF THE CASE

Michelle Chrystal, substituted Appellant¹ for accrued benefits purposes, is the surviving spouse of Vietnam veteran Robert Chrystal. The veteran's current PTSD ratings are 30% between January 1989 and February 1994, 70% between February 1994 and March 1997, and 100% thereafter. She seeks reversal of the October 6, 2015 Board decision that found the veteran ineligible for higher ratings and/or a finding of unemployability between 1989 and 1997. R. 2-26.

FACTS AND PROCEEDINGS BELOW

This honorably discharged wartime veteran served in the U.S. Army from January 1968 to June, 1971, including service in the Republic of Vietnam as a Hawk Missile Fire Control Operator from July 17 to August 2, 1969 R. 26, 91, 133, 135. He received the Vietnam Service Medal. *Id.*

¹ In June 2008, the veteran died while his case was on appeal at this court. CAVC 7-1039. In February 2009, the Court substituted his surviving spouse as Appellant. CAVC 08-11295.

His service entrance and separation examinations were negative for psychiatric disorders. R. 261-62; 291-94 (SMR's 260-316). While in Vietnam the veteran presented at a field mental health clinic with complaints of "migraine headaches." The diagnostic impression was "anxiety reaction, doubt migraine headaches."² R. 281 (7/22/69).

1. Lay and Medical evidence.

a. The veteran's lay description of his post-Vietnam mental status.

At his April 1, 1992 VARO hearing the veteran stated: "I'm just very depressed all of the time. I don't know if it's 90% because I'm very unhappy with my life that I can't find work." R.3509 (3496-3512). "The longest I worked was for a George C.Field Company in Essex for about a year and a half. That was probably 72, 73, maybe something like that." *Id.* He last worked in January 1991:

"I helped a guy sheetrock for a while...I've been on welfare with the town and Soldier's and Sailors relief fund... I never could hold a job because either I didn't come in because of a headache or I wouldn't come in because my feet hurt and they would fire me..."

Id.

In his 1994 application for Social Security and Connecticut Disability Determination Services Questionnaire he added more details: "I've never been able to hold down a job or relationship since Vietnam – I was told while in West

² In 2003, Dr. Randy Gergal diagnosed this anxiety reaction as "acute stress disorder," it stated it was predictive of PTSD for this veteran. R. 1110-11.

Haven VA I have an ADH disorder besides my PTSD and depression along with all my bodily problems.” R. 3228 (R. 3146-47, 3222-3235). “Yes my back is bad enough but depression is worst because no income and to be a burden on my old retired parents who can hardly feed themselves.” R. 3146. “I don’t have any friends, nobody bothers with me – I’m the black sheep of the family.” R. 3226. “Mostly I just lay in bed depressed.” R. 3222.

b. Medical evidence.

The record shows that the veteran’s mental disorder symptoms were apparent shortly after discharge. In May 1972, a psychiatrist prescribed Stelazine, a major tranquilizer. R. 3046 (Letter from Dr. Sanford). In 1981 he began taking Valium “for anxiety neurosis that sometimes became disabling.” *Id.*

Between 1988 and 2006 five psychiatrists diagnosed PTSD, depression and substance abuse and they all agreed these conditions began in Vietnam. R. 1150-52 (4/18/02, Dr. Randy Gergal), 1644-1651 (3/03, Dr. Mary Berg); 2349-50 (7/88, Dr. Ann Price); 3059 (R. 3056-3061) (3/97, Dr. Gottschalk). They described severe symptoms. In July 1988, Dr. Price wrote:

“I talked with Mr. Chrystal for approximately one and a half hours and reviewed his records. Both sources of information are deemed to be reliable. Mr. Chrystal reports that while in Vietnam he witnessed the death of a young girl...[He is] an extremely depressed white male...suffering from PTSD. Mr. Chrystal exhibits symptoms of serious depression, at the earliest possible time he needs to be transferred to a psychiatric facility for treatment of his depression and polysubstance abuse disorders.

R. 2349-2350.

In January and February 1994 the veteran spent 23 days in the VA hospital. R. 3260-66. The attending psychiatrist, Dr. Saab, diagnosed bipolar disorder and substance abuse. R. 3260. The veteran's GAF on admission was 25 but was 60 over the past year. *Id.* He described experiencing fluctuating depression symptoms since Vietnam. *Id.* Upon release from the VAMC, the veteran was referred to the outpatient Mood and substance abuse clinics. R. 3266.

In 1998 Dr. Bassam Awwa diagnosed him with severe PTSD complicated by substance abuse and personality changes. R. 2186 (2185-86). He described the veteran's history of longstanding symptoms:

He reports that in 1992 he became addicted to heroin but managed to stop using all substances about five years ago, per his report, after he went to rehabilitation treatment at West Haven VA. He reports that he was also diagnosed with antisocial personality because he does not like being around people, he is reactive, he takes off impulsively when he gets upset, and he can't hold down a job. He at the present time continues to experience flashbacks and nightmares. He experiences periods of depression where he cannot sleep for days."

R. 2185. He found the veteran unemployable: "It is my impression that his psychological coping skills and defenses are quite compromised and render him severely impaired and incapable of managing the demands of work, especially if that was in a competitive environment." *Id.*

Dr. Randy Gergal, the veteran's Asheville VAMC psychiatrist from 2002 until he passed away in 2008, also described longstanding symptoms:

Mr. Chrystal has had chronic emotional sequelae resulting from his military experiences. *He has experienced persistent symptoms of depression and frequent suicidal ideation, and he has a history of two suicide attempts.* He has had nightmares of the war regularly for years, and

he has had *daily intrusive memories of traumatic events that he experienced*. He has tried hard to avoid reminders of the war, and typically has kept painful feelings to himself. He has had long term guilt about his actions in Vietnam, and about having survived the war when others around him died. He has been socially isolative and has had great difficulty with interpersonal relationships. He has been hypervigilant and generally distrustful of others, for years. *He has lost many construction jobs because of inability to function around others... These impairments render him incapable of obtaining and maintaining any type of gainful employment, and there is no likelihood whatsoever that his condition will improve to the point that he could resume employment.*”

R. 1110-1111 (8/03). Additional medical evidence will be discussed in the proceedings and argument.

2. Proceedings below.

In January 1989, the veteran applied for service connection:

“Unable to keep jobs do (sic) to emotional problems from Vietnam and drug use that started there. Also, have severe headaches since then. Also have bad back injury and have applied at SS for assistance both was told to apply to VA for help. Also have failing memory which causes problems at jobs and living in general – please help.”

R. 3714-3717. In January 1991 he applied for nonservice connected (NSC) pension. R. 3448-49. For income he wrote “0. Live with parents.” *Id.*

In March 1991 VA provided a medical examination. R.3550-3552. The examiner, Dr. Kim, noted that the veteran’s records were incomplete but proceeded with the examination. He found “no significant acute disease.” R. 3550. He diagnosed “personality disorder with passive/aggressive, dependent features.” *Id.* Dr. Kim also noted the veteran’s physical problems and stated that that the veteran was unemployed for the past year and lived with his parents. *Id.*

At his April 1, 1992 VARO hearing the veteran complained about his 1991 VA examination, stating that it only lasted for 7 minutes and during that time the examiner ate his lunch, answered the phone, and looked at another file. R. 3497.

In August 1992 the Board remanded for record development and a new medical examination. R. 3425-30. First, it noted the veteran's complaint about his 1991 examination. R. 3426. Next, it determined that the veteran's claim was a likely PTSD claim . R. 3428. After it undertook further development of the evidence, the Board required VA to obtain a new psychiatric examination. The VA examiner was supposed to determine the nature and extent of the veteran's mental condition, based upon a complete review of the veteran's history and claims file. *Id.* A new examination was not performed on remand. When the case returned to the Board in 1996, the Board again remanded for further development and a new psychiatric examination. R. 3118 (3108-3119). It instructed VA to provide the examiner with a complete claims file in order to ensure a comprehensive review of the veteran's entire history. R. 3119. The examiner was to indicate the veteran's overall psychological, social, and occupational functioning using the Global Assessment Functioning (GAF) scale in the DSM. R. 3118-19.

In March 1997 Dr. Peter Gottschalk performed that VA examination. He diagnosed longstanding PTSD, depression, and substance abuse:

There are also elements of both his PTSD and depression manifested by his passive suicidal thinking, such as "If I had died in Vietnam, I'd be a hero, instead my life is a mess."...

...In addition, the documents which he provided, which consisted of surveys or forms that he filled out for his Social Security Disability rating in the past and some of his prior evaluations here at the West Haven VA, indicate that he *has had periods of major depression consisting of severe mood instability, sadness and suicidal ideation, total lack of energy, inability to get out of bed or out of the house, lack of ambition or volition of any kind, and excessive sleep and excessive eating.* These also, I think, have been major issues interfering with his ability to work and ability to follow through on treatment or even to comply with appointments or evaluations at various times here and elsewhere....

The other main diagnosis alluded to in Dr. Price's [1988] evaluation is major depression, which I mentioned earlier, *some of the symptoms of which persist...*

In terms of his general review of psychiatric or psychological symptoms, I have noted impairment of thought process, ...*He has had periods of significant suicidal thoughts as well as episodes of rage which probably were accompanied by homicidal ideation or threats.* He definitely has had significant periods of inability to maintain minimal personal hygiene and activities of daily living. He notes that he has significant long-term memory problems which I think are a function of both his major Axis I disorders. He has had symptoms of panic attacks which are in the mild to moderate range, periodically, usually elicited by anticipatory symptoms, *long periods of significant depression* and sleep impairment, as noted above.

In summary, I would say that the patient suffers from a variety of disorders the *combination of which have seriously impaired his ability to function over a long period of time,* and as, noted, *significantly interfered with both his ability to maintain connection with treatment or comply with plans for evaluation* and also affected, I think, significantly, the ability of some of his examiners to provide an objective review and synthesis of his symptoms in that his appearance could be superficially labeled as selfish or obstinate or any number of other qualifiers that do not aid in the diagnosis of straight forward psychiatric and characterological disorders.”

R. 3059-3060 (3056-3061). Also, Dr. Gottschalk discredited previous evaluations:

“It is apparent to me that part of the problem with his prior evaluations, follow-up and connection to treatment has been *the severity of his*

depression at times to the point that he has been unable to get out of bed or out of the house for long periods of time.”

R. 3057-58.

Also, Dr. Gottschalk provided retrospective GAF scores: the overall GAF score was in the “ 25-35 range over the past year when not in jail;” the PTSD GAF score was “45 at various times including the last year;” the major depression GAF score was “25 for the majority of the past five years;” the polysubstance abuse GAF was “45-55 over last 5-10 years.”³ *Id.*

In August 1997 VA partially granted the veteran’s claim for NSC pension, back to October 22, 1993. R. 3018-23. VA found that the veteran was permanently and totally disabled for pension purposes as of October 22, 1993.⁴

R. 3023. It rated his nonservice connected conditions at 80%; 50% for bipolar disorder/ depression, 10% anxiety reaction, 0% PTSD, 10% personality disorder, 10% back condition, 10% bilateral pes planus, 0% right knee status post arthroscopy, 10%; right wrist, status post fracture. R. 3020, 3023. Polysubstance abuse of alcohol, marijuana, cocaine, heroin and Percocet was noncompensable due to misconduct. 3022-23. PTSD was not rated due to lack of stressor verification. *Id.*

³ A GAF score of 25-35 denotes behavior considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment OR inability to function in almost all areas (stays in bed all day, no job, home, or friends.) A GAF score between 45 and 55 indicates serious symptoms OR serious impairment in social, occupational, or school functioning (i.e. no friends, unable to keep a job).

⁴ That effective date was based on a fully favorable Social Security determination, not the date he applied for pension (i.e. 1991). See R. 3192-3203. (12/9/04).

In 2003 and 2006 psychiatrist Dr. Mary Berg provided VA medical opinions. R. 891-94 (9/06), 1644-1651 (3/03). She diagnosed PTSD, depression, and substance abuse. In her 2003 opinion she connected the veteran's severe PTSD, major depression and substance abuse to service. R. 1650. In 2003 and 2006 she related his "...difficulty keeping a job due to being unable to work around people and due to anger outbursts" to PTSD. *Id.*, R. 892. "He last worked 18 years ago as a carpenter and had to quit because of health problems as well as his mental problems." *Id.*

In 2004 the BVA awarded service connection for a "psychiatric disorder, including post-traumatic stress disorder and substance abuse." R. 1228-29, 1231 (1228-35). The VARO assigned staged ratings and the veteran appealed. R. 989 (VA 9), 1056-66 (NOD), 1228-35 (8/04 Rating decision). In 2007, effective March 27, 1997, a 100% rating was assigned due to total occupational impairment. R. 844 (841-63). The veteran appealed his ratings between 1989 and 1997. See CAVC 07-1039.

In 2008, the parties entered into a Joint Motion for Partial Remand (JMPR). R. 743-51. The Board was required to provide a statement of reasons and bases that adequately accounted for (1) the veteran's severe PTSD and major depression symptoms between January 1989 and March 1997, as described in the retrospective 1997 C & P examination; (2) the veteran's overall disability picture from depression, substance abuse and PTSD in light of the rating schedule and his GAF

scores; and (3) explain whether favorable findings in the 1997 NSC pension decision were binding. R. 745-51. In June 2008 the veteran passed away. His surviving spouse was substituted as Appellant and the case was remanded to the Board. CAVC 08-11295 (2009).

The Board remanded the case to the VARO and the VARO increased the veteran's ratings to 30% between January 1989 and January 1994 and to 70% between February 1994 and March 1997. R. 468-70. In 2014, the Board affirmed these ratings. R. 370-392 (6/4/14). A rating higher than 30% between 1989 and 1994 was not warranted because depression was not related to service. The 1997 VA examination and GAF scores were not applied retrospectively. The Board did not address TDIU or whether the 1997 pension decision was binding. Appellant again appealed to this Court. CAVC 14-3161.

In 2015, the parties agreed that the Board failed to substantially comply with the 2009 remand and to a JMR. R. 359-368 (2/12/15). The JMR directed the Board to address (1) whether the veteran's depression was related to his PTSD or service, (2) the 1997 VA medical opinion and apply it and the retrospective GAF scores retrospectively, considering the veteran's "long periods of depression," and his active substance abuse, (3) address whether the 1997 NSC pension decision was binding, and (4) address the veteran's eligibility for TDIU under 38 C.F.R. sec. 4.16. *Id.*

October 6, 2015 Board decision. The veteran's 30% rating from January 1989 to January 1994.⁵ The Board relied on the 1991 VA examination and Dr. Saab's 1994 discharge summary to affirm the 30% rating. The veteran's nonservice connected depression symptoms could not be separated from his PTSD symptoms so depression was part of the rating. R. 18-20 (2-26). However, a higher rating was not warranted because "no clinical assessment of depression was obtained during this time period due to the veteran's failure to report for several VA examinations." *Id.* Regarding unemployability, the veteran's inability to work during this time was solely due to his physical disabilities. *Id.* Thus, neither substance abuse nor Dr. Gottschalk's retrospective opinion was factored into that rating. Next, the 1997 NSC pension decision was not controlling in rating his service connected conditions. R. 20-21. As for the rating between January 1994 and March 1997, a 100% schedular rating was not warranted. R. 21-22. Also, TDIU was not warranted because his inability to work during this time was due to both physical and mental disabilities. *Id.*

SUMMARY OF THE ARGUMENT

Appellant seeks reversal of the Board decision due to the following clear errors: the Board understated the severity of the veteran's PTSD when it relied upon the inadequate 1991 VA examination and the 1994 discharge summary and failed to take substantial medical and lay evidence into account; its determination

⁵ The Board awarded a temporary total evaluation November 30, 1994 and December 29, 1994 due to the veteran's in patient substance abuse treatment.

that the veteran's depression was not clinically assessed ignores Dr. Gottschalk's retrospective examination; it underestimated the veteran's social and occupational impairments as shown by the 1997 examiner's his retrospective GAF scores; and its determination that the 1997 NSC pension decision was not binding does not accord with applicable law and regulations. Also, its analysis of the veteran's eligibility for TDIU between 1989 and 1997 is not in accordance with 38 C.F.R. sec. 4.16 because it did not base its determination as to the veteran's employability upon his service connected disabilities alone. Alternatively, Appellant seeks a remand to the Board for substantial compliance with the 2015 JMR.

JURISDICTION AND STANDARD OF REVIEW AND REVIEWABILITY

This Court has jurisdiction under 38 U.S.C.A. secs. 7252 (a)(1), 7266.

Reversal is warranted only when there is absolutely no plausible basis for the decision and where the Board's decision is clearly erroneous in light of the uncontroverted evidence in the appellant's favor." *Hicks v. Brown*, 8 Vet. App. 417, 422 (1995). The adequacy of a rating and a veteran's eligibility for TDIU are questions of fact that are reviewed under the "clearly erroneous" standard of review. 38 U.S.C. § 7261 (a)(4); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). Interpretation of a regulation is a question of law that is reviewed *de novo*. 38 U.S.C. 7261(a)(1), *Cullen v. Shinseki*, 24 Vet.App. 74, 78 (2010). This Court may set aside agency conclusions as unlawful that are "arbitrary, capricious, [or] an abuse of discretion, in violation of statutory right, not in accordance with law, or without observance of procedure required by law." 38 U.S.C. sec. 7261(a)(3).

Alternatively, remand is required when the Board fails to substantially comply with a remand. *Stegall v. West*, 11 Vet.App. 268 (1998).

ARGUMENT

A. Substantial lay and medical evidence of record supports higher ratings between 1989 and 1997.

When evaluating a service-connected mental disorder, VA must assess a number of factors such as "the frequency, severity, and duration of psychiatric symptoms." 38 C.F.R. 4.126(a); *Vasquez-Claudio v. Shinseki*, 715 F.3d 112, 117 (Fed. Cir. 2013). Here, VA and the Board applied the pre-1996 mental disability rating schedule.⁶ The categories are as follows:

30%: Definite impairment in the ability to establish and maintain effective and wholesome relationships with people with psychoneurotic symptoms resulting in such reduction in initiative, flexibility, efficiency and reliability levels as to produce definite industrial impairment, and this contemplates impairments of mood and hindrances to employment described above.

50% : Ability to establish or maintain effective or favorable relationships with people is considerably impaired. By reasons of psychoneurotic symptoms the reliability, flexibility and efficiency levels are so reduced so as to result in considerable industrial impairment.

70%: Ability to establish and maintain effective or favorable relationships with people is severely impaired. The psychoneurotic symptoms are of such severity and persistence that there is severe impairment in the ability to obtain or retain employment.

100%: The attitudes of all contacts except the most intimate are so adversely affected as to result in virtual isolation in the community. Totally

⁶ Effective November, 1996, the Secretary amended the regulatory criteria governing mental disorders, including PTSD. SEE Schedule for Rating Disabilities; Mental Disorders, 61 Fed.Reg. 52,695-52,702 (Oct. 8, 1996) (redesignating 38 C.F.R. sec. 4.132 as 38 C.F.R. sec. 4.130).

incapacitating psychoneurotic, symptoms bordering on gross repudiation of reality with disturbed thought or behavioral processes associated with almost all daily activities such as fantasy, confusion, panic, and explosions of aggressive energy resulting in profound retreat from mature behavior. Demonstrably unable to obtain or retain employment.

38 C.F.R. secs. 4.132, DC 9411 (1996); *Cohen v. Brown*, 10 Vet.App. 128 (1997).

Substantial evidence in this record shows that the veteran's ability to maintain effective relationships and to retain employment was severely impaired. For example, in his 1994 Social Security application statement he wrote: "I don't like to be around people cause of problems in Vietnam." R. 3330. His statement is supported by substantial evidence of record:

- Dr. Price in 1988: "He is an extremely depressed white male suffering from PTSD. Mr. Chrystal exhibits symptoms of *serious* depression, at the earliest possible time he needs to be transferred to a psychiatric facility for treatment of his depression and polysubstance abuse disorders. R. 2350.
- Dr. Saab's 1994 diagnosis: "Anhedonia or pervasive loss of interest in almost all activities, sleep disturbance, decreased energy, feelings of guilt and worthlessness, difficulty concentrating or thinking; Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive symptoms." R. 3260.
- Dr. Gottschalk 1997 retrospective examination: "In summary, I would say that the patient suffers from a variety of disorders the combination of which have *seriously impaired* his ability to function over *a long period of time*, and as noted, *significantly interfered* with his ability to maintain connection with treatment or comply with plans for evaluation." R. 3060.
- Dr. Awwa's 1998 letter: He reports that he was also diagnosed with antisocial personality disorder because he does not like being around people, he is reactive, he takes off impulsively when he gets upset, and he can't hold down a job. He at the present time continues to experience flashbacks and nightmares. He experiences periods of depression where he cannot sleep for days. R. 2185.

Also, in 1992 the veteran described longstanding impairment in his ability to obtain or retain employment: “The longest I worked for George C.Field Company in Essex for about a year and a half. That was probably 72, 73, maybe something like that.” R. 3506. “I’m just very depressed all of the time. I don’t know if it’s 90% because I’m very unhappy with my life that I can’t find work.” R. 3509. In his 1994 application for Social Security: “I’ve never been able to hold down a job or relationship since Vietnam – I was told while in West Haven VA I have an ADH disorder besides my PTSD and depression along with all my bodily problems.” R. 3228. In 1994 he wrote: “I don’t like to be around people cause of problems in Vietnam.” R. 3330. His statements were supported by three VA examiners:

- Dr. Gottschalk’s 1997 Examination: Retrospective GAF scores for PTSD 45 *many times including over the past year*, major depression 25 for the *majority of the past five years*. R. 3061.
- Dr. Randy Gergal: “He has been hypervigilant and generally distrustful of others, for years. He has lost many construction jobs because of inability to function around others...” R. 1111 (2003).
- Dr. Mary Berg: “He had difficulty keeping a job for very long due to being unable to work around people and due to anger outbursts; he last worked 18 years ago as a carpenter and had to quit because of health problems as well as mental problems. R. 892 (2006).

Further, these doctors also connected the veteran’s major depression and symptomatic substance abuse (addiction) to service. *Id.* All of these service connected conditions severely impaired this veteran’s relationships and ability to obtain or retain employment between 1989 and 1997.

1. Instead of addressing this substantial lay and medical evidence, the Board relied upon the inadequate 1991 VA opinion and one 1994 VAMC discharge record to deny a rating higher than 30% between 1989 and 1994.

A VA medical opinion is adequate “where it is based upon consideration of the veteran’s prior medical history and examinations” and “describes the disability...in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one.” *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). An adequate medical opinion must not only rely upon correct facts and reasoned medical judgment, *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012), but also a reasoned medical explanation connecting clear conclusions with supporting data. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

The Board relied on the 1991 opinion and one 1994 VA medical record to deny a rating higher than 30%. However, in 1992 and 1996 the Board acknowledged that 1991 VA examination was inadequate and remanded for a new medical examination and set forth requirements that the 1991 exam did not meet. *Id.*, *Stefl, supra*, 21 Vet.App. at 123. The 1992 Board remand implicitly or explicitly acknowledged the inadequacies of the 1991 examination because it mentioned the veteran’s 1992 complaint that the examiner was distracted and the exam only lasted 7 minutes as well as the examiner’s statement that the record was incomplete. R. 3426. It also acknowledged that the 1991 examination did not address PTSD. R. 3428. In its 1996 remand the Board again implicitly found that the 1991 examination was inadequate because it remanded for a medical exam

“based a thorough review of the veteran’s file” and instructed the VA examiner to assign GAF scores in accordance with the DSM. 3118-19. In 1994, the VA psychiatrist diagnosed bipolar disorder. R. 3260. Based upon its 1991 and 1996 findings, the Board could not reasonably rely upon the 1991 medical examination or the 1994 medical record to evaluate his PTSD because neither addressed PTSD. *D’Aries v. Peake*, 22 Vet.App. 97, 106 (2008).

Thus, the favorable 1997 VA examination was uncontroverted. *Hicks, supra*, 8 Vet.App. 417. Indeed, unlike the 1991 examiner, the 1997 VA examiner complied with the 1996 Board remand. He based his opinion upon a complete review of the veteran’s history, fully described the veteran’s disability history and mental conditions, and evaluated the veteran’s overall psychological, social, and occupational functioning by applying the DSM GAF scale. R. 3118-19. For all of these reasons, the Board’s rating determination was based upon inadequate medical evidence and disregarded probative evidence in the record,. *D’Aries*, 22 Vet.App. at 104. (Medical opinions that rely on mistaken analysis or incorrect facts are not competent evidence).

Accordingly, the Board’s decision to affirm the 30% rating between 1989 and 1994 was clearly erroneous and requires reversal. 38 U.S.C. sec. 7261(a)(4); *Gilbert, supra*, 1 Vet.App. at 52. Appellant was prejudiced by the Board’s failure to apply the uncontroverted favorable 1997 examination retrospectively because it deprived the veteran of higher ratings. See 38 U.S.C. sec. 7261(b)(2).

2. The Board's finding that a higher rating was not warranted because the veteran's depression was not clinically assessed was clearly erroneous and should be reversed.

Substantial medical evidence of record establishes not only that that the veteran's major depression was clinically assessed but also that it was related to service. *Mauerhan v. Principi*, 16 Vet.App. 436, 440-444 (2002).

The 1996 Board remand required the VA examiner to describe the veteran's overall "psychological, social, and occupational functioning using the Global Assessment Functioning (GAF) scale in the DSM." R. 3118-19. In 1997 the VA examiner, Dr. Gottschalk, complied with the Board's remand. R. 3056-3061. He diagnosed PTSD, major depression and substance abuse. The veteran's depression was severe:

"He has had periods of major depression consisting of severe mood instability, sadness, suicidal ideation, total lack of energy, inability to get out of bed or out of the house, lack of ambition or volition of any kind, and excessive sleep and excessive eating. These also, I think have been *major issues interfering with his ability to work and ability to follow through on treatment or even to comply with appointments or evaluations at various times here or elsewhere.*"

R. 3059-60. He also assigned a retrospective depression GAF score of 25 "for most of the past five years." *Id.* at 3061. His clinical assessment accorded with the DSM. *Id.* Importantly, this retrospective GAF score corresponded with the veteran's description of his symptoms during this time and the impressions of five other psychiatrists. R. 2349-50 (Dr. Price), 3260 (Dr. Saab); 2185 (Dr. Awwa) 1110-11, 1150-52 (Dr. Gergal); 1644-51 (Dr. Berg). Also, his clinical assessment was sufficient to establish a 100% rating under 38 C.F.R. 4.132 because it

confirmed the veteran's "inability to function in almost all areas, i.e. stays in bed all day, no job, home, friends." *Id.*

Accordingly, reversal is required because the Board's finding that the veteran's depression was not clinically assessed was clearly erroneous. *Gilbert, supra.* 1 Vet.App. at 52. This prejudicial error deprived the veteran of a higher rating back to at least March 1992. 38 U.S.C. sec. 7261(b)(2).

3. The Board's failure to apply the 1997 VA examiner's retrospective GAF scores retrospectively was clearly erroneous and requires reversal.

A rating evaluation must be based on "all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination." *Vasquez-Claudio, supra,* 715 F.3d at 117. Here the Board's failure to assess the veteran's GAF scores caused it to lose track of its regulatory imperative to evaluate all the evidence of record rather than solely rely on one examiner's assessment "of the level of disability at the moment of examination." 38 C.F.R. 4.126(a).

In its 1996 remand, the Board specifically required the VA examiner to assess the veteran's psychological, social and occupational functioning by providing GAF scores that accorded with the DSM. R. 3118-19. The 1997 VA examiner provided those GAF scores. R. 3061. The veteran's an overall GAF score was in the "25-35 range *over the past year when not in jail;*" the PTSD GAF score was "45 *at various times including the last year;*" the major

depression GAF score was “25 for the *majority of the past five years*;” the polysubstance abuse GAF score was “45-55 *over last 5-10 years*.”⁷ *Id.*

In 2007 the Board relied on the 1997 VA examination to award a 100% rating but only from March 1997. It stated that the veteran’s

“... overall picture more nearly approximates the criteria (“total occupational and social impairment”) for a 100% rating. Accordingly, a 100 percent evaluation is warranted for the period after March 27, 1997.”

R. 844. Turning to GAF scores, it stated:

“In regard to GAF scores, the examiner found that for the previous year, his GAF score was 25-25 (sic). *He scored his PTSD symptoms at 45; substance abuse at 45-55; and his depression at 25. GAF scores are not controlling, but must be accounted for as they represent the assessment of trained medical observers. Scores such as the veteran’s show serious social and occupational impairment, “unable to keep a job.”*

Id. This analysis reveals the Board’s mistake. It shows that the Board relied on the date of the evaluation, March 1997, and applied the scores prospectively even though the GAF scores were retrospective. Thus it failed to accurately determine the date when Appellant became eligible for a 100% rating. *Vasquez-Claudio, supra*, 715 F.3d at 117. If it had applied the scores retrospectively, as the VA examiner intended, the effective date for a 100% rating would have been at least five years earlier and a rating higher than 30% prior to March 1992.

⁷ A GAF score of 25-35 denotes behavior considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment OR inability to function in almost all areas (stays in bed all day, no job, home, or friends.) A GAF score between 45 and 55 indicates serious symptoms OR serious impairment in social, occupational, or school functioning (i.e. no friends, unable to keep a job).

First, given the veteran's overall GAF score of 25-35 over the past year, March 1996 was an obvious effective date. The 1997 opinion clearly indicated total social occupational impairment from that date. 38 C.F.R. 4.132. Second, and similarly, in March 1997 the veteran's depression GAF score was 25 "over most of the past five years," so 100% disability based upon his severe depression extended back to March 1992. *Id.* Third, the veteran's GAF score of 45-55 for substance abuse for "the past five to ten years," meant he likely qualified for a 70% rating between January 1989 and March 1992. *Richard (Mary) v. Brown*, 9 Vet. App. 266, 267-68 (1996) (A 50 GAF score denotes either "serious" symptoms or "serious" impairment, as described in the rating schedule. 38 C.F.R. 4.132 (1996).)

Although the Board never addressed the veteran's disability from substance abuse, substantial evidence in this record from January 1989 to December 1994 shows he had serious impairment during that time:

- Dr. Price, in 1988, recommended in-patient substance abuse treatment at the earliest possible time. R. 2949-50.
- Dr. Guadio, in December 1992, stopped prescribing Percocet after being notified by veteran's family about his painkiller addiction. R. 3352-53.
- Dr. Guadio and Dr. Awwa confirmed that the veteran began abusing heroin in 1992. *Id.*; R. 2185.
- In February 1994, Dr. Saab referred the veteran to outpatient substance abuse treatment. R. 3260.
- VAMC records between February and November 1994 the veteran cycled through outpatient substance abuse treatment and entered in-patient

treatment. R. 3322 (2/22/94), 3212, 3218 (9/7/74-9/9/94, GAF 40); 3355-3358 (11/30/94 to 12/29/94).

For all of these reasons, the Board's rating determinations from 1989 and 1997 were clearly erroneous and must be reversed. *Vasquez-Claudio, supra*, 715 F.3d at 117; *Stegall, supra*, 11 Vet.App. at 271. The error was prejudicial because it deprived the veteran of higher ratings between 1989 and 1997. 38 U.S.C. sec. 7261(b)(2).

4. The Board's finding that the 1997 NSC pension decision was not binding for purposes of rating the veteran's service connected conditions should be reversed as contrary to applicable laws and regulations.

"Previous determinations are final and binding, including...degree of disability...will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. sec. 3.105(a); ⁸ 38 C.F.R. sec. 3.104(a).⁹ Once the Secretary

⁸ 38 C.F.R. sec. 3.105(a) Error. Previous determinations which are final and binding, including decisions of service connection, degree of disability, ...will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of 38 C.F.R. sec. 3.500(b)(2) will apply.

⁹ 38 C.F.R. sec. 3.104 Finality of decisions. (a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in 3.105 and 3.2600 of this part.

has made a finding of fact, a later decision reconsidering that finding outside certain circumstances (e.g., outside the context of CUE or reconsideration by the Board Chairman) is *ultra vires* and must be set aside. *DiCarlo v. Nicholson*, 20 Vet. App. 52, 57-58 (2006)

In 1997, VA found that the veteran's nonservice connected disabilities were "permanent and total" and awarded NSC pension. R. 3023 (3018-3023). It rated those NSC disabilities at 80%: 50% for mental disabilities (excluding PTSD and substance abuse), 30% for physical disabilities. *Id.* Thus, the 1997 decision contained two favorable findings of fact that are potentially applicable in this case. *Gilbert, supra*, 1 Vet.App. at 52. First, it established October 1993 as the date for permanent and total disability; second, it established that the veteran's mental disabilities were more severe than his physical disabilities.

Moreover, the 1997 NSC pension decision was binding on the Board because the veteran's mental disability diagnoses did not "rest on distinct factual bases." *Boggs v. Peake*, 520 F.3d 1330, 1337 (Fed. Cir. 2008); *Clemons v. Shinseki*, 23 Vet.App. 1 (2009). The veteran's mental disorder diagnoses, bipolar disorder and post traumatic stress disorder, rested on a disagreement between physicians regarding the appropriate diagnosis, not upon distinct factual bases. *Boggs, supra*, 520 F. 3d at 1336 ("a misdiagnosis cannot be the basis for a new claim").

By 1997 the veteran had two PTSD diagnoses and one bipolar disorder diagnosis. SEE e.g. R. 2349-50 (1988 diagnosis of PTSD, serious depression, polysubstance abuse by Dr. Ann Price), R. 3260 (1994 diagnosis of bipolar disorder with substance abuse, depression dating back to service by Dr. Walid Saab), 3059-3060 (1997 diagnosis of severe PTSD, major depression, polysubstance abuse, in remission). Moreover, the reason VA did not factor veteran's PTSD into its NSC pension rating determination was that the stressor was not verified, not because PTSD was not diagnosed. R. 3019.

In 2004 VA confirmed the veteran's stressor and the Board awarded service connection for a "psychiatric disorder including post traumatic stress disorder and substance abuse (previously bipolar disorder with depression, anxiety disorder and polysubstance abuse.)" R. 3021-23. Thus, when VA changed the veteran's mental disability diagnosis from bipolar disorder to PTSD, it was because VA finally accepted that his PTSD stressor occurred. *Boggs, supra*. Therefore, the NSC pension diagnosis of bipolar disorder did not rest upon a different factual basis than the finding of service connection for PTSD so the Board was bound by VA's final findings in the 1997 pension decision. *Id.* Accordingly, the Board's finding should be reversed as *ultra vires*. *DiCarlo, supra*, 20 Vet. App. at 57-58.

5. Alternatively, the Board failed to substantially comply with the 2015 JMR.

A remand by the Court and Board confers on the claimant a legal right to substantial compliance with the remand order. *Stegall, supra*, 11 Vet.App. at 271;

Donnellan v. Shinseki, 24 Vet.App. 167, 176 (2010). Here, the Board failed to substantially comply with the 2015 JMR. R. 359-368. It did not provide an adequate reasons and bases as to why the retrospective 1997 medical opinion and GAF scores were not applicable to the veteran's ratings between 1989 and 1994. It did not provide adequate reasons and bases as to why the 1997 VA opinion was not sufficient to show that the veteran suffered from severely disabling major depression during that time. Its statement of reasons and bases for finding that the 1997 NSC pension decision was not controlling for purposes of rating the veteran's service connected mental disorders was merely conclusory and therefore also inadequate. Its determination that veteran was unemployable due to nonservice connected physical disabilities was not based on the factors set forth in 38 C.F.R. sec. 4.16. It failed to address the impact of the veteran's symptomatic substance abuse on his ratings prior to January 1995. Therefore, Appellant seeks remand for adequate statements of reasons and abases that substantially comply with the 2015 JMR.

B. Appellant seeks reversal of the Board's unemployability findings for the period between January 1989 and March 1997 because substantial evidence of record supports an award of TDIU.

This argument is raised in the alternative.¹⁰

¹⁰ This argument is raised in the alternative to Appellant's argument that the veteran should have been found 100% disabled back to March 1992 and in addition to his argument that he should be rated 70% disabled from January 1989 through March 21, 1992.

“Total disability ratings for compensation may be assigned where the scheduler rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.” 38 C.F.R. sec. 4.16(a). Unlike the regular disability rating schedule, which is based on the average work-related impairment caused by a disability, “entitlement to TDIU is based on an individual’s particular circumstances” *Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009); VA Adjudication Procedures Manual, M21-1, Part IV, Para.7.55(b)(8) (The adjudicator is instructed to “consider the nature of the employment and reason for termination in all claims). VA must take the veteran’s education, training, and work history into account. *Hattlestad v. Derwinski*, 1 Vet.App. 164, 168 (1991). It must also determine whether the veteran engaged in substantially gainful employment. *Faust v. West*, 13 Vet.App. 342, 356 (2000). (Substantially gainful occupation is “[an occupation] that provides [the veteran with an] annual income that exceeds the poverty threshold for one person, irrespective of the number of days or hours the veteran actually worked.”) The Board’s analysis did not comply with these requirements.

First, as to the veteran’s employability between 1989 and 1994, the Board concluded that the veteran was unable to work solely because of physical disabilities. R. 20-22. Thus the Board failed to address the central inquiry under 4.16: whether the veteran’s service connected disabilities alone rendered him unable to secure and/or maintain substantially gainful employment. *Hattlestad*,

supra, 1 at 168. Also, it did not account for the 1997 NSC pension decision's favorable factual findings: (1) that the veteran was permanently and totally disabled as of October 1993; and (2) that the veteran's non-service connected physical conditions only warranted a 30% rating. The NSC pension decision calls the Board's determination as to the date of onset of permanent and total disability into question. Also, it shows that the veteran's physical conditions were less severe than his mental conditions. His back, knee and wrist were only rated 10% or less, those conditions were less disabling than his mental disorder for purposes of extraschedular TDIU.¹¹ 38 C.F.R. 4.16(b).

Second, as to the veteran's unemployability between 1994 and 1997, the Board incorrectly applied 38 C.F.R. 4.16(a). The veteran's mental disabilities were rated at 70% during this time. Again, the Board found that he did not work during that time due to both physical and mental disabilities. R. 22. This finding does not consider only the effects of his service connected mental disabilities on his ability to secure or maintain substantially gainful employment. *Hatlestad*, *supra*, 1 Vet.App. 164. Also, it does not address probative medical evidence

¹¹ 8 NSC (VE) 9432-9434, Bipolar disorder and/or Major Depression, 50%; 5276, Bilateral pes planus, 10%; 5293, Herniated Nucleus Pulposus, L4-5 and status post-compression fracture, L-1, 10%; 8045, post traumatic headaches, 10%; 9400, Anxiety Reaction, 10%; 9499, Personality Disorder, 10%; 9411, Post traumatic Stress Disorder, 0%; 9499, Polysubstance Abuse (Willful misconduct); 2.PT (VE from 10-22-93), 5215 10% Status Post Fracture of the Right Wrist; 7805-7816 10% Nummular Eczema and/or Psoriasis; 5299, 0% status post right knee arthroscopy for meniscus tear; 7599-7522 0% Erectile Dysfunction." R. 3021-23 (3018-3023).

including Dr. Gottschalk's retrospective GAF scores or the effects of VA's NSC pension decision that found the veteran was permanently and totally disabled as of October 1993. R. 3023, 3056-61.

Appellant seeks reversal, not remand. The Board had two opportunities to perform this analysis, most recently the 2015 JMR, but it failed to do so. R. 359-368. Also, substantial uncontroverted evidence of record including the veteran's testimony about his work history, the 1997 VA opinion with retrospective GAF scores, and the 1997 NSC pension decision supports an award of TDIU back to March 1992. *Hicks, supra.* 8 Vet.App. 417. Therefore, Appellant seeks reversal of the Board's clearly erroneous unemployability decision back to March 1992. As for the period prior to March 1992, he seeks remand for an unemployability determination that complies with the relevant provisions of 38 C.F.R. 4.16.

CONCLUSION

For reasons set forth in this Brief, Appellant respectfully requests that this Court reverse the Board's clearly erroneous findings and remand for compliance applicable laws, regulations and precedents of this Court. Alternatively, and to some extent additionally, he seeks remand so the Board can comply with the 2015 JMR.

RESPECTFULLY SUBMITTED,
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