

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 REPLY BRIEF

DOCKET NO. 15-4104

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ARGUMENT

The Board clearly erred when it determined that the veteran was only entitled to a 30% rating between January 1989 and February 1994 and that he was ineligible for TDIU between 1989 and 1997.

A. The 1991 VA opinion is not probative for rating purposes.

The Board relied heavily on the 1991 C & P exam to affirming the veteran's 30% PTSD rating and denying TDIU between 1989 and 1994. The Secretary argues that the 1991 exam was probative for rating purposes because it offers a contemporaneous opinion and, on this basis, the Board's decision should be affirmed. S.Br at 7-9.

A medical opinion is adequate for rating purposes “where it is based upon consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, in sufficient detail so the Board’s “evaluation of the claimed disability will be a fully informed one.” *Stefl v. Nicholson*, 21 Vet.App. 123 (2007); *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994); 38 C.F.R. § § 4.1 and 4.2. Also, mental disorder examinations must conform to the DSM. 38 C.F.R. 4.125(a). The examiner must perform a thorough and contemporaneous examination and take the veteran’s records of prior treatment into account. *Green (Victor) v. Derwinski*, 1 Vet.App. 121, 124 (1991). The 1991 exam was inadequate and not probative.

To begin with, it was not a thorough exam. *Id.* It lasted only 7 minutes, as the Veteran told the VA in 1992, and during that time the examiner ate his lunch, answered the phone, and looked through another file. R. 3497 (3496-3512).

Additionally, the 1991 exam did not take the veteran’s prior treatment records into account. *Green, supra*, 1 Vet. App. at 124. The examiner said that he did not have access

to the Veteran's records. R. 3550 (3550-3552). Available records as of March 1991 included service and post service medical records. In July 1969, the Veteran was diagnosed with anxiety reaction¹ during an enemy attack in Vietnam.² R. 281. In 1972, soon after he left service, the Veteran started seeing a psychiatrist; he prescribed Stelazine, a major tranquilizer. R. 3046. In 1982, Dr. Sanford began prescribing Valium to the Veteran for "anxiety neurosis that sometimes became disabling." *Id.* In 1988, while he was incarcerated for a domestic violence offense, a private psychiatrist diagnosed PTSD, severe depression, and substance abuse and recommended immediate transfer for in-patient treatment. R. 2349-50 (Dr. Price). As the examiner did not have access to these records, he had no basis to evaluate the severity, frequency, or duration of the Veteran's symptoms in March 1991. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115-17 (Fed. Cir. 2013). Therefore that opinion was inadequate for rating purposes. *See Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) ("[O]nce the Secretary undertakes the effort to provide an examination when developing a claim...he must provide an adequate one...").

In 1994 and 1996, the Board remanded for a new examination to specifically correct these deficiencies and to address PTSD. R. 3108-3120, 3425-30. In the 1996 remand, the Board stated that the examiner must perform a comprehensive examination,

¹ In 2003, Dr. Gergal, his VA psychiatrist, provided an opinion in which he the veteran's anxiety reaction was predictive for PTSD. R. 1110-11.

² In 2003, Steven Reisdorf, a fellow soldier, described his anxiety reaction: "As I recall during that evening we got hit by RPG's and Chrystal went into a "shock" reaction, standing, screaming, not running for any cover....As I recall Chrystal was real nervous all the time...He went or was sent to the medics." R. 1961 (1959-62).

review the veteran's medical history and claims file, and provide GAF scores.³ In March 1997 Dr. Gottshalk, a VA psychiatrist, provided an opinion that fully complied with the remand and, by extension, VA requirements. R. 3057-61. Importantly, Dr. Gottschalk pointed out that previous VA examiners misdiagnosed the Veteran:

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. 3057-58. Thus, the Board clearly erred in relying on the 1991 exam for any purpose.

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

B. The Board's finding that the veteran's rating between 1989 and 1994 could not be greater than 30% between 1989 and 1994 because depression was not clinically assessed is clearly erroneous. With regard to substance abuse, the Board did not comply with the 2015 Joint Motion for Remand.

The Secretary raises four arguments. First, because the Veteran failed to show up for his VA examinations prior to 1991, the Board's finding that it lacked sufficient evidence to support a rating higher than 30% was reasonable. S.Br. at 11. Second, the veteran's major depressive disorder (MDD) was not service connected so the Board was not required to factor it into his rating. S. Br. at 11-13. Third, the Board adequately explained its decision to dismiss the veteran's retrospective GAF scores. S.Br. at 12-13.

³ Errata. The first Board remand for a new medical examination was 1994. In the Opening Brief Appellant mistakenly stated that the first remand was in 1992.

Fourth, with respect to substance abuse, Appellant failed to explain how the Board erred. S.Br. at 14. These arguments are addressed seriatim.

As to the Secretary's first argument, the Board's finding that, because the Veteran did not report to his VA exams prior to 1991 "no clinical evaluation of his [depression] symptomatology could be obtained"⁴ is clearly erroneous for two reasons. *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). First, the incapacitating effect of the Veteran's depression accounts for any absence. In his 1997 evaluation, Dr. Gottschalk explained this aspect of the Veteran's disability:

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 (3056-61) (emphasis added). Second, Dr. Gottschalk 1997 opinion was retrospective. *See Chotta v. Peake*, 22 Vet.App. 80, 85 (2008) (retrospective medical opinions are probative evidence). Dr. Gottschalk evaluated the Veteran's symptoms over a 10 year period. Moreover, his opinion was probative. 38 C.F.R. § 4.125(a); *Cohen v. Brown*, 10 Vet.App. 128 (1997). His evaluation fully complied with the 1996 Board remand order. *Stegall v. West*, 11 Vet.App. 268 (1998). He reviewed the veteran's claims file; described the frequency, severity, and duration of the veteran's psychiatric symptoms; provided a detailed in-person examination; and supported his opinion with a fully descriptive rationale. R. 3118 (3108-3120, 1996 Board Remand). He diagnosed

⁴ The Board stated in pertinent part: "The record reflects that the veteran did not report for a number of VA scheduled psychiatric evaluations for more than two years after initiating the claim *such that no clinical evaluation of his symptomatology could be obtained.*" R. 18.

PTSD, depression and substance abuse and assigned retrospective GAF scores: 45 for PTSD many times, including the past year; 25 for depression for the past five years; 45-55 for substance abuse over the past five to ten years.⁵ R. 3061. Indeed, in 2007 the Board relied upon the 1997 examiner's assessment to assign the veteran a 100% rating from March 1997, the date of the exam. R. 841-863. And, contrary to the Secretary's argument, the 2008 JMPR did not disturb that decision. R. 743 (743-751).

Finally, the record as a whole supports Dr. Gottschalk's assessment. *Mariano v. Principi*, 17 Vet.App. 305, 313 (2003) (applying "clearly erroneous" standard, as directed by 38 U.S.C. § 7261(b)(1). Three VA psychiatrists diagnosed severe, continuous depression and stated that it began in service. R. 1150-52 (Dr. Gergal, 2002), 891-894, 1644-1651 (Dr. Berg, 2003 and 2006), 3260 (Dr. Awwa, fluctuating depression symptoms since Vietnam). Also, at his April 1992 VARO hearing, the veteran testified: "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). In summary, Dr. Gottschalk adequately described the severity of the veteran's depression from 1989. *Vazquez-Claudio, supra*, 713 F.3d at 115-17. Thus, the Board did not lack a clinical assessment because it had the retrospective 1997 VA opinion.

⁵ 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).

To the Secretary's second contention, depression must be factored into the veteran's rating for two reasons. First, the Board's finding that depression is not related to service is clearly erroneous. *Mariano, supra*, 17 Vet.App. at 313. Multiple psychiatrists, including the veteran's VA treating psychiatrist and a later C & P examiner, connected the veteran's depression to service and to PTSD. R. 891-94, 1150-52, 1644-51. Second, even if his depression was not related to service it must be factored into the veteran's PTSD rating because the Board found that the veteran's depression symptoms could not be separated from his PTSD. R. 19, citing *Mittleider v. West*, 11 Vet. App. 181, 182 (1998). Further, the Board agreed that the veteran's depression was continuous, it stated: "Review of the evidence from the date of the claim received on January 20, 1989 reveals that the Veteran's service connected PTSD was primarily manifested by depression and emotional distress, as reported at his personal hearing in April 1992." R. 19. Continuous depression entitles the veteran to a 70% rating. 38 C.F.R. 4.30 (DC 9440).

To the Secretary's third contention, the 1997 examiner assigned GAF scores that accorded with his longstanding symptoms. *Vasquez Claudio, supra*, 713 F.3d at 115. The retrospective depression GAF of 25 was consistent with his clinical assessment. R. 3057-61. Moreover, in dismissing those retrospective GAF scores, the Board failed to address the evidence and evaluations that the examiner cited in support of those scores. *Bowling v. Principi*, 15 Vet. App. 1, 12-14 (2001). For example, in 1997, when the VA examiner diagnosed PTSD, depression, and substance abuse he described the Veteran's entire medical history. R. 3057-61. Moreover, the examiner's conclusions were not

anomalous. His findings are supported by substantial medical evidence in this record. *Bowling*, 15 Vet. App. at 12-13. R. 891-894, 1644-1651 (Dr. Berg, 2003 and 2006); 1110-11, 1150-52 (Dr. Gergal, 2002); 2185 (Dr. Awwa); 2349-50 (Dr. Price). This evidence shows that the veteran's impairment during this time was severe. *Mauerhan v. Principi*, 16 Vet. App. 436, 442-43 (2002). Between January 1989 and February 1994 he exhibited continuous depression, suicidal ideation, inability to get out of bed, anhedonia, pervasive loss of interest in almost all activities, sleep disturbance, feelings of guilt and worthlessness. R. 891-84, 1110-11, 1644-51, 2185, 2349-50. These are symptoms are consistent with a 25 retrospective depression GAF score. See Note 5, *infra*.

Finally, as to the Secretary's substance abuse contention, the Board failed to comply with the 2015 JMR. *Stegall, supra*, 11 Vet.App. at 271. On remand, the Board was required reconsider the 30% rating and account for favorable evidence that showed the Veteran's polysubstance abuse was active between 1989 and 1995 in determination. R. 361 (359-368) 2185, 2349-50,⁶ 3260-66, 3352-53. The pertinent evidence was cited in the remand order. *Id.* However, the Board did not factor substance abuse in its rating determination. Therefore it failed to comply with the remand.

For all of these reasons the Board's rating determination was clearly erroneous. *Mittleider, supra*, 11 Vet. App. at 182. The error was prejudicial because the veteran's continuous depression and substance abuse symptoms potentially warranted 70%

⁶ Errata. In the Opening Brief this record was cited incorrectly. The correct citation is 2349-50. It was properly listed on the Table. Appellant apologizes to the Court and the Secretary for this error.

schedular ratings from January 1989 to March 1992 and a 100% schedular rating thereafter. See 38 C.F.R. 4.130, DC 9440 (2015), 38 C.F.R. 4.132 (1995).

C. The Board's TDIU determinations are clearly erroneous because it did not apply 38 C.F.R. § 4.16.

The Secretary argues that the Board's determination that the veteran was unemployable between January 1989 and February 1994 solely due to physical disabilities and between March 1994 and March 1997 due to a combination of physical and mental disabilities should be affirmed. S.Br. 18-20. The Board's employability findings should be reversed as clearly erroneous. *Gilbert, supra*, 1 Vet.App. at 52.

Under 38 C.F.R. 4.16, the question is whether the veteran is unable to secure and/or follow a substantially gainful occupation due to his service connected disabilities. *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). Where the veteran has both service-connected and non-service connected disabilities the Board *must attempt* to discern the effects of each disability and, where such a distinction is not possible, attribute such effects to the service-connected disability. *Mittleider, supra*, 11 Vet.App. at 182.

January 1989 and February 1994. The Veteran raised the issue of TDIU as part of his initial application for service connection. *Rice v. Shinseki*, 22 Vet.App. 447 (2009). Although Appellant believes the correct rating during this time is 70%, the veteran's 30% rating did not preclude a determination under 38 C.F.R. § 4.16(b). Veterans whose disabilities do not meet the percentage requirements of 4.16(a) who are unable to secure and follow substantially gainful occupation due to their service connected disabilities are eligible for extraschedular TDIU. *Id.* Here, the Board never addressed whether the

veteran's service connected mental disabilities alone were of sufficient severity to produce unemployability. *Mittleider*, supra, 11 Vet.App. at 182. It did not even mention § 4.16(a) or (b). Instead, it determined that he was not eligible for an extraschedular rating under 38 C.F.R. § 3.321(b). R. 22-23. Thus the Board's employability analysis is clearly erroneous.

February 1994 and March 1997. The veteran's mental disabilities were rated at 70% so a different TDIU analysis applied. 38 C.F.R. § 4.16(a). However, the Board did not apply 38 C.F.R. § 4.16(a). Instead, the Board erroneously determined that because the veteran's psychiatric symptoms did not result in total impairment his inability to maintain employment was not solely due to his psychiatric symptoms. R. 21-22. Thus, the Board improperly applied a higher evidentiary standard than TDIU requires. *See Roberson v. West*, 251 F.3d 1378, 1385 (Fed. Cir. 2001) (noting that an award of TDIU does not require total impairment a showing of 100% unemployability). Eligibility for TDIU does not require total impairment. *Id.*

Moreover, the appropriate analysis, given the veteran's 70% rating, hinged upon his inability to undertake substantially gainful employment as a result of his service-connected mental disabilities, and his service connected disabilities were irrelevant. 38 C.F.R. § 4.16(a). *Hatlestad*, supra, 5 Vet.App. at 529. Thus, the Board's clearly erroneous determination requires reversal. *Gilbert*, supra, 1 Vet.App. at 52.

Applying 38 C.F.R. § § 4.16(a), (b), a review of the evidence of record shows that the veteran qualifies for TDIU as of January 20, 1989, the date of his claim. This evidence includes:

- July 1988: “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 (2349-50) (Dr. Price).
- January 1989 veteran’s application for compensation: “Unable to keep a job due to emotional problems from Vietnam and drug use that started there.” R. 3714 (3714-15).
- 1992 Dr. Guadio and Dr. Awwa confirmed that the veteran began abusing heroin in 1992. R. 2185, 3352-53.
- April 1992 hearing testimony: “I’m just very depressed all of the time. I don’t know if it’s 90% because I’m very unhappy and 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.” In January 1991 “I helped a guy sheetrock for a while...I’ve been on welfare with the town and Soldier’s and Sailor’s 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.*
- October 22, 1993 effective date for Award of Social Security disability based on diagnoses of PTSD, substance abuse, and back pain. R. 3188-3202 (12/1994).
- October 1993 effective date for NSC pension, mental disabilities rated 50%; physical disabilities rated 30%, finding that veteran was permanently and totally disabled. R. 3017-23 (8/1997).
- 1994 Social Security questionnaire: “I’ve never been able to hold down a job or relationship since Vietnam – I was told while in West Haven VA that I have ADH disorder besides my PTSD and depression along with my bodily problems.” R. 3228 (3222-3235).
- 1997 VA examiner: “In addition the documents...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 and 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 comply with appointments...” R. 3059 (3057-61). Retrospective GAF scores: Depression, 25 over the past five years; PTSD, 45 many times including the past year; substance abuse 45-55 over the past five to ten years. R. 3061.

- 1998 Social Security disability evaluation: “...he has antisocial personality...he does not like being around people, he is reactive, he takes off impulsively, he cannot hold down a job. He at the present time continues to experience flashbacks and nightmares. He experiences long periods of depression where he cannot sleep for days.” R. 2185 (Dr. Awwa).
- 2003 VA treating psychiatrist: “He has been socially isolative and has had great difficulty with interpersonal relationships. He 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) (Dr. Gergal).
- 2003 and 2006, VA C & P Examiner: the veteran was unable to keep a job because he was “unable to work around people and due to anger outbursts.” R. 891-94, 1644-51. In 2006, she stated that the veteran last worked 18 years ago and had to quit because of his health problems and his mental problems. R. 893. (Dr. Berg).

This evidence shows that the Veteran’s mental disabilities alone were of sufficient severity to cause unemployability between January 20, 1989 and March 22, 1997.

Hatlestad, supra, 5 Vet.App. at 529.

Alternatively, because it never addressed 38 C.F.R. § 4.16, Board did not meaningfully assess the veteran’s employment history between 1989 and 1997, or his education, training, and marginal employment. 38 C.F.R. sec. 4.16 (a), (b); *Gleicher v.*

Derwinski, 2 Vet.App. 26, 28 (1991). According to Social Security, his past relevant work required concentration, the ability to make work related decisions, the ability to remember and carry out instructions, use good judgment and insight, and interact appropriately with supervisors and coworkers. R. 3196. Evidence in this record shows that the veteran worked full time until 1972 or 1973 and after that he worked in numerous construction jobs until January 1991. R. 3509 (3496-3512). Between 1972 and 1991 the veteran lost many construction jobs due to his difficulties with being around people, angry outbursts, memory problems, periods of severe depression that resulted in insomnia and hypersomnolence. R. 891-94, 1110-11, 2185, 3059-3061. He did not work at all after January 1991. R. 3509. By then he was on welfare and living with his parents. *Id.* He had a high school education and his training was in construction. R. 3198.

Finally, even if the Board was correct that 1997 NSC pension decision was not controlling, that decision was relevant to the TDIU inquiry under 38 C.F.R. 4.16 it established October 22, 1993 as the date that his disabilities were permanent and total. *Foster v. Principi*, 4 Vet.App. 35, 36 (1993) (finding error in the Board's failure to discuss vocational rehabilitation and employment records). In 1997 VA relied on a 1994 Social Security decision to determine that there was “no evidence that he was capable of obtaining or retaining employment” after October 22, 1993. R. 3023 (3018-23). At the very least the Board should have explained why VA’s finding of permanent and total disability did not apply to a TDIU determination. *Foster, supra.*

Moreover, the Board’s finding that VA relied on the 1997 VA examiner’s opinion to determine the veterans NSC pension ratings is not supported by the record. The 1997

decision had two parts: a denial of service connection for PTSD and an award of NSC pension. R. 3019-23. In the PTSD decision, the RO denied the veteran's claim for service connection for PTSD despite the 1997 PTSD diagnosis because the veteran's stressor had not been verified. R. 3021. It awarded NSC pension for bi-polar disorder, not PTSD or substance abuse. R. 3023. Dr. Gottschalk did not diagnose bipolar disorder, he diagnosed PTSD, depression and substance abuse. R. 3061. Therefore, the NSC pension ratings are not based upon the 1997 VA examination because it does not account for the severe symptoms he described. Moreover, VA abandoned the bipolar disorder diagnosis in 2004 when the veteran was finally awarded service connection for PTSD. R. 1228-35.

CONCLUSION

Therefore, for reasons stated here and in the opening brief, Appellant asks this Court to reverse the Board's rating and TDIU determinations and award a 70% rating and TDIU from January 20, 1989. Alternatively, for reasons cited here and in the opening brief, he requests remand for an adequate statement of reasons and bases. However, because this case has been remanded previously for the same errors, reversal is warranted.

RESPECTFULLY SUBMITTED,
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