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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4154

WILLIAM A. IZZARD, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: The appellant, William A. Izzard, served in the U.S. Army from May 1968 to April 1970, including service in the Republic of Vietnam, and is the recipient of, inter alia, the Bronze Star Medal. Record (R.) at 610. He appeals, through counsel, a September 2, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to an initial disability rating in excess of 10% for post-traumatic stress disorder (PTSD) prior to June 14, 2012. R. at 1-20. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266.

For the reasons that follow, the Court will vacate that part of the Board's September 2, 2015, decision denying entitlement to a disability rating greater than 10% for PTSD prior to June 14, 2012, and remand that matter for further proceedings consistent with this decision. In addition, as the appellant presents no argument concerning the Board's denial of entitlement to a disability rating greater than 50% for PTSD for the period beginning June 14, 2012, or the denial of entitlement to service connection for a back disorder, the Court holds that he has abandoned those matters and will, accordingly, dismiss the appeal as to those claims. *See Pederson v. McDonald*, 26 Vet.App. 276, 285 (2015) (en banc).

The appellant's principal argument on appeal is that the Board failed to provide an adequate statement of reasons or bases to support its determination that he was not entitled to an initial disability rating greater than 10% for his PTSD. Appellant's Brief (Br.) at 3-13; Reply Br. at 1-2. He asserts, inter alia, that the Board relied solely on statements from a September 2008 VA examination report in denying an increased initial disability rating and failed to explain why it rejected other favorable medical evidence of record. Appellant's Br. at 7-8. Specifically, he contends that the Board failed to explain the weight it assigned to a March 2009 letter from the appellant's VA therapist and an April 2009 VA treatment record. *Id.* The Court agrees.

In the March 2009 letter, the appellant's VA's therapist opined that "he has suffered moderate social and familial impairment" as a result of his combat history. R. at 407. The April 2009 VA treatment record noted that the appellant had no present suicidal thoughts but that he had "recent past thoughts of suicide as a relief from stress," as recently as six months prior. R. at 374. The Board noted the March 2009 letter and April 2009 VA treatment note in its recitation of the facts. R. at 13. It ultimately found that the medical evidence of record, "as provided in the examination reports and the clinical records," are "more probative" than the appellant's complaints of increased symptomatology. R. at 14.

However, in so finding, the Board did not discuss the weight it assigned to the March 2009 letter or the April 2009 VA treatment note. *See id.* In fact, the Board appears to discuss only the findings from the September 2008 VA examination report in its analysis. *See* R. at 13-14. Absent a specific discussion of the weight given to the March 2009 letter and April 2009 VA treatment record, the Court cannot understand the precise basis for the Board's determination that a higher initial disability rating for PTSD was not warranted. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (holding that the Board's statement of reasons or bases for its decision "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"); *see also Abernathy v. Principi*, 3 Vet.App 461, 465 (1992) (holding that merely listing the relevant evidence is not adequate to fulfill the Board's obligation to provide a statement of reasons or bases for its decision).

Although the Secretary argues that the appellant "has not shown how that evidence he relies on contradicted or otherwise undermined the Board's analysis," Secretary's Br. at 13, it is the duty of the Board, not the Court, to weigh and assess evidence in the first instance. *See Deloach v.*

Shinseki, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding "that the evaluation and weighing of the evidence are factual determinations committed to the factfinder—in this case, the Board"); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (noting that it is the Board's duty, as factfinder, to assess the credibility and probative weight of all relevant evidence); *cf.* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"). Similarly, although the Secretary argues that the March 2009 letter was not enough to establish a 30% disability rating and that the April 2009 treatment note indicates that the appellant "linked his past thoughts of suicide to his financial problems and not his PTSD," Secretary's Br. at 11, his arguments amount to post hoc rationalizations of the Board's failure to discuss the weight given to this evidence, which the Court cannot accept, *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action.").

As the Court's review of this matter is frustrated, the Board's statement of reasons or bases is inadequate. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (holding that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Accordingly, the Court will vacate and remand the Board's decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations").

In light of this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit those arguments, as well as additional evidence and argument, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (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 Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the appellant's and the Secretary's briefs, and a review of the record, that part of the Board's September 2, 2015, decision denying entitlement to an initial disability rating

for PTSD greater than 10% for the period prior to June 14, 2012, is VACATED, and the matter is REMANDED for further proceedings consistent with this decision. The appeal is DISMISSED as to the Board's denial of a disability rating for PTSD greater than 50% for the period beginning June 14, 2012, and entitlement to service connection for a back disorder.

DATED: November 30, 3016

Copies to:

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VA General Counsel (027)