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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1623

AMANDA THOMPSON, APPELLANT,

v.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Amanda Thompson, surviving spouse of deceased veteran James Thompson, appeals, through counsel, a January 7, 2015, Board of Veterans' Appeals (Board) decision that denied a disability rating in excess of 70% for bipolar disorder, to include a rating in excess of 50% prior to November 20, 2011. Record of Proceedings (R.) at 2-28. The Board also remanded the issue of entitlement to a total disability rating based upon individual unemployability (TDIU) prior to November 20, 2011. R. at 27-28. The remanded matter is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board cannot be reviewed by the Court). The appellant does not raise any argument concerning the Board's denial of a disability rating in excess of 70% after November 20, 2011. The appellant has, therefore, abandoned her appeal of that issue. Accordingly, the Court will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's 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). For the following reasons, the Court will vacate the decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The veteran's original claim for bipolar disorder was granted in October 2002, and he was granted a 30% disability rating. R. at 4296-300. In June 2007, the veteran filed for an increased disability rating. R. at 4210-13. In a November 2007 VA examination, the examiner noted that the veteran had been imprisoned from April 1998 through September 2001. R. at 3971. At the time of the examination, the veteran was incarcerated with a mandatory release date set for October 2010. *Id.* The veteran reported ongoing suicidal ideation and anxiety and ongoing irritability with other inmates. R. at 3971-73. The examiner stated that the appellant met the conditions for a 50% disability rating, including circumstantial speech, panic attacks, disturbance in motivation and mood, and difficulty establishing and maintaining effective work and social relationships. R. at 3973. In April through July of 2008, VA sent out more than a dozen requests for statements in support of the veteran's claim. *See, e.g.*, R. at 2356-57, 2395-96, 2360-61, 2372-73, 2454-55, 2620-21. The record reflects that many of these requests went unanswered. In September 2008, the regional office (RO) awarded the veteran a 50% disability rating for bipolar disorder, effective July 31, 2006. R. at 2317-19, 2331, 2333-38.

In an August 2009 VA examination, the veteran reported daily suicidal thoughts and panic attacks (R. at 1661, 1663), and stated that although he currently had "3 good plans" for suicide, he had no current intention to harm himself. R. at 1663. The examiner noted that the veteran had a pattern of job instability, "although reports that his most recent job working delivering flowers was going well with no reported impairment." R. at 1665. The examiner opined that the veteran's bipolar disorder would "at least as likely as not result in impairment in academic functioning as well as occupational functioning due to periods of irritability, circumstantiality of his thought process, distractibility, and poor concentration." *Id.* The examiner also concluded that there was evidence that the veteran's bipolar disorder resulted in deficiencies in "most of the following areas: Work, school, family relations, judgment, thinking and mood, and that his personality disorder contributes to additional impairment beyond that." R. at 1665-66. The RO continued to deny the veteran's claim in April and May 2010 Supplemental Statements of the Case (SSOCs). R. at 1177-81, 1385-91.

The veteran underwent another VA examination in June 2011, reporting that he was currently engaged to be married and that he and his fiancée had an "excellent relationship." R. at 1053. The

veteran also stated that he still had "daily symptoms, currently to a moderate severity," and that he had about three good friends. *Id.* The veteran further reported having problems with his emotions and thoughts, including problems staying focused and feeling fear and anger that sometimes escalated to rage. *Id.* The examiner opined that the veteran's bipolar disorder had remained "fairly stable," was of moderate severity, and would pose "occasional decrease in work efficiency." R. at 1054, 1056.

In April 2014, the veteran submitted a February 2014 psychological evaluation where Dr. Calvin Langmade, a private psychologist, noted that the veteran is "generally considered an unreliable historian of personal data as he rationalizes his behaviors in the past." R. at 156. Dr. Langmade ultimately opined that he did not believe there was "any clinical evidence to support the belief that [the veteran] can maintain any effective relationships" and that the veteran "cannot establish or maintain any work or personal life stability." R. at 159.

In April 2014, the RO awarded a 70% disability rating for PTSD effective November 20, 2011. R. at 116-22. In June 2014, Dr. Langmade completed a supplemental report where he stated that the veteran's clinical status was "no worse in November 2011 than it was [in] 1991/1992. His clinical records document a clear pattern of poor clinical adjustment, which adversely affected his employment history and social relationships." R. at 90.

In the January 7, 2015, decision on appeal, the Board concluded that the evidence of record did not show that the veteran had occupational or social impairment supporting ratings greater than those currently assigned. R. at 2-28. This appeal followed.

II. ANALYSIS

Disability ratings and effective dates are findings of fact reviewed under the "clearly erroneous" standard of review. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any finding on an issue of material fact or law, the Board must support its assignment of a disability evaluation and effective date with a statement of reasons or

bases that enables a claimant to understand the precise basis for its decision and facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide the 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).

Moreover, the Board's reasons or bases for a decision based on the general rating formula for psychiatric disorders must be thoroughly explained. *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (citing *Mitchem v. Brown*, 9 Vet.App. 138, 140 (1996) ("The need for a statement of reasons or bases is particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders.")). In its decision, the Board does not need to discuss every item of evidence within the record, but must address the evidence that is relevant or favorable to the claim. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence).

Under the current rating schedule for mental disorders, including bipolar disorder, a 50% disability rating is assigned when there is

occupational 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, Diagnostic Code (DC) 9432 (2016). A 70% disability rating is assigned when there is

occupational 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 work-like setting); inability to establish and maintain effective relationships.

Id.

In *Mauerhan v. Principi*, the Court held that the symptoms listed in § 4.130 are "not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects, that would justify a particular rating." 16 Vet.App. 436, 442 (2006). The Board is required to "consider all symptoms of a claimant's condition that affect the level of occupational and social impairment," not just those listed in the regulation. *Id.* at 443. Thus, when determining the appropriate disability evaluation to assign, the Board's "primary consideration" is the veteran's symptoms. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013). However, "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." *Id.* at 116.

The appellant argues that the Board's decision may not be supported because the Board relied "almost exclusively" on evidence outside the relevant time period, did so "without the expert medical evidence or records necessary," and improperly rejected Dr. Langmade's opinions. Appellant's Brief (Br.) at 6. The Secretary responds that the Board considered relevant evidence and that the examiners were competent to opine as to the occupational effects of the veteran's bipolar disorder. Secretary's Br. at 12-16. He further contends that the appellant's arguments regarding Dr. Langmade's opinions are essentially impermissible requests that the Court reweigh the evidence. *Id.* at 17.¹

The Board in its decision concluded that the evidence of record did not establish that the veteran's bipolar disorder caused occupational and social impairment, with deficiencies in most areas prior to November 2011. R. at 25. In its discussion, the Board pointed to various reports discussing

¹ Upon review of the parties' briefs, there appear to be factual disputes regarding what jobs the appellant held and when and for how long. See Appellant's Br. at 12-13; Secretary's Br. at 12-14; Reply Br. at 2-5. The Court notes that these issues may be raised on remand and be resolved by the Board in the first instance. See *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000) (stating that the determination of whether to entertain an argument raised for the first time at the Court is a "matter of discretion").

the veteran's work history and a 2011 medical opinion that deemed the veteran's symptoms "stable and moderate." R. at 23. Lastly, the Board acknowledged Dr. Langmade's assessment that there was no evidence supporting the belief that the veteran can maintain any effective relationships, but rejected the opinion on the basis that the veteran is currently married and, before that, had a relationship with a person that violated the terms of his parole. *Id.*

What the Board noticeably failed to discuss, however, are the symptoms the veteran reported throughout the appeal and an assessment of their frequency, duration, and severity. The veteran repeatedly reported having daily panic attacks, mood swings, and thoughts of suicide; anger and confusion that could escalate to rage; and distractibility and irritability that interfered with relationships, employment, and academic functioning. *See, e.g.*, R. at 1053-54, 1661-63. The VA examinations reflect these symptoms. The Board acknowledged that under *Vazquez-Claudio* and *Mauerhan*, it may not simply use the symptoms listed in § 4.130 as an exhaustive list, but then stated conclusorily that the "totality of the [v]eteran's symptomatology" is not most consistent with a 70% rating prior to November 20, 2011. R. at 22-23. This analysis is deficient because it is unclear from its discussion what criteria the appellant met for a 70% disability rating. In other words, the Board failed to conduct the first part of the two-part analysis required under *Vazquez-Claudio*, i.e., an assessment of the symptoms displayed by the appellant, including the frequency, duration, and severity of his symptoms, supported by an explanation why the symptoms "are of the kind" enumerated in DC 9432 for assignment of a 50% and not a 70% disability rating. Although the Board devotes multiple pages to restating the evidence, its actual analysis is conclusory. *See Mittleider, supra.*

Moreover, the Board failed to address an opinion from the 2009 VA examiner assessing that the veteran's bipolar disorder results in "deficiencies in most of the following areas: Work, school, family relations, judgment, thinking and mood, and that his personality disorder contributes to additional impairment beyond that." R. at 1665-66. Although the determination of a disability rating is a factual finding to be made by the Board, the 2009 examination is favorable evidence the Board should have discussed. *See Caluza, 7 Vet.App. at 506* (Board must account for evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of material evidence favorable to the claimant). Not only does the Board fail to explain why it disregarded this evidence in light

of *Vazquez-Claudio* – it also fails to even mention the examiner's conclusion anywhere in its discussion.

Additionally, the Board states that the veteran "consistently referenced having friends" and a "social support network." R. at 21. However, the Board does not discuss any of the instances in the record where individuals were unable or unwilling to speak positively about the veteran in response to requests by the VA for statements in support of the veteran's claim. *See* R. at 2378 ("I don't have nothing to help him. I can't speak or do anything for him."), 2379 ("Mr. Witte is not willing to provide any information in support of a claim for this veteran. Mr. Witte states that the veteran and he do not have a relationship anymore, and that the veteran has threatened to hurt and/or kill him in the past. Mr. Witte also wanted to state that the veteran should not be entitled to any sort of benefit."); 2354-55 ("I would call [the veteran] 'eccentric' but I'm not so sure he's 'disabled' . . . He also lies a lot to get his way . . . He doesn't trust anyone . . . I'm not sure what else to say . . ."). The Board is not required to discuss every piece of evidence, but it must address relevant evidence raised in support of a veteran's claim. *Dela Cruz*, 15 Vet.App. at 149. Without addressing these pieces of evidence, the Court cannot determine how the Board concluded that the veteran's references to having friends outweighed evidence of poor connections and relationships as exhibited in the records above.

The Board's failure to provide the proper analysis prevents the appellant from understanding the precise basis for the Board's denial of a disability rating in excess of 50% and frustrates judicial review of that issue. *See Gilbert, supra*. The Board's reasons or bases for its decision on that issue are therefore inadequate and remand is required. *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").

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and

argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's January 7, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: December 14, 2016

Copies to:

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