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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-6249

MAI DE HART, APPELLANT,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Air Force veteran Mai De Hart appeals a June 2021 Board decision that denied entitlement to (1) a rating in excess of 10% for a lumbar spine (back) condition prior to March 7, 2019, (2) a rating in excess of 20% for a back condition thereafter, and (3) a rating in excess of 50% for PTSD.* The parties also raised arguments regarding the Board's duty to discuss her service-connected radiculopathies that the Court referred to a panel for a precedential ruling. The parties' remaining arguments as to the back ratings and the proper initial rating for PTSD should be decided by a single judge. Thus, the Court bifurcates the issues in this appeal. This nonprecedential decision addresses her arguments regarding her back condition ratings and PTSD rating. For the reasons discussed below, the Court vacates and remands the Board's decision regarding her back condition and PTSD ratings.

* The Board also remanded claims for service connection for an eye disorder and for an imbalance disorder, including vertigo. Because a remand is not a final decision, those claims are not before the Court. *See Clark v. McDonough*, 35 Vet.App. 317, 323 (2022) (per curiam order).

I. BACK CONDITION

Ms. De Hart filed a claim for a lumbar spine condition in 2008. VA granted service connection for her condition with a noncompensable rating, and she appealed to the Board for a higher rating. This is the claim currently before the Court—the propriety of the veteran's spine condition rating since 2008. During this period, VA procured three relevant exams—in 2016, in 2017, and in 2019. Based on these exams, the RO assigned a 10% rating beginning in April 2016 and, later, it assigned a 20% rating beginning March 2019. In the decision on appeal, the Board confirmed the initial 10% rating prior to March 2019 and denied a rating higher than 20% thereafter. But for both rating periods, the parties agree that the Board relied on inadequate exams.

A. Prior to March 2019

At her VA exam in April 2016, Ms. De Hart reported flare-ups occurring multiple times a month and lasting for hours or days at a time. The examiner, however, concluded that a flare-up opinion could not be provided because there was "no conceptual or empirical basis for" providing such an opinion "without directly observing functioning." R. at 1933. After this exam, the regional office (RO) increased her rating to 10%, effective April 2016.

The parties agree that the Board erred by relying on inadequate exams when it denied a rating higher than 10% for Ms. De Hart's back condition prior to March 7, 2019. Specifically, they agree that the April 2016 exam is inadequate because the examiner did not opine upon the veteran's possible functional loss during flare-ups. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 43–44 (2011). The Court accepts the Secretary's concession and remands this matter for the Board to secure an adequate examination.

B. From March 2019

The parties also agree that the issue of the veteran's back condition rating from March 2019 should be remanded. They disagree, however, on what the Board must do on remand. The appellant urges the Court to remand for a new statement of reasons or bases while the Secretary asks for a new exam. The new exam is warranted.

Ms. De Hart's initial brief presents alternative arguments. First, that the Board didn't recognize that the March 2019 exam is favorable evidence as to a higher rating because it shows that she was unable to perform three repetitions of range of motion testing. She further argued that the Board failed to independently assess her functional limitations and, instead, merely adopted the examiner's negative conclusions. Alternatively, she says the March 2019 exam is inadequate

and a new one is warranted because it was internally inconsistent. Specifically, the examiner found that she could not perform more than one repetition of flexion due to pain but that her range of motion after repeated use over time would remain unchanged.

The Secretary agrees that the exam is inadequate and that a new one is needed. He agrees that the exam is internally inconsistent because the examiner failed to indicate at what point during range of motion testing that the veteran experienced limitation of motion specifically attributable to pain. Secretary's Br. at 19 (citing *Mitchell*, 25 Vet.App. at 44). He also believes the exam to be inadequate because the examiner did not explain why passive range of motion testing could not be performed. *Id.* (citing *Correia v. McDonald*, 28 Vet.App. 158 (2016)). For these reasons, he argues that a new exam is warranted.

The veteran's reply brief walks back her request for a new exam to cure the inadequacies of the 2019 exam and instead argues that, because "the March 2019 examination report provided the Board with enough information to grant a 40 percent rating for her lumbar spine," the Court need only remand the matter so the Board can provide new reasons or bases. Reply Br. at 1.

When, as part of his duty to assist in developing a claim, the Secretary undertakes to provide an examination, "he must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). The Secretary concedes that the exam provided was not adequate, which is an error that cannot be remedied through a new statement of reasons or bases. This is especially true where the appellant argues that the exam is inadequate for rating purposes. Accordingly, the Court remands the matter for VA to obtain a new examination assessing Ms. De Hart's back condition from March 2019.

II. PTSD RATING

A. PTSD Rating Criteria

Disability ratings for mental disorders are assigned based on a "General Rating Formula." 38 C.F.R. § 4.130 (2024). The rating analysis for psychiatric disorders is "symptom driven." *Golden v. Shulkin*, 29 Vet.App. 221, 225 (2018). Use of the term "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is nonexhaustive, meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013). Although "symptomatology is the primary consideration, the regulation also requires an ultimate factual

conclusion as to the veteran's level of impairment in 'most areas.'" *Id.* at 118 (quoting 38 C.F.R. § 4.130). More specifically, it "is not the symptoms, but their effects, that determine the level of impairment." *Mauerhan v. Principi*, 16 Vet.App. 436, 443 (2002) (quotes omitted). Accordingly, "VA must engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment." *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017). That is, rating psychiatric disorders requires a two-part analysis. First, VA must account for all the symptoms and, second, determine the degree to which these symptoms impact a veteran's social and occupational functioning. *Emerson v. McDonald*, 28 Vet.App. 200, 212 (2016). Where the veteran's symptoms result in "occupational and social impairment with reduced reliability and productivity," a 50% rating is appropriate; a 70% rating is warranted where those symptoms result in "occupational and social impairment, with deficiencies in most areas." 38 C.F.R. § 4.130.

B. *The Board's Decision*

VA granted service connection for PTSD in 2008 and evaluated the veteran's condition as 50% disabling under the "General Rating Formula for Mental Disorders." 38 C.F.R. § 4.130 (2008). Ms. De Hart appealed and has been seeking a higher rating for over 15 years. In its decision on appeal, the Board continued to deny a rating greater than 50%.

The Board's reasoning was largely based on three VA exams of record—from 2008, 2014, and 2017—all of which found that, regardless of her symptom presentation, the veteran's impairment level did not exceed the 50% rating level (reduced reliability and productivity). It noted that the 2008 exam reported myriad PTSD symptoms, including anger and rage, problems with concentration and memory, and severe short-term and long-term memory loss. However, that examiner opined that Ms. De Hart's PTSD only moderately affected her employment and quality of life. During the 2014 exam, the veteran reported volunteering to teach children and perform training at a local police department. She also reported acting as a caretaker for her mother. Her PTSD symptoms remained largely the same, though the examiner noted impaired impulse control, including unprovoked irritability with periods of violence. The veteran also reported fleeting thoughts of suicide but no intent to act on those thoughts. This examiner similarly concluded that the veteran's PTSD only resulted in occupational and social impairment with reduced reliability

and productivity. Last, the Board discussed the 2017 exam in which the veteran reported numerous symptoms but denied suicidal thoughts. Ultimately, this examiner also concluded that the veteran's PTSD symptoms resulted in occupational and social impairment with reduced reliability and productivity.

Based on this evidence, and on a "holistic analysis" of the veteran's symptoms, the Board denied a rating higher than 50%. R. at 11. It found that the evidence did not show that Ms. De Hart's memory loss causes her to forget names of close relatives or her own occupation or name (a symptom found in the 100% rating criteria). And although the 70% rating references suicidal ideation, the Board found that the evidence did not show that she has "been hospitalized, found to be at a risk of committing suicide, or reported elsewhere attempting suicide during treatment or examinations." *Id.* Thus, the Board said, intermittent indications of suicidal ideation during the period on appeal did not establish the symptom of suicidal ideation appropriately found in the 70% rating. Finally, the Board noted that the veteran performs daily caretaker duties for her mother, "so she has not experienced total social impairment." R. at 12.

C. Analysis

On appeal, Ms. De Hart makes three arguments: (1) the Board erred in assessing her reports of suicidal ideation; (2) the Board applied improperly high standards in assessing her other symptoms; and (3) the Board erred in adopting the VA examiner's impairment findings without independently assessing impairment itself. The Court agrees that the Board made multiple errors and, accordingly, remand is warranted.

The Court reviews claims of legal error by the Board *de novo* but may only overturn a factual finding made by the Board where there is a definite and firm conviction that a mistake was made. *See Martinez-Bodon v. Wilkie*, 32 Vet.App. 393, 397 (2020); *see also Fears v. Wilkie*, 31 Vet.App. 308, 314 (2019). However, remand is appropriate when the Board committed legal error or failed to adequately explain its conclusions in a way that facilitates review in this Court. *Hedgepeth v. Wilkie*, 30 Vet.App. 318, 325 (2018). To provide adequate reasons or bases, "the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant." *Id.*

In this case, the Board's errors are twofold: first, it collapsed the 70% and 100% rating criteria throughout much of its analysis, holding Ms. De Hart's memory loss and social impairment

to a higher standard than required for a 70% rating; second, it failed to adequately assess evidence of relevant symptoms, including her reported disorientation and disassociation, as well as her ability to adapt to stressful circumstances. And as explained further below, the Board's failure to adequately address these symptoms does not facilitate this review of the Board's conclusion that the veteran is entitled to a rating no higher than 50%.

Regarding the former, Ms. De Hart contends that the Board erred by applying the 100% criteria to her memory loss and social impairment. For reference, the 50% rating contemplates "impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks)"; the 70% rating does not contemplate a form of memory loss; and the 100% rating contemplates "memory loss for names of close relatives, own occupation, or own name." 38 C.F.R. § 4.130. For Ms. De Hart's memory loss, the Board noted that "while the examiners noted some memory impairment, [she] has not claimed, and the evidence does not show that her PTSD has resulted in memory loss for names of close relatives, own occupation, or own name." R. at 11. By this language, it is plain to see that the Board assessed this symptom under the 100% rating criteria. But the veteran is seeking a rating higher than 50%, which could include *either* a 70% or 100% rating. The Board did not assess this symptom as it relates to the 70% criteria, which (along with other symptoms) must be severe enough to result in "occupational and social impairment with deficiencies in most areas"—the 70% rating's impairment level. 38 C.F.R. § 4.130. The veteran points to evidence that she "had to write down everything she needed to do and note things in multiple calendars" and that "[s]he also used electronic devices to set reminders for activities that she needed to complete," as well as an examiner's note that her memory impairment was severe and she needed assistive devices for reminders. Appellant's Br. at 25–26. The Court agrees that, instead of simply noting that this memory loss does not equate to the memory-loss symptom found in the 100% rating criteria, the Board should have discussed whether the frequency, severity, and duration of the veteran's memory loss more nearly approximates the symptoms and impairment level of a 70% rating, even though memory loss is not explicitly listed in those criteria.

Ms. De Hart next argues that the Board erred by failing to address evidence of spatial disorientation (a 70% symptom) and dissociative episodes (akin to "disorientation to time and place"—a 100% symptom). In reciting the record evidence, the Board acknowledged the veteran's reports of disassociation and disorientation (R. at 9-10), but it made no mention of those symptoms

in its "holistic analysis." Instead, it focused only on a select few symptoms—memory loss, suicidal ideation, and anger/irritability. R. at 11. The Court cannot assess these symptoms in the first instance. *See Stinson v. McDonough*, 92 F.4th 1355, 1362 (Fed. Cir. 2024). And because the Board merely noted these symptoms but did not assess where they fall in the rating criteria, the Court is unable to review its rating determination or deem its PTSD-rating assessment holistic. Additionally, Ms. De Hart cites a 2017 treatment record that, she argues, shows that she is no longer able to adapt to stressful circumstances (a 70% symptom). In that 2017 record, the veteran reported that she "was attempting to teach foreign language" before but was "unable to do this at all [that] year due to increased [symptoms] related to stressors." R. at 960. The Board did not discuss this evidence, which is obviously relevant to Ms. DeHart's ability or inability to adapt to stressful circumstances. Because the Court cannot assess relevant evidence in the first instance, a remand is needed so the Board can assess this evidence in relation to the veteran's ability to adapt to stressful circumstances. *See Stinson*, 92 F.4th at 1362.

Last, the Board found that she "has not experienced total social impairment" because she performs "daily caretaker duties for her mother." R. at 12. Again, *total* social impairment is required for a 100% rating, not a 70% rating. The Board never discussed the veteran's disability picture as it relates to the 70% rating. Thus, it is clear to the Court that the Board repeatedly assessed the veteran's symptoms under the requirements of a higher impairment level than necessary for a rating higher than 50%.

A final note: the appellant presented additional arguments regarding the Board's treatment of two other symptoms—suicidal ideation and impaired impulse control. The Court has reviewed the Board's decision and the record and finds these last arguments unconvincing. However, because the Court remands for readjudication of the veteran's PTSD rating, these symptoms must nevertheless be reconsidered on remand as well.

III. CONCLUSION

Based on the foregoing, the portions of the Board's June 9, 2021, decision denying an initial rating higher than 10% for lumbar spondylolisthesis prior to March 7, 2019, and higher than 20% thereafter, and an initial PTSD rating higher than 50% are VACATED, and the matters are REMANDED for further adjudication consistent with this opinion. The balance of the appeal is DISMISSED.

DATED: July 23, 2024

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