BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

17-2310

MARIO I. HERNANDEZ,

Appellant

v.

ROBERT L. WILKIE, Acting
SECRETARY OF VETERANS AFFAIRS,

Appellee

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I. Prior to July 25, 2011, the Veteran experienced chronic thoughts of suicide, and in 2010, he actively took a pistol, held it, and seriously contemplated killing himself. The Veteran also engaged in obsessive rituals that were severe enough to interfere with his routine activities. Was the Board's denial of a rating in excess of 50 percent for the Veteran's PTSD erroneous?

II. Between July 25, 2011 and February 19, 2015, the Veteran was suspended from work after he deliberately sprayed diesel fuel on a coworker out of anger; prior to this incident, he also had arguments with other coworkers. A VA examiner opined the Veteran was totally occupationally and socially impaired. Did the Board's denial of a rating in excess of 70 percent for PTSD constitute prejudicial error?

III. Since February 19, 2015, the Veteran harbored suicidal thoughts and at times wanted "it all to be over with." But the Board failed to include this symptomatology in its analysis, and it did not adequately explain why a lesser rating was appropriate for this time period. Moreover, assuming the Board was proper to consider evidence on the date it was submitted, the Board did not consider whether the Veteran's spraying of diesel fuel on his co-worker was evidence of more severe impairment. Did the Board err by failing to assign a rating in excess of 50 percent for the Veteran's PTSD?

IV. The Board denied the Veteran higher ratings for his PTSD, but it failed to provide articulable standards for the adjudication of this increased rating claim prior to July 25, 2011 and as of February 19, 2015. Did this omission constitute prejudicial legal error?

V. The Veteran was self-employed before he stopped working, and when employed for others, he was fired from jobs due to anger, violence, and low frustration tolerance. He believed that word spread about his troublesome ways, including his physical and verbal altercations, and he did not get good work as a result. Thus, he retired. Did the Board err in denying TDIU because the Veteran held a job for some of the appeal period?

STATEMENT OF THE CASE

Mario I. Hernandez served honorably in the United States Army from November 1967 through November 1969, including service in Vietnam. R-3 (1-25); R-475 (475-79). The Veteran earned the Bronze Star Medal and Air Medal for his service. R-218 (209-22). He engaged in direct combat, "and one time had to carry the body of a comrade out of battle." R-475. A friend of his in Vietnam was killed in an ambush. R-410 (408-12). He saw his friend's body being brought back to camp and thought the body did not look like his friend from "the way [it] was dangling." *Id.* He watched his fellow soldiers throw dirt on top of the body "to keep the flies" away. *Id.* For years upon his return from Vietnam, he had distressing memories of his combat experiences, and he experiences "significant feelings of survivor guilt." R-510 (509-17).

He worked in the trucking industry since his return from Vietnam. R-417 (414-18); R-513. He had difficulty maintaining work stability. R-477. Beginning in the 1990s, the Veteran owned his own trucking business. R-417; R-354-55. He stopped working in April 2008. R-354; R-291-92 (287-94). The Veteran retired "because he was not getting the loads he should." R-292. He "believe[d] the dispatcher spread the word that he was a trouble

maker" as he engaged in "verbal fights and one time a physical assault with another driver." *Id.*; *see also* R-323 (noting a union benefits issue).

In 2010, he returned to work part-time because he was "driving his wife 'crazy'" when he was at home. R-244 (243-46). Although he lost work due to depression, anxiety, and dread two days weekly, Mr. Hernandez then worked from 2011 through 2013 in a test fleet as a truck driver, but he was laid off when the company lost the contract. R-50 (48-54); R-218. Mr. Hernandez experienced decreased concentration, difficulty following instructions, increased absenteeism, increased tardiness, and memory loss. *Id.* He got the same job with a similar company "relatively soon" after that and worked full time in that position for about one year. R-50. However, he was then suspended from that job "for deliberately spraying diesel fuel on a coworker." *Id.*

Prior to that, he was involved in arguments with coworkers, but no physical altercations with others at that company. *Id.* He hoped to return to work soon because it "distract[ed] him from thinking about distressing memories" about his "traumatic experiences in Vietnam." R-50-51. Although he was skilled in truck driving, he "generally ha[d] problems with people." R-53. He worked to get away from his family, otherwise he stayed in his room. R-211. And he forgot what days he was supposed to work. R-214. He was fired from jobs because of his anger, violence, and low frustration tolerance. R-220.

The Veteran experienced irritability and angry outbursts. R-50; *see* R-52. He had trouble with concentration. R-52. The Veteran was irritable and engaged in angry outbursts with little or no provocation, typically expressed as verbal or physical aggression toward people or objects. *Id.* He got into a fight with a trucking dispatcher, which began verbally

but escalated into pushing. R-288. He had difficulty functioning at work due to anger and poor judgment, resulting in "significant workplace problems[,] among others." R-292-93. He also got into a confrontation which ended with Mr. Hernandez pushing a man working on his neighbor's house over leaves on his property. R-288. He had poor impulse control. R-290.

He harbored suicidal thoughts, and "sometimes [ ] just want[ed] it to be over with." R-50-51; R-53; R-235 (235-38). He believed "if he were not alive[,] he would not have to deal with any problems." R-235. The Veteran's thoughts of suicide were chronic, and in 2010, he took a pistol into the countryside, held it, and "seriously thought to kill himself." R-211; R-213; R-220. He drank in excess to reduce his symptoms of PTSD. R-211; *see* R-220 (2011 examination noting his recreation was limited to drinking alcohol by himself). Furthermore, Mr. Hernandez showed up to his 2010 VA examination wearing a soiled shirt, and his grooming was "a little messy." R-289. At the following year's examination, he was bleary-eyed and unkempt. R-212. He was disheveled and his pants were falling off. R-213. The Veteran had not showered in three days. *Id.*; *see* R-220 (2011 examination noting "poor health and hygiene" as he showered 1-2 times per week). He did not know what day it was. R-212. The Veteran had "chronic vague paranoia when he was outside of the house." R-220. He also engaged in obsessional behavior, keeping a weapon close to him at all times and checking locks and windows. R-213. In 2011, his psychiatrist recommended he consider a voluntary admission to stabilize his symptoms. R-218. He believed his symptoms were worsening. *Id.*

In March 2008, Mr. Hernandez filed a claim for service connection and compensation for his PTSD, and in August 2008, the RO increased the Veteran's rating from 30 percent to 50 percent, effective March 5, 2008. R-493; R-386 (385-88). The Veteran timely disagreed. R-384 (May 2009 notice of disagreement). In April 2010, the RO denied entitlement to TDIU. R-284 (281-85); *see* R-354-55 (July 2009 VA Form 21-8940). In March 2012, the RO continued Mr. Hernandez's 50 percent rating for PTSD. R-76 (76-84). He timely perfected his appeal to the Board. R-86-106 (March 2012 statement of the case); R-73-74 (May 2012 VA Form 9).

In June 2017, the Board denied Mr. Hernandez a rating in excess of 50 percent for PTSD prior to July 25, 2011 and since February 19, 2015, and in excess of 70 percent between July 25, 2011 and February 19, 2015. R-23. For the first and third time periods, the Board noted some of the Veteran's symptomatology, such as his relationships and impulse issues, but determined the impairment shown was not consistent with a higher rating. R-15-17. For the second appeal period, the Board noted the VA examiner's opinion that the Veteran was totally occupationally and socially disabled, but determined his disability was "more in line" with the symptoms associated with the 70 percent rating because he worked from 2011 to 2013 as a truck driver. R-18. The Board also denied TDIU. R-23. It determined the Veteran's assertions regarding his unemployability were contradictory and that he retired for non-PTSD reasons. *See* R-21-13. This appeal followed.

SUMMARY OF THE ARGUMENT

The Board erred when it denied Mr. Hernandez ratings in excess of 50 percent for his PTSD for the first and third time periods on appeal, and in excess of 70 percent for the second time period on appeal.

Prior to July 25, 2011, the Veteran experienced obsessional rituals that interfered with his daily functioning. But because the examiner noted this history on the 2011 examination report, the Board erroneously considered this symptomatology only as of the date of the examination, even though it was relevant prior to that date. Further, the Veteran experienced chronic suicidal thoughts and even held a pistol in his hand while debating killing himself prior to the examination. But again, because the examiner noted these experiences on the examination report, the Board erroneously failed to consider whether a higher rating was warranted prior to the date of the examination. The Veteran also had a legal history including an altercation that required police intervention. He had a history of violence/assaultiveness and was fired from jobs due to his anger and violence. He drank in excess in order to reduce symptoms of PTSD. Yet the Board failed to adequately analyze this symptomatology and instead erroneously adopted a VA examiner's opinion regarding the Veteran's level of impairment. The Board additionally failed to consider whether the Veteran's memory loss for his location and street names, despite having been a driver for many years, approximated the impairment contemplated in the higher rating criteria. Finally, the Board erred when it failed to consider whether the Veteran was entitled to a higher rating for this time period in light of his inability to maintain proper hygiene, which the 2011 examiner documented.

Between 2011 and 2015, the Board erred when it failed to properly consider the VA examiner's opinion that Mr. Hernandez was totally occupationally and socially impaired. The Board could not merely rely on the fact that Mr. Hernandez had a job to determine he was not totally occupationally impaired, as he worked for himself and lost work throughout the appeal period. The fact that he was employed is not contrary to an inability to do so more than at a marginal level. Furthermore, the Board erred when it failed to analyze the Veteran's risk of harm to himself in denying him a higher rating.

And as of February 19, 2015, the Board failed to provide any adequate explanation as to why a lesser rating was warranted. The Board also failed to consider the Veteran's suicidal ideation and whether that symptomatology approximated the higher rating criteria. And assuming the Board's consideration of the fact that the Veteran was suspended from work after he deliberately sprayed diesel fuel on a coworker out of anger was proper as of the date of the examination, the Board's decision is still inadequate because it relied on the fact that he was hoping to go back to work to deny a higher rating; yet the Board failed to consider that the Veteran was hoping to return to work as a means to cope with his PTSD symptoms.

The Board also failed to enumerate articulable standards in denying the Veteran higher ratings. But proper adjudication of his claim requires the Board to provide clear standards by which it adequately considers the appropriate disability ratings.

The Board also erroneously denied entitlement to TDIU because the Veteran was employed. While during part of the appeal period he did work for a trucking company, he was suspended for throwing diesel fuel on a co-worker. He was also fired from jobs due to his PTSD symptoms. When he was self-employed, he only worked two days a week and

missed two days because of his PTSD symptoms. For part of the appeal period, he engaged in no work at all. The Board failed to adequately consider this evidence. Remand is appropriate.

STANDARD OF REVIEW

The Board's determination regarding the level of a veteran's impairment under the applicable rating criteria is a finding of fact subject to the clearly erroneous standard of review. 38 U.S.C. § 7261(a)(4); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *U. S. v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). This Court may hold a clearly erroneous finding unlawful and set it aside or reverse it. 38 U.S.C.A. § 7261(a)(4).

The Court reviews claims of legal error by the Board under the *de novo* standard of review. *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc). The Board's interpretation of statutes and regulations is a legal ruling to be reviewed without deference by the Court. *See Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003). A conclusion of law shall be set aside when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by adequate reasons or bases." *King v. Shinseki*, 26 Vet.App. 433, 437 (2014); *see* 38 U.S.C. § 7261(a)(3). "The Board's determination of the application of established law to the facts of a particular case without creating precedent is an issue of material fact subject to review under the clearly erroneous standard." *Lennox,* 353 F.3d at 945.

The Court reviews material questions of fact under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). "A finding is 'clearly erroneous' where "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Court may not "substitute its judgment for that of the BVA on issues of material fact[,]" and may not overturn factual determinations of the Board if there is a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

ARGUMENT

I. The Board erred when it denied a higher rating for PTSD prior to July 25, 2011 because it failed to adequately address evidence that reveals a higher level of impairment and only considered evidence as of the day it was reported.

The Board denied Mr. Hernandez a rating in excess of 50 percent for this time period. R-15. It listed the symptoms the Veteran exhibited such as "intrusive recollections; nightmares; fatigue; irritability; anger; depressed mood; anxiety; isolation; avoidance of crowds; and hypervigilance." *Id.* The Board then listed the symptoms the Veteran did not exhibit and relied on these to deny a higher rating, even though the Board noted that the lack of symptoms was not dispositive. R-15-16. The Board's reliance on the symptoms Mr. Hernandez did not exhibit misapplies the law under *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 117 (Fed. Cir. 2013). Rather than use the rating criteria as a checklist, the Board was required to analyze the Veteran's actual symptoms and determine if they resulted in impairment that more nearly approximated a higher rating. Mr. Hernandez need not demonstrate all or any the symptoms listed within the rating criteria to warrant an increased rating. 38 C.F.R. § 4.130 (2017). If the Board had appropriately considered the severity of

the Veteran's PTSD, it may have determined a higher rating was appropriate. *See Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004).

Obsessional rituals. Prior to July 2011, Mr. Hernandez engaged in obsessive rituals that were severe enough to interfere with his routine activities, such as being overly security conscious and getting up to look out of the window frequently. R-478 (May 2008 examiner's opinion). He also experienced paranoia. R-219-20 (July 2011 examination). The Board listed this evidence when noting the "[f]actual [b]ackground" of the Veteran's claim, but failed to provide an analysis of this symptomatology and whether it warranted a higher rating, especially in light of the 70 percent criteria's explicit contemplation of this type of impairment. *See* R-9-10; R-13; R-16-18; 38 C.F.R. § 4.130. This was error. *See Dennis v. Nicholson,* 21 Vet.App. 18, 22 (2007) (noting that "merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases") (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992)).

Instead, the Board solely considered this impairment for the period between July 25, 2011 and February 19, 2015 because the Veteran described this behavior "on the date of the [2011] examination." R-18. But "the date the evidence is submitted . . . is irrelevant when considering the effective date of an award." *McGrath v. Gober*, 14 Vet.App. 28, 35 (2000). Instead, "the effective date of an award 'shall be fixed in accordance with the facts found.'" *Id.* Here, the facts demonstrate he had these symptoms prior to July 2011. Thus, remand is warranted for the Board to analyze the Veteran's obsessional rituals and determine if the impairment they caused approximated a higher rating during that period on appeal.

On remand, the Board must determine whether these ritualistic behaviors, which interfered with the Veteran's routine activities – alone or in concert with his other symptoms – approximate the level of impairment contemplated by the higher rating criteria prior to the 2011 examination. *See id.*; 38 C.F.R. § 4.130 (explicitly contemplating obsessional rituals which interfere with routine activities in the 70 percent rating criteria). Whether or not that evidence is "sufficient to support a determination that an earlier effective date is warranted is a finding of fact for the Board to determine in the first instance." *See McGrath,* 14 Vet.App. at 35 (citing *Hensley v. West,* 212 F.3d 1255 (Fed. Cir. 2000)). In sum, the issue must be remanded to the Board for readjudication to determine if a higher rating is warranted for this time period. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Suicidal ideation and action. The Veteran entertained the "occasional passive death wish or thoughts that if he were not alive he would not have to deal with any problems." R-235 (April 2011 psychiatry note). By July 2011, the Veteran had experienced chronic thoughts of suicide and in 2010, he actively took a pistol, held it, and seriously contemplated killing himself, ultimately changing his mind due to worries about his wife. R-210-13; *see* R-213 (noting "suicidal practicing behavior" without thoughts of suicide during the 2011 examination).

The Board listed this evidence when noting the "[f]actual [b]ackground" of the Veteran's claim. R-12. Yet the Board's mere listing of the evidence of record does not constitute an adequate analysis. *See Abernathy*, 3 Vet.App. at 465. And in denying a rating in excess of 50 percent for this time period, it entirely failed to analyze this symptomatology. *See* R-16-17. Its analysis in support of its determination as to the appropriate rating during

this time period is silent for any consideration pertaining to suicidal ideation. R-17-18.

The prejudice of this error is highlighted by the fact that the Board granted a higher rating from July 2011 to February 2015 because during the 2011 examination, Mr. Hernandez reported "he had been experiencing chronic suicidal thoughts" and that he had taken and held a pistol while he "seriously considered suicide." R-18. These "chronic" thoughts occurred prior to the examination, and as the examiner noted, the incident with the pistol occurred the year prior, in 2010. R-210-13. Thus, the Board erred by failing to include this symptomatology in its analysis prior to July 25, 2011. *See McGrath,* 14 Vet.App. at 35. Furthermore, it is hard to believe that the level of severity of Mr. Hernandez's PTSD would so dramatically increase from 50 to 70 percent disabling within the course of one day – especially given the *persistent* nature of multiple symptoms. *See* R-17-18.

The Board's failure to consider the Veteran's suicidal ideation and actions in this time period was prejudicial because this evidence reveals that Mr. Hernandez suffered from impairment which VA concedes is characteristic of warranting a higher rating, as suicidal ideation is contemplated only within the higher rating criteria. *See* 38 C.F.R. § 4.130; *Bankhead v. Shulkin,* 29 Vet.App. 10, 20 (2017) (finding VA deemed suicidal ideation a symptom representative of occupational and social impairment with deficiencies in most areas because there are no analogues in the lower evaluations). The Board thus erred when it failed to discuss this symptomatology in its analysis. *See* R-16-17; *DeLa Cruz v. Principi*, 15 Vet.App. 143, 149 (2001). "Where, as here, the Board fails to adequately assess evidence of a . . . symptom experienced by the [V]eteran . . . its reasons or bases for its denial of a higher

evaluation are inadequate." *Bankhead,* 29 Vet.App. at 22. Remand is warranted for the Board to provide an analysis in this regard. *See Tucker*, 11 Vet.App. at 374.

Impulse control. During the July 2011 VA examination, the examiner noted the Veteran had a "legal *history*" in that he had a "minor-moderate altercation with [a] neighbor *that required police intervention.*" R-211 (emphasis added). Mr. Hernandez had a "history of violence/assaultiveness" and exhibited a "tendency towards violence and fighting." *Id.* The Veteran had been fired from jobs due to his anger and violence. R-220. He was "easily angered" and had "frequent agitation." R-475. He "dr[a]nk[ ] to excess" in order "to reduce symptoms of PTSD." R-211; *see* R-219 (opining alcohol use is secondary to and used to treat PTSD). Thus, these histories were relevant to this appeal period. *See McGrath*, 14 Vet.App. at 35. Furthermore, the 2010 examiner opined the Veteran's impulse control was poor. R-290.

The Board "note[d]" the Veteran participated in "physical and verbal altercations," such as "pushing a dispatcher at work and a man blowing leaves into his yard, as well as verbal and, on one occasion, physical fights with other drivers on the job." R-16; *see* R-288. However, instead of conducting its own analysis of this symptomatology, it adopted the 2010 VA examiner's opinion as to Mr. Hernandez's overall level of impairment. R-16. But this was not appropriate. The Board "cannot evade [its] statutory responsibility" to provide adequate reasons or bases for its decision by "merely by adopting [a medical opinion] as its own." *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). The Board was required to consider this symptomatology and its severity to consider whether it approximated the higher rating criteria, as his lack of control over his impulses caused him to act out verbally and physically

as contemplated in the 70 percent rating criteria, alone or in conjunction with the rest of his PTSD symptomatology. *See* 38 C.F.R. § 4.130; *Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001). Remand is warranted for the Board to provide this analysis. *Tucker*, 11 Vet.App. at 374.

Memory. The Veteran's memory was "impaired and the degree [was] moderate." R-478. He had "problems with retention of highly learned material" and he forg[o]t[ ] to complete tasks. *Id.* In addition, Mr. Hernandez had "been a driver for many years, but frequently w[ould] get lost and forget the names of streets, etc." *Id.* The Board listed a "variety of symptoms" the Veteran experienced during this appeal period, but did not consider the Veteran's memory impairment. R-15. The Board referenced that the 2011 "VA examiner noted" that Mr. Hernandez "described" these issues during the 2011 examination when it adjudicated the issue of entitlement to a higher rating pertaining to the time period from 2011 to 2015, but the Board ignored it for this time period. R-17-18.

Yet the fact that prior to the 2011 examination Mr. Hernandez was suffering from memory impairment, such as frequently forgetting names of streets when he had been a driver for years, was relevant to his overall impairment prior to July 2011. *See McGrath,* 14 Vet.App. at 35. Memory loss of own occupation, own name, or names of close relatives is contemplated in the 100 percent rating criteria. 38 C.F.R. § 4.130. Thus, the 100 percent rating criteria recognizes that part of total impairment is the loss of memory regarding places, such as a job, or people, such a family, that are very familiar and close to an individual. And here, the Veteran had been a driver for many years. R-478. But due to his PTSD, Mr. Hernandez was unable to remember his way around or the names of the streets. *Id.* Thus, the Board was required to consider whether Mr. Hernandez's memory loss for

street names and directions after driving for many years was akin to memory loss for names of others and of own occupation as enumerated in the 100 percent rating criteria, or was a symptom that more nearly approximates a level of impairment higher than 50. *See* 38 C.F.R. § 4.7 (2017); *Vazquez-Claudio,* 713 F.3d at 118 (Fed. Cir. 2013); *Dela Cruz,* 15 Vet.App. at 149. Remand is required for the Board to conduct this analysis. *See Tucker,* 11 Vet.App. at 374.

Hygiene. The July 2011 examiner opined that the Veteran was unable to maintain minimum personal hygiene; he was disheveled, unkempt, and his pants were falling off. R-212-13. He had not showered in three days. R-213; *see* R-220 (opining the Veteran maintained poor health and hygiene). Prior to the 2011 examination, he showered only one to two times per week. R-220. Thus, the Veteran had not showered on the 22nd, 23rd, and 24th of July, but the Board failed to consider this lack of maintenance of basic hygiene for that time period before the effective date of the Veteran's 70 percent rating. *See* R-17-18; R-23.

The Board's analysis for this time period failed to consider any of this symptomatology, which reflected the Veteran was so impaired he was unable to engage in "[r]outine responsibilities of self-care." *See* R-17-18; R-219. The Board only discussed this evidence for the time period beginning the date of the 2011 examination, even though the evidence contained reflections of past habits. R-18; R-220. As this evidence reflects impairment VA explicitly correlates with a 100 percent rating pursuant to 38 C.F.R. § 4.130, remand is required for the Board to, in the first instance, determine both whether a higher rating is warranted for this time period in light of the Veteran's inability to maintain minimal

personal hygiene leading up to the 2011 examination, and if so, what the appropriate rating should be – despite the fact that this evidence was reported in July 2011. *See McGrath,* 14 Vet.App. at 35.

Prejudice The Board's failure to properly analyze the Veteran's symptomatology prejudiced Mr. Hernandez because it should have considered these symptoms as aligned with the higher rating criteria. *See* 38 C.F.R. § 4.130. The Veteran's failure to shower regularly demonstrates an inability to maintain minimal personal hygiene, his memory loss for known material demonstrated impairment akin to memory loss of own occupation, own name, or names of close relatives, and his violence demonstrated impaired impulse control. He experienced chronic thoughts of suicide and an attempt, and his checking of the door demonstrated obsessive rituals that were severe enough to interfere with his routine activities.

II. The Board erred when it denied a higher rating for PTSD between July 25, 2011 and February 19, 2015 because it failed to adequately consider favorable evidence that reveals a higher level of impairment.

The Board erred when it denied Mr. Hernandez a rating in excess of 70 percent between July 2011 and February 2015 by rejecting the 2011 examiner's opinion as to the Veteran's overall impairment. R-18. During the July 25, 2011 examination, the Veteran was disoriented to time, and he believed it was six days prior to the actual date. R-212. He was unable to remember what days he was supposed to work. R-214. He kept a weapon close to him at all times. R-213. Mr. Hernandez had a tendency towards violence and fighting. R-211. He went to work "to get out of the house and get away from [his] family." *Id.* When he was at home, he stayed "indoors and in his room." *Id.* Despite therapy, and use of

Remeron, Zoloft, Wellbutrin, and Trazodone, his "core PTSD symptoms and suicidal thoughts [did] not remit." R-210.

The frequency, severity, and duration of his PTSD symptoms was "daily, marked, [and] chronic." R-214. The 2011 examiner opined the Veteran had no remissions of symptomatology and had no "capacity for adjustment during remission;" in fact, the examiner opined Mr. Hernandez was "getting worse with time." R-215.

The Board "note[d]" that the examiner "described the Veteran's disability as a total social and occupational disability." R-18; *see* R-220. However, the Board discounted the examiner's assessment of the severity of the Veteran's impairments because the Veteran was working part-time. R-18. But on a date "recently" before February 2015, the Veteran was suspended from work after he deliberately sprayed diesel fuel on a coworker out of anger; prior to this incident, he also had arguments with other coworkers. R-50. And he engaged in angry outbursts. *Id.*

Thus, simply because the Veteran held employment does not mean he was not totally impaired, as revealed by his actions on the job. The Board had to analyze the Veteran's symptomatology and provide an adequate statement of reasons or bases before it could reject the examiner's favorable opinion. *See* R-18; *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (Board is required to provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). The Board could not merely rely on the sole fact that Mr. Hernandez had a job to determine he was not totally occupationally impaired just as the Board may not solely rely on the fact that a veteran is employed to deny TDIU. *See* 38 C.F.R. § 4.16(a) (2017); VA Manual M21-1, IV.ii.2.F.1.e.

(recognizing that a veteran may be entitlement to unemployability benefits when they are "currently employed" if that employment is marginal). Thus, remand is warranted for the Board to provide an adequately analysis specific to this time period considering this relevant, favorable evidence. *See Dela Cruz,* 15 Vet.App. at 149; *Tucker*, 11 Vet.App. at 374.

Additionally, the examiner opined that the Veteran was unable to maintain minimum personal hygiene; he was disheveled, unkempt, and his pants were falling off. R-212-13. He had not showered in three days. R-213; *see* R-220 (opining the Veteran maintained poor health and hygiene); *see* R-289 (noting the Veteran's grooming was messy and his shirt was soiled)[1]. Thus, his PTSD precluded him from completing routine responsibilities of self-care. R-219.

Beyond listing this evidence, the Board failed to provide any analysis of this symptomatology to inform the Veteran why his inability to maintain minimum personal hygiene did not approximate the higher rating criteria, even though VA lists impairment this severe within the 100 percent rating criteria. *See* R-18; 38 C.F.R. § 4.130; *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992) (the Court "has long held that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases"). Remand is required for the Board to consider whether this impairment, alone or with the Veteran's other symptomatology, warrants a higher rating. *See Dela Cruz,* 15 Vet.App. at 149.

And in July 2011, the Veteran seriously contemplated killing himself, ultimately changing his mind due to worries about his wife. R-210-13. In fact, Mr. Hernandez

[1] Appellant acknowledges this evidence is outside of the appeal period but cites it with regard to the duration of his issues maintaining minimal hygiene. *See Vazquez-Claudio,* 713 F.3d at 116.

explained that his symptoms were worsening, and his psychiatrist "recommended he consider a voluntary admission to stabilize his depression and PTSD." R-218. His only recreation was drinking alcohol alone. R-220.

Yet the Board failed to analyze the Veteran's persistent danger of self-harm, which is contemplated by the 100 percent rating criteria. *See* R-18; R-210-13; 38 C.F.R. § 4.130; *Bankhead,* 29 Vet.App. at 21. Without an adequate analysis to consider this symptomatology, the Board was unable to rely on the Veteran's part-time employment to deny a higher rating. *See Thompson*, 14 Vet.App. at 188 ; *see also Miller v. West,* 11 Vet.App. 345, 348 (1998) ("A bare conclusion . . . is not probative without a factual predicate in the record."). Thus, remand is warranted. *See Wagner*, 365 F.3d at 1365; *Tucker*, 11 Vet.App. at 374.

III. The Board erred when it denied a higher rating for PTSD since February 19, 2015 because it failed to explain why a lesser rating was appropriate for this time period or adequately address evidence that reveals a higher level of impairment, including as of an earlier date.

Staged rating. The Board denied Mr. Hernandez a rating in excess of 50 percent for this time period, providing a joint analysis for the periods prior to July 25, 2011 and since February 19, 2015. R-15; R-17-18. The Board failed to provide any adequate explanation as to what changed between February 18 and February 19, 2015 to warrant the decrease in his ratings. *See* R-16-18. Thus, the Veteran is unaware of why he was entitled to a lesser rating as of that examination date. *See Thompson,* 14 Vet.App. at 188; *McGrath*, 14 Vet.App. at 35.

Suicidal ideation. Mr. Hernandez experienced suicidal thoughts. R-51; R-53. During his 2015 VA examination, he stated that "sometimes [he] just want[ed] it to be over with." R-51. The Board entirely failed to address this symptomatology when it evaluated the proper rating as of February 2015. *See* R-15-17.

But suicidal ideation, regardless of intent or plan, is explicitly contemplated within the 70 percent rating criteria, and thus the Board had to consider this evidence in its analysis. *See Bankhead,* 29 Vet.App. at 20; *Dela Cruz,* 15 Vet.App. at 149. Remand is necessary for the Board to consider whether the Veteran's suicidal thoughts, alone or in conjunction with the remainder of his symptomatology, warrants a higher rating. *See Bankhead,* 29 Vet.App. at 20; *Tucker*, 11 Vet.App. at 374.

Grossly inappropriate behavior or persistent risk to others. Assuming the Board's consideration of the fact that the Veteran was suspended from work after he deliberately sprayed diesel fuel on a coworker out of anger was proper as of the date of the examination, the Board's decision is still inadequate. Prior to this incident, he also had arguments with other coworkers. R-50. The Veteran engaged in angry outbursts with little or no provocation, typically expressed as verbal or physical aggression toward people or objects. R-50; R-52. The Board entirely failed to consider whether these encounters constituted grossly inappropriate behavior or revealed that Mr. Hernandez posed a persistent risk of harm to others, such as his coworkers, consistent with the impairment contemplated within the 100 percent rating criteria, or at least approximated impairment of a 70 percent level of severity and reflected impaired impulse control. *See* R-16-18; 38 C.F.R. § 4.130.

Instead, the Board determined that because the Veteran "anticipated returning to work shortly thereafter," R-17, a higher rating was not warranted. This was error. Whether the Veteran hoped to return to work, which he hoped to do as a mechanism to try and "not [ ] think about [his] traumatic experiences in Vietnam," does not reflect a lack of impairment. R-51. Rather, the Veteran's method to cope with his distressing impairment was to hope to

go to work and keep his mind busy. *Id.*; *see also* R-511 (noting the Veteran "tended to bury himself in work" to deal with his PTSD symptoms in 2002).[2] The Board thus could not rely on the hope of returning to work as a means to determine Mr. Hernandez was not entitled to a higher rating without providing an adequate analysis of the context of this symptomatology. *See Thompson,* 14 Vet.App. at 188. Thus, remand is warranted for the Board to provide an analysis specific to this time period considering this relevant, favorable evidence. *See Dela Cruz,* 15 Vet.App. at 149; *Tucker*, 11 Vet.App. at 374.

Prejudice The Board's improper analysis prejudiced Mr. Hernandez because it should have considered these symptoms as corresponding with the higher rating criteria. *See* 38 C.F.R. § 4.130. The Veteran's suicidal ideation, regardless of a plan, demonstrated suicidal ideation as contemplated in the 70 percent criteria. *See Bankhead,* 29 Vet.App. at 20. In addition, the Veteran's angry outbursts, including his throwing of diesel fuel, demonstrated grossly inappropriate behavior, as contemplated by the 100 percent criteria, or at least impaired impulse control within the 70 percent criteria. *See* 38 C.F.R. § 4.130.

IV. The Board failed to provide articulable standards for adjudication of the Veteran's PTSD claim for the first and third time periods on appeal.

The Board erred when it failed to explain what standard it used to determined that the Veteran experienced occupational and social impairment with reduced reliability and productivity prior to July 2011 and as of February 2015. R-23. In *Mauerhan v. Principi*, the Court recognized that the factors listed in the rating criteria are examples, and without the

[2] Appellant acknowledges this evidence is outside of the appeal period but cites it with regard to the duration of work as an attempt at a coping mechanism. *See Vazquez-Claudio,* 713 F.3d at 116.

listed symptoms, differentiating between the rating criteria would be a "difficult task." 16 Vet.App. 436, 442 (2009) ("Without those examples, differentiating a 30 percent evaluation from a 50 percent evaluation would be extremely ambiguous."). It is not enough for the Board to consider the relevant evidence and then announce its ultimate conclusion. That skips the middle step: in what way does the evidence satisfy the 50 percent standard and not the 70 percent one? In other words, what is it about the relevant evidence that tells the Board that the Veteran has reduced reliability in occupational and social functioning (50 percent), *as opposed to* deficiencies in most areas (70 percent)?

In *Hood v. Brown*, 4 Vet.App. 301 (1993), the Court noted that many of the terms in the prior diagnostic code (total, severe, considerable, and mild) were quantitative in nature, but one (definite) was qualitative. *Id.* at 303. A similar problem exists here. The 50 percent rating's "reduced reliability" standard is a different measuring stick than the 70 percent's "deficiencies in most areas" standard. *See* 38 C.F.R. § 4.130. The former measures *reliability*; the latter looks at the number of areas in which there are *deficiencies*. As in *Hood*, the Board here did not explain how it reached its ultimate conclusion. Simply listing the symptoms does not provide the analysis needed to determine if the impairment rises to the level of occupational and social impairment with deficiencies in most areas, or why it does not rise to that level. And, as in *Hood*, the Board's simply announcing an ultimate conclusion "must be justified by a clear statement of reasons or bases and not by the equivalent of 'because I say so.'" *Id.*

Recently, the Court agreed that where the Board "merely discussed the symptomatology and then selected a rating—not unlike a math student who forgot to 'show

their work'" its reasons or bases were inadequate.[3] *Jenkins v. Wilkie*, No. 17-0126, 2018 WL 1719473, at *2 (Vet.App. Apr. 9, 2018). There, the Court found that "the Board never articulated under what standard it determines whether symptoms of occupational and social deficiency cause a veteran to become occasionally inefficient (30%), have reduced reliability (50%), or have deficiency in all areas (70%)." *Id.* at *4. Because of this, the Court held that "[a]bsent a standard for differentiating between the various thresholds of impairment, e.g., occasional inefficiency, reduced reliability, deficiency in most areas, the Board's decision essentially amounts to: appellant's symptomatology shows occasional impairment 'because I say so.'" *Id.*

Without clear standards, the Veteran is unaware of the rules being applied to his case, in violation of procedural due process. *See Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976) (due process requires notice and a meaningful opportunity to be heard); *see also Thurber v. Brown*, 5 Vet.App. 119 (1993) (fair process obligates VA to provide claimant with a meaningful opportunity to respond). The lack of standards for defining the terms the Board used also renders its decision arbitrary and capricious. *See Gray v. McDonald*, 27 Vet.App. 313, 325 (2015). Remand is required for the Board to appropriately consider the evidence listed above under an appreciable and authoritative standard and determine whether the Veteran was entitled to a higher rating.

[3] U.S. Vet. App. R.30(a) (revised November 19, 2015) ("Actions designated as nonprecedential by this Court or any other court may be cited only for the persuasive value of their logic and reasoning, provided that the party states that no clear precedent exists on point and the party includes a discussion of the reasoning as applied to the instant case.").

And "[w]ithout a definition of the phrase or, at the very least, a list of factors that VA adjudicators should consider in making that determination, there is no standard against which VA adjudicators can assess the facts of a veteran's case to determine whether he or she is employed in a protected environment." *Cantrell v. Shulkin*, 28 Vet.App. 382, 390-91 (2017). A lack of standards leads to ambiguous decision-making, and should be avoided. *See e.g. King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) ("Just as inconsistent application leads to ambiguous standards, overly ambiguous standards almost inevitably lead to inconsistent application."). The application of different standards to the same legal question is unquestionably arbitrary. *See, e.g., South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) ("[P]atently inconsistent applications of agency standards to similar situations are by definition arbitrary."), all cited by and relied on in *Cantrell*, *id.* at 391.

The Board's failure to use clear standards to make its conclusion rendered its decision arbitrary and capricious, and remand is required. This type of decision does not allow for fair adjudication of the Veteran's claim, and remand is needed for the Board to correct its errors. *See Tucker,* 11 Vet.App. at 374.

V. The Board failed to adequately consider the evidence of record and whether the Veteran was capable of only marginal employment when it denied entitlement to TDIU.

The Board denied Mr. Hernandez entitlement to TDIU. R-23. Under § 4.16, not all employment is "substantially gainful." For the purposes of TDIU, "[m]arginal employment shall not be considered substantially gainful employment." *Id.*

The Board determined the Veteran's statements to VA providers and examiners, as well as to private care providers, contradict the assertions he made in his application for TDIU. R-21. The Board thus determined Mr. Hernandez was not credible. *Id.*

The Board relied on the Veteran's April 2008 statement that he was "still working" and lost no time from work due to PTSD. *Id.* Contrary to the Board's determination, these statements are not necessarily inconsistent. The Veteran did not retire until April 2008, and thus, until that time, he *was* employed and attending work. Therefore, the Veteran's statements are consistent. In fact, the Veteran's July 2009 application for benefits based on individual unemployability confirms that he left his self-employment as a truck driver due to his PTSD and hearing loss, he was not earning any income, and he had not earned any income for the past twelve months. R-354.

The Board further relied on the fact that in February 2009, the Veteran planned to go back to work, but in April 2009, he was unable to. R-21. The Board failed to explain why these statements were inconsistent. *See id.* And whether the Veteran refused to work in 2009 because of a union benefits issue does not shed any light on whether he was capable of maintaining such substantially gainful employment, especially without an adequate analysis in this regard. *See id.*; R-323; *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Pratt v. Derwinski*, 3 Vet.App. 269, 272 (1992).

In addition, the Board relied on the Veteran's statement that he worked from 2011 through 2013 as a truck driver but was then laid off after they lost the contract. *Id.* The Board determined this was inconsistent with the statements the Veteran provided in 2009 in support of his application for benefits, at which time he reported he was self-employed and

only worked about six weeks out of the year, and therefore Mr. Hernandez was not credible. *Id.* But for this time period, the Veteran was self-employed, R-417, which may not be substantially gainful, and thus may not be reflective of a true occupational ability, as VA recognizes; this is true in situations such as where a veteran had low gross earnings that supported a finding of marginal employment, taking into account the time lost from work due a service-connected disability. *See* VA Manual M21-1, IV.ii.2.F.3.b. And Mr. Hernandez worked for himself, forgot the days he was supposed to work, was violent at work, worked at his own pace – although not even full time – as a truck driver, while still abusing alcohol. R-211; R-214; R-354. So the fact that Mr. Hernandez maintained employment is not contrary to his inability to do so at more than a marginal level. *See* R-21. "The language of § 4.16(a) focuses on a veteran's capabilities and not his current employment status." *Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016). *See* 38 C.F.R. § 4.16(a) ("marginal employment" includes "employment in a protected environment such as a family business or sheltered workshop"); *see also Mauerhan*, 16 Vet.App. at 442 (noting that terms which follow the phrase "such as" are "not intended to constitute an exhaustive list, but rather are to serve as examples"). And he later worked in a test fleet, and was then suspended for the diesel fuel incident. R-50. Thus, the Board's basis for finding Mr. Hernandez not credible was erroneous because his reports were supported by the chronology of the facts. *See* R-21.

Furthermore, the Board cherry-picked from the Veteran's report of why he retired to find his assertions were inconsistent. R-21. The Board relied on the fact that he stated, in 2010, that he retired because he was not getting the loads he believed he was entitled to. R-21; *see* R-292. The Board omitted consideration of the fact that this was the case due to his

PTSD symptomatology. *See* R-292. Thus, the Veteran consistently reported he stopped working, at least in part, due to his PTSD. *Compare* R-292 *with* R-354.

And although the Veteran was employed during the appeal periods, the Board failed to consider whether that employment was substantially gainful. *See* R-21-22. The Board recognized the Veteran had a "temporary job with the government" and then had a "part-time job driving trucks" and only worked two days per week. R-22. In 2015, the Veteran was suspended from his job after throwing diesel fuel on a co-worker out of anger, although he "hoped" he would be allowed to go back to work after that incident. R-50. He lost work two days each week from his already part-time employment because of "depression, anxiety, [and] dread." R-218. Yet the ability to handle stress is also a relevant consideration when deciding whether an individual is capable of being employed in substantially gainful work. *See Washington v. Derwinski,* 1 Vet.App. 459, 465 (1991).

Further, the 2011 examiner noted the Veteran's occupational functioning was limited by his "[d]ecreased concentration, [d]ifficulty following instructions, [i]ncreased absenteeism, [i]ncreased tardiness, [and] [m]emory loss." R-218. But employers are concerned with capabilities such as substantial capacity, psychological stability, and steady attendance, and they will not unduly risk hiring an employee with serious physical or mental problems. *See Hutsell v. Massanari*, 259 F.3d 707, 713 (8th Cir. 2001). Part of the "mental and physical acts required by employment" is the ability to show up and work productively on a consistent basis. *See Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993).

Thus, had the Board adequately considered this job history, it may have determined the Veteran was incapable of substantially gainful employment. *See* R-22; *see also Wagner*, 365

F.3d at 1365. "Requiring a veteran to prove that he is 100 percent unemployable is different than requiring the veteran to prove that he cannot maintain substantially gainful employment." *Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed. Cir. 2001).

The question here is not whether Mr. Hernandez is completely unemployable, but instead whether he can secure or follow substantially gainful employment. The Board's entire analysis was devoid of any reasoning or contemplation regarding Mr. Hernandez's ability to maintain substantially gainful employment, and it instead simply determined that the evidence did not establish that he "cannot work." R-22. The fact that Mr. Hernandez can do *something* to make some form of income is not the appropriate focus. *See* 38 C.F.R. § 4.16(a) (2017) ("Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop)"). Notably, if the Veteran were to change career fields, it was possible he "might be excluded from any occupations that require normal hearing as a condition of employment." R-61 (55-63); *see* R-355 (noting the Veteran's high school degree and no other training).

Remand is thus required for the Board to adequately explain how the Veteran's capacity for mainly temporary and part-time employment, including self-employment with limited attendance, would not preclude him from working in a "substantially gainful" capacity. Without an adequate discussion in this regard, the Veteran is unable to ascertain the precise basis for the Board's decision. *See* R-12; *Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001). Furthermore, the Board's lack of discussion frustrates judicial review by this Court. *Id.*; *see also Allday*, 7 Vet.App. at 527 (the Board's statement of the 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"). Remand is necessary for the Board to properly adjudicate entitlement to TDIU. *Tucker*, 11 Vet.App. at 374.

CONCLUSION

The Board erred when it denied higher ratings for all three time periods on appeal. For the first time period, because the examiner noted the Veteran had been experiencing obsessional rituals on the 2011 examination report, the Board erroneously considered this symptomatology only as of the date of the examination. Further, the Veteran experienced chronic suicidal thoughts and handled a pistol as he considered suicide during a time period prior to the examination. But again, the Board erroneously failed to consider whether an increased rating was warranted as of a date earlier than the date of the examination. Moreover, Mr. Hernandez had an assaultive history and drank in excess. Yet the Board omitted an adequate analysis of this symptomatology. The Board also failed to consider whether the Veteran's memory loss approximated the impairment contemplated in the higher rating criteria, and whether the Veteran was entitled to a higher rating for this time period in light of his inability to maintain proper hygiene, which the 2011 examiner documented.

Between 2011 and 2015, the Board erred when it failed to properly consider the VA examiner's opinion that Mr. Hernandez was totally occupationally and socially impaired. The Board could not merely rely on the sole fact that Mr. Hernandez had a job to determine he was not totally occupationally impaired. And the Veteran exhibited a risk of harm to himself but the Board failed to provide a proper analysis in this regard.

For the time period as of February 19, 2015, the Board failed to adequately explain why a lesser rating was warranted. The Board further failed to analyze the Veteran's suicidal ideation. And assuming the Board's consideration of the spraying of diesel fuel on a coworker out of anger was proper as of the date of the examination, the Board erred by relying on the fact that he was hoping to go back to work to deny a higher rating because this was a means to cope with his PTSD symptoms.

In addition, the Board's lack of provision of articulable standards for distinguishing one level of impairment from another for the first and third appeal periods was erroneous. For proper adjudication of his increased rating for PTSD claim, the Board was required to provide clear standards by which it could evaluate the proper disability assignments.

The Board further erred by denying TDIU because the Veteran was employed. While during part of the appeal period he worked for a trucking company, he was suspended for throwing diesel fuel on a co-worker. He was also fired from jobs due to PTSD symptoms. The Veteran was also self-employed, but he only worked part-time and missed work because of his PTSD symptoms. For part of the appeal period, he engaged in no work at all. The Board failed to adequately consider this evidence. As such, remand is necessary.

Respectfully submitted,

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