REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

17-2310

MARIO I. HERNANDEZ

Appellant

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board's negative credibility determination was erroneous.

The Secretary "agrees that [the Veteran's] employment as a truck driver in a test fleet from 2011 until 2013 does not necessarily contradict his 2009 statements." Secretary's Br. at 26. He argues, however, that the Veteran's "statements to medical professionals that he stopped working because of issues unrelated to his disabilities contradict his statements in support of his [] claim," and thus the Board's finding was accurate. Secretary's Br. at 26.

The full context of these statements reveals they were not inconsistent. Appellant's Br. at 26-27. He did say that he was "eligible by age or duration of work" to retire. R-292. But he *also* said that he was "not getting the loads he should," which he believed was due to word spreading that he "was a trouble maker." *Id.* Mr. Hernandez admitted he engaged in "verbal fights and one time a physical assault with another driver." *Id.* The examiner noted that the Veteran's "symptoms appear to have worsened over the last years resulting in him having problems at work." *Id. And see* R-293 (noting irritability and significant problems at work due to PTSD). Thus, the Veteran's statements were complementary, not contradictory. But the Board failed to consider them in the context they were provided or to take all of the Veteran's descriptions of his reasons for retirement into account. *See* R-21; R-292-93; *see also Moore v. Shinseki*, 555 F.3d 1369, 1373-74 (Fed. Cir. 2009) ("[T]he clear mandate of VA regulations is that a veteran's disability must be evaluated in light of its whole recorded history"); 38 C.F.R. § 4.1. The Board failed to review the Veteran's statements as a whole. *See, e.g., Gill v. Shinseki,* 26 Vet.App. 386. 391 (2013). The Board's credibility determination was therefore inaccurate, and remand is warranted for the Board to

account for all evidence and provide adequate reasons or bases. *See DeLa Cruz v. Principi*, 15 Vet.App. 143, 149 (2001); *Tucker v. West,* 11 Vet.App. 369, 374 (1998).

II. The Board failed to consider whether the Veteran's employment was marginal.

Simply because Mr. Hernandez maintained some employment during the appeal period does not mean he was able to do so at more than a marginal level. *See* R-21-22; *Ortiz-Vallez v. McDonald,* 28 Vet.App. 65, 71 (2016); *Cantrell v. Shulkin*, 28 Vet.App. 382, 391 (2017) (holding that "a veteran can establish marginal employment" by "the facts of his [or her] particular case"); 38 C.F.R. § 4.16(a). The Veteran worked for himself, forgot the days he was supposed to be at work, was violent at work, worked at his own pace and not full-time, and was eventually suspended for throwing diesel fuel on a co-worker out of anger. R-50; R-211; R-214; R-354. Mr. Hernandez lost two days of work each week from his already-part time employment due to "depression, anxiety, [and] dread." R-218. Although the Board recognized the Veteran had temporary jobs, it did not consider whether his employment was substantially gainful. *See* R-22; *Cantrell,* 28 Vet.App. at 392.

The Secretary responds that the issue was not reasonably raised by the record because "while [the Veteran's] PTSD impacted his ability to work, it did not prevent him from employment." Secretary's Br. at 27. The Court has already rejected his position. *See Ortiz-Valles v. McDonald,* 28 Vet.App. 65, 71 (2016) (holding that the plain meaning of 38 C.F.R. § 4.16(a) allows VA to consider marginal employment for employed veterans). The facts of this case reasonably raise the issue of marginal employment, and he did not have to be unemployed. *See id.* Thus, the Secretary's argument is meritless. Remand is required to consider the Veteran's decreased concentration, difficulty following instructions, increased

absenteeism and tardiness, and memory loss, in addition to his suspension and the temporary nature of his employment history, in light of the reasonably raised issue of marginal employment. *See* R-50; R-211; R-214; R-218; R-354; *Tucker,* 11 Vet.App. at 374. This is especially true in light of his self-employment and the Veteran's inability to remember what days he was supposed to work, his violence at work, and his need to work at his own pace, while still abusing alcohol. R-211; R-214; R-354.

Moreover, the Board erred by determining the evidence needed to establish that the Veteran "cannot work," because it needed to consider whether the Veteran could engage in substantially gainful employment – not whether he could simply do *something* to earn an income. R-22; 38 C.F.R. § 4.16(a); Appellant's Br. at 28. The Secretary notes that if the Veteran were to change career fields, he "might be excluded from *any* occupations that require *normal* hearing." R-61; Secretary's Br. at 27 (citing R-22; R-67). However, he argues this is "not probative where there is *no evidence* that [the Veteran was] unable to work as a truck driver." Secretary's Br. at 27 (emphasis added). But there *is* evidence the Veteran was able to work as a truck driver, but only in a marginal capacity, and thus his argument fails.

Employers are concerned with substantial capacity, psychological stability, and steady attendance, and will not risk hiring an employee with serious mental problems. *Hutsell v. Massanari,* 259 F.3d 707, 713 (8th Cir. 2001). As Mr. Hernandez was limited in his concentration, ability to follow instructions, promptness, presence, and memory, the Board's analysis was inadequate, and remand is necessary. *See* R-218; *Tucker,* 11 Vet.App. at 374.

III. The Board failed to provide articulable standards for distinguishing between relevant levels of impairment in the PTSD rating criteria.

Contrary to the Secretary's assertion, the "standards . . . used to evaluate the differences between a 50 [percent] rating and a 70 [percent] rating" are *not* "contained in 38 C.F.R. § 4.130." Secretary's Br. at 23. Section 4.130 does not provide an articulable measuring stick for determining whether symptoms or occupational and social deficiency cause the various levels of impairment listed within the regulation. Thus, Mr. Hernandez is unaware why the Board failed to assign higher ratings for his PTSD. Appellant's Br. at 22-23. Listing evidence is not a standard. It merely describes the facts the Board found relevant to its assessment. But the list of evidence does not explain *why* the facts listed led to the result announced. The facts of each case are different; a clear standard allows the adjudicator to assess those different facts in a consistent manner. *See Cantrell*, 28 Vet.App. at 391. Nowhere does the Secretary (or the Board) explain *why* the extensive list of symptoms meant that the Veteran experienced reduced reliability and productivity but not deficiencies in most areas, such as, for example, due to his passive death wishes and chronic thoughts of suicide, including when he held a pistol and contemplated ending his life. R-210-13; R-235.

The Court has agreed the Board's failure to articulate a standard for its decision when applying section 4.130 rendered its decision inadequate, "not unlike a math student who forgot to 'show their work.'" Appellant's Br. at 22-23 (citing *Jenkins v. Wilkie,* No. 17-0126, 2018 WL 1719473, at *2 (Vet.App. Apr. 9, 2018)); *see* CAVC R. 30(a) ("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.").

The Secretary does not challenge the similarity of this decision to Mr. Hernandez's case, so the Court may consider it conceded. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992).

The Secretary argues that the Veteran's reliance on *Hood v. Brown,* 4 Vet.App. 301, 302-03 (1993) is misplaced because there, the Board "concluded that the current rating adequately encompassed the appellant's symptomatology without further explanation," but here, "the Board reviewed all of the evidence . . . and provided significant discussion as to why" a higher rating was not warranted. Secretary's Br. at 24. His characterization of the facts in *Hood,* and thus why they are similar to Mr. Hernandez's case, is inaccurate. In *Hood,* the Court was "unable to accept the Secretary's argument that the statutory 'reasons or bases' requirement or section 7104(d)(1) [could] be met" in light of the Board's failure to provide a quantifiable standard for evaluating the veteran's impairment. 4 Vet.App. at 302-03. The "Secretary's General Counsel [was] unable to offer [the Court] any way to articulate a reasoned basis for describing" the level of impairment noted in the Board decision other than between two quantifiable degrees of impairment. *Id.* at 303. Thus, the Board could not have provided adequate reasons or bases by "simply stating that the degree of impairment lie[s] at the midpoint between 50 [] and 10 [percent]." *Id.* Here, the Board's "discussion" could not replace its failure to provide a quantifiable level of impairment. *See* R-23; Appellant's Br. at 22-23. Because the Board failed to provide clear standards, it violated the Veteran's right to due process and its decision was arbitrary and capricious. *See Matthews v. Eldridge,* 424 U.S. 319, 332-33 (1976); *Thurber v. Brown,* 5 Vet.App. 119 (1993); *Gray v. McDonald,* 27 Vet.App. 313, 325 (2015). Remand is required. *See Tucker,* 11 Vet.App. at 374.

IV. The Board failed to adequately address favorable evidence and the appropriateness of an earlier effective date when it denied a rating in excess of 50 percent for the Veteran's PTSD prior to July 25, 2011.

The Board denied Mr. Hernandez a higher rating for his PTSD without appropriately considering the Veteran's symptomatology and his symptoms' duration.

Reliance on symptoms not experienced. The Board determined a higher rating was not warranted by listing the symptoms he did not exhibit. R-15-16. Such reliance was in error, because the Veteran did not need to demonstrate any or all of the symptoms within the rating criteria to warrant an increased rating. *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 117 (Fed. Cir. 2013); 38 C.F.R. § 4.130. The Secretary does not directly respond to this argument, and the Court may thus consider it conceded. *See* Secretary's Br. at 8-18; *MacWhorter*, 2 Vet.App. at 136.

Suicidal thoughts and actions. The Board erred when it denied Mr. Hernandez a higher rating in light of his occasional passive death wish, R-235, chronic thoughts of suicide, and his serious contemplation of suicide when he actively took and held a pistol in 2010. R-210-13. The Board recited this evidence, but provided no consideration of it in its analysis. *See* R-16-18; *Abernathy v. Principi,* 3 Vet.App. 461, 465 (1992). Because suicidal ideation is expressly contemplated by the 70 percent rating criteria, this omission was in error. 38 C.F.R. § 4.130; *DeLa Cruz,* 15 Vet.App. at 149. This symptomatology impaired the Veteran as he engaged in "suicidal practicing behaviors." R-213. The Veteran also contemplated suicide with a firearm "within the [prior] year" to his 2011 examination, and his symptoms were "chronic." R-220; R-214. Yet the Board granted a higher rating as of July 2011 in light of the Veteran's "chronic suicidal thoughts," as well as his "serious[ ]

consider[ation of] suicide" with a pistol, which he reported during the 2011 examination. R-18; *see* R-210-13. Because the pistol incident occurred in 2010, and the 2011 examiner noted the Veteran's suicidal thoughts were "chronic," the Board was required to consider whether a higher rating was appropriate prior to the date of the 2011 examination. R-210-13; *see* R-214 (noting the Veteran's symptoms were "daily, marked, [and] chronic"). *See McGrath v. Gober,* 14 Vet.App. 28, 35 (2000); *contra* Secretary's Br. at 13 (arguing about a lack of "evidence as to when this symptomatology worsened before July 2011").

The Secretary proffers that the "July 2011 VA examiner's mere statement that [Mr. Hernandez] had experienced suicidal thoughts in the 'past year,' whether chronic or not, [did] not specify a date when [the Veteran's] symptoms began to worsen." Secretary's Br. at 14. He therefore attempts to distinguish this case from *McGrath*, 14 Vet.App. at 35. But in *McGrath,* the Court did not remand the veteran's case based on evidence of an exact date. *See* 14 Vet.App. at 35. Rather, the examiner "opined that the appellant had been suffering from PTSD since at least 1972." *Id.* The Court did not demand evidence of a specific date, but determined that in light of this opinion, the Board needed to reassess the appropriate effective date. *See id.* Similarly, here, there is an indication that the Veteran experienced his symptomatology before the date of the examination – and it is for the Board to engage in the necessary fact finding upon remand regarding the assignment of the proper effective date in light of this evidence. *See* R-210-14; *McGrath,* 14 Vet.App. at 35. Remand is required for the Board to engage in this analysis. *See Tucker,* 11 Vet.App. at 374. And although the Secretary opines that "it is clear that [the Veteran's] symptomatology [was] not as severe" as the Veteran portrayed, his position is unsupported. Because the Veteran denied suicidal

ideation, intent, or a plan, the Secretary disregards Mr. Hernandez's simultaneous "endorse[ment] [of] having an occasional passive death wish or thoughts that if he were not alive he would not have to deal with any problems." Secretary's Br. at 14 (citing R-235). The Board noted the Veteran's occasional passive thoughts of death in its list of evidence, and in its analysis, it generally found that "to the extent that [the Veteran's] symptoms me[]t any of the criteria for a 70 percent rating or higher . . . his overall level of disability [did] not exceed the criteria for a 50 percent rating." *See* Secretary's Br. at 14-15; R-12; R-17. This determination was insufficient. *See Abernathy,* 3 Vet.App. at 465.

VA deems suicidal ideation "representative of occupational and social impairment with deficiencies in most areas." *Bankhead v. Shulkin,* 29 Vet.App. 10, 20 (2017). It "appears only in the 70 [percent] evaluation criteria," without "analogues at the lower evaluation levels." *Id.* Thus, "VA generally considers" suicidal ideation "indicative of a 70 [percent] evaluation." *Id.* at 21. Although "the presence or lack of evidence of a specific sign or symptoms listed in the evaluation criteria is not *necessarily* dispositive of any disability level," VA must adequately assess each sign or symptom a veteran experiences and "consider the impact" of the symptoms as part of the "whole" in order for its reasons or bases to be adequate. *See id.* at 22 (emphasis in original). Yet here, the Board's analysis failed to consider suicidal ideation. *See* R-17. Its mere statement regarding the Veteran's impairment, without any reference to his suicidal thoughts and actions, was insufficient to provide an adequate statement in support of its decision to deny a higher rating. *See id.*; *Bankhead,* 29 Vet.App. at 21-22. Because VA considers suicidal ideation generally representative of a 70 percent evaluation, and the Veteran engaged in "practicing behaviors" as a result, the Board

was required to "adequately assess" this symptomatology to determine whether it warranted such a rating. *See* R-213; *Bankhead,* 29 Vet.App. at 21-22; *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000). As it did not, remand is required. *See Tucker,* 11 Vet.App. at 374.

Obsessional rituals. The Board further denied Mr. Hernandez a higher rating for his PTSD although the record reveals he engaged in obsessional rituals that impaired him as they were severe enough to interfere with his routine activities. R-478; *see* 38 C.F.R. § 4.130. The Secretary asserts that "reading the decision as a whole, it is clear that the Board considered this symptomatology" because it acknowledged evidence of obsessional rituals but "explained that after considering the medical and lay evidence of record and [the Veteran's symptoms during the relevant rating period, his occupational and social impairment [was] best represented by a 50 [percent] rating." Secretary's Br. at 11 (citing R-10; R-15-17). As the Secretary acknowledges, the Board merely listed this evidence in its factual background section of the decision. *See* R-9-10; R-13; R-16-18. Although the Board failed to engage in an analysis, the Secretary attempts to credit the Board with a "clear" discussion in this regard. Secretary's Br. at 11. Because reciting the relevant facts alone is not sufficient to provide adequate reasons or bases, his argument is flawed, and the Board should have considered whether a higher rating was warranted for this time period, as the Veteran's obsessional rituals caused him to be overly security-conscious and to frequently look out of the window. *See* R-478; *Abernathy,* 3 Vet.App. at 465; Secretary's Br. at 11.

Instead, the Board erroneously considered this symptomatology only between July 25, 2011 and February 19, 2015 because the Veteran described this behavior on the July 2011 examination. R-18; *see McGrath,* 14 Vet.App. at 35. The Secretary argues that there is a

lack of "any evidence to establish that it was factually ascertainable that a worsening of [Mr. Hernandez's] PTSD occurred prior to the date of the July 2011 VA examination." Secretary's Br. at 12. There is no indication that his symptoms worsened during the examination. *See* R-475-79. Rather, the examination suggests the Veteran's symptoms were just as severe during the time frame leading up to the examination, and 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 id.*; *McGrath,* 14 Vet.App. at 35 (citing *Hensley v. West,* 212 F.3d 1255 (Fed. Cir. 2000)).

Neglect of appearance and personal hygiene. Mr. Hernandez was unable to maintain minimum personal hygiene. R-212-13; R-220. He appeared disheveled, unkempt, and his pants were falling off at the 2011 examination. R-213. The Veteran had not showered in three days upon appearing for the examination, and prior to the 2011 examination, he only showered one to two times per week. *Id.*; R-220. The Secretary argues the Board did not err when it failed to consider this evidence in denying Mr. Hernandez a higher rating for this time period because he reported this symptomatology during his July 2011 examination, which did "not specify an earlier date when this symptom began." Secretary's Br. at 8. He asserts that the examination's notation about the frequency of the Veteran's bathing does not allow for an inference of the date of onset for his poor hygiene. Secretary's Br. at 10. The Secretary fails to appreciate that the examiner explicitly asked the Veteran when he last bathed, and the Veteran responded "it was '[three] days [prior.]'" R-213. Thus, the Veteran does not have to infer about the date of onset of the Veteran's poor hygiene. *Compare* Secretary's Br. at 8, 10 *with* R-213. The Veteran's statement implies that he

was referring to his regular routine, as nothing in his response references the contrary. *See* R-213. At a minimum, although the specific date is a factual finding the Board must make in the first instance, the Board should have explained whether this statement indicated an ongoing prior routine that extended back to the date of the Veteran's claim. *See id.*; *McGrath,* 14 Vet.App. at 35; *Wagner v. United States*, 365 F.3d 1358, 1365 (Fed. Cir. 2004).

Impaired impulse control. As noted in the July 2011 VA examination, Mr. Hernandez had a legal history that required police intervention involving an altercation with a neighbor. R-211. He also had a history of assaultiveness. *Id.* Moreover, the Veteran drank to excess as a means to reduce his PTSD symptoms. *Id.*; R-219. Thus, these histories were relevant to the appeal period. The Secretary posits that this symptomatology was not relevant to this appeal period because the record does not contain a specific "earlier date on which [it] occurred." Secretary's Br. at 15. Because there is no indication the Veteran's disability picture worsened on the date of the examination, but rather has existed prior to that date, remand is necessary for the Board to consider whether an earlier effective date is needed. *See* R-219; *McGrath,* 14 Vet.App. at 35. But for the Board's failure to consider the Veteran's impaired impulse control, he might have been entitled to a higher rating, as he isolated and avoided others due to his violent tendencies, and he had been fired from jobs due to his anger and violence. R-213; R-220; *Wagner,* 365 F.3d at 1365; 38 C.F.R. § 4.130.

Memory. The Veteran's memory was impaired. R-478. Although he had been a driver for many years, he began to frequently get lost and forget street names. *Id.* In the Board's analysis, it did not consider the Veteran's memory impairment for this time period. *See* R-15-18. The Secretary asserts that "memory impairment is not included" in the next

higher rating criteria to reason that such symptomatology does not result in occupational and social impairment with deficiencies in most areas. Secretary's Br. at 17 (citing 38 C.F.R. § 4.130). Yet the factors listed in the rating criteria are merely examples. *Mauerhan v. Principi,* 16 Vet.App. 436, 442 (2009). Thus, the fact that the 70 percent rating does not list memory impairment does not mean it cannot cause such impairment. *See* Secretary's Br. at 17. And for the 100 percent rating criteria to be met, Mr. Hernandez's memory loss had to approximate memory loss for names of close relatives, own occupation, or own name. 38 C.F.R. § 4.130. The Board failed to consider whether the Veteran's inability to remember directions or street names after being a driver for many years was similar to such memory loss. *See id.*; R-15-18. Rather than disagree with how the Board weighed the evidence, Mr. Hernandez asserts the Board failed to provide adequate reasons or bases for its decision because it did not engage in this analysis. *See* R-15-18; 38 U.S.C. § 7104. But for the Board's omission, Mr. Hernandez might have been entitled to increased compensation. *See Wagner,* 365 F.3d at 1365. Remand is therefore warranted. *See Tucker,* 11 Vet.App. at 374.

V. The Board's denial of a higher rating for the Veteran's PTSD between July 25, 2011 and February 19, 2015 failed to adequately consider favorable evidence.

During Mr. Hernandez's July 2011 VA examination, he was disoriented to time, and he was unable to remember the days he was supposed to work. R-212; R-214. He kept a weapon close to him at all times, and he exhibited a "tendency towards violence and fighting." R-211; R-213. The Veteran went to work to get away from his family, and when he was home, he stayed in his room. R-211. Despite therapy and several medications, his symptoms did not remit, but instead worsened with time. R-210; R-215. In fact, the 2011 examiner opined the Veteran was *totally* socially and occupationally disabled. R-220. The

Board disregarded this opinion because the Veteran was working part-time. R-18. Yet simply because the Veteran had a job does not mean he was not totally impaired. Shortly before February 2015, the Veteran was suspended from work after he deliberately sprayed diesel fuel on a coworker out of anger. R-50. He also experienced angry outbursts and argued with others at work. *Id.*

The Secretary defends the Board's decision by arguing that the Veteran could not be totally occupationally impaired while employed during this time period. Secretary's Br. at 19. However, the regulation required Mr. Hernandez to be totally occupationally *impaired,* not *unemployed.* 38 C.F.R. § 4.130. The record reveals the Veteran was, in fact, totally impaired in a work setting, as described above, and the Board thus erred when it denied a higher rating. At a minimum, the Board provided inadequate reasons or bases for its decision when it relied on the fact the Veteran had a job as a per se bar for a finding of total occupational impairment, warranting remand. *See* Secretary's Br. at 18; *Tucker,* 11 Vet.App. at 374.

In addition, the Veteran maintained poor health and hygiene and did not engage in regular self-care. *See* R-212-13; R-219; R-220; R-289; Appellant's Br. at 18. The Board listed this evidence, but provided no analysis regarding whether Mr. Hernandez's inability to maintain minimum personal hygiene approximated a higher rating, even though it is explicitly listed within the 100 percent rating criteria. *See* R-18; 38 C.F.R. § 4.130. The Secretary argues the Board "considered" this evidence. Secretary's Br. at 20. Yet because merely listing evidence cannot constitute an adequate statement of reasons or bases, his argument must fail. *See Abernathy,* 3 Vet.App. at 465. Remand is warranted for the Board to provide adequate reasons or bases in this regard. *See Tucker,* 11 Vet.App. at 374.

VI. The Board erroneously denied a higher rating for the Veteran's PTSD since February 2015 because it did not adequately address favorable evidence or appropriately consider whether an earlier effective date was necessary.

The Board erred when it denied a rating in excess of 50 percent for this time period because it did not adequately analyze the Veteran's symptomatology that indicated a higher rating might have been appropriate.

Suicidal ideation. During this time period, the Veteran experienced suicidal thoughts, and "sometimes just want[ed] it to be over with." R-51. Yet the Board did not analyze this symptomatology, even though suicidal ideation is contemplated by the 70 percent rating criteria. *See* R-15-17; 38 C.F.R. § 4.130. The Secretary asserts the Board did not "ignore" this evidence, citing to the Board's recitation of the evidence of record. Secretary's Br. at 21 (citing R-14). Listing this evidence as present in the record does not render the Board's decision adequate, despite the Secretary's assertion to the contrary. *See Abernathy,* 3 Vet.App. at 465; Secretary's Br. at 21. Thus, the Board was required to analyze the Veteran's suicidal ideation to determine whether a higher rating was warranted in light of VA's recognition that such symptomatology is generally reflective of impairment warranting a 70 percent rating. *See* 38 U.S.C. § 7104; *Bankhead,* 29 Vet.App. at 20-21.

Grossly inappropriate behavior or persistent risk to others. The Veteran was suspended from work due to grossly inappropriate behavior, and he argued with his coworkers, after little or no provocation. R-50; R-52. The Board did not consider whether this symptomatology warranted a higher rating for this time period. *See* R-16-18; 38 C.F.R. § 4.130. Instead, it relied on the Veteran's *hope* that he could return to work. R-17. This desire does not reflect the behavior he engaged in, nor does it encapsulate the risk he posed

to others if he returned. *See* R-50; R-52. Thus, although the Secretary asserts the Board could consider this evidence to determine a higher rating was not warranted, the Board could not negate the symptoms the Veteran did experience by relying on the Veteran's wish to work. *See* R-50; R-52; Secretary's Br. at 22. Remand is required for the Board to provide adequate reasons or bases in this regard in the first instance. *See Tucker,* 11 Vet.App. at 374.

CONCLUSION

The Board erred when it denied Mr. Hernandez entitlement to TDIU. Its credibility determination was inaccurate and it failed to consider whether the Veteran's employment was marginal. The Board further erred when it denied Mr. Hernandez higher ratings for his PTSD for all time periods on appeal. It did not provide clear standards for distinguishing between the various levels of impairment within the PTSD rating criteria. In addition, the Board failed to adequately address favorable evidence and relied on symptoms the Veteran did not experience. Moreover, it committed error when it assigned effective dates for the Veteran's ratings without considering whether his symptoms that existed prior the dates of the examinations warranted earlier effective dates. Moreover, the Board erroneously determined the Veteran could not experience total occupational impairment because he worked. Based on the foregoing reasons, as well as the arguments contained in Mr. Hernandez's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the Veteran's entitlement to higher ratings for his PTSD and entitlement to TDIU in accordance with the Court's opinion.

Respectfully Submitted,

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