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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2310

MARIO I. HERNANDEZ, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: Mario I. Hernandez appeals through counsel a June 22, 2017, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 50% for post-traumatic stress disorder (PTSD) prior to July 25, 2011, and from February 19, 2015; a disability rating in excess of 70% for PTSD from July 25, 2011, to February 19, 2015; and a total disability rating based on individual unemployability (TDIU). This appeal is timely and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate as the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the June 22, 2017, Board decision and remand the matters for readjudication consistent with this decision.

I. FACTS

Mr. Hernandez served on active duty in the U.S. Army from November 1967 to November 1969, including service in Vietnam. Record (R.) at 475. His service involved engaging in direct combat, including carrying the body of his comrade out of battle and seeing his friend's dead body after an ambush. R. at 475, 410.

In April 2002, Mr. Hernandez was granted VA benefits for PTSD and assigned a 30% disability rating. R. at 505-08. He sought a higher disability rating in March 2008. R. at 493. The next month, he underwent a VA examination, at which he reported symptoms of irritability, anger, emotional distancing, hypervigilance, an inability to sit still, nightmares, agitation, a lack of trust in others, and isolation. R. at 475. He stated that he had difficulty with relationships, including poor relationships with co-workers, and difficulty maintaining work stability. R. at 479. He stated that, at that time, he had been employed as a truck driver for a company for five years. R. at 477. The examiner noted that Mr. Hernandez had moderate memory impairment and passive thoughts of death without a plan or intent. R. at 478. The examiner opined that Mr. Hernandez's PTSD caused "difficulty establishing and maintaining effective work/school and social relationships because he tends to isolate from others." R. at 479.

A VA regional office (RO) subsequently increased Mr. Hernandez's disability rating for PTSD to 50%, effective March 5, 2008. R. at 391-96. Mr. Hernandez disagreed with that decision, stating that he had stopped working as a result of his PTSD. R. at 382. In July 2009, he filed an application for a rating of TDIU, stating that he worked 40 hours per week as a truck driver with the same employer from 1998 to April 2008. R. at 354-55.

Mr. Hernandez underwent a VA examination for his PTSD in January 2010, at which the examiner noted that he was messy in appearance. R. at 289. The examiner also found Mr. Hernandez was anxious, irritable, and had difficulty concentrating. *Id.* Mr. Hernandez indicated that he had nightmares twice a month, which interfered with his sleep. R. at 291. He reported that he thought about Vietnam daily. R. at 291. The examiner stated that his symptoms had worsened over the last year resulting in difficulty functioning at work, at home, and socially. R. at 292. As for his problems at work, the examiner noted that he had anger and poor judgment, resulting in outbursts. R. at 293.

At a July 2011 VA examination, the examiner again noted that Mr. Hernandez's PTSD symptoms had worsened, including limited social relationships, chronic thoughts of suicide, a tendency towards violence and fighting, and excessive alcohol use to reduce his symptoms. R. at 218. The examiner noted that Mr. Hernandez was disheveled and had poor hygiene and that his pants were falling off. R. at 213. At that time, Mr. Hernandez reported working twice a week, but otherwise staying to himself. R. at 211. The examiner opined that Mr. Hernandez's suicidal thoughts,

chronic paranoia, loss of work due to anger and violence, poor hygiene, social isolation, and alcohol use resulted in total occupational and social impairment. R. at 220.

In February 2015, Mr. Hernandez underwent another VA PTSD examination, at which the examiner noted that he experienced depressed mood, anxiety, suspiciousness, disturbances of motivation and mood, difficulty establishing and maintaining effective work and social relationships, difficulty adapting to stressful circumstances, and suicidal ideation. R. at 53. He reported working from 2011 to 2013, but losing his job after the company he was working for lost its contract. R. at 50. He stated that he found another job, but was recently suspended from work for purposefully spraying diesel fuel on a coworker after the coworker tried to startle him. R. at 50. However, he was hoping to return to work within a few days. *Id.* The examiner noted that Mr. Hernandez's PTSD resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. However, the examiner stated that he was generally functioning satisfactorily, with normal routine behavior, self-care, and conversation. R. at 49. The examiner opined that Mr. Hernandez was capable of maintaining employment as a truck driver and that his PTSD negatively impacts his functioning to a mild-moderate degree in his current job. R. at 54.

In June 2017, the Board issued the decision on appeal. The Board determined that staged ratings were appropriate for Mr. Hernandez's PTSD and assigned a 70% disability rating, but no higher, for PTSD between July 25, 2011, and February 19, 2015. The Board continued the assigned 50% disability rating for the periods prior to July 25, 2011, and from February 19, 2015. In doing so, the Board found that the medical and lay evidence showed that Mr. Hernandez's symptomatology reflected occupational and social impairment with reduced reliability and productivity, which warranted a 50% disability rating, but no higher. The Board denied entitlement to TDIU based on its finding that Mr. Hernandez's service-connected disabilities do not prevent him from securing or following substantially gainful employment.

On appeal, Mr. Hernandez argues that the Board erred in denying him entitlement to disability ratings in excess of 50% for his PTSD for the first and third time periods on appeal, and in excess of 70% for the second period. He argues that the Board failed to adequately consider the

evidence of record during each of these periods. He also argues that the Board erred by denying entitlement to a rating of TDIU simply because he was employed for part of the appeal period.

The Secretary argues that the Board did not err in denying entitlement to a disability rating in excess of 50% prior to July 25, 2011, and after February 19, 2015, and in excess of 70% between July 25, 2011, and February 19, 2015. He also argues that the Board did not err when it denied entitlement to TDIU. The Secretary further contends that the Board's reasons or bases were adequate.

II. ANALYSIS

The Board assigned staged disability ratings for Mr. Hernandez's PTSD by applying the general rating formula for mental disorders set forth in 38 C.F.R. § 4.130. Under those criteria, a veteran is entitled to a 50% disability rating if the disorder produces

[o]ccupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

38 C.F.R. § 4.130 (2018). A veteran is entitled to a 70% disability rating if the symptoms of the disorder cause

[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

Id. A veteran is entitled to a 100% disability rating if the symptoms of the disorder cause

[t]otal occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including

maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Id.

Both this Court and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) have made it clear that the symptoms listed in the rating criteria are not meant to be comprehensive. *See Maurerhan v. Principi*, 16 Vet.App. 436, 442 (2002). Instead, they are to serve as examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. Thus, the Board is not expected to find the presence of most or even some of the enumerated symptoms. *Id.* Rather, the Board should consider whether "the evidence demonstrates that a claimant suffers symptoms or effects that cause occupational or social impairment equivalent to what would be caused by the symptoms listed in the diagnostic code," and, if so, the "equivalent rating will be assigned." *Id.* at 443.

In *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013), the Federal Circuit determined that VA "intended the General Rating Formula to provide a regulatory framework for placing veterans on the disability spectrum based upon their objectively observable symptoms." Thus, "symptomatology should be the fact-finder's primary focus when deciding entitlement to a given disability rating" and "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id.*

The Court reviews the Board's factual findings regarding the assignment of a disability rating under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

As with any finding on a material issue of fact and law presented on the record, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at

56-57. To comply with this requirement, 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The need for adequate reasons or bases "is particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders." *Mittleider v. West*, 11 Vet.App. 181, 182 (1998).

A. Periods Prior to July 25, 2011, and After February 19, 2015

The Board found that Mr. Hernandez's symptoms did not warrant a disability rating higher than 50% prior to July 25, 2011, and since February 19, 2015. In doing so, the Board found that, although Mr. Hernandez exhibited some of the symptoms for a 70% disability rating, his overall disability level did not exceed the 50% criteria. In support, the Board discussed treatment records from 2007 to 2009, noting that, although he had some avoidance behaviors, he could tolerate groups and was close to his wife. The Board also relied on the April 2008 and January 2010 VA medical opinions, noting that these examinations showed only that he had some difficulty establishing and maintaining relationships. For the period after February 19, 2015, the Board relied on the February 2015 VA medical opinion, which found that Mr. Hernandez's PTSD resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks.

In discussing the evidence generally, the Board noted that the medical opinions prior to July 2011 contained evidence of obsessive rituals that interfere with daily life, some suicidal ideation, a tendency toward angry outbursts and violence, and memory problems. However, the Board ignored this evidence in its analysis, instead focusing on the fact that Mr. Hernandez had a good relationship with his wife and two children. Similarly, for the period after February 19, 2015, the Board acknowledged that the evidence showed that Mr. Hernandez had a propensity for angry outbursts and verbal and physical altercations, but did not explain why that did not warrant a higher disability rating. Instead, the Board focused on Mr. Hernandez being able to return to work after one such altercation. The Board also did not address Mr. Hernandez's suicidal ideation since February 2015, despite evidence that he continued to harbor thoughts of suicide. Based on these failures, the Court

finds the Board's reasons or bases for denying entitlement to a disability rating higher than 50% before July 25, 2011, and after February 19, 2015, inadequate. *See Gilbert*, 1 Vet.App. at 56-57.

B. Period from July 25, 2011, to February 19, 2015

Mr. Hernandez also argues that the Board erred by denying entitlement to a disability rating higher than 70% from July 25, 2011, to February 19, 2015. The Board noted that the July 2011 examiner reported that Mr. Hernandez had chronic thoughts of suicide and obsessive and ritualistic behavior, did not know what day it was, and was unable to maintain his personal hygiene. The Board acknowledged that the examiner characterized his impairment from PTSD as a "total social and occupational disability," which mirrors the language in the rating criteria for a 100% disability rating. R. at 18, 220. However, the Board found that, because he was working during part of the time from July 2011 to February 2015, he did not have a total occupational disability that would entitle him to a 100% disability rating. In rendering its finding, the Board did not address Mr. Hernandez's suspensions from work or explain why his ability to work some of the time rendered the examiner's description of his disability as a "total social and occupational disability" less probative. R. at 220. Consequently, the Court finds the Board's reasons or bases concerning the appropriate disability rating from July 25, 2011, to February 19, 2015, inadequate. *See Gilbert*, 1 Vet.App. at 56-57.

C. TDIU

A rating of TDIU may be assigned to certain veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities. 38 C.F.R. § 4.16 (2018). To determine whether a TDIU rating is warranted in a given case, "VA conducts a holistic and individualized assessment of the veteran." *Withers v. Wilkie*, 30 Vet.App. 139, 144 (2018). When conducting a TDIU analysis, the Board "'must take into account the individual veteran's education, training, and work history.'" *Id.* (quoting *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc)).

In denying entitlement to a rating of TDIU, the Board acknowledged that Mr. Hernandez's service-connected disabilities impact his employability, but found that they did not prevent him from securing or maintaining substantially gainful employment. The Board discussed Mr. Hernandez's lay statements about being unable to work, but found those statements inconsistent with other statements

he had made to VA examiners. The Board also noted that he had worked during the appeal period at issue.

Mr. Hernandez argues that the Board erred by discounting his statements and did not consider whether his employment was more than marginal. *See Ortiz-Valles v. McDonald*, 28 Vet.App. 65, 71 (2016) (providing definition of "marginal employment"). In support, he highlights evidence discussed by the Board that he had a "temporary job with the government" followed by a "part-time job driving trucks" and only worked two days per week. R. at 22. He also reiterates that while working, he was suspended from his job after throwing diesel fuel on a co-worker out of anger and that he lost work two days each week from his already part-time employment because of "depression, anxiety, dread." R. at 218. Based on the evidence, the Court agrees that the issue of whether Mr. Hernandez is capable of more than marginal employment was reasonably raised and the Board erred by not addressing that matter. *See Ortiz-Valles*, 28 Vet.App. at 71. The Board's focus on whether Mr. Hernandez was completely unemployable failed to consider whether he was able to secure or follow substantially gainful employment, as required by 38 C.F.R. § 4.16(a).

D. Other Matters

The Court need not at this time address Mr. Hernandez's other arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]"). On remand, he is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Once the Board is prepared to act, it must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' pleadings, the June 22, 2017, Board decision on appeal is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: February 13, 2019

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