

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0287

PATRICK RODRIGUEZ,

Appellant

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

1. Whether the Board's statement of reasons and bases in denying benefits for a right shoulder condition is adequate when it failed to acknowledge the Veteran's theory of service connection.
2. Whether the Board's statement of reasons and bases for denying a higher disability evaluation for the Veteran's headaches is adequate when it failed to address the favorable evidence of record and equated economic inadaptability under DC 8100 with an inability to work.
3. Whether the Board's statement of reasons and bases is adequate in denying a higher disability evaluation for the Veteran's PTSD when it failed to address the favorable evidence of record.

STATEMENT OF THE CASE

Patrick Rodriguez (Rodriguez) served in the United States Air Force from August 13, 2002 to August 12, 2008. R-1210. He was honorably discharged. *Id.*

Rodriguez filed VA Form 21-0966, "Intent to File a Claim for Compensation" on May 9, 2017 (R-1227) and a VA Form 21-526EZ claiming entitlement to service connection for headaches, PTSD, a cervical spine condition and a right shoulder condition on September 11, 2017 (R-1211-14). On November 16, 2017, the Agency of Original Jurisdiction (AOJ) issued a Rating Decision granting service connection for PTSD and assigning a 30 percent disability evaluation and denying service connection for Rodriguez's cervical spine condition and right shoulder condition. R-547-56. The AOJ issued a Rating Decision on December 22, 2017, granting service connection for headaches and assigning a 30 percent disability evaluation. R-405-07. Rodriguez timely filed a Notice of Disagreement (NOD) on January 4, 2018. R-392-93. Rodriguez opted his appeal into the Rapid Appeals Modernization Program (RAMP), requesting Higher-Level Review

(HLR). R-271-72. On September 18, 2018, a RAMP decision was issued denying entitlement to a higher disability evaluation for Rodriguez's PTSD and headaches and service connection for his right shoulder condition. R-70-76. Rodriguez submitted an appeal to the Board of Veterans' Appeals (Board) on October 30, 2018. R-44-45.

Rodriguez, through counsel's written arguments to the Board, asserted that his theory of service connection for his right shoulder condition was that it was secondary to his cervical spine condition. R-29. Rodriguez noted that this rendered the issue inextricably intertwined with his cervical spine condition, which had (as of the date of Rodriguez's brief to the Board) been deferred for a Compensation & Pension (C & P) examination. *Id.*

Rodriguez also contended that a 50 percent disability evaluation for his headaches was more appropriate than a 30 percent rating under Diagnostic Code (DC) 8100. R-22-24. In support of his contention, Rodriguez cited to an October 2017 C & P Examination, and a January 2018 C & P Examination. R-23-24. Rodriguez cited to, and attached to his arguments, two factually analogous Board decisions. R-24, 31-34.

Finally, Rodriguez asserted that his disability picture more nearly approximated a 70 percent disability evaluation under DC 9411 for his PTSD due to his significant occupational and social impairment with deficiencies in most areas. R-25-28. In support of this contention, Rodriguez cited to mental health treatment notes that depicted the severity of his condition. R-26. Rodriguez also highlighted evidence indicative of his significant social limitations, including relationship problems with his girlfriend. R-26-27. Finally, Rodriguez asserted that his endorsement of "passive thoughts of death" at his October 2017

C & P Examination warranted a 70 percent disability evaluation based on the Court's holding and discussion in *Bankhead v. Shulkin*, 29 Vet. App. 10, 20 (2017). R-27.

The Board issued a decision on December 17, 2018. R-5-18. The Board did not acknowledge the arguments raised in Appellant's Brief (R-21-34) or at the HLR Informal Conference on September 17, 2018. R-80-83. In fact, the Board found that Rodriguez had not alleged entitlement to the benefits sought on appeal. R-8, 10, 12, 13.

The Board summarized Rodriguez's position on his shoulder condition claim as: "The Veteran contends that he suffers from a right shoulder disability as a direct result of his active duty service, however there is no allegation of any incident or injury in service." R-8. The Board acknowledged that Rodriguez has a current disability, but stated that based on the lack of in-service treatment, no examination was warranted. R-8-9. It premised its denial of service connection on the lack of documentation in Rodriguez's service treatment records (STRs) and/or the first post-service year. R-8.

As to Rodriguez's claim for an increased disability evaluation for headaches, the Board stated that he had "provided no specific allegations to support his contention." R-10. Although it acknowledged that Rodriguez experienced three to four headaches per day that involved intense, throbbing pain, and photophobia, and that "his concentration and focus are affected at work," it maintained that there was "no evidence or even allegation that the Veteran has had headaches of such frequency or severity [...] so as to warrant the higher 50 percent rating." R-12. The Board premised its denial of the higher disability evaluation on the fact that while Rodriguez reported that "his headaches impacted his

work,” they were “not productive of severe economic inadaptability, as he remained employed for the period on appeal.” *Id.*

Finally, the Board stated that Rodriguez had not provided specific allegations to support his contention of entitlement to a higher disability evaluation for his PTSD. R-13. In denying Rodriguez’s claim, the Board stated: “There was no evidence of auditory or visual hallucinations and the Veteran denied suicidal and homicidal ideation (although, he did passive thoughts of death [*sic*], but without any serious ideation, intent or plan). The Veteran was married and employed throughout the time on appeal.” R-16. The Board elaborated that throughout “the entire period on appeal,” Rodriguez “did not indicate any problems with either his personal or work relationships.” *Id.*

Upon receipt of the Board’s decision denying his claims, Rodriguez then appealed to this Court.

STATEMENT OF THE FACTS

On May 19, 2017, Rodriguez underwent a cervical spine x-ray due to his “posterior neck pain with radiculopathy to bilateral shoulders.” R-99. He endorsed right shoulder pain that had been ongoing for two years and was worsening, and associated this with his chronic neck pain. R-121. On August 31, 2017, Rodriguez sought treatment for continued posterior neck pain and right shoulder pain. Rodriguez reported that he had constant pain in his “neck and [right] shoulder.” R-176-77.

Rodriguez underwent a Headaches C & P Examination on October 16, 2017. R-457-59. He endorsed three to four headaches per day that are “intense” and “throbbing,” with photophobia, and usually lasting 30 minutes to an hour. R-457. Rodriguez stated that

his headaches affected his ability to work, as they interfered with his concentration and focus. *Id.* The examiner noted that Rodriguez's headaches impact his ability to work as they limit his "concentration and productivity when they occur." R-458. In a C & P Examination for chronic fatigue on January 23, 2018, Rodriguez reported that he usually experienced three "attacks" of headaches per day, each one lasting 20 to 40 minutes. R-341.

Rodriguez receives mental health treatment at the VA. He described stress in the workplace to his VA treatment provider in May 2017 (R-142), which culminated in his resignation that June (R-136). The following month, Rodriguez described relationship problems with his girlfriend stemming from his inability to control his anger. R-631. He also detailed how he "wakes every [two to three] hours with a compulsion to check the house." *Id.* In September, Rodriguez detailed further relationship problems with his girlfriend, including her concern about his lack of empathy. R-614. Rodriguez stated that he is unable to emotionally connect to his feelings and consequently distances himself from others as a protective mechanism. *Id.* Rodriguez described a decline in his mental health in December 2017, as his anxiety, nightmares, and depressive symptoms had increased. R-125. Rodriguez told his VA treatment provider that he was staying up most of the night, repeatedly checking newly installed security cameras. *Id.* Rodriguez endorsed relationship problems with his girlfriend stemming from his lack of interest in sex due to his depressive symptoms. R-126. He also said that he had recently quit his job after being given negative feedback, and his treatment provider drew a parallel between this and his "last few jobs."

Id. In January 2018, Rodriguez described continued issues with his girlfriend stemming from his inability to be physically intimate. R-146.

On October 4, 2017, Rodriguez underwent a C & P Examination for his PTSD. R-824-33. The examiner recorded Rodriguez's employment history, noting the frequent job changes and his resignation from the police department due to his mental condition. R-827. At that time, Rodriguez worked part-time "due to his depression and lack of energy/motivation." *Id.* The examiner noted Rodriguez's symptoms included depressed mood, anxiety, chronic sleep impairment, and panic attacks that occur more than once a week, and further noted he was quick to get irritable and had "thoughts of death." R-827, 831-32.

Rodriguez underwent a C & P Examination for chronic fatigue on January 23, 2018. R-340-43. The examiner noted that Rodriguez's last job had ended due to his "cold relationship" with customers and his inability to interact normally with others. R-340. Rodriguez told the examiner that nothing made him happy, his wife left him because of impotency, he is unable to hold a job for long, he lost his job as a police officer because of being sleepy, and he is inattentive to instructions. *Id.* At the time of the examination, Rodriguez was working part-time. R-341. He expressed an ambition to become a teacher, but was stunted by his inability to retain information and because "it is hard to think." *Id.* The examiner further noted Rodriguez's loss of motivation. *Id.*

Vocational expert Stacy Fisher, MA, CRC, completed an assessment of Rodriguez's ability to work based on review of his claims file and a clinical interview with the veteran on May 29, 2018. R-274-86. Fisher reported that Rodriguez's constant depression and

feelings of worthlessness causes him to withdraw, and he does not have any friends. R-280. She also recorded a complete history of Rodriguez's employment since his separation from the military. R-281-83. He worked part-time as a TSA security guard from 2011 to 2013, but experienced challenges at work stemming from his inability to concentrate. R-281. He ultimately resigned from the position. *Id.* He then worked from 2014 to 2015 doing website design. *Id.* While the position was full time, Rodriguez took a 10-minute break every hour to "gather his thoughts" and cope with his inability to concentrate. *Id.* He transitioned from that position to police work in May 2015. R-281-82. Rodriguez continued taking hourly breaks to make it through his day due to impaired ability to concentrate, and he resigned in February 2016 after reaching "rock bottom in his personal life." R-282.

Rodriguez had a job for two weeks after that, then secured a position at Vitamin Shoppe for one year. *Id.* In his position, Rodriguez had interpersonal issues with his manager that culminated in arguments, and was told he was "not good with customers." *Id.* Ultimately, his inability to interact peacefully with his superior led to his resignation. *Id.* After a two-month lapse in employment, Rodriguez secured a part-time job in July 2017. R-282. He continued taking breaks as needed, and resigned when there was going to be a change in management out of fear that the new management would not be as accommodating to Rodriguez's occupational limitations. R-282-83. Rodriguez's last job was as a car salesman from April to May 2018. R-283. He resigned when the position began to cause him "too much anxiety." *Id.* Fisher ultimately opined that Rodriguez was unemployable. R-285-86.

One of Rodriguez's former employers, Martha Serrano, submitted a VA Form 21-4192 in February 2018. R-330-31. Serrano reported that concessions were made for Rodriguez due in part to his headaches and PTSD. R-330. She reported that his functional impairment included limitations with "memory, concentration, [and] personality." R-331. She noted that he had to take notes to limit his confusion and be reminded of deadlines and assignments, and that he had difficulty focusing, communicating with clients, and maintaining a positive attitude due to his depression and anxiety. *Id.*

SUMMARY OF THE ARGUMENT

The Board's decision is clearly erroneous and is not supported by an adequate statement of reasons and bases. Rodriguez contends that the Board's denial of service connection for his left shoulder condition was clearly erroneous, as it failed to account for his theory of entitlement on a secondary basis. Rodriguez also contends that the Board's denial of a rating in excess of 30 percent for his headaches was in error, as it failed to apply the correct standard to assess economic inadaptability. Finally, Rodriguez asserts that the Board's denial of a rating in excess of 30 percent for his PTSD was in error, as it did not account for significant evidence of record supporting an increased evaluation. The Board's errors were prejudicial to Rodriguez's claims, and require vacatur and remand.

STANDARD OF REVIEW

The Board is required to consider all theories of entitlement to VA benefits that are raised by the claimant or reasonably raised by the record. *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000); *Robinson v. Mansfield*, 21 Vet. App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). More specifically,

the Board is required to adjudicate all issues reasonably raised by a liberal reading of all documents and oral testimony in the record prior to the Board's decision. *Brannon v. West*, 12 Vet. App. 32, 34 (1998). This includes giving "a sympathetic reading to the veteran's filings by 'determining all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)). The Court has jurisdiction to review whether the Board erred in failing to consider such theories of entitlement. *Barringer v. Peake*, 22 Vet. App. 242, 244 (2008).

Further, the Board's conclusion that a medical examination is not necessary is reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. *See* 38 U.S.C. § 7261(a)(3)(A).

As to arguments that a higher disability evaluation is warranted, the Board's determination of the appropriate degree of disability is a finding of fact subject to 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). "A factual 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.'" *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). When there is a question as to which of two evaluations apply, "the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned." 38 C.F.R. § 4.7 (2016).

ARGUMENTS

I. The Board erred in failing to consider Rodriguez's theory of entitlement to service connection for his right shoulder condition.

While the Secretary is not required to raise “all possible” theories of service connection for a claim, the Secretary must investigate the reasonably apparent and potential causes of the veteran's disability and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the veteran's filing. *Robinson v. Peake*, 21 Vet. App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d at 1361 (holding that “[i]n direct appeals, all filings must be read ‘in a liberal manner’ whether or not the veteran is represented” (quoting 38 C.F.R. § 20.202)); *see Roberson*, 251 F.3d at 1384. In other words, the Board has a duty to address all issues reasonably raised either by the appellant or by the contents of the record. *Robinson*, 557 F.3d at 1361.

This duty requires VA to consider all legal theories raised by the record that may lead to a grant of the benefits requested, regardless of whether they are specifically raised by the veteran. *Douglas v. Derwinski*, 2 Vet. App. 435, 438 (1992) (en banc). Accordingly, when the claimant raises the basic issue of service connection by alleging he suffers from a condition that was somehow related to service, the Board must consider, in liberally construing the appeal, direct as well as secondary service connection if raised by the record. *Robinson*, 557 F.3d at 1359-62.

Here, the Board premised its denial of benefits for Rodriguez's right shoulder disability on a direct theory of entitlement only. R-8-9. It failed to consider Rodriguez's entitlement to disability benefits for his right shoulder as secondary to his cervical spine

disability, which was reasonably raised by record and specifically alleged by Rodriguez. R-29, 99, 176-77. Rodriguez's neck condition was on appeal at the time of the Board's decision. R-392-93.

“[T]he Board is required to address all claims reasonably raised in the appellant's substantive appeal and in all of his documents [...] submitted prior to the Board's decision.” *Solomon v. Brown*, 6 Vet. App. 396, 402 (1994). In *Thomas v. McDonald*, the Board denied a veteran's claim for service connection for erectile dysfunction on a direct theory of service connection. 14-1664, 2015 WL 1760140, at *3 (Vet. App. Apr. 20, 2015).¹ Although the veteran's counsel did not raise a theory of entitlement to service connection for the condition as secondary to the veteran's service-connected PTSD, there was “some evidentiary support for a particular theory of recovery based on secondary service connection.” *Id.* at *4. As such, the Court held that the Board “erred in not addressing this alternative theory in support of his claim,” and vacated the Board's decision. *Id.*

Like in *Thomas*, there is evidentiary support in the record for Rodriguez's theory of entitlement to service connection. *See id.* In May 2017, radiological studies were ordered to address Rodriguez's neck pain with radiculopathy to both shoulders. R-99. In August 2017, Rodriguez was treated for neck pain with associated right shoulder pain that had been chronic since 2008. R-176-77. The case at bar is distinguishable from *Thomas* because Rodriguez did raise the theory of entitlement to service connection on a secondary basis through written arguments submitted prior to the Board's decision by the undersigned.

¹ The undersigned notes that this is an unpublished decision, and submits it for its persuasive, not precedential, value.

R-29; *see id.* Thus, the present case is an even stronger one for vacatur and remand by this Court. *See Thomas*, 2015 WL 1760140, at *3.

Because it found no evidence in the record supporting a direct theory of service connection for Rodriguez's right shoulder condition, the Board refused to order a C & P Examination. R-5. As part of his statutory duty to assist, the Secretary must provide a medical examination or obtain a medical opinion "when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d). VA must provide a medical opinion or examination if the information and evidence of record does not contain sufficiently competent medical evidence on which to decide the claim, but there is

(1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies; and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability.

McLendon v. Nicholson, 20 Vet. App. 79, 85-86 (2006). When deciding whether an examination is necessary, the Secretary shall consider the evidence of record, "taking into consideration all information and lay or medical evidence (including statements of the claimant)." 38 U.S.C. § 5103A(d)(2).

Rodriguez has established the first element of *McClendon*, because the Board stated in its decision that "the evidence clearly reflects right shoulder pain and a disability." R-8. Because Rodriguez raised a theory of service connection for his right shoulder as secondary to his neck condition, the Board then was obligated to consider whether there was a neck

injury—not a shoulder injury—noted in Rodriguez’s STRs and it failed to do so. *See McLendon*, 20 Vet. App. at 83. As to the third element, the Board found that it was not met because the only evidence supporting a nexus on a theory of direct service connection was Rodriguez’s lay statements. R-9. The Board did not analyze whether the evidence of record was sufficient to meet the “low threshold” to show relation between his shoulder disability and his neck condition. *See McLendon*, 20 Vet. App. at 83.

The Board erred in failing to discuss Rodriguez’s entitlement to service connection for his right shoulder disability as secondary to his neck condition, and its refusal to order a VA Examination on that basis was arbitrary. *See* 38 U.S.C. § 7261(a)(3)(A); *see also Robinson v. Shinseki*, 557 F.3d at 1361. Therefore, remand is warranted.

II. The Board’s failure to provide adequate reasons and bases in denying a higher disability evaluation for Rodriguez’s headaches warrants vacatur and remand.

As with any finding on a material issue of fact and law, the Board must support its degree-of-disability determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). “When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.” 38 C.F.R. § 4.3 (2017). Additionally, “[w]here there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.” 38 C.F.R. § 4.7 (2017). Further, for “atypical

instances[,] it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified”; however, “[f]indings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function will, however, be expected in all instances.” 38 C.F.R. § 4.21 (2017).

In *Pierce v. Principi*, the Court held that, where the Board refused to award a 50 percent disability rating for a headache disability without discussing the “interplay” among §§ 4.3, 4.7, and 4.21, the Board committed a reasons or bases error. 18 Vet. App. 440, 445 (2004). The Court further held that severe economic inadaptability must not be equated with an inability to work, as “nothing in DC 8100 requires that the claimant be completely unable to work in order to qualify for a 50 [percent] rating.” *Id.* at 446. The Board’s statement of reasons and bases must evaluate the impact of the veteran’s headaches in terms of whether they are *capable of* producing severe economic inadaptability – not whether they actually produce it. *See id.* at 445 (emphasis added).

In denying Rodriguez’s entitlement to a 50 percent disability evaluation, the Board did not discuss the applicability of or even cite to 38 C.F.R. §§ 4.3, 4.7, and 4.21. The Board did make a finding that the benefit of the doubt doctrine was “not applicable” to Rodriguez’s case because “the preponderance of the evidence is against a higher rating.” R-12-13. This cursory mention of the benefit of the doubt doctrine does not constitute or amount to the discussion of the interplay between §§ 4.3, 4.7, and 4.21 as required by *Pierce*; thus, it is inadequate. *See* 18 Vet. App. at 445.

The Board stated in its denial that “there is no evidence or allegation suggesting that his headaches cause severe economic inadaptability; the Veteran reported that while his headaches impacted his work, they were not productive of severe economic inadaptability, as he remained employed for the period on appeal.” R-12. This finding violates *Pierce* in equating severe economic inadaptability with unemployability. *See Pierce*, 18 Vet. App. at 445-46. Its decision further violates *Pierce* by examining whether Rodriguez’s headaches “cause severe economic inadaptability” (R-12) not whether they are capable of producing it. *See id.*

In *Penn-Haynes v. Wilkie*, the Court set aside a Board decision denying a veteran’s entitlement to a 50 percent rating for headaches when it violated *Pierce*. 16-3053, 2019 WL 2393423, at *4 (Vet. App. June 6, 2019).² The Court faulted the Board’s decision because it contained “no discussion of §§ 4.3, 4.7, and 4.21 as required by the Court in *Pierce*.” *See id.* at *3. The Court stated that the Board’s “failure to [assess] those regulations along with the evidence of record in any meaningful way” was a prejudicial error that left the Court to “guess whether the Board applied the correct law when fulfilling its important responsibilities.” *See id.* Further, the Court held that the Board violated *Pierce* in requiring that the veteran’s headaches render him unemployable to satisfy the 50 percent criteria, and that this constituted “holding the veteran to a higher standard than set forth in DC 8100.” *Id.* Finally, it stated that the Board erred in focusing “solely on whether the veteran’s condition actually produced severe economic inadaptability.” *Id.* at *4. In doing

² The undersigned notes that this is an unpublished decision, and submits it for its persuasive, not precedential, value.

so, it failed to address the entirety of the evidence tending to support that the veteran's headaches were capable of producing severe economic inadaptability. *See id.*

The Board committed identical errors here. *See id.* at *3-*4. First, its failure to address or even mention the interplay of §§ 4.3, 4.7, and 4.21 constitutes a prejudicial error under *Pierce*. *See id.* at *3. The Board similarly erred in requiring that Rodriguez's headaches render him unemployable for a 50 percent evaluation under DC 8100 and in limiting its discussion to whether Rodriguez's headaches actually produce severe economic inadaptability rather than whether they are capable of producing it. R-12-13; *see id.*

The Board's errors violate case law established by this Court in *Pierce*, and are prejudicial to Rodriguez's claim for entitlement to a 50 percent disability evaluation. *See Pierce*, 18 Vet. App. at 445-46. Therefore, its failure to assign a 50 percent disability evaluation for Rodriguez's headaches is clearly erroneous, and reversal and remand is warranted.

III. The Board failed to provide adequate reasons and bases in denying a higher disability evaluation for Rodriguez's PTSD.

The Board is required to provide "a written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(2); *see also Spurgeon v. Brown*, 10 Vet. App. 194, 196 (1997); *Gilbert*, 1 Vet. App. at 49. 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). The need for a statement of reasons or bases is particularly acute when the Board's findings and conclusions pertain to the degree of disability resulting from mental disorders. *Mitchem v. Brown*, 9 Vet. App. 138, 140 (1996).

The Board denied Rodriguez a higher disability evaluation for his PTSD because he “was married and employed throughout the entire period on appeal and did not indicate any problems with either his personal or work relationships.” R-16. Because this finding is contravened by the evidence of record, it amounts to an inadequate statement of reasons and bases. *See Caluza*, 7 Vet. App. at 506.

The record is replete with references to Rodriguez's occupational limitations and frequent job changes. In May 2017, Rodriguez endorsed work-induced stress to his VA treatment provider. R-142. He resigned from that job that following month. R-136. In December 2017, Rodriguez said that he had recently quit another job due to his inability to cope with negative feedback, and his VA treatment provider noticed that this had been a pattern with his “last few jobs.” R-126. Rodriguez's frequent job changes were noted in an October 2017 C & P Examination, and the examiner reported that he had recently resigned from the police department due to his mental condition. R-827. At a January 2018 C & P Examination, the examiner noted that Rodriguez's last job had ended due to his cold relationship with customers and inability to interact normally with others. R-340. Rodriguez told the examiner he was “unable to hold a job for long” and had recently resigned from the police department because of his mental condition. *Id.*

Vocational expert Fisher noted in her May 2018 assessment that Rodriguez had experienced challenges at all of his jobs due to an inability to concentrate. R-280-82. Fisher reported that Rodriguez had left one job because of interpersonal issues and his inability to interact with customers and authority figures, and another because he was afraid a management change would compromise an accommodating work environment. R-282-83. At the time she interviewed Rodriguez, he had just resigned from a two-month stint as a salesman because the position caused “too much anxiety.” R-283.

Serrano, Rodriguez’s former employer, submitted a statement attesting to his occupational limitations in February 2018. R-330-31. She reported that Rodriguez’s functional impairment was due to his limitations with “memory, concentration, [and] personality,” and that he had to take notes to limit confusion, be reminded of deadlines and assignments, and had difficulty focusing, communicating with clients, and maintaining a positive attitude due to his depression and anxiety. R-331.

In *Mittleider v. West*, the Court held that remand was required to discuss the applicability of a 70 percent rating for a veteran’s PTSD when the evidence of record showed that his PTSD materially contributed to his serious employment handicap. 11 Vet. App. 181, 182 (1998). The Court pointed to evidence that the veteran experienced social isolation, hypervigilance, depression, and considerable occupational impairment. *See id.* at 181. Remand is similarly warranted here, as the Board failed to address any of this evidence showing Rodriguez’s significant occupational limitations. As a result, its statement of reasons and bases was inadequate. *See Caluza*, 7 Vet. App. at 506.

The Board's finding that Rodriguez was "married" throughout the entire period on appeal and did not indicate problems with personal relationships is similarly contravened by the evidence of record. R-16. Importantly, Rodriguez was not married for the entire period on appeal. His claim for benefits was submitted on May 9, 2017. R-1227. Rodriguez was married on August 10, 2018. R-42. He also endorsed frequent issues in his relationship with his girlfriend because of his mental condition in his course of treatment at the VA. In June 2017, he described relationship problems with his girlfriend stemming from his inability to control his anger. R-631. In September, he told his VA treatment provider that he was having issues with his girlfriend because of her concern about his lack of empathy. R-614. Rodriguez described distancing himself from others emotionally as a protective mechanism. *Id.* In December 2017, Rodriguez endorsed further relationship difficulties because of his lack of interest in sex due to his depressive symptoms. R-126. This issue continued into January 2018, when Rodriguez expressed continued tension stemming from his inability to be physically intimate. R-146. The Board did not address any of this evidence in its decision, and its failure to do so renders its statement of reasons and bases inadequate. *Caluza*, 7 Vet. App. at 506.

The Board further found that while Rodriguez endorsed "thoughts of death" in his October 2017 C & P Examination, this did not amount to "serious" suicidal ideation. R-16. Importantly, suicidal ideation appears only in the 70 percent evaluation criteria, and there are no analogues at the lower evaluation levels. *Bankhead*, 29 Vet. App. at 20. Additionally, there are no descriptors, modifiers, or indicators as to suicidal ideation in the 70 percent criteria (including no specific mention of "active" suicidal ideation, "passive"

suicidal ideation, suicidal “intent,” suicidal “plan,” suicidal preparatory behavior, hospitalization, or past suicide attempts). *Id.* Thus, the language of the regulation indicates that the “presence of suicidal ideation alone, that is, a veteran’s thoughts of his or her own death or thoughts of engaging in suicide-related behavior, may cause occupational and social impairment with deficiencies in most areas.” *Id.*

Here, the Board erroneously added the requirement that Rodriguez endorse “serious” suicidal ideation to warrant a 70 percent evaluation. R-16. This amounts to an incorrect application of the law, and remand is warranted. *See Bankhead*, 29 Vet. App. at 23 (holding that remand was warranted on the issue of entitlement to an evaluation in excess of 50 percent for service-connected major depressive disorder “so that the Board can adequately address the record evidence of suicidal ideation”); *see also Tucker v. West*, 11 Vet. App. 369, 374 (1998) (holding that remand is the appropriate remedy “where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate”).

The Board’s failure to address the evidence of record showing Rodriguez’s significant occupational and social limitations, as well as its requirement that he endorse “serious” suicidal ideation to warrant an increased disability evaluation, renders its statement of reasons and bases inadequate. *See Bankhead*, 29 Vet. App. at 20; *see also Caluza*, 7 Vet. App. at 506. Therefore, vacatur and remand is warranted.

CONCLUSION AND RELIEF SOUGHT

Rodriguez contends that the Board's denial of service connection for his right shoulder condition claim is clearly erroneous. He further asserts that the Board's denial of an increased disability evaluation for his headaches and PTSD is not supported by an adequate statement of reasons and bases. The Board's errors were prejudicial to Rodriguez's claims and require reversal and remand.

Respectfully submitted on August 2, 2019 by:

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