

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

Vet. App. No. 19-3501

NANCY R. THOMPSON,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

- A. Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for its decision to deny an increased rating.**
- B. Whether the Board of Veterans' Appeals commits remandable error when it fails to provide an adequate statement of reasons and bases for its decision to rely on an inadequate examination.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Nancy R. Thompson (Appellant) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2019).

B. Nature of the Case / Result Below

Appellant appeals the Board's January 31, 2019 decision denying a rating in excess of 50 percent for adjustment disorder [R 5 (4-20) (January 2019 BVA Decision)]

C. Relevant Facts

Appellant is a U.S. Army veteran, with honorable service from April 1995 to April 1999 [R 655 (1999 DD214)] and February 2003 to May 2004. [R 667 (2004 DD214)] She was awarded, *inter alia*, the Joint Service Commendation Medal, the Army Achievement Medal, the Good Conduct Medal, and National Defense Service Medal. [R 655 (1999 DD-214)]. Appellant's service-connection claims are on appeal from a July 2016 rating decision from the VA regional office. [R 6 (4-20) (May 2018 BVA Decision); 431-37 (July 27, 2016 Rating Decision)]

III. ARGUMENTS & AUTHORITIES

A. Adjustment Disorder

1. The Board failed to provide an adequate statement of reasons and bases for its decision to deny an increased rating.

In its denial of Appellant's claim, the Board asserts that "a 50 percent rating is appropriate for [Appellant's] adjustment disorder. The objective medical evidence does not demonstrate that [Appellant's] symptoms more nearly approximate a 70 percent rating under Diagnostic Code 9440." [R 15 (4-20) (January 2019 BVA Decision)] However, the Board has not addressed evidence submitted in 2016 including a statement from Appellant's private physician as well as a statement from Appellant's social worker.

The statement from Appellant's private physician listed symptoms stemming from her anxiety disorder including being "angry a lot, yelling for no reason and very irritable. She kept getting in arguments with her husband and they ended up divorced in 2008." [R 515-16 (Letter from Dr. Day)] Dr. Day also noted memory problems and being cited for "unbecoming behavior at work," crowd avoidance, low mood, flashbacks, and irritability. [*d.*]

The statement from Ashley Varner, LCSW-C, corroborate Appellant's symptoms noting "hypervigilance and irritability, difficulty sleeping due to nightmares, avoidance of triggering situations including seeing people in military uniform, relationship issues and isolation." [R 672 (Letter from Ashley Varner dated January 26, 2016)] Ms. Varner also notes Appellant's "intense emotional pain" as

well as leaving a job due to the frequency of seeing military personnel and divorce due to her symptoms. [*Id.*]

These statements show that Appellant's symptoms include impaired impulse control, difficulty adapting to stressful circumstances, as well as an inability to establish and maintain effective relationships. These are all symptoms associated with an increased rating. However, the Board has discounted these symptoms because the evidence did not show suicidal/homicidal ideation, delusions, near-continuous panic or depression or obsessional rituals. The Board also noted that Appellant was able to handle activities of daily living. Lastly the Board relied upon the June 2016 examiner's opinion that Appellant had only "occasional decrease in work efficiency." [R 15-16 (4-20) (January 2019 BVA Decision)] In determining a degree of disability based on a mental disorder, the Court of Appeals for Veterans Claims has held:

VA must engage in a holistic analysis in which it assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment.

Bankhead v. Shulkin, 29 Vet. App. 10, 22 (2017).

A statement from Appellant's former spouse was submitted noting Appellant's "violent and hostile behavior" as well as "unpredictable behavior" that lead to the end of their marriage. [R 565 (Letter from Stuart Thompson dated May 20, 2016)] Another statement from Appellant's sister notes the change in Appellant's behavior

including irritability, night terrors, and difficulty in maintaining relationships. [R 567 (Letter from Margaret Hodge dated May 15, 2016)] The Board has not addressed these favorable lay statements and whether they have any bearing upon Appellant's evaluation. "The statement of reasons or bases must explain why the Board discounts favorable evidence." *Thompson v. Gober*, 14 Vet. App. 187,188 (2000). Furthermore, the Supreme Court has stated:

If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). The Board has a duty to provide adequate reasons and bases for its decisions and findings "on all material issues of fact and law presented in the record". *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); 38 U.S.C. § 7104. The Board has not provided adequate reasons and bases for its decision to deny an increased rating nor has it addressed the favorable evidence contained in the lay statements of Appellant's sister and former spouse. Accordingly, remand is warranted.

2. The Board relied upon an inadequate medical record in making its decision to deny an increased rating.

In the Board's decision at issue, the Board has adopted the medical opinion of the June 2016 examiner. [R 15-16 (4-20) (January 2019 BVA decision)] However, as of the January 2019 decision, the June 2016 examination would not accurately

reflect the current severity of Appellant's condition. This disparity comes further into focus as the Board acknowledges that the June 2016 examiner found only an occasional decrease in productivity, which, the Board states "is contemplated by the 30 percent rating criteria, not the presently assigned 50 percent rating for the period in question." In addition to the lack of reasons and bases for discounting favorable evidence, this issue should also be remanded so that a contemporaneous examination may be performed, and the examiner may consider all evidence in the record in making a determination as to the current severity of Appellant's condition. See *Caffrey v. Brown*, 6 Vet. App. 377, 381 (1994) (holding that a two-year-old examination is too remote to constitute a contemporaneous examination). The Board has committed remandable error.

CONCLUSION

The Board committed remandable error when it failed to provide adequate reasons and bases for its denial of an increased rating as well as its reliance upon an inadequate examination. Appellant asks this Court to remand these issues for further development.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

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on November 6, 2019.

/s/ Josef A. Loukota
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