

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

Vet. App. No. 19-2731

RALPH L. HARRIS,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

**John S. Berry,
Attorney for Appellant**

**Jerusha L. Hancock,
Attorney for Appellant**

**Cameron Kroeger,
Attorney for Appellant**

**BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444**

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CASES AND AUTHORITIES	i
RECORD CITES	ii
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENTS AND AUTHORITIES	2
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CASES AND AUTHORITIES

Cases

<i>Barr v. Nicholson</i> , 21 Vet. App. 303 (2007)	6, 7
<i>Clemons v. Shinseki</i> , 23 Vet. App. 1 (2009)	3, 8, 9
<i>Colvin v. Derwinski</i> , 1 Vet. App. 171 (1991)	9
<i>Hersey v. Derwinski</i> , 2 Vet. App. 91, 94 (1992)	2
<i>Smallwood v. Brown</i> , 10 Vet. App. 93, 97 (1997)	2
<i>Stegall v. West</i> , 11 Vet. App. 268 (1998)	9
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364 (1948)	2

Statutes

38 U.S.C. § 7104(d) (2019)	5, 7, 10
38 U.S.C. § 7252 (2018)	1
38 U.S.C. § 7261(a)(4) (2019)	2

Regulations

38 C.F.R. § 4.310, <i>General Rating Formula for Mental Disorders</i> (2019)	3
38 C.F.R. §§ 4.1, 4.2 (2019)	6, 7

Record Cites

[R 5-17 (2018 Board decision)]	1, 3, 4, 5, 6, 8, 9
[R 27-32 (October 2018 DBQ)].....	3
[R 216-23 (July 2018 USCAVC remand)]	2, 3, 4, 8, 10
[R 306-308 (Psychiatry Note)]	7
[R 392 (May 2018 VAF21-4138)]	6
[R 418-28 (May 2018 NOD)]	9
[R 464-73 (April 2018 RD)].....	9
[R 1287 (DD214)]	1
[R 1500-25 (November 2017 BVA decision) (30% cont)].....	2
[R 1548 (April 2017 VAF8)]	2
[R 1555-58 (April 2017 SSOC)].....	2
[R 1633-37 (February 2017 SSOC)]	2
[R 1646-62 (February 2017 PTSD exam)	3
[R 2142-43 (May 2014 physician's letter)].....	4, 7
[R 2150 (February 2014 VAF9)].....	2, 5, 7
[R 2154-78 (January 2014 SOC)].....	2
[R 2232-39 (June 2013 VAM social note)]	5
[R 2310-13 (February 2012 RD)].....	2
[R 2320-33 (February 2012 PTSD exam)]	3, 5
[R 2378 (November 17, 2011 VAF21-526b)]	2

I. STATEMENT OF THE ISSUES

- A. Whether The Board Of Veterans' Appeals Commits Remandable Error When It Ignored Favorable Evidence Of An Earlier Effective Date For The Increased Evaluations For His Anxiety Disorder.**
- B. Whether The Board Of Veterans' Appeals Commits Remandable Error When It Failed To Substantially Comply With A Prior Remand Order.**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Ralph L. Harris (Appellant) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2019).

B. Nature of the Case / Result Below

The Appellant appeals the Board's December 28, 2018, decision that denied entitlement to a rating in excess of 50 percent for an "other specified trauma and stressor related disorder prior to May 22, 2014, and a rating in excess of 70 percent prior to May 14, 2018. [R 5-17 (2018 Board decision)]

C. Relevant Facts

The Appellant is a U.S. Army veteran with honorable service from December 1967 to December 1969. He was awarded the Bronze Star, Vietnam Service Medal, Vietnam Campaign Medal, Air Medal and Good Conduct Medal – all evidencing his good character. [R 1287 (DD214)] He timely appeals the December 28, 2018, Board decision that denied earlier effective dates for the increased 70 and 100 percent staged ratings. His increased rating claim is in appellate status

from November 17, 2011.¹

III. ARGUMENTS & AUTHORITIES

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) (2019). 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 (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 (2019).

Appellant's increased rating claim is on remand from the Court's July 2018 order which granted the parties' Joint Motion for Remand. In adopting the parties' agreement, the Court found, though appellant had been diagnosed as suffering from anxiety, PTSD and a dysthymic disorder, he had only been service-connected for an anxiety disorder. The Court remanded Appellant's claim for consideration as to whether Appellant was entitled to a separate rating for any of his coincident

¹ R 2378 (November 17, 2011 VAF21-526b)(CTR); 2310-13 (February 2012 RD)(reopened; 30% from November 17, 2011); 2154-78 (January 2014 SOC); 2150 (February 2014 VAF9); 1633-37 (February 2017 SSOC); 1555-58 (April 2017 SSOC); 1548 (April 2017 VAF8); 1500-25 (November 2017 BVA decision) (30% cont); 216-23 (July 2018 USCAVC remand); 5-17 (decision)(50/70/100%).

mental disorders, as well as increased ratings for his anxiety.² The Court also found the Board had failed to provide an adequate statement of reasons and bases regarding its consideration of appellant's suicidal ideation – a rating criteria associated with an increased 70 percent rating.³ [R 216-23 (July 2018 USCAVC remand)]

In deciding the increased rating claim in the decision now on appeal, the Board awarded an increased 50 percent rating from November 17, 2011; an increased 70 percent rating from May 22, 2014; and, an increased 100 percent rating from May 14, 2018. In rating appellant's mental disorder disability, the Board adopted the February 2012 C&P, February 2017 C&P, and October 2018 DBQ exams as its medical reasons and bases. [R 7-14 (5-17) (2018 Board decision); 2320-33 (February 2012 PTSD exam); 1646-62 (February 2017 PTSD exam); 27-32 (October 2018 DBQ)]

Appellant timely appeals.

- A. The Board failed to provide an adequate statement of reasons and bases explaining why it discounted favorable evidence which showed rating criteria associated with increased ratings, but instead relied on the inadequate medical exam record.**

Effective Date Earlier Than May 22, 2014 for 70% Rating

In the December 2018 decision now on appeal, the Board increased Appellant's 30 percent rating to 50 percent effective from November 14, 2011 –

² See *Clemons v. Shinseki*, 23 Vet. App. 1 (2009).

³ See 38 C.F.R. § 4.310, *General Rating Formula for Mental Disorders* (2019).

the date of his SC claim.⁴ The Board additionally awarded Appellant an increased 70 percent rating effective from May 22, 2014 – the date of a private physician’s letter. [R 2142-43 (May 2014 physician’s letter)] Appellant contends the increased 70 percent rating should be awarded effective prior to May 22, 2014 - possibly as far back as November 14, 2011.

The relied on May 22, 2014, letter reported symptoms associated with the increased 70 percent rating. The symptoms included recurrent nightmares, chronic sleep impairment, violent outbursts, and an inability to sustain work relationships. [R 10 (5-17) (2018 Board decision); 2142-43 (May 2014 physician’s letter)] A review of the letter itself shows the physician described historic events, all of which predated the May 22, 2014 letter.⁵

A review of the medical record (seemingly ignored by the Board when actually rating the mental disorder) also showed that the symptoms existed prior to the May 22, 2014, letter. Specifically, as acknowledged by the Board in the decision now on appeal, the February 2012 examiner reported “depressed mood and chronic sleep impairment [And VAMC] social work notes from 2013 reported symptoms of nightmares and flashbacks Veteran was violent during dreams”. The discounted medical record also showed appellant had reported in

4 The Court’s July 2018 remand order additionally affirmed the adjudicated fact appellant’s acquired psych disorder disability is service-connected from November 14, 2011. The 50 percent rating cannot be earlier than that effective date.

5 The May 22, 2014 letter reported appellant’s GAF score was 40, and his nightmares had onset in 1969. The entire letter is written looking backwards in time. The Court’s July 2018 remand directed the Board to consider appellant’s GAF score – which it failed to do. [R 219 (216-23)(July 2018 USCAVC remand)]

February 2012 he was unable to work because of his anxiety disorder. [R 9 (5-17) (2018 Board decision); 2332 (2320-33) (February 2012 PTSD exam) (“depressed mood” and “chronic sleep impairment”); 2232 (2232-39) (June 2013 VAM social note) (“violent nightmares”); 2150 (February 2014 VAF9) (unable to work due to anxiety)]

The Board remandably erred.

The Board failed to provide an adequate statement of reasons and bases explaining why it discounted favorable evidence which showed Appellant suffered from symptoms on which the increased 70 percent rating was awarded, well prior in time than the May 22, 2014, private physician’s letter. That is, the evidence shows the existence of increased symptoms prior to May 22, 2014. Absent an adequate explanation why the Board failed to consider the evidence in awarding the increased rating effective May 22, 2014, the Court and appellant have been denied an opportunity for meaningful judicial review. See 38 U.S.C. § 7104(d) (2019).

As discussed below, the Court’s July 2018 remand directed the Board to consider further development of the claim to potentially include an examination. The Board, however, failed to consider if the medical record was adequate absent a retrospective opinion reporting when the increased symptoms (associated with the increased 70 percent rating) began or intensified. The Board should have sought clarification from the relied-on May 22, 2014 physician, as well as the

VAMC PTSD examiners' reports. See *Barr v. Nicholson*, 21 Vet. App. 303 (2007); 38 C.F.R. §§ 4.1, 4.2 (2019).

Effective Date Earlier Than May 14, 2018 for the 100% Rating

As discussed above, Appellant's mental disorder was rated as 70 percent disabling, effective from May 22, 2014, by the Board in the decision on appeal. The Board awarded appellant an increased 100 percent rating, effective from May 14, 2018 – the date of the Appellant's lay statement, which described his increased mental disorder symptoms. [R 392 (May 2018 VAF21-4138)] Appellant contends the increased 100 percent rating should be awarded effective prior to May 14, 2018 - possibly as far back as May 22, 2014.

In awarding the total 100 percent rating, effective from the date of the Appellant's lay statement in which he described his mental disorder symptoms, the Board found "Veteran's symptoms [described in his lay statement] resulted in the type of occupational and social impairment associated with a 100 percent disability rating." The Board then awarded appellant a total 100 percent rating effective from the date of his May 14, 2018 lay statement. [R 14 (5-17) (2018 Board decision)]

The Board again remandably erred.

First, the Board failed to provide an adequate statement of reasons and bases explaining why it discounted favorable evidence that showed the Appellant reported in February 2014 that he was unable to work, and the relied-on May 2014 private physician's letter had reported appellant was unable to sustain any work

relationships. [R 2150 (February 2014 VAF9) (unable to work due to anxiety); 2142-43 (May 2014 physician's letter)] The Board also ignored the fact that the Appellant's primary care provider referred him to psychiatry in November 2017, where he complained of flashbacks, paranoia, visual hallucinations, and violent nightmares. [R 306-308 (Psychiatry Note)] He also reported delusions, paranoia, and some suicidal ideation. The Board did not address this favorable evidence. Absent an adequate explanation why the Board discounted the favorable evidence, the Court and appellant have been denied an opportunity for meaningful judicial review. See 38 U.S.C. § 7104(d) (2019).

As discussed below, the Court's July 2018 remand directed the Board to consider further development of the claim. The Board, however, failed to consider if the medical record was adequate to rate the disability absent a retrospective opinion reporting when the increased symptoms (associated with the increased 100 percent rating) had onset. The Board should have sought clarification of the 2014 physician's statement, as well as the VAMC PTSD examiners. Specifically, the Board should have sought retrospective opinions as to when the increased symptoms began, or a rationale why such a retrospective opinion was not available. See *Barr v. Nicholson*, 21 Vet. App. 303 (2007); 38 C.F.R. §§ 4.1, 4.2 (2019).

B. The Board failed to substantially comply with the Court's July 2018 remand of the claim.

The Court's July 2018 remand order vacated the Board's November 2017 decision, and remanded appellant's claim to the Board with specific instructions in how the Board was to proceed. After discussing (and quoting) *Clemons v. Shinseki*, 23 Vet. App. 1 (2009), the Court ordered the Secretary:

A review of the record reflects . . . [a]ppellant has been diagnosed with PTSD and dysthymic disorder Notwithstanding the above-noted diagnoses, the Board . . . did not adequately discuss whether the record on appeal reasonably raised additional claims of entitlement to service connection for any mental disabilities aside from his currently service-connected anxiety disorder, NOS. Accordingly, its reasons and bases are inadequate, frustrating judicial review, and requiring vacatur and remand On remand, the Board should discuss whether Appellant has been appropriately diagnosed with any mental disabilities aside from his currently service-connected anxiety disorder, NOS, at any point during his appeal. If Appellant is found to have been diagnosed with any such mental disability, **the Board should ensure that any necessary development be accomplished to determine** (a) whether such disability is due to his military service, and, if so, (b) whether such disability resulted in symptomology not currently contemplated by his 30% disability rating for his service-connected anxiety disorder, NOS. [R 218-19 (216-23) (July 2018 USCAVC remand) (emphasis added)]

After the claim was remanded, the Board readjudicated the claim in the December 2018 decision now on appeal. After acknowledging the Court's instructions (as quoted above), the Board limited its discussion of the Court's remand to finding "the record [as developed] does not sufficiently distinguish the symptoms of any diagnosed psychiatric disorder from his service-connected [anxiety disorder, NOS]. Thus, the Board's instant discussion attributes all of the Veteran's mental health symptoms to his service-connected [anxiety] disorder". [R 7 (5-17) (2018 Board decision)]

The Board remandably erred. The Board's December 2018 decision failed to substantially comply with the Court's July 2018 remand order.⁶ See *Stegall v. West*, 11 Vet. App. 268 (1998).

The Board's finding (*i.e.* "the Board attributes all of the Veteran's mental health symptoms to his service-connected [anxiety] disorder") is erroneously based on the Board's exercise of its own medical judgment. The Board is not competent to exercise medical judgment. The Board failed to cite anything on which its dispositive finding was made, despite the Court's remand instructions, but for its own medical judgment. See *Colvin v. Derwinski*, 1 Vet. App. 171 (1991).

In remanding the claim in July 2018, the Court found appellant had been diagnosed as suffering from other diagnosed mental disorders apart from his service-connected anxiety. Specifically, "PTSD and dysthymic disorder." The Court further found the Board had failed to "adequately discuss" separate ratings for the diagnosed, coincident ("PTSD and dysthymic") mental disorders as required by *Clemons v. Shinseki*, 23 Vet. App. 1 (2009). Based on that, the Court remanded the claim and ordered "the Board should ensure that any necessary

⁶ In briefly mentioning the Court's July 2018 remand, the Board additionally noted appellant's mental disability was "recharacterized as other specified trauma and stressor related disorder (previously, anxiety disorder) by the AOJ/RO's April 2018 rating decision". The Board, however, failed to explain how the AOJ/RO was able to adjudicate appellant's mental disability in April 2018, while that same claim was then pending at the USCAVC (and to be adjudicated in the July 2018 remand order). The Board also failed to consider how that April 2018 rating decision, which continued the existing 30 percent rating for appellant's anxiety, while it relabeled the disability, in any way supports its purported substantial compliance with the Court's remand. The void (for want of jurisdiction) rating decision – as disagreed to by appellant's counsel – enigmatically remains pending the issuance of a Statement of the Case at the AOJ/RO, while on its second appeal to the Court. The Board's reliance on that rating decision is not a valid reason and basis for the Board's decision. [R 7 (5-17) (2018 Board decision); 464-73 (April 2018 RD); 418-28 (May 2018 NOD)]

development be accomplished to determine . . . whether such disability resulted in symptomology not currently contemplated by his 30% disability rating for his service-connected anxiety disorder”. [R 219 (216-23) (July 2018 USCAVC remand) (emphasis added)]

However, on remand the Board again failed to “adequately discuss” the coincident mental disorder diagnoses. While the Board’s decision can be read to include implied findings that the coincident mental disorders do exist (as previously found by the Court), in deciding the claim in the decision now on appeal, the Board again failed to not only consider whether the coincident mental disorders do in fact exist, but also whether “any necessary development be accomplished” to decide whether the diagnosed coincident disorders should be separately rated. As previously found by the Court’s July 2018 remand order, absent such consideration, the Board’s “reasons and bases [remain] inadequate, [thereby] frustrating judicial review, and require[ing] vacatur and remand”. [R 218 (216-23) (July 2018 USCAVC remand)] See 38 U.S.C. § 7104(d) (2019).

CONCLUSION

The Board committed remandable error by ignoring favorable evidence of earlier effective dates for the increased evaluations for his service-connected acquired psychiatric condition. The Board also remandably erred when it failed to substantially comply with a prior remand order. The claim should be remanded.

Respectfully submitted,

RALPH L. HARRIS, Appellant

By: /s/ Jerusha L. Hancock
Jerusha L. Hancock, Esq.
BERRY LAW FIRM, PC
6940 O Street, Suite 400
Lincoln, NE 68510
402-466-8444
402-466-1793 Fax
jerusha@jsberrylaw.com
Attorney for Appellant

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:

Colin E. Tansits, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on November 14, 2019.

By: /s/ Jerusha L. Hancock
Jerusha L. Hancock, Esq.