

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

**Vet. App. No. 19-2247**

**SIDNEY F. MEDFORD,**

**Appellant**

**v.**

**ROBERT L. WILKIE,**

**SECRETARY OF VETERANS AFFAIRS**

**Appellee**

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**APPELLANT'S BRIEF**

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

**Stephani Bennett  
Attorney for the Appellant**

**Cameron Kroeger  
Attorney for the Appellant**

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

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## **I. STATEMENT OF THE ISSUES**

- A. Whether the Board provided an adequate statement of reasons or bases when it failed to discuss favorable evidence supporting an increased evaluation in excess of 30 percent for PTSD from January 20, 2010 to May 27, 2015.**

## **II. STATEMENT OF THE CASE**

### **A. Jurisdiction**

Appellant, Sidney F. Medford (Appellant), invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252.

### **B. Nature of the Case / Result Below**

Appellant appeals the Board's December 10, 2018 decision that denied his claim of entitlement to an increased evaluation for post-traumatic stress disorder (PTSD). R. 4-15 (December 2018 Board Decision).

### **C. Relevant Facts**

Appellant is a U.S. Army combat veteran of the Vietnam War, with honorable service from October 1967 to October 1970. R. 2389 (October 1970 DD 214). He was awarded the Purple Heart with V, Combat Infantryman Badge, RVN Cross of Gallantry, Vietnam Service Medal, and Vietnam Campaign Medal. *Id.*

Appellant applied for service connection for PTSD in a statement received by the VA on July 21, 2005. R. 3524-27 (July 2005 PTSD Claim). The VA granted the claim for service connection in a decision dated November 6, 2006,

effective the date of the claim. R. 3455-57 (November 2006 Rating Decision). The VA assigned a 10 percent evaluation based on an examination dated September 27, 2006. R. 3455-57 (November 2006 Rating Decision); 3458-62 (September 2006 PTSD C&P Examination).

In January 2010, Appellant sought an increased evaluation for his PTSD, noting that his symptoms had increased in severity. R. 3214 (January 2010 VA Form 21-4138). The VA provided an examination on June 13, 2012, in which the examiner found that Appellant suffered from increased PTSD symptoms such that he could only work part time. R. 2595-2401 (June 2012 PTSD C&P Examination). The examination was silent for any findings or discussion of when such symptoms onset. *Id.*

Based on the June 2012 examination, the VA increased Appellant's PTSD rating to 30 percent, effective January 20, 2010 (the date he filed for an increased evaluation). R. 2587-89 (July 2012 Rating Decision). Appellant appealed both the effective date of the award and the 30 percent rating, arguing that his symptoms were more closely associated with higher ratings and that the Secretary erred in failing to consider awarding the increase for the year prior to the January 2010 claim for increase. R. 2557-68 (July 2012 Notice of Disagreement).

The 30 percent evaluation was continued in a Statement of the Case dated December 26, 2012. R. 2490-2511 (December 2012 Statement of the Case). The 30 percent evaluation was based on the following enumerated symptoms:

- Disturbances of motivation and mood
- Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal)
- Anxiety
- Chronic sleep impairment
- Depressed mood
- Suspiciousness

*Id.* at 2508-09. Appellant submitted a timely VA Form 9 to continue his appeal. R. 2469-70 (January 2013 VA Form 9).

In an April 2015 decision, the Board, in relevant part, remanded the increased evaluation in excess of 30 percent. R. 1825-40 (April 2015 Board Decision). The Board also denied the issue of an earlier effective date prior to January 2010, an issue which as ultimately been finally decided and affirmed by the Court, but that resulted in the Board again listing an increased evaluation in excess of 30 percent on a decision dated April 2016. R. 1682-86 (April 2016 Board Decision). However, the claim for increase continued to be processed by the Agency of Original Jurisdiction (AOJ) during the appeal from the Board of the earlier effective date issue.

In May 2015, the VA provided an examination with the examiner noting that Appellant's ability to work had "dropped significantly in the last few years..." and that he had been "steadily reducing his hours at work due to some increase in PTSD symptoms." R. 1774-83 (May 2015 PTSD DBQ). Based on this examination, in July 2016, the VA assigned a 50 percent evaluation from May 27, 2015 for PTSD. R. 1437-39 (July 2016 Rating Decision). The VA then issued a Supplemental Statement of the Case, which, in relevant part, continued the increase to 50 percent from May 2015. R. 1401-17 (September 2016 Supplemental Statement of the Case).

In a May 2017 decision, the Board denied a rating in excess of 30 percent for PTSD prior to May 27, 2015, and in excess of 50 percent thereafter. R. 212-30 (May 2017 Board Decision). Appellant again appealed to the Court of Appeals for Veterans' Claims.

In a Memorandum Decision, the Court set aside the portion of the Board's May 2017 decision that denied entitlement to a disability rating higher than 30. R. 172-77 (May 2018 Memorandum Decision). Specifically, the Court found that the Board failed to discuss or provide adequate reasons or bases for rejecting potentially favorable evidence, including information in a June 2012 examination stating that Appellant could only work part time. R. 174 (172-77) (May 2018

Memorandum Decision). The Court instructed that the Board consider this evidence and any other relevant evidence on remand. *Id.* at 174-75.

On remand from the Court, the Board again denied Appellant's claim for an increase in excess of 30 percent for PTSD from January 20, 2010 to May 27, 2015. R. 4-15 (December 2018 Board Decision) Appellant appealed the Board's decision in the present action.

### **III. SUMMARY OF THE ARGUMENT**

The Board provided an inadequate statement of reasons or bases when it failed to discuss evidence supporting an evaluation in excess of 30 percent from January 20, 2010 to May 27, 2015. Specifically, the Board did not discuss notations in the record showing irritability, anger, periods of verbal violence, and suicidal ideation. These symptoms are enumerated within the Rating Code only under the 70 percent evaluation, but the Board found that a continuation of the 30 percent evaluation was warranted.

Furthermore, the Board did not provide an adequate explanation for weighing an absence of evidence as negative evidence when it found that Appellant's decrease from full time to part time work was not caused by PTSD in 2012. The Board's finding was based on a lack of notation within the 2012 examination specifically explaining why Appellant cut back his hours, though he did in another section of the examination report a lack of patience with clients,



which the Board did not address. The Board's conclusion that PTSD did not contribute to the 2012 reduction in hours was particularly unclear because the Board later found that a 2015 reduction in work hours was at least partly caused by PTSD. These inconsistent approaches required an explanation, which was not provided.

#### IV. ARGUMENTS & AUTHORITIES

**A. The Board provided an inadequate statement of reasons or bases when it failed to discuss favorable evidence supporting an increased evaluation in excess of 30 percent for PTSD from January 20, 2010 to May 27, 2015.**

In its May 2018 Memorandum Decision, the Court found that remand was necessary because the Board "failed to discuss or provide adequate reasons or bases for rejecting potentially favorable evidence from, at least, appellant's June 2012 VA examination." R. 174 (172-77) (May 2018 Memorandum Decision). As the Court said in that same decision, is the Board's duty to "analyze the credibility and probative value of all material evidence... and provide the reasons for its rejection of any such evidence." *Caluza v. Brown*, 7 Vet.App. 498, 06 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (emphasis added). The Board is further required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate

review by the Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). However, in the decision now on appeal, the Board failed to discuss or provide an adequate statement of reasons or bases for rejecting potentially favorable evidence.

While the Board did correct its previous failure to discuss some of the evidence within the June 2012 VA examination, it did not discuss all of the potentially favorable evidence within the examination. Specifically, the Board failed to note Appellant's irritability, which was one of four symptoms reported to the examiner by Appellant's wife. R. 401 (397-406) (June 2012 PTSD C&P Examination). The symptom of irritability or outbursts of anger was also noted by the examiner under the heading of, "Persistent symptoms of increased arousal, not present before the trauma..." R. 404 (397-406) (June 2012 PTSD C&P Examination).

Irritability is particularly relevant to the present claim for increase because it is contemplated in the 70 percent criteria under the General Rating Formula for Mental Disorders. See 38 C.F.R. § 4.130. Specifically, the relevant Diagnostic Code states that a 70 percent rating is warranted where:

there is occupational 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 work like setting); inability to establish and maintain effective relationships.

38 C.F.R. § 4.130, Diagnostic Code 9410 (emphasis added).

Given the significance of irritability as a symptom warranting an increased evaluation, the Board had an obligation discussed the frequency, severity, and duration of these symptoms, determined the level of occupational and social impairment they caused, and assigned a rating that most nearly approximated that level of occupational and social impairment. See 38 C.F.R. § 4.126; *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013); see also *Moore v. Shinseki*, 555 F.3d 1369, 1373 (Fed. Cir. 2009) (“VA regulations specifically provide that a rating for a psychiatric disorder must be ‘based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner’s assessment of the level of disability at the moment of the examination.’”). However, the Board did not mention the notations of Appellant’s irritability in the 2012 examination at all. In fact, the Board specifically stated that Appellant did not show symptoms including “impaired impulse control (such as unprovoked irritability with periods of violence)…” R. 14 (4-15) (December 2018 Board Decision).

Had the Board adequately addressed the issue of irritability, it might have

found that Appellant's work had been affected prior to 2015 because other indications within the June 2012 examination indicate that irritability was causing problems at work. Appellant reported that he was "physically able" to do activities, but that he had "less patience with his clients than before..." R. 404 (397-406) (June 2012 PTSD C&P Examination). The Board did note Appellant's report of less patience with clients but did not engage in the requisite analysis of how this irritability and lack of patience impaired Appellant's ability to work.

Other places in the record support the notion that Appellant suffers from impaired impulse control with periods of unprovoked irritability. As far back as his initial compensation and pension examination for PTSD in 2006, Appellant was noted to suffer from irritability. R. 3458-62 (September 2006 PTSD C&P Examination). Appellant has additionally reported having a "short fuse" with people and has admitted that it takes "very little for [Appellant] to get in someone's face" and "verbally abuse them." R. 1690 (1689-93) (February 2016 Affidavit of Appellant).

The Board also failed to address Appellant's report of suicidal ideation. In an affidavit, Appellant stated that he experienced some suicidal ideation in the past, which was not addressed by the Board. R. 1691 (1689-93) (February 2016 Affidavit of Appellant). Again, the Board specifically stated that Appellant had not shown any symptoms of suicidal ideation. R. 14 (4-15) (December 2018 Board

Decision).

The criteria for a 70% evaluation under § 4.130 lists “suicidal ideation” as a symptom VA deems representative of occupational and social impairment with deficiencies in most areas. 38 C.F.R. § 4.130, Diagnostic Code 9410. Suicidal ideation appears only in the 70% evaluation criteria with no analogues at the lower evaluation levels. See *Bankhead v. Shulkin*, 29 Vet.App. 10 (2017); *Vazquez-Claudio*, 713 F.3d at 116 (tracking the increasing severity, frequency, and duration of panic attacks and memory loss across the various disability levels). Additionally, there are no descriptors, modifiers, or indicators as to suicidal ideation in the 70% criteria (i.e., no specific mention of active suicidal ideation versus passive suicidal ideation, suicidal intent, suicidal plan, suicidal preparatory behavior, hospitalization, or past suicide attempts). 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. *Bankhead*, 29 Vet.App. at 20. This symptom, reported in the record, was relevant to an increased evaluation and the Board was obligated to discuss it.

Finally, the Board found that there was no indication that Appellant's decrease in work from full time to part time at the time of the June 2012

examination was due to his service-connected PTSD. R. 12 (4-15) (December 2018 Board Decision). As discussed above, Appellant did indicate a lack of patience with clients, which could be construed as an indication that the decrease in work was due to PTSD, but the Board also later found that Appellant's decrease to working only a few hours per week in May 2015 was "at least partially due to his PTSD symptoms. R. 13 (4-15) (December 2018 Board Decision). The Board did not explain its inconsistent approach to the decrease in ability to work from 2012 (when it found that PTSD did not contribute) to 2015 (when it found that PTSD did contribute).

Furthermore, there is no evidence showing that Appellant's decrease in work hours reported on the 2012 examination was not due to PTSD. The Board apparently considered the lack of specific notation in the examination as to why Appellant chose to work part time to weigh against the notion that PTSD caused him to decrease his work without establishing the proper foundation. See *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000).; see also *Horn v. Shinseki*, 25 Vet.App. 231, 240 n.7 (2012) (stating that, when the Board uses the absence of evidence as negative evidence, there must be " 'a proper foundation ... to demonstrate that such silence has a tendency to prove or disprove a relevant fact.' ") (quoting *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (Lance J., dissenting)).

The Board's statement of reasons or bases was inadequate because it did not discuss Appellant's irritability at all, particularly in the context of the effect of irritability on Appellant's social and occupational functioning. Given his numerous failed marriages and the fact that he started working part time while indicating he suffered from a lack of patience with clients, Appellant's irritability should have been discussed. The Board also failed to discuss Appellant's report of suicidal ideation. Finally, the Board found that Appellant's decrease to part time work, as reported in the 2012 examination, was not due to PTSD, a finding which was not explained, was inconsistent with the Board's determination that PTSD caused the 2015 decrease in work, and was made without the proper foundation for weighing an absence of evidence as negative evidence.

The Board's failure to discuss this favorable evidence renders its statement of reasons or bases inadequate. See *Thompson*, 14 Vet.App. at 188 (per curiam) (holding that, for the Board's reasons or bases to be adequate, the Board must provide reasons for discounting favorable evidence); *Allday*, 7 Vet.App. at 527 (the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court").

### **CONCLUSION**

The Board committed remandable error when it failed to provide adequate reasons or bases for finding that the claim for PTSD did not warrant an increased evaluation. The decision on appeal must be vacated and the matter remanded for the Board to properly apply the law, consider the relevant evidence of record, and issue a decision supported by adequate reasons or bases.

Respectfully submitted,

Sidney F. Medford, Appellant

By: /s/ Stephani Bennett  
Stephani Bennett, Esq.  
BERRY LAW FIRM, PC  
6940 O Street, Suite 400  
Lincoln, NE 68510  
(402) 466-8444  
(402) 466-1793 / Fax  
[stephani@jsberrylaw.com](mailto:stephani@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:

Matthew D. Showalter, Esq.  
Office of the General Counsel  
Department of Veterans Affairs  
810 Vermont Ave., NW  
Washington DC 20420

on November 25, 2019.

/s/ Stephani Bennett  
Attorney for Appellant