

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

ROY C. HAMPTON,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD A. DALEY
Deputy Chief Counsel

JAMES M. CARLSON
Appellate Attorney
Office of General Counsel (027E)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
202-632-6796

Attorneys for Appellee

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ROY C. HAMPTON,)
Appellant,)
)
v.) Vet. App. No. 19-2384
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

Whether the Court should vacate the portions of the Board of Veterans' Appeals' (Board) February 1, 2019, decision that denied a rating above 30% for an acquired psychiatric disorder and a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) where the Board did not provide an adequate statement of reasons or bases for denying a higher schedular rating and where the issue of TDIU is inextricable from the claim for an increased rating for the psychiatric disorder.

On February 1, 2019, the Board issued a decision denying a rating higher

than 30% for an acquired psychiatric disorder and denying TDIU.¹ (Record (R.) at 5 (5-19)). Appellant, Roy C. Hampton, appealed to this Court in April 2019.

C. STATEMENT OF RELEVANT FACTS

In October 2015, Appellant sought service connection for a psychiatric condition, stating that he had post-traumatic stress disorder (PTSD). (R. at 1379-80). In January 2016, Appellant attended an examination with a private psychiatrist. (R. at 892-95). The private examiner diagnosed Appellant with PTSD and stated that he had major impairments in several areas, including work and housework. (R. at 894). The examiner recorded Appellant's report that he had last worked in April 2015 but that he was looking for work. (*Id.*). The examiner also stated that Appellant had serious impairments in his social relationships and that he became confused when faced with complex tasks. (*Id.*).

Two months later, in March 2016, Appellant underwent an examination with a VA psychologist. (R. at 859-69). Unlike the private examiner, the VA examiner concluded that Appellant did not have a diagnosis of PTSD but instead diagnosed him with insomnia. (R. at 859). The examiner opined that Appellant had occupational and social impairment due to mild or transient symptoms, which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress. (*Id.*). The examiner noted that Appellant was currently living with his girlfriend and that he enjoys playing cards, going to the

¹ The Board's grant of a 30% rating for PTSD is favorable to Appellant, so the Court may not disturb it. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

movies, and spending time with friends. (R. at 861). Appellant informed the examiner that he was currently enrolled full time in a computer programming course and that he had a GPA of 3.8. (*Id.*). The examiner observed that Appellant had normal speech, good eye contact, a cooperative attitude, normal psychomotor activity, and a stable, somewhat anxious affect. (R. at 862). The examiner concluded by noting that Appellant did have subthreshold PTSD symptoms but that his symptoms, except a sleep disorder, had largely resolved. (R. at 867).

In April 2016, a VA examiner reviewed Appellant's records and offered an opinion about his insomnia. (R. at 723-24). The examiner concluded that this condition was related to his service, observing that his symptoms had been present since service. (R. at 724). The following month, the RO granted service connection for insomnia, assigning a 10% rating and an effective date in October 2014, the day after Appellant's discharge. (R. at 711 (711-16)). In June 2016, Appellant submitted a formal application for TDIU. (R. at 691-92). That same day, he submitted a notice of disagreement (NOD) with the May 2016 RO decision, requesting a 70% rating and TDIU or a 100% rating. (R. at 688 (688-89)). With the NOD, Appellant submitted a letter asserting that the RO had erred in assigning only a 10% rating and requesting the assignment of a higher rating. (R. at 685-87). In March 2017, the RO issued a statement of the case (SOC), which found that the 10% rating for insomnia was proper and denied TDIU. (R. at 570 (551-72)). Appellant appealed to the Board that same month. (R. at 549).

In September 2018, a private psychologist completed a disability benefits

questionnaire (DBQ). (R. at 84-88). The psychologist noted a diagnosis of recurrent insomnia disorder and opined that this condition causes occupational and social impairment with occasional decreased in work efficiency and intermittent periods of inability to perform occupational tasks. (R. at 84-85). The examiner recorded Appellant's reports of making critical mistakes at work related to his mental disorder and his difficulty focusing. (R. at 86). The examiner also noted that Appellant had an associate's degree and that he was currently working full time as a desktop support technician, a job he had held for nine months. (*Id.*). The examiner further noted that Appellant had previously worked as a driver for Uber while he was finishing his degree. (*Id.*).

The Board issued the decision on appeal on February 1, 2019, granting an increased rating of 30%, but no higher, for an acquired psychiatric disorder under 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411, and denying TDIU. (R. at 5 (5-19)). Appellant appealed to this Court in April 2019.

SUMMARY OF THE ARGUMENT

The Court should vacate the portions of the Board's February 1, 2019, decision that denied a rating above 30% for an acquired psychiatric disorder and TDIU. The Board did not provide an adequate statement of reasons or bases for denying a higher rating for the psychiatric disorder, and the issue of TDIU is inextricable from the claim for an increased rating.

ARGUMENT

The Board Did Not Provide an Adequate Statement of Reasons or Bases for Its Denial of a Rating Above 30% for an Acquired Psychiatric Disorder, and the Issue of TDIU is Inextricable from the Claim for an Increased Rating

VA assigns a disability rating for mental health conditions that most closely reflects the level of social and occupational impairment that a veteran experiences.

Mauerhan v. Principi, 16 Vet.App. 436, 440-41 (2002). In that regard, a 100% rating for PTSD under 38 C.F.R. § 4.130, DC 9411, requires evidence of

[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.

A 70% rating for PTSD requires evidence of

[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.

A 50% rating requires evidence of

[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.

And a 30% rating requires evidence of

[o]ccupational 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), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

The Board's determination of the appropriate schedular rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4). But, like all factual findings, the Board's findings about which level of disability to assign must be supported by 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)(1). "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 in th[e] Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To that end, the Board must, at a minimum, discuss the applicability of the criteria for the next higher rating when it assigns a disability rating. See *AB v. Brown*, 6 Vet.App. 35, 39 (1993).

Here, the Board failed to provide an adequate statement of reasons or bases because it did not specifically discuss the criteria for a 50% rating when it granted a rating of 30%, but no higher. (R. at 12-14); see *Allday*, 7 Vet.App. at 527; *AB*, 6 Vet.App. at 39. Although the Board listed the criteria for a 50% rating (R. at 7) and

concluded that Appellant's symptoms did not more nearly approximate the "social and occupational impairment with reduced reliability and productivity" associated with a 50% rating (R. at 12), it did not specifically explain why Appellant's symptoms did not rise to this level. Vacatur and remand of the portion of the Board's decision that denied a higher rating for an acquired psychiatric disorder are therefore warranted.

On remand, the Board will again discuss the effects of Appellant's acquired psychiatric disorder on his social and occupational functioning. See *Mauerhan*, 16 Vet.App. at 440-41; 38 C.F.R. § 4.130, DC 9411. As such, the determination about the appropriate rating for his psychiatric disorder may have a significant effect on the claim for TDIU. See *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991). These issues should, therefore, be adjudicated together, and the issue of TDIU should be remanded with the claim for an increased rating for a psychiatric disorder. See *Tyrues v. Shinseki*, 23 Vet.App. 166, 178-79 (2009), *aff'd* 631 F.3d 1380 (Fed. Cir. 2011).

CONCLUSION

Considering the foregoing, the Court should vacate the portions Board's February 1, 2019, decision that denied a rating higher than 30% for PTSD and TDIU remand those matters for readjudication.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ James M. Carlson
JAMES M. CARLSON
Appellate Attorney
Office of General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
202-632-6796

Attorneys for Appellee

CERTIFICATE OF SERVICE

On December 12, 2019, a copy of the foregoing was mailed postage prepaid to:

Roy C. Hampton
119 Beechleaf Court
Clayton, NC 27520

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ James M. Carlson
JAMES M. CARLSON
Appellate Attorney