

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

Vet. App. No. 19-5076

JOHN CORDOVA,

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 erred by misapplying the law and discounting evidence favorable to Appellant's claim for increased evaluation for post-traumatic stress disorder without providing an adequate statement of reasons or bases**

II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant, John Cordova (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 April 9, 2019 decision that denied his claim for an initial rating in excess of 50 percent for post-traumatic stress disorder. R. 5-10 (April 2019 Board Decision).

C. Relevant Facts

Appellant is a veteran of the United States Marine Corps with honorable service from July 20, 1971 to December 6, 1972. R. 671 (December 1972 DD-214). His claim for service connection for post-traumatic stress disorder was granted in a decision dated June 6, 2017 with an initial 30 percent evaluation. R. 785-87 (June 2017 Rating Decision). Appellant disagreed with the evaluation on appeal. R. 647-54 (August 2017 Notice of Disagreement). As a result, a Decision Review Officer provided an increased evaluation of 50 percent, a partial grant of the benefit on appeal. R. 140-56 (October 2017 Statement of the Case); 134-36 (October 2017 Rating Decision). Appellant continued his appeal to the Board of

Veterans' Appeals seeking an evaluation in excess of 50 percent. R. 120 (October 2017 VA Form 9).

The Board denied an increased evaluation (in excess of 50 percent). R. 5-10 (April 2019 Board Decision). In denying the claim, the Board found that Appellant's post-traumatic stress disorder was "not productive of occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking or mood." R. 8 (5-10) (April 2019 Board Decision). The Board supported their finding by first noting that Appellant had "not sought treatment for his PTSD, and the evidence of record consist[ed] of his lay statements and a May 2017 report of VA examination." *Id.*

Regarding Appellant's ability to work, the Board stated that the evidence did "not reflect deficiencies in the area of work." R. 4 (5-10) (April 2019 Board Decision). According to the Board, Appellant worked for 24 years as a police officer and then began to work part-time in security. *Id.* The Board stated that there was "no evidence that [Appellant] retired due to his PTSD, or that he now works part-time due to his PTSD." *Id.*

The Board then moved to an analysis of Appellant's familial relationships, stating that Appellant was close to one of his children but did not speak to the other. *Id.* Specifically, Appellant "indicated that his daughter [did] not talk to him because of his anger issues." *Id.* The Board also noted Appellant's contention that his PTSD contributed to the dissolution of his marriage in 2001. *Id.* Appellant

reported only being able to maintain short relationships since the end of his marriage and that his last girlfriend terminated their relationship because they did not get along. *Id.* The Board noted that the VA examiner reported Appellant suffered from an “inability to establish and maintain effective relationships.” *Id.*; 821-29 (May 2017 VA PTSD Examination).

The Board then moved on to a finding that Appellant did not suffer from impairment of judgment or thinking. *Id.* To support its finding, the Board relied on the previously referenced May 2017 VA examination, which found that Appellant had attention, concentration, and memory within normal limits. R. 8-9 (5-10) (April 2019 Board Decision); 821-29 (May 2017 VA PTSD Examination). The Board did not address the examiner’s report of, “Mild memory loss, such as forgetting names, directions or recent events,” listed in the same examination. R. 821-29 (May 2017 VA PTSD Examination).

Next, the Board discussed Appellant’s deficiencies in the area of mood. R. 9 (5-10) (April 2019 Board Decision). Based on the VA examination, the Board found that Appellant reported irritability and angry outbursts, as well as depression, anxiety, and disturbances of motivation and mood. *Id.* However, the Board did not find that Appellant suffered from suicidal ideation, obsessional rituals, speech that is illogical, obscure or irrelevant, near continuous panic or depression affecting the ability to function, impaired impulse control or spatial disorientation. *Id.*

Based on its analysis of Appellant's symptoms, the Board found that Appellant's post-traumatic stress disorder did not cause occupational and social impairment with deficiencies in most areas. Specifically, the Board found that, "[a]lthough the Veteran experiences deficiencies in the areas of family and mood, his PTSD has not caused him to experience deficiencies in the areas of work, judgment or thinking." *Id.* Accordingly, the Board found that the record reflected a 50 percent evaluation. *Id.*

III. SUMMARY OF THE ARGUMENT

During the period on appeal, Appellant's symptoms included anxiety, depression, irritable behavior and angry outbursts typically expressed as verbal or physical aggression toward people or objects, nightmares, sleep impairment, mild memory loss, impediments to forming relationships, and disturbances of motivation and mood. Nonetheless, the Board denied him a rating in excess of 50 percent because he did not display symptoms specifically associated with the higher rating criteria. The Board misapplied the law when it failed to adequately assess the symptoms Appellant actually displayed—along with their frequency, severity, and duration—to assign the appropriate disability rating.

The Board failed, moreover, to provide an adequate statement of reasons and bases when it failed to adequately discuss some of Appellant's symptoms, such as his irritability and anger directed at people and objects. It selectively relied on the portions of the record least favorable to Appellant, without discussing other

portions. The Board's misapplication of law, inadequate reasons and bases and its inaccurate findings that he did not experience symptoms consistent with an increased evaluation warrant reversal.

IV. ARGUMENTS & AUTHORITIES

A. The Board erred by misapplying the law and discounting evidence favorable to Appellant's claim for increased evaluation for post-traumatic stress disorder without providing an adequate statement of reasons or bases.

The Board determined that Appellant's post-traumatic stress disorder symptoms were not "productive of occupational and social impairment with deficiencies in most areas." R. 9 (5-10) (April 2019 Board Decision). Specifically, the Board found that, although Appellant experienced deficiencies in the areas of family and mood, his symptoms did not cause him to experience deficiencies in the areas of work, judgment, or thinking. *Id.*

The Board's discussion misapplied the law under *Vazquez-Claudio v. Shinseki*, *Mauerhan v. Principi*, and the applicable regulations because it unduly focused on symptoms hunting and never included an analysis of the frequency, severity, and duration of the Veteran's symptoms. See *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet.App. 436, 443 (2002); 38 C.F.R. §§ 4.126, 4.130. Evaluating whether a higher rating for PTSD is warranted requires the Board to complete a two-step analysis, which it did not do here. There must first be an "initial assessment of the symptoms displayed by the veteran, and if they are of the kind enumerated in the regulation,"

and second, an assessment of whether those symptoms cause occupational and social impairment commensurate with a higher rating. *Vazquez-Claudio*, 713 F.3d at 118; see also 38 C.F.R. § 4.126(a); *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017) (“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.”).

With respect to the first step, the “such symptoms as” language in section 4.130 means that the listing is not exhaustive, and the plain language of the regulation undermines “any suggestion that the Board [is] required...to find the presence of all, most, or even some, of the enumerated symptoms.” *Mauerhan*, 16 Vet.App. at 442; see also 38 C.F.R. § 4.130. Consequently, the Board must evaluate the effects of the Veteran’s symptoms, not merely hunt for the set of symptoms a particular rating contemplates. See *Mauerhan*, 16 Vet.App. at 443. “[I]t is not the symptoms, but their effects, that determine the level of impairment.” *Thun v. Peake*, 22 Vet.App. 111, 118 (2008) (quoting *Mauerhan*, 16 Vet.App. at 443), *aff’d sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009).

In its analysis, the Board engaged in symptom hunting when it listed the symptoms contemplated under a 70 percent evaluation for mental health disorders and stated whether Appellant suffered from each enumerated symptom. R. 8-9 (5-10) (April 2019 Board Decision). The General Rating Formula for Mental Disorders under 38 C.F.R. § 4.130 lists the following under the 70 percent rating criteria:

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 worklike setting); inability to establish and maintain effective relationships.

38 C.F.R. § 4.130.

The Board then engaged in an analysis that began with deficiencies in work, then family relations, followed by judgment, thinking, and mood. R. 8-9 (5-10) (April 2019 Board Decision). The Board found, in order, that Appellant did not suffer from “suicidal idea, obsessional rituals, speech that is illogical, obscure or irrelevant, near continuous panic or depression affecting the ability to function, impaired impulse control, or spatial disorientating.” R. 9 (5-10) (April 2019 Board Decision). Simply matching the Veteran’s noted symptoms to the criteria within which they are listed is directly contrary to the Court’s holding in *Mauerhan*. See 16 Vet.App. at 443. It also misapplies the regulation; using the rating criteria as a scorecard and assigning a rating that encompasses the greatest number of the Veteran’s singular symptoms does not capture the impairment they cause. See *Thun*, 22 Vet.App. at 118; *Mauerhan*, 16 Vet.App. at 443; 38 C.F.R. §§ 4.126, 4.130.

Similarly, the Board’s emphasis on the symptoms that Appellant did not

experience within the higher rating criteria shows that it did not perform the required analysis. See R. 8-9 (5-10) (April 2019 Board Decision); see also *Mauerhan*, 16 Vet.App. at 443. The Board concluded that he did not experience occupational and social impairment with deficiencies in most areas (for a 70 percent rating) specifically because he did not exhibit deficiencies in the areas of work, judgment or thinking. R. 9 (5-10) (April 2019 Board Decision). In making this determination, the Board found that Appellant did not have deficiencies in work because the VA examiner did not report that Appellant's symptoms included "difficulty in establishing and maintaining effective work relationships or difficulty in adapting to stressful circumstances, including work or a work-like setting." R. 8 (5-10) (April 2019 Board Decision). The Board found that Appellant did not suffer impairment of judgment or thinking because he did not experience suicidal ideation, delusional thinking, or hallucinations. R. 8-9 (5-10) (April 2019 Board Decision).

Appellant did not need to experience any of those symptoms to receive a 70 percent rating. See 38 C.F.R. § 4.130 (stating "such as" before the symptoms listed); see also *Mauerhan*, 16 Vet.App. at 442. This basis for the Board's denial violated the law because it improperly focused on the symptoms the Veteran did not display, as opposed to analyzing the severity, frequency, and duration of the symptoms he did experience and whether they amounted to the requisite level of impairment for a 70 percent rating. See *Mauerhan*, 16 Vet.App. at 443.

In response to the evidence that Appellant retired as a police officer and worked part-time in security, the Board found that Appellant had not retired or reduced his working time due to post-traumatic stress disorder. R. 8 (5-10) (April 2019 Board Decision). This again misapplied the diagnostic code; simply because Appellant retired and worked part time does not eliminate the possibility that he had difficulties working. See 38 C.F.R. § 4.130.

The Board's misapplication of law prejudiced Appellant because, had the Board conducted the requisite analysis, it might have found that Mr. Cordova's symptoms better approximated the criteria for a higher rating. After recognizing Appellant's various symptoms, the Board should have proceeded to evaluate whether they caused occupational and social impairment commensurate with a higher rating. See *Vazquez-Claudio*, 713 F.3d at 118; see *also* 38 C.F.R. § 4.126.

For example, though the Board mentioned Appellant's anger issues, severe enough to end his relationship with his child, it provided no analysis as to why that symptom only caused deficiencies in the area of family relations. R. 8 (5-10) (April 2019 Board Decision); see *also* 38 C.F.R. § 4.130. The Board noted that Appellant "reported to the VA examiner that he experiences irritability and anger outbursts..." but failed to include the symptom in its analysis. R. 9 (5-10) (April 2019 Board Decision); 821-29 (May 2017 VA PTSD Examination). This is particularly relevant, as impaired impulse control (such as unprovoked irritability with periods of violence) is a symptom contemplated under the rating criteria for a 70 percent

evaluation. 38 C.F.R § 4.130.

The Board is not entitled to ignore evidence that is directly relevant to Appellant's entitlement to a higher rating. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (requiring the Board to provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"); *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding the Board is not required to discuss all evidence of record but must discuss all relevant evidence); see also 38 U.S.C. § 7104(d)(1). Nor is it entitled to highlight the least favorable evidence of record and ignore evidence favorable to Appellant. See generally *Dela Cruz*, 15 Vet.App. at 149. But, when the Board noted some portions of the evidence over others and omitted evidence of additional psychiatric impairments caused by Appellant's PTSD, specifically anger and irritability, it did just that.

As discussed above, the Board failed to engage in a holistic analysis of Appellant's symptoms and failed to adequately discuss symptoms consistent with an increased rating. This prejudiced Appellant. If the evidence had been properly discussed and analyzed, the Board might have found Appellant's anger and irritability to be comparable to the "unprovoked irritability with periods of violence" contemplated by the 70 percent rating criteria. 38 C.F.R. § 4.130. Instead, the Board focused on the symptoms under the 70 percent criteria that Appellant purportedly did not experience, an improper evaluation of the rating criteria.

CONCLUSION

Both remand and reversal are required to correct the deficiencies in the Board's decision. In denying Appellant's claim for an increased rating, the Board misapplied the law. It failed to assess the frequency, severity, and duration of Appellant's symptoms and relied on the absence of symptoms associated with the higher rating criteria by simply matching Appellant's symptoms to the rating criteria with no analysis of his complete disability picture. The Board also provided an inadequate statement of reasons or bases for failing to discuss all of Appellant's symptoms and selectively highlighted the least favorable evidence to the claim. Because of these errors, remand is required for the Board to properly apply the law and provide an adequate statement of reasons and bases for its conclusions.

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 January 15, 2020.

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