Vet. App. No. 18-7358

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WILLIE B. HUDSON,
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

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	)	
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ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should vacate the portion of the September 25, 2018, decision of the Board of Veterans' Appeals (Board), which denied entitlement to a total disability rating based on individual unemployability (TDIU).

Whether the Court should affirm the portion of the September 25, 2018, decision of the Board, which denied entitlement to an initial rating in excess of 50% for post traumatic stress disorder (PTSD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Willie B. Hudson (Appellant) appeals the September 25, 2018, decision of the Board, which denied entitlement to an initial rating in excess of 50% for PTSD and denied TDIU.

C. Statement of Relevant Facts

Appellant served in the United States Army from November 1966 to March 1968. (Record Before the Agency (R.) at 417). In a November 2011 rating decision, VA granted Appellant service connection for PTSD, with a 50% rating, effective February 27, 2007. (R. at 884-889). Appellant filed his notice of disagreement in February 2012. (R. at 851). In July 2013, Appellant filed an application for TDIU based on PTSD and a non-service connected pulmonary condition. (R. at 716-717). VA provided Appellant with a compensation and pension (C&P) examination for PTSD in September 2013. (R. at 509-516). The examiner opined Appellant's symptoms were "largely stable with occasional flare-ups due to life stressors." (R. at 516). She further opined that, "[w]hile much of his functional impairment is due to his medical problems, his severe difficulty in social relationships, ability to trust others, and his tendency to isolate himself associated with PTSD, would lead to difficulty in contributing to a workplace in a consistently reliable and productive manner." (R. at 516). VA issued a statement of the case in February 2014, which continued his 50% rating, finding that a higher rating was not supported by the evidence of record. (R. at 644-662). The following month, Appellant perfected his appeal to the Board. (R. at 473). In an

August 2014 rating decision, VA denied Appellant's claim for TDIU finding, "that while [his PTSD] cause[s] a certain level of impairment, there is no evidence that [his] PTSD alone prevents [him] from working." (R. at 428-439).

Appellant testified before the Board in December 2015. (R. at 95-146). In April 2016, the Board remanded Appellant's claims for further development, to include obtaining an examination, "to determine the functional effects of his service-connected psychiatric disorder on his ability to obtain and maintain employment consistent with his education and occupational experience." (R. at 89 (87-90)).

In June 2016, VA provided Appellant with a C&P examination. (R. at 60-71). The examiner opined, "the demands of the C&P examination process have perhaps led [Appellant] to embellish his reports of worsened mental health conditions and increased functional impairment as they are contradicted by information contained in the Progress Notes written by his VAMC psychiatrists since his last C&P exam." (R. at 70). She specifically referenced an April 2016 mental health outpatient note, which indicated Appellant "is a social person and travels often. He talked about recent trip to MN and the ice fishing he did." (R. at 1663 (1663-1666)). The note also indicated Appellant had "[n]o major side effects. Tolerating the medications well with good benefit." (R. at 1664). The June 2016 examiner further opined, "[i]t is unlikely that [Appellant's] mild PTSD symptoms, in and of themselves, would negatively impact his ability to obtain and maintain substantially gainful employment. Additionally, as his psychiatrists have

consistently indicated the Veteran has not reported side effects from his current mental health medication regimen, obviously there can be no medication-related functional impairment if there are no side effects." (R. at 70-71).

In September 2018, the Board issued the decision on appeal, which denied entitlement to an initial rating in excess of 50% for PTSD and denied TDIU. (R. at 4-14). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should vacate the portion of the September 25, 2018, decision of the Board, which denied entitlement to TDIU, as the Board failed to provide an adequate statement of reasons or bases for its determination. However, this Court should affirm the portion of the decision which denied entitlement to an initial rating in excess of 50% for PTSD. Specifically, the Board did not err in its statement of reasons or bases for the denial of Appellant's claim. It properly considered and interpreted the applicable law and adequately explained its determinations.

IV. ARGUMENT

A. THE BOARD FAILED TO PROVIDE AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DENIAL OF ENTITLEMTENT TO TDIU

A total disability rating may be assigned where the schedular evaluation is less than total but the disabled veteran is unable to secure or follow a substantially gainful occupation as a result of a single service-connected disability ratable at 60 percent or more or multiple service-connected disabilities

ratable at 70 percent or more where certain additional criteria are met. 38 C.F.R. § 4.16(a). Alternatively, if a veteran fails to meet these percentage requirements but is nevertheless rendered unemployable by reason of one or more service-connected disabilities, the matter must be submitted to the Director of Compensation and Pension for extraschedular consideration. 38 C.F.R. § 4.16(b). A determination as to whether a veteran is able to secure or follow substantially gainful employment is a factual determination subject to review under the deferential clearly erroneous standard. *Bowling v. Principi,* 15 Vet.App. 1, 6 (2001); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (a factual finding is not clearly erroneous if there is a plausible basis for it in the record).

Here the Board found, "[t]he evidence weighs against finding that service-connected PTSD alone precludes [Appellant] from performing the mental and physical acts required for employment." (R. at 12). The Board further found Appellant's PTSD has not resulted in "significant impairment of communication, speech, thinking, attention, concentration, or focus to preclude mental functioning required for employment" and there is no indication that he "experiences disturbances of mood and motivation that are so severe that they would preclude employment." (R. at 12). However, the Board did not provide any discussion as to Appellant's work history and whether he has the mental ability to perform the activities required by employment. As such, the Secretary concedes that remand is warranted for the Board to take note of the definition of "ability to secure and follow gainful employment" in 38 C.F.R. § 4.16(b) as provided by this Court in

Ray v. Wilkie, 31 Vet.App. 58 (2019), and provide adequate reasons or bases in support of its determination regarding Appellant's entitlement to a TDIU rating. *See Ray* 31 Vet.App. at 73 ("By discussing these potentially relevant factors, we don't create a checklist that must be run completely through in every case. Instead, discussion of any factor is only necessary if the evidence raises it.").

B. THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DENIAL OF AN INITIAL RATING IN EXCESS OF 50% FOR PTSD

A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert*, 1 Vet.App. at 57.

To warrant a 70% rating under Diagnostic Code (DC) 9411 governing PTSD, a veteran must present with: 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, DC 9411. To warrant a 100% rating, a veteran must demonstrate: total 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. *Id*.

Appellant asserts, "[b]y requiring [his] symptoms to 'collectively affect his ability to function independently, appropriately, and effectively,' the Board demanded that [his] symptoms cause more than deficiencies in most areas." (Appellant Brief (App. Br.) at 9). This assertion is without merit. Here, the Board found, "[w]hile the Veteran clearly has deficiencies in family relations, mood, insight and judgment, overall his symptoms *neither individually nor collectively* affect his ability to function independently, appropriately and effectively." (R. at 9). (Emphasis added). Appellant inexplicably focuses on the Board's use of "collectively" and disregards its inclusion of "individually." (App. Br. at 9). Read as a whole, the Board's decision properly considered the evidence in terms of his

symptoms' effect on his occupational and social impairment. *See Johnson v. Shinseki,* 23 Vet.App. 237, 247 (2013) ("A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.") (citation omitted), reversed on other grounds by *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). This is the proper standard.

The Board found, "[Appellant's] statements about assaultive behavior and hearing voices is incongruous with the medical findings of record that show no hallucinations or delusions or abnormal behaviors." (R. at 9). Appellant argues "the Board's determination that the medical findings of record did not show hallucinations, delusions, or abnormal behavior was contrary to the record" and cites the September 2013 C&P examination a support. (App. Br. at 10). The Board also found, '[t]o the extent that [Appellant] may hear voices and experience paranoia, these symptoms do not appear to be near-constant or affect his ability to function independently." (R. at 9). Appellant argues this "imposed a higher standard than required by the rating criteria." (App. Br. at 11). These arguments are unpersuasive. The September 2013 examiner noted Appellant reported auditory hallucinations, however, she attributed them to his psychotic disorder, not his service-connected PTSD. (R. at 510). Additionally, Appellant did not report, or appear to present with, auditory or visual hallucinations to his treating mental health providers. (R. at 792 (792-793)) [October 2012 mental health care follow-up note], (R. at 635 (635-637)) [January

2013 medical student note], (R. at 1766 (1766-1767)) [April 2015 mental health outpatient note], (R. at 1674 (1673-1676)) [January 2016 mental health outpatient note], (R. at 1663), (R. at 69), (R. at 1424 (1424-1433)) [May 2017 mental health outpatient note]. Likewise, the June 2016 examiner noted Appellant did not report experiencing hallucinations and did not appear to be experiencing delusions. (R. at 69). While Appellant did experience hallucinations during some points of period on appeal, he fails to cite to any evidence that would suggest they were due to his service-connected PTSD. Moreover, even if Appellant's hallucinations were persistent and attributable to his PTSD, there is no evidence that they produced total social or occupational impairment. The evidence of record shows Appellant is a social person who has maintained at least one friendship since childhood and maintains contact with some family members. (R. at 633-634) [January 2013 medical student note], (R. at 1663), (R. at 63). Additionally, Appellant's paranoia, which is a manifestation of suspiciousness, is contemplated by the 30% rating criteria. The Board's determination that Appellant's statements regarding hallucinations or delusions is not supported by the evidence of record is plausible. *Gilbert*, 1 Vet.App. at 52.

Appellant also contends that his belief that others were "not going to do the right thing for [him]" is consistent with the definition of persecutory delusions. (App. Br. at 11); (R. at 126) [December 2015 Board hearing transcript]. However, there is no evidence of record to support this contention, which is a medical determination, and it should be given no probative weight. *See Kern v. Brown,* 4

Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence").

The Board found "[t]o the extent that there has been impaired impulse control with violence, the evidence shows that this is not frequent occurrence." (R. at 9). Appellant argues the Board's use of "frequent occurrence" imposed an additional frequency requirement on the 70% criteria of impaired impulse control. (App. Br. at 12-13). Here, the appeal period begins February 2007. Appellant cites to two incidents of impaired impulse control during the appeal period, both in 2008. (App. Br. at 13-14), (R. at 906 (903-909)) [January 2011 C&P examination], (R. at 578 (575-582)) [April 2013 social work note]. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) clarified that, when deciding the appropriate evaluation of a mental health disorder under 38 C.F.R. § 4.130, "symptomatology should be the fact-finder's primary focus." *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed. Cir. 2013). As the Federal Circuit explained, a veteran's entitlement to a particular evaluation requires that he or she demonstrate "the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id.* at 117. If the veteran is shown to experience the particular symptoms listed in the diagnostic criteria or symptoms of the same kind, then the inquiry turns to whether and to what degree those symptoms result in social and occupational impairment. *Id.* at 118. While the rating criteria does not specify a frequency for impaired impulse control, the Board is still charged with considering the severity, frequency, and duration of

symptoms and did so here. Appellant also contends that his isolation is a means to manage his impulses and that he did not have homicidal ideation because of it. (App. Br. at 14). Isolation, which can manifest as difficulty in establishing and maintaining effective work and social relationships, is contemplated by the 50% rating criteria. Further, Appellant cannot make a determination as to the clinical significance of his isolation. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."). Appellant's disagreement with the Board's finding is nothing more than a mere disagreement with how the Board interpreted and weighed the evidence.

The Board found, [g]iven that [Appellant] has reported not having a close relationship with family, no employment, and no close friends, the Board finds that he apparently is able to attend to the requirements of daily living. It is noted that he lives alone and has home based health care services 3 times a week to help with chores (bathing, cooking, shopping, etc.) due to his nonservice-connected medical problems." (R. at 9). Contrary to Appellant's assertion, this analysis does not suggest the Board considered whether Appellant had the time to perform the activities of daily living instead of the ability to do so. (App. Br. at 15). Furthermore, Appellant fails to cite to any evidence that indicates he requires assistance with performing activities of daily living due to his PTSD. To the contrary, the evidence of record indicates while Appellant has mobility issues as a result of nonservice-connected disabilities, he lives independently with home

health care services during the week for light housekeeping and personal care assistance with bathing. (R. at 908), (R. at 512), (R. at 63), (R. at 542) [May 2013 outreach note].

The Board found, "[t]he evidence discloses mood disturbances, but not near-continuous depression affecting his ability to function independently, appropriately and effectively." (R. at 9). It noted Appellant reported "travelling to Minnesota to ice fish and that he has travelled all over the U.S" and found "[a]lthough [Appellant] has reported a lack of interest in activities, he acknowledged an[] enjoyment of music and maintains contact with some nieces and nephews." (R. at 9). Appellant asserts the Board failed to explain how his interests reflect on his functional ability. (App. Br. at 16). He further asserts that his contact with family was not a reflection of his social functioning and is not indicative of an ability to maintain effective relationships. (App. Br. at 16), (App. Br. at 18). The record shows that Appellant regularly communicated with his neighbors and niece. (R. at 807-809) [July 2012 October 2012 mental health follow-up note], (R. at 792-793) [October 2012 mental health follow-up note]. While Appellant did not initiate this contact, there is no evidence that he rejected it or otherwise was unable to maintain those relationships. While the September 2013 examiner did indicate an inability to establish and maintain effective relationships; she also indicated Appellant's symptoms more nearly approximated the criteria for a 50% rating, summarizing his level of occupational and social impairment as with reduced reliability and productivity. (R. at 511), (R.

at 514). The record also shows that Appellant's depression was not near-continuous for the entire appeal period, as he has at times denied prolonged depressed mood. (R. at 243-245) [April 2015 mental health follow-up note], (R. at 1673-1676), (R. at 1663). While the September 2013 examiner did indicate near-continuous depression; she also indicated Appellant's symptoms more nearly approximated the criteria for a 50% rating. (R. at 514), (R. at 511). Additionally, it does not appear that Appellant reported his relationship with his niece at this examination. (R. at 807-809), (R. at 792-793). Although Appellant may have had periods of near-continuous depression, there is no evidence to suggest it resulted in occupational and social impairment, with deficiencies in most areas as is required for a higher rating. The Board's findings in this regard are supported by the evidence of record; Appellant's disagreement is a mere disagreement with the Board's weighing of the evidence.

The Board found that Appellant did not exhibit spatial disorientation. (R. at 10). Appellant contends the Board did not consider evidence "that suggests he was spatially disoriented during flashbacks" and his report that "he sometimes forgot why he was in a certain place." (App. Br. at 17). The Board is presumed to have considered all of the evidence of record "absent specific evidence indicating otherwise," *Gonzales v. West,* 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and where it is silent as to a specific price of evidence the Court "must presume that the Board considered this evidence and found it too scant to warrant comment," *Robinson v. Mansfield*, 21 Vet.App. 545, 555 (2008), *aff'd sub nom. Robinson v.*

Shinseki, 557 F.3d 1355 (Fed. Cir. 2009). Here, the Board considered Appellant's flashbacks but did not provide explicit analysis about them. (R. at 8). Appellant's flashbacks present as panic attacks, and there is no evidence that he experiences them more than once a week, which would be required to warrant a 70% rating. The June 2016 examiner noted reports of flashbacks, of decreasing frequency and severity, in 2013 and 2014 but no current reports. (R. at 64-65). Also, the Board acknowledged Appellant's mild memory loss and found "objectively there is only mild memory impairment (such as forgetting names, directions, recent events)"; mild memory loss is contemplated by the 30% rating criteria.

Appellant asserts the Board "failed to discuss whether the evidence demonstrated an inability to adapt to stressful circumstances" and cites the June 2016 examiner's finding that his PTSD worsened his abilities to cope with stress. (App. Br. at 18); (R. at 62). However, the examiner summarized Appellant's level of occupational and social impairment as presenting with "occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation." (R. at 62). The examiner also found that "without resorting to speculation it is impossible to delineate the impact of each specific disorder on the Veteran's social and occupational functioning," to include his mood and anxiety disorders. (R. at 62). There is no indication in the record that

Appellant's difficulties with stress are solely due to his PTSD or result in occupational and social impairment in most areas.

Overall, the evidence of record does not demonstrate Appellant's PTSD results in occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood. Therefore, and in light of Appellant's failure to establish error warranting remand, as required by law, the Court should affirm the Board's decision.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, the Court should vacate the part of the Board's decision which denied entitlement to TDIU. It should affirm the remainder of the Board's decision.

Respectfully submitted,

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