

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7358

WILLIE B. HUDSON, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

FALVEY, *Judge*: Army veteran Willie B. Hudson appeals through counsel a September 25, 2018, Board of Veterans' Appeals decision denying entitlement to a rating above 50% for PTSD and denying entitlement to a total disability rating based on individual unemployability (TDIU). The appeal is timely; the Court has jurisdiction to review the Board decision; and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The parties agree that we should remand the part of the Board decision that denied TDIU because the Board failed to adequately address the appellant's work and educational history and whether he can perform the activities required by employment. They also agree that the standard for addressing the "ability to secure and follow gainful employment" laid out in *Ray v. Wilkie*, 31 Vet.App. 59 (2019) should inform the Board's analysis. What they disagree about is whether the Board correctly denied the veteran a rating above 50% for PTSD. Because, as the parties agree, the Board must better explain the standard with which it evaluate the veteran's employability and because the Board used the wrong legal standard to evaluate his PTSD rating, we will set aside the Board decision.

I. ANALYSIS

Mr. Hudson assails the Board's decision to deny a rating above 50% on many grounds. We need only address one to provide him his full relief. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). As explained, remand is warranted based on Mr. Hudson's correct assertion that the Board applied the wrong legal standard when evaluating his PTSD rating.

The rating criteria for all psychiatric disorders contemplate a 70% rating when there is [o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood" and the impairment is caused by symptoms such 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 (2019).

In denying Mr. Hudson a rating above 50%, the Board found that, "[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. 9. As Mr. Hudson points out, the first part of the Board's sentence tracks the level of impairment required for a 70% rating: "[o]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood." 38 C.F.R. § 4.130. The problem is that the rest of that sentence improperly takes a standard specifically applicable to two symptoms and more broadly applies it to the level of impairment.

The rating criteria require only that "near-continuous panic or depression affect[] the ability to function independently, appropriately and effectively." The question of whether a veteran has the "ability to function independently, appropriately, and effectively" applies only to two enumerated symptoms—panic and depression; it has nothing to do with the remainder of the symptoms enumerated in § 4.130. Nor does it apply to the central inquiry of whether those or other symptoms cause "[o]ccupational and social impairment, with deficiencies in most areas." Even so, despite finding impairment in most of the enumerated areas, the Board denied the 70% rating

because the veteran's impairment did not meet the standard applicable to only two symptoms. This is not the correct legal analysis.

“[A] veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration.” *See Vazquez-Claudio*, 713 F.3d 112, 116-17 (Fed. Cir. 2013). Because § 4.130 includes the term “such symptoms as,” it shows that the list of symptoms that follows is “non-exhaustive,” meaning that VA need not find the presence of all, most, or even some of the enumerated symptoms to assign a 70% evaluation. *Id.* But rather than treat the list of symptoms as non-exhaustive, the Board took a qualifier applicable to two symptoms and applied it to the entire rating provision. As this is not the correct legal standard, the appropriate remedy is for us to remand the matter back to the Board. *See Stevens v. Principi*, 289 F.3d. 814, 817-18 (Fed. Cir. 2002).

II. CONCLUSION

Thus, the Board's September 25, 2018, decision is SET ASIDE and the matter is REMANDED for further proceedings.

DATED: April 27, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)