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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5076

JOHN CORDOVA, APPELLANT,

v.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran John Cordova appeals through counsel an April 9, 2019, Board of Veterans' Appeals (Board) decision denying entitlement to a disability evaluation in excess of 50% for post-traumatic stress disorder (PTSD). Record (R.) at 5-10. For the reasons set forth below, the Court will set aside the April 2019 Board decision and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Cordova served honorably on active duty in the U.S. Marine Corps from July 1971 until December 1972, including service in Vietnam. R. at 674. In March 2017, he filed for service connection for PTSD. R. at 944-54. Mr. Cordova also submitted a statement describing his symptoms, including, *inter alia*, irritability, isolation, issues with concentration, and a loud ringing or humming in his ears. R. at 945.

In March 2017, a VA examiner diagnosed PTSD with delayed expression. R. at 821. The examiner observed that the veteran reported irritability, angry outbursts, and impaired sleep, with those symptoms first manifesting 30 years ago. R. at 823. The examiner also noted the veteran's reports of depression, physiological reactions to triggers, avoidance behaviors, feeling detached,

anhedonia, and exaggerated startle response, with those symptoms beginning 4-5 years ago and worsening over time. *Id.* The veteran described the recurrence of intrusive images from a traumatic incident in Vietnam when his partner was shot. R. at 823, 825. The veteran indicated that these intrusive images had become more frequent since his retirement; he also reported nightmares. R. at 823. The examiner noted Mr. Cordova's report that he is estranged from one of his two daughters, as she says he has anger issues. *Id.* Mr. Cordova described a recent break-up with a woman, as well as the end of his 22-year marriage in 2001; he stated that he otherwise had not been in a relationship for years. *Id.* The examiner opined, "[i]t appears he is experiencing a delayed onset of his PTSD." *Id.*

In June 2017, a VA regional office (RO) granted service connection for PTSD, and assigned a 30% evaluation. R. at 785-87. Mr. Cordova filed a Notice of Disagreement (NOD) one month later. R. at 647-54. He also submitted a statement describing, inter alia, memory loss, nightmares, loss of concentration, and loss of interest in pleasure; he also asserted that it takes him longer to make decisions. R. at 646.

In an October 2017 Statement of the Case (SOC), a decision review officer assigned an increased evaluation of 50%. R. at 140-56 (SOC); R. at 134-16 (October 2017 evaluation decision). Mr. Cordova timely perfected an appeal to the Board. R. at 119-20.

In the April 2019 decision on appeal, the Board denied entitlement to an evaluation in excess of 50% for PTSD. R. at 5-10. The Board found that Mr. Cordova's PTSD symptoms were not productive of occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking or mood, as required for a 70% evaluation. R. at 8. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Cordova's appeal is timely and the Court has jurisdiction to review the April 2019 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed." *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (explaining that the Court "is not permitted to substitute its judgment for that of the [Board] on issues of material fact" and therefore may not overturn the Board's factual determination "if there is a 'plausible' basis in the record for [those] determinations").

As with any finding on a material issue of fact and law presented on the record, the Board must support its degree-of-disability determination with adequate reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57 (1990); see *Mittleider v. West*, 11 Vet.App. 181, 182 (1998) (explaining that the need for adequate reasons or bases is "particularly acute when [Board] findings and conclusions pertain to the degree of disability resulting from mental disorders"). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence 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).

III. ANALYSIS

Mr. Cordova argues that the Board provided inadequate reasons or bases for finding that he was not entitled to an evaluation higher than 50%. Appellant's Brief (Br.) at 5-10. Specifically, he contends that the Board failed to assess the frequency, severity, and duration of his symptoms, and instead relied on the absence of symptoms listed in the higher evaluation criteria, with no analysis of his complete disability picture. *Id.* at 11. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 3.

PTSD is evaluated under 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411. Under that DC, a 50% evaluation is warranted when evidence shows

[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.

38 C.F.R. § 4.130, DC 9411 (2019). A 70% evaluation is warranted when evidence shows

[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.

Id. The maximum 100% evaluation for PTSD is warranted where the evidence shows

[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.

Id.

Use of the term "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is nonexhaustive, meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013); *see Sellers v. Principi*, 372 F.3d 1318, 1326-27 (Fed. Cir. 2004); *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002). However, because "[a]ll nonzero disability levels [in § 4.130] are also associated with objectively observable symptomatology," and the plain language of the regulation makes it clear that "the veteran's impairment must be 'due to' those symptoms," "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." *Vazquez-Claudio*, 713 F.3d at 116-17. In sum, VA is required to perform 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; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment." *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

The Board's reasons or bases for denying an evaluation in excess of 50% for PTSD are inadequate. First, although the Board purported to assess the severity, frequency, and duration of Mr. Cordova's PTSD symptoms, it failed to address numerous symptoms not listed in the rating schedule that suggest more serious impairment than the symptoms it did address. For example, the

Board did not discuss Mr. Cordova's flashbacks, intrusive thoughts, ringing or humming in his ears, difficulty with concentration, exaggerated startle response, avoidance, disinterest in formerly pleasurable activities, and memory impairment. R. at 646, 821-25, 945. Although the Board is presumed to have considered all of the evidence of record when making its decision, *see Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007), that presumption does not relieve the Board of its independent obligation to perform the analysis required by *Vazquez-Claudio*—that is, to assess the severity, frequency, and duration of psychiatric symptoms when determining the appropriate disability evaluation to assign for a service-connected mental disorder. 713 F.3d at 116-17. The Board's failure to conduct that analysis and to address the aforementioned material evidence potentially favorable to Mr. Cordova's claim thus renders inadequate the reasons or bases for its decision. *See Caluza*, 7 Vet.App. at 506.

The above error is sufficient to warrant remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). However, the Court feels compelled to comment on another troubling error. The Court notes that the Board's analysis of the veteran's occupational impairment, and its conclusion that the evidence does not reflect deficiencies in the area of work, focused on the veteran's work history prior to retirement, even though he stopped working several years prior to filing his claim for disability compensation. R. at 4. Indeed, the Board observed that "he retired after 24 years as a police officer and continued to work part-time doing security [and that] there is no evidence that the [v]eteran retired due to his PTSD, or that he now works part-time due to his PTSD." *Id.*

The Court reminds the Board that, in a claim for increased compensation such as Mr. Cordova's, "the present level of disability is of primary importance," *Francisco v. Brown*, 7 Vet.App. 55, 58 (1994), *see Proscelle v. Derwinski*, 2 Vet.App. 629, 632 (1992) (noting that, in a claim for increased compensation, the relevant issue is the veteran's current level of disability). The Board's inquiry must focus on the current severity of the symptoms of the veteran's service-connected PTSD and whether they render him unable to obtain or sustain substantially gainful employment without consideration of the effect of any non-service-connected disabilities. *See Ray v. Wilkie*, 31 Vet.App. 58, 72-73 (2019); *Hatlestad v. Brown*, 5 Vet.App. 524, 529 (1993). The Board's improper temporal focus on a lack of reported occupational impairment due to his PTSD

while he was employed overlooks the examiner's conclusion that Mr. Cordova is experiencing a delayed onset of PTSD, with symptoms worsening since his retirement. R. at 823.

Mr. Cordova is free on remand to present any additional arguments and evidence relevant to the remanded claim to the Board in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing, the April 9, 2019, Board decision is SET ASIDE and the matter is REMANDED for readjudication consistent with this decision.

DATED: April 30, 2020

Copies to:

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