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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1413

SUSAN R. JOHNSTON, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Susan R. Johnston is the surviving spouse of veteran Bruce L. Johnston, who served the Nation honorably in the United States Army from February 1994 to June 1994, from March 1996 to June 1996, and from June 1997 to March 2000.¹ On August 19, 2019, the Court granted appellant's motion to substitute for her late husband in this appeal, which is timely and over which the Court has jurisdiction.² She challenges a November 9, 2018, decision of the Board of Veterans' Appeals that denied entitlement to a disability rating greater than 70% for depression and an effective date before March 17, 2014, for a 30% disability rating for sinusitis.³ Because the Board failed to provide an adequate statement of its reasons or bases, we will set aside and remand the sinusitis effective date issue. On the other hand, the Board properly

¹ Record (R.) at 3364-65, 3367.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ To the extent that the Board granted a 70% disability rating for the veteran's depression, a total disability rating based on individual unemployability, and service connection for sleep apnea, these are favorable findings that the Court will not review. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also denied compensable ratings for hearing loss and erectile dysfunction and a disability rating greater than 30% for sinusitis. Appellant raises no arguments about these claims, and we deem she has abandoned any appeal as to them. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). Finally, the Board remanded a claim for a disability rating greater than 20% for a left shoulder disability. We lack jurisdiction over this remanded matter. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

applied the relevant law, did not clearly err, and provided an adequate discussion of its findings, so we affirm its denial of a higher disability rating for depression.

I. ANALYSIS

Appellant argues that the Board failed to provide an adequate statement of its reasons or bases for denying a disability rating greater than 70% for the veteran's depression and an earlier effective date for the 30% rating awarded for sinusitis. As to the depression claim, she asserts that the Board relied on criteria, such as ability to efficiently converse, lack of psychosis, and being in touch with reality, that are not a part of the 100% rating criteria for depression. She further argues that the Board used the wrong standard in determining that a 100% rating was not warranted, namely finding that the veteran could manage his daily activities, rather than relying on occupational and social impairment. She also contends that the Board failed to consider evidence of the veteran's attempt to kill himself by stopping his medication and of an episode in which he nearly killed his dog as evidence of the veteran being a harm to himself and others, sufficient to warrant a 100% disability rating. Finally, she asserts that the Board failed to consider evidence of visual hallucinations in denying a 100% disability rating.

With respect to the sinusitis effective date question, appellant argues that the Board failed to consider whether she was entitled to an effective date one year prior to the date of the claim, or March 17, 2013, based on evidence that the veteran had symptoms of sinusitis during that time that may have indicated that his condition worsened prior to the date of his claim.

For his part, the Secretary defends the Board's decision in full. He urges us to affirm the decision in its entirety. We discuss each claim in turn below.

A. Disability Rating for Depression

The veteran's depression is measured against the rating criteria in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9434, which directs the rating specialist to apply the general rating formula for mental disorders. Per the general rating formula, a 70% disability rating is warranted where the evidence demonstrates

[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.^[4]

A 100% rating 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.^[5]

Because the symptoms enumerated in § 4.130 are not an exhaustive list, the Court has held that VA must consider "all the evidence of record that bears on occupational and social impairment," and then "assign a disability rating that most clearly reflects the level of social and occupational impairment a veteran is suffering."⁶ The U.S. Court of Appeals for the Federal Circuit has explained that evaluation under § 4.130 is "symptom driven," meaning that "symptom[s]" should be the fact finder's primary focus when deciding entitlement to a given disability rating" under the regulation.⁷ "[A] veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or other of similar severity, frequency, and duration."⁸ To qualify for a particular disability rating, § 4.130 requires "not only the presence of certain symptoms[,] but also that those symptoms have caused occupational an social impairment in most of the referenced areas."⁹

The Court reviews the Board's determination of the proper level of impairment for a mental disorder for clear error.¹⁰ We may overturn the Board's factual findings only if there's no plausible basis in the record for the Board's decision and the Court is "'left with the definite and firm conviction'" that the Board's decision was in error.¹¹ For all findings on a material issue of fact and

⁴ 38 C.F.R. § 4.130, DC 9434 (2019).

⁵ *Id.*

⁶ *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

⁷ *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013).

⁸ *Id.* at 117.

⁹ *Id.*; *see* 38 C.F.R. § 4.130, DC 9434.

¹⁰ *Johnson v. Brown*, 10 Vet.App. 80, 84 (1997).

¹¹ *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.¹² To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant.¹³ If the Board failed to do so, remand is appropriate.¹⁴

In its decision, the Board granted a 70% disability rating for the veteran's depression, finding him to be "severely disabled" and relying on evidence of his unemployment and alienation from his wife and grown children.¹⁵ However, the Board found that a 100% disability rating was not warranted because the "frequency, duration, and severity" of his symptoms; his "capacity for adjustment"; and the examiner's assessment of his functioning did not meet or "more closely approximate[]" the criteria for a 100% rating.¹⁶ The Board noted that the veteran could "efficiently converse with the VA examiner/private physician" and "generally manage his daily activities on his own" and was "not psychotic or out of touch with reality," and that overall "his depression is not shown to manifest the type, extent and severity of symptoms demonstrating 'total occupational and social impairment' within the meaning of the rating schedule."¹⁷

The Board explained the import of the evidence it relied on in reaching its conclusions and assigning a 70% but not a 100% disability rating for the veteran's depression. Thus, the Court is able to sufficiently review its decision on this matter.

To the extent that appellant argues that the Board incorrectly relied on symptoms that are not a part of the rating criteria, the Court discerns no error. In fact, this Court has specifically held that the symptoms in § 4.130 are not exhaustive and the Board is required to consider *all* evidence that relates to occupational and social impairment.¹⁸ Thus, not only did the Board commit no error

¹² 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

¹³ *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

¹⁴ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹⁵ R. at 15.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Mauerhan*, 16 Vet.App. at 440-41; *see Bankhead*, 29 Vet.App. at 22.

in considering symptoms such as the veteran's ability to converse, lack of psychosis, and being in touch with reality, it was required to do so.

Although appellant argues that the Board relied on an incorrect standard – the veteran's ability to manage his daily activities – in denying an increased disability rating, the Board specifically addressed the frequency, duration, and severity of the veteran's symptoms on his "social and occupational functioning."¹⁹ The Board relied on the veteran's ability to manage his daily activities as an example to support its conclusion that his symptoms did not demonstrate total occupational and social impairment. Thus, the Board used the correct standard in denying a 100% disability rating, and appellant fails to meet her burden of demonstrating error in this regard.²⁰

Finally, appellant argues that the Board failed to consider evidence of the veteran's visual hallucinations and instances of suicidal ideation and an attempt to kill his dog. But, the Board did specifically consider these symptoms in its decision.²¹ The Board found that none of the veteran's symptoms were of the duration, severity, or frequency to warrant total social and occupational impairment.²² Thus, again, appellant fails to meet her burden of showing error in the Board's analysis.²³

In sum, the Court finds no error in the Board's decision denying a disability rating greater than 70% for the veteran's depression. The Board considered the relevant evidence of depression symptoms and correctly applied the rating criteria, taking note of the frequency, severity, and duration of those symptoms. The Board also supported its conclusions with a detailed rationale sufficient for meaningful judicial review. Thus, we affirm.

B. Earlier Effective Date for Sinusitis

In a claim for an increased rating, the effective date should generally be "the [e]arliest date as of which it is factually ascertainable based on all evidence of record that an increase in disability had occurred if a complete claim or intent to file a claim is received within 1 year from such date, otherwise, date of receipt of claim."²⁴ Thus, "the effective date for an increased rating, indeed, as

¹⁹ R. at 15.

²⁰ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

²¹ R. at 13-14.

²² R. at 15.

²³ *Hilkert*, 12 Vet.app. at 151.

²⁴ 38 C.F.R. § 3.400(0)(2) (2019); see 38 U.S.C. § 5110(b)(3).

well as for an initial rating or for staged ratings," depends on when the change in disability can be "ascertained."²⁵ The Board's determination of the effective date of an award is a finding of fact reviewed for clear error.²⁶ The Board must support its decision with an adequate statement of reasons or bases as well.²⁷

Here, although the Board cites to 38 C.F.R. § 3.400(o)(2) in its decision,²⁸ it focuses its analysis on when the veteran submitted his claim for an increased disability rating for sinusitis, finding that he did not appeal a December 2011 rating decision and did not submit a new claim for an increased disability rating for sinusitis until March 2014.²⁹ The Board also found that VA treatment records "primarily pertain to the [v]eteran's other disabilities" with no indications of a worsening of his sinusitis.³⁰ The Board concluded that "there is no formal or informal claim for a higher rating for his sinusitis dated between December 2011 and March 17, 2014," and thus "an effective date earlier than March 17, 2014[,] for the assignment of a 30[%] disability rating for sinusitis must be denied."³¹ The Board failed to consider whether it was "factually ascertainable" that the veteran's sinusitis worsened within one year of his March 2014 claim. Without this analysis, judicial review is frustrated, and remand is warranted.³²

The Secretary crafts an argument attempting to explain why the Board was not required to consider § 3.400(o)(2), namely because the evidence does not contain information about a worsening within the one-year period. However, the Board did not provide this explanation and it is not the Secretary's prerogative to correct any errors in the Board's decision after the fact.³³ We

²⁵ *Swain v. McDonald*, 27 Vet.App. 219, 224 (2015).

²⁶ *Evans v. West*, 12 Vet.App. 396, 401 (1999).

²⁷ 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

²⁸ R. at 25.

²⁹ R. at 27.

³⁰ *Id.*

³¹ *Id.*

³² *Tucker*, 11 Vet.App. at 374.

³³ See *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action." (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2015).

have made clear that "[i]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."³⁴

Because the Court remands this matter, we need not address any remaining arguments now and appellant can present them to the Board.³⁵ On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.³⁶ The Board must consider any such additional evidence or argument submitted.³⁷ The Board must also proceed expeditiously.³⁸

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the November 9, 2018, Board decision to the extent that it denied an effective date earlier than March 17, 2014, for a 30% disability rating for the veteran's sinusitis and REMANDS that matter for proceedings consistent with this decision. We AFFIRM the Board's denial of a disability rating greater than 70% for depression.

DATED: May 7, 2020

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³⁴ *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011).

³⁵ *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

³⁶ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

³⁷ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

³⁸ 38 U.S.C. §§ 5109B, 7112.