Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0581

RICHARD A. HARRINGTON, 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*: Marine Corps veteran Richard A. Harrington appeals through counsel a December 6, 2018, Board of Veterans' Appeals decision denying an initial rating in excess of 30% for post-traumatic stress disorder (PTSD) and depressive disorder and 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).

We are asked to decide whether the Board provided adequate reasons or bases for denying a rating in excess of 30% for PTSD and depressive disorder. Because the Board failed to do so, and because the TDIU claim is "part and parcel" of the PTSD and depressive disorder claim, the Court will set aside the Board decision and remand those matters.

I. FACTS

Mr. Harrington served on active duty from November 1968 to November 1971, with service in Vietnam. Record (R.) at 1124. In March 2012, he filed a claim for service connection for a psychiatric condition. R. at 1507.

A March 2012 medical record noted that, for the past year, the veteran experienced mood swings; crying for no reason; wanting to be left alone; irritability; and inability to sleep. R. at 343.

An April 2012 medical record indicated that Mr. Harrington had the following symptoms: difficulty motivating himself, dysphoria, and poor energy level; irritability that often resulted in lashing out at his wife; frequently waking up feeling startled and a recurring dream about Vietnam; and discomfort in crowded places and debilitating anxiety attacks triggered by going out in public. R. at 336-37. He reported that symptoms made it extremely difficult to work, take care of things at home, or get along with people. R. at 338. An April 2012 mental health consult noted anxiety; irritability; lack of pleasure and motivation; avoidance behavior; and fear of crowds. R. at 1053. Mr. Harrington reported using alcohol extensively since returning from Vietnam, including up to six to nine drinks per night. *Id*. The psychiatrist noted that the veteran retired from his job as a mechanic several years prior and that he "keeps himself busy with household chores and exercising each day." *Id*.

In August 2012, a fellow veteran stated that Mr. Harrington seemed "jumpy and on edge." R. at 1325. In October 2012, the veteran reported decreased energy, motivation, appetite, and ability to gain pleasure from activities; crying spells several times each week; disturbed sleep with nightmares; increased anxiety with shortness of breath, sweating, decreased attention and concentration, lightheadedness, exaggerated startle response, and social withdrawal; and discrete episodes of panic attacks with depersonalization and derealization. R. at 1327.

In November 2012, a VA examiner diagnosed PTSD, R. at 756, and stated that Mr. Harrington had occupational and social impairment due to mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, R. at 757. The examiner then noted the following symptoms: depressed mood; anxiety; chronic sleep impairment; disturbances of mood and motivation; irritability or outbursts of anger; hypervigilance; difficulty concentrating; inability to finish projects; and markedly diminished interest or participation in significant activities or social groups, although the veteran remained social with his wife, her family, and a good friend. R. at 759, 762-64. Later, the examiner stated that, with regard to occupational functioning, Mr. Harrington retained the ability to interact appropriately with coworkers and supervisors, adapt to routine work environments, and understand simple instructions. R. at 765. But, the examiner further opined that disrupted occupational functioning was evidenced in reported history of decreased work efficiency due to mental health symptoms and alcohol abuse, and difficulties maintaining attention and concentration for extended periods. *Id*. The examiner noted that, at the time, the veteran reported anxiety in crowds that could

be overwhelming for him as a part-time driver, but that he also reported doing his job well, although recognizing that his schedule was stressful. R. at 765-66 (noting difficulty adapting to stressful circumstances). The examiner concluded that his psychiatric symptoms negatively impacted his emotional and physical health status and quality of life. *Id*.

In March 2013, a regional office (RO) granted service connection for PTSD and depressive disorder and assigned a 30% rating effective March 2012. R. at 1258. A June 2013 mental health note indicated that the veteran had frequent nightmares that resulted in thrashing around and hitting his wife accidentally. R. at 185. He reported undertaking household projects and visiting a friend for three weeks to help him at his vineyard. *Id*. In October 2013, Mr. Harrington filed a Notice of Disagreement (NOD) as to the RO decision, R. at 1240; in January 2014, the RO issued a Statement of the Case (SOC) continuing the 30% rating, R. at 1230; and in March 2014, the veteran perfected his appeal, R. at 1176.

In March 2014, Mr. Harrington's wife stated that he had the following symptoms: no energy; more frequent outbursts; more nightmares; easily startled; and staying inside and not completing household projects. R. at 159. Later that month, the veteran reported feeling lethargic and lacking motivation to complete home improvement projects. R. at 156. In June 2014, Mr. Harrington indicated that he had been gardening and taking trips to help his friend with the vineyard, but his wife stated that he was more withdrawn and staying home more often. R. at 1006.

During a July 2014 Board hearing, the veteran testified that his symptoms had gotten worse since the November 2012 examination. R. at 994. He reported depression; panic attacks once or twice each week; not wanting to leave the house; self-medicating; only socializing with Vietnam veterans; short-term memory impairment; concentration problems; anger and frustration that strained his marital relationship; and doing daily perimeter checks, sometimes with a baseball bat, that "drives my wife nuts" because he would wake her up. R. at 994-96, 999. He stated that he was not currently working, but, when he was a driver, the environment was unstructured and "it drove me crazy . . . I hated every minute of it." R. at 996. He also testified that, previously, he had retired from being a mechanic due to his hearing loss[1] and inability to concentrate. R. at 1000 (noting he "was making stupid mistakes").

[1] VA had granted service connection for bilateral hearing loss and assigned a 10% rating effective December 2007. R. at 1529.

In June 2015, the Board remanded the PTSD and depressive disorder claim to obtain a new VA examination to assess the current severity of his condition. R. at 987. The Board also construed his hearing testimony as a claim for TDIU because the "evidence of record suggests that . . . service-connected PTSD . . . may interfere with his ability to secure or follow a substantially gainful occupation." *Id*. The Board remanded the TDIU claim for proper notice to be provided to the veteran and for necessary development of the claim. *Id*.

In March 2016, a VA examiner stated that Mr. Harrington had occupational and social impairment due to mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress. R. at 686. The veteran reported a good relationship with his wife, son, and two friends, but stated that he tended to isolate unless his wife encouraged him to socialize. R. at 687. The examiner noted that Mr. Harrington worked as a mechanic from 1976 to 2007; endorsed good performance; retired due to his difficulty hearing, but denied that his mental health impacted his performance. *Id*. The examiner further indicated that the veteran had attempted to work part-time as a driver in 2012, but left the company after 4 months because the hours were long, the assignments were unpredictable, and he experienced anxiety and high levels of stress. *Id*. Finally, the examiner noted that the veteran had recently begun to work at his friend's vineyard in Pennsylvania and that he planned to move there to help maintain the vines and equipment. *Id*. (the veteran reporting that he enjoyed the work and the examiner indicating mild occupational impairment at that time).

The examiner noted the following symptoms: markedly diminished interest or participation in significant activities; hypervigilance; concentration problems; anxiety; chronic sleep impairment; and disturbances of mood and motivation. R. at 689-90. The examiner concluded that Mr. Harrington had not had a change in impairment since the November 2012 examination and, specifically regarding occupational impairment, that he could "be successful if the environment is an appropriate match including having autonomy, predictability, and is in an area of his interest and experience." R. at 690-91.

In a February 2017 Supplemental SOC, the RO continued the 30% PTSD and depressive disorder rating and denied the TDIU claim, noting that VA could not verify his current work status because he had not completed VA Form 21-8940, Veteran's Application for Increased Compensation Based on Unemployability. R. at 678-79. A May 2017 mental health note indicated that Mr. Harrington had sleep impairment, nightmares, and trouble concentrating; that his wife

stated that he was combative and had no patience; and that he experienced stress related to his new house, which had "different sounds" and he was "up often to check things out." R. at 1784.

December 2017 medical records noted the following symptoms: worsening anxiety with increased alcohol consumption to cope; inability to concentrate; depression and worsening mood; increased anger and irritability; isolation; lack of motivation; sleep impairment; and trouble with his wife. R. at 1742, 1744, 1748-49. A March 2018 medical record noted that Mr. Harrington had anxiety and trouble sleeping and concentrating. R. at 1685. In June 2018, the veteran reported depression; trouble sleeping and concentrating; anxiety; and becoming easily annoyed or irritable. R. at 1668.

In the December 2018 decision, the Board denied an initial rating in excess of 30% for PTSD and depressive disorder and entitlement to TDIU. R. at 4. This appeal followed.

II. ANALYSIS

Mr. Harrington argues that the Board provided inadequate reasons or bases for denying a rating in excess of 30% for PTSD and depressive disorder. Appellant's Brief (Br.) at 11-22. The Secretary disputes the veteran's assertions and urges the Court to affirm the December 2018 decision. Secretary's Br. at 4-30.

A psychiatric condition is rated as 30% disabling when it causes

> [o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

38 C.F.R. § 4.130, DC 9411 (2019). A 50% rating is warranted where evidence shows that the psychiatric condition causes

> [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.

Id. A 70% rating is appropriate where the psychiatric condition manifests with

> [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.

Use of the term "such symptoms as" in § 4.130 indicates that the list of symptoms that follows is non-exhaustive, 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.

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 an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). 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. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Here, the Board concluded that Mr. Harrington's 30% rating for PTSD and depressive disorder was appropriate. R. at 10. The Board stated that his condition manifested in symptoms of hypervigilance, exaggerated startle response, decreased concentration, sleep disturbances, social isolation, mild memory loss, and anger. *Id*. The Board found that a higher rating was not warranted because his symptoms were not of the frequency, severity, or duration commensurate with a 50% rating. *Id*. The Board stated that, although Mr. Harrington had endorsed occasional panic attacks

in excess of once a week, disturbances of motivation and mood, and some difficulty in establishing and maintaining effective work relationships, "the evidence, as a whole, fails to show that the [v]eteran's symptoms equate in severity, frequency[,] and duration to occupational and social impairment with reduced reliability and productivity." *Id*. The Board noted that he had maintained effective friendships and family relationships; had enjoyable hobbies, including gardening and working at his friend's vineyard; and did not exhibit difficulties with long-term memory, complex tasks, judgment, or thinking. *Id*.

The Court finds that the Board provided inadequate reasons or bases for its determination. The Board did not explain how symptoms listed under the 50% rating criteria (i.e., those causing "[o]ccupational and social impairment with reduced reliability and productivity") failed to show symptoms equating to occupational and social impairment with reduced reliability and productivity. For example, the 50% rating criteria includes disturbances of motivation and mood. *See* § 4.130. The record is replete with evidence indicating that Mr. Harrington had disturbances of mood and motivation. *See* R. at 343 (March 2012 medical record noting mood swings); R. at 336-38 (April 2012 medical record indicating that the veteran reported difficulty motivating himself and that symptoms made it extremely difficult to work, take care of things at home, or get along with people); R. at 1053 (April 2012 mental health consult noting lack of motivation); R. at 1327 (in October 2012, the veteran reporting decreased motivation); R. at 764 (November 2012 VA examination indicating disturbances of mood and motivation); R. at 156, 159 (in March 2014, the veteran and his wife reporting a lack of motivation to complete home projects); R. at 690 (March 2016 VA examiner noting disturbances of mood and motivation); R. at 1742-49 (December 2017 medical records indicating worsening mood and lack of motivation). But, the Board's statement that this symptom did not show occupational and social impairment with reduced reliability and productivity was conclusory. Moreover, the Board did not discuss how a symptom that was noted at least eight times in the record did not equate in frequency to occupational and social impairment commensurate with a 50% rating. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 56-57.

In addition, the Board did not explain how evidence possibly suggesting symptoms that are noted in the 50% rating criteria—panic attacks more than once a week and short-term memory loss, such as forgetting to complete tasks—did not show occupational or social impairment commensurate with a 50% rating. *See* R. at 336-37 (April 2012 medical record indicating

debilitating anxiety attacks); R. at 1327 (in October 2012, the veteran reporting increased anxiety with shortness of breath, sweating, decreased attention and concentration, and lightheadedness, and episodes of panic attacks with depersonalization and derealization); R. at 995-96 (July 2014 hearing testimony of panic attacks once or twice a week, short-term memory impairment, and forgetting items more than once); R. at 1742 (December 2017 medical record noting anxiety attacks resulting in an inability to concentrate, such as losing focus while making dinner, and that this was "a new level of severity"); R. at 1748 (another December 2017 medical record indicating more frequent anxiety attacks).

Finally, the Board did not discuss evidence that possibly showed symptoms listed under the 70% rating criteria—obsessional rituals, impaired impulse control such as unprovoked irritability, and difficulty in adapting to stressful circumstances—and why such symptoms did not warrant an initial rating in excess of 30% for PTSD and depressive disorder. *See* R. at 343 (March 2012 medical record indicating irritability); R. at 336-37 (April 2012 medical record noting that Mr. Harrington reported irritability that often resulted in lashing out at his wife); R. at 1053 (an April 2012 mental health consult indicating irritability); R. at 763, 766 (November 2012 examiner noting irritability or outbursts of anger and difficulty adapting to stressful circumstances); R. at 159 (in March 2014, Mr. Harrington's wife reporting more frequent outbursts); R. at 999 (July 2014 hearing testimony regarding anger and frustration that strained his marital relationship and daily perimeter checks, sometimes with a baseball bat); R. at 1784 (in May 2017, the veteran's wife stating that he was combative and had no patience and the veteran stating that he was "up often to check things out" in his new house); R. at 1744 (December 2017 medical record noting increased anger and irritability); R. at 1668 (in June 2018, the veteran reporting becoming easily annoyed or irritable).

Accordingly, because the Board provided inadequate reasons or bases for denying an initial rating in excess of 30% for PTSD and depressive disorder, remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is the appropriate remedy where the Board failed to provide an adequate statement of reasons or bases for its determinations). Given this disposition, the Court need not address Mr. Harrington's additional arguments as to the PTSD and depressive disorder claim, which could not result in a remedy greater than remand. *See Best v. Principi*, 15 Vet.App. 18, 19 (2001).

In addition, because the TDIU claim is "part and parcel" of the PTSD and depressive disorder claim, the Court will also remand that matter. *See Rice v. Shinseki*, 22 Vet.App. 447, 455 (2009) (finding that TDIU was "part and parcel" of a claim for a higher initial PTSD rating); *see* R. at 986 (the June 2015 Board decision noting this and remanding the PTSD and depressive disorder and TDIU claims together); *see also* Secretary's Br. at 29 (the only argument that the Secretary offers regarding Mr. Harrington's assertion that these two claims are inextricably intertwined and should be remanded together is that that matter is moot because the Secretary maintains that the Court should affirm the Board's denial of a higher initial PTSD and depressive disorder rating).

Mr. Harrington is free on remand to submit additional evidence and argument, including those raised in his briefs, and he has 90 days from the date of the postremand notice VA provides to do so. *See Kutscherousky v. West*, 12 Vet.App. 369, 372–73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also* 38 U.S.C. § 7112 (a remand must be performed in an expeditious manner); *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

On consideration of the foregoing, the December 6, 2018, Board decision denying an initial rating in excess of 30% for PTSD and depressive disorder and entitlement to TDIU is SET ASIDE and the matters are REMANDED.

DATED: May 12, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)