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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3501

NANCY R. THOMPSON, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Nancy R. Thompson served in the Army from 1995 to 1999 and from February 2003 to May 2004. She appeals a January 2019 Board decision that assigned a 50% rating, but no greater, for her adjustment disorder.¹ In support of her claim for an increased rating, Ms. Thompson submitted statements from her private physician, social worker, ex-husband, and sister. On appeal, she argues that the Board didn't adequately address this medical or lay evidence. As explained more below, the Board didn't address symptomatology and impairment levels described in the lay evidence that is relevant to the 70% rating criteria. Therefore, the Board's statement of reasons or bases precludes effective judicial review, and remand is necessary.

There are five pieces of evidence relevant to the resolution of this appeal: a February 2016 statement from Ms. Thompson's social worker, a May 2016 statement from her private physician, May 2016 statements from her sister and ex-husband, and a June 2016 VA medical opinion.

¹ Ms. Thompson does not challenge that part of the Board decision that denied a rating in excess of 30% for a skin condition, and any appeal as to that matter is dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 283 (2015) (en banc). The Board also remanded the issue of service connection for bilateral breast cancer. Remanded issues are not final, and the Court has no jurisdiction over them. *See Foreman v. Shulkin*, 29 Vet.App. 146, 147 n.1 (2018).

First, in a February 2016 statement, Ms. Thompson's social worker noted that the veteran had symptoms of intense emotional pain, hypervigilance, irritability, difficulty sleeping due to nightmares, avoidance of triggering situations, relationship issues, and isolation. She said that, because of these symptoms, Ms. Thompson quit her job and got divorced.

In May 2016, Ms. Thompson's private physician, who had treated Ms. Thompson since 2013, provided a statement. He noted that, during her treatment, she reported occasional anxiety attacks, flashbacks, trouble sleeping, and low mood. He described the effects of these symptoms on Ms. Thompson's job as a police officer in Washington, D.C., explaining that her anxiety increased during the tourist season because the large crowds reminded her of driving through crowded areas in Iraq. While at work, she experienced anger, irritability, and flashbacks and was cited for "unbecoming behavior." R. at 516. Because the veteran experienced anger and anxiety at work, she began working night shifts to lessen her interactions with others. The veteran benefited from working the night shift and maintaining her distance from others.

Also in May 2016, Ms. Thompson submitted lay statements from her sister and ex-husband. Her sister discussed the veteran's irritability, isolation, and nightmares. She said that the veteran was easily irritated, often misinterpreting simple conversations. Her sister also said that the veteran would not spend much time in public or with her family, noting that friends and family needed to beg her to go out in public. And when Ms. Thompson would sleep at her sister's house, she would often need Tylenol PM to avoid waking up from nightmares.

Her ex-husband reported that, since the veteran returned from Iraq, she had a "violent and hostile nature" and "unpredictable behavior." R. at 565. He said that she yelled and cursed constantly and would call and harass him for "trivial reasons." *Id.* Their marriage dissolved because of her violent nature and unpredictable behavior. Also, per the veteran's ex-husband, Ms. Thompson stopped practicing good health and hygiene.

Ms. Thompson then underwent a VA examination in June 2016. The examiner noted that she experienced depressed mood, anxiety, chronic sleep impairment, feelings of detachment, diminished interest in activities, flattened affect, disturbances of motivation and mood, difficulty in establishing and maintaining effective relationships, and difficulty adapting to stressful circumstances. She also noted that the veteran experienced anger and irritability but denied physical aggression. In the examiner's opinion, Ms. Thompson's impairment manifested as

"occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." R. at 453.

Several years later, the Board adjudicated the claim based on the above-mentioned evidence. The Board related the findings of the private physician, social worker, and VA examiner but did not expound on the contents of the lay evidence. Rather, the Board noted that the "lay statements of record largely confirm" the symptoms described in the medical evidence. R. at 15. The Board determined that only a 50% rating was warranted, finding that "the objective medical evidence" didn't demonstrate symptoms that more nearly approximate to a 70% rating. *Id.* The Board also found that the record contained no evidence of suicidal or homicidal ideation, delusions, near-continuous panic or depression, or obsessional rituals. Ultimately, the Board relied on the 2016 VA opinion that the veteran's overall severity amounted to "occupational and social impairment with occasional decrease in work efficiency." *Id.* at 16. And, although this is the level of impairment found in a 30% rating, the Board concluded that Ms. Thompson was entitled to a 50% rating.

On appeal, Ms. Thompson argues that the Board didn't adequately address the statements from her private physician, social worker, ex-husband, and sister that demonstrated symptomatology in the 70% rating criteria, such as impaired impulse control and violent behavior, difficulty adapting to stressful circumstances, and an inability to establish and maintain effective relationships.

The Board's rating determinations are factual determinations reviewed for clear error, which requires the veteran to show in no uncertain terms that a mistake has been made. *See Bankhead v. Shulkin*, 29 Vet.App. 10, 18 (2017). When addressing increased rating claims for mental disorders, the Board must provide 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." *Id.* at 22.

PTSD is rated under 38 C.F.R. § 4.130, which provides compensable ratings at 10%, 30%, 50%, 70%, and 100%. A 50% rating is warranted when the veteran demonstrates:

Occupational 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 (2019). A 70% rating is warranted when the veteran demonstrates:

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.

Id.

Here, the Board concluded that the lay evidence "largely confirm[s]" the symptoms discussed in the medical evidence. R. at 15. However, that conclusion is not entirely accurate. The lay evidence describes symptomatology that is noted in the 70% rating criteria and that has accompanying effects that appear to be more severe than what was described by the VA examiner. For instance, Ms. Thompson's ex-husband reported that she had a "violent and hostile nature" and exhibited "unpredictable behavior." R. at 565. Violent nature and unpredictable behavior are relevant to the 70% symptom of "impaired impulse control (such as unprovoked irritability with periods of violence)." 38 C.F.R. § 4.130. Because the lay evidence describes symptomatology that is not found in the medical evidence, the Board's conclusion that the evidence is consistent is unclear to the Court. The Board should have addressed whether the veteran's violent and unpredictable behavior was of sufficient frequency, severity, and duration to establish "impaired impulse control." *Id.*

Further, the veteran's ex-husband described how her violent and unpredictable behavior led to the dissolution of their marriage. Because the Board did not adequately address this piece of evidence, it is unclear whether it demonstrates "a difficulty in establishing and maintaining effective work and social relationships" as noted in the 50% rating criteria or whether it demonstrates an "inability to establish and maintain effective relationships" as noted in the 70% criteria. *Id.* Remand is therefore warranted so the Board can adequately address it.

The Secretary contends, in part, that any Board error is, at most, harmless because the veteran did not demonstrate how overlooking certain symptoms precludes judicial review. *See Simmons v. Wilkie*, 30 Vet.App. 267, 280 (2018) (holding that the appellant generally has the burden of demonstrating the prejudicial effect of an error). However, the Court cannot conclude that the Board's error was harmless. The lay evidence did not simply describe certain symptoms in the 70% rating criteria, but it also described their associated impacts on the veteran's marriage, relationships, and occupation. In addressing impairment level, however, the Board only discussed the 2016 VA examiner's findings. A more "holistic analysis" of the medical and lay evidence could have altered the Board's ultimate determination regarding impairment level. *See Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013) (holding that the presence of a certain symptom is not sufficient to entitle a veteran to a certain rating, because the veteran's level of impairment ultimately determines the appropriate rating); *Bankhead*, 29 Vet.App. at 22. To conclude that the Board committed harmless error would require the Court to assess the lay evidence and reach factual findings regarding the veteran's symptoms and impairments that are better left to the Board in the first instance. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Thus, the Board's failure to explain how the lay evidence affected its determination renders its statements of reasons or bases inadequate for judicial review.

A final matter. The veteran also contends that the Board erred in relying on the 2016 VA opinion instead of obtaining a more contemporaneous and accurate opinion, citing *Caffrey v. Brown*, 6 Vet.App. 377, 381 (1994), for the proposition that a two-year-old examination is too remote to be relied on. Appellant's Br. at 5. But *Caffrey* did not hold that a two-year-old examination is too remote to be relied on. The Court held that, since Mr. Caffrey submitted evidence "tending to suggest that [his] condition had become worse," the Board should have reexamined the veteran to evaluate the alleged worsening. *Id.* at 381. This Court has been clear that the "mere passage of time" is not sufficient to trigger VA's duty to provide an additional medical examination." *Palczewski v. Nicholson*, 21 Vet.App. 174, 182 (2007). Because the veteran has not identified any alleged worsening, the Board did not err in not obtaining a new exam.

After consideration of the parties' briefs, the record, and the relevant law, the Court VACATES the January 31, 2019, Board decision, and remands the matter for readjudication consistent with this decision.

DATED: May 12, 2020

Copies to:

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