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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2247

SIDNEY F. MEDFORD, 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 Sidney F. Medford served the Nation honorably in the U.S. Army from October 1967 to October 1970, including service in the Republic of Vietnam for which he received a Purple Heart.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a December 10, 2018, Board of Veterans' Appeals decision that denied entitlement to a disability rating higher than 30% for service-connected PTSD from January 20, 2010, to May 27, 2015.³ Because appellant has failed to demonstrate error in the Board's decision, we will affirm.

I. ANALYSIS

Appellant argues that the Board erred when it denied a higher disability rating for service-connected PTSD from January 20, 2010, to May 27, 2015, because it overlooked favorable evidence of irritability and suicidal ideation, which are symptoms associated with at least a 70% disability rating. He also argues that the Board did not properly account for occupational

¹ Record (R.) at 2389.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ R. at 4-15.

impairment because it relied on the absence of evidence to find that his PTSD did not cause a reduction from full-time to part-time employment.⁴ The Secretary defends the Board's decision in full and urges us to affirm.

The Court reviews the Board's determination of the proper level of impairment for a mental disorder for clear error.⁵ The Court will reverse a factual finding of the Board when, after reviewing the evidence of record, we are left with "a definite and firm conviction that a mistake has been committed."⁶ For all findings on a material issue of fact and 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.⁷ 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.⁸ If the Board failed to do so, remand is appropriate.⁹

Appellant's PTSD is measured against the rating criteria described in 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411, which directs the rating specialist to apply the general rating formula for mental disorders. Per the general rating formula, a 30% disability rating is warranted where the evidence demonstrates

[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).^[10]

A 50% disability rating is warranted where the evidence demonstrates

[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

⁴ Appellant's Brief (Br.) at 7-12.

⁵ *Johnson v. Brown*, 10 Vet.App. 80, 84 (1997).

⁶ *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁷ 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57.

⁸ *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

⁹ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹⁰ 38 C.F.R. § 4.130, DC 9411 (2019).

(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.^[11]

A 70% rating requires evidence of

[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.^[12]

And 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.^[13]

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 closely reflects the level of social and occupational impairment a veteran is suffering."¹⁴ 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 that regulation.¹⁵ "[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."¹⁶ To qualify for a particular disability rating, § 4.130

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

¹⁵ *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013).

¹⁶ *Id.* at 117.

requires "not only the presence of certain symptoms[,] but also that those symptoms have caused occupational and social impairment in most of the referenced areas."¹⁷

In its decision, the Board provided a thorough summary of the evidence of record as it assessed appellant's rating for PTSD from January 20, 2010, to May 27, 2015. The Board relied heavily on the June 2012 VA examination report. The June 2012 examiner, after considering evidence of appellant's increased irritability, noted that appellant had symptoms of depressed mood, anxiety, suspiciousness, chronic sleep impairment, and disturbances of motivation and mood.¹⁸ Contrary to appellant's contention, the examiner did not opine that appellant had impaired impulse control, such as unprovoked irritability.¹⁹ The Board then concluded that a rating higher than 30% for appellant's PTSD during the period at issue was not warranted. The Board noted that appellant had symptoms that were not associated with any specific rating, but determined that the severity, frequency, and duration of those symptoms were contemplated by a 30% disability rating. Moreover, the Board explained that although appellant has symptoms specifically associated with higher ratings, the Board concluded that appellant's "overall impairment, including consideration of his disturbances of motivation and mood, more closely approximates the level associated with a 30[%] rating."²⁰ Further, the Board explained why the evidence after May 27, 2015, for which VA awarded him a 50% rating, was distinguishable from the evidence in the period before that date. Because the Board considered an accurate account of appellant's symptoms as they were reported from January 20, 2010, to May 27, 2015, including evidence of irritability assessed as a disturbance in mood, we don't believe the Board erred as appellant suggests.²¹

To the extent that appellant argues that the Board erred when it failed to consider evidence of irritability and suicidal ideation contained in a September 2006 VA examination and his February 2016 statement to VA, such evidence is from outside the period at issue here and there is no indication it has any "spillover" effect for the period on appeal. In its decision in appellant's earlier appeal, the Court affirmed the Board's denial of an earlier effective date for PTSD and dismissed the appeal of the Board's denial of a higher disability rating for the period after May 27,

¹⁷ *Id.*; see 38 C.F.R. § 4.130, DC 9411.

¹⁸ R. at 405.

¹⁹ *Id.*

²⁰ R. at 12.

²¹ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1004) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

2015.²² Thus, without further explanation, appellant does not sufficiently explain why the Board's failure to consider this evidence was prejudicial.²³

Finally, appellant argues that the Board relied on the absence of evidence when it determined that from January 20, 2010, to May 27, 2015, PTSD did not cause him to reduce his work schedule to part-time. Appellant asserts that the Board "did not explain its inconsistent approach to the decrease in ability to work from 2012 (when it found that PTSD did not contribute) to 2015 (when it found that PTSD did contribute)." The Court is not persuaded by appellant's argument. It amounts to a mere disagreement with the way the Board weighed the evidence, something that is insufficient to show error.

Here, the Board found that although during the June 2012 VA examination appellant reported working part-time hours, the evidence of record did not indicate that appellant reduced his working hours as a result of PTSD. In support of its determination, the Board explained that the June 2012 examiner concluded that appellant's PTSD did not cause occupational impairment with reduced reliability and productivity.²⁴ The Board further explained that appellant's "work hours decreased from working part-time in June 2012 to a few hours per week in May 2015," appellant reported that his reduction in activity was due to physical pain, and the May 2015 VA examiner stated that appellant would have a harder time functioning in a work setting. For these reasons, the Board found appellant's condition to be worse in May 2015 than in June 2012. Thus, contrary to appellant's assertion, the Board did not rely on the absence of evidence. Rather it relied on a weighing of the affirmative evidence of record. A different factfinder might have weighed the evidence differently, but that does not show a mistake. Accordingly, appellant has failed to demonstrate error in this regard.²⁵

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the December 10, 2018, Board decision.

DATED: May 13, 2020

²² See *Medford v. Wilkie*, No. 17-2073, 2018 WL 2316960 (Vet. App. May 22, 2018).

²³ See *Hilkert*, 12 Vet.App. at 151; see also *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006).

²⁴ R. at 12-13, 400.

²⁵ See *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010) (citing *Owens v. Brown*, 7 Vet.App. 429, 433 (1995)).

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