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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2731

RALPH L. HARRIS, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Ralph L. Harris, appeals through counsel a December 28, 2018, Board of Veterans' Appeals (Board) decision in which the Board granted him entitlement to a 50% disability rating for the period from November 17, 2011, until May 21, 2014, a 70% disability rating for the period from May 22, 2014, until May 13, 2018, and a 100% disability rating beginning on May 14, 2018, for "other specified trauma and stressor disorder."¹ R. at 5-15. The disability ratings that the Board set are favorable to the appellant. The Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The only issue on appeal is whether the appellant is entitled to disability ratings greater than those set by the Board for the two periods prior to May 14, 2018.

This appeal is timely and the Court has jurisdiction over the matter on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*,

¹ The Board also referred the question whether the appellant is competent "to handle the disbursement of VA funds" to the VA regional office (RO) for initial consideration. R. at 5. The appellant does challenge that referral or otherwise argue that the competency issue is before the Court.

1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's conclusion that the appellant is not entitled to a disability rating greater than 50% from November 17, 2011, until May 21, 2014, and a disability rating greater than 70% from May 22, 2014, until May 13, 2018, for his psychiatric disorder, and it will remand those matters for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from December 1967 until December 1969. R. at 1287. In February 2012, a VA medical examiner concluded that he had developed "mild to moderate [psychiatric] symptoms without significant impairment in social or occupational functioning." R. at 2044. Also in February 2012, the RO granted him entitlement to disability benefits for a psychiatric disorder and assigned his disorder a 30% disability rating effective November 17, 2011. R. at 2310-13.

On May 22, 2014, Dr. Edwin W. Hoeper submitted a statement describing the appellant's symptoms. R. at 2142. In February 2017, a VA medical examiner opined that the appellant had "[o]ccupational and social impairment due to mild or transient [psychiatric] symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." R. at 1648.

In November 2017, the Board denied the appellant entitlement to a disability rating greater than 30% for his psychiatric symptoms. R. at 1500-23. He appealed to the Court. On June 26, 2018, the parties filed a joint motion to vacate the Board's decision and remand the matter on appeal for further proceedings. R. at 215. The Court granted the parties' motion. *Id.*

On May 14, 2018, the appellant submitted a statement reporting his symptoms. R. at 392. On December 28, 2018, the Board issued the decision presently under review. R. at 4-12.

II. ANALYSIS

The Board's decision is deficient for the following reasons. First, the Board found that that the symptoms that the appellant experienced prior to May 22, 2014, "included recurrent nightmares related to his experiences during war and flashbacks." R. at 13. It then concluded that the "record does not reflect that [he] has demonstrated the symptoms associated with a 70 percent rating, or other symptoms of similar severity, frequency, and duration prior to May 22, 2014." *Id.*

Flashbacks and nightmares cannot be found in the lists of symptoms attached to the rating criteria for mental health disorders. 38 C.F.R. § 4.130 (2019). The Board did not explain its conclusion that these symptoms are not of "similar severity, frequency, and duration" as symptoms attached to the rating criteria for a 70% disability rating. *Id.*; see *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). Remand is necessary for it to do so.

Second, as the word "included" reveals, the Board did not discuss all symptoms caused by the appellant's disorder in the period prior to May 22, 2014. In its recitation of the evidence, the Board noted that the appellant "was violent during dreams" and that he had shown "violent tendencies toward his spouse." R. at 9. In February 2014, the appellant "reported that he could no longer work due to his anxiety." R. at 10. The record also reveals that as early as 2005 the appellant reported intrusive thoughts, avoidance, "diminished interest in pleasurable activities, restricted affect, a sense of foreshortened future . . . hyperstartle response, and hypervigilance." R. at 1651. Instead of reviewing all symptoms that the appellant has experienced and their effects, the Board listed symptoms the appellant has not experienced. The Court has found that to be the incorrect way to decide rating cases for mental health disorders. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002).

The gaps in the Board's symptom review led to prejudicial error. Later in its decision, the Board concluded that hypervigilance is a symptom "not contemplated within a 50 percent rating," "more compatible with a 70 percent rating," and indicative of a "more severe disability picture." R. at 14. The Board also concluded that the appellant's intrusive thoughts are a symptom suggesting total impairment. R. at 15. These findings indicate that the appellant had symptoms associated with a 70% and perhaps even a 100% disability rating throughout the periods on appeal. On remand, the Board should review each symptom the appellant has experienced and determine whether it is of a type that indicates that an increased disability rating may be warrant. *Vazquez-Claudio*, 713 F.3d at 117. If so, it should review the occupational and social effects the symptom produces and compare its findings to the rating criteria. *Id.*

Third, as the appellant noted, he may have had paranoia and visual hallucinations as early as November 2017, facts that the Board did not review. R. at 306-07. That evidence is potentially favorable, and it should have been considered. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

Fourth, the Board, without discussion, based the effective dates for the increased disability ratings it awarded on the dates of medical and lay reports indicating that the appellant had developed more severe symptomatology. The Board did not consider whether those reports reveal that his symptoms worsened before the dates they were written. *See McGrath v. Gober*, 14 Vet.App. 28, 35 (2000) (holding that "the date on which the evidence is submitted is irrelevant").

Finally, the Board weighed two competing medical opinions against one another but made no fully explained and properly supported adequacy determinations. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007). The Board concluded that the "May 2017 VA examiner found that [Dr. Hoeper's] opinion that the [appellant] had severe memory problems was unsupported based on the VA examination findings." R. at 13. The Board did not explain its apparent conclusion that the May 2017 examiner's review of the appellant's symptoms is adequate and Dr. Hoeper's is not. That oversight is noteworthy given the Board's finding a few sentences later that the 2017 examiner's report "indicated that the overall level of function is compatible with a 10 percent rating," strongly suggesting, based on Agency determinations and the Board's discussion, that the examiner's review was deficient and his opinion incorrect. R. at 14. On remand, the Board should make fully supported adequacy determinations about medical reports in the record and then, should those reports prove adequate, carefully explain its decision to award one more probative value than another.

The Court need not address other arguments raised by the appellant at this time. *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]").

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion Board's December 28, 2018, decision denying the appellant entitlement to a disability rating greater than 50% for the period from November 17, 2011, until May 21, 2014, and greater than 70% for the period from May 22, 2014, until May 13, 2018, for his trauma and stressor related disorder is VACATED and those matters are REMANDED for further proceedings consistent with this decision.

DATED: May 15, 2020

Copies to:

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