IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 22-1199

RICHARD R. BERDY,
Appellant,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLANT

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INTRODUCTION

The Appellant, Richard R. Berdy, appeals the November 3, 2021 decision of the Board of Veterans' Appeals ("Board") that denied entitlement to a rating greater than 50 percent for posttraumatic stress disorder (PTSD) before April 25, 2017. R. at 5, 16 (4-18). On November 30, 2022, after full briefing by the parties, the Court issued an Order requiring both parties to submit supplemental briefs addressing whether the Board may or may not consider the ameliorative effects of medication when determining the proper disability rating in excess of 10% under 38 C.F.R. § 4.130. The Order directs the parties to take care to address whether a diagnostic code contains successive criteria using the factors set forth in *Johnson v. Wilkie*, 30 Vet.Ap 245 (2018) and how those factors inform whether the ameliorative effects of medication may be considered at all rating levels under § 4.130. The Appellant submits this Supplemental Brief in response to this Order.

ARGUMENT

I. The Rating Criteria of Diagnostic Code 9411 are not successive.

In *Johnson v. Wilkie*, 30 Vet.App. 245 (2018), this Court enumerated three factors to determine whether rating criteria are successive.

> The first factor is the degree to which the criteria in lesser disability ratings are repeated or incorporated into the higher disability rating under consideration. The second is whether awarding a disability rating on less than all the rating criteria would render a lesser disability rating superfluous. Stated another way, the Court must consider whether a claimant can fulfill the criteria of the higher rating without fulfilling those of the next lower rating. The third factor is whether the higher rating employs a conjunctive 'and' in a manner that signals bundling of all the rating factors in that disability rating.

Johnson, 30 Vet.App. at 250-51.

Diagnostic Code (DC) 9411, which is the DC used for PTSD, allows for a non-compensable rating if a veteran has a diagnosed mental health condition but the symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication. 38 C.F.R. § 4.130. A compensable 10 percent rating requires occupational or social impairment due to mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms that are controlled via continuous medication. *Id*.

A 30 percent rating requires occupational 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,

weekly or less often panic attacks, chronic sleep impairment, mild memory loss (such as forgetting, names, directions, recent events). *Id*.

A 50 percent rating requires occupational and social impairment with reduced reliability and productivity due to symptoms such as flattened affect, circumstantial, circumlocutory, or stereotyped speech, panic attacks on a greater than weekly basis, difficulty in understanding complex commands, impairment of short-and long-term memory (such as retention of only highly learned material, forgetting to complete tasks), impaired judgment or abstract reasoning, disturbances of motivation and mood, and difficulty in establishing and maintaining effective work and social relationships. *Id*.

A 70 percent rating requires occupational and social impairment with deficiencies in most areas, such as work, school, family relation, judgment, thinking, or mood due to such symptoms as: suicidal ideation, obsessional rituals, intermittently illogical speech, continuous panic or depression affecting the ability to function independently, impaired impulse control (including unprovoked irritability), self-neglect, difficulty in adapting to stressful circumstances, and inability to establish and maintain effective relationships. *Id*.

The criteria for a 100 percent rating are as follows: total 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. *Id*.

Factor 1: Do the higher ratings of DC 9411 repeat/incorporate the criteria from lower criteria?

DC 9411 does not repeat or incorporate medication use as a rating criterion for any rating. § 4.130. The text of § 4.130 sets forth one single requirement for all mental health conditions that is carried through all higher ratings: a formally diagnosed condition. § 4.130; *Martinez-Bodon v. McDonough*, 28 F.4th 1241 (2022). After achieving a non-compensable rating, § 4.130 *allows* for continuous medication use to be one of two options to demonstrate a compensable 10 percent mental health condition.

The text of DC 9411 states a compensable mental health condition is shown either through "occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, **or** symptoms can be controlled by continuous medication." *Id*. (emphasis added). The use of "or" here signals optionality. No subsequent higher rating mentions ameliorative effects of medication. *Id*. Because of this, the Court and the Board should not read ameliorative effects of medication into the regulation without any explicit language. See *Williams v. Taylor*, 529 U.S. 420, 431, 435 (2000); *Petitti v. McDonald*, 27 Vet.App. 415, 422 (2015).

Factor 2: Can a veteran fulfill a higher rating without fulfilling the requirements of a lower rating?

A claimant may show a higher rating without fulfilling all lower criteria under DC 9411. The Secretary acknowledged in his brief that the rating criteria of DC 9411 are "non-exhaustive." Sec. Br. at 18. The Court also held in *Mauerhan v. Principi*, 16 Vet. App. 436 (2002) that a veteran does not have to show each of the specified symptoms to establish

a specific rating, and the symptoms listed are only examples that would support an individual rating. Here, DC 9411 allows for ratings greater than 10 percent without required medication use. § 4.130. If the Court required medication as a criterion for ratings 10 percent and higher, the holding in *Mauerhan* would allow claimants to argue that medication use alone warranted 30, 50, 70, or 100 percent ratings. This is untenable.

Further, ratings under DC 9411 are not additive in the way the Court concluded DC 8100 or DC 7913 are when determining the factors for successive ratings. *Johnson*, 30 Vet.App. at 251; *Camacho v. Wilkie*, 21 Vet.App. 360, 366 (2007). The only firm requirement under DC 9411 is a diagnosed condition. § 4.130. A claimant must be able to show a higher rated mental condition under DC 9411 without meeting all lower requirements or the requirements for any rating over 10 percent would be prohibitive.

DC 9411 differentiates mental conditions of increasing severity by differing symptoms, which escalate through the DC, but they are not identical, additive, or all required. Therefore, an individual could show a higher rating without showing the specific criteria of the next lower rating. For example, an individual may have suicidal ideation warranting a 70 percent rating. § 4.130; *Bankhead v. Shulkin,* 29 Vet.App. 10, 20 (2017). He may also have depressed mood but not have panic attacks at all or impaired memory, which are different symptoms of ratings greater than 10 percent. Finding that DC 9411 requires all lower rating criteria be met is inconsistent with the holding in *Bankhead*, supra, which requires a "holistic analysis" of an individual's psychiatric symptoms. *Bankhead*, 29 Vet.App. at 22.

Factor 3: Do higher ratings use the conjunctive "and" that 'bundles' lower criteria into higher rating?

In its discussion of this factor, the *Johnson* Court stated "[s]uch construction—in which the language corresponding to a lower rating also appears verbatim in the next higher rating, with the higher rating use the conjunctive 'and' to join the added language to the higher rating—certainly is the most direct means by which to construct successive rating criteria." *Johnson*, 30 Vet.App. at 251. Here, DC 9411 *does not repeat verbatim* language from lower rating codes at higher levels. Specifically, it does not repeat the need for medication use. As discussed, medication use is only mentioned specifically as one of two ways to establish a compensable 10 percent mental disorder. § 4.130.

The phrases that are repeated in § 4.130—social and occupational impairment—address the *effects* of psychiatric symptoms but do not bundle multiple symptoms together over the course of several ratings to yield successive ratings. These repeated phrases also do not include an "and" to join language from lower ratings to higher ratings. DC 9411 puts forth examples but no required symptoms. This is consistent with the nature of psychiatric conditions and their symptoms, which vary per claimant and must be assessed on an individual basis. See *Bankhead*, supra.

The effect of a veteran's mental health has on his occupational and social impairment allows for a compensable rating whether the individual is medicated or not. Similarly increasing symptoms, which are evidence of deterioration in mental health status, allow for increased rating under DC 9411, regardless of medication usage. *Escalating*

symptoms are the rateable criteria at issue, which should be evaluated regardless of medication usage.

VA's decision to allow *either* medication usage *or* unmedicated impact as an option for a compensable rating indicates it has inherently acknowledged that not every veteran will choose to use medication. The issue is the effect of and level of symptoms rather than a veteran's choice of treatment. The absence of an "and" allows for DC 9411 to be used with some discretion. The Appellant argues the lack of a conjunctive and specific bundling supports a finding that it is not successive.

Further, allowing the Board to consider the ameliorative effects of medication would undercut the individual ratings. Allowing assignment of specific increased ratings based on any one criterion as put forth in *Mauerhan*, supra—here medication use—would yield no material difference between the criteria for a fully compensated veteran and a veteran who chooses not to treat with medication. An individual who took medication but had no other specified symptoms could argue that that criterion—medication use—alone allowed for 30, 50, 70, or 100 percent ratings. Again, this is untenable.

II. The Board may not address the ameliorative effects of medication in determining ratings greater than 10 percent under § 4.130.

The Secretary presumes in his brief that DC 9411 is successive. Sec. Br. at 18. He argues that the ratings are based on "an increasing degree of occupational and social impairment due to a non-exhaustive list of symptoms such that the consideration of the effects of medication at one level includes the consideration of the effects of medication at all levels when reading the applicable diagnostic code as a whole." *Id*. The Appellant

does not dispute that the symptoms are non-exhaustive for each rating and that an individual must have increased occupational and social impairment for higher ratings.

However, analysis of the three *Johnson* factors supports a finding that DC 9411 is not successive. Because of that, the ameliorative effects of medication are a consideration only for a 10 percent rating, and the Board may not address the ameliorative effects of medication in determining ratings greater than 10 percent. The Board concluded that the "evidence shows the Veteran's PTSD symptoms were managed successfully with medications throughout this time period." R. at 14 (4-18).

Consideration of medication and its effects is only proper when considering the veteran's actual symptomology i.e. an individual with medication may or may not have hallucinations. The issue is not whether the individual is medicated but rather *what his symptoms are*. The rating should be assessed based on symptoms as DC 9411 outlines symptoms. *Vasquez-Claudio v. Shinseki*, 713 F.3d 112, 116-117 (Fed.Cir. 2013). Lowering a veteran's rating because the Board feels the symptoms are "managed" (R. at 14 (4-18)) when the rating at issue is greater than 10 percent is a medical determination that despite, exhibited symptoms, an individual's mental condition is not as severe as shown. This violates *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991). The Board must evaluate the facts without inserting itself and its judgment on whether an individual's condition is controlled. The Board's actions further violated 38 C.F.R. 4.71 which requires VA find in favor of the veteran in instances of doubt. Here, the Board's conclusion that the Veteran's symptoms were "managed" was inappropriate given the discussion above.

Additionally, the Secretary states that DC 9411 allows for "a noncompensable rating for a formally diagnosed condition where the symptoms are not severe enough to require continuous medication. Sec. Br. at 18-19. And then, a 10 percent evaluation is provided if the mental condition has symptoms controlled by continuous medication." Sec. Br. at 19. The Secretary has misread the requirements here. As discussed, above DC 9411 allows for **two ways** to show a compensable rating either through "occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, **or** symptoms can be controlled by continuous medication." *Id*. (emphasis added). The use of "or" and the emphasizing comma here signal two distinct ways to show compensable rating. § 4.130. It is not additive, and the Secretary has incorrectly assumed successive rating criteria when such criteria would undercut the intended effects of DC 9411—to allow for fluidity based on variable symptoms with medication only a consideration at the outset.

CONCLUSION

An analysis of DC 9411 under the *Johnson* factors indicates the criteria in this DC are not successive. A veteran need not demonstrate every lower rating criterion to establish a higher rating for a mental disorder, here specifically PTSD. Medication is not a required criterion for any mental condition and may not be read into higher ratings as criterion that may affect a rating. The Board impermissibly assessed the effects of medication on the Veteran's mental health.

Respectfully submitted,

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