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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-4086

JAMES O. EMERSON, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, James O. Emerson, through counsel appeals a November 3, 2016, Board of Veterans' Appeals (Board) decision that denied an initial compensable disability rating for post-traumatic stress disorder (PTSD) prior to April 24, 2008, and a disability rating in excess of 10% thereafter. Record (R.) at 1-22. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from November 1963 to November 1967. R. at 1405. In August 2004, the appellant filed a disability compensation claim for PTSD, R. at 2225-27, and in October 2004, the appellant underwent a mental health evaluation at his doctor's recommendation, R. at 2095-2100. The appellant described his experiences during two 6-month tours in Ethiopia and reported that, since then, he experienced nightmares every 6 to 8 months and that he was "'more nervous' and 'more cautious'" the day after a nightmare. R. at 2095.

The appellant stated that he had been married for 32 years, although he also reported that he "avoid[ed] people" and that from time to time coworkers told him that he was "'touchy.'" *Id.* The appellant reported "trouble sleeping for 'as long as he can remember,'" memory difficulty at times, and decreased interests. *Id.* The examiner recorded the following depressive, anxiety, and PTSD symptoms, respectively: "Change in sleep, [c]hange in level of interest, [f]eelings of worthlessness, [f]eelings of helplessness, [d]ecreased energy, [and p]oor appetite"; "[e]xcessive worry, nervousness, insomnia, [and] irritability"; and "[i]ntrusive memories, [n]ightmares, [a]voidance, [and h]yperarousal." R. at 2095, 2097. The examiner determined, however, that the appellant did not meet the diagnostic criteria for PTSD or anxiety, reasoning that, although the appellant had nightmares and some symptoms of increased arousal, he did not have enough significant avoidant symptoms, and no functional impairment could be ascertained from the appellant's anxiety symptoms. R. at 2099. The examiner noted that the appellant had "maintained a relationship with his wife for over 30 years[, h]is career ha[d] not been affected by any of his symptoms, . . . he ha[d] a full range of affect, and seem[ed] to have no sense of foreshortened future." *Id.* The appellant reported that he had managed his symptoms for more than 40 years and the examiner found "no reason at th[e] time to suspect that he cannot continue to manage his symptoms." *Id.*

The appellant perfected an appeal from a January 2005 VA regional office (RO) decision that denied disability compensation for PTSD, R. at 2039-40, 2053-74, 2080-81, 2088-94, and in October 2006, testified at a Board hearing, R. at 2001-17. The Board then remanded the claim, in part to obtain a VA psychiatric examination to determine whether the appellant had a diagnosable mental illness and, if so, whether the condition began in or was causally related to service, R. at 1995-98.

On April 24, 2008, the appellant underwent a VA examination. R. at 1956-59. At the outset of the examination, the appellant reported that he did not receive mental health treatment, take psychotropic medications, or suffer from "any mental health problems that he could not cope with." R. at 1956. The examiner reported, however, that "as the examination progressed it became clear that [the appellant] does have some problems." *Id.* The appellant reported experiencing nightmares, two or three times per month, and that they were related to service in Ethiopia. R. at 1957. Upon waking from these nightmares, the appellant experienced nervousness, sometimes taking 1 to 2 hours to return to sleep. *Id.* The appellant denied having intrusive thoughts about his time in Ethiopia, but acknowledged that he startled easily. *Id.* The appellant reported that he and

his wife of 34 years "generally get along fairly well[,] although they each tend to do their own things." *Id.* He further related that he had worked for many years in education, including as a principal, counselor, assistant superintendent, and superintendent, but said he was "'booted out' from his job as [a] superintendent" in part because of his "personality characteristics." *Id.* The examiner diagnosed PTSD and assigned a Global Assessment of Functioning (GAF) score of 59. R. at 1958. The examiner further opined that the appellant's PTSD symptoms were fairly mild, his anxiety and depression were symptoms of his PTSD, and that, although his symptoms did not preclude employment, they "may have contributed to some possible interpersonal difficulties on his job." R. at 1958-59.

Following additional development, *see* R. at 1863-65, 1900-01, in August 2009, the RO granted entitlement to disability compensation for PTSD, with a noncompensable disability rating effective August 25, 2004, and a 10% disability rating from April 24, 2008, R. at 1850-60. The appellant disagreed with the assigned disability ratings, R. at 1835, perfected an appeal to the Board, R. at 1768, and testified at an August 2012 Board hearing, R. at 1477-1505. The appellant testified that for PTSD he was taking medication that had been prescribed by his primary care physician. R. at 1493. He reported that he had a good relationship with his wife, whom he described as "very understanding." R. at 1495. Although he stayed in contact with his family, he did not like to socialize, and his children felt that he had irritable outbursts. R. at 1495-96. The appellant testified that it was "easy for [him] to lose [his] temper," but denied having violent outbursts. R. at 1497. He had difficulty remembering names, had to write things down, and experienced bouts of anxiety. R. at 1497-98. The appellant denied having suicidal thoughts and having to leave work early or to be absent from work because of his mental state. R. at 1499.

In September 2014, the Board remanded the claim to obtain an additional examination to determine the current severity of the appellant's PTSD. R. at 1454-63. In September 2015, the appellant underwent an examination. R. at 171-75. The examiner diagnosed PTSD and opined that the appellant had "[o]ccupational 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 controlled by medication." R. at 171. The appellant reported that he was sleeping well; he endorsed having dreams and nightmares a few times per week, but none that were recurring. R. at 173. He stated that he had stopped going to church because "no one came to see him for the 18 days he was hospitalized" for colo-rectal cancer treatment. *Id.* Finally, he

endorsed symptoms of markedly diminished interest or participation in significant activities, feelings of detachment or estrangement from others, problems with concentration, and sleep disturbance. R. at 174.

On November 3, 2016, the Board denied an initial compensable disability rating prior to April 24, 2008, and a disability rating in excess of 10% thereafter. R. at 1-22. This appeal followed.

II. ANALYSIS

The appellant argues that the Board applied an arbitrary standard to deny higher initial disability ratings for both periods on appeal and provided inadequate reasons or bases for its denial. Appellant's Brief (Br.) at 7-17; Reply Br. at 1-5. The Secretary disputes these contentions and urges the Court to affirm the Board's decision. Secretary's Br. at 6-12.

The Board's determination of the proper disability rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See* 38 U.S.C. § 7261(a)(4); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

The 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. According to the general rating formula, a noncompensable disability rating—the appellant's rating for the period prior to April 24, 2008—is warranted where "[a] mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication." 38 C.F.R. § 4.130, DC 9411 (2017). A 10% disability rating—the appellant's rating from April 24, 2008—is warranted where the evidence demonstrates "[o]ccupational 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 controlled by continuous medication." *Id.* A 30% disability rating is warranted where the evidence demonstrates the following:

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

Id.

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." *Mauerhan v. Principi*, 16 Vet.App. 436, 440-41 (2002); *see Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017) (requiring VA to "engage in a holistic analysis" of the claimant's symptoms to determine the proper disability rating). The U.S. Court of Appeals for the Federal Circuit has explained that evaluation under § 4.130 is "symptom driven," meaning that "symptoms should be the fact finder's primary focus when deciding entitlement to a given disability rating" under that regulation. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 116-17 (Fed. Cir. 2013). "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." *Id.* at 117. To qualify for a particular disability rating, § 4.130 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." *Id.* at 117; *see* 38 C.F.R. § 4.130, DC 9411.

With respect to the period prior to April 24, 2008, the appellant argues that the Board failed to discuss favorable evidence of record regarding the effect PTSD had on his previous employment and the symptoms he experienced. Appellant's Br. at 7. Specifically, he asserts that the Board did not discuss whether his chronic sleep impairment—a symptom contemplated by a 30% disability rating—and "significant symptoms of an anxiety disorder," noted in the October 2004 mental health consultation report, may have warranted a higher disability rating. *Id.* at 8-9. The appellant further notes that the currently assigned noncompensable evaluation contemplates no impairment on occupational functioning, but that the evidence demonstrates that his PTSD impaired his interpersonal relationships at work. *Id.* at 11 (citing R. at 1957-58).

Here, the Board determined, based primarily on the October 2004 mental health consultation, that the appellant's PTSD did not warrant a compensable disability rating, finding

that the appellant's "PTSD was not productive of occupational and social impairment due to mild or transient symptoms which decrease work efficiency and [the] ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication." R. at 4; *see* R. at 16. In support, the Board noted that the appellant did not take medication and maintained full-time employment, and that, "[i]n October 2004, it was noted that his career had not been affected by any of his symptoms." R. at 16.

The Court finds that the Board did not discuss evidence identified by the appellant in his brief—specifically, the April 2008 examiner's opinion that the appellant's PTSD symptoms "may have contributed to some possible interpersonal difficulties on his job," R. at 1958, and the appellant's report to that examiner, which may temporally relate these difficulties to a period prior to April 24, 2008, when the appellant's PTSD disability is rated noncompensable, R. at 1957. The Secretary's argument that the Board is not required to discuss every piece of evidence, Secretary's Br. at 9, is not persuasive here, where the evidence identified by the appellant constitutes potentially favorable evidence that may be relevant to the assignment of a compensable disability rating prior to April 24, 2008. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (holding that the Board must analyze the credibility and probative value of the material evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant). Indeed, the Board cited this evidence, in part, as a basis for denying a disability rating in excess of 10% from April 24, 2008. *See* R. at 17.

With respect to the period from April 24, 2008, the appellant argues that the Board failed to discuss the frequency, duration, and severity of his actual symptoms, and in some cases, the Board's findings are contradicted by the record. Appellant's Br. at 12-17. Specifically, he asserts, contrary to the Board's findings, that the record contains evidence of obsessive-compulsive disorder (OCD) symptoms and irritable outbursts, and that the Board failed to explain adequately why it found no evidence of impaired judgment, impaired impulse control, or obsessive behavior. *Id.* at 13. The appellant also contends that the Board provided a cursory assessment of his social impairment and inappropriately relied on the fact that the appellant had been employed for 45 years without addressing the extent that his PTSD impaired his occupational functioning. *Id.* at 13-16.

In its analysis of this period, the Board noted, in part:

[The appellant] did not have any panic attacks, hallucinations, delusions, thought disorder, impairment of communication, impairment of judgment, or impairment of impulse control. He also denied having suicidal or homicidal ideation or plan, as well as obsessive or ritualistic behavior. It was also demonstrated that he had the ability to carry out activities of daily living.

R. at 16-17.

The Court agrees with the appellant that the Board's findings appear to conflict with evidence of record indicating that he experienced OCD symptoms with related irritability, R. at 2097, and evidence describing irritable outbursts, R. at 1496-97. The Secretary's response, that the appellant reported symptoms in October 2004 and that the Board acknowledged the appellant's 2012 hearing testimony, is not persuasive. *See* Secretary's Br. at 10. First, the Board stated that during this time the appellant *denied* obsessive or ritualistic behavior, R. at 16-17, but it is unclear from the record before the Court whether the appellant's OCD symptoms resolved or what evidence the Board relied on to deny such symptoms. Second, although the Board mentioned that the appellant "can become upset and lose his temper at times" in its summary of the appellant's 2012 hearing testimony, R. at 14, the Board did not discuss or analyze evidence of irritable outbursts or whether such evidence demonstrated more severe symptoms of impaired impulse control when it determined that a disability rating greater than 10% was not warranted. *See Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) ("[M]erely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases." (citing *Abernathy v. Principi*, 3 Vet.App. 461, 465 (1992))).

Based on the foregoing, the Court concludes that the Board provided inadequate reasons or bases for its conclusion that the appellant is not entitled to a compensable disability rating for PTSD prior to April 24, 2008, and a disability rating in excess of 10% thereafter. *See Allday*, 7 Vet.App. at 527. Accordingly, the Court will remand the matter to allow the Board to provide an adequate statement of reasons or bases for its decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *see Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional

evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's November 3, 2016, decision is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: January 5, 2018

Copies to:

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VA General Counsel (027)