

Vet. App. No. 15-3197

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

GREGORY M. HEAL,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD MAYERICK
Deputy Chief Counsel

JAMES R. DRYSDALE
Appellate Counsel
Office of the General Counsel (027H)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
202-368-9477 / 202-632-6927
Attorneys for Appellee

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. Statement of the Issues.....	1
II. Statement of the Case.....	1
A. Nature of the Case.....	1
B. Statement of Relevant Facts and Proceedings Below	2
III. Argument.....	6
IV. Conclusion	16

TABLE OF AUTHORITIES

Cases

<i>Buchanan v. Nicholson</i> , 451 F.3d 1331 (Fed. Cir. 2006)	8
<i>Caluza v. Brown</i> , 7 Vet.App. 498 (1995)	7, 8, 9, 13
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990)	6
<i>Hilkert v. West</i> , 12 Vet.App. 145 (1999)	6, 16
<i>Johnson v. Shinseki</i> , 26 Vet.App. 237 (2013)	8
<i>Norvell v. Peake</i> , 22 Vet.App. 194 (2008)	7
<i>Ortiz v. Principi</i> , 274 F.3d 1361 (Fed. Cir. 2001)	15
<i>Owens v. Brown</i> , 7 Vet.App. 429 (1995)	8
<i>Rose v. West</i> , 11 Vet.App. 169 (1998)	7
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009)	7, 16
<i>Steffl v. Nicholson</i> , 21 Vet.App. 120 (2007)	14
<i>Tatum v. Shinseki</i> , 23 Vet.App. 152 (2009)	7
<i>Woehlaert v. Nicholson</i> , 21 Vet.App. 456 (2007)	16

Statutes

38 U.S.C. § 7261(a)(4)	7, 8
38 U.S.C. § 7261(b)(2)	16
38 U.S.C. § 7104(d)(1)	7
Article 15 of the Uniform Code of Military Justice	2, 12
Article 16 of the Uniform Code of Military Justice	2, 11, 13

Regulations

38 C.F.R. § 3.102	16
38 C.F.R. § 3.305(f)(5)	6

Citations to the Record

R. at 1-25 (April 30, 2015, BVA Decision on Appeal)	1, 6, 9, 14, 15
R. at 41-55 (January 2015 BVA Hearing Transcript)	6, 10

R. at 75-79 (October 2014 BVA Decision)	6
R. at 80-81 (August 2014 BVA Hearing Request)	6
R. at 100-05 (June 2014 Joint Motion for Remand and Court Order)	5, 6
R. at 110-28 (November 2013 BVA Decision)	5
R. at 141-45 (June 2013 Report of John L. Newcomb, M.D.)	5, 12, 15
R. at 171-78 (February 2013 Report of Robert T. Rubin, M.D., Ph.D.)	<i>passim</i>
R. at 223-29 (March 2012 VA Examination Report)	4, 9, 10
R. at 277-92 (August 2011 BVA Decision)	4
R. at 304-24 (March 2011 BVA Hearing Transcript)	4, 10
R. at 397 (May 2010 Substantive Appeal on VA Form 9)	4
R. at 412-25 (March 2010 Statement of the Case)	3
R. at 430 (August 2009 Notice of Disagreement)	3
R. at 431-37 (January 2009 RO Rating Decision)	3
R. at 450-55 (January 2009 VA Examination Report)	3
R. at 530-87 (Service Personnel Records)	2, 11, 12, 13
R. at 781-88 (April 2006 RO Rating Decision)	3
R. at 793-97 (May 2008 Statement in Support of Claim)	3
R. at 2288-93 (January 2009 RO Rating Decision (duplicate))	3

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**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. STATEMENT OF THE ISSUES

Whether this Court should affirm the April 30, 2015, Board of Veterans' Appeals (BVA or Board) decision that denied Appellant's claim of entitlement to service connection for an acquired psychiatric disorder.

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal contests an April 30, 2015, Board decision that denied Appellant's claim of entitlement to service connection for an acquired psychiatric disorder. See [Record Before the Agency (R.) at 1-25]. Appellant has not demonstrated the BVA decision is clearly erroneous or the product of prejudicial error and therefore it should be affirmed.

B. Statement of Relevant Facts and Proceedings Below

Appellant had qualifying service in the United States Army from September 1975 to February 1977. [R. at 530 (530-87)] (DD Form 214). During service, Appellant was punished under Article 15 of the Uniform Code of Military Justice (UCMJ) for assaulting a woman. See [R. at 558, 563 (530-87)] (record discussing Appellant's "recent alleged assault on one of the company wives" and record of Article 15 proceedings). Personnel records from November 1976 document that Appellant was provided informal counseling after using a racial slur to "try to provoke a fight in this company." [R. 570, 572 (530-87)]. Appellant was recommended for discharge. One statement in support of discharge notes that Appellant "continues to get involve [sic] in fights and arguments with other members of the company." See [R. at 552 (530-87)]. Another states that Appellant "doesn't care and always starting trouble with other soldiers. . ." [R. at 554 (530-87)]. Ultimately, Appellant was discharged under Article 16 due to drug and alcohol abuse. See [R. at 556-57 (530-87)] (Appellant stating he did not want to stop drinking during rehabilitation because he would be declared a "success" and then would "have to stay in the Army") *and* [R. at 558 (530-87)] (Appellant stating that "he wanted out of the service and would do anything to achieve this").

In December 2005, Appellant filed a claim with the Department of Veterans Affairs (VA) seeking entitlement to service connection for anxiety, which was denied in an unappealed and final rating decision by the VA Regional Office (RO)

in April 2006. [R. at 781-88]. In 2008, Appellant filed a claim with VA seeking service connection for PTSD. [R. 793-97]. He stated that he had “a hard time” in service because of his eye sight and described his in-service stressor as related to the death of his mother. [R. at 793, 796 (793-97)].

Appellant was provided with a VA examination in January 2009. [R. 450-55]. Appellant reported having difficulty on the firing range during service because of his poor eyesight and this “made him feel not capable of doing the job.” [R. at 452 (450-55)]. He also stated that after his mother died he did not want to return to the military but he did. [R. at 452 (450-55)]. Appellant stated his belief that he has PTSD because “when he was in the service [] he could not do what he thought he should have been able to do.” [R. at 453 (450-55)]. Appellant did not allege any in-service person assault ever occurred. [R. 450-55]. He was diagnosed with alcohol dependence, dysthymic disorder, and anxiety disorder. [R. at 454 (450-55)]. The examiner noted that “[a]t the time of evaluation, it was also noted that he had been drinking.” [R. at 454 (450-55)].

In January 2009, the VA RO issued a rating decision denying Appellant’s claim of entitlement to service connection for posttraumatic stress disorder (PTSD), previously claimed as anxiety. [R. 431-37]; [R. at 2288-93] (duplicate). Appellant filed a Notice of Disagreement in August 2009 emphasizing that his poor eyesight “made other recruits make fun of me.” [R. 430]. The RO issued a Statement of the Case (SOC) in March 2010. [R. 412-25]. Appellant perfected

his appeal in May 2010 by filing a Substantive Appeal to BVA on VA Form 9. [R. 397].

In March 2011 Appellant, with the counsel of his current attorney, testified under oath at a BVA hearing that during service “people made fun of me and said you know just rude remarks,” which he stated was very stressful. [R. at 308 (304-24)]. Appellant testified “I was being made fun of in service,” but, he did not allege that he experienced a physical assault or threats of physical assault. [R. at 309 (304-24)]. In August 2011, BVA remanded Appellant’s claim for additional notice and record development as well as a new VA examination. [R. 277-92].

Appellant was provided a VA examination in March 2012 during which he reported that he experienced verbal teasing during service but expressly denied any physical altercations or threats of physical altercations. [R. at 225 (223-29)]. The examiner wrote that “teasing and taunting do not meet the first criteria for a diagnosis of posttraumatic stress disorder.” [R. at 228 (223-29)].

In February 2013, VA obtained a Veterans Health Administration (VHA) medical expert opinion from Robert T. Rubin, M.D., Ph.D. [R. 171-78]. Dr. Rubin opined that it was less likely than not that Appellant’s current psychiatric disorders were related to events that occurred during his military service. [R. at 177 (171-78)]. He noted that Appellant had behavioral issues during service related to him being charged with an Article 15 assault on a woman. [R. at 172 (171-77)]. Dr. Rubin reasoned that Appellant’s deliberate excessive drinking while in service lead to sanctions and discharge and continued post-service

resulting in medical complications such as blackouts and seizures. [R. at 177 (171-78)]. He opined it was “highly unlikely” that Appellant’s current psychiatric conditions, first diagnosed some 25 years post-service, have any relation to events occurring during military service but rather that Appellant’s “later-onset depressive and anxiety disorder were related to his many years of excessive drinking and as well as to some of the physical infirmities he was developing as he grew older.” [R. at 177 (171-78)].

Appellant reported for the first time in a June 2013 report prepared at the request of Appellant’s counsel that he experienced an in-service personal assault. [R. at 142 (141-45)]. John L. Newcomb, M.D., wrote that Appellant “felt humiliated” during service because he was “frequently teased and ridiculed and shunned” by others because of his vision and, additionally, stated that “he would often get into fights with others and would often be beaten up. . . .” [R. at 142 (141-45)]. The examiner noted that Appellant “states also that he has been drinking today and admits to having two beers prior to our meeting.” [R. at 143 (141-45)]. The examiner diagnosed major depressive disorder, alcohol dependence, and opiate dependence in full sustained remission, but did not render a diagnosis of PTSD after considering and discussing Appellant’s alleged in-service personal assaults. [R. at 143 (141-45)].

In November 2013, BVA denied Appellant’s claim. [R. 110-28]. Appellant sought review by this Court, resulting in a Joint Motion for Remand, which the Court granted in June 2014. [R. 100-05]. The parties agreed that BVA had

provided an inadequate statement of reasons or bases for its decision and failed to consider whether Appellant had been provided proper notice under 38 C.F.R. § 3.305(f)(5) in light of “the newly advanced allegation contained in [Dr. Newcomb’s] June 2013 opinion” that he had been personally assaulted during service. [R. at 102 (100-05)].

In October 2014, BVA remanded the claim because Appellant, through current counsel, requested a second travel board hearing to present testimony regarding his remanded claim. [R. 75-79] (BVA remand); see [R. 80-81] (hearing request). In January 2015, Appellant testified that during service “because of my bad eyes . . . all the other soldiers started just making a lot of fun of me, didn’t want to be on the same team as I was because of my disability.” [R. at 43 (41-55)]. Appellant, however, did not allege that he experienced any physical altercation or in-service personal assault. [R. 41-55].

The Board issued its decision in this matter on April 30, 2015. [R. 1-25]. An appeal to this Court ensued.

III. ARGUMENT

The Court should affirm the April 30, 2015, Board decision that denied Appellant entitlement to service connection for an acquired psychiatric disorder, because it is plausibly based upon the evidence of record and is not clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance. See *Hilkert v. West*, 12 Vet.App. 145,

151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table); *Shinseki v. Sanders*, 556 U.S. 396 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

The Board's determination of service connection is factual and reviewed under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). See *Norvell v. Peake*, 22 Vet.App. 194, 198 (2008); *Rose v. West*, 11 Vet.App. 169, 171 (1998). Appellant neither alleges nor argues that BVA clearly erred in finding service connection was not warranted. Rather, he argues for remand based on the Board purportedly having failed to provide an adequate statement of reasons or bases for its findings and committing procedural duty-to-assist error. See [Appellant's Brief (Br.) at 5-17].

The Board is required to provide a written statement of reasons or bases explaining its findings of fact and conclusions of law to enable Appellant to understand the basis for the decision and to facilitate judicial review. 38 U.S.C. § 7104(d)(1). To comply with this requirement, the Board must consider all applicable provisions of law and regulation, analyze the credibility and probative value of evidence, account for evidence it finds to be persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claim. *Tatum v. Shinseki*, 23 Vet.App. 152, 155 (2009); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board's statement of reasons or bases "generally should be read as a

whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.” *Johnson v. Shinseki*, 26 Vet.App. 237 (2013) (en banc) (citations omitted), *reversed on other grounds sub nom Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). The Board’s decision in this case, considered as a whole, meets this standard.

The crux of Appellant’s argument is his disagreement with the Board’s factual determination that his alleged in-service personal assault was not credible. See [Br. at 5-17]. It is the responsibility of the Board, not the Court, to assess the credibility and weight to be given to evidence. See *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (explaining that, as fact finder, the Board is obligated to determine whether lay evidence is credible); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995). The Board’s credibility determinations are factual and reviewed by the Court under the “clearly erroneous” standard of review. See *Arneson v. Shinseki*, 24 Vet.App. 379, 382 (2011); 38 U.S.C. § 7261(a)(4). The credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character. *Caluza*, 7 Vet.App. at 511; *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (bias and conflicting statements may be considered in determining credibility). As discussed further below, the Board’s credibility determination is not clearly erroneous, is supported by an adequate statement of reasons or

bases, is fully supported by the record, and is consistent with this Court's caselaw.

The Board noted that in June 2013, in support of a diagnosis of posttraumatic stress disorder (PTSD), Appellant reported an in-service stressor "of at times getting in fights and often being beaten up after being ridiculed in service." [R. at 12 (1-25)]. BVA expressly found Appellant's "stressor involving physical assault not to be credible." [Br. at 12, 14 (1-25)]. As the Board explained, the record reflects that during the prosecution of his claim, while Appellant routinely and repeatedly reported "verbal teasing in service, he did not report any physical assaults or confrontations." [R. at 14 (1-25)]; see *Caluza*, 7 Vet.App. at 511 (credibility of a witness can be impeached by inconsistent statements).

During a March 2012 VA examination, Appellant expressly denied any physical altercations or threats of physical altercations during service. [R. at 225 (223-29)]. The examiner explained:

The patient indicated that once he was in the service other soldiers made fun of him because he could not see well enough to hit targets, they referred to his glasses as 'Coke bottle.' The patient indicated that teasing was verbal. The soldiers did not engage in any physical altercations, nor in any threats of physical altercation.

[R. at 225 (223-29)]. The examiner added that Appellant's claimed PTSD stressor was "how he was treated in the service by his fellow soldiers . . . the teasing, because of his eyesight, was not physical. It was largely name calling, a

lot of it took place ‘behind my back.’” [R. at 226 (223-29)]. The examiner wrote that “teasing and taunting do not meet the first criteria for a diagnosis of posttraumatic stress disorder.” [R. at 228 (223-29)]. Conspicuously absent from Appellant’s brief is any mention of or citation to this examination report, which facially contradicts his subsequent allegations of experiencing in-service personal assaults. See [Br. at 5-17].

BVA further noted that in March 2011 Appellant, with counsel of his current attorney, testified under oath during a BVA hearing that during service “people made fun of me and said you know just rude remarks,” which he stated was very stressful. [R. at 308 (304-24)]. Appellant testified “I was being made fun of in service,” but, as BVA explained, Appellant never stated that he experienced a physical assault or threat of physical assault. [R. at 309 (304-24)]. Likewise, BVA found that in January 2015 Appellant testified that during service “because of my bad eyes . . . all the other soldiers started just making a lot of fun of me, didn’t want to be on the same team as I was because of my disability.” [R. at 43 (41-55)]. Appellant, however, did not allege that he experienced any physical altercation or in-service personal assault. [R. 41-55]. Appellant’s sworn testimony on multiple occasions undermines his subsequent allegation of experiencing an in-service personal assault and provides a plausible basis for the Board to find his allegation of in-service personal assault not credible.

In February 2013, VA obtained a medical expert opinion from Robert T. Rubin, M.D., Ph.D. [R. 171-78]. The report provides a detailed review of

Appellant's medical history, to include the fact that VA construed a claim of entitlement to service connection for PTSD from the diagnosis of that condition rendered in a 2009 VA examination report. See [R. at 174 (171-78)] ("VARO's consideration of PTSD apparently arose from Dr. Kawamura's multiple diagnoses, one of which was PTSD. . ."); *compare* [Br. at 7] (Appellant asserting the report is inadequate because Dr. Rubin was "not apprised of [his] specific service-connection claim for PTSD"). Dr. Rubin opined that it was less likely than not that Appellant's current psychiatric disorders were related to events that occurred during his military service. [R. at 177 (171-78)]. He noted that Appellant had behavioral issues related to him being changed with an Article 15 assault on a woman. [R. at 172 (171-77)]; see [R. at 558, 563 (530-87)] (record discussing Appellant's "recent alleged assault on one of the company wives" and records of Article 15 proceedings). Dr. Rubin reasoned that Appellant's deliberate excessive drinking (as a way out of the Army) lead to sanctions and discharge and continued post-service resulting in medical complications such as blackouts and seizures. [R. at 177 (171-78)]; see *also* [R. at 556-57 (530-87)] (SMR wherein Appellant stated he did not want to stop drinking during rehabilitation because he would be declared a success and "have to stay in the Army" and was seeking an Article 16 discharge) *and* [R. at 558 (530-87)] (Appellant stating that "he wanted out of the service and would do anything to achieve this"). Dr. Rubin opined it was "highly unlikely" that Appellant's current psychiatric conditions, first diagnosed some 25 years post-service, have any

relation to events occurring during military service but rather that Appellant's "later-onset depressive and anxiety disorder were related to his many years of excessive drinking and as well as to some of the physical infirmities he was developing as he grew older." [R. at 177 (171-78)].

In a June 2013 report prepared at the request of Appellant's attorney, a private doctor, John L. Newcomb, M.D., wrote that Appellant "felt humiliated" during service because he was "frequently teased and ridiculed and shunned" by others because of his vision and, additionally, stated that "he would often get into fights with others and would often be beaten up. . . ." [R. at 142 (141-45)]. The examiner noted that Appellant "states also that he has been drinking today and admits to having two beers prior to our meeting." [R. at 143 (141-45)]. The examiner diagnosed major depressive disorder, alcohol dependence, and opiate dependence in full sustained remission, but did not render a diagnosis of PTSD despite considering and discussing Appellant's alleged in-service personal assaults. [R. at 143 (141-45)].

Contrary to Appellant's recent assertion that he was assaulted during service, made in the context of seeking VA compensation for PTSD, the evidence of record actually shows that it was Appellant who was charged with assault during service. [R. 558, 563 (530-87)]. A record of proceedings under Article 15, UCMJ, shows that Appellant was punished in November 1976 for assault. [R. 563 (530-87)]; see also [R. at 558 (530-87)] (record discussing Appellant's "recent alleged assault on one of the company wives"). Other

personnel records from November 1976 document that Appellant was provided informal counseling after using a racial slur to “try to provoke a fight in this company.” [R. 570, 572 (530-87)]. Appellant places great emphasis in his brief on a service record noting that he “continues to get involve [sic] in fights and arguments with other members of the company.” See [R. at 552 (530-87)]. He asserts this statement constitutes “*specific evidence in the record corroborating [his] personal assault claim*” and that the Board’s failure to specifically discuss it renders the Board’s statement of reasons or bases inadequate. [Br. at 9] (emphasis original). He contends this record leaves “no reasonable doubt” that Appellant was assaulted during service and “should have been determinative.” [Br. at 9]. However, the statement was provided in the context of Appellant’s Article 15 and Article 16 proceedings wherein *he* was charged with assault and *he* was reported as trying to start a fight in furtherance of his deliberate strategy to be discharged from service. See [R. at 558 (530-87)] (Appellant stating that “he wanted out of the service and would do anything to achieve this”). The record neither confirms that he was personally assaulted nor does it undermine the basis of the Board’s credibility finding. A similar statement prepared contemporaneous with the statement Appellant highlights, but which Appellant does not cite or mention, states that it was Appellant who “doesn’t care and always starting trouble with other soldiers . . .” [R. at 554 (530-87)]. Against this factual background, manifested by reading the record as a whole, it cannot be said that the Board clearly erred or failed to adequately support its finding that

Appellant's allegation of an in-service assault was not credible. See *Caluza*, 7 Vet.App. at 511. Appellant's attempt to utilize the statement out of context and in support of his contentions should be rejected. *But cf.*, [Br. at 11] (Appellant asserting it was BVA who failed to appreciate the context in which the highlighted statements were made).

Likewise, Appellant's assertion that Dr. Rubin's 2013 medical opinion is inadequate, and the BVA erred by relying upon it, is not persuasive. See [R. 171-78]. BVA found that Dr. Rubin "fully documented the Veteran's in-service history, including his claims of abuse, his in-service promotion, and the behavioral disciplinary problems for which he received reprimands, counseling, and ultimately discharged from the military." [R. at 19 (1-25)]. BVA found that Dr. Rubin also addressed Appellant's post-service treatment and diagnoses in formulating his opinion that Appellant's current conditions were not related to any events that occurred during active duty but rather to his longstanding history of alcoholism. [R. at 20, 22 (1-25)]; see *Steffl v. Nicholson*, 21 Vet.App. 120, 124 (2007) ("Relevant points that can be considered in an examination report include, but are not limited to . . . whether the veteran has other risk factors for developing the claimed condition"). Dr. Rubin did not "ignore" the possibility that Appellant had PTSD, as Appellant suggests, and specifically noted that in 2006 Dr. Kawamura had diagnosed Appellant with PTSD in but stated there was no stressor indicated to support the diagnosis and no symptoms other than social withdrawal. See [R. at 173 (171-77)]. Dr. Rubin also noted that a 2009 VA

examination had listed a diagnosis of PTSD and that a 2012 VA examiner considered a diagnosis of PTSD but found Appellant did not meet the criteria for a PTSD diagnosis. [R. at 174, 175 (171-77)]. Dr. Rubin's 2013 report was fully descriptive of Appellant's medical history and did not "ignore" the question of whether Appellant had PTSD.

The Board found Dr. Rubin's opinion more probative than the Dr. Newcomb's 2013 opinion, submitted by Appellant's counsel, for multiple reasons, to include that it was based on an inaccurate factual basis. [R. at 22 (1-25)]. Specifically, BVA explained that Dr. Newcomb's opinion was based upon Appellant's report that he "would often get in fights with others and would often be beaten up" due to his visual impairment that BVA found not credible. [R. 141-45]. The Board's finding that Dr. Rubin's 2013 opinion was adequate and its articulated reasons for the assessment of the relative probative value of the opinion evidence of record are plausible and adequately explained as to permit juridical review. Appellant has not demonstrated any BVA error. Moreover, because the Board correctly found the duty to assist had been satisfied by the examinations and opinions obtained, there was no need to order any further evidentiary development, as Appellant contends. See [Br. at 16-17].

To the extent Appellant argues BVA erred in failing to appropriately grant him the benefit of the doubt, the Board expressly found the preponderance of the evidence was against his claim. [R. at 22 (1-25)]. The benefit of the doubt doctrine has "no application where the Board determines that the preponderance

of the evidence weighs against the veteran's claim” or when the evidence is not in “equipoise.” *Ortiz v. Principi*, 274 F.3d 1361, 1366 (Fed. Cir. 2001). The Board is fully justified in impeaching evidence and denying an application where there is “actual conflict or a contradiction in the evidence” without running afoul of the benefit of the doubt doctrine. See 38 C.F.R. § 3.102.

Appellant has not shown the Board’s decision is clearly erroneous or that BVA committed any prejudicial error warranting remand. See *Hilkert*, 12 Vet.App. at 151 (appellant has the burden of demonstrating error); *Shinseki* (appellant burden of demonstrating prejudice). Because Appellant limited allegations of error to those noted above, Appellant has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007). The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2); *Shinseki*, 556 U.S. 396, 129 S. Ct. 1696.

IV. CONCLUSION

In view of the foregoing arguments, Appellee,, Secretary of Veterans Affairs, respectfully requests the Court affirm the April 30, 2015, decision of the Board of Veterans’ Appeals.

Respectfully submitted,

LEIGH A. BRADLEY

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Richard Mayerick

RICHARD MAYERICK

Deputy Chief Counsel

/s/ James R. Drysdale

JAMES R. DRYSDALE

Appellate Counsel

Office of the General Counsel (027H)

U.S. Dept. of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, DC 20420

202-368-9477 / 202-632-6927

Attorneys for Appellee,

Secretary of Veterans Affairs